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NEW NATIONS AND THE INTERNATIONAL CUSTOM

S. PRAKASH SINHA*

INTRODUCTION

New states have emerged in Asia and Africa as part of the existing international system. They inject new interests, new conditions, and a new structure of social relations in this system. From their perspectives of the nature of law governing this system, they seek formulation of certain new rules of international law. Some of these are hoped to supersede certain traditional rules, and others to add to the existing ones. When the means for achieving this adjustment are searched, treaty is often believed to provide the answer. However, treaty binds only the parties to it and does not create general rules of international law. Moreover, treaty is possible only between the willing states. But the problem of achieving that adjustment of international law which is desired by the new states is limited neither to a small number of willing states nor with respect to a particular transaction. It is larger than treaty. While the useful role of treaty in achieving a limited, but nevertheless important, adjustment of law must not be underrated, it need be realized that a deletion or addition in the existing body of general international law cannot be achieved by treaty.¹ Consequently, resort must be had to international custom. Therefore, this article proposes to examine the significance of custom making in international law for the newly independent states of Asia and Africa.

PLACE OF CUSTOM IN THE NATURE OF INTERNATIONAL LAW

International law is a product of the practice of states during the past four centuries. It is customary. It came to be so as a consequence of a process of evolution and refinement. This law was known as the law of nations until Jeremy Bentham called it "international" in 1789,² and

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1. It is sometimes suggested that a multilateral treaty or convention would achieve this wider purpose. However, the concluding of the multilateral treaty has certain limitations, discussed later in this article, which make it hardly more expedient than the formulation of custom for establishing a new rule of international law.

2. The term international law first appeared in Jeremy Bentham's introduction to his book, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789).

it originated in the *jus gentium* of the classical period of Roman law. *Jus civile* governed the Romans and *jus gentium* referred to the special status granted to foreigners in Rome. This, in the western world, appears to be the first instance of a legal relationship with foreigners.³ A triple distinction of law is made in the Justinian compilation where the civil law, the law of nations, and the law of nature compose the scheme of law. The medieval Christian theologians seem to have later adopted this distinction in constructing their own ecclesiastical, or canon, law. Unlike the Roman law, the law of nature of these theologians postulated the existence of a higher authority than man and his legal systems.⁴ The law of nations was considered as man-made law of superhuman origin.⁵ Partly, at least, it grew from the positive law of human legislators, a fact which was first pointed out by Abélard and the French scholars of canon law in the twelfth century. The juristic thought of the later middle ages, notably at the beginning of the fourteenth century, viewed the law of nature as common to all peoples; it applied certain principles of the law of nations in both domestic affairs as well as in relations with other peoples;⁶ and it distinguished the civil law from both the law of nature and the law of nations.

Until the twelfth century, the view prevailed in the western world that the Roman custom, the *consuetudo communis*, applied throughout the known world. The emperors of the west were regarded by the medieval lawyer as law-givers not only for the occident but for the entire world, for the *universus orbis*.⁷ From the twelfth century onward, the Imperial power began to abate as the universal law-giver.

3. Cf. P. Guggenheim, *The Birth of Autonomous International Law*, in C. W. JENKS, *et al.*, *INTERNATIONAL LAW IN A CHANGING WORLD*, 80 (1963).

4. Thus, St. Augustine maintained in the fourth century that law eternal, or the law of nature, took precedence over temporal and secular law. St. Isidore, the Bishop of Seville in the sixth century, wrote in the fifth book of his *ETYMOLOGIES* that the origin of the law of nature rested in the natural instincts of man and not in any human legislative system.

5. This was the contention of certain medieval writers, such as St. Isidore in the sixth century, Gratian's decree published about 1140, St. Thomas Aquinas, and various other writers of the late thirteenth century.

6. These rules were applied in relation to all other peoples, Christian or non-Christian. Three centuries later, Grotius elaborated the notion into a concept that the application of the law of nations was not limited to Christendom alone. H. Grotius, *Mare Liberum* (1609) in *THE CLASSICS OF INTERNATIONAL LAW* 11 (R. van Deman Magoffin transl. 1916).

7. Contemporary practice supports this notion. For example, King Robert of Sicily invoked *pandects* and *codex* no less than twenty times in his instructions to his legates to the Pope in 1319. See P. Guggenheim, *supra* note 3, at 84.

