KAROL WOLFKE

Custom in Present International Law

SECOND REVISED EDITION

Martinus Nijhoff Publishers

DORDRECHT / BOSTON / LONDON

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Preface to the Second Edition

This work was published for the first time in the Series of the Wrocław Scientific Society in 1964. The present edition has been brought up-to-date with only minor changes and omissions.

Considering the richness of the source materials and writing published in the last three decades and the lasting validity of the main conclusions in the first edition, such an approach seemed to be warranted.

In order to maintain the condensed character of the book, only the most representative new material has been utilized. A fuller list can be found in the attached Bibliography.

K.W.

Abbreviations

AFDI	Annuaire français du droit international
AIC	Archivum Iuridicum Cracoviensis
AIDI	Annuaire de l'Institut de Droit International
AIASH	Acta Iuridica Academiae Scientiarum Hungaricae
AJIL	American Journal of International Law
AphD	Archives de Philosophie du Droit
ASDI	Annuaire suisse de droit international
AUS	Acta Universitatis Stockholmiensis
AUW	Acta Universitatis Wratislaviensis
AV	Archiv für Völkerrecht
AYBIL	The Australian Yearbook of International Law
BV	Bibliotheca Visseriana
BYIL	The British Yearbook of International Law
Committee	Permanent Court of International Justice, Advisory Committee of Jurists, Process-verbaux of the Proceedings of the Committee, June 16th-July 24th 1920 with annexes, The Hague 1920
CRSSLW	Comptes rendu de la Société des Sciences et de Lettres de Wrocław
CWILJ	California Western International Law Journal
CYBIL	Canadian Yearbook of International Law
Dictionnaire	Dictionnaire de la terminologie du droit international, Paris 1960
GYIL	German Yearbook of International Law
HILJ	Harvard International Law Journal
HLR	Harvard Law Review
ICJ Reports	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
IL	International Lawyer
ILA	The International Law Association
ILM	International Legal Materials

ILR	Indiana Law Review
Int. Org.	International Organization
ISLR	Israel Law Review
NILR	Netherlands International Law Review
NTIR	Nederlands Tijdschrift voor International Recht
NYIL	Netherlands Yearbook of International Law
ODIL	Ocean Development and International Law
ÖZÖR	Österreichische Zeitschrift für Öffentliches Recht
ÖZÖRV	Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht
PCIJ	Permanent Court of International Justice
PiP	Państwo i Prawo
Proceedings	Proceedings of the American Society of International Law
PYIL	Polish Yearbook of International Law
PZ	Przegląd Zachodni
RBDI	Revue belge de droit international
RCADI	Recueil de Cours de l'Académie de droit international de la Haye
RDI	Rivista di Diritto Internazionale
RDIL	Revue de droit international (de Lapradelle)
RDILC	Revue de droit international et de législation comparée
REDI	Revue Egyptienne de droit international
RG	Recueil d'études sur les sources du droit en l'Honneur de Français Gény
RGDIP	Révue général de droit international public
RITD	Révue internationale de la théorie du droit
RPUNO	Repertory of Practice of the United Nations Organs
SDLR	San Diego Law Review
SJIR	Schweizerisches Jahrbuch für Internationales Recht (See ASDI)
SJMP	Sovetskij Ježogodnik Meždunarodnogo Prava
SR	Staat und Recht
Symbolae Verzijl	Symbolae Verzijl, Présentées au professeur J. H. W. Verzijl a l'occasion de son LXXieme anniversaire, La Haye 1958
TILJ	Texas International Law Journal
UCLALR	The University of California Los Angeles Law Review
UNCIO	United Nations, Documents of the United Nations Conference on International Organization, San Francisco, 1945, 16 vols.
VIIRUK	Veröffentlichungen des Instituts für Internationales Recht an der Universität Kiel
WLR	Washington Law Review
YBWA	The Yearbook of World Affairs
YILC	Yearbook of the International Law Commission
LJ	Yale Law Journal
ZNUW	Zeszyty Naukowe Uniwersytetu Wrocławskiego

Introduction

1. Object and Scope of the Study

The problems of custom in international law, as in law in general, include some of the oldest and most difficult. Their difficulty lies in the intangibility of custom, in the numerous factors which come into play, in the great number of various views, spread over the centuries, and in the resulting ambiguity of the terms involved. Consequent on this is the fact that international custom and customary law still raise the greatest number of doubts and controversies.[1] Manley O. Hudson stated that even the authors of Article 38 of the Statute of the International Court of Justice and Article 24 of the Statute of the United Nations International Law Commission "had no very clear idea as to what constituted international custom".[2]

In the municipal law of many countries, as modern legislation develops, customary law loses its significance entirely. It is otherwise in international law. Notwithstanding the present development of that law by way of treaties, there are still several branches of international life regulated by customary law and, which is even more important, new rules of customary law are arising.

It seems, therefore, that the opinion sometimes expressed that, as a result of the accelerated pace and growing complexity of international life and the

[1] One might remember here the statement by Basdevant: "Les idées des juristes sur les caractères de la coutume n'ont atteint ni a l'unité ni a clarté". Jules Basdevant, "Règles générales du droit de la paix", *RCADI*, v. 58 (1936–IV), p. 508. In 1955, Charles de Visscher wrote: "En fait, le phénomene coutumier en droit international est encore peut exploré; ses critères divisent les auteurs, ses applications, en bien des domaines, suscitent des controverses entre gouvernements". Ch. de Visscher, "Coutume et traité en droit international public", *RGDIP* 1955, No 3, p. 355.

These opinions have in no way lost their validity since the first edition. *E.g.*, D'Amato writes of a "tremendous amount of disagreement among scholars and publicists over the rules of customary international law", A. A. D'Amato, *The Concept of Custom in International law*, Ithaca and London 1971, p. 5; Sørensen stated that "the doctrine of customary law is in the melting pot", M. Sørensen, "Theory and Reality in International Law", *Proceedings*, 75 Mtg. (1981), p. 142; Van Hoof points to the fact that "the views represented in doctrine provide a kaleidoscopic picture ranging from one extreme to the other". G. J. H. van Hoof, *Rethinking the Sources of International Law*, Deventer 1983, p. 85.

[2] *YILC* 1950, v. I, p. 6.

progress of codification, customary law is rapidly losing its importance, is premature.[3] True, customary law, because of its disadvantages, is very inconvenient in application. On the other hand, being the most elastic and adaptable to new conditions, it is evolving with the evolution of all international life. The enormous growth of contacts between states, especially as a result of the triplication of the society of states and of the multiplication of international organizations, creates a new demand for customary rules, mainly in those fields where, for various reasons, the conclusion of treaties or accession to them is difficult.[4] Problems of customary international law are, therefore, still topical and deserve analysis.

The object of the present study is to attempt to ascertain what conception of customary international law might be recognized as generally accepted in contemporary international society. Mainly, however, an effort will be made to clarify the reigning confusion in the theory and practice of that law.[5]

The applied method may be roughly called inductive, that is, based upon generalizations of the collected, most representative material showing what the states and, above all, their common organs, called upon to ascertain and apply customary international law, recognize as necessary for the arising, change, evidence, etc., of that law.

