

**THE SOURCES OF HUMAN RIGHTS LAW:
CUSTOM, JUS COGENS, AND GENERAL PRINCIPLES**

BRUNO SIMMA*

AND

PHILIP ALSTON**

1. Introduction

The question of the sources of international human rights law is of major significance. As international human rights endeavours expand their scope and their reach, and as their potential ramifications become greater, the need to ensure that the relevant norms are solidly grounded in international law assumes increasing importance. The last few years have witnessed an ever-expanding number of contexts in which those norms are being invoked. International development assistance has become far more human rights-conscious than was the case a decade ago, labour rights issues are intruding further and further into the international trade regime, and the very legitimacy of governments is being regularly assessed on the basis of their compliance with international human rights norms. What then are the sources of the norms that are being invoked?

In many situations treaty law provides a solid and compelling legal foundation. But despite a steady increase in the number of States Parties to international treaties in recent years, reliance upon treaties alone provides an ultimately unsatisfactory patchwork quilt of obligations and still continues to leave many States largely untouched. Thus treaty law on its own provides a rather unsatisfactory basis on which to ground the efforts of international institutions whose reach is truly universal, such as the General Assembly and the Commission on Human Rights. The prospects for developing an effective and largely consensual international regime depend significantly on the extent to which those institutions are capable of basing their actions upon a coherent and

* Professor of Law, Law School, University of Michigan.

** Professor and Director of the Centre for International and Public Law, Australian National University.

generally applicable set of human rights norms. Reliance upon treaty law is likely to be even less rewarding in relation to domestic legal argumentation in the courts, legislatures and executives of countries which have ratified few if any of the major international treaties.

There is thus a strong temptation to turn to customary law as the formal source which provides, in a relatively straight-forward fashion, the desired answers. In particular, if customary law can be construed or approached in such a way as to supply a relatively comprehensive package of norms which are applicable to all States, then the debate over the sources of international human rights law can be resolved without much further ado. Given the fundamental importance of the human rights component of a just world order, the temptation to adapt or re-interpret the concept of customary law in such a way as to ensure that it provides the 'right' answers is strong, and at least to some, irresistible. It is thus unsurprising that some of the recent literature in this field, especially but not exclusively that coming out of the United States, is moving with increasing enthusiasm in that direction.¹

But while largely endorsing the result that is thereby sought to be achieved, we have considerable misgivings about the means being used. In particular, we believe it to be important to pose two questions. The first is whether this effort to revise or 'up-date' custom does fundamental and irreparable violence to the very concept? As Jennings noted almost a decade ago, much of what many modern commentators characterise as custom "is not only not customary law: it does not even faintly resemble a customary law".² The second is whether it is a necessary step in order to reach the desired goal, or whether there are other approaches to the issue of sources which enable us to achieve the same objective while maintaining the integrity of the concept of custom relatively intact?

2. Treaties: A Brief Digression

Before turning to the question of which basic rules of human rights law may be considered part of customary international law it is appropriate to note, by comparison, that human rights law-making by way of treaties, and the legal characteristics of such treaties, appear to be more or less uncontroversial. The qualification 'more or less' seems apposite in view of the fundamental tensions inherent in the very concept of sovereign States agreeing to expose to international accountability an issue that a few decades ago they regarded as the core of their *domaine réservé*, as a result of which it would be unrealistic to expect human rights treaty law to operate in exactly the same way as other international treaties. As Jack Donnelly has observed, the international human rights regime, even though strong on promotion, is extremely weak on what a

¹ See below notes 6-11 and accompanying text.

² Jennings RY, "The Identification of International Law", in Bin Cheng (ed), *International Law, Teaching and Practice* (1982) p3 at 5.

lawyer would consider enforcement or remedies.³ This characteristic has led to some controversy as to whether, and if so to what degree, human rights treaties might be considered 'softened', 'defused', or 'decoupled' from the body of general international law, with the result that the only means of securing compliance with human rights treaty obligations would be the machinery, if any, embodied in or attached to those treaties themselves.⁴

To pursue this issue further would take us too far afield from our focus of concern. But in leaving human rights treaty law let us just suggest that if, for systemic or regime reasons, we really consider human rights treaties to be different from 'normal' international treaties, we should, for those very reasons, approach the question of the existence, or rather, the viability, of an extensive *customary* law of human rights with equal caution.

3. The Significance of Different Approaches to Sources

Caution is far from being a characteristic of much of the contemporary human rights literature. Perhaps this has to do with the fact that "human rights lawyers are notoriously wishful thinkers", as John Humphrey once observed.⁵ However this may be, it appears that a majority of authors today take the view that international human rights obligations incumbent upon States may, and actually do, also derive from customary international law. This thesis is presented with varying degrees of sophistication. There are writers who state flatly that the entire *corpus* of international human rights law, or, to be slightly more specific, the substance of the 1948 Universal Declaration of Human Rights, is now to be regarded as customary law in its entirety.⁶ A recent variation on this approach is that, in order to accommodate all of the desired human rights principles, a "modernized view of customary international law" should be applied.⁷ That view would accord "the ability to create custom" to non-state

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- 3 Donnelly J, "International Human Rights": A Regime Analysis" (1986) 40 Int'l Org 599, 633-636.
 - 4 See Simma B, "Consent: Strains in the Treaty System", in Macdonald RStJ and Johnston DM (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1986) pp485, 500-502; "Self-contained Regimes" (1985) 16 Netherlands YBIL 111, 129-135 (with further references).
 - 5 Humphrey JP, "Foreword", in Lillich RB (ed), *Humanitarian Intervention and the United Nations* (1973), VII.
 - 6 See eg Humphrey JP, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character", in Ramcharan BG (ed), *Human Rights: Thirty Years After the Universal Declaration* (1979) pp21, 37; Sohn L, "The Human Rights Law of the Charter" (1977) 12 Texas Int LJ 129, 133 ;McDougal MS, Lasswell H and Chen L, *Human Rights and World Public Order* (1980) pp273-274, 325-327; D'Amato A, *International Law: Process and Prospect* (1986) pp123-147.
 - 7 Gunning I, "Modernizing Customary International Law: The Challenge of Human Rights" (1991) 31 Virginia JIL, 212, 213.

actors such as international organizations and "certain non-governmental organizations [that] have a distinct, measurable impact on international affairs".⁸

Then there are more moderate, "middle-of-the-road" views, like those of the new *Restatement*⁹ or of Oscar Schachter¹⁰ (if this distinction makes sense, given the important contribution of the latter to the former), according to which something like a "hard core" of human rights obligations exists as customary law today. The recent book by Theodor Meron on our topic can be regarded as elaborate and carefully-reasoned support for the *Restatement* view without challenging in any significant way its theoretical foundation.¹¹ And, finally, there are voices which affirm that nowadays certain obligations to respect and ensure human rights derive from "general" international law,¹² without being specific about the source from which such general international law is supposed to flow.

Against the proponents of a broad-based customary (or, at least, general) international law of human rights stands an embattled group of writers who declare themselves unable to verify the presence of (what they perceive to be) the prerequisites of customary law in a large part of a field so torn by ideology and politics, and so replete with hypocrisy, double standards and second thoughts. Antonio Cassese, for instance, an author certainly not to be accused of avoiding pronounced humanitarian stands, remains firm that "in formal terms, [the Universal Declaration] is not legally binding, but possesses only moral and political force".¹³ Some authors even consider it dangerous "to denaturate the practice-oriented character of customary law by making it comprise [in the human rights field] methods of law-making which are not practice-based at all", to quote van Hoof.¹⁴

Perhaps at this point one might ask what is the practical relevance of all this? In view of the paramount importance of human rights treaties, does it really matter whether, beyond these treaty instruments, there exists an extensive customary, or some other general, international law of human rights?

The answer is, of course, that it matters a great deal – for reasons probably more closely related to domestic law than to international legal issues proper. With regard to domestic law implications, a growing number of modern

8 Ibid 221–222.

9 American Law Institute, *Restatement (Third) Foreign Relations Law of the United States* (1987), § 702; Vol 2, 161. See also Henkin L, "The International Bill of Rights: The Universal Declaration and the Covenants", in Bernhardt R and Jolowicz JA (eds), *International Enforcement of Human Rights* (1987) pp 1,6.

