

## CERTAIN REMARKS ON THE ELEMENT OF WILL IN CUSTOMARY INTERNATIONAL LAW: A SHORT COMMENT

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### INTRODUCTION

Among the many outstanding contributions that Professor Karol Wolfke made to international law, his work on customary international law has resonated throughout the international doctrine and left an indelible imprint on the understanding of the process of international law-making.<sup>1</sup> His approach fostered deeper reflection on both the formation of customary international law and the interaction between its two elements: actual practice and *opinio juris*. Even today, after almost 20 years and the work of the International Law Commission, the book has not lost its theoretical usefulness and attractiveness. It should have found its way to the shelves of many lawyers dealing with the sources of law in public international law as it did in my case from the very beginning of my interest in customary international law.

Therefore, I have been particularly honoured and privileged to be asked to contribute to this *Liber Amicorum* for Professor Karol Wolfke who made such a significant contribution to international law. My chosen topic for this collection deals with the major preoccupation of the Professor's academic career and examines the element of will in customary international law. This brief comment is not intended to address all of the important issues that arise with respect to the formation and binding force of customary international law. It will only invite attention to a question concerning the element of the will of States. Thus, the aim of this comment is to stimulate the reader to consider the nature and essence of the will of States in customary international law.

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<sup>1</sup> K Wolfke, *Custom in Present International Law* (2<sup>nd</sup> ed 1993).

## I. ELEMENT OF WILL

As Professor Wolfke aptly stated, “[t]he 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.”<sup>2</sup> Article 38 (1) (b) of the ICJ Statute provides that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international custom, as evidence of a general practice accepted as law. Therefore, we all have been taught and we teach that international custom consists of two elements: (a) actual practice, and (b) *opinio juris sive necessitatis* of States.<sup>3</sup> Article 38 was drafted in 1920 by the Advisory Committee of Jurists, appointed by the Council of the League of Nations. One may claim that it does not meet the needs of contemporary international society, but the two-elements theory still receives strong support from States.<sup>4</sup> Having that in mind, it may be considered whether the two-elements theory demands from States the expression of their will to be bound by a customary rule or not. A few citations may be given in order to clarify the issue. Chronologically, the first example is the famous *Lotus* case in which the Permanent Court of International Justice decided that:

“[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law ...”<sup>5</sup>

Thus, it appears that custom is an emanation of the will of States as it reflects a consensual understanding of international law. However, as M. Koskenniemi deftly pointed out,<sup>6</sup> the International Court of Justice sometimes distinguishes between – what may be called – consensual custom and another set of customary rules which – as it at least tentatively seems – are binding on States automatically and independent of any specific, direct

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<sup>2</sup> *ibid* 1.

<sup>3</sup> See eg *Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 13, 29, para 27.

<sup>4</sup> See: statements of States on the *Report of the International Law Commission on the work of its sixty-sixth session* (Sixth Committee of the General Assembly of the United Nations): 28 October 2014: *Statement by China*, at 5; 3 November 2014 r.: *Statement by India*, at 2; *Statement by Spain*, at 2, 7; *Statement by South Africa*, at 2; *Statement by Romania*, at 2; *Statement by Germany*, at 2; *Statement by Japan*, at 1; *Statement by Poland*, at 2; *Statement by the Netherlands*, at 3-4; *Statement by the Czech Republic*, at 2; *Statement by Ireland*, at 2; *Statement by Greece*, at 2; *Statement by the United Kingdom*, at 2; *Statement by Norway on behalf of the Nordic Countries*, at 2; *Statement by Portugal*, at 2; *Statement by Austria*, at 2; *Statement by Israel*, at 2; 5 November 2014 r.: *Statement by the Republic of Korea*, at 1; *Statement by Indonesia*, at 4; *Statement by Jamaica*, at 4; *Statement by the United States*, at 1; *Statement Iran*, at 1; <https://papersmart.unmeetings.org/ga/sixth/69th-session/agenda/78/>, last visit: February 2016.