Consequently, the universally accepted norms of international law, the most representative practice, to which the jurisprudence of the old and new international Court may be reckoned, and the opinions of contemporary doctrine, primarily those expressed in the records of the International Law Commission, have been chosen as the field of research.

Such a limitation of the basic material is fully justified. A reconstruction of the present concept of international custom by means of raw state practice

[3] See, *e.g.* Ch. de Visscher, "Cours général de principes de droit international public", *RCADI*, v. 86 (1956–II), p. 475. See also, R. Y. Jennings, "The Identification of International Law", in: Bin Cheng (ed.), *International Law: Teaching and Practice*, London 1982, p. 6; Van Hoof, *op. cit.*, pp. 113–116; N. C. H. Dunbar, "The Myth of Customary International Law", *AYBIL*, v. 8, 1983, pp. 1–19; p. R. Trimble, "A Revisionist View of Customary International Law", *UCLAIR*, v. 33, 1985/6, pp. 665–731; W. M. Reisman, "The Cult of Custom in the Late 20th Century", *CWILJ*, v. 17, 1987, pp. 133–145.

[4] Stanisław Hubert in his *Prawo Narodów*, (Wrocław 1949, v. I, p. 208) stated: "Among the virtues of customary law should be included its elasticity. Being the direct outcome of needs, without strict definition, it is very malleable and adapts itself easily to new circumstances." (translation by K. W.)

In the last decades, the vitality and importance of international customary law has also been stressed by numerous authors, for example, D'Amato, *op. cit.*, pp. XII, 3–10; H. W. A. Thirlway (*International Customary Law and Codification*, Leiden 1972, pp. 2 and 35), R. Bernhardt, "Customary International Law", in *Encyclopedia of International Law*, v. 7, 1984, p. 61. G. M. Danilenko (*Obytšaj v sovriemiennom mešdunarodnom pravie*, Moskva 1988, p. 4). H. Meijers ("How is International Made? – The Stages of Growth of International Law and the Use of Its Customary Law", *NYIL*, v. IX, 1978, pp. 3–4) notes even a growing importance of international customary law.

[5] On the reigning "Pathology of the International Normative System", see p. Weil, "Towards Relative Normativity in International Law", *AJIL*, v. 77, 1983, pp. 413–442.

would be, for obvious reasons, impracticable and at the same time in fact unrepresentative. One should not forget that only a small fraction of state conduct is related to customary international law, mainly in cases of legal disputes or of ascertaining international customs for their codification.[6]

On the other hand, we have eschewed here an historic survey of the practice and doctrine. Instead, some existing studies may be indicated. For instance, among the older ones, those by Kosters, Gianni, and especially Mateesco, who confronted opinions on customary international law from most distant ages. Among more recent studies, the lectures on the history of the sources by Guggenheim in the Hague Academy of International Law deserve special attention.[7]

Also omitted are detailed descriptions of the views, already many times discussed, of representatives of main currents in the doctrine of international law. Finally, the well known, almost classical, decisions referring to international custom, given by international tribunals and national courts in the last two centuries have been passed over. This is the more justified, since they have either been already taken into consideration by the new practice or have become obsolete.

2. Basic Terminology

Before attempting any discussion of the problems of international custom, it is essential to define at least the most important terms involved. For there is still in this respect a glaring arbitrariness and even inconsistency, not only in the doctrine, but also in the jurisprudence.

It seems, for instance, reasonable to give up the term "source of international law", since it is equivocal to such a degree as to lead to serious misunderstandings, especially in the theory of customary law.[8]

The term "international custom" is often used in the jurisprudence of the

[6] In particular, to take into account for the formulation of a theory of international custom "the kinds of arguments actually used by States to legitimize their claims" would be of little value, considering that states as a rule use all possible arguments to that end. *Per contra*, D'Amato, *op. cit.*, p. XII. It would be more conclusive, but no less impracticable to analyse the argumentation used by states for accepting or rejecting the claims of others. See Chapters below.

[7] J. Kosters, "Les fondements du droit des gens", *BV*, v. IV, 1925; G. Gianni, *La coutume en droit international*, Paris 1931, p. 115. Nicolas Mateesco, *La coutume dans les cycles juridiques internationaux*, Paris 1947; Paul Guggenheim, "Contribution à l'histoire du droit des gens", *RCADI*, v. 94 (1958–II), pp. 5–82. In the last two decades a relatively comprehensive survey of the practice and doctrine has been given by H. Günther *Zur Enstehung von Völkergewohnheitsrecht*, Berlin 1970, pp. 15–74.)

[8] The term "source of international law" has been already heavily criticized by numerous authors, but it is still in general use even in detailed theoretical considerations and in the practice. Van Hoof is certainly right that "there are probably few fields of international law where confusion and unclarity reign more supreme than that of sources". (*op. cit.*, p. 13.). See also the present author's, "International Law-making Factors. An Attempt at Systematization", *PYIL*, v. XV, 1986, pp. 243–250.

International Court of Justice and by one and the same author in the same publication with various meanings – for instance, that of international practice or customary rule. On the other hand, the notion of international custom is often described by the term "international practice" or "usage".[9] Kelsen has forthrightly declared that the term custom is equivocal, since it denotes, first a certain factual situation creating rules, next, a rule created by that factual situation, hence a customary rule.[10]

There is also a serious ambiguity as to the meaning of the term "custom" in the wording of subparagraph 1(b) of Article 38 of the Statute of the Court.[11] which, being inserted in the United Nations Charter, constitutes the most authoritative definition of the rule of international customary law. Many authors, including some members of the Advisory Committee of Jurists of 1920, considered this article as an enumeration of what are called the "sources" of international law.[12] On the other hand, from the very wording of the whole of Article 38 it unequivocally follows that subparagraphs 1(a-c) refer to kinds of rules of international law, for it is indisputable that the Court applies rules for giving decisions, and not sources. The confirmation of this may be found in the Report of the Advisory Committee of Jurists of 1920, where it is indicated that Article 38 "lays down an order in which rules of law are to be applied".[13]

As an example of inconsistency in applying terms by the Court, we might cite the replacements of the term "practice" by that of "usage" in

[9] As an illustration of the reckless use of terms, we may quote a statement referring to subparagraph 1(b) of Article 38 of the Statute of the Court in the already mentioned, well-known article by Kosters: "... une coutume internationale ne prouve une pratique de quelque nature qu'elle soit; la pratique est la coutume même et étant de droit, elle est droit coutumier". Kosters, *op. cit.*, pp. 240–241. See also Clive Parry, *The Sources and Evidences of International Law*, Manchester 1965, pp. 56–57.

Jennings rightly pointed to the fact that "the term custom in international law has come to be used as a catch-all for anything that is not either conventional law or general principles". ("General Course on Principles of International Law", *RCADI*, v. 121 (1967–II), p. 335).