10 Schachter O, "International Law in Theory and Practice: General Course in Public International Law", 178 *Recueil des cours* 21, 333–342 (1982–V).

11 Meron T, *Human Rights and Humanitarian Norms as Customary Law* (1989).

12 See eg Verdross A and Simma B, *Universelles Völkerrecht: Theorie und Praxis* (3d ed 1984) sec. 1234.

13 Cassese A, *International Law in a Divided World* (1986) p299.

14 van Hoof GJH, *Rethinking the Sources of International Law* (1983) pp107–108.

constitutions not only incorporate customary international law automatically as part of the law of the land but also grant it a rank superior to that of domestic statutes. On the other hand, with very few exceptions, contemporary constitutions put treaties on the same footing as statutes in this respect.¹⁵ As a consequence, international human rights prescriptions derived from customary law, or, in the language of Art. 25 of the German Basic Law, from a general rule (or principle) of international law, would be protected against derogation by a conflicting domestic statute much more effectively than provisions of human rights treaties. Apart from such worst-case scenarios, customary or general international law is allowed by modern constitutions to have a persuasive normative impact on municipal law. To return to Art. 25 of the *Grundgesetz*, for instance, the German Constitutional Court ruled in 1987 that German courts and authorities are, by virtue of Art. 25, prevented from interpreting and applying any German domestic law in such a way as to violate the general rules of international law.¹⁶

In an important Australian High Court case, in which state action aimed at preventing expanded Aboriginal land ownership was struck down as being contrary to the applicable international human rights norms, three of the four judges in the majority were prepared to rely upon customary international law as the source of the relevant norms.¹⁷ In the United States, we have witnessed the emergence of the famous *Filartiga* jurisprudence¹⁸ – one of the few more likeable facets of the omnipresent tendency of U.S. courts to usurp jurisdiction beyond limits – or at least, what most lawyers abroad would consider to be such limits.

For a foreign observer not accustomed to having to squeeze unwritten international law through a constitutional needle's eye, as prescribed in the *Paquete Habana* case,¹⁹ in order to prepare it for consumption by domestic courts, the readiness of U.S. courts – as well as of the Carter Administration and many American international lawyers serving as *amici curiae* – to view official torture, arbitrary detentions, disappearances and summary executions as violations of customary international law without feeling any particular need to engage in much serious debate about the prerequisites of that source, is striking,

15 See generally Verdross and Simma, note 12 above, secs. 848–866.

16 75 BVerfGE 1, 19.

17 *Koowarta v Bjelke-Peterson and ors; Queensland v The Commonwealth* (1982) 153 CLR 168, 220–221 *per* Stephen J; 234–236 *per* Mason J and 238–242 *per* Murphy J. For an analysis see Byrnes A and Charlesworth H, "Federalism and the International Legal Order: Recent Developments in Australia" (1985) 79 AJIL 622.

18 *Filartiga v Pena-Irala* 630 F. 2d 876 (2d Cir. 1980). For a recent overview and analysis of the decisions based on the Alien Tort Statute of 1789 see Burley AM, "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor" (1989) 83 AJIL 461.

19 *The Paquete Habana* 175 US 677 (Sup Ct 1900), 20 Sup Ct Rep 290, 44 L Ed 320.

to say the least.²⁰ Given the highly desirable nature of the policy goal of the *Filartiga* jurisprudence, and in view of the formidable array of authorities apparently accepting its approach with respect to custom (or lack of it) as now reflecting the received wisdom, one inevitably hesitates to tamper with it on more or less 'academic' grounds. In many respects, what we observe in action here is essentially a concerted effort by American judges and activist human rights lawyers to compensate for the abstinence of the United States *vis-à-vis* ratification of international human rights treaties.²¹ We will turn to another aspect of this phenomenon later.

In addition to its important domestic law ramifications, the question of the existence *vel non* of human rights obligations arising from customary international law is also of considerable relevance on the plane of inter-State relations. Thus for example, less than two-thirds of the U.N. Member States are parties to the two International Human Rights Covenants; and participation in most other human rights treaties is even more limited.²² With only a limited number of ratifications or accessions being added to that list every year in the case of the Covenants, a certain plateau seems to have been reached. The existence of a wide range of customary law obligations (or, let us say, obligations under general international law) *erga omnes* in this field would mitigate the negative significance of this fact. The existence of such obligations would probably entitle all States – not just the parties to human rights treaties *inter se* – to apply remedies or countermeasures at least in cases of gross and persistent breaches of such obligations.²³ It may appear doubtful, however, whether States which prefer to abstain from joining human rights treaties will, at the same time, pursue activist international human rights policies going so far as to resort to effective countermeasures. But again, the practice of the United States is said to provide examples to the contrary.²⁴ Perhaps this is another reason why the thesis

20 On *Filartiga* and related issues see: Symposium, (1981) 4 Houston JIL 1; "Federal Jurisdiction, Human Rights, and the Law of Nations: Essays on *Filartiga v Pena-Irala*" (1981) 11 Georgia JIL & Comp. L. 305; Blum J and Steinhardt R, "Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filartiga v Pena-Irala*" (1981) 22 Harvard ILJ 53; Lillich RB, "The Role of Domestic Courts in Enforcing International Human Rights Law" (1980) 74 ASIL Proceedings 20; Gerstel D and Segall A, "Conference Report: Human Rights in American Courts" (1986) 1 American U. JIL & Policy 137; and Burley AM, note 18 above.

21 For a "pessimistic assessment of the role of international human rights treaties in the United States legal system" contrasted with a "somewhat more optimistic outlook about the potential effect of customary international human rights law" see Lillich, "The United States Constitution and International Human Rights Law" (1990) 3 Harvard Human Rights Yearbook 53.

22 See U.N. Centre for Human Rights, *Human Rights: Status of International Instruments as at 31 March 1991*, U.N. Doc. ST/HR/ note 5 above.

23 See eg Verdross and Simma note 12 above sec. 1343; *Restatement* note 9 above, sec. 703; Vol 2, 175.

24 See eg Carleton D and Strohl M, "The Foreign Policy of Human Rights: Rhetoric and Reality from Jimmy Carter to Ronald Reagan, (1985) 7 Hum Rts Q 205; and see,

endorsing the existence of a customary law of human rights is so popular among American international lawyers.

In any case, the purpose of this brief analysis has been to demonstrate that a discussion of whether such obligations do indeed exist, amounts to more than an exercise in esoterics. Let us turn, then, to the question of the viability, so to speak, of a *customary* law of human rights. What makes this issue so controversial and confused is, in our view, the fact that the international human rights movement's quest for additional sources finds its favorite candidate, customary international law, in the midst of a profound identity crisis.²⁵

4. The Identity Crisis of Customary Law

According to the traditional understanding of international custom, the emphasis was clearly on the material, or objective, of its two elements, namely State *practice*. Customary international law was generally considered to come about through the emergence of a general (or extensive), uniform, consistent and settled practice, more or less gradually joined by a sense of legal obligation, the *opinio juris*. However, practice had priority over *opinio juris*; deeds were what counted, not just words. What international courts and tribunals mainly did in fact was to trace the subjective element by way of discerning certain recurrent patterns within the raw material of State practice and interpreting those patterns as resulting from juridical considerations. The *Lotus* judgment of the Permanent Court seems to be a perfect illustration of such an inductive approach to custom.²⁶ Viewed from this angle, *opinio juris* was an elusive and rather ephemeral creature – so much so in fact that two of the most prominent publicists of the first half of our century, Kelsen and Guggenheim, tried in their earlier writings to dispense with *opinio juris* altogether and instead saw customary international law arising from State practice alone.²⁷

Rules of customary law thus firmly established through inductive reasoning based on deeds rather than words may have been, and still are, limited in scope, but they had, and continue to have, several undoubted advantages. They are hard

in particular, United States trade legislation which authorises the President to impose a variety of sanctions against any U.S. trading partner which he deems to be engaging in the systematic denial of "internationally recognized worker rights" : s 301 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), s 301 codified at 19 USCA s 2411(a). See generally Lawyers Committee for Human Rights, *A Report on Legal Mechanisms to Protect Worker Rights* (mimeo, 1991).