<sup>5</sup> *The case of the "S.S. Lotus" (France v Turkey)* [1927] PCIJ Rep Series A No. 10, at 18. See: Richard R Baxter, *Treaties and Custom*, (1970) 129 RCADI 31, 43-44.

<sup>6</sup> M Koskenniemi, *From Apology to Utopia : the Structure of International Legal Argument* (2005) 389-473.

or indirect, assent (using the term in its widest sense). For example, in the *Gulf of Maine* case, the Court observed that:

“customary international law ... in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.<sup>7</sup>

In the view of the Court there are two sets of rules: (1) the first comprising rules fulfilling the two-elements theory (hereinafter: “regular custom”), and (2) the second comprising rules of moral, naturalistic, logical origins or those which must function in the international community simply by way of necessity for its peaceful co-existence and co-operation (hereinafter: “irregular or vital custom”). They should be deduced from certain preconceived ideas such as State sovereignty, peace, natural justice, equity, equality or morality. It seems from the dictum of the Court that they are binding even if States have not expressed their consent. Therefore, our comment will try to elaborate on a question of whether indeed a customary rule may be formed and exist without the need of backing from past practice and State consent. Such a rule, being non-consensual or at least less consensual than regular custom, would presumably need no *opinio juris*. Instead, it seems that the fulfilment of the criterion of “ensuring the co-existence and vital co-operation of the members of the international community” will be enough for ascertaining the existence of a rule of customary international law. To consider that, I will start with presenting some objective theories of custom and certain problems regarding the two-elements theory to discuss the *opinio juris* element and its relation with the will of States.

The examination of the basis of customary international law leads to an observation that there are four basic theories of custom. The first voluntarist conception regards custom as *tacitus consensus*, i.e. a silent agreement of nations to abide by it in their mutual relations.<sup>8</sup> The two-elements theory is a second conception widely recognized by the doctrine and accepted among States which also embodies State consent in the subjective element. The third theory perceives custom as a certain process of reciprocal interactions and communications of claims, acceptances, protests, objections and silence which ends up in finding certain social

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<sup>7</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* [1984] ICJ Rep 246, at 299, para 111. See also: *North Sea Continental Shelf (Federal Republic of Germany v Netherlands) (Federal Republic of Germany v Denmark)* [1969] ICJ Rep 3, 28, para 37.

<sup>8</sup> For example, Emer de Vattel wrote that: “custom is founded on a tacit consent, or, if you please, on a tacit convention of the nations that observe it towards each other.” E de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Thomas Nugent tr, Liberty Fund, Inc, 2008), *Preliminaries*, para. 25. See: Wolfke (n 1) 46.

regularity regarded as custom.<sup>9</sup> Some scholars tried to combine those theories and prove that they coalesce to a greater or lesser extent. For example, Professor Karol Wolfke, while recognizing this process of international custom-formation, was of the view that from the international law perspective it essentially boils down to the fulfilment of two necessary elements of regular custom.<sup>10</sup> Last, there is an objective conception of customary international law. It finds supporters both in the continental and Anglo-American doctrine. For example, Hersch Lauterpacht in his Hague lecture observed that: “custom is the current practice that complies with or obeys what is already the law”<sup>11</sup> In France, the most prominent advocate of objective theory, George Scelle viewed the law as the product of the social necessity (*nécessité sociale, solidarité sociale*). Each act creating the law is autonomous, isolated and therefore there is no sign of express or implied consensus. In this place, “it is necessary to speak of a consciousness of the social needs of the international community in its relations with the particular interests of the national communities. This is a kind of compromise between two superimposed solidarities.”<sup>12</sup>

In the two-elements theory the second component necessary for the formation of the customary international law demands the “acceptance” of the general practice as law. This subjective element is often connected with the will of States. Michael Wood, the Special Rapporteur of the International Law Commission with respect to the topic “Formation and evidence of customary international law,” noted in his second report that scholars have wrestled with long-standing theoretical problems associated with *opinio juris*. In the regard, he remarked that:

“[i]n particular, some have debated whether the subjective element does indeed stand for the belief (or opinion) of States, or rather, for their consent (or will). Others have deliberated the *opinio juris* “paradox”, that “vicious cycle argument” which questions how a new rule of customary international law can ever emerge if the relevant practice must be accompanied by a conviction that such practice is already law.”<sup>13</sup>

Accepting the consensual (voluntarist) vision of international law one should also accept the consensual understanding of customary

<sup>9</sup> See for example: *Dissenting Opinion of Judge Lachs, North Sea Continental Shelf (Federal Republic of Germany v Netherlands), (Federal Republic of Germany v Denmark)* [1969] ICJ Rep 3, 231; Jörg P Müller, *Vertrauensschutz in Völkerrecht* (1971) 78, 85-103, 258.

<sup>10</sup> Wolfke (n 1) 58.

<sup>11</sup> H Lauterpacht, *Règles générales du droit de la paix* (1937) 62 RCADI 158. “La coutume est la pratique actuelle qui se conforme ou obéit à ce qui est déjà le droit.”

<sup>12</sup> G Scelle, *Règles générales du droit de la paix* (1933) 46 RCADI 1933, at 428 et seq; *idem*, *Manuel élémentaire de droit international public* (Les éditions Domat-Montchrestien, 1943), *passim*, in particular: 6-10, 574-578. “Il faut parler de conscience des nécessités sociales de la collectivité internationale dans ses rapports avec les intérêts particuliers des collectivités nationales. Il s’agit d’une sorte de compromis entre deux solidarités superposées.”

<sup>13</sup> *Second Report on Identification of Customary International Law by Michael Wood, Special Rapporteur*, 22 May 2014, UN Doc A/CN.4/672, at 51-52, para 66.

international law. Therefore, the subjective element should require the consent of States to be bound by a customary rule. However, the international case law shows that courts and tribunals do not speak of the subjective element as a an element of will of States but rather they use other terms reflecting to a certain extent their assent to be bound by a customary rule. In *Lotus*, the Permanent Court spoke of consciousness of having a duty to abstain (“la conscience d'un devoir de s'abstenir”).<sup>14</sup> As Professor Karol Wolfke aptly pointed out, earlier in the same decision the Court unequivocally declared itself in favour of the voluntarist conception of international law when it perceived international law as an emanation of will of States and spoke of usages generally accepted as expressing principles of law.<sup>15</sup> Therefore, one may put forward the following questions: what is the difference between the customary “rules of law binding upon States [that] emanate from their own free will” and “consciousness of having a duty”? Should these two phrases be regarded as synonyms? The Court did not answer these questions. Nevertheless, in the similar vein, the new Court in 1951 spoke of “assent to one or the other of these practices (l’existence d’un assentiment à l’une ou à l’autre pratique).”<sup>16</sup> In 1956 the Court used the phrase: “generally accepted practice (une pratique généralement acceptée),”<sup>17</sup> while in 1960 it referred to: “practice ... accepted as law.”<sup>18</sup> It has never explained how to relate these concepts to the dictum of the Permanent Court in the *Lotus* case.

In the *North Sea* cases the Court used various terms for describing the subjective element. It may cause confusion and misinterpretation as to the element of the will of States in the formation of regular custom. In the first place, it spoke of acceptance as it observed that it is perfectly possible that Article 6 of the Geneva Continental Shelf Convention of 1958 as a norm-creating provision: “has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now *accepted* [italics added] as such by the *opinio juris*, so as to become binding even for countries which have never, and do not, become parties to the Convention.”<sup>19</sup> Then the Court declared that: “state practice ... should have occurred in such a way as to show a *general recognition* [italics added] that a rule of law or legal obligation is involved”<sup>20</sup> to explain further that:

even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;— for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned

<sup>14</sup> *The case of the „S.S. Lotus” (France v Turkey)* [1927] PCIJ Rep Series A No 10, 28.

<sup>15</sup> Wolfke (n 1) 10-11.

<sup>16</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, 26.

<sup>17</sup> *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO* [1956] ICJ Rep 77, 85.

<sup>18</sup> *Right of Passage over Indian Territory (Portugal v India)* [1960] ICJ Rep 40.