[10] Hans Kelsen, "Théorie du droit international coutumier", *RITD*, v. I, 1939, no. 4, p. 262; see also Paul Fauchille, *Traité de droit international public*, v. I, part. I, 8th ed., Paris 1922, p. 42; Alf Ross, *A Textbook of International Law, General Part*, London 1947, p. 87.

[11] The term "Court" will be used to denote both the Permanent Court of International Justice and the International Court of Justice.

[12] G. Fitzmaurice argued, for instance, that "the drafting of head 1(b) in Article 38 is notoriously defective, but the source it mentions – international custom – is an undoubted formal source of international law". G. Fitzmaurice "Some Problems Regarding the Formal Sources of International Law", *Symbolae Verzijl*, La Haye 1958, p. 173. Following Professor Schwarzenberger, who abandoned the term "source of law", subparagraph 1(a) to 1(c) refer to "lawcreating processes", Georg Schwarzenberger, *International Law*, v. I, London 1957, p. 26.

[13] *Committee*, p. 729. The enumeration in Article 38 is decisively referred to by Professor Hubert as enumeration of kinds of rules. Hubert, *op. cit.*, v. II, p. 17. See also Ludwik Ehrlich, *Prawo międzynarodowe*, 4th ed., Warszawa 1958, p. 23; T. Gihl, The Legal Character and Sources of International Law, Stockholm 1957, p. 73. More recently, Günther, *op. cit.*, p. 59. See *infra*, Chapter I.

the *Columbian-Peruvian Asylum* Case of 1950.[14]

These few instances – and numerous others could be cited – clearly show the necessity of preliminary determination of a few basic terms to avoid further misunderstandings.

Practice

The term "practice" is one of the most fundamental and, at the same time, most general and vague terms used in connection with international custom. It is sometimes used also in the meaning of the term "usage" or even "custom".[15] Especially as regards the practice of courts, in this case of international courts, the term "practice" has the meaning of an unwritten rule of procedure.[16]

Very frequently, however, this term means simply a sequence of facts of conduct, although it is impossible to determine whose practice, hence whose action, what kind of action, and the reference to whom. All these – sometimes essential – features of conduct denoted as "practice" have to be deduced from the context in which the term has been used.

To the term "practice" adjectives are often added indicating at least one of the qualities of the conduct in question. Those adjectives are, however, as a rule too vague. For instance, the generally encountered term "state practice" indicates that reference is made to conduct ascribed to states. There are, however, still some doubts as to whether it embraces conduct of all state organs or only of some of them; whether only relations with other states are concerned, and so on. Still more difficulties are encountered in the attempt to determine the meaning of such terms as "general practice" or "long practice".

In order to avoid misunderstandings, it seems, then, advisable to apply the term "practice" only in its broadest sense – that is, as the conduct of all organs, even of private persons, which might have any bearing on international law.[17]

[14] "The Colombian Government must prove that the rule invoked by it is in accordance with the constant and uniform usage practiced by the states in question ... This follows from Article 38 ... which refers to international custom *as evidence of general practice accepted as law*". *ICJ Reports*, 1950, p. 276 (Italics added.)

[15] See *infra*.

[16] "La pratique de la C. I. J. est la manière habituelle selon laquelle la Cour procéde sur des points non réglés par le Statut ou le Reglement, par exemple pour la préparation de ses arrêts ou avis". *Dictionnaire*, p. 465.

[17] "Pratique. – Terme qui, dans les expressions: pratique des Etats, des organisations internationales, d'un organ international, désigne une manière habituelle d'agir, de procéder, de décider qui ne constitue pas une règle coutumiere mais peut contribuer á la création de celle-ci". *Ibid.*, p. 465. The above quoted definition, though general, is still too narrow, for it suggests a certain uniformity and hence does not include conduct not fulfilling the conditions of custom – that is, when inconsistent and sporadic actions are referred to. As an example of conceiving "practice" in a broad sense, the opinions given by Waldkirch and Ross may be cited: "(Die Staatenpraxis) ... wird nicht durch einen einheitlichen Inbegriff von Handlungen gebildet, sondern besteht aus allen möglichen Äusserungen des zwischenstaatlichen Lebens". E. Waldkirch, *Das Völkerrecht in seinen Grundzügen dargestellt*, Basel 1926, p. 37. "A State's international attitude may reveal itself in all acts of State that are connected in some way or

This term, however, will not embrace the activity of writers on international law, which under the name "teachings of publicists", "opinions of writers" or "the doctrine" has always, by tradition, been considered as something distinct.

Precedent

The term "precedent" is another important term, closely linked with international custom and practice. The range of meanings in which it is used is indeed considerable.[18]

Many writers under the influence of the Anglo-American judicial system, which has had a strong bearing on international courts and tribunals, understand *precedent* to mean primarily a judicial decision in which a rule has been ascertained or applied. Such a decision acquires the authority of a precedent for the judges and other organs settling similar cases in the future.

A narrow meaning of the term "precedent" has been given, for instance, by Professor Hubert who wrote:

> The ascertainment of a legal principle in a judicial decision by virtue of a custom existing in a practice – that is, applied by States – constitutes a precedent and is undoubtedly binding.[19]

A somewhat broader meaning was given by Professor Ross: "Precedent may be defined as earlier judicial decisions in which a body of rules is more or less plainly objectified".[20] Ludwik Ehrlich embraced in this term also acts by other organs of international subjects, but only as applied to concrete case of a more general principle previously applied to cases of the appropriate kind.[21] Paul Reuter, on the other hand, required only that precedents should be derived from organs whose function is the application of rules of law.[22] A very broad definition of precedent was given by Basdevant, who wrote:

> Precedents are often furnished by actions and not by abstract formulas enunciating the rule itself. The jurist should by an intellectual effort extract the principle which is involved in a concrete fact constituting a precedent.[23]

In the broad meaning, as examples of practice, the term has also sometimes been used by the Court. In the *S. S. Wimbledon* case of 1923 "the precedents" of the Suez and Panama canals were cited, which included both valid treaties

other with International Law". Ross, *op. cit.*, pp. 87–88.

[18] "*Précédent.* – Décision, acte, disposition, ou manière d'agir invoquée dans la suite ou susceptible de l'être pour déterminer la conduite a suivre dans une situation semblable". *Dictionnaire*, p. 466.

[19] Hubert, *op. cit.*, v. II, p. 6.

[20] Ross, *op. cit.*, p. 86.

[21] Ehrlich, *op. cit.*, p. 14.

[22] Paul Reuter, *Droit international public*, Paris 1958, p. 35.

