

Natural Law and Customary Law

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I. Introduction

The principal focus of this contribution is the process whereby the threshold of law-making is crossed through the formation of customary law. This problem has multiple dimensions. Given that the doctrinal discourse on this subject occasionally appeals to categories not subsumable within the consensual positivism, it is necessary to examine the normative and conceptual setting in which such categories can be perceived, and this above all covers natural law. It is not intended to provide a comprehensive analysis of natural law theories, but to focus on natural law in clarifying where the dividing line between positivist and extra-positivist (including naturalist) argument lies, in a way responsive to the need of the above-mentioned mainline argument of this contribution. The clarification of the naturalist/positivist dichotomy at the start precedes the delimitation of the field of consensual customary rules from that of inherent rules of general international law. At the same time, this analysis will focus only on such theoretical or practical aspects of natural and customary law which directly relate to and consider the structural characteristics of international law as the inter-State legal system. The relevance of natural and customary law in general jurisprudence and legal theory is besides the point of the present analysis.

The problem of customary law has received widespread doctrinal attention. The aim of this contribution is not to provide yet another comprehensive discussion of the elements of customary law but to address the issues that have not so far received the adequate attention, are left open or are subject of disagreement, and this attempt making a further doctrinal step. In particular, this analysis focuses specifically on factors responsible for the crossing of the threshold of law-making in the process of custom-generation. The principal issues are the relevance of consensual element, especially the meaning of psychological element of custom-generation, the link between customary law and natural law, and the issue of inherent rules. Of all aspects of the emergence of customary law, this contribution focuses on its psychological element, as the most debated issue. It is intended to focus more on the nature of the process of expression of *opinio juris*, rather than proving *opinio juris* of individual rules. The relevance of the other element of customary law – State practice – is hardly ever disputed. Despite the occasional objections,¹ it is firmly

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¹ There are occasional objections to the role of State practice in custom-generation. Judge De Castro, following the approach of German historical school, asserted that “practice (usages) is not the foundation of customary law, but that it is the sign by which the existence of a custom may be known. The custom is produced by the community of conviction, not by the will of men, whose acts

recognised that customary law develops on the basis of State practice. On the other hand, the previous contributions have not so far properly located the often contested concept of *opinio juris* in the context of interaction between positivist and naturalist arguments.

This contribution is neither theoretical nor exclusively practice-oriented. It addresses conceptual aspects raised by customary law and its place within the structure of the international legal system. This is a priority of focus and the reference to theoretical or practical aspects is meant as auxiliary to this primary task. The variety of writings advance different theories that must be confronted and examined. It is particularly important to bring all the relevant approaches together and assess them in terms of the governing systemic framework of international law, which has not been done for the long period of time. The lack of doctrinal consensus on the emergence of customary law² is observable today as it was at earlier stages. In terms of evidence, there are few pronouncements on customary law made by international tribunals. The gist of the doctrinal debate relates to the understanding of these pronouncements and this contribution cannot be an exception to this pattern.³

II. Natural Law

1. The Essence, Origin and Development of the Concept of Natural Law

Natural law (*jus naturale*) has during the entire history of legal science occupied a central place in terms of understanding the nature of law in general and international law in particular. The issues of its essence, origin, scope and interaction with positive law are essential in considering whether it has its place in the international legal system and can be the legitimate object of the study of international law. The

only manifest this community of ideas.” Separate Opinion, *Fisheries Jurisdiction (UK/Ireland)*, ICJ Reports 1974, 100.

² For the latest such attempt see A. Verdross, *Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts*, ZaöRV 29 (1969), 635.

³ This contribution does not examine the issues of custom-generation at the example of peremptory norms of general international law (*jus cogens*), which is a specific problem that relates to the small group of public order rules and thus governed by specific criteria that do not necessarily apply to the mainline process of custom-generation dealt with in the present contribution. For the custom-generation process at the example of *jus cogens* see A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, Chapter 5; on the same problem see also S. Kadlbach, *Zwingendes Völkerrecht*, Berlin 1992, in particular Chapter 5, particularly at 185-188, and id., *Jus Cogens, Obligations Erga Omnes and Other Rules – The Identification of Fundamental Norms*, in: C. Tomuschat/J.-M. Thouvenin, *The Fundamental Rules of the International Legal Order*, 2006, 21-41. Nor does this contribution deal with the limitations on the custom-generation process such as those provided by the existing treaty regulation in the face of conflicting State practice. On this see the International Court’s decision on *Land and Maritime Boundary between Cameroon and Nigeria*, General List No. 94, Judgment of 10 October 2002.

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concept of natural law refers to rules and principles deducible from nature, reason, or the idea of justice. In addition, the concept of natural law also relates to phenomena that are not expressly denoted as natural law, but cannot be explained by reference to positivist criteria. In line with these broad characteristics, the precise definition and parameters of conceiving natural law have been evolving and altering over different periods of history. This has demonstrated the different logical possibilities of viewing natural law that is not least caused by the legal, social, religious or political sentiment at the relevant time.

In terms of its origin, natural law is perceived as the law that is not laid down by the human authority generally competent to create law in the relevant legal system, that is the legislature in national legal systems and State consent in international law. In terms of its essence, natural law is often perceived as the law of natural state that is the law applicable to societies that have not yet established the organised legal community. It may or may not survive after such organised community is established. Another way of perceiving the essence of natural law is the law applicable to nature, that is the law regulating the most natural elements of life of human beings as well as other biological creatures. Yet another possibility is to conceive natural law as the law expressing the essence and idea of law, the basic values law is supposed to serve and embody, that is rules expressive of the ideal of justice, or the principles concerning the inherent nature of the relevant legal institutions. Viewed from different angles, natural law may be conceived as paramount and immutable, or as subject to changes whenever the need for this arises in the relevant legal community. It is on occasions conceived either as divine law derived from the will of God or secular law reflective of the nature of law or of legal community.

The essence of natural law calls for understanding its interaction with positive law. Depending on doctrinal orientation, natural law is perceived as law from which the validity of positive law derives, or the law which sets limits to the validity and operations of positive law, or again the law which provides a fallback source applicable rules and principles should positive law have no answer as to how the relevant situation is governed.

Given these different logical possibilities, natural law has been accorded different relevance in different historical contexts. In one way or another, the relevance of natural law is acknowledged not only by naturalists but also within those doctrinal trends that do not expressly state their adherence to the natural law doctrine, and even those that on their face are generally opposed to the natural law doctrine.

Among the Roman jurists, natural law was viewed as the law derived from the nature of human beings, and as law expressive of the basic ideas of justice. According to Cicero, natural law is immutable. In Middle Ages, the divine concept of God-given natural law acquired increasing relevance, especially in the writings of Thomas Aquinas who at the same time did not view it as the immutable law. In this period natural law is sometimes made subservient to the reason of State, for instance in terms of the concept of "just war" which, while claiming to restrain States

in their recourse to force, effectively leaves them as sole arbiters in determining the justness of war.⁴

The link between natural law and international law figures in the writings of Vitoria, where international law is perceived as universal law which restrains the freedom of action of nations in relations with one another. For instance, the European powers are limited in means they can legally apply to the Indian tribes in the Western hemisphere who are protected by natural law. Vitoria's writings also show that natural law can be manipulated. This is witnessed by the thesis of Vitoria that natural law not only protects native Indian tribes but also can justify coercing them.⁵ On the other hand, and again in the context of the international legal system, Grotius conceives natural law as purely secular law, which would be there even if God did not exist.

In the classical scholarship of international law, from Grotius onwards, natural law is perceived as one of the basic elements and sources of international law. This is due partly to the influence of the Hobbesian approach that asserts that States live in the natural state without any form of government and hence there can be no international law. On the other hand, this is also due to the well-perceived need to elaborate upon some principles of law, justice or equity that should guide States in their relations with each other and, above all, to locate the growing legally relevant practice of States within that framework of law, justice and equity. On some instances this practice is perceived as merely expressive of the dictates of natural law, and on other instances it is perceived as an element of positive law.

Puffendorf proceeds from the assumption that the absence of the central government over and above States makes positive international law impossible. Consequently, Puffendorf does not accept that there is any law of nations which is not natural law; especially the voluntary law of nations. With Wolff and Vattel, natural law exists parallel to, and above, the positive law. According to Wolff, the voluntary law of nations is not created through general consent of nations whose existence is assumed, but due to the purpose of the supreme State which nature itself established. So nations are bound to agree to that law.⁶ Wolff suggests the notion of "the necessary law of nations which consists in the law of nature applied to nations". This law of nature is immutable and hence "the necessary law of nations also is absolutely immutable". Consequently, "neither can any nation free itself nor can any nation free another from it".⁷

For Vattel, "the law of nations is originally no other than the law of nature applied to nations". But there is also voluntary law of nations, which follows from

⁴ For an overview see G. Schwarzenberger, *Jus Pacis ac Belli? Prolegomena to a Sociology of International Law*, 37 *AJIL* (1943), 460; R. Ago, *Positive Law and International Law*, 51 *AJIL* (1957), 691.

⁵ F. Vitoria, *De Indis*, in: F. Vitoria, *Political Writings*, Cambridge 1991, 233; A. Nussbaum, *A Concise History of the Law of Nations*, New York 1954, 80-81.

⁶ C. Wolff, *The Law of Nations Treated According to a Scientific Method*, Oxford/London 1934, 6.

⁷ *Ibid.*, 10.

the system of the law of nations as a system based on perfect equality of nations; and the law which States can establish through their agreement, through entering engagements with each other, and this includes stipulative law and customary law based on tacit consent. This natural law of nations is, according to Vattel, “necessary, because Nations are absolutely bound to observe it”. The necessary law of nations “is not subject to change”.⁸

The 19th century scholar Georg Friedrich von Martens perceives the law regulating the relations between the government and citizens as internal public law. In relation to foreigners and foreign States, States and governments are conserved in the state of natural relations. Therefore, natural law applies to a State’s external relations and forms external public law (*droit public exterieur*). Such external public law is a branch of the law of nations. At the same time, a simple natural law does not suffice to govern the relations between the nations. Positive law of nations (*droit des gens positif*) operates as mitigating the impact of natural law, determining doubtful points, regulating on what natural law is silent, or altering on reciprocal basis the universal laws established by natural law for all nations. Such positive law of nations rests on conventions, whether express or tacit, or on a simple usage; it is divisible into conventional and customary law.⁹ Under this approach, natural law and positive law can coexist and complement each other.

In the 20th century, the relevance of natural law in international law is the subject of deep doctrinal controversy and debate. The most prominent representative of the 20th century naturalism is Alfred Verdross. Although Verdross avoids giving naturalist orientation to his magisterial treatise of international law due to the perception that the audience would reject the reasoning based on natural law,¹⁰ he observes in other places that natural law as based on universal reason is essential to ensure the stability and fairness of the international legal system.¹¹ Apart from the straightforward naturalism of Verdross, the 20th century scholarship witnesses the adherence to the natural law doctrine within the framework of the sociological conception of international law in the writings of Georges Scelle. Scelle’s social solidarity doctrine conceives law as existing in terms of legal necessity to enable legal persons to achieve security and satisfaction of their basic needs. Scelle rejects the relevance of static and immutable natural law which applies to any society at any time. Societies differ from each other and the natural law of social development is dynamic because it is biological law. Law, including natural law, develops following the dictates of social necessity. At the same time Scelle accepts that social and material factors are not the only ones that determine the development of

⁸ E. Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, in: J.B. Scott (ed.), *Classics of International Law*, Washington 1916, 4-5.

⁹ G. F. von Martens, *Précis du droit des gens moderne de l’Europe*, (1831), 42-43.

¹⁰ Cf. B. Simma, *The Contribution of Alfred Verdross to the Theory of International Law*, 6 *EJIL* (1995), 1.