<sup>19</sup> *ibid* 41, para 71.

<sup>20</sup> *North Sea Continental Shelf* (n 7) 43, para 74.

amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of *a belief* [italics added] that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned *must therefore feel* [italics added] that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by *any sense of legal duty* [italics added].<sup>21</sup>

The Court used the psychological terms such as “belief,” “feel” or “sense of a legal duty.” It may seem that they appeal to a subconscious state of mind which is not fully connected with a conscious expression of the will of States and therefore these terms are less consensual than the wording applied in the earlier cases by the Court and its predecessor, thus indicating that the subjective element may be at least to some extent unwitting and unintentional. However, in the next paragraph the Court referred to the *Lotus* case. It decided not to quote the dictum referred to by some authors international law as “an extremely consensualist vision of international law,”<sup>22</sup> but to consciousness of having a duty to abstain.<sup>23</sup> Making express references to the second part of the *Lotus* case, the Court seems to move from the theory of custom based on the will of States towards a less consensual theory based on their consciousness. But at the same time it may be argued that the Court underlined its wish not to deviate from the established case law on the matter and excluded the subconscious (non-consensual) element from the subjective part of custom. However, it also omitted the reference to the will of States, which may suggest that the Court did not want to connect *opinio juris* with that element and put it somewhere in between the will of States and a conscious belief or a sense of legal duty. In this vein, the Court concluded that “[t]here is no evidence that [States] so acted because they *felt legally compelled* to draw them [according to the principle of equidistance] by reason of a rule of customary law obliging them to do so.”<sup>24</sup>

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<sup>21</sup> *North Sea Continental Shelf* (n 7) 44, para 77. See also: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 107-108, para 207 („a belief”). Moreover, the Court based the customary status of certain rules enshrined in General Assembly resolutions on the “attitude” taken by States in this matter –[1986] ICJ Rep. 99-100, para 188.

<sup>22</sup> *Declaration of Judge Simma, Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, [2010] ICJ Rep 403, 439, para 3. See: *The case of the „S.S. Lotus” (France v Turkey)* [1927] PCIJ Rep Series A No 10, 18.

<sup>23</sup> *North Sea Continental Shelf* (n 7) 44, para 78.

<sup>24</sup> *ibid* 44-45, para 78. [italics added].

The various terms used by the Court have brought about various doctrinal comments. Some authors are of the view that the Court tries to undermine the consensual element of custom; some others, to the contrary, believe that the Court has affirmed the consensual element. Professor Karol Wolfke, after reviewing the relevant decisions of the World Court, was certain enough to observe that: “the way in which the Court has applied the element of acceptance of practice as an expression of law entirely confirms the supposition that this element has been considered as an element of the will of states, mainly in the form of presumed acquiescence in the practice, above all, on the part of those states against which the rule was to be applied.”<sup>25</sup> It might be said, to confirm Professor’s finding, that in the recent *Jurisdictional Immunities of the State* case the Court referred expressly to the element of acceptance. It underlined that the Court:

“must determine, in accordance with Article 38 (1) (b) of its Statute, the existence of “international custom, as evidence of a general practice accepted as law” conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be “a settled practice” together with *opinio juris*.”<sup>26</sup>

One may only agree with Professor Wolfke if he treats the element of acceptance as an emanation of the will of States. Such a view may be supported by the argument that the will to be bound by an international obligation may be expressed in an indefinite number of forms. For example, an international agreement might be concluded in writing according to the Vienna Convention on the Law of Treaties of 1969 or might be implied from the conduct of the parties (*de facto* or tacit agreements).<sup>27</sup> The conclusion of treaties is based on the principle of good faith which does not demand any formalities to be fulfilled in order to conclude a treaty.<sup>28</sup> Therefore, no specific form of consent is required from States to create a legally binding agreement. This point was underlined in the *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* case in which the Court pronounced that:

“[a]ny passing of sovereignty might be by way of agreement between the two States in question. Such

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<sup>25</sup> Wolfke (n 1) 24.