[23] "Les précédents sont souvent fournis par les actions et non par des formules abstraites énonçant la règle elle-même. Le juriste doit, par un effort intellectuel, dégager le principe qu'implique le fait concret constituant le précédent". Basdevant, *op. cit.*, p. 511.

and the facts of passage of warships through those canals.[24] In the *Asylum* case, the Court applied this term to facts of granting asylum, which the Columbian Government cited as evidence of an alleged regional custom.[25] In the Advisory Opinion on *Effect of Award of Compensation Made by the United Nations Administration Tribunal* the action of the Council of the League of Nations was defined as precedent.[26]

As with the term "practice", ambiguity can be avoided, at least in part, by adding adjectives. Thus, to distinguish precedents furnished by courts and tribunals the term "judicial precedents" is most frequently used.

In the present study, the term "precedent" without additional description, will also be applied only in its broadest sense, denoting every act, single manner of acting of any organ (or even private person) which can have any significance for the creation or application of international law in the future.[27] In other words, precedent will simply mean element of practice. Obviously enough, every such fact becomes precedent not by itself but only *ex post* for those who search the past for guidance in settling a concrete dispute or problem.

International Usage

The very old term "usage", originating in Roman law, is also very often used alternatively for practice, custom, or customary rule.[28] Most frequently, however, by "usage" is meant a practice of a certain uniformity and constancy, such that it is possible to presume a duty to act accordingly, although this duty is not of a legal character, but a moral one, or of courtesy. Sometimes "usage" (*usus*) also simply denotes a habit of conduct in a certain way in similar circumstances.[29] Among typical usages may be included the maritime honours, certain privileges granted to diplomatic envoys *ex gratia*, or even the form of diplomatic correspondence.

Assuming that usage is a kind of uniform practice, we should not confuse it with corresponding non-legal rules, for example, of international morality or comity.[30]

[24] *PCIJ*, Series A I, p. 28.

[25] *ICJ Reports* 1950, p. 286.

[26] *Ibid.* 1954, p. 62.

[27] *E.g.*, *PCIJ* Series B 16, p. 15. On division of precedents, see Jean Haemmerlé, *La coutume en droit des gens d'après la jurisprudence de la C. P. J. I.*, Paris 1936, pp. 148–165.

[28] Cf. Mateesco, *op. cit.*, Paris 1947, p. 223. The terms "usage" and "custom" are used interchangeably especially in English literature and jurisprudence. L. Oppenheim. *International Law, A treaties*, 8th ed. by H. Lauterpacht, London 1955, v. I, p. 26.

[29] "(Usage) ... – Pratique généralement suivie par les Etats, qu'elle soit transformée ou non en règle coutumiere, l'usage étant parfois invoqué sans prétendre par là à l'existence d'une coutume ...", *Dictionnaire*, p. 663; see also Haemmerlé, *op. cit.*, p. 178; Oppenheim, *op. cit.*, v. I, p. 25; Gihl, *op. cit.*, p. 77. See *infra* Chapter II, p. 67.

[30] See *infra*, "International Custom and Customary Rule of International Law".

International Custom and Customary Rule of International Law

The term "international custom" is frequently used ambiguously, not only in the doctrine but even, as we have seen, in such an important instrument as the Statute of the International Court of Justice.[31] In particular, neither international jurisprudence nor the doctrine attach importance to the distinction between international custom and international customary rules. The distinction is essential, however, if not so much for judicial practice, as for research purposes.

In the present study, the term "international custom" will be used only in the meaning of a kind of qualified practice distinguished from others (for example, from usage) by the existence of a corresponding legal obligation to act according to this practice, hence by the existence of a corresponding customary rule of international law. This does not imply, however, that custom and customary rule are conceived here as two independent entities. On the contrary, both are *ex definitione* interdependent and complementary. They create, rather, two aspects of a single ontologically complex entity, custom representing the "is" aspect and the customary rule the "ought" aspect. It is precisely this close interdependence which is the reason why in most instances the terms "custom" and "customary rule" may be used interchangeably. Nearly everything which will be said in the following chapters on conditions, formation, division, ascertainment, etc., refers both to custom and customary rules. There are, however, exceptions. It would be incorrect, for instance, to speak of a binding "custom" or of its "application". Custom as a kind of practice, hence actual qualified conduct, can exist, develop, become extinct, and so on. But only the corresponding right and obligation, that is, a rule of law which may at any time be expressed in words, can bind and be applied. Thus, such frequent expressions as "binding custom", "obligatory practice", or "general practice accepted as law" in subparagraph 1 (b) of Article 38 of the Statute of the Court are, in fact, no more than misleading abbreviations, actually meaning, in sequence: a binding customary rule, an obligation to follow a practice, and general practice accepted, though not "as law" (since practice cannot be law), but at most as a manifestation or expression of law.

In connection with customary rules of international law, it should further be noted that such rules may be expressed either as rights or as obligations.[32]

[31] This has been noted by Kelsen and after him by Lukin. Kelsen wrote, *inter alia*: "It is not possible to apply 'international custom' since custom is a habitual or usual course of action and the course of action cannot be applied to a case. What is applicable to a dispute is a legal norm ...", Hans Kelsen, *The Law of the United Nations, with Supplement*, London 1951, p. 533. See also p. I. Lukin, *Istočniki meždunarodnogo prava*, Moskva 1960, p. 79.

The necessity of such a distinction was also recognized in 1975 by J. Charpentier, "Tendences de l'élaboration du droit international public coutumier", in: *L'élaboration du droit international public* (Colloque de Toulouse), Paris 1975, p. 106.

[32] Considerable importance was attached to this distinction by Professor MacGibbon when he discussed the role of acquiescence in international customary law. (I. C. MacGibbon, "Customary International Law and Acquiescence", *BYIL* 1957, p. 116).

Without going into detailed analysis of this fact, it is assumed here that both, a customary right and the corresponding duty, constitute only two different formulations of the same customary rule, based on the same custom.

Customary International Law

Without additional qualifications, this term will also be used only in its broadest meaning, embracing all customary rules of international law, both those universally binding and those binding several or even only two states.

Among broadly used terms causing much confusion in the practice and theory of customary international law "*opinion juris sive necessitatis*" should also, or perhaps even primarily, be mentioned. Its meaning and criticism requiring more extensive discussion will be found in the chapters below.[33]

[33] Particularly in Chapter I.

CHAPTER I

The Elements of International Custom

1. The Genesis of Subparagraph 1(b) of Article 38 of the Statute of the Court

The problem of what are called the "elements of international custom", that is, the conditions of its existence, and hence of the binding force of the corresponding customary rule, is among the most important and controversial in the theory of customary international law.[1]

In attempting to ascertain what are the requirements imposed on custom by contemporary international law, we must pause at Article 38 of the Statute of the Court, as the enumeration of the categories of rules of international law accepted, practically speaking, by all states and the majority of authors.[2]

A confirmation of the lasting authority of Article 38 may be found in the Judgment of the Court's Chamber in the Case *Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* of 1984 where it was stressed that "a Chamber of the Court in its reasoning in the matter, must obviously begin with referring to Article 38, of the Statute of the Court".[3]

[1] Among authors who have discussed this problem most pertinently one should mention: Gianni, Gouet, Kelsen, Kopelmanas, Séréfiades and Strupp. After the Second World War – in particular Guggenheim, MacGibbon, Sørensen and Tunkin. In the last three decades – Akehurst, Barberis, Bleckmann, Cheng, D'Amato, Danilenko, Charpentier, Duisberg, Francioni, Günther, Kirchner, Simma, Skubiszewski, Thirlway, Verdross, Villiger and Waldock. See Bibliography.