¹¹ A. Verdross/H. Köck, *Natural Law: The Tradition of Universal Reason and Authority*, in: R. MacDonald/D. Johnson (eds.), *The Structure and Process of International Law*, (1983), 42.

law. Considerations of justice and morality also contribute to this process by influencing the content and direction of legal rules.¹²

Still, Scelle argues that the conception of morality and justice varies from society to society. Justice, in particular, is perceived in terms of individual utility and the consequent understanding of interest. Legal order ends up expressing interest of legal persons. For Scelle, positive laws are expression of basic social laws in development of society. If positive law were to conflict with what Scelle denotes as objective natural law, rupture of social solidarity possibly leading to revolution would ensue. Effectively, Scelle advocates the idea of judging positive law in the light of natural law reflecting the dynamics of society.¹³

The 20th century scholarship includes a great deal of criticism of and opposition to natural law. Dionisio Anzilotti develops the positivist vision of international law in which he tries to negate the relevance of extra-legal, or extra-consensual factors in explaining the basis and binding force of international law. Anzilotti's approach is a direct contradiction to Scelle's theory of social solidarity. As a starting-point, Anzilotti accepts that the rules of State behaviour respond to the specific needs and interests of these States, or to the exigencies of justice which penetrate the social consciousness of the time. However, these are only material factors behind the rules of international law. The rules themselves are established through the expression of will and through this the social consciousness gets translated into legal rules. But law, as a system of rules, exists only because this process of translation of values through will into rules takes place and only to the extent this process gets accomplished.¹⁴

It can be concluded that the doctrine of natural law includes jurists who expressly explain the essence and relevance of natural law, but also those who imply the natural law element in their argument. The considerations of natural law and justice are not completely neglected by the positivist doctrine. Positivism separates the law from the mere aspirations and subjective expressions of legal exigencies of justice. Positive law is defined differently on different occasions. It is conceived as the law enacted by the competent authority; law that actually operates with efficacy; or law that is received as socially desirable in terms of social pattern and opinion.¹⁵ In terms of positivist philosophy, all these approaches are acceptable as they refer to positively observable rules and data. But from the viewpoint of the character of international law, where State consent is the principal basis of legal obligations, positive law can only be described as the law laid down through consent and agreement of the actors that are entitled to create rules of international law. The identity of positivism and consensualism in international law is required by the need of coherency and predictability of the legal system whose legitimacy rests on the expression of the will of States who know of no sovereign government over

¹² G. Scelle, *Précis de droit des gens*, Paris 1923, 1-5.

¹³ *Ibid.*

¹⁴ D. Anzilotti, *Cours de droit international*, Paris 1929, 44-45, 67.

¹⁵ For discussion of all these options see Ago (note 4).

and above them. The mainline essence of international law is best explained by reference to consensual positivism as developed in the writings of Anzilotti.

Given that, natural law, in whichever version or fashion it is presented, can in some circumstances cause undermining legal stability by stating the justification for not complying with the written word. While natural law expresses the idea of law and justice that should apply to States in the international society, positivism also expresses an idea that is most inherent to the international legal system, namely that States shall only be bound by their consent. Therefore, for international law not all ways in which natural law can be generally perceived in theoretical perspective are relevant. The natural law views denying the positivist element of international law can certainly not be taken as the starting point in explaining where natural law stands in international law – the relevance of natural law in international law can never be perceived as compromising the relevance of legal positivism.

On the other hand, the relevance of natural law means that the relevance of positivism is not unlimited. In principle, the dominance of the positivist sources of law in international law can logically entail two different results: the denial of natural law or viewing natural law as the fall-back source that provides solutions where positive law provides none. The nature of the international legal system requires giving preference to the second option. Whatever approach is taken, positivism cannot escape the recognition that certain rules, indeed of fundamental character, are not based on consensual sources. While indispensable, legal positivism in international law is inherently incomplete and cannot explain the basis on which legal obligations are binding. Even in that part of the doctrine which states its obvious semi-absolute preference for positivism, this incompleteness is recognised. Anzilotti accepts the limits on positivism by admitting that the fundamental rule of international law – *pacta sunt servanda* – from which all other rules derive their validity through the expression of State will and which indeed operates as the criterion for determining the legal basis of positive rules and thus as the criterion for distinguishing binding rules of law from other rules, is not a demonstrable rule in the sense of positivist requirements of rule-identification.¹⁶ This fundamental rule operates as a matter of legal necessity.

Kelsen also acknowledges that while law is generally what has been postulated as law by the competent authority, the basis as to why that postulated law – in this case law agreed upon by States – shall be binding cannot be provided by the positivist approach because there is no data confirming the existence of such agreement in terms that would satisfy the positivist requirements. Therefore, they assume the existence of the basic rule (*Grundnorm*) which requires that States have to keep promises they give, or that they have to behave as they have customarily behaved. Although Kelsen claims that the basic rule (*pacta sunt servanda*) is part of customary rule, he asserts this without adducing evidence.¹⁷ More specifically, and

¹⁶ Anzilotti (note 14), 43-44.

¹⁷ H. Kelsen, *General Theory of Law and State*, New York 1961, 369 ff.

while accepting the consensual character of stipulative obligations, Brierly points out that the obligation upon which the bindingness of the consensually assumed obligations rests is not by itself consensual, and some extra-consensual basis must be sought for to identify the legal basis of such obligation.¹⁸ It is thus accepted in doctrine that the principle of *pacta sunt servanda* cannot be satisfactorily explained just by reference to positivist criteria.

Such relevance of extra-positivist or extra-consensual factors in international law, and moreover the link of those factors to the very foundation of this legal system, requires identifying the character of that natural law which can be relevant and applicable in the international legal system in a way that conforms the nature of that system. If, for instance, Justinian's version of natural law referring to human nature is applied to the society of nations, then the relevance of natural law in international law would have to be totally excluded, because States are not the same as individuals. The Hobbesian perception of the state of nature or Puffendorf's exclusivity of natural law is also unsuitable for its antagonism with legal positivism. The most plausible explanation of natural law in international law is that which draws on the legal institutions recognised under positive international law, explains their inherent character and makes them operate justly and fairly. In other words, international law can accommodate that natural law which suits the nature of the society of nations and at the same time expresses the ideal of law and justice in relation to the positive legal institutions to ensure the meaningful degree of justice, state where justice can reasonably be found and be functioning, so that this goal is not compromised by the absence of specific positive rules that would require such outcome. This approach is furthermore consistent with the thesis that the natural law argument is not limited solely to the argument speaking expressly in terms of natural law, but also covers the argument focusing on the inherent nature of legal institutions and the consequent limits on positivism.

This leads to dualistic composition of international law in which naturalist and positivist elements coexist. The necessity of positivist approach is justified by the stability and coherence of the system: promises and consent must be demonstrated through observable evidence and once they are so demonstrated, be regarded as binding. While at early stages natural law was regarded a key source of international law, in the current legal system, if international law is in the first place positive law, natural law cannot be its substitute, and its relevance must be judged by the negative method of analysis, by asking in which cases is it justified to look for and accept solutions not based on positive law. The relevance of natural law today is determined not by asking whether, or asserting that international law is based on natural law, but whether natural law can be relevant in situations where positivism cannot, due to its limits, explain the legal outcomes, either through filling gaps or providing the guidance in choosing the interpretation of legal rules and institutions conducive to justice, reason, logic and fairness, to the exclusion of interpretation which evidently contradicts the postulates of justice. Given that the principles of

¹⁸ J.L. Brierly, *The Basis of Obligation in International Law*, (1958), 11-13.

natural law are independent of positivist constructs of law-making, the positivist argument cannot be successfully used against the relevance of natural law.

2. Practical Aspects of Natural Law

International law accepts the relevance of natural law in several ways. The primary and most frequently used sources of international law – treaty and custom – are sources of positive law. They furnish the objectively observable data evidencing consent. Another source mentioned under Article 38 of the International Court’s Statute – general principles of law – can have some positive aspect if understood, as it often is, as the body of principles accepted in national legal systems.¹⁹ While this refers to positive data, it falls short to demonstrate such positive data as would qualify for the positivist test in terms of international law. On the other hand, no positive data can be found in those general principles of law that are regarded as expressions of the general character of international law and its basic ideas. The solid doctrinal opinion regards these principles as non-positive yet legally binding. The reference to such principles in the International Court’s Statute is, among others, the recognition of such principles as the principles of natural law. As Schachter points out, the idea behind the “general principles of law” does not depart too far from the classic concept of natural law.²⁰

In examining which principles can belong to the category of natural law, the starting-point reference is not looking for rules expressly designated as natural law rules – which would be meaningless as natural law rules cannot be expressly and externally designated – but for rules that have the essence of natural law. These are rules that are indispensable for functioning of international law in general or its specific institutions. The most obvious examples are the principle of legal equality of States, *pacta sunt servanda*, good faith, and the rule against the abuse of rights. The natural law element is presumably present in fundamental human rights, in accordance with the stance taken in the 1948 Universal Declaration on Human Rights that the basic rights of an individual are inherent and inalienable. The right to self-defence is also denoted as an inherent right in English text of Article 51 of the UN Charter and as a natural right in the French text. These characteristics notwithstanding, the parameters of the exercise of this inherent right are determined in positive law. The law of the use of force is codified in the United Nations Charter, which includes all conditions on which the exercise of the right to self-defence can be claimed. Justness of war in this case is not relevant in modern international law. Another obvious principle inherently existing in international law is that of reparation for violations of international law. As the Permanent Court of International Justice confirmed in the *Chorzow Factory* case, the duty to make

¹⁹ For analysis see W. Friedmann, The Uses of “General Principles of Law” in the Development of International Law, 57 AJIL (1963), 279.

²⁰ O. Schachter, International Law in Theory and Practice, (1991), 75 ff.

reparation for an international wrong is an inherent consequence of that wrong and does not need to be stipulated in the treaty whose violation the court is dealing with.²¹

A further category of natural law includes those inherent rules that are meant to enable the relevant legal institution justly and meaningfully. Thus in the *North Sea Continental Shelf* case, the International Court addressed the issue of the natural law of continental shelf. The Court faced the submission that the equidistance method of delimitation of continental shelf was based on the source of law other than sources that operate on the basis of State consent. Denmark and Netherlands submitted among others that such delimitation method was based on the source of law that operated unless the States involved otherwise agreed. The Court characterised this claim as expressive on the “natural law of continental shelf, in the sense that the equidistance principle is seen as a necessary expression in the field of delimitation of the accepted doctrine of the exclusive appurtenance of the continental shelf to the nearby coastal State, and therefore, having an *a priori* character of so to speak juristic inevitability”.²² In addition, the Court accepted that the outcome under this natural law argument would predetermine the answer under positive law as well: if the equidistance was based on the rule of inherency, then positive law would be applied as responsive to that; if not, this would not bar a similar result being materialised under the sources of positive law.

Thus, the Court did accept that natural law can have play in such fields. The Court then identified what it called “real issue” – whether the basic concept of continental shelf required that equidistance should operate in all circumstances and prohibited the allocation of the shelf areas to the relevant State unless they were closer to it. The Court found that the inherent necessity of equidistance did not follow from the basic concept of the continental shelf.²³ On the basis of the nature of continental shelf, the Court concluded that only proximity in general sense was required, not equidistance in strict terms. The Court also referred to an alternative fundamental consideration – that of natural prolongation. It treated at length and interpreted both parties’ submissions as to the applicable fundamental rules not based on the sources of positive law and concluded that the notion of equidistance was not logically necessary. Even if the relevant State had the inherent right to certain shelf areas, this did not impose any method of delimitation. Thus, the Court examined the natural law argument on its merits and rejected the method of equidistance while in principle approving that the argument based on notions such as inherent or natural right can potentially succeed if consistent with the nature of relevant legal relations. Whatever the merits of the Court’s argument under the law of the sea, it must be acknowledged that it engaged with the natural law argument and examined it on its merits. Thereby the Court admitted that in principle cases in

²¹ *Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, 29.

²² ICJ Reports 1969, 28-29.

²³ *Ibid.*, 35.

international law can be decided on the basis of natural law should the nature of relevant legal institutions require this.

Inherent rules related to the competence of international tribunals, and inherent judicial powers derived from those rules have never been expressly denoted as an aspect of natural law but they are not fully explainable from the positivist perspective either.²⁴ The normative basis for inherent powers can be the concept of inherent rules in the same way that this concept operates in other fields of international law. For instance, tribunals possess the power to determine their own jurisdiction (*Kompetenzkompetenz*) because there is an inherent rule requiring that tribunals must be able to judge on their own jurisdiction. Tribunals possess inherent power to indicate provisional measures because there is an inherent rule requiring that States cannot frustrate by their action the subject-matter of litigation. The Permanent Court identified in the *Electricity Company of Sofia and Bulgaria* case the rule prohibiting the parties to the litigation to act in a way frustrating the object of litigation as a universally recognised inherent rule. As the Court states, Article 41 of its Statute regulating the indication of provisional measures “applies the principle universally accepted by international tribunals and likewise laid down in many conventions to which Bulgaria has been a party – to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given”.²⁵ Speaking broadly, such rules can be denoted as natural law of international adjudication, that is the law specifying the natural requirements of such adjudication. On the other hand, they are on some instances positively embodied in the statutes of international tribunals and in relevant cases this dispenses with, or softens, the requirement to elaborate on the inherency of the relevant rules.