25 For a brilliant overview and extensive discussion see Koskenniemi M, *From Apology to Utopia: The Structure of International Legal Argument* (1989) pp342-421. See also Cassese A and Weiler JHH (eds), *Change and Stability in International Law-Making* (1988).

26 *The Lotus Case; France v Turkey* (1927) PCIJ Ser A, No 10.

27 Kelsen H, "Théorie du droit international coutumier" (1939) 1 *Revue internationale de la théorie du droit, Nouvelle Série* 253; Guggenheim P, "Les deux éléments de la coutume en droit international", in *La technique et les principes du droit public: Etudes en l'honneur de Georges Scelle* (1950), Vol 1, p275.

and solid; they have been carefully hammered out on the anvil of actual, tangible interaction among States; and they allow reasonably reliable predictions as to future State behavior. They constitute the type of international law that Kelsen must have had in mind when he expressed his *grundnorm* in the formula: "states ought to behave as they have customarily behaved".²⁸ In other words, what is happening in this process of inductive reasoning is to look into the past to identify customary patterns of State practice and then to turn this empirical result into a normative projection for the future.²⁹

So much then for the old-style of practice-based custom, *la coutume sage*. Then followed the stage of *la coutume sauvage*:³⁰ a product grown in the hothouse of parliamentary diplomacy and all too often 'sold' as customary law before actually having stood the test of time. What is customary about this cultured pearl³¹ version of customary law is not (at least, not necessarily) its consistent application in actual State practice but the fertilizing role it plays through proclamation, exhortation, repetition, incantation, lament. For some writers, practice no longer has any constitutive role to play in the establishment of customary law; rather it serves a purely evidentiary function. After all, the only task practice ever had to perform, the 'modernists' would say, was to bring consent or *opinio juris* to the fore; and now that we have all these international bodies, and above all the U.N. General Assembly, generating an almost permanent, intensive flow of communications, consent and *opinio juris* can manifest themselves more or less instantly and without the help of a vehicle as cumbersome and demanding as actual State practice.³²

For other writers, it is the notion of "practice" itself which has undergone a dubious metamorphosis. It has changed from something happening out there in the real world, after the diplomats and the delegates have had their say, into paper practice: the words, texts, votes and excuses themselves.³³ The process of customary law-making is thus turned into a self-contained exercise in rhetoric. The approach now used is *deductive*: rules or principles proclaimed, for instance, by the General Assembly, as well as the surrounding ritual itself, are taken not only as starting points for the possible development of customary law in the

28 Kelsen H, *Principles of International Law* (1952) p418.

29 As Judge VM Koretsky put it in his Dissenting Opinion to the *North Sea Continental Shelf* judgment, custom "turns its face to the past": ICJ Rep 1969, p 3, at 156.

30 See Dupuy RJ, "Coutume sage et coutume sauvage", in *La communauté internationale. Mélanges offerts à Charles Rousseau* (1974) p75.

31 This phrase was coined by Abi-Saab G, "La coutume dans tous ses états où le dilemme du développement du droit international général dans un monde éclaté", in *International Law at the Time of Its Codification. Essays in Honour of Roberto Ago* (1987), Vol I, p61 ("des perles de culture").

32 See eg Bin Cheng, "Custom: The Future of General State Practice in a Divided World" in Macdonald and Johnston note 2 above, 513, and the further references in Verdross and Simma, note 12 above sec. 566 note 45.

33 See eg Akehurst M, "Custom as a Source of International Law" (1974-75) 47 British YBIL 1, 53.

event that State practice eventually happens to lock on to these proclamations, but as a law-making process which is more or less complete in itself, even in the face of contrasting 'external' facts. This new, radical customary law has lost the element of retrospection; if its protagonists look back at the past it is a look back in anger, full of impatience with the imperfections and gaps of the old rules. Such impatience also extends to the processes of treaty-making, a field in which delay or a lack of consent simply cannot be argued away by theoretical constructs. Thus the flight into a new, "progressive", more or less instant custom.

The elevation of the Universal Declaration of 1948 and of the documents that have built upon its foundations to the status of customary law, in a world where it is still customary for a depressingly large number of States to trample upon the human rights of their nationals, is a good example of such an approach.

[We are taking a short-cut here. In treating this issue many writers start by dealing with the question of whether certain resolutions, or declarations, of the U.N. General Assembly may have a law-making function. We do not need to go into this point because the vast majority of commentators agree that such resolutions may indeed set in motion, influence, or become part of, the process of custom-building,³⁴ and that is where we meet again].

5. Different Views on the Customary Status of Human Rights Norms

We have already mentioned the view according to which the Universal Declaration has now acquired customary law status *en bloc*. That some of the voices to this effect sound from within the U.N. human rights "establishment" should not be surprising. To cite a particularly striking example, the Commission on Human Rights' Special Rapporteur on the situation in Iran, Mr. Galindo Pohl, arrived at the following conclusions:

The rights and freedoms set out in the Universal Declaration have become international customary law through State practice and *opinio juris*. Even if the strictest approach is adopted to the determination of the elements which form international customary law, that is, the classical doctrine of the convergence of extensive, continuous and reiterated practice and of *opinio juris*, the provisions contained in the Universal Declaration meet the stringent standards of that doctrine. Of course, they also meet the more liberal standards of contemporary doctrines on the constitutive elements of international customary law.³⁵

34 For a recent review of the literature see Sloan F, "General Assembly Resolutions Revisited", (1987) 58 *British YBIL* 39.

35 "Report on the human rights situation in the Islamic Republic of Iran by the Special Representative of the Commission, Mr. Reynoldo Galindo Pohl, appointed pursuant to resolution 1986/41, U.N. Doc. E/CN.4/1987/23, para.22. It is perhaps symptomatic of the reluctance, or perhaps even the inability, of U.N. organs to grapple with complex theoretical issues, that the Commission fully endorsed (by way of taking "note with appreciation") "the report of the Special Representative and the conclusions and recommendations contained therein" (CHR Res. 1987/55 of 11 March 1987, para. 1) without any significant discussion on the issue of the status of

Turning from United Nations to academic circles, Lung-Chu Chen, a follower of Myres McDougal's New Haven approach, in his evaluation of the new *Restatement's* provisions on the protection of persons, considers quite categorically that the Universal Declaration's "frequent invocation and application by officials, at all levels of government and in many communities around the world" have conferred on it "those expectations characteristic of customary international law".³⁶ Similarly, K.M.G. Nayar, writing in the *Harvard International Law Journal* in 1978, argued that the entire Universal Declaration had become part of customary international law.³⁷ His view was subsequently cited with approval by Judge Kaufman in the *Filartiga* case.³⁸ Reference might also be made to John Humphrey's view that the Universal Declaration is now "part of the customary law of nations and therefore binding on all States".³⁹

Other voices are more clearly aware of the discrepancies between what is said to have become custom and what the facts tell us. Thus, in a Special Issue of the U.N. *Bulletin of Human Rights*, published on the occasion of the 40th anniversary of the Universal Declaration, Alexandre Kiss enquires "whether the assertion that a customary rule of international law exists [i.e. in the human rights field] can be rebutted by evidence of *contrary acts* or by the affirmations of States which do not accept these rules of international law".⁴⁰ While he then goes on in some detail to affirm the obvious, namely, that States do not tend to oppose the principles proclaimed in the Declaration explicitly, he draws no conclusions whatsoever from his own admission that, "unfortunately, in every day life violations of these rights and freedoms nevertheless occur".⁴¹ Rather,

the Universal Declaration. See U.N. Doc. E/CN 4/1987/SR.56/Add. 1, paras. 10-37. At its 1988 session the Commission specifically endorsed "the conclusion of the Special Representative that the obligations acquired by the Islamic Republic of Iran as a State Member of the United Nations and as a party to the two International Covenants on Human Rights are fully binding and do not admit exceptions on account of constitutional problems, rules and regulations of municipal law, or cultural or historical background". Commission on Human Rights resolution 1988/69, 6th preambular paragraph.