[2] *E.g.*, Waldock expressed the opinion that "Article 38, paragraph (b) gives us what is equivalent of a statutory definition of customary law for the purposes of international law". (*RCADI*, v. 106 (1962–II), p. 41.) Also more recently authors consider Article 38 as the starting point for any discussion of the sources of international law in general, and customary international law in particular. For example, Professor I. MacGibbon sees "no sign of abandoning the traditional criteria for the existence of international custom which are reflected in Article 38 (1)(b) of (the Court's) Statute". ("Means for the Identification of International Law. General Assembly Resolutions: Custom, Practice and Mistaken Identity" in: Bin Cheng (ed.), *International Law: Teaching and Practice*, London 1982, p. 21.). See also G. J. H. van Hoof, *Rethinking the Sources of International Law*, Deventer 1983, p. 85; M. E. Villiger, *Customary International Law and Treaties*, Dordrecht 1985, p. 3; G. M. Danilenko, *Obyčai v sovremiennom meždunarodnom pravie*, Moskva 1988, pp. 26–27; American Branch of the International Law Association, *Report of the Committee on the Formation of Customary Law*, 1988, p. 105.

[3] *ICJ Reports*, 1984, p. 290.

This article reads as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
   b. *international custom, as evidence of a general practice accepted as law*;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most higly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide *ex aequo et bono*, if the parties agree thereto.

In particular, the genesis and interpretation of subparagraph 1(b) of that article still constitutes a natural starting point for every discussion on customary international law.[4] Behind this definition of "international custom" stands a prolonged evolution of opinions on custom in general since Roman times.[5] The first enumeration of kinds of rules in a convention where customary rules, under the name of "usage", were mentioned may be found in 1899 in the Hague Convention on Law and Customs of War on Land. It is stipulated there that in cases not regulated by that convention the population and the belligerent parties remain under the protection of principles of the law of nations resulting from "usages existing among civilized nations, from law of humanity and the postulates of public conscience".[6]

Next, in the famous Article 7 of the Convention of 1907, relative to the creation of an international Prize Court, customary law was not even mentioned, but only admittedly embodied in the term "rules of international law".[7] Customary law was enumerated as a separate category of law for the first time in Article 38 referred to above of the Statute of the Permanent Court of International Justice as paragraph 2.

The Advisory Committee of Jurists, appointed by the Council of the League of Nations for the purpose of preparing plans for the establishment of the Permanent Court of International Justice, referred to the work of both Hague conferences and even explicitly based the draft of the present Article 38 on

[4] Italics added. One might even consider subparagraph 1(b) of Article 38 as the embryo of a "law of international customs". See Danilenko, *op. cit.*, p. 26–27.

[5] See *e.g.*, Paul Guggenheim, "Contribution à l'histoire des sources du droit des gens", *RCADI*, v. 94 (1958–II), pp. 1–84.

[6] *Conférence International de la Paix*, La Haye 18 Mai–29 Juillet 1899, Nouv. Ed., La Haye 1907, Annexes, p. 18.

[7] "Si la question de droit à resoudre est prévue par une Convention en vigueur ... la Cour se conforme aux stipulation de ladite Convention.

A défaut de telles stipulations, la Cour applique les règles du droit international. Si des règles généralement reconnues n'existent pas, la Cour statue d'après les principes généraux de la justice et de l'équité." *Deuxième conférence internationale de la Paix, Actes et documents*, La Haye 1908, v. I, p. 670.

the aforementioned Article 7 of the convention concerning the Prize Court.[8] Also considered were draft-schemes prepared by individual States and groups of States.[9]

Baron Descamps, Chairman of the Committee, initiated discussion on the question of what rules were to be applied by the future court. He presented a proposal which read:

> The following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the undermentioned order:
>
> 1. conventional international law, whether general or special, being rules expressly adopted by states;
> 2. *international custom, being practice between nations accepted by them as law*;
> 3. the rules of international law as recognized by the legal conscience of civilized nations;
> 4. international jurisprudence as a means for the application and development of law.[10]

A valuable comment to this draft may be found in Descamps' Speech on the Rules of Law to be Applied, delivered at the 14th Meeting of the Committee.

Both the draft and the comment show that Descamps, though far from being a voluntarist (since he based customary law, *inter alia* on the "constant expression of the legal conviction and the needs of nations",[11] nevertheless explicitly required two elements as conditions of custom: state practice and acceptance of this practice by those states, that is, an element of consent. That the element of the will of states was meant follows not only from paragraph 2 of the proposed article, but also from the fact that Descamps opposed conventions and custom to "objective justice".[12] It is also quite clear that

[8] *Committee*, pp. 323, 729.

[9] *Ibid.*, pp. 41, 43, 86–99. Among the draft-schemes submitted by states, only the German one explicitly mentioned customary law. Article 35 of that project reads as follows: "The decision of the tribunal is based according to international agreements, international customary law, and according to general principles of law and equity." *Ibid.*, p. 91. In the common draft-scheme of five neutral states, and in the Swiss draft, not only treaties but also "recognized rules of international law" and "principles of law of nations" were mentioned, which evidently also embraced customary law. No draft-scheme, however, defined what was to be understood by customary international law.

[10] *Ibid.*, p. 306. Italics added.

[11] "... Custom has always played an important part in, and been especially applicable to the law of nations ... It is a very natural and extremely reliable method of development since it results entirely from the constant expression of the legal convictions and of the needs of the nations in their mutual inter-course. Not to recognize international custom as a principle which must be followed by the judge in the absence of expressed conventional law, would be to misconstrue the true character and whole history of the law of nations". *Ibid.*, p. 322.

[12] "The only question ... is whether after having recorded as law conventions and custom, objective justice should be added ... It would be a great mistake to imagine that nations can be bound only by engagements which they have entered into by mutual consent." *Ibid.*, pp.

Descamps understood "custom" to mean customary law and that, although he defined it as "proof of general practice" (*attestation d'une pratique commune*), he in fact thought that practice creates customary law, and hence is evidence of custom and not vice versa.[13]

The comparison of the draft with Descamps' speech and the official translation of these texts in the records of the Committee constitute further evidence of how little importance has been attributed to consistent terminology in the drafting of the rubric referring to customary law. While in the draft the term "*pratique commune*" was used, in the English translation it was simply "practice"; in his speech Descamps spoke of "*règle établie par la pratique constante, générale*", which in turn was translated into: "a rule established by continual and general usage".[14]

In the discussion at the meetings of the Advisory Committee of Jurists in 1920, the Great Power jurists supported limitation of the rules to be applied by the future court.[15] Root (USA) even doubted whether states would agree to accept customary law.[16] Lord Phillimore (United Kingdom) was in favour of the first part of the scheme drafted by the five neutral states, that is, for settling disputes primarily on the basis of treaties, and, in their absence, upon "recognized rules of international law". Certainly he was opposed to overstepping the limits of accepted law.[17] Ricci-Busatti (Italy), on the other hand, insisted upon stressing in the paragraph on customary law that practice should be that of the parties and "accepted by them as law".[18] His motivation was that "custom, like any convention applicable to a state, must be in force

322–323; see also *ibid.*, p. 324.