Rulers claimed exemption from the Emperor's authority on legal grounds, such as prescription, privilege granted by the Emperor, ancient custom, and even assumption of irregular titles. Eventually, the Holy Roman Empire broke up, giving the final truth to the popular saying that it was neither holy, nor Roman, nor an empire. It was in the spirit of these times that Bartole wrote that "*civitates non recognoscunt superiorum* [states do not recognize a higher authority than their own]," and Balde stated that "*Rex in regno suo est imperator regni* [the king, in his kingdom, is emperor of that kingdom]." ⁸ With the fall of the Roman Empire a feudal system of authority emerged in Europe. There grew a world of warrior, priest, free farmer, serf, and the local trader. By the beginning of the seventeenth century, the western man had colonized the new world and moved eastward in quest of further trade. He also searched for a new ordering of the system of authority to control the rich life of this trade and intercourse. He found it not in a Roman state but in the nation-state. At first the warrior chief became the sovereign; but soon an impersonal sovereign emerged to take his place. It was the modern state. The state was sovereign. It was impersonal. It was separate from its prince, separate even from its government. It was a juridical entity by itself.⁹ The final step in the emergence of the modern system of states is represented by the Peace of Westphalia of 1648, which ended the Thirty Years' War.¹⁰ From the viewpoint of that system, the world was carved into various states.¹¹ The new states took shape along the Aristotelian concept of the *civitas perfecta*, that the state was self-sufficing. The civil law and the law of nature provided them their legal foundation. The law of nations provided them the governing principle for the juridical relations among themselves. It thus faded out of civil law and emerged as a law applicable exclusively to the inter-state relations. It was newly conceived. Its content now needed to be developed.

Vitoria (1480-1546) had advanced in 1557 the new concept of the community of nations, the *societas gentium*, which obeyed one law,

8. *Id.*

9. K. S. CARLSTON, *LAW AND STRUCTURES OF SOCIAL ACTION*, 132-133 (1956).

10. L. GROSS, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20 (1948).

11. As Professor Carlston has stated, although the structure of the world was so compartmentalized, neither the social action of the world could be so compartmentalized nor was one state able to achieve authority over all social action. The system thus failed to provide the necessary means of control for the social action of the world society even under the conditions of the world of 1648. CARLSTON, *supra* Note 9.

the *jus gentium*.¹² This law was either equated with or derived from the law of nature. In 1612, Suarez (1548-1617) viewed the law of nations as independent of the law of nature in certain respects.¹³ In 1625, Grotius (1583-1645) distinguished it completely from the law of nature and asserted its fully autonomous status, although he does not seem quite clear as to what rules belong to which laws.¹⁴ Later, particularly in the eighteenth century, the law of nations was claimed to prevail over the law of nature. Jurists, such as Christian Wolff (1679-1754) of Germany¹⁵ and Emerich de Vattel (1714-1767) of Switzerland,¹⁶ stripped the law of nature of its legal imperative and confined it to its moral influence, and Otto von Gierke (1841-1921) of Germany held that the role of the law of nations was independent of the civil law and the law of nature.¹⁷ Finally, the legal historians of the nineteenth century expounded that a legal system is valid to the extent of its effectiveness. That gave birth to the contemporary theory of positive law. International law is valid if it conforms to the actual practice of states.

Thus, when the first foundations of the newly conceived law of nations were being laid it was generally accepted that nature had given man universally^o valid inherent rights, which could be discovered through right reason. This law which nature gave man was a higher law to which all mankind was subject. At first it was thought that this higher law rested directly upon the conscience of rulers as individuals and thence upon states. Later, when the state itself was given juridical personality, the law of nations became that branch of the law of nature which applied to the society of states. This conception of the law of nations had profound influence on it in its early formative stages in the seventeenth and the eighteenth centuries. But since it was impossible to found an objective legal system upon so subjective a basis as a

12. F. DE VITORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* (1557) (ed. E. Nys 1917).

13. F. Suarez, *De legibus, ac Deo Legislatore*, (1612), Ch. XIX, §§ 1, 2 in *CLASSICS OF INTERNATIONAL LAW*, (1944).

14. H. Grotius, *De Jure Belli ac Pacis Tres* (1625), Prolegomena (*corresponding to* §§ 40 and 41 of the translation by F.W. Kelsey), Ch. I, § XIV, (*CLASSICS OF INTERNATIONAL LAW*, 1913).

15. C. WOLFF, *INSTITUTIONES JURIS NATURAE ET GENTIUM, IN QUIBUS EX IPSA HOMINUS NATURA CONTINUO NEXU OMNES OBLIGATIONES ET JURA OMNIA DEDUCUNTUR*, Ch. II, 12 ff. (1769).

16. E. de Vattel, *Le droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, (1758), Preliminaires, §§ 26, 27, in *CLASSICS OF INTERNATIONAL LAW*, (1916).