<sup>26</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, [2012] ICJ Rep 99, 112, para. 55.

<sup>27</sup> See: Y Le Bouthiller, J-F Bonin, ‘Article 3’, in O Corten, P Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) vol. I, 69-70; K Widdows, ‘On the Form and Distinctive Nature of International Agreements’ (1976-1977) 7 *Australian Yearbook of International Law* 120-122.

<sup>28</sup> See for example: L Ehrlich, *Prawo międzynarodowe [International Law]* (4th ed. 1958) 254; S E Nahlik, *Wstęp do nauki prawa międzynarodowego [An Introduction to International Law]* (1967) 225.

an agreement might take the form of a treaty, as with the 1824 Crawford Treaty and the 1927 Agreement ... The agreement might instead be tacit and arise from the conduct of the Parties. International law does not, in this matter, impose any particular form. Rather it places its emphasis on the parties' intentions."<sup>29</sup>

Therefore, if the will to be bound by a treaty may be tacit or implied from the conduct of State, then the will of States to be bound by a settled practice may be also given in an indefinite number of forms, starting from an express acceptance of a given practice and ending in the tacit or silent assent or conscious abstention from certain actions due to any sense of legal duty. Similarly, the unilateral acts of State may take different forms according to their types.<sup>30</sup> Also in a case of estoppel the consent given by a State is implied from the facts. The only element which seems to be missing in the theory of customary international law and the decisions of the Court is the intention of States. Perhaps this element is redundant with respect to regular custom as it plays a role only in cases of treaties and unilateral acts. Or, and this might be an idea worth serious consideration, the intention of States may be crucial for deciding whether the States actually conform to what amounts to a legal obligation or rather conform to what is demanded in the field of international courtesy. In other words, perhaps the intention of States could be a helpful criterion of distinguishing between those acts which are motivated by a sense of legal duty and those acts which are motivated by considerations of courtesy, convenience or tradition. Therefore, one may argue that certain explanation is still needed from the Court when referring to factors and terms describing the subjective element considered to be an emanations of the will of States.

Professor Wolfke's view equating the subjective element with the will of States is only one of the many within the doctrine of international law. For example, M. Koskenniemi has distinguished five versions of psychological element which may be associated with:

1. a collective (national, popular) unconscious;
2. tacit agreement;
3. the belief by a State that something is law (declaratory approach);
4. the will by a State that something be law (constitutive approach);
5. law cannot be dissociated from what State will or belief.<sup>31</sup>

Each of them requires a certain form of assent of States in order to create a legal rule and, thus, support the voluntarist vision of international law. It seems from the review of basic decisions of the World Court that it demands the ascertainment of the subjective element connoted to the will of States.

However, as indicated above, the jurisprudence of the Court seems also to distinguish another type of custom which may be referred to as irregular or vital custom according to the *Gulf of Maine* case. A few examples from the Court's docket may illustrate such custom. First, in the

<sup>29</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)* [2008] ICJ Rep 12, para. 120.

<sup>30</sup> P Saganek, *Unilateral Acts of States in Public International Law* (2015).

<sup>31</sup> Koskenniemi (n 6) 414.



*Mavrommatis Palestine Concessions* case the Permanent Court declared that:

“[i]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.”<sup>32</sup>

The Court did not verify the normative status of the principle of diplomatic protection noting instead that it is of elementary character and therefore does not demand examination of a settled practice and *opinio juris*. It seems that this elementary principle ensures the co-existence and vital co-operation of the members of the international community in cases in which one State espouses a claim of its national against a wrongdoing State. It is to be derived from a preconceived idea that each State enjoys personal sovereignty over its nationals inside and outside its territory. Thus, it should be included in a limited set of irregular customary rules.