[13] "It is equally evident that, when a clearly defined custom exists or a rule established by the continual and general usage of nations, which has consequently obtained the force of law, it is also the duty of a judge to apply it". *Ibid.*, p. 322.

[14] *Ibid.*, pp. 306, 322–323.

[15] In spite of the fact that the members of the Advisory Committee were formally independent experts in international law, the supremacy of the great Powers could be distinctly felt in the preparatory work, and in the final wording of the Statute of the Court. See the present author's, "The Privileged Position of the Great Powers in the International Court of Justice", *Die Friedenswarte*, v. 56, no. 2, 1961, pp. 156–167.

[16] "Mr. Root: [as in the proces-verbal of the Committee] The States would not accept a Court which had the right to settle disputes in accordance with rules established by the Court itself and by the interpretation of more or less vague principles...Nations will submit to positive law, but will not submit to such principles as have not been developed into positive rules supported by an accord between all States." *Committee*, pp. 286–287. The proces-verbal further reads: "Mr. Root at a first reading found nothing in clauses 1 and 2 of the President's project which required amendment, but even if, personally, he would accept the clause relative to international custom, he was not certain that 50 States would agree on the subject." *Ibid.*, p. 293.

[17] "Whenever the point of law to be decided by the Court is provided for directly by any Treaty in operation between the contracting parties, such Treaty shall form the basis of the judgment. In the absence of such Treaty provisions the Court shall apply the recognized rules of international law." *Ibid.*, pp. 89 and 295. *Cf.* Kelsen, *The Law of the United Nations*, London 1951, p. 532.

[18] "2... international custom as evidence of common practice among said States, accepted by them as law." *Committee*, p. 351.

between the parties of the dispute".[19]

The final draft of the provision corresponding to the present subparagraph 1(b) of Article 38 did not differ essentially from the original proposal by Descamps. Striking only is the dropping of the requirement that practice should be accepted by nations taking part in it (*acceptée par elles comme loi*), as had been originally proposed. The existing inconsistency between the English translation and the French original was also removed, in spite of the fact, that, as we have already noted, that translation was more logical.[20]

The League of Nations Council proposed to amend the English wording of the paragraph to read: "international custom, recognition of a common practice accepted as law". Finally, however, the text accepted by the Committee was left untouched.[21]

No change has been introduced into the wording of the paragraph in the Statute of the new Court either. Basdevant, as rapporteur of the United Nations Committee of Jurists in 1945, pointed out that

> while Article 38 was not well drafted, it would be difficult to make a better draft in the time at the disposal of the Committee.[22]

There are no details in the records concerning the amendments introduced into the original text of the paragraph on customary law. In particular the comment in the final Report of the Committee throws no light on this point. On the contrary, by introducing into the Report of the Commission still other terms, it raises new doubts.[23]

2. Criticism of Subparagraph 1(b) of Article 38 of the Statute of the Court

In general, writers on international law have accepted the wording of subparagraph 1(b) of Article 38 only with serious reservations. Anzilotti, for instance, wrote unequivocally:

> Curious, if nothing more, is the wording of Paragraph 2 of Article 38 of the Statute of the Permanent Court ... which speaks of customary law as of evidence of general practice accepted as law; whereas it is precisely the

[19] *Ibid.*, p. 584; see *ibid.*, pp. 351 and 597.

[20] French text: "... la coutume internationale, comme attestation d'une pratique commune des nations, acceptée par elles comme loi". The Original English translation read: "international custom, being practice between nations accepted by them as law". On amendment: "International custom, as evidence of a general practice, which is accepted as law." *Ibid.*, pp. 306 and 636. See also Appendix.

[21] League of Nations, Permanent Court of International Justice, *Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption of the Assembly of the Statute of the Permanent Court*, pp. 44, 68, 145.

[22] *UNCIO*, v. XIV, p. 176. See also *ibid.*, pp. 170, 171, 373, 436, 843. See H. Günther, *Zur Entstehung von Gewohnheitsrecht*, Berlin 1970, p. 60.

[23] "... the Court is to apply... in the absence of general or special conventions, international custom in so far as its continuity proves a common usage". *Committee*, p. 729.

generally accepted practice which constitutes customary law![24]

Similarly, Makowski criticized the definition in the Statute. In his opinion "it is wrongly drafted, because it is not custom which constitutes evidence of certain practice, but universal practice which constitutes evidence of custom".[25] The same objection was raised by Hudson in 1950 in the International Law Commission.[26] Professor Schwarzenberger also warned against the faulty wording of sub-paragraph 1(b)[27]

The apparent absence of criticism on the part of certain authors cannot always be taken to mean that they accept the subparagraph in its literal wording. For example, Professor Tunkin, although he based himself distinctly upon this subparagraph, at the same time stated that accepted general practice created a customary norm[28] – hence practice is evidence of customary law. Similarly, Ludwik Ehrlich, though accepting the wording in the Statute without objections, at the same time cites as illustration cases in which practice had clearly served as evidence of customary rule.[29]

[24] "Singolare, a dir poco, e la formulazione dell'art. 38 dello Statuto della Corte permanente di giustizia internazionale..., che parla della consuetudine come 'prova di una pratica generale accetata come diritto che constituisce la consuetudine'!" Dionisio Anzilotti, *Corso di diritto internazionale*, Volume primo, *Introduzione – Teorie generali*, 3rd ed., Roma 1928, p. 99. (translation K. W.) In Borchard's opinion "the wording of the paragraph is most ambigous. It would have been better to stop with the words 'international custom', without endeavouring to explain its nature or source." Edwin M. Borchard, "The Theory and Sources of International Law", *RG*, v. III, p. 347; see also G. Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law", *Symbolae Verzijl*, La Haye 1958, p. 173.

[25] Julian Makowski, *Podręcznik prawa międzynarodowego*, Warszawa 1948, p. 12 (translation K. W.); see also M. Sørensen, *Les sources du droit international*, Copenhague 1946, p. 84; Charles Rousseau, *Principes généraux du droit international public*, Paris 1944, p. 825.

[26] "Subheading (b) of Article 38... was not very happily worded. It would be better to say 'international practice, as evidence of a general practice, *etc.*'" *YILC* 1950, v. I, p. 4.