3. Evaluation

In the international legal system which is for its most part composed of consensually produced rules, natural law is not what governs the relations between States in the first place. Much of what can qualify as natural law principles is received in positive – conventional and customary – law as well. Yet, the rejection of the relevance of natural law is unsound. It has its valid, sometimes indispensable, role to play in ensuring that fairness and the ideal of justice is not compromised through the strict adherence to the positivist approach, nor is the inherent nature of specific legal institutions perverted and disregarded. Natural law as accepted in contemporary international legal system is not antithetical to the sources and rules of law based on consent, nor does it aspire to make them irrelevant or undermine them. What it does is to complement them and step in situations where the consen-

²⁴ On this see A. Orakhelashvili, *The Concept of International Judicial Jurisdiction: A Reappraisal*, 3 LPICT (2003), 501-550.

²⁵ P.C.I.J., Series A/B, No. 79, at 199.

sual sources of law are insufficient for providing a legal solution. In this sense natural law is neither very transcendent nor exclusively theoretical. It refers to the inherent nature of the existing legal institutions. Consequently, the natural law argument is the valid and received category of the international legal argument with the utility in a number of fields of international law.

III. Customary Law

1. Consent as Basis of Customary Law

International law is generally said to be based on State consent. This is most obvious at the example of treaties. Whether such consensual pattern also extends to customary law is the subject of heavy doctrinal debate and disagreement. There are obvious structural differences between the two sources of law. Treaties are formally concluded and drawn in writing; customary rules are less formal and drawn from State practice. The real issue however is whether the difference in form is crucial in terms of the legal nature of the two sources. More specifically, the question is whether the process of agreeing in writing is substantially different, in terms of legal effect and implications, from agreeing informally and through State practice.

Apart from their difference in terms of their form, the two sources are similar as the consensual and reciprocity elements are present in both. In terms of both these sources, States are able to avoid the binding force of the rule by refusing to accept it – which in the case of custom is manifested by the ability of persistent objection²⁶ – and after the rule has already emerged such avoidance is not possible in the case of the either source. This is reflected in Wolff's observation that treaties and custom are similar in character, only different in form, one being expressly consented and the other based on tacit consent; customary law is not universal but binds, like treaties, only the States that accept it.²⁷

Furthermore, the compliance structure of and the pattern of allocation of rights and obligations under both sources, as well as the regime governing the measures in response to non-compliance are in principle similar. As specified in Articles 34 to 36 of the 1969 Vienna Convention on the Law of Treaties, treaties bind only by consent and cannot bind third States unless it manifests its consent through one of the ways provided for under these provisions. In relation to customary law, there is an intensive ongoing debate as to whether (reciprocally established) customary rules can bind (third) States, which issue is at the heart of the consensual dimension of custom-generation. If customary rules bind third States only if they properly and knowingly acquiesce into and do not object to them, then custom-generation is a matter of consensual law-making, and thus the emergence of customary law is as much the process of agreement as the emergence of treaty law is. In this case,

²⁶ On which see *infra* section III.5(c).

²⁷ Wolff (note 6), 6, 18-19.

however, it is not possible to strictly separate the field of States becoming bound by customary law from that of custom arguably binding third States.²⁸

An additional problem is posed by the apparent fluidity of law-making in the field of customary law, in comparison with conventional law. Nevertheless, the real question is whether the relevant binding rule exists. The alleged fluidity of the law-making process in this field cannot be taken as an all-disposing factor because it cannot obstruct the basic task of identifying the existence of the relevant rule.

There are several doctrinal attempts to formulate the difference between custom and treaty in terms of their nature or structure. Grotius has understood custom as an informal analogy of treaties, or tacit agreement. Wolff has similarly regarded customary rules as tacit agreements.²⁹ But in the 20th century this approach has been subjected to some objections.

According to Visscher, the special value of custom, and its superiority over conventional instruments, consists in its reflection of the “deeply felt community of law”, through developing of spontaneous practice. The contractual origin of treaties remains a cause of weakness, manifested through the difficulties of interpretation and risks of nullity attached to the manifestation of will.³⁰

Kelsen contends that the understanding of custom as tacit treaty is a fiction motivated by the desire to trace international law back to the “free will” of States and thereby to maintain the idea that the State is “sovereign”, in the sense that it is not subject to a superior legal order restricting its liberty. Kelsen contradicts this analogy between treaty and custom by arguing that treaties can bind non-parties, as in the case of treaties establishing “objective” regimes, and so does custom. A State cannot, according to Kelsen, “escape from the validity of the rule of general international law by proving that it did not participate in the creation of this rule”.³¹

Kelsen’s assumption that certain treaties can bind States on their own and without the additional consensual process is an exaggeration, and contradicts the *pacta tertiis* rule. While it is generally true that the State cannot escape from the validity of the rule in the creation of which it has not affirmatively participated, it may well escape from the operation of the rule by proving that it did not give its consent to it. The formation of the general rule of customary law cannot proceed in a way escaping the general knowledge of all States, and the inaction of States in

²⁸ K. Skubiszewski, Elements of Custom and the Hague Court, ZaöRV 31 (1971), 810 at 846, emphasises that the binding force of customary rules is governed by principles other than that of treaties, but does not specify such difference any further. It is this author’s opinion that such difference may indeed be possible. But for identifying such, an express provision confirming it must be referred to. Skubiszewski, (847) may be right that the process of custom-formation is different from the expression of consent to treaties. This is obvious. But the real point is the *e s s e n c e* of the process and its relation to consent, as opposed to formal details of this process. In the former field, the alleged difference has to be shown with evidence.

²⁹ Wolff (note 6), 7.

³⁰ Ch. de Visscher, Theory and Reality in Public International Law, (1968), 161.

³¹ Kelsen (note 17), 351-352.

this process can only signify their expression of will and attitude that they are not opposed.

Ago's characterisation of custom as spontaneous law is based on his perceived distinction between treaty and custom. He explains the binding character of customary rules in a peculiar way, considering this as a consequence not of law being laid down by a competent body, but by its "sociality". Ago considers that law is there not because the members of the society want to consider it as binding but because it is so considered "by human thought which reflects on social phenomena".³² Therefore, law is not laid down, it is spontaneously formed, "following various causes and motives which have nothing to do with a formal process of production". Thus, Ago sees no need of constructing the "imaginary productive facts" which are supposed to have laid down law. The idea of laying down law is seen by Ago as an arbitrary restriction of positivism made in the sphere of law.³³ However, he still recognises that what it calls "imaginary legal law-creating process" consisting in the elements of custom is the only way in which customary rules can be manifested.³⁴

In the end, Ago's thesis is not free of contradictions, because even as it rejects the relevance of law-producing facts and bodies, it still refers to the relevance of human thought that considers legal rules as such. Therefore, his thesis in fact accepts that the legal character of rules is to some extent a matter of conscious evaluation and decision. What really distinguishes Ago's thesis from consensual positivism is its reference to the "sociality" of law – a notion that, as will be seen below, is on occasions seen as the factor that explains *opinio juris*. In this respect, his thesis does not clarify how these spontaneous rules should be identified and told from those spontaneous practices that do not become law. Instead, Ago effectively accepts that the manifestation of customary rules takes place through the externally cognisable data.

The issue of consent in the context of creation of customary rules raises several problems. It is emphasised that the voluntarist approach has been brought to the fore by the rejection of natural law and the rise of positivism.³⁵ This is certainly true in terms of explaining the dominance of voluntarist approach. However, already the classical writers of international law, many of them adherents of naturalism, have emphasised the relevance of consensual and voluntary law. Naturalism has rarely been absolutist in the sense of excluding the relevance of what is not natural law and of consent for the creation of international rules; while positivism is often presented in the near-absolutist way. Consequently, the problem of customary rules as consensual phenomenon has been accepted both by naturalist and positivist doctrines.

³² Ago (note 4), 727-728.

³³ Ibid., 729-730.

³⁴ Ibid., 723.

³⁵ M. Mendelson, The Subjective Element in Customary International Law, 76 BYIL (1995), 177 at 184.

Brierly contradicts viewing consent as the basis of customary rules, suggesting that

“implied consent is not a philosophically sound explanation of customary law, international or municipal; a customary rule is observed, not because it has been consented to, but because it is believed to be binding, and whatever may be the explanation or the justification of that belief, its binding force does not depend, and is not felt by those who follow to depend, on the approval of the individual or the State to which it is addressed.”

States, according to Brierly, are bound by principles which they cannot, except by the most strained construction of the facts, be said to have consented to it, and it is unreasonable to force facts into such preconceived theory. Furthermore, Brierly rejects the relevance of implied consent as an exclusively theoretical construct.³⁶ Similarly, Condorelli argues that the “presumption of acceptance” through implied consent is artificial, as jurists have never sought to prove that the rule is accepted by each State individually.³⁷

But there is no reason why implied consent should not operate in practice. Consent can be inferred from conduct and attitude as much as from an express statement, and will expressed to the attention of other States through inaction or conduct is as good as will expressly stated. Action can be conscious whether it manifests that consciousness expressly or by conduct.

The consensual nature of customary law has long been accepted in doctrine. Wolff has seen customary law as produced by practice which implies inter-State agreement. Wolff states that customary law “is so called, because it has been brought in by long usage and observed as law”.³⁸ This statement could be understood as referring to both material and psychological elements of customary law. But the next statement specifies that custom is based on usage (*Herkommen*); “since certain nations use it with the other, the customary law of nations rests upon the tacit consent of the nations or, if you prefer, upon a tacit stipulation”.³⁹

This statement implies a causal connection between practice (usage) and the agreement that follows from it. Wolff did not expressly at that stage articulate the notion of *opinio juris*. Vattel likewise refers to customary law based on tacit consent. Customary law binds only those States who consent to it and in this respect it is similar to treaties.⁴⁰ In the later period, Phillimore emphasised that custom is one of the ways expressing consent of States to legal rules. It is tacitly expressed by long usage, practice, custom.⁴¹

Anzilotti considers custom as a tacit agreement. The content of a customary rule is determined by its repetition (usage).⁴² But custom according to Anzilotti

³⁶ J.L. Brierly, *The Law of Nations*, (1949), 53.

³⁷ L. Condorelli, Custom, in: M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, (1991), 179 at 203.

³⁸ Wolff (note 6), 18.

³⁹ *Ibid.*, 18-19.

⁴⁰ Vattel (note 8), 4-5.

⁴¹ R. Phillimore, *Commentaries on International Law*, Vol. I, London 1879, 38.

⁴² Anzilotti (note 14), 68.

is a rule observed with the conviction to observe a juridical rule. In international law there is not simply custom but legal custom, as States behave in a certain way having a conviction that in doing so they comply with an obligation.⁴³ This approach, besides being a landmark of positivism, also demonstrates the commonality between the consensual approach and the essence of *opinio juris* as later emphasised in international jurisprudence, notably in *Lotus* and *North Sea*.

Fitzmaurice offers indeed a down-to-earth approach to the consensual element of general customary law, which sees the problems attendant to the consensual perspective yet emphasises its essential importance:

“Where a *general* rule of customary international law is built up by the common practice of States, although it may be a little unnecessary to have recourse to the notion of agreement (and a little difficult to detect it in what is often uncoordinated, independent, if similar, action of States), it is probably true to say that consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law. It makes no substantial difference whether the new rule emerges in regard to (in effect) a new topic on which international law has hitherto been silent, or as change of existing law.”⁴⁴

This perspective allows for customary rules to emerge and consolidate in the context where practice is sufficiently public. The problems involved in this process shall be seen as those of evidencing rules, and should not detract from the basic principle that if the State has not given consent to the rule, it cannot be seen as bound by it.

In fact, the relevance of tacit, or implied, consent is dictated by the need of systemic effectiveness of the international legal order. On the one hand, it leaves each State free to accept or reject the rule; on the other hand, it operates as refusing the possibility of treating the sufficiently long and widespread silence of States as an infinite tool of obstructing the establishment of rules through the practice and attitude of other States. The device of tacit or implied consent corresponds to the character of the international legal system more than any of alternative perceived tools of law-making.