Another illustration may be posed by a case before the International Court. In the *Corfu Channel* case the Court analysed, *inter alia*, the right of innocent passage of warships through territorial waters and the obligation to notify the existence of minefields on such waters. The VIII Hague Convention relative to the Laying of Automatic Submarine Contact Mines of 1907 obliges the belligerents to notify the danger zones as soon as military exigencies permit. However, it is applicable only in time of war. Nevertheless, the Court was of the view that:

“[t]he obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely : elementary considerations of humanity, even more exacting in peace than in war ; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”<sup>33</sup>

The Court did not search for the relevant practice and *opinio juris*. It simply inferred the customary rule from other norms as it took a basis for

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<sup>32</sup> *Mavrommatis Palestine Concessions*, [1925] PCIJ Rep, Series A, No 2, 12.

<sup>33</sup> *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* [1949] ICJ Rep 4, 22. Additionally, the Court stated that in his opinion it is generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent (at 28).

the obligation to notify from three general and well-recognized principles. In the language of the *Gulf of Maine* case, they may be referred to as certain preconceived ideas, since they have a general and norm-creating character, i.e., certain norms are derived from those ideas. It should also be underlined that such an obligation to notify seems to be necessary to ensure the peaceful and friendly co-existence of the members of the international community. Therefore, all the criteria for irregular custom set out in the *Gulf of Maine* case have been met with respect to a customary rule of obligation to notify and this obligation may be fairly said to exist without the need to prove the subjective element.

Another example is the *Military and Paramilitary Activities in and against Nicaragua*. For the purposes of the present comment, it is not necessary to summarize the facts of such a complex case, but it needs to be stressed that the Court could not base its decision on multilateral conventions. One of the questions examined by the Court concerned the production and dissemination of the manual on psychological operations by the United States. In deciding this issue, the Court refrained from making reference to the four Geneva Conventions of 1949, since:

“the conduct of the United States may be judged according to the fundamental general principles of humanitarian law ; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles.”<sup>34</sup>

According to the Court, the rules enshrined in Article 3 which is common to all four Geneva Conventions and which are applicable in the armed conflicts of non-international character: “constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts ; and they are rules which ... reflect what the Court in 1949 called "elementary considerations of humanity" ...”<sup>35</sup> The Court again did not discuss the normative status of these rules. The only point which may be deduced from the judgment is that the fundamental principles of international humanitarian law were loosely connected to the Geneva Conventions. The Court referred to the *Corfu Channel* case in order to derive the irregular rules from elementary considerations of humanity (the Martens clause)<sup>36</sup> which again may be regarded as a preconceived idea for

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<sup>34</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, 113-114, para 218. The Court mindfully noted that the denunciation of one of the Conventions shall in no way impair the obligations which the parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

<sup>35</sup> *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 113-114, para. 218.

<sup>36</sup> See: The IV Hague Convention respecting the laws and customs of war on land (1907), Preamble, reprinted in D Schindler and J Torman, *The Law of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, (4th revised and completed ed. 2004) 61; the four Geneva Conventions for the protection of war victims (1958, GC I: Art. 63; GC II: Art. 62; GC III: Art. 142; GC IV: Art. 158) 480, 503, 559, 626; Additional Protocol I (1977), Art. 1(2) 715, and Additional Protocol II (1977), Preamble 776; Convention on Prohibitions or restrictions on the Use of Certain Conventional Weapons

specific rules to be derived therefrom. These rules elude legal demonstration by way of the two-elements theory. The subjective element is missing in the decision of the Court. However, it seems natural and necessary for the co-existence and vital co-operation of the members of the international community that such basic rules as those enshrined in Article 3 of the Geneva Conventions should be included in a limited set of vital norms.

The above cases indicate that irregular custom does not demand the fulfilment of the subjective element. The standard is different as the threshold for vital custom is its necessity for the co-existence and co-operation of the members of the international community. It is a very broad and imprecise notion which could virtually enclose a major part of international rules governing the conduct of States. The Court, however, indicated that this class of customary rules is limited and its case law clearly shows that only basic norms strictly related to the basic ideas of the international legal order may be listed into the irregular custom. Its main purpose would appear to be ensuring peaceful and friendly co-existence and basic humanitarian standards among the States.