[27] "It is essential not to be misled by the faulty draftsmanship which is responsible for the somewhat unhappy formulation of this clause. In the first place, international custom, as used in this subparagraph, means international customary law. Secondly, the Court does not apply international custom in this sense because it is evidence of a general practice accepted as law. The position is reverse. A general practice accepted as law is the test, by which it must be ascertained whether, in any particular case, an alleged rule qualifies as an actual rule of international customary law..." Georg Schwarzenberger, *International Law*, v. I: *International Law as Applied by International Courts and Tribunals*, 3rd. ed., London 1957, p. 39; see also Torsten Gihl, *The Legal Character and Sources of International Law*, Stockholm 1957, p. 76; L. Gould, *An Introduction to International Law*, New York 1957, p. 137; I.C. MacGibbon, "Customary International Law and Acquiescence", *BYIL* 1957, p. 125.

Since the first edition see *e.g.* Clive Parry, *The Sources and Evidences of International Law*, Manchester 1965, p. 56; H. Günther, *op. cit.*, pp. 61–65; M. Bos, "The Recognized Manifestations of International Law. A New Theory of 'Sources'", *GYBIL*, v. 20, 1977, p. 25; G. J. H. van Hoof, *Rethinking the Sources of International Law*, Deventer 1983, p. 95. Lately, see P. Haggenmacher, "La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale", *RGDIP*, 1986/1, pp. 18–32.

[28] G. I. Tunkin, "Co-existence and International Law", *RCADI*, v. 95 (1958–III), pp. 12–13; *ibid.*, *Theory of International Law*, London 1974, pp. 117–118.

[29] L. Ehrlich, *Prawo międzynarodowe*, 4th ed., Warszawa 1958, pp. 23–24.

Some writers saw in paragraph 1(b) the influence of the theory of objective law.[30]

There are, however, no grounds for assuming in the final version of paragraph 1(b) any intention to change the original concept of the drafters. The requirement "accepted as law" was understood by the majority of the members of the Committee literally – that is, as an expression of the consent of states, hence their will, and not of any feeling, conscience or conviction.[31] It should be borne in mind that the final wording of the draft-statute was based on schemes by Phillimore and Root – that is, members of the Committee who were most decisively in favour of limitation of the law to be applied by the Court exclusively to rules accepted by the interested states.[32] Besides, as can be easily noted, all the paragraphs of Article 38 in fact manifest the consensual conception of international law.

It is less certain whether the drafters intended to exclude particular custom, considering, *inter alia*, that as Meijers noted, "the article does not say a 'general practice generally accepted as law'" and thus the term "general" may be differently interpreted.[33]

One might also agree that the trouble with the interpretation of paragraph 1(b) is caused by the term "*preuve*" ("evidence"), which in earlier drafts was replaced by "... la coutume internationale, *attestation d'une pratique* ..." ("international custom, *being* the recognition of a general practice").[34]

Unfortunately, the replacement of the original, more logical translation proves that precisely "*attestation*" in the meaning of "evidence" was meant.[35]

Charles de Visscher tried to defend the wording of subparagraph 1(b), so strongly criticized by others. In his opinion, it is indeed defective, because, from the sociological and historical point of view, the opposite corresponds to reality. Formally, however, the customary rule once ascertained implies the existence of practice, which serves as a basis of that rule, and, consequently,

[30] H. Kelsen, "Théorie du droit international coutumier", *RITD*, v. I (1939), no. 4, pp. 259–260; referring to subparagraph 1(b), Lauterpacht stated univocally: "La coutume ne crée pas le droit. La coutume est la pratique actuelle qui se conforme ou obeit à ce qui est déjà le droit." H. Lauterpacht, "Règles générales du droit de la paix", *RCADI*, v. 62 (1937–IV), p. 158. See also Max Sørensen, "Principes du droit international", *RCADI*, v. 101 (1960–III), p. 35. It seems, however, that the naturalistic influence refers rather to Subparagraph 1(c) of Art. 38.

[31] See *supra*, pp. 4–5.

[32] *Committee*, p. 281. Phillimore and Root accepted the wording proposed by Descamps for the project of the article referring to rules to be applied by the future court. Here the opinion by Fernandes (Brazil), a member of the Committee, merits quotation: "... a great Power could never agree to a system which had not been approved by it, or what will be more serious, of a rule whose legality it had systematically contested at all time". *Ibid.*, p. 345.

[33] H. Meijers, "How is International Law Made? – The Stages of Growth of International Law and the Use of Customary Rules", *NYIL*, v. IX, 1978, p. 21. See, G. J. H. van Hoof, *op. cit.*, p. 95–96. *Cf.* also Chapter III, pp. 88–90.

[34] See Günther, *op. cit.*, p. 63; A Verdross, *Die Quellen des universellen Völkerrechts. Eine Einführung*, Freiburg 1973, p. 99; Haggenmacher, *op. cit.*, pp. 25–26; Danilenko, *op. cit.*, pp. 10–11.

[35] See Appendix.

confirms the practice.[36]

One might even fall in with this argument. Certainly, an already fixed customary rule not only confirms the actual practice, but also legalizes the future one. Such argumentation, however, still does not justify the wording of subparagraph 1(b), which is wrong because of the very fact that it raises so many doubts. Moreover, whatever we think of the role of practice – as a cause of law, hence also evidence, or only as a consequence of an already existing law – the function of this provision is certainly not to show what constitutes evidence of practice, but at most what constitutes evidence of customary rule.

Lately Haggenmacher, analysing the wording of various drafts of paragraph 1(b), has concluded that the final formula expresses neither that custom is evidence of practice, nor that practice is evidence of custom, but that the expression means that custom is simply "a general practice accepted as law".[37]

All the foregoing, however, are only more or less justified assumptions, the more so because, as has already been mentioned, the drafters of the Statute themselves had no clear idea as to what custom was.

Generally speaking, the present subparagraph 1(b) of Article 38 of the Statute of the new Court is still confusing and even unintelligible. Existing doubts as to what is international custom and how subparagraph 1(b) should be understood can be removed primarily by investigating how customary international law has been applied by the Court itself and by such an important organ dealing with the development and codification of that law as the United Nations International Law Commission.

3. The Elements of International Custom in the Decisions and Opinions of the Court

Neither custom nor customary law have been mentioned often *expressis verbis* in the decisions of the Court.[38] In its more than sixty years of activity the Court has only four times explicitly quoted or at least referred to subparagraph 1(b) of Article 38 of its Statute.[39] Very often, however, it has applied various "principles", "rules", "practices", "precedents", "traditions", etc., which in the majority of cases, if not in all, constituted precisely customary rules of international law.[40]

[36] "... sociologiquement et historiquement, c'est l'inverse qui est vrais, car ... c'est la pratique qui apporte la démonstration de la coutume. Mais, formellement, la coutume une fois constitutée, présuppose et, par conséquent, atteste la pratique qui lui sert de base". Ch. de Visscher, "Cour général de principles de droit international", *RCADI*, v. 86 (1954–II), p. 475.

[37] Haggenmacher, *op. cit.*, pp. 25–26.