2. Consent and *Opinio Juris*

It may on occasions seem that the issue of consent as part of custom-generation has little practical significance. In jurisprudence, the real and immediate problem is to find whether there is sufficient State practice and *opinio juris* and tribunals just look at this without burdening themselves with expressly addressing allegedly theoretical issues as to whether customary law is based on State consent or some other factor. In the *Lotus* case, the Permanent Court referred to the absence of le-

⁴³ Ibid., 73-74.

⁴⁴ G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, (1986), 198 (emphasis original).

gal conviction as the factor precluding the formation of customary rule on the relevant aspect of State jurisdiction; in *Asylum*, the International Court was unable to see the customary law developed because the relevant practice was conducted with political expediency in mind, as opposed to the sense of legal obligation; in *North Sea*, there was no practice involved that would “show a general recognition that a rule of law or legal obligation is involved”.⁴⁵ In *Nicaragua*, the International Court inferred *opinio juris* from acceptance by States to the formulation of the rule in the General Assembly Resolution which was meant to codify the applicable law.⁴⁶

Thus, judicial decisions refer to the factors of intellectual and mental dimension – acceptance, recognition, conviction of States, as factors that bring about the legal change of transforming non-law into law. The reference to these concepts presumably implies the existence of some element constitutive of legal obligation, for if some practice is accepted or recognised as law, it would not be law but for such acceptance and recognition which express the will of the States. If the expression of conviction of States that the relevant practice expresses law is indicative of the existence of custom, then without demonstrating such conviction, which is a conscious attitude of State, such rule would not exist. In particular, recognition is a device expressing consent of the recognising State, as can be seen, among others, from the wording of Article 38(1) which denotes treaties, that is consensual instruments, as those expressly recognised by States-parties. This further confirms the thesis, developed above, that there is much room for regarding implied recognition too as an aspect of consensual law-making. Similarly, as Skubiszewski illustrates, acceptance of a rule is also an act of will, that is consent.⁴⁷

Furthermore, the consensual explanation is most suitable in terms of the decentralised law-making in the society of States not subject to any sovereign or government. Thus, the issue of consent is in the background and it must be addressed in view of a number of explanations of the nature of *opinio juris* advanced in doctrine, if only because the elements of acceptance, recognition and legal conviction, as elaborated upon in practice, need to be explained. At the same time, the legal conviction focused upon here is not that of the individual State, but the shared *opinio juris*, which definitionally implies the element of agreement in making the rule binding, and further reinforces the consensual understanding of customary law.

Individual Judges have extensively affirmed the relevance and necessity of *opinio juris*. Judge Tanaka in *North Sea* emphasised the need to prove *opinio juris* for proving existence of customary rules and added that *opinio juris* is a “qualitative factor of customary law”, “by which a simple usage can be transformed into a custom with binding power”.⁴⁸ A similar requirement was implied by Judge Amoun in *Barcelona Traction*, where he explained that diplomatic protection of

⁴⁵ ICJ Reports 1969, para. 74.

⁴⁶ ICJ Reports 1986, 101 ff.

⁴⁷ Skubiszewski (note 28), 847.

⁴⁸ ICJ Reports 1969, 175.

shareholders did not amount to customary rule, as it was not based on adequate State practice and was not accompanied by psychological element of *opinio juris*.⁴⁹ In the *Fisheries Jurisdiction* case, Judge De Castro has made several significant observations on the relevance of *opinio juris* as an implication of voluntary profile of customary law, which is based on

“General or universal acceptance. There should be no doubt as to the attitude of States. The rule in question must be generally known and accepted expressly or tacitly. What has led to the view that international custom is binding is that it expresses a *consensus tacitus generalis*, if not as a sort of tacit agreement, at least as the expression of a general conviction. For an international custom to come into existence, the fact that a rule may be adopted by several States in their municipal legislation, in treaties and conventions, or may be applied in arbitral decisions is not sufficient, if other States adopt a different rule, and it will not be opposable to a State which still opposes its application (ICJ Reports 1951, p. 131). The existence of a majority trend, and even its acceptance in an international convention, does not mean that the convention has caused the rule to be crystallized or canonized as a rule of customary law (ICJ Reports 1969, p. 41).”⁵⁰

Thus, despite his stated adherence to viewing customary law as reflecting and responding to the community of societal conviction, Judge De Castro still effectively requires the presence of *opinio juris* in terms of the individual State agreement to the rule.

This psychological element of acceptance (*opinio juris*) is the key issue in determining the nature of custom and its location from naturalist and positivist perspectives. The approach explanatory of the nature of *opinio juris* must be such as accords with the basic structure and nature of the international legal system; and can be accommodated in terms of the requirements approved within the century-long *acquis* on custom-generation. This must be borne in mind when the specific approaches are examined.

Article 38 of the International Court’s Statute describes customary law as the general practice accepted as law. This implies that practice is an element antecedent to its acceptance as law. As Verdross examines, having examined different modes of recognition and acceptance of customary rules, including that pursuant to a treaty rule or the decision of an international organisation, all these modes fall within the pattern covered by Article 38(1)(b) of the Statute, and all they imply the expression of attitude to the attention of all.⁵¹ The mere practice cannot amount to customary law. There can be practice that could be perfectly suitable to give rise to rights and duties and be applicable as law, but it happens not to do so because there is no supportive common belief.⁵² In *Fisheries*, the Court refuted the British contention that the Norway’s use of straight baselines was contrary to interna-

⁴⁹ Separate Opinion, ICJ Reports 1970, 329.

⁵⁰ ICJ Reports 1974, 89-90; see further *Ahmadou Sadio Diallo*, on the independence of the content of customary law from the development of treaty regimes.

⁵¹ Verdross (note 2), 649.

⁵² Mendelson (note 35), 177 at 198.

tional law, by reference to the fact that Britain acquiesced to this practice due to its knowledge and inaction in the face of it.⁵³

The *Fisheries Jurisdiction* decision of the International Court deals with the problem of customary law without expressly mentioning the concept of *opinio juris*. This concerned the development of preferential fishing rights at and after the 1960 Second Conference on the Law of the Sea “the law evolved through the practice of States on the basis of the debates and near-agreements at the Conference”. The Court suggested that the concept of preferential rights had “crystallized as customary law in recent years arising out of the general consensus revealed at that Conference”.⁵⁴ Furthermore, the Court emphasises that

“State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal States, particularly in favour of countries or territories in a situation of special dependence on coastal fisheries. Both the 1958 Resolution and the 1960 joint amendment concerning preferential rights were approved by a large majority of the Conferences, thus showing overwhelming support for the idea that in certain special situations it was fair to recognize that the coastal State had preferential fishing rights.”⁵⁵

The Court refers to State practice, and the consensus reached at the Conference, without elaborating upon the legal nature of that consensus. The Court does not specifically search for *opinio juris*. This may create the impression that the customary rule is deemed to have emerged without its *opinio juris* being proved. However, the Court’s Judgment does not stop at that point, and to support the legitimacy of its findings, it refers to the repeated instances on which both parties to the litigation have accepted and recognised each other’s preferential rights in the relevant maritime areas. To specify further, the Court uses the State practice and consensus achieved at the Conference to demonstrate the existence on a general plane of the concept of preferential rights. It does not, however, regard this concept as self-operating in a way to enable it allocating rights and obligations to States. Preferential rights belong to the State which is exceptionally dependent on the fisheries in the relevant area, and only if such exceptional dependence is recognised by other affected States.⁵⁶

Thus, the legal position in any case depends on the agreement between the relevant States. The *Fisheries Jurisdiction* Judgment does not suggest any standard whereby the legal position established without *opinio juris* of States can bind them merely on the basis of State practice.

In *Libya/Malta*, the Court was requested to affirm the equidistance rule of delimiting continental shelf, on the basis of the extensive practice consisting of delimitation agreements. The Court found that this practice revealed the numerous deviations from the strict application of the equidistance rule, and fell short of

⁵³ M. Akehurst, Custom as a Source of International Law, 47 BYIL (1975-76), 1 at 25.

⁵⁴ ICJ Reports 1974, 23.

⁵⁵ Ibid., 26.

⁵⁶ Ibid., 24, 26-27.

proving the existence of the rule of equidistance, or any other method, as obligatory.⁵⁷ It seems that the analysis of practice was just the first step of what normally is the ascertainment of the law-making process. As practice provided no straightforward material of the rule, no examination of *opinio juris* was necessary. The question of whether, had the practice been straightforward and uniform enough, the Court would have found it sufficient even without *opinio juris*, is purely hypothetical.

The science of international law has witnessed proposals to abandon *opinio juris* as the requirement for custom-generation. This can be seen from doctrinal contributions in which *opinio juris* is described as the mirror-image of the consensual approach which does not explain the creation of customary rules, and of how they bind non-participants. Thus, it is considered unnecessary to seek proof of *opinio juris*, any more than it is necessary to prove consent. One should not insist on the requirement of *opinio juris* where there is “a constant, uniform and unambiguous practice of sufficient generality, clearly taking place in a legal context and unaccompanied by disclaimers, with no evidence of opposition at the time of the rule’s formation by the State which it is sought to burden with the customary obligation”.⁵⁸

Along the lines of opposition to the requirement of psychological element, Judge Read in the *Fisheries* case argued that in terms of defining the relevant rights or titles, the starting point is the actual practice consisting of physical action.⁵⁹ Another similar approach is to argue the judge has an unfettered discretion to insist on, or dispense with, the requirement of *opinio juris*.⁶⁰

There are significant problems with the feasibility of this thesis. One can rarely meet practice which is constant, uniform and unambiguous, and at the same time of sufficient generality. This thesis cannot explain practice with deviations – that is most of the situations in which customary rules are created – unless additional resort is made to the attitudes and beliefs of States, their *opinio juris*. It is hardly possible to know that the relevant practice is taking place in a legal context unless we can identify the evidence of the conviction of States that this is indeed so, that is their *opinio juris*. In addition, the lack of opposition of the State which is burdened by the relevant customary rule expresses its attitude, belief, and even consent, and thus emphasises the need to search for and identify the psychological element of custom along with State practice.

If the psychological element were to be dispensed with, the line delimiting the relevant practice from the irrelevant practice would disappear; and some alternative

⁵⁷ *Libya-Malta*, ICJ Reports 1985, 38, 48.

⁵⁸ Mendelson (note 35), 177 at 201-202, 204, 206-207; similarly, in the Hague Lectures Mendelson states that *opinio juris* is only of limited utility, M. Mendelson, *The Formation of Customary International Law*, 272 RdC (1998-II), 165 at 282, 285, 292.

⁵⁹ Judge Read in *Fisheries*. For some such views see Thirlway, *The Law and Procedure of the International Court of Justice*, BYIL (1990), 1 at 43.

⁶⁰ Akhurst (note 53), 1 at 33.

tool would be needed to clarify which practice is relevant and which is not. Such criterion cannot be found at the present stage. Therefore, the requirement of psychological element cannot be abandoned.

As Akehurst observes, the frequency or consistency of practice provides no answer as to the existence of legal obligation; *opinio juris* alone can provide the answer, and furthermore only it can distinguish legal obligations from non-legal obligations based on morality, courtesy or comity. "If *opinio juris* is abandoned, some other criterion for making such distinctions will be needed to take its place. Most authors who seek to eliminate *opinio juris*, in whole or in part, do not face this problem."⁶¹

Thirlway correctly observes that the acceptance of the claim in the bilateral dispute can be expressive, in terms of *North Sea*, of the "belief that this practice is rendered obligatory by the existence of a rule of law requiring it".⁶² Verdross also emphasises that certain customary rules are created through the adjustment of competing State claims.⁶³ State practice, however, does not consist only of controversies. There can also be – and it is mostly so – the constructive State practice that builds up the substratum of customary law and which expresses the concordant effort of States towards effecting the normative change.⁶⁴ This constructive practice does not often come up in judicial practice, because adjudication is about dealing with controversies.⁶⁵ It is such practice that most acutely poses the question whether the customary rule emerges through the action of States in belief of the existence of the obligatory rule, or in being conscious of their practice and action implying their attitude, agreement and consent as to the (prospective) emergence of the customary rule.

3. The Process of Emergence of *Opinio Juris*

How and at which stage can practice be seen as expressive of or accompanied by the legal conviction? Cassese considers that in the custom-generation process the element of *opinio juris* does not need to be present from the very outset of the development of the relevant practice. Practice initially is motivated under the impulse

⁶¹ Ibid., 1 at 33.