17. O.F. VON GIERKE, *DIE GRUNDBEGRIFFE DES STAATSRICHTS UND DIE NEUESTEN STAATSRICHTSTHEORIEN*, UNVERÄNDERTER ABDRUCK DER IN DER ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT, (1915).

revealed law of nature, it gave way in the nineteenth century to the positivist approach, according to which what is law and what should be law are not necessarily the same thing. What the international law is can be discovered only by an examination of the practice of states and the principles upon which this practice is based. The validity of this law is sought in the common consent of states. Substantial uniformity of practice becomes evidence of the existence of the convergence of the wills of the states, which produces a rule that binds a state without reference to its particular consent. Scientific methodology has been used to develop the content of the principles of international law along these lines. International law is created by a general recognition among states of a certain practice as obligatory. It is customary. Its existing rules are a product of international custom. Originating in common consent of states, they bind all states without requiring the particular consent of any state. Treaty creates binding rules too, but whether bilateral or multilateral, it does not bind states not party to it. It is custom which creates rules of general application. Treaties may facilitate creation of customary law when same provisions are adopted with respect to a particular matter by different sets of states in a regular succession. Such a treaty pattern may generate a general norm. But it acquires its authority of general international law not from the treaties themselves, but from the practice of states which the treaties prompted and evidenced.¹⁸ Thus, in the final analysis, custom is of natal significance to international law.

THE NEW STATES AND THE EXISTING INTERNATIONAL LAW

As seen above, the existing body of international law is a product of international custom, established almost entirely during a period when the newly independent states of Asia and Africa were excluded from its formative process,¹⁹ for they were not states then. During that period the economic conditions, the structure of social relations, and the interests for which the rules of international law were developed were different from, and at times conflicting with, those of the new states of Asia and Africa. Consequently, upon emergence as states, they criticize or reject certain of the existing rules which tend to prejudice their interests, although they have neither denied the very system of international law nor rejected its rules entirely. They have also shown

18. H. Waldock, *General Course on Public International Law*, Académie de droit international de la Haye, 106 *RECUIL DES COURS* 1, 40-41 (1962).

19. Recent rules as to the continental shelf are an exception.

interest in the development of such new rules as would help promote their interests.²⁰ In addition, they are interested in the growth of what may be called an emerging law of world society which, as distinguished from the traditional international law composed of binding rules governing inter-state relations, includes

all those rules which are not purely domestic law but nevertheless possess a legal quality and purport to control the action of the participants in international society, including states, international organizations, public and private corporations, and individuals.²¹

The emergence of this law has been generated by the increasing volume as well as the varied facets of international action in recent years, which are increasingly transforming the international society into a world society.²² The new states desire a development of this law. For example, the economic needs of these states have created a phenomenon of international economic development, as distinguished from the traditional international economic ventures,²³ which has given rise to the need for a body of rules and principles to govern the legal aspects of this phenomenon. Neither classic international law nor national laws are adequate to meet this need entirely.²⁴ Consequently, the institutions and

20. The attitudes of these states toward rules of international law, the conditioning factors for their attitudes, and the significance of these attitudes for international law have been analyzed in detail in S.P. SINHA, *NEW NATIONS AND THE LAW OF NATIONS*, (1967).

21. Carlston, *Book Review*, 17 J. LEGAL ED. 472, 473 (1965). Cf. Ross' *intern statsfoellesskabsret* (A. Ross, *Laereog i Folkeret*, 4. udg., 32 (1961)), and Verdross' *interne Staatsoemeinschaftsrecht* (A. Verdross, *Règles générale du droit international de la paix*, Académie de droit international de la Haye, 30 RECUEIL DES COURS 275, 311 (1929)).

22. An exploration of this phenomenon is found in W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, (1964).

23. The concept of economic "development" involves non-economic factors of an economic process. It has a political motivation. It describes the powers of social and cultural change which produces results that cannot be measured in economic terms. J.N. Hyde, *Economic Development Agreements*, Académie de droit international de la Haye, 105 RECUEIL DES COURS 271, 273-274 (1962); R.E. ASHER, *DEVELOPMENT OF THE EMERGING COUNTRIES*, Ch. 2 (1962).

24. The phenomenon has presented two categories of legal situations; one involving inter-state relations where international law applies, the other which are not governed by public international law, as in the case of those agreements of economic development where one of the contracting parties is a private party and the other is a developing state. Since, in the latter situation, public international law does not apply directly, the problem would ordinarily be one of choice of law and the rules of private international law, or conflicts law, would suggest the territorial law of one state or the other to apply in a particular situation. However, many of the developing countries are governed

practices of international economic development are creating an international law of economic cooperation²⁵ which, as distinguished from the traditional international law, forms part of the emerging law of world society.²⁶ The new states are interested in its growth.