- ³⁶ Chen LC, "Restatement: Protection of Persons" (1989) 14 Yale JIL 542, 546-547. See also McDougal M, Lasswell H, and Chen L-C, *Human Rights and World Public Order* (1980) pp273-274, 325-327. For a recent Soviet voice to this effect see Kartashkin VE, "The Universal Declaration and Human Rights in the Contemporary World" (1988) 39 Soviet YBIL 39 (English summary at 50).
- ³⁷ Nayar KMG, "Human Rights: The UN and US Foreign Policy", (1978) 19 Harv ILJ, 813, 816-817.
- ³⁸ Note 18 above, 883.
- ³⁹ Humphrey J, "International Bill of Rights: Scope and Implementation" (1976) 17 Wm Mary LR 527, 529.
- ⁴⁰ Kiss A, "The Role of the Universal Declaration of Human Rights in the development of international law", U.N. Centre for Human Rights, *Bulletin of Human Rights: Special Issue: Fortieth Anniversary of the Universal Declaration of Human Rights* (1988) pp47, 48 (emphasis added).
- ⁴¹ Id.

what matters under these circumstances is that "quite certainly no State, even the most tyrannical, would wish to proclaim to the whole world in that way its contempt for values recognized as fundamental by all nations".⁴² What Kiss seems to be saying is that, if a rule or principle is universally proclaimed and recognized, evidence of its violation is simply irrelevant. We will return to the implications of this view later.⁴³

The most sophisticated line of argument in favor of a customary law of human rights based on the Universal Declaration is to be found in the Reporters' Notes on §§ 701 and 702 of the new *Restatement*⁴⁴ and, with even greater subtlety, in Oscar Schachter's magnificent 1982 Hague General Course,⁴⁵ to which we now turn.

At the outset, Schachter admits that our question "cannot readily be answered on the basis of the *usual* processes of customary law formation",⁴⁶ because here one just does not come across the material that is normally considered to constitute State practice accompanied by *opinio juris*. Rather, Schachter proposes to rely on different kinds of evidence in the human rights field, including the incorporation of human rights provisions in many national constitutions and laws; frequent references in U.N. resolutions and declarations to 'duties' arising out of the Universal Declaration; resolutions of the U.N. and other international bodies condemning human rights violations as breaches of international law; statements by national officials criticising other States for serious human rights violations; the famous dictum of the International Court in the *Barcelona Traction Case*;⁴⁷ and, finally, some judgments of domestic courts that refer to the Universal Declaration as a source of standards for judicial decisions.⁴⁸

Schachter acknowledges that the weight of all these materials cannot be assessed as evidence of custom without considering actual practice, and that human rights infringements are "widespread, often gross and generally tolerated by the international community".⁴⁹ Unlike many others, Schachter does not want to minimise the significance of this negative practice. Rather, he draws a distinction between different provisions of the Universal Declaration. In the case of some rights (freedom of expression, equality between men and women, and the right to work, are given as examples), State behavior clearly does not comport with the claim that they constitute international custom. On the other hand, he continues, there are provisions that clearly do have a strong claim to the status of customary law. In his view, "[t]his can be shown not so much by

42 Ibid p49.

43 See text accompanying notes 68-76.

44 See note 9 above.

45 See note 10 above.

46 Id 334 (emphasis added).

47 ICJ Rep 1970, p33.

48 Note 10 above, 334-335.

49 Ibid 335.

applying formal criteria of customary law as by considering conduct that has been universally condemned as violative of the basic concept of human dignity".⁵⁰ This criterion leads Schachter to the cases enumerated in § 702 of the *Restatement*: slavery, genocide, torture, mass killings, prolonged arbitrary imprisonment, and systematic racial discrimination, or any consistent pattern of gross violations of internationally recognised human rights.

Schachter draws attention to the fact that in these cases there is a difference in intensity and depth of the attitudes of condemnation. In the case of torture, for instance, even if it takes place in many countries, it is almost always contrary to national law and is not legitimised as State policy. "Hence, when violations of these strongly held basic rights of the person take place, they are to be regarded as violations, not as 'State practice' that nullifies the legal force of the right".⁵¹ According to him, it is also important to consider whether conduct which is the subject of criticism is defended by the perpetrators as legitimate or is instead denied on factual grounds, because in the latter event, one may plausibly infer that the State accepts the principle involved. Finally, he considers the relative intensity of the criticism of infringements of some human rights to be pertinent.⁵²

Other commentators, although espousing a comparably careful approach in relation to satisfying the requirements of custom, have been prepared to extend Schachter's list even further. Richard Lillich, for example, has suggested that the right to equality before the law and to non-discrimination (equal protection) as stated in articles 7 and 26 of the Universal Declaration of Human Rights is (provided that their content is interpreted in a "properly limited" way) part of customary law.⁵³ In addition, while suggesting that the right to free movement within a State is not yet part of customary law, he concludes that "both the right to leave and the right to return seem well-established in conventional and perhaps even customary international human rights law".⁵⁴

Theodor Meron has proposed an even more extensive list of customary norms, although he also leaves open the possibility that the source of some of them might instead (or perhaps as well) be found in general principles of law. His list includes the right of self-determination, the right to humane treatment of detainees, the prohibition of retroactive penal measures, the principle of *ne bis in idem* (the right not to be tried or punished again for an offence for which one has already been convicted or acquitted)⁵⁵ and various due process rights including:

50 Ibid 336.

51 Id.

52 Ibid 338.

53 Lillich R, "Civil Rights" in Meron T, (ed), *Human Rights in International Law: Legal and Policy Issues* (1984) Vol 1, 115, 133.

54 Ibid, 151.

55 Meron, note 11 above, 97 and 134.

the right to be tried by a competent, independent and impartial tribunal established by law, the right to presumption of innocence, the right of everyone not to be compelled to testify against himself [sic] or to confess guilt: the right of everyone to be tried in his or her presence and to defend himself or herself in person or through legal assistance of his or her own choosing, the right of everyone to examine witnesses against him or her and the right to have one's conviction and sentence reviewed by a higher tribunal according to law.⁵⁶

These various approaches, as well as that of the *Restatement*, seem to warrant a number of comments both in terms of human rights policy and of the doctrine of customary law. With regard to the first aspect, it is noteworthy that in these views there is a remarkable correlation between the norms identified as customary rules, and the range of rights which has been incorporated into the U.S. Bill of Rights. This correlation may, of course, be considered to be coincidental. Alternatively, it might be seen as a tribute to the foresight and perceptiveness of the drafters of the U.S. documents or as a reflection of the dominant influence of American values in the world. It is also possible, however, to view it as an instance of what might be termed normative chauvinism, albeit of an unintentional or sub-conscious variety.⁵⁷ We have already mentioned that the *Restatement's* list in § 702 concludes with the category of "a consistent pattern of gross violations of internationally recognised human rights". The interpretation which the *Restatement* applies to this category is a particularly striking instance of assuming that American values are synonymous with those reflected in international law. The following examples of rights which are covered by this clause are cited in the commentary to the *Restatement*: systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention (even if not prolonged); denial of fair trial in criminal cases; grossly disproportionate punishment; denial of freedom to leave the country; denial of the right to return to one's country; mass uprooting of a country's population; denial of freedom of conscience and religion; denial of personality before the law; denial of basic privacy such as the right to marry and raise a family; and invidious racial or religious discrimination.⁵⁸

The right to freedom from hunger, the right to adequate housing, the right to access to basic health care, the right to freedom of association, the right to form trade unions and the right to primary education are all excluded from this

⁵⁶ Ibid 96-97.

⁵⁷ It is appropriate here to note the comment made by Koskiennemi in a review published after the first draft of the present Article had been presented. He opines that Meron's discussion of customary law norms, note 11 above, "is more intended to show American lawyers how to plead when pressing a human rights case in American courts than to reveal much about international law". Koskiennemi M, "The Pull of the Mainstream" (1990) 88 Mich LR 1946 at 1951.