⁶² Thirlway (note 59), 41, 50; Thirlway also points to the requirement that the practice shall not be motivated by the compliance with other rules, such as treaty rules, *ibid.*, 44. This is still something different than positively addressing the issue of practice that affirmatively expresses the opinion of compliance with customary rules specifically. Thirlway explains away this latter issue too easily. Showing that the practice in pursuance to the treaty does not build up customary *opinio juris* falls short of demonstrating how such *opinio juris* is built up whenever it is relevant.

⁶³ Verdross (note 2), 646.

⁶⁴ As Mendelson points out, "The rules relating to such matters as diplomatic immunity and the freedom of the high seas have evolved as the result of the *conduct* of States which was either parallel and uniform from the outset, or (more commonly) eventually fell into a common pattern." Mendelson (note 58), 165 at 197.

⁶⁵ Skubiszewski (note 28), 853.

of economic, political or military demands and at this stage it may be regarded as “being imposed by social or economic or political needs (*opinio necessitatis*)”. If such practice encounters no significant opposition, it gradually crystallises into a customary rule through acceptance or acquiescence. At this stage practice is already dictated by international law (*opinio juris*), and States comply out of their sense of legal duty as opposed to economic, political or social factors. This process of transformation cannot, according to Cassese, be pinpointed precisely, because it is a continuous process.⁶⁶ Cassese considers that telling examples of rules initially based on *opinio necessitatis* and subsequently endowed with *opinio juris* are the rules on continental shelf, and outer space.⁶⁷ Along the similar lines, Mendelson deals with *opinio juris* at the formative stage of custom and when the customary rule is mature, suggesting that at the former stage “pioneers” believe that the rule is desirable; at the later stage the general belief is that the rule is law.⁶⁸ Mendelson also observes that “the will or the belief of a State is more difficult to ascertain than its conduct, which is often, by its nature, public and objectively verifiable”.⁶⁹ While this problem cannot be denied, it is not insurmountable. The very public character of State practice, the consistency of it, the knowledge thereof by other States and their non-contradiction to it may be indication of consent, acquiescence through *opinio juris*.

Cassese’s thesis that the exact moment of transformation of *opinio necessitatis* into *opinio juris* is correct in many cases. At the same time, the criteria for telling one from the other are still necessary, because the ultimate task always is to ascertain whether there is *opinio juris*, that is whether the practice is complied with as a matter of legal obligation.

In this respect, there can be no detailed criteria with universal application. There can, however, still be some guidance related to the context in which the relevant practice develops. And in these terms several criteria can be identified:

- The practice consisting of mere action of the State will never be as good as practice that expresses or implies the conscious correlation of attitudes.
- The practice taking place within *domaine reserve* may in some cases imply the acceptance by the relevant State of legal limitation of its sovereign freedom; and in other cases it may signify just a discretionary action. This would again depend on the correlation of attitudes between that State and other involved States.
- The practice in compliance with some other extra-customary rule will not be the independent evidence of customary *opinio juris*, as has been established in the *North Sea* case.
- The practice developing in the field in which there has hitherto been no certainty of legal regulation or no specific applicable rule, and in relation to which States are supposed to expect the clarity of their rights and obligations because it involves the exercise

⁶⁶ A. Cassese, *International Law*, (2005), 157-158; see also Skubiszewski (note 28), 838.

⁶⁷ Cassese (note 66), 158.

⁶⁸ Mendelson (note 58), 281.

⁶⁹ *Ibid.*, 197.

of and correlation between their sovereign rights and obligations, and provided that there is evidence of the correlation of State attitudes, can be particularly indicative of the rule endowed with *opinio juris* being formed.

- Most general customary rules are formed as bundles of bilateral normative relations. Thus – and in a way cognate to the phenomenon of persistent objection – if the relevant State accepts or rejects the rule in relation to itself, and depending on the context, the existence of the rule on a general plane can presumably be identified.

Therefore, the doctrinally postulated uncertainty notwithstanding, there can be criteria that help identifying the existence of *opinio juris* in the relevant case, as distinct from other motivations of State practice. Not that these criteria are absolute, but they can provide guidance for distinguishing the relevant factors from irrelevant ones.

Once the indispensability of *opinio juris* is established, it must be ascertained whether State practice and *opinio juris* are always and necessarily separate, or whether *opinio juris* can be implied in practice. As Skubiszewski considers, the evidence of *opinio juris* is the weakest point of the study of customary law.⁷⁰

According to Akehurst, *opinio juris* can be inferred from the very acts that constitute State practice.⁷¹ An important part of jurisprudence on this issue suggests that for the customary rule to exist, it must relate to the practice followed in belief of the existence of the rule of law requiring such conduct. For instance, in the *Lotus* case the Permanent Court held that the abstention of Turkey from exercising jurisdiction on the basis of objective territorial principle was not accompanied by the belief of legal obligation and hence it was merely bare practice. States had abstained from prosecuting individuals in similar circumstances, but they were not deemed to have been abstaining “being conscious of having a duty to abstain”, which would be a prerequisite for a customary rule to exist. In addition, it seemed hardly probable, according to the Court, that the French Government in certain incidents “would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian courts, if they had really thought that this was a violation of international law”.⁷² Practice can by itself signify the acceptance of customary rule as law. As Judge Lachs emphasised in *North Sea*, “the general practice of States should be recognized as *prima facie* evidence that it is accepted as law. Such evidence may, of course, be controverted – even on the test of practice itself, if it shows ‘much uncertainty and contradiction’”.⁷³ Similarly, in the *North Sea Continental Shelf* case, the International Court specified that practice must be such “as to be the evidence of a belief that this practice is rendered obligatory by the ex-

⁷⁰ Skubiszewski (note 28), 854.

⁷¹ Akehurst (note 53), 39.

⁷² P.C.I.J. Series A., No. 10, at 28-29.

⁷³ Dissenting Opinion, ICJ Reports 1969, 231, further referring to the *Asylum* case. In this latter case, practice was not seen as sufficiently uniform to demonstrate acceptance of the rule and it involved political expediency as motivation of State conduct, as opposed to the conviction of the legal obligation.

istence of a rule of law requiring it. ... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”⁷⁴

This statement assumes the pre-existence of the legal rule that renders the practice as obligatory. Conceived in strict terms, this statement means that States do not create the rule through expressing *opinio juris*, but conform to the existing rule. As Akehurst observes in this spirit, “*opinio juris* is to be found in assertions that something is already law, not in statements that it ought to be law”.⁷⁵ Does the acting in pursuance of a rule or in consciousness of a legal obligation create the rule or assume its existence? It seems that the field of *opinio juris* still leaves some room for the relevance of the assertions or attitudes of States that the relevant practice thereby becomes law. In fact, whether *opinio juris* is expressed at once, gradually or subsequently is a question of technique and form. It does not prejudice the basic conceptual question of whether *opinio juris* is an expression of consent.

It is however arguable that the perspective of States acting in belief that the obligation exists potentially takes matters out of the positivist reasoning and implies the emergence of customary rules on the basis other than consent and agreement. There are criticisms of that approach. According to Skubiszewski, to consider *opinio juris* as implying that the relevant practice is required by prevailing international law is wrong, because practice is creative, not corroborative, of customary rules. Moreover, the change of customary rules cannot be performed by belief of acting in accordance with an existing rule.⁷⁶ This is arguably reflected in the fact that the *North Sea* Judgment referring to the action in belief of a legal obligation related to the creation of rules in the context where none existed on that specific subject-matter.

The limits on this approach and the necessity of alternatives can be seen from the analysis of Judge Lachs in *North Sea*. As Judge Lachs observes, “in view of the complexity of this formative process and the differing motivations possible at its various stages, it is surely over-exacting to require proof that every State having applied a given rule did so because it was conscious of an *obligation* to do so”.⁷⁷ According to Judge Lachs, it is not necessary to have the straightforward *opinio juris* from the very beginning of the practice. It is a fiction to assume that all States believe to be acting under a legal obligation. The process may begin from the voluntary acts inspired by the calculation that the acceptance from other States will follow.⁷⁸

In some cases, the State which introduces new practice at variance with law has no belief of acting in conformity with the law. For instance, with the Truman proclamation, the United States first claimed *opinio necessitatis*, that the exercise of the relevant rights on the continental shelf was “reasonable and just”, which was

⁷⁴ ICJ Reports 1969, 41.

⁷⁵ Akehurst (note 53), 1 at 37.

⁷⁶ Skubiszewski (note 28), 839.

⁷⁷ Dissenting Opinion, ICJ Reports 1969, 231 (emphasis original).

⁷⁸ ICJ Reports 1969, 230-231.

the expression of legal necessity.⁷⁹ But this is more a question of *ratio legis*, than of the psychological element of the customary rule. *Opinio juris* is implied in the response other States gave to this through claiming their own continental shelves, as opposed to the US claim *per se*.

Akehurst's final observation holds the real key to the solution of this problem: "It is not necessary that the State making such statements [on the conduct being required or prohibited by international law] believes them to be true; what is necessary is that the statements are not challenged by other States."⁸⁰ Beliefs are indeed subjective and difficult to verify. But the fact of acceptance of this stated belief by other States constructs *ex post facto* the agreement regarding the legality or illegality of certain action as between the relevant States, and further upholds the relevance of the consensual element in the creation of customary rules. The other State's acceptance of the stated belief makes the difference and effectively amounts to consent, and the legal rule emerges at that point. It is not whether the States making statements actually believe in whether the relevant conduct is obligatory, but whether the outcome regards the rule as legally obligatory; whether on balance there is agreed and objectively certifiable *opinio juris*, as opposed to the presumably subjective beliefs at the launching stage of the relevant practice. This implies the concordance of attitudes and therefore confirms that the recognition of a rule through the action pursuant to a legal obligation complies with the consensual framework of the creation of customary rules. However we name it, recognition, consensus, or shared conviction, the psychological element of custom is an expression of will that transforms, by reference to the will of States, the non-rule into the rule.

4. Doctrinal Criticisms of and Alternatives to the Consensual Explanation of Custom

The issue of theories alternative to consensual approach is at the heart of the issue of the threshold of law-making and the relevance of non-law in generating legal rules. The consensual approach is widely criticised in doctrine, and several alternatives are proposed to explain how customary rules acquire their binding character. There is widespread opposition to consensual understanding of customary law. According to Charney, "most writers argue that States do not have the free

⁷⁹ Mendelson (note 35), 177 at 196-197, 201-202. See also Verdross (note 2), 647. Legal necessity or utility shall not be confused with the inherency of the rules, unless one views this claim as made pursuant to the perceived natural law entitlement to the continental shelf. On which see *supra* section 2 and *infra* section 6. The cardinal difference is that natural law/inherent rules are deemed to be there on their own, while the social necessity or utility argument refers to (some) States considering the particular rule as useful and socially necessary.

⁸⁰ Akehurst (note 53), 1 at 53.

will to decide whether or not to be bound by rules of international law".⁸¹ The last two decades have especially witnessed the enthusiasm for replacing consensual understanding of custom by the sociological theory of custom, mirroring in some ways the sociological approach of Scelle.

The almost inherent and irreconcilable contradiction of the sociological approach with the consensual, or positivist, perspective can be seen from the dissent of Judge Tanaka in the *North Sea* case in which he advocated the customary status of the equidistance rule of continental shelf delimitation rejected by the Court as a whole. He suggested sociological factors contribute to the speedy formation of customary rules, and that the elements of custom-generation including those related to State practice and its duration, are relative. In advocating such relativity, Judge Tanaka argued that "we must not scrutinise formalistically the conditions required for customary law and forget the social necessity, namely the importance of the aims and purposes to be realised by the customary law in question". In addition, Judge Tanaka suggests with approval that "those who advocate the objective existence of law apart from the will of States, are inclined to take a more liberal and elastic attitude in recognizing the formation of a customary law attributing more importance to the evaluation of the content of law than to the process of its formation".⁸² Sociological approach has been used against the Permanent Court's consensual approach in *Lotus*, as can be seen from Judge Nyholm's dissent, which bases custom on "international legal ethics", on the basis of which the continual recurrence of events creates rules with "an innate consciousness of their being necessary".⁸³ Similarly, Judge De Castro has come closer to the sociological approach, by advancing the thesis that, as customary law expresses the community conviction, "in order to be binding as a legal rule, the general conviction (*opinio communis*) does not have to fulfil all the conditions necessary for the emergence of a custom".⁸⁴

These passages, and above all Judge Nyholm's approach, reflect the approach of the classical natural law school which has explained certain part of customary law as reflective of some sort of natural necessity as opposed to consensual agreement; or viewing this consensual agreement as compliance with those natural necessities. This argument also implies that the mere social interest behind the rule can justify its binding force at the expense of the formal elements of law-making which express the will and attitude of States. Furthermore, in broader perspective this approach advocates the independent influence of non-legal considerations on international law-making.