[38] As regards the Permanent Court of International Justice Sørensen wrote in 1946 that "La Cour n'a jamais dans sa pratique attaché une importance décisive aux termes de la stipulation Subparagraph 1(b) (*Les sources*, *op. cit.*, p. 84).

[39] See below. The Judgments and Opinions of the Permanent and of the new Courts are treated here together as one entity.

[40] See *infra*.

One even gains the impression that the Court purposely avoided the terms "custom" or "customary law" in its decisions and opinions. The reasons for this may be, *inter alia*, the notoriously controversial character of international customary law in general and the resulting division of opinions on it in the Court itself.

In the practice of the Court, it is desirable to distinguish between those cases in which it itself investigated whether the conditions of customary law had been fulfilled and those, much more frequent where it applied or cited already ascertained rules of this kind. True, to draw a distinction between these two kinds of cases is sometimes difficult, because the Court, applying already fixed rules, always takes into consideration additional circumstances in favour of or opposed to the validity of such rules.

A. The Elements of International Custom in the Process of Ascertainment of Customary rules

Among the cases in which the Court itself ascertained the existence of an international customary rule, the most autoritative for the interpretation of elements enumerated in Article 38 should be, it would seem, those in which the Court expressly called upon the content of subparagraph 1(b) of that Article.

This happened for the first time in the *Columbian-Peruvian Asylum* case. In the part of the Judgment concerning evidence of an alleged "regional" or "local" custom peculiar to American States, the Court spoke of "constant and uniform" practice and, instead of practice "accepted as law", it required that practice should be an "expression of right" and corresponding "duty". The Court, however, expressly added that this requirement "follows from Article 38 of the Statute of the Court, which refers to international custom as evidence of general practice accepted as law".[41]

In fact, the Court applied neither the elements mentioned in this Judgment nor foreseen in subparagraph 1(b) consistently. For example, in the same Judgement, the Court, rejecting the arguments of one of the parties as to the existence of a regional custom, returned to a still modified wording of subparagraph 1(b):

> ... it is not possible to discern in all this any constant and uniform usage, accepted as law.[42]

The Court repeated *in extenso* the above-mentioned interpretation with

[41] "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 pertaining 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.' *ICJ Reports* 1950, pp. 276–277.

[42] *Ibid.*, p. 277.

express reference to subparagraph 1(b) in the case concerning the *Rights of the United States in Marocco*,[43] where the existence of a particular customary rule was also at stake. This is significant, considering the outstanding importance attached by the Court to its own decisions.[44] It lends force to the conclusion that the Court aimed at express recognition of particular customary law and, at the same time, that the requirements of subparagraph 1(b) are valid not only for general custom but also for particular and even local custom.[45] The fullest reference to subparagraph 1(b) of Article 38 of the Statute of the Court can be found in one of the recent cases concerning *Military and Paramilitary Activities in and Against Nicaragua* (Merits) of 1986.[46]

Cases in which the Court ascertained customary rules without any express reference to its Statute and even without using the term "custom" are relatively numerous. Among such the Franco-Turkish *S.S. Lotus* case is of special interest.

In this case, the Court unequivocally declared itself in favour of the voluntarist conception of international law, giving its own famous definition of that law, hence also of customary law:

> International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own will as expressed in conventions *or by usages generally accepted as expressing principles of law* and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims.[47]

This time, then, instead of "general practice accepted as law" the Court spoke of "usages generally accepted as expressing principles of law". It is impossible to state whether this is a conscious departure from the wording of subparagraph 1(b) (at that time – paragraph 2) of Article 38. Perhaps it is just further evidence of how little importance the Court attached to terminology in general. Numerous examples in the whole practice of the Court would indicate rather the latter explanation. Clearly, what is here of particular importance is that both elements envisaged in the Statute are, though only roughly, preserved – that is, the existence of a practice and of its acceptance as an expression of law.[48]

[43] *Ibid.*, 1952, p. 200. See *supra* n. 41. The Court added: "In the present case there has not been sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Marocco." *Ibid.*

[44] See *infra*, Chapters II and V.

[45] See Chapter III.

[46] See *infra*.

[47] *PCIJ Series* A 10, p. 18.

[48] In particular, as far as the subjective element of custom is concerned in this Judgment, such expressions as "universally accepted", "generally accepted", "tacit consent", "recognized themselves as being obliged to do so", or "would have omitted to protest" have been used. *Ibid.*, pp. 26–29.

In another point of the same Judgment, the Court mentioned the elements of custom in still other terms. Instead of "practice accepted as law" it speaks of "being conscious of having a duty" to act in certain way.[49] From the context it clearly follows, however, that the condition has been considered as the equivalent of recognition of the practice as law (hence its acceptance). The Court declared, *inter alia*:

> Even if the rarity of the judicial decisions ... were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstentions were based on their being conscious of having duty to abstain would it be possible to speak of an international custom.[50]

The element of the will of states (and not of any consciousness of duty) in the form of acceptance of or consent to practice was also emphasized in the separate and dissenting opinions attached to the above Judgments.[51]

For example, Judge Loder stated in his dissenting opinion that the principle which maintains that the criminal law of a state is not binding outside the territory of that state can be abrogated only by convention or a "certain exception generally and even tacitly accepted by international law".[52] Judge Weiss, in a dissenting opinion, advanced as the requirement for acceptance of a customary rule "*consensus omnium*".[53]

[49] *Ibid.*, p. 28.

[50] *Ibid.* In reference to this Judgment Guggenheim *e.g.* wrote: "... étant donné que l'élement psychologique n'est pas facilement à prouver, on constate une tendance dans la jurisprudence internationale, en particulier celle de la Cour internationale de Justice, à n'admettre que difficilement l'existence de *l'opinio juris sive necessitatis* indépendamment d'une accord tacite entre les parties". P. Guggenheim, *Traité de droit international public*, 2nd ed., v. I, Genève 1967, p. 105. See also Chapter V.

[51] Here a general remark should be made. It seems that too often excessive importance is attached to dissenting, separate and individual opinions by quoting them *al-pari* with the judgments or in abstraction from the decision to which they refer; whereas in fact the role of such opinions is secondary. In particular, when an opinion, especially of a judge, national of the unsuccessful party, confirms a certain view of the Court it constitutes a serious fortification to that view. On the other hand, if such an opinion contains a view different from that of the majority, it proves only that the Court's conclusion has been reached in spite of the dissenting opinion of certain judges. In the latter case, then, we cannot speak of a fortification of the position taken by the Court, but rather of the removal of doubts as to the arguments which have been rejected by the majority.

To attach too great importance to opinions of this kind in abstraction from the concrete case – that is, treating them as opinions of publicists, often seems unjustified, also because they are given in view of concrete circumstances, by which the judge might be, even involuntarily, biased. This remark applies, of course, even to a much greater degree to the opinions of the parties, their representatives and advisers, and therefore, having regard to the main object of this study, such opinions will be quoted only exceptionally.

[52] *PCIJ Series* A 10, p. 35.

[53] *Ibid.*, pp. 43–44.