There is also another possibility which needs to be mentioned. The reasoning of the Court might be enough to postulate that the rules identified by the Court form a part of general principles of law recognized by civilized nations within the meaning of Article 38 (1) (c) of its Statute. It would, however, imply a doubtful conclusion that general principles of law can impose direct obligations on States. Therefore, it is better to think of those rules in terms of customary international law which may establish international obligations among members of the international community.

### CONCLUDING REMARKS

If one accepts that the irregular custom may exist in international law, then he faces a dilemma concerning the element of will of States in such rules. Either he accepts that subjective element is a necessary condition for the formation of a customary rule which includes the acceptance by the State for such a rule or he agrees with a conclusion that subjective element is missing in cases of rules vital for international co-existence and co-operation. In the latter, the consent needs not be established and certain customary rules could appear to exist against the will of States. However, it might be considered whether the element of will might be indirectly deduced from the criterion of "vitality" of irregular custom. Perhaps a right direction would be to connect irregular custom with the membership in the international community. The acceptance of certain basic practice of a fundamental character is necessary for the co-existence and co-operation of States. The status of a member of the international community expresses the acceptance as to the fundamental norms of the community. Every State is firmly interested in the existence of certain vital rules ensuring the co-existence and co-operation of States. The status of a member of the international community, the participation in various international

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which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (1980), Preamble 184.

organizations protecting such co-existence and co-operation, being a party to fundamental international agreements and preserving certain minimum standards of communication and collaboration among nations proves the acceptance of irregular custom by States.<sup>37</sup> If this is the case, one may try to argue that the membership of the international community form a basis for the binding force of vital custom.

The above conclusion is a tentative, and perhaps erroneous, proposition which nevertheless may demand particular examination and verification. This also relates to the question of intention in customary international law. The analysis should also embrace the subjective element and its relationship with the will of States. An in-depth investigation of the above issues may lead to the confirmation of Professor Wolfke's finding that customary international law is based on the will of State. The will, however, may be expressed in various forms and different ways, thus proving that the element of will may be less consensual and formal than it would initially seem.

### References

- Ehrlich L, *Prawo międzynarodowe [International Law]* (4th ed. 1958).
- Franck TM, *Fairness in International Law and Institutions* (Clarendon Press 1995)
- Franck TM, *The Power of Legitimacy among Nations* (1990) 193, 202.
- Koskenniemi M, *From Apology to Utopia : the Structure of International Legal Argument* (2005).
- Lauterpacht H, *Règles générales du droit de la paix* (1937) 62 RCADI 158.
- Le Bouthiller Y, Bonin J-F, 'Article 3' in O Corten, P Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary* (2011).
- Müller JP, *Vertrauensschutz in Völkerrecht* (1971).
- Nahlik SE, *Wstęp do nauki prawa międzynarodowego [An Introduction to International Law]* (1967).
- Saganek P, *Unilateral Acts of States in Public International Law* (2015).
- Scelle G, *Manuel élémentaire de droit international public* (Les éditions Domat-Montchrestien, 1943).

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<sup>37</sup> See e.g. T M Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995) 29. He observes, while quoting HLA Hart, that the membership in a community entails the fundamental associative obligation to abide by the norms which define that community. Chief among these, in the community of States is the obligation to respect legal commitments. In another book, he also noted that: "[i]n a mature voluntarist community ... the capacity of rules to obligate does not derive only from the specific consent of the members, but as a concomitant of the status of membership." Referring to R Dworkin, he concludes that the community of States has important secondary rules of recognition which obligate State because of their status as validated members of the international community. Such a rule is the obligation to honour treaties. T M Franck, *The Power of Legitimacy among Nations* (1990) 193, 202.

Scelle G, *Règles générales du droit de la paix* (1933) 46 RCADI 428.

Schindler D, Torman J, *The Law of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (4th revised and completed ed. 2004).

Vattel E de, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Thomas Nugent tr, Liberty Fund, Inc, 2008).

Widdows K, 'On the Form and Distinctive Nature of International Agreements' (1976-1977) 7 *Australian Yearbook of International Law* 120.

Wolfke K, *Custom in Present International Law* (2nd ed 1993).