It has to be reiterated that social necessity can be a motivating factor behind customary rule, causing States to accept the rule in the exercise of their sovereign free-

⁸¹ J. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BYIL (1985), 1 at 16.

⁸² Dissenting Opinion, ICJ Reports 1969, 176, 178.

⁸³ Dissenting Opinion of Judge Nyholm, P.C.I.J. Series A, No. 10, 60.

⁸⁴ Separate Opinion, *Fisheries Jurisdiction*, ICJ Reports 1974, 100.

dom. But it cannot by itself make the rule binding. This can only happen through State consent, in some cases with motivation to respond to social necessity.

Visscher considers that the development of customary international law is the result of the repeated action of power. Some States have larger footprint than the others and therefore their practice and action are more influential in developing customary law.⁸⁵ This approach follows from Visscher's general approach to view international law as the product of power and reality.

It must be asked whether Visscher's approach to customary law inherently contradicts consensual approach. Even if some powerful States were to have predominant influence in developing customary law, customary rules would still owe their validity to the consensual acceptance by the rest of the States. This would be so unless one were to specifically deny the relevance of the consent of those other States and assert that customary rules bind them against their will. Visscher does not advance this thesis expressly and his theory is therefore incomplete. Instead, although developing the view that customary law is the consequence of the, repeated exercise of power, Visscher eventually accepts that "a custom becomes compulsory only from the moment when the practice which is its material substratum is generally accepted 'as law'".⁸⁶

From here Visscher proceeds to explain the acceptance of customary rules by States in moral and sociological terms, suggesting that "this psychological judgment implies a moral judgment which, relying on the criteria of reason, justice and common utility, separates what in a given practice appears to be dictated by a certain conformity with the general interest and with principle from what appears to be due solely to accidental circumstances or individual motives".⁸⁷ Therefore, Visscher suggests that practice can get transformed into custom if it corresponds to the perception of general interest. But Visscher does not specify whether the perception of general interest itself generates customary law, or whether it is merely a motivation inducing States to consent to the emerging customary rule.

Kelsen suggests that "general international law is binding upon many States which never, expressly or tacitly, consented to it".⁸⁸ Kelsen views customary law in terms of power of States, submitting that the consistent and effective violation of a customary rule cannot leave the old law unimpaired. If these States are sufficiently numerous and powerful, their action can deprive the existing customary law of "that degree of effectiveness which forms an indispensable condition of its continued validity".⁸⁹

Another observation on Kelsen's approach relates to his above-mentioned thesis that the State cannot escape the operation of customary rules on the basis of its lack of consent to it. This thesis, coupled with Kelsen's reference of the role

⁸⁵ de Visscher (note 30), 153 ff.

⁸⁶ Ibid., 156.

⁸⁷ Ibid.

⁸⁸ H. Kelsen, *Principles of International Law*, (R. Tucker ed., 1967), 448.

⁸⁹ Ibid., 454.

of powerful States in modifying customary rules effectively implies that some States can legislate for others, which is a view antithetical to the fundamental character of international law.

Kelsen's approach raises several other problems. In the first place, this approach falls short of explaining how many States should there be violating the "old" law to deprive it of its legal effectiveness. Kelsen's approach also contradicts the principle of the independent operation of customary rules, asserting that the validity of customary rule can be undermined by the group violation. The framework of international law-making does not sustain this view. The change of customary rules necessarily presupposes the coincidence of the attitudes of all affected States that the old rule is replaced and the new rule is established. This fundamental question is also left unanswered by Kelsen, who does not examine what the legal position is if the "old" customary rule were indeed to be deprived of its validity; is the outcome the non-regulation, legal vacuum or some kind of *non liquet*? Is the mere violation enough unless it can bring with it the new legal regulation of the field governed by the "old" rule? The failure to address these issues confirms that Kelsen's theory fails to formulate a viable alternative to the consensual explanation of customary law.

Mendelson likewise criticises the consensual approach, suggesting that "though the voluntarist approach is plausible and hard to disprove definitely, there are important respects in which it does not furnish a convincing answer. At the theoretical level, it is often based on a logical error concerning the level of analysis; and empirically it postulates a will which is often lacking in fact."⁹⁰ Consent has arguably to be demonstrated at systemic level, in terms of the general consensual character of international law, and the sources-of-law level, in terms of the relevance of consent for the particular sources of law.⁹¹ Mendelson tries to narrow a gap in the dichotomy between the consent approach and belief approach, and states that "consent plays a role in some conditions, but belief in others". The difference between the two is that between necessary conditions and sufficient conditions. Consent may be the sufficient condition, but not a necessary one.⁹²

Interestingly enough, Mendelson's objections to consensual explanation of custom runs parallel to some objections to the relevance of *opinio juris*. According to Mendelson, in the process of general custom-generation, the relevance of

⁹⁰ Mendelson (note 35), 177 at 193-194; another difficulty Mendelson attributes to the voluntarist approach is that it does not properly consider the position of unaffected States and persistent objection, *ibid.*, 261. These questions are dealt with in the relevant parts of this analysis.

⁹¹ In this respect Mendelson refers to the non-consensual elements of international law, such as general principles of law under Article 38(1)(c) of the International Court's Statute and some structural rules such as those governing the conclusion, interpretation, termination etc. of treaties, (1998), 263-264. It has to be stated, however, that whether or not international law includes non-consensual structural rules and principles, this does not affect the outcome as to the existence and binding force of substantive rules of customary law. As for those structural rules, it is correct that they do not strictly or completely derive from State consent. But State consent is still relevant, if the question is posed whether those structural rules would still be there if the will of States had gone against them.

⁹² Mendelson (note 35), 183, 188; Mendelson (note 58), 165 at 264-265.

consent is simply untrue in describing the general process of non-objection and acquiescence. *Opinio juris* relates to belief, not consent. The lack of objection may in formal terms be presented as giving consent, but “it does not describe what actually happens”.⁹³

But what actually happens is that the consent is implied in inaction. Taken literally, *opinio juris* may relate to belief or view, but its manifestation to the attention of other States results in communicating the will to treat the relevant rule as legally binding, that is in giving consent. In fact, Mendelson accepts that acquiescence is equivalent to consent.⁹⁴ If so, then it is unclear why the acquiescence to the rule of general customary law, itself the conscious decision, is not an incidence of consent. The observation that the International Court has never expressly stated that customary law embodies tacit consent⁹⁵ has to be noted and presumably it is correct. On the other hand, viewing the International Court’s approach to custom-generation and *opinio juris* as consensual approach does not inevitably require express pronouncement in favour of this approach. The Court has not denied the relevance or indispensability of State consent either. What is most important is not whether the Court expressly accepts that customary law in general or *opinio juris* in particular rests on consent (after all the Court does not strictly have to engage in this question – it has only to find that the relevant practice is accepted by the relevant States as law as its mandate under Article 38 of the Statute requires), but whether those contexts in which the Court affirms or denies the presence of *opinio juris* actually imply the requirement of State consent. In other words, the real question is the structural characteristics of the relevant legal relations, among which – as the Court’s practice confirms – the emphasis on the will and attitude of individual States and the impossibility of the emergence of customary rules in the face of objection of the relevant States is most prominently to be found. No case has so far been cited in which the International Court accepted the existence of customary rule in circumstances where the consent of the relevant State could not have been reasonably assumed to be given. On the other hand, where the Court has denied the existence of *opinio juris* it did so in the contexts where the relevant State could not be deemed as having consented to the rule.

Mendelson does not object to the thesis that customary rules are product of mind, and that some States indeed will their creation. But he characterises the voluntarist theory as going further and requiring the will and consent of each and every State.⁹⁶ Mendelson submits that “initiation, imitation and acquiescence may plausibly be described in terms of will. But others still, who were not directly affected, sat by and did nothing, and in due course found themselves bound by the emerging rule.” Mendelson further reinforces its view by the domestic law analogy, in which “movers and shakers” create the rules which end up binding the en-

⁹³ Ibid., 185-186.

⁹⁴ Ibid., 192.

⁹⁵ Ibid., 165 at 260.

⁹⁶ Ibid., 165 at 255.

tire society, without others consciously consented to it. It is further pointed out that only States with knowledge are capable of acquiescing.⁹⁷ In fact, those States are deemed to have acquiesced, that is consented, as well; if they did not know that the rule was being created, they would become entitled to persistent objection from the point of time from which they knew or ought to have known in good faith of the creation of the rule, and their failure of the use of this entitlement would also amount to acquiescence, that is consent. Domestic law analogy cannot be adopted either because the international legal system does not admit any centralised law-making.

In more general terms, the International Court's jurisprudence deals with the factor of knowledge in terms of custom-generation. The *Fisheries* Judgment discusses this question in terms of bilateral relations. As Fitzmaurice specifies, "very little may be required to create a presumption of knowledge and acquiescence on the part of States".⁹⁸ This obviously relates to the acquiescence that follows the preceding knowledge. Fitzmaurice was developing this thesis regarding the Court's approach in *Fisheries* that the refusal of Norway at the 1882 North Sea Fisheries Conference to adhere to North Sea Fisheries Convention put the United Kingdom Government upon notice of Norway's claims.⁹⁹

Another objection to the consensual explanation of customary law is made by Thirlway by reference to certain passages in the *Nicaragua* case. In this case, the International Court pointed out that the "shared views of the parties" as to what they regarded as customary rule and their "recognition" of it could not prejudice its opinion on this issue: it had to ascertain that the existence of *opinio juris* was confirmed in practice.¹⁰⁰ Thus, Thirlway suggests that the Court did not speak of consent, but of shared views and recognition of the rule, which arguably confirms that customary rules are not based on consent, and they can bind States that have not participated in their creation. "Shared views" of the Parties can at most evidence the bilateral custom, but not general custom, and these views, or consent of the parties, are irrelevant in the case of general customary rules.¹⁰¹

It seems that this view is inconsistent. Binding States without their consent obscures the issue of acquiescence and lack of objection to which every State is entitled. But most importantly, the Court's mentioning of *opinio juris* did not touch upon the issue of whether this concept is consensual or sociological: it merely means that *opinio juris* has to be ascertained. The Court's proclamation of insufficiency of the parties' "shared views" does not certify the irrelevance of consent either. All this means is that "shared views" can evidence the existence of the custom established on the basis of consent that has been given by States previously,

⁹⁷ Ibid., 256.

⁹⁸ G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 30 BYIL (1953), 1 at 43.

⁹⁹ Ibid., 39.

¹⁰⁰ ICJ Reports 1986, 97-98.

¹⁰¹ Thirlway (note 59), 51.

but they cannot prejudice the question whether or not such consent to the customary rule has been properly given. Therefore, *Nicaragua* cannot be used as evidence against the consensual view. All *Nicaragua* says is the “shared views” are not crucial by themselves, not that they determine what else may or may not be crucial, or that the irrelevance of “shared views” of the parties means their subjection to general custom they do not consent to.

Thirlway speaks not “of consent but of conviction of the existence of the rule”.¹⁰² Whatever the terminology, it is the attitude of States expressed to the attention of other States, and that brings about the rule and without it there will be no rule. This, now, is the very foundation of the consensual approach, emphasising the shared conviction as opposed to the conviction *per se*.

The issue of view as to the customary status of the relevant rule is normally treated as an issue of consent to that rule, as is clear from Judge Sorensen’s approach to the reception of treaty rules into customary law. Judge Sorensen thus commented on the relevance of the attitude of Germany in relation to the 1958 Continental Shelf Convention:

“At a decisive stage of this formative process, an interested State, which was not a party to the Convention, formally recorded its view that the Convention was an expression of generally applicable international law. This view being perfectly well founded, that State is not now in a position to escape the authority of the Convention.”¹⁰³

Further in opposing the consensual explanation of custom, Thirlway favours the “sociological” concept of *opinio juris* that puts emphasis on the social desirability of the rule.¹⁰⁴ Thirlway repeatedly suggests in his writings an explanation of this process: at early stages States consider the rule either as “potentially rule-creating” or “useful and desirable”.¹⁰⁵ The concept of “potentially rule-creating” can indeed express the view of States that the rule can potentially acquire the legal character or is suitable to do so, but this does not by itself prove that the rule has actually acquired the legal character. Viewing rules as “useful and desirable” is not the same as their acceptance as legally binding rules. The criterion of “useful and desirable” refers to the potentiality and likelihood but not to the actual process of law-making. Whether or not the problem is seen from consensual perspective, the establishment of customary rule through the expression of *opinio juris* necessarily requires ascertaining the actual conviction of States that the rule is a legal rule.