⁵⁸ See note 9 above.

listing.⁵⁹ The *Restatement's* reasoning is all the more questionable since the wording of the clause is taken directly from a U.N. procedure (under Economic and Social Council Resolution 1503)⁶⁰ which the U.N. has clearly stated to be equally applicable to economic, social and cultural rights as to civil and political rights.⁶¹

The end result of the *Restatement's* analysis is, at best, suspiciously convenient. The great majority of rights considered important under U.S. law, as well as virtually every right which recent U.S. governments have been prepared to criticize other governments for violating, are held to be part of customary international law. By contrast, none of the rights which the U.S. fails to recognise in its domestic law, is included. In the final resort it must be asked whether any theory of human rights law which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not capital punishment for crimes committed by juveniles or death by starvation and which finds no place for a right of access to primary health care, is not flawed in terms both of the theory of human rights and of United Nations doctrine.

But the suggestion of sub-conscious chauvinism must not be permitted to conceal the genuinely important point that emerges in this context. That is that, as appealing as Schachter's more sophisticated and more nuanced approach to the issue of the evidence of State practice may be, it still leaves us with an excessively flexible, and thus inevitably rather subjective, set of criteria. The relative intensity of criticism test would surely yield dramatically different results when viewed from the perspective of many Third World diplomats or jurists than from that of their Western, or more particularly American, counterparts. Moreover, at least for the foreseeable future, the evidence that will be called in support of any particular application of the test will be almost exclusively Western in origin except for the evidence produced on those occasions on which Third World governments have been encouraged to pronounce themselves in a United Nations or related forum. And, in those latter cases we are taken back to that school of thought which is prepared to accept diplomatic pronouncements as sufficient evidence for the existence of a customary rule of law. Thus the practical result, at least, of Schachter's relative intensity test may not differ significantly from that yielded by applying virtually the same criteria as those which he had seemed unwilling to accept.

But leaving aside this practical result and returning from policy to the theory of the sources of international human rights, the line of reasoning to be found in the *Restatement* and in Schachter's Hague Lectures is probably as persuasive as any attempt to anchor such rights in customary law can possibly be. Nevertheless

59 For an instructive critique, partly along similar lines, see Murphy D, "The Restatement (Third)'s Human Rights Provisions: Nothing New, But Very Welcome" [1990] *The Int'l Lawyer* 917.

60 ECOSOC Res. 1503 (XLVIII) of May 27, 1970, 49. U.N. ESCOR Supp. (No. 1A), pp. 8-9, U.N. Doc. E/4832/Add.1 (1970).

61 CHR Res. 5 (XXXIII) (1977).

even such high-powered arguments cannot entirely dispel doubts as to whether custom really is an adequate means for embedding fundamental human rights obligations in general international law. Is it wise to disregard the usual processes and the formal criteria for customary law, as Schachter in effect proposes, or at least to bend these prerequisites very considerably, in order to reach a certain policy result, however desirable it may be? Can we really put customary law on a "sliding scale", as Kirgis has suggested,⁶² and put less emphasis on what States actually do, the more generally accepted a principle or rule appears to be? In Kirgis' view, which is similar to that of Kiss, the basic rule is that "the more destabilising or morally distasteful the activity – for example, the offensive use of force or the deprivation of fundamental human rights – the more readily international decision makers will substitute one element for the other [i.e. state practice and *opinio juris*], provided that the asserted restrictive rule seems reasonable".⁶³ But this reasoning would seem to be a case of arriving at the wrong conclusion for the right reasons. Kirgis suggests that "the Universal Declaration of Human Rights has come to be regarded as an authoritative articulation of customary international law, at least with respect to the most fundamental rights, no matter how widespread or persistent the nonconforming state conduct may be".⁶⁴ He defends this result on the grounds that "the alternative would be an international legal order containing ominous silences – where treaty commitments cannot be found – concerning the ways in which states impose their wills on other states or on individuals".⁶⁵ Leaving to the concluding part of our paper the question of whether there would in fact be an "ominous silence" if this radical approach to custom is not accepted, it is surely open to doubt whether the concept of custom should be so fundamentally re-shaped in a manner which disregards its intrinsic limitations (and some would say, virtues) in order to accommodate a desired (and highly admirable) policy outcome.

This observation leads us back to what we called the present "identity crisis" of customary law: the de-emphasising of material practice as a constitutive element combined with the tendency to "count" the articulation of a rule twice, so to speak, not only as an expression of *opinio juris* but also as State practice itself. In its *Nicaragua* judgment, after paying lip-service to the classic view,⁶⁶ the International Court of Justice also submitted to this current trend of de-emphasising practice in favor of *opinio juris* and looking to soft law emanations

62 Kirgis F, "Custom on a Sliding Scale" (1987) 81 AJIL 146.

63 Ibid 149.

64 Id 147–148.

65 Id 148.

66 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v U.S.A.)*, *Merits*, ICJ Rep 1986, p14 at 97–98: "The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law. Bound as it is by Article 38 of its Statute, to apply, *inter alia*, international custom as 'evidence of a general practice accepted as law', the Court may not disregard the essential role played by general practice".

for determining the content of the subjective element. It is astonishing how readily the Court accepted the consent of the parties to certain General Assembly resolutions and other soft law instruments as the manifestation of an appropriate *opinio juris*, without looking for positive evidence of "external" State practice in conformity with these positions.⁶⁷

In another paragraph of the *Nicaragua* judgment, the Court attempted to come to terms with the problem of inconsistency between practice and *opinio juris* – as we have seen, the major argument against the credibility of an extensive customary law of human rights. In such a case, says the Court, in order for customary law to survive, it is sufficient that the conduct of States should be consistent with such rules in general. Instances of State conduct inconsistent with a rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.⁶⁸

In our view, this is a statement valid in those cases in which State practice and *opinio juris* have had a chance to establish themselves solidly in an initial, formative stage. The argument appears to us much less convincing, however, in instances where the inconsistency between words and factual behavior has been glaring from the very beginning.⁶⁹ This point deserves to be re-emphasised because it seems decisive. It makes a big difference whether we are in the presence of a case where customary law has been gradually built up, through State practice of the traditional material kind and where subsequent instances of inconsistent conduct occur, or whether claims to the existence of a rule of customary law are voiced amidst – or against – a real world which all too often continues to behave as if it were totally unimpressed by such claims.

Our reservations in this regard are shared by a report of the Committee on the Formation of Customary Law established by the American Branch of the International Law Association ("ILA"). In addressing the role of practice, the Committee considers that where the rule in question is neither old nor established, the approach of looking first to articulated rules and only secondly to practice in support of those rules, coupled with a broader definition of, and diminished requirements for practice, may result in a sort of "instant" customary international law of dubious relationship to the actual behaviour and interests of States.⁷⁰ Now, if one assumes that the advance of "soft custom", as we could call it, will continue, or even accelerate, the *Restatement's* line of thought might soon not have to disregard any formal criteria but would rather blend perfectly with a new general theory of customary law-making. Whether such a development will be as beneficial for custom as for human rights, is open to doubt.

67 Ibid 99–104.

68 Ibid 98.

69 *Semle van Hoof* (note 14 above) 108 note 423.

70 Committee on the Formation of Customary International Law, American Branch of the International Law Association: "The Role of State Practice in the Formation of Customary and *Jus Cogens* Norms of International Law" (January 19, 1989) 7.

Our own view would be that, instead of further manipulating the established concept of customary law based on an effective requirement of concrete practice, we ought to look for a different – and less damaging – way to explain the legal force of universally recognised human rights. If state conduct is to be entirely disregarded, as some authors suggest may be necessary at least in extreme cases, it would seem more logical and potentially more persuasive to proceed on the basis of some alternative theory of state obligation in the human rights field.