Another vigorous support for the sociological understanding of customary law is offered by Charney. According to Charney, “the obligation to conform to rules of international law is not derived from the voluntary decision of a State to accept or reject the binding force of a rule of law. Rather, it is the societal context which motivates States to have an international law and obligates them to conform

¹⁰² Ibid., 52.

¹⁰³ Dissenting Opinion, ICJ Reports 1969, 248.

¹⁰⁴ Thirlway (note 59), 45.

¹⁰⁵ Ibid., 43, referring to *International Customary Law and Codification*, (1972), 53-54; and also acknowledging that the Court in *North Sea* refused to rely on the criteria of desirability, (1990), 45.

to its rules.”¹⁰⁶ Charney further argues pursuant to Visscher that “If it is the societal context that is the source of the obligation to conform to specific rules of international law, then consent, either express or tacit, is irrelevant to the obligation”.¹⁰⁷

This can be a plausible sociological explanation of why States ought to conform to international law in general and what the general motivation behind international law is. But this cannot be a proper explanation of why the State is to be considered as bound to comply with the individual and specific rules of international law. As Akehurst observes, “practice accompanied by a sense of social or moral obligation does not always create the rule of customary law”.¹⁰⁸ The fact that something is required by morality, comity, courtesy or social needs does not support the existence of the legal rule.¹⁰⁹

In fact, the thesis of rationality of customary rules as the factor of their validity, which is an issue very cognate to the “social desirability” approach, has been rejected in jurisprudence. In *North Sea*, the International Court refused to infer the existence of a customary rule from the principle of equidistance in maritime delimitation, even as it acknowledged that the rule was reasonable, practicable and convenient. Instead, the Court required the evidence in terms of State practice and *opinio juris*.¹¹⁰ This rejection of the relevance of rationality went hand in hand with the Court’s rejection of the inherency of equidistance in the nature of continental shelf.

Another rejection of the rationality argument can be seen in the *Ahmadou Sadio Diallo* case, in which the Court rejected the claim that international law admits the diplomatic protection rule allowing protection of the company rights “by substitution”, through vindicating the rights of individual shareholders. As the Court put it, “The theory of protection by substitution seeks indeed to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the State of its nationality”. However, State practice could not support the view that any such rule, despite the stated rationale, achieved the status of a customary rule.¹¹¹

On the other hand the rationality and usefulness of the *uti possidetis* rule was affirmed in *Burkina-Faso/Mali*, extending the originally Latin American rule to Africa as a general rule of international law. This rule was also derived as an inherent element of the broader principle of self-determination, which also explains the reference to its usefulness. Thus, the mere rationality did not matter. In fact, rational-

¹⁰⁶ Charney (note 81), 1 at 16.

¹⁰⁷ Ibid., 18.

¹⁰⁸ Akehurst (note 53), 35.

¹⁰⁹ Ibid., 1 at 37.

¹¹⁰ ICJ Reports 1969, para. 23.

¹¹¹ *Ahmadou Sadio Diallo*, Preliminary Objections, General List No. 103, Judgment of 24 May 2007, paras. 88-90.

ity and inherency of the rule are essentially different matters: one refers to the inherent merit of the projected rule, while the other links the rule that cannot, or not completely, be empirically proved, to the essence of another, broader, rule of undisputed status.

Thus, it must be admitted that none of the approaches that oppose the consensual nature of custom-generation does advance the consistent alternative that would be consistent with the basic nature of the international legal system and capable of being accommodated within the requirements developed in jurisprudence.

In the end, the device of implied consent removes all potential problems in this field and spares the international legal science of inventing alternatives to consent such as social necessity or moral desirability of rules. It is not less important that none of the relevant judicial pronouncements justify a customary rule by reference to its social, political and economic desirability, as opposed to the sense of legal obligation. In addition, the *Asylum* case even expressly excludes the relevance of practice pursued in terms of political expediency.

5. Consensual Basis of Custom and the Side Aspects of Custom-Generation

a) General Aspects

In doctrine, the problem of consensualism in custom-generation is often approached from the sides, in terms of the contested and marginal aspects of custom-generation, rather than focusing on its principal nature. Ultimately, whether the process of custom-generation is consensual depends not on side issues such as regional custom-generation, persistent objection, protest, or the issue of new States – which are on their own quite useful in enabling us to discern the merits of consensual approach – but on what actually the mainline process of custom-generation means. Judging the process of custom-generation relates to the positive process of custom-generation, while side issues involve additional considerations and this should not affect the understanding of the process of custom-generation where other things are equal. The analysis of mainline process of custom-generation ultimately holds the key for explaining the essence of side elements as well as the mainline process itself. Nevertheless, these side aspects still need to be examined if only to demonstrate that they involve no inherent contradiction with the consensual essence of customary law.

b) The Problem of Regional Customary Law

One of the objections against viewing custom-generation as the consensual phenomenon is based on the alleged difference in the process of creation of general and regional customary rules. The principal doctrinal emphasis is made on the al-

leged distinction that while the emergence of regional custom is more dependent on will and consent of individual States, the emergence of general or universal custom is less so. Mendelson regards the *Lotus* case as dispensing the requirement of consent by each and every State, because it referred to “usages generally accepted”. This is contrasted to the *Asylum* case on regional custom-generation where it was held that the party asserting that the customary rule exists must prove that it has become binding on the other party.¹¹² Although in *Lotus*, even in terms of general customary law, the attitudes of individual States have been treated as relevant.

The *Asylum* case is often portrayed as supportive of the thesis that the International Court emphasised the relevance of individual consent in the case of regional custom and thus implied the absence of the similar requirement in the case of general customary law. But even though the Court was addressing the regional custom-generation, it has said nothing to prejudice the consensual nature of general custom, which is clear from the relevant passages of the case. The Court emphasised that the Colombian Government in this case

“has relied on an alleged regional or local custom peculiar to Latin-American States. The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom ‘as evidence of a general practice accepted as law’.”¹¹³

It is difficult to see from this passage that the Court meant formulating different standards for the emergence of different customary rules depending on their geographical scale. Although the Court addresses the regional custom and speaks of “a custom of this kind”, this is due to the context of the case rather than the Court’s conception of the normative framework. This is clear also from the Court’s reference to Article 38 of its Statute and the consequent placing all customary rules on the same footing in terms of their psychological element. It shall therefore be concluded that the formation of regional customary rules does not include any such element of bindingness of rules on States that is absent in the process of formation of general customary law.

c) The Problem of New States

According to Brierly, the new State joining the international society is not bound by international law on the basis of consent: “It does not regard itself, and it

¹¹² Mendelson (note 35), 177 at 181; similarly, Judge de Castro in *Fisheries Jurisdiction* suggests that regional customary rules need to be proved, while general customary rules are based on general conviction of their validity, ICJ Reports 1974, 79.

¹¹³ ICJ Reports 1950, 276-277.

is not regarded by others, as having any option in the matter.”¹¹⁴ Along the similar lines, Kelsen argues that if custom is based on consent, the thesis that new States are automatically bound by all rules of customary law in existence at the time of their becoming independent cannot stand. Whether or not the new State gives consent to these rules is therefore irrelevant. This allegedly explains that the consensual understanding of custom is only a fiction.¹¹⁵ But Kelsen is quick enough to add that this does not affect the relevance of consent in the development of custom.¹¹⁶

It is a common and indisputable ground that the new States are bound by the bulk of international law in force when they join the international society. However, the thesis that the new State is bound by the existing international law created before it joined international society as the condition of joining is not conceptually the same as the thesis that the same new State can, after joining the international society, be subjected to the operation of customary rules against its will. Therefore, the issue of new States and customary law has little to do with the mainline issue of consensual character of customary international law.

At the same time, the relevance of the consent of new States, especially implied or tacit consent, cannot be disregarded altogether. A further explanation of their implied consent can be the absence of their reservation to one or another customary rule.¹¹⁷ Even as the rules may well be consolidated upon their independence,¹¹⁸ new States still may object to them within reasonable time and this will be seen as withholding their consent from the rule.

d) Protest and Persistent Objection

It is generally recognised that protest is a factor in the creation of customary rules, and timely protest can prevent the formation of custom.¹¹⁹ Obviously, protests operate as withholding the consent from the rules that would be established had protests not been made. Therefore, there is room for suggesting that the absence of protest implies giving consent. It is difficult to argue that States can preclude the emergence of custom by withholding consent, but they can actually be bound by customary rules they have not consented to.

The Permanent Court’s approach in *Lotus* is that if States do not protest against practice, they view this practice in conformity with international law. This view cannot be without limits, because in this case it would expect States to protest against anything and everything in order to avoid the adverse implications for law-making. Although the negative side of protest is quite clear in precluding the

¹¹⁴ Brierly (note 36), 53.

¹¹⁵ Kelsen (note 88), 445, 453; Mendelson (note 35), 177 at 188-198.

¹¹⁶ Kelsen (note 88), 453.

¹¹⁷ Akehurst (note 53), 1 at 27.

¹¹⁸ *Ibid.*, 27-28.

¹¹⁹ For the criteria see *ibid.*, 1 at 39-40.

agreement, the positive implication of the lack of protest is far from being clearly established. Mere toleration is not the same as acceptance of practice as law. This can be seen in the Permanent Court's Opinion in *Danube Commission*, where the Court faced the argument that the exercise of certain powers of the Commission commanded mere toleration of the territorial State, not its legal acceptance. The Court did not ascribe any legal effect to mere toleration. It instead identified the basis of the relevant in Article 6 of the Definitive Statute as opposed to customary practices.¹²⁰ There are implications for the doctrine of acquiescence, the burden of proof for which is very high, presupposing the long and consistent inaction accompanied with consciousness of legal change.¹²¹

The essence of the persistent objection rule is that a State which objects to the evolving rule of customary law is exempted from its operation.¹²² The International Court in *Fisheries* affirmed that the ten mile rule related to maritime bays was not binding on Norway which had consistently opposed it.¹²³ In essence, the normative implications of persistent objection are practically indistinguishable from that of protest. The affirmation of the persistent objection rule in the *Fisheries* case must therefore be seen as its support for the consensual element present in the process of custom-generation. Similarly, Judge Lachs' reasoning in *North Sea* signifies the acceptance of the persistent objection thesis at the example of the equidistance rule allegedly transmitted into customary law from Article 6 of the 1958 Geneva Convention on Continental Shelf. Judge Lachs admits that this rule could have been opposed by certain States from its inception.¹²⁴ This runs parallel to the rejection by the Court as a whole of the customary status of that rule, which presumably signifies that the withholding of consent to a rule through persistent objection is not essentially different from the rule's failure to secure the *opinio juris* necessary for its bindingness.

There are different doctrinal perspectives on persistent objection. Brownlie considers the persistent objector rule important in view of the increase of majoritarian tendencies in the law-making process.¹²⁵ This means effectively that the persistent objection rule protects individual States from being subjected to rules they do not consent to. Charney follows Visscher in denying the relevance of consent in custom-generation in favour of the societal context and contends that

“if the societal context is the source, then an objection at any time, persistent or not, is irrelevant to the binding effect of a rule of law. If this is true, there is no place in interna-

¹²⁰ *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Series B, No. 14, 8 December 1927, 36-37.

¹²¹ On acquiescence and customary law see I. McGibbon, Customary International Law and Acquiescence, BYIL (1957), 115.

¹²² Charney (note 81), 1 at 2.

¹²³ *Fisheries (UK v Norway)*, ICJ Reports 1951, 116 at 131; see further Judge de Castro in: ICJ Reports 1974, 90; for doctrinal support and historical overview see Verdross (note 2), 650-652; Skubiszewski (note 28), 848.

¹²⁴ Dissenting Opinion, ICJ Reports 1969, 229.