Before turning to such alternatives, let us just say that, if we were really to insist on discovering extensive *customary* law in the field of international human rights, we might well find the most convincing evidence, in full conformity with the established criteria, in a different direction. At the level of universal international law, international concern for human rights and the generally accepted *droit de regard* in this respect have developed over more than four decades through the activities of the U.N. General Assembly, the Commission on Human Rights and a number of other U.N. bodies, on the modest "hard law" basis of a few very generally worded Charter provisions. It is here that the decisive human rights bridgeheads in areas of formerly unfettered domestic jurisdiction of States have been achieved: by a literal avalanche of General Assembly resolutions, through decisions of the Human Rights Commission and its Sub-Commission, through public debate of gross human rights violations or confidential responses to petitions within the Resolution 1503 procedure; by means of country-oriented or thematic reports by Special rapporteurs and their acceptance by the bodies mentioned, through the initiation of sanctions against particularly grave breaches, and so on. In the resolutions and debates of these institutions and organs, the standards contained in the Universal Declaration are consistently and routinely cited as being applicable to all States. We are on safe ground in considering this very *droit de regard*, entitling the U.N. itself to respond to gross violations of human rights in these various ways, to be firmly established in customary international law.⁷¹ Proof of this can be seen, for instance, in the reactions by target governments to the application of the Resolution 1503 procedure; as Tolley has shown in his analysis of the work of the Human Rights Commission, by virtue of their regular participation such governments tacitly acknowledge that any alleged gross violations of human rights norms require some response.⁷² This acknowledgement would be even more firmly entrenched if, as we have advocated elsewhere, the 1503 procedure is given a much more significant public dimension than it has at present.⁷³

Further, it is now widely accepted that the issue of severe human rights violations may also be taken up in various other multilateral contexts as well as in bilateral inter-State relations, for instance within the framework of the "Helsinki process", without encroaching upon the *domaine réservé* of the

71 *Semble Müller C, Die Menschenrechte als außenpolitisches Ziel* (1986) pp115–117.

72 Tolley H, Jr. *The U.N. Commission on Human Rights* (1987) pp124–133.

73 Alston P, "The Commission on Human Rights" in Alston P (ed), *The United Nations and Human Rights: A Critical Appraisal* (forthcoming 1992).

sovereign States addressed. There is no doubt in this regard that intensive State practice has indeed been joined by *opinio juris* and thus has led to firmly established customary international law.⁷⁴

Before leaving the *droit de regard* it is appropriate to ask whether the range of norms which can appropriately be the subject of the scrutiny or *regard* is limited in some way – to customary norms, for example. In our view its scope is comprehensive and embraces all of the dimensions of international human rights law. It thus takes full account of customary norms, norms based on authentic interpretation, and general principles and extends also to soft law norms. This is borne out by the range of norms regularly used by the U.N., the Commission on Security and Co-operation in Europe and other bodies and in which the vast majority of States have acquiesced.

If we compare these – relatively – uncontroversial instances of customary law-making *lege artis* with the mode of recognition of certain substantive human rights obligations, we see that the former can be derived from constant interaction, from claims and tolerances as to what sovereign States can do to *each other*, or in other words how far they can go, unilaterally or in an organised way, out of their concern for human rights. The performance of most substantive human rights obligations, on the other hand, lacks this element of interaction proper; it does not "run between" States in any meaningful sense. Thus, one reason why the claims to the existence of such a number of substantive human rights obligations under customary law remain unconvincing, and even do violence to some degree, to the established formal criteria of custom, can be seen in the fact that an element of interaction – in a broad sense – is intrinsic to, and essential to, the kind of State practice leading to the formation of customary international law. If we review successful as against unsuccessful candidates for norms with customary law status, we could conclude that the processes of customary international law can only be triggered, and continue working, in situations in which States interact, where they apportion or delimit in some tangible way. But, at least in most cases, this is not what happens when a consensus about substantive human rights obligations, to be performed domestically, grows into international law.

One further point warrants consideration in this context. How can we distinguish, in practice, between the performance of customary law obligations operating purely at the domestic level, such as in the case of human rights, and internationally concordant domestic behaviour followed for reasons other than a sense of international legal obligation, such as driving on the correct side of the road?⁷⁵ The answer is because of that very sense of *international* legal

74 For a recent confirmation of this approach see the views submitted in the form of a draft resolution on "The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States" submitted by the *Institut de Droit international* to the U.N. Commission of Human Rights in 1990, U.N. Doc. E/CN.4/1990/NGO/55, English text in (1989) 27 *Archiv des Völkerrechts* 230.

75 On this general issue see Simma B, *Das Reziprozitätselement in der Entstehung des Völkergewohnheitsrechts* (1970) pp36–37 note 88.

obligation present in the case of human rights but absent in the other. What this means, however, is that the existence *vel non* of a rule of international customary law not requiring interaction, and not really running between States, can only be ascertained by finding expressions of a respective international *opinio juris*. Thus, as a matter of logic, such an *opinio juris* would remain the only relevant element; domestic practice would simply not matter anymore. But such a result would overstretch the limits of even the most lenient, or "progressive", theory of customary law.

None of this is to suggest that there are no human rights norms that are capable of satisfying the appropriate criteria for the creation of customary international law. Indeed it may well be that, in relation to many of the rights contained in the *Restatement* list, a strong case could be made which also takes careful account of the concerns expressed above. The point that we wish to make, however, is that the resulting list will inevitably be rather brief and will certainly constitute an unsatisfactory or inadequate basis on which to achieve many of the goals appropriately sought by the strongest proponents of international human rights law.

6. The 'Authoritative Interpretation' Approach

Let us now turn to the first of two alternative approaches used to arrive at human rights obligations under international law independently of specific treaties. It consists of treating the Universal Declaration and the body of soft law built upon it as an *authoritative interpretation* of the obligation contained in Articles 55 and 56 of the U.N. Charter according to which "all Members pledge themselves to take joint and separate action in cooperation with the Organization" in order to achieve "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". This approach appears to have been supported by the Carter Administration⁷⁶ and has been put forward by several leading academic commentators.⁷⁷

In our view, the authoritative interpretation approach appears to rest on somewhat more solid legal foundations than the customary law approach. Indeed, there are strong grounds for arguing that States Parties to the Charter, having in good faith undertaken treaty obligations to respect 'human rights', are subsequently bound to accept, for the purposes of interpreting their treaty obligations, the definition of 'human rights' which has evolved over time on the

⁷⁶ Under President Carter, the U.S. Government acknowledged the obligatory character of the Charter's human rights provisions and appeared to accept the Universal Declaration as an authoritative interpretation of those provisions. See eg "Address by President Carter to the United Nations General Assembly" (1977) 76 Dept. of State Bull. 332; and Vance C, "Human Rights and Foreign Policy", id, 505.

⁷⁷ See Sohn L, "The New International Law: Protection of the Rights of Individuals Rather Than States" (1982) 32 *Amer Univ LR* 1, 17; and Buergenthal T, "International Human Rights Law and Institutions: Accomplishments and Prospects" (1988) 63 *Washington LR* 1.

basis of the virtually unanimous practice of the relevant organs of the United Nations.⁷⁸ This view has been reinforced by the approach adopted by the Inter-American Court of Human Rights which has stated that the member states of the Organization of American States are, in effect, bound by the American Declaration of the Rights and Duties of Man as an authoritative interpretation of the human rights referred to in the OAS Charter.⁷⁹ Nevertheless, at a certain point there must be limits to this approach which would require an individuated analysis in order to determine whether *all* of the rights in the Universal Declaration, as well as the new rights such as the right to development which the U.N. has subsequently proclaimed, can be said to fall within the ambit of the original Charter provision.

Where does such a cautious approach lead us? Do we, by doubting the adequacy or viability of the customary law of human rights advocated by so many voices and, by limiting the scope of the authoritative interpretation approach, negate the possibility or existence of a general international law in this area? For some writers, like Professors Watson, Lane, Weisburd or, more recently, Rubin, there is indeed no alternative to this conclusion.⁸⁰ We see things differently, however. In the first place, as noted above, it may well be possible to justify the proposition that a limited range of norms satisfies the relevant criteria. In the second place, and more importantly, the latter school of thought does not, in our view, sufficiently appreciate the potential inherent in the international law-making process. For its adherents, international law does not extend beyond treaties and custom. In contrast, it is proposed to examine some suggestions that were put forward recently and which seem rather attractive – partly so because some of them coincide with what Professor Alfred Verdross and one of the present authors have written quite a while ago, alas, in German.⁸¹

⁷⁸ In the early years after the adoption of the U.N. Charter and The Universal Declaration, a lively debate over this issue took place. Among those who rejected the approach, see Hudson M, "Charter Provisions on Human Rights in American Law" (1950) 44 AJIL 543; and Kelsen H, *The Law of the United Nations* (1950) p110. In support, see: Jessup P, *A Modern Law of Nations* (1948) 4; and Lauterpacht H, *International Law and Human Rights* (1950) p166.

⁷⁹ "Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights", Advisory Opinion OC-10/89 of July 14, 1989, para. 43. (1990) 29 Int'l Legal Materials 379 at 389.

⁸⁰ Watson JS, "Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law", [1979] U of Illinois L Forum 609; Lane E, "Demanding Human Rights: A Change in the World Legal Order" (1978) 6 Hofstra LR 269; "Mass Killing by Governments: Lawful in the World Legal Order?", (1979) 12 NYU JIL and Politics 239; Weisburd AM, "Customary International Law: The Problem of Treaties" (1988) 21 Vanderbilt J of Transnational L 1. The last-quoted contribution led to a veritable *dialogue des sourds* on the nature and formation of customary law between Professors D'Amato and Weisburd; see D'Amato, "Custom and Treaty: A Response to Professor Weisburd", *ibid* 459. See also Rubin A, "Are Human Rights Legal?", (1990) 20 Israel Yearbook on Human Rights 45.

⁸¹ See Verdross and Simma note 12 above, secs. 526, 602, 606, 639.

In the Report of the Committee on the Formation of Customary Law established by the American Branch of the ILA, to which reference was also made earlier, (entitled "The Role of State Practice in the Formation of Customary and *Jus Cogens* Norms of International Law"),⁸² the authors share our concerns about the contemporary movement in the direction of minimising the role of State practice in the formation of customary international law, or by adjusting its definition.⁸³ In assessing the relevance of State practice for the formation of unwritten international law, they draw attention to the third source mentioned in Art. 38 of the Statute of the International Court, namely "the *general principles of law* recognised by civilized nations".⁸⁴ Admittedly, the dominant view understands this concept in a narrow sense, as referring to legal principles developed *in foro domestico*. But, as many writers have pointed out in various contexts, there is no necessity to restrict the notion of 'general principles' in this way.⁸⁵ For the drafters of the Statute the decisive point was that such principles were not to be derived from mere speculation; they had rather to be made objective through some sort of general acceptance or recognition by States.⁸⁶ Such acceptance or recognition, however, may also be effected on the *international* plane. The emphasis on acceptance *in foro domestico* was simply caused by the necessity to validate general principles in a reliable way; it cannot be read as closing the door to alternative means of objective validation.

7. Using 'General Principles'

Such new means are available today: general principles can now be accepted in an international setting. Principles brought to the fore in this 'direct way', so to speak, would (and should) then percolate down into domestic fora, instead of being elevated from the domestic level to that of international law by way of analogy. Of course, if we perceive customary international law to be derived not only from a generalisation of State practice but from the express articulation of rules in, for example, declarations of the General Assembly, the concept of custom will be difficult to distinguish from that of general principles recognised internationally in the first instance. The Report, however, pleads in favour of keeping the two notions separate on the ground, among others, that the concept of a "recognised" general principle seems to conform more closely than the concept of custom to the situation where a norm invested with strong inherent authority is widely accepted even though widely violated.⁸⁷ The example that

82 See note 70 above.

83 *Ibid* 1, 6 *et seq.*

84 *Ibid* 8 *et seq.*

85 For an overview of theoretical opinions see Vitanyi B, "Les positions doctrinales concernant le sens de la notion de 'principes généraux de droit reconnus par les nations civilisées'", (1982) 86 *Revue générale de droit international public* 48.

86 On the drafting history of Art. 38 (1)(c) of the Statute see, eg van Hoof, note 13 above 136-139; Herczegh G, *General Principles of Law and the International Legal Order* (1969) pp11-33.

87 Note 70 above, 10.

the Report primarily has in mind here is the prohibition on the threat or use of force, but it may be that internationally recognized human rights are even more pertinent.

The prohibition against the threat or use of force and fundamental human rights prescriptions share another important characteristic. They both belong to the body of international *jus cogens*. We must emphasise that what is referred to here are *fundamental* human rights, of the type considered earlier in connection with the list set up by the *Restatement*. We would certainly hesitate to claim the peremptory nature of the entire body of today's human rights and humanitarian law lock, stock and barrel.⁸⁸

According to the Report, it is not clear whether such peremptory international law has significance outside treaties.⁸⁹ In contrast to this hesitancy stands the opinion of the International Law Commission that "[i]t is not the form of a general rule of international law but the particular nature of the subject matter with which it deals that may... give it the character of *jus cogens*".⁹⁰ We submit that the latter view (certainly held by the majority of commentators) is correct. In any case, the U.S. Report follows it implicitly by undertaking a comparison of the conditions which have to be met for the formation of customary law on the one hand and of *jus cogens* on the other.⁹¹ We have already dealt with the prerequisites of custom. With regard to peremptory rules, the emergence of such norms presupposes their acceptance and recognition by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by subsequent norms of general international law having the same character, to quote the definition used in Art. 53 of the Vienna Convention on the Law of Treaties. If we compare the interpretations given to the term 'international community of States as a whole' with the prerequisites for 'general practice' eventually leading to the formation of custom, we are safe in concluding that the threshold requirement for the emergence of *jus cogens*, namely the generality, or universality, of acceptance *and* recognition, is set at least as high as that necessary for the development of general (or universal) customary law.⁹²

According to the Report, it is doubtful whether rules of *jus cogens* can ever meet this generality-of-practice criterion.⁹³ Settled practices of States as regards *jus cogens* are elusive to grasp, mainly because most, if not all, rules of *jus cogens* are prohibitive in substance; they are rules of abstention.⁹⁴ How does one marshal conclusive evidence of abstentions? Abstentions *per se* mean

88 See in general Schachter note 10 above, 339-342; Meron T, "On a Hierarchy of International Human Rights" (1986) 80 AJIL 1.

89 Note 70 above, 15.

90 (1966) 2 Yearbook of the International Law Commission 248.

91 Note 70 above, 15-16.

92 See Verdross and Simma note 12 above sec. 530.

93 Note 70 above, 16.

94 *Ibid* 17.

nothing; they become meaningful only when considered in the light of the intention motivating them. Consequently, fundamental importance must be attached to *opinio juris* when one considers a customary rule of abstention.⁹⁵ This of course is exactly what the International Court indicated in its *Nicaragua* judgment. In fact, as noted earlier, the Court went to the extreme in minimising the role of actual State conduct in regard to non-use of military force. As the Report correctly observes, the *Nicaragua* Court really had no other choice because if it had insisted on the criteria of State practice established in its own earlier jurisprudence, it would have been unable to sustain the rule.⁹⁶

Indeed, the situation with regard to non-use of force bears a striking similarity to the position of States with respect to human rights. While principles of behavior are generally recognised and maintained, tangible State conduct frequently does not live up to these promises. Perhaps, as the Report suggests, the *Nicaragua* Case tells us that the general practice of States is simply irrelevant in regard to peremptory rules; only *opinio juris* matters.⁹⁷ But how is this assumption to be reconciled with the exigencies of customary law? According to the Report, the truth of the matter may very well be that *jus cogens* is not international custom as defined in the ICJ Statute at all. The customary law-making process may be unable to provide logical and sound devices to identify peremptory norms of abstention.⁹⁸ Such norms do not (and simply cannot) result from a gradual accretion of State practice eventually accepted as law. Rather, what we witness here is the express articulation of principles in the first instance, *ab initio* or progressively being "accepted and recognized" as binding and peremptory by the "international community of States as a whole". This process does not – or not yet – lead to the emergence of customary law but to the formation of "general principles of law recognized by civilized nations" in the sense of Article 38 of the ICJ Statute.

So much then for the Report of the American ILA Committee.. Maybe it goes too far in denying in such categorical terms the possibility that *jus cogens* rules might emerge in the customary law mode. But still it seems that the Report's line of argument provides a more plausible explanation of how substantive human rights obligations may be established in general international law, than that offered by a strained, or even denatured, "new" theory of custom. The value of the Report lies not so much in its originality of thought as in the convincing, clear and matter-of-fact way in which it reconciles the mainstream, positivist, theory of sources with earlier views expressed by international lawyers of the natural law school. To mention just two examples of such natural law recourse to general principles, Professor Verdross claimed as early as 1935 that general

95 *Id.*

96 *Ibid* 18.