¹²⁵ I. Brownlie, Principles of Public International Law, 5th ed., (2003), 11.

tional law for the persistent objector rule. ... Only if one actually believes in the reality of the tacit consent theory of international obligation might there be any room for the persistent objection rule.”¹²⁶

Charney argues that the persistent objector rule can only possess the temporary value of strategic bargain, but “cannot serve a permanent role, unless, of course, one really does believe that States have the independence freely to grant or withhold their consent to rules of customary international law”.¹²⁷ In fact, persistent objection cannot even serve, in legal terms, that strategic temporary role Charney allocates to it unless it is viewed as the tool of withholding the consent of the objecting State. If consent is not being withheld, the objecting State cannot achieve its bargaining purposes in legal terms. Thus, whatever doctrinal perspective one adopts, one cannot avoid explaining the persistent objection rule by reference to consensual nature of custom-generation.

In fact, the dimension of persistent objection to the emerging customary law contributes to consolidating the consensual perspective of custom-generation. With persistent objection States preclude something which is not yet law in relation to them from becoming such. With *opinio juris* they just arguably acknowledge something being law. One process involves saying no to what is not yet law, while the other process involves saying yes to what arguably “already” is law. One wonders how this can be so, for if *opinio juris* relates to what already is law, persistent objection is thus not possible, which cannot be true. Persistent objection is always possible provided that it is timely made. If States can prevent the emergence of a customary rule through expression of the attitude consisting in an objection, then the relevance of such attitude relates also to the positive process of the emergence of a rule. *Opinio juris* is thus not just an acknowledgment of an already existing rule also can involve the attitude relating to the very emergence of the rule. To put it in simpler terms, those who can say no to the emergence of the rule shall, at some stage and in some form, be supposed to having said yes to this process. Whether such consent is inferable from long-time conscious silence and non-objection, or from other factors is more a question of evidence than of principle.

The doctrinal opposition to persistent objection cannot prove that it is irrelevant. On the contrary, all such opposition does to emphasise the indispensable link between persistent objection and consensual basis of customary law. Most importantly, the institute of persistent objection is not self-explanatory – it is there because it represents and explains the broader framework of custom-generation. Thus, given the ability of States to object through the expression of will, before the rule becomes law and so acknowledged, there must be some psychological element involved that expresses the will of States to make it part of law. It is simply inconsistent to suggest that the emergence of the rule can be precluded through withholding consent, yet the very emergence of the rule would not be based on con-

¹²⁶ Charney (note 81), 1 at 18.

¹²⁷ Ibid., 23-24.

sent. If persistent objection is possible, then the whole process of custom-generation is consensual.

IV. The Issue of Inherent and Fundamental Rules

In certain cases, the rules of customary law, designated as fundamental or inherent rules whose normative status derives from the structural necessity of international legal system, are identified without much enquiry into the supportive State practice and *opinio juris*. Whether such fundamental or inherent rules can be seen as customary in the mainline sense of this term can be the subject of a debate. This is presumably a field in which the incidences of customary law overlap with those of natural law. The consensual pattern of customary international law is therefore subject in certain cases to limitations defined by the need of systemic effectiveness.

Certain legal frameworks may evidence that if one were to require the empirical evidence for each and every rule of fundamental evidence, there would practically be no legal regulation in the relevant field. As Fitzmaurice emphasises in conceptual terms, "If a rule is necessary, or if the existence of a system of rules is a necessary condition of a certain state of affairs, the rule or system must also necessarily be binding, or it would not fulfil, or be able to fulfil its function. ... It is something that arises logically and inevitably out of the requirements of international intercourse, relations and transactions. It is an inherent necessity of the case, and no theory of consent need to be postulated in order to account for it."¹²⁸

In two of the very few contributions on this subject, Bleckmann develops the rationale behind the inherency of rules. There are fields in which the existence of certain legal rules is objectively necessary and independent of practice, such as the fields of territorial sea, nationality or outer space.¹²⁹ These can also be areas which relate to the structure of international law and the consequent allocation of territorial competence, or liability of the State organs for its actions.¹³⁰ There are further areas in which the consequential rules (*Folgesätze*) can be derived from the governing legal principles. These consequential rules can be confirmed through practice as well, but this is not necessary, because consequential rules can exist without being corroborated in practice.¹³¹

It must also be examined whether this approach to customary rules, that is the reliance on the inherency of rules, or on the practice only as the basis of general rules, implies the revival of the natural law argument. Classical writers and 19th century writers refer on occasions to State practice while at the same time accept-

¹²⁸ G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RdC (II-1957), 39-40.

¹²⁹ A. Bleckmann, *Völkergewohnheitsrecht trotz widersprüchlicher Praxis?*, ZaöRV 36 (1976), 374 at 389.

¹³⁰ A. Bleckmann, *Zur Feststellung und Auslegung von Völkergewohnheitsrecht*, ZaöRV 37 (1977), 505 at 508-509.

¹³¹ *Ibid.*, 390.

ing the relevance of natural law. This can be seen at the example of Puffendorf's reasoning, according to which ambassadorial inviolability is based on "tacit consent, as evidenced by the usage of nations", that is voluntary law, and also on natural law.¹³² This may be seen as the reference to the inherency of the rule, arguably derived from natural law, its legal status also being based on usage (practice). The consensual and voluntary element is also underlined. Similarly the *Fisheries Jurisdiction* judgment demonstrates that the reference to practice-based consensus is not sufficient for the normative allocation of rights and obligations, and the Court had to base its reasoning on the recognition of this allocation by the affected States.¹³³

One field in which the existence of certain legal regulation can be seen as objectively necessary is that of the continental shelf. Presumably, continental shelf is not by itself inherent in international law for it can exist and survive without it. But the inherency relates to the inherent nature of continental shelf. What matters is what the implications of such inherency are.

In the *North Sea* case, the International Court identified

"the most fundamental of all the rules of law relating to the continental shelf ... namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised."¹³⁴

This is the reasoning that does not share the positivist approach as to the evidences required for identifying the legal rule. This reasoning is transcendent and self-explanatory, and thus perhaps implies the naturalist element. But this reasoning also relates to the well-recognised institution dealing with the structural aspects of territorial sovereignty. This perhaps evidences the link between the structural aspects of the international legal system and the inherency of rules.

The Court refused to identify the fundamental rule on continental shelf requiring that the State should own the parts of shelf closer to its coast than to the coast of the other State. This followed from the absence of the inherent link between the adjacency and proximity. As the Court put it, "the notion of adjacency, so constantly employed in continental shelf doctrine from the start, only implies proximity in a general sense, and does not imply any fundamental or inherent rule the ultimate effect of which would be to prohibit any State (otherwise than by agreement) from exercising continental shelf rights in respect of areas closer to the coast

¹³² Cf. H. Wheaton, *Elements of International Law*, London 1866, 8.

¹³³ See on this *supra* section III (2).

¹³⁴ ICJ Reports 1969, 22.

of another State”.¹³⁵ The rule of equidistance was not a “logical necessity deriving from the fundamental theory of the continental shelf”.¹³⁶

Support for the thesis of inherent rules has also been voiced by individual judges in the *North Sea* case regarding the principle of equidistance as the inherent normative consequence of the concept of continental shelf.

In advancing the argument of inherent rule, Judge Morelli in *North Sea* argued that

“the equidistance criterion for the delimitation of the continental shelves of various States to be a necessary consequence of the apportionment effected by general international law on the basis of contiguity. I am therefore of the opinion that it is not necessary to ascertain if a specific custom has come into existence in this connection. State practice in this field is relevant not as a constitutive element of a custom which creates a rule, but rather as a confirmation of such rule. Confirmation of the rule is also provided, within certain limits, by the provisions of the Geneva Convention.”¹³⁷

Thus, under this perspective, the inherency of the rule can provide for the relevance of practice as explanatory of pre-existing rules, as opposed to constitutive of new rules. Practice seen in this light is arguably not part of the consensual law-making process. In other words, at the conceptual level, such practice presumably does not need evidencing the overlap of attitudes between the relevant States.

In *Tunisia-Libya* both parties accepted the relevance of the fundamental concept of the continental shelf as the natural prolongation of the coast, but differed on the principles and rules deriving from this concept.¹³⁸ In *Gulf of Maine*, both parties have agreed that there was a fundamental rule that governs the delimitation of maritime boundaries in all cases, and it requires the delimitation on the basis of applicable law and equitable principles, either by agreement or by the dispute settlement bodies. Apart from this fundamental rule, the parties were not in agreement on any specific rules that could mandatorily govern the delimitation of their maritime spaces.¹³⁹

The Court referred to the fundamental rule on which the parties have agreed and which is present in the legal conviction not only of the Parties, but also of all States, and requires delimitation on the basis of applicable law and equitable principles, either by agreement or by the dispute settlement bodies. The Court’s judgment suggests that this fundamental rule is part of customary law. Customary law did not provide any more detailed rules determining the specific ways and criteria of delimitation.¹⁴⁰ Especially, there was no trace that customary law accommodated the “combined equidistance-special circumstances rule”.¹⁴¹

¹³⁵ Ibid., 30-31.

¹³⁶ Ibid., 45-46.

¹³⁷ Dissenting Opinion, ICJ Reports 1969, 202.

¹³⁸ *Tunisia/Libya*, ICJ Reports 1982, 43.

¹³⁹ *Gulf of Maine*, ICJ Reports 1984, 295-296.

¹⁴⁰ Ibid., 299-300.

¹⁴¹ Ibid., 302.

It is noteworthy that apart from the acknowledgment by the parties to the proceedings, the Court does not search for any specific evidence required to establish customary rules, and this is not *prima facie* compatible with its refusal to base itself on “shared views” of parties in *Nicaragua*. But this field is presumably different as it relates to the inherency of the legal rule without which there could be no general international law on delimitation of maritime spaces.

All these passages from different case convey the impression that the “fundamental” character of the rule refers in this context to its subject-matter, not to its special status or origin. It is the rule defining the most fundamental aspects of delimitation. Fundamental rule is not discovered by consensual evidence or State practice *per se*; nevertheless, the Court still refers to the acceptance of this rule by States-parties to the proceedings, as was the case, for instance, in *Gulf of Maine*. In addition, the fundamental character of the relevant rule does not influence its content and scope. The rule exists to the extent of its indispensability felt in the international legal community, but it cannot cover on what States disagree.

Thus, in the law of the sea, fundamental rule has not been viewed as substitute in regulating on what there is no agreed regulation. In addition, the existence of allegedly inherent and non-consensual fundamental rules does not prejudice specific legal outcomes. The rejection of the inherency of the specific rule does not prejudice the general merit of the inherency argument either.

In *Libya/Malta*, the Court rejected the relevance of the principle of sovereign equality as the principle requiring the equidistance in delimiting the continental shelf area between the two States. It mattered whether the equidistance rule was deriving from the legal rule accepted by States, not whether the sovereign equality had any implication.¹⁴² In this case there was presumably no adequate structural connection between the two rules. However, the relevance of inherent corollaries to rules was affirmed in *Burkina Faso/Mali*, where the Court saw the *uti possidetis* principle as logically connected with the attainment of independence,¹⁴³ that is the principle of self-determination.

The field of inherent or consequential rules is not detached from the positivist framework of analysis, but it may in some aspect imply the natural law element, for instance in terms of the necessity of legal regulation. In other cases, inherent or consequential rules can be explained through the positivist approach, that is by the need to ensure the operation of the original rule to which the consequential rule relates.

V. Conclusion

The above analysis demonstrates that the field of customary law does not tolerate any strict separation of naturalism and positivism, and the proper understand-

¹⁴² *Libya/Malta*, ICJ Reports 1985, 43.

¹⁴³ ICJ Reports 1986, 565.

ing of this field cannot be reached only on the basis of the adherence to one of these doctrines to the exclusion of the other. It is not possible to view the mainline area of customary international law as independent of the consent of States and no alternative theory is in position to replace it. Both the practice in this field and the conceptual framework of international law require accepting this outcome. The argument of natural law or social necessity has no play in explaining the emergence of substantive rules of customary law. On the whole, the consensual element confers to international law the distinct legitimacy that is not present in national legal system, in the sense that the legal person is bound by rules it directly consents to, as opposed to the representative legislation. The consensual foundation of international law is not its weakness but its strength.

At the same time, the outcome that the natural law argument is necessary to explain some normative developments cannot be escaped either. While natural law does not contribute to the mainline process of creation of customary rules, the natural law argument is necessary to ensure that the rules are applied in accordance with their rationale and the inherent nature of the relevant legal institutions is respected.