97 *Ibid* 19.

98 *Ibid* 20.

principles could trump rules based on treaty or custom.⁹⁹ And, in his Dissenting Opinion to the 1966 *South West Africa* judgment, Judge Tanaka of Japan had no doubt that the law concerning the protection of human rights belonged to *jus cogens*, and that, "[a]s an interpretation of Article 38, paragraph 1(c), ... the concept of human rights and of their protection is included in the general principles mentioned in that Article", although, in his view, this provision did not require the consent of States as a condition of the recognition of general principles.¹⁰⁰

In contrast to such natural law views, the recourse to general principles suggested here remains grounded in a consensualist conception of international law.¹⁰¹ Consequently, what is required for the establishment of human rights obligations *qua* general principles is essentially the same kind of convincing evidence of general acceptance and recognition that Schachter asks for – and finds – in order to arrive at customary law.¹⁰² However, this material is not equated with State practice but is rather seen as a variety of ways in which moral and humanitarian considerations find a more direct and spontaneous "expression in legal form".¹⁰³

Turning from possible doctrinal views to the jurisprudence of the International Court of Justice and reviewing those judgments in which human rights issues have been addressed,¹⁰⁴ we see that the Court, too, has unambiguously accepted that the obligation to respect fundamental human rights is an obligation under general international law. However, in none of these cases does the Court expressly speak of customary international law in this regard. Indeed a close reading might even give rise to the impression that the Court has rather carefully avoided the use of this notion. Thus in the *Corfu Channel* Case the Court spoke of "obligations...based...on certain general and well-recognized

99 Verdross A, "Les principes généraux du droit dans la jurisprudence internationale", 52 *Recueil des Cours* 204–206 (1935 II).

100 ICJ Rep 1966, p4 at 298.

101 Cf. the line of reasoning in the U.S. Report (note 70 above) just described as well as Verdross and Simma (note 12 above). Note also the view that "[t]he obligation to respect human rights is a general principle of law recognised by all civilised nations". Bossuyt M, "The UN and Civil and Political Rights in Chile" (1978) 27 *ICLQ* 467.

102 See the text preceding note 48 above. See also the observation by Van Boven that: "[i]t is, in terms of human rights law, difficult to draw a dividing line between the concepts of customary law and of general principles of law. It would seem that they substantially overlap...". Van Boven TC, "Survey of the Positive International Law of Human Rights", in Vasak K and Alston P (eds), *The International Dimensions of Human Rights* p87 at 107, Vol 1 (1982). Van Boven's approach differs somewhat from that suggested herein by virtue of his characterisation of general principles as "fundamental or suprapositive norms which lie at the basis of the whole human society". *Id.*

103 To use the phrase coined by the International Court of Justice in the 1966 *South West Africa* judgment: ICJ Rep 1966, p4 at 34.

104 See in general Rodley NS, "Human Rights and Humanitarian Intervention: The Case Law of the World Court" (1989) 38 *ICLQ* 321.

principles", among them "elementary considerations of humanity".¹⁰⁵ In its advisory opinion on *Reservations to the Genocide Convention* the ICJ observed that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".¹⁰⁶ We are all familiar with the distinction drawn in the *Barcelona Traction* judgment between mere bilateral obligations and the obligations of a State towards the international community as a whole. Such obligations *erga omnes* were seen as deriving, *inter alia*, "from the principles and rules concerning the basic rights of the human person".¹⁰⁷

In the *Tehran Hostages Case*, the Court stated that "[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".¹⁰⁸ And finally, in its *Nicaragua* decision the International Court evaluated certain activities of the U.S. on the basis of "fundamental general principles of humanitarian law", referring to its *Corfu Channel* dictum.¹⁰⁹ The least one can deduce from this choice of words is that if another case involving human rights issues, perhaps even more centrally, was brought before the Hague Court tomorrow, the Court would adhere to the tendency described by acknowledging fundamental human rights prescriptions as binding and part of peremptory international law without going into details about their formal source, but rather stressing their inherent authority and universal recognition.

In any case, the jurisprudence of the International Court cannot be read as lending support to the customary-law-of-human rights school. The same is true of the jurisprudence generated by decisions of high-ranking domestic courts outside the U.S. in human rights matters. Thus, the German *Bundesverfassungsgericht*, in a decision rendered in 1977, considered a minimum standard of human rights to be part of "general international law",¹¹⁰ while the *Bundesverwaltungsgericht* considered grave infringements of human rights, such as official torture, to be prohibited by "general principles of international law".¹¹¹ The Swiss *Bundesgericht* has viewed the prohibition of torture as a rule of *jus cogens*.¹¹² None of these decisions spoke of customary law in this regard.

¹⁰⁵ ICJ Rep 1949, p4 at 22.

¹⁰⁶ ICJ Rep 1951, p15 at 23.

¹⁰⁷ ICJ Rep 1970, p3 at 32.

¹⁰⁸ ICJ Rep 1980, p3 at 42.

¹⁰⁹ ICJ Rep 1986, p14 at 113-114.

¹¹⁰ 46 BVerfGE 342, 362; *semble* 60 BVerfGE 253, 303-304.

¹¹¹ (1985) 45 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 88.

¹¹² (1983) 39 *Annuaire suisse de droit international* 281-282.

8. Conclusion

To sum up then, the international protection of human rights has extended the scope of international law beyond hitherto accepted 'natural' boundaries. In the development of this new human rights law, international treaties certainly play the most obvious role and give rise to the least jurisprudential difficulties. However, in human rights as in any other branch of the law, participation in treaties is at the discretion of States, the substance of the relevant treaties is often unsatisfactory and sometimes there simply is no treaty around. Thus the need for additional sources of international human rights law.

The mainstream position, particularly in the United States, satisfies its appetite by resorting to a progressive, streamlined theory of customary law, more or less stripped of the traditional practice requirement, and through this dubious operation is able to find a customary law of human rights wherever it is needed. Against this tendency, we have sought first of all to ascertain on the basis of the human rights activities of States and international organisations those processes which may be considered as leading to the emergence of 'hard' customary law, conforming to traditional kinds of evidence. As the outcome of such processes we identified a general *droit de regard* in response to gross infringements of human rights and a correlative inroad into national sovereignty. As ways to ground substantive obligations to respect human rights in positive international law, we then sketched two approaches which are considered to be more acceptable under the premises of consensual international law-making. The first one arrives at general human rights obligations by treating the Universal Declaration of 1948 and the body of soft law following up and building upon it as an authoritative interpretation of the human rights provisions of the U.N. Charter. The second approach attempts to accommodate this very consensus within the triad of Article 38 of the ICJ Statute by regarding it as a "modern" method of articulating and accepting general principles of law. Admittedly, general principles have not fared too well as a source of international law, mainly due to their natural law flavour and the uncertainties surrounding the ways in which they are to be established and applied. But the acceptance of principles in the human rights field does not share this aleatory element: it is a decidedly *consensual* process, giving "a sufficient expression in legal form"¹¹³ to the underlying humanitarian considerations. International law has grown to encompass the protection of the human person spontaneously rather than out of a habit; in the development of human rights law principles have always preceded practice. Finally, law-making through international acceptance of general principles appears to be much better suited than customary law to meeting the requirements for the formation of *jus cogens*.

Throughout this paper we have sought to follow a strictly consensualist line of argument. Whether human rights need such backing from State practice and

¹¹³ Note 103 above.

consent in order to be valid¹¹⁴ is a different question. Louis Henkin said it well in his 1989 General Course at the Hague Academy:

[P]rinciples common to legal systems often reflect natural law principles that underlie international law. ... [I]f the law has not yet developed a concept to justify or explain how such general principles enter international law, resort to this secondary source seems another example of the triumph of good sense and practical needs over the limitations of concepts and other abstractions.¹¹⁵

¹¹⁴ See Koskenniemi note 25 above, pp 350–362 for an analysis of natural law elements in doctrine and ICJ jurisprudence on sources of international law.

¹¹⁵ Henkin L, "International Law: Politics, Values and Functions: General Course in Public International Law", 216 *Recueil des cours* 61–62 (1989–IV).