As to the existing body of international law, which is the matter of our primary concern here, the new states desire an adjustment to achieve, first, the deletion from it of those rules which tend to prejudice their interests, and, second, the addition to it of such rules as would help promote and realize their own interests.

EFFECT OF AN ATTITUDE OF DISAPPROVAL UPON A CUSTOMARY NORM

Of relevance, then, is the question that what is the effect of a state's attitude of disapproval of an existing rule of international law. As seen above, rules of international law which have general application are established by international custom, and once thus established they are binding upon a state without reference to its particular consent. Accordingly, an existing rule of international law is neither lapsed nor diminished by a state's disapproval of it. It prevails until a countervailing practice of states is established. Furthermore, when a new state emerges it is deemed bound by all the existing rules of international law. Therefore, under the generally accepted principles of international law, the critical attitude of the new states of Asia and Africa toward a certain rule is not sufficient either to change the rule or to exempt them from its application. However, the fact that these states constitute a majority of states today, and a considerably large majority when put together with similarly dissatisfied Latin American states, has consequences even within the framework of the doctrine stated above. These consequences are twofold. First, although the critical attitude of these states is not sufficient to change an existing rule, it does indicate what their state practice can be expected to be. If a large majority of states follows a divergent practice concordantly, with a view to establishing it as a rule of law, this may at least tend to create a countervailing practice which might eventually establish a new rule

by some system of law which has not yet been developed to deal adequately with contracts of this type. Thus, neither classic international law nor national laws are adequate for the need.

25. This development has been taking place through, for example, international development agreements of various types, treaties between states providing capital and skill and states receiving them, and organization and structuring of international financial organizations.

26. SINHA, *supra* note 20, at Ch. II.

to supersede the traditional one. Second, although under the doctrine stated above the attitude of the new states may not determine the existence of a rule of international law, it becomes significant in determining whether a general consensus still exists upon the traditional norm.²⁷ If a rule of international law does not have the support of a large sector of the international community, it would, at least, lack that foundation which is necessary for its successful functioning.²⁸ The principle, however, remains that an attitude of disapproval is not sufficient by itself to change a customary norm.

MEANS FOR THE DESIRED ADJUSTMENT OF INTERNATIONAL LAW

What, then, are the means available to the new Asian and African states for achieving the desired deletion or addition of rules of international law? Since these states have accepted the system of international law, if not all of its rules, the means for the desired adjustment of the corpus of international law must be sought, even from the viewpoint of these states, within the framework of this system. These means correspond to the sources of international law. Article 38(1) of the Statute of the International Court of Justice seems to be an adequate enumeration of these sources, although there is some doubt whether the statement contained in subparagraph 1(b) of the article corresponds to the prevailing practice and views.²⁹ According to this article the Court,

whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provision of Article 59 [The decision of the Court has no binding force except between the parties and in respect of that particular case.], judicial decisions and the

27. Q. Wright, *Custom as a Basis for International Law in the Post-War Period*, 2 TEXAS INT'L L. F. 147, 148-149 (1966); Q. Wright, *Custom as a Basis for International Law in the Post-War World*, 7 INDIAN J. INT'L L. 1, 2 (1967).

28. R. Pal, *Future Role of the International Law Commission in the Changing World*, 9 UNITED NATIONS REVIEW 29, 31 (1962).

29. See, e.g., K. WOLFKKE, *CUSTOM IN PRESENT INTERNATIONAL LAW*, 166 (1964).

teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.³⁰

Judicial decisions and juristic opinions do not create rules of international law. They help ascertain these rules only as subsidiary means. The binding force of decisions of an international court is limited only to the parties to the dispute and in respect to the particular case. The teachings and opinions of publicists have no binding force at all. The general principles of law recognized by civilized nations make it possible to develop and elaborate international law either by analogy to principles common to the important systems of municipal law or by deduction from accepted principles of justice. But these cannot establish new rules in derogation of the existing ones. Therefore, they cannot be relied upon for the adjustment of the content of international law as desired by the new states, except perhaps in developing new rules for those matters for which no rules exist at all.

This leaves international custom and treaty. Generally, custom is regarded as a slow process. Therefore, it is not considered completely satisfactory for achieving the desired adjustment of law, although exceptionally its pace can be faster in comparatively non-controversial matters, as for example, in establishing the rules for continental shelf. Conclusion of treaties is a much faster process than establishment of custom. However, treaty does not bind states not parties to it. The objective of the desired adjustment of law may still be achieved to a large, if not full, extent through general and multilateral treaties.³¹ But the process of negotiating them and achieving their universal, or even general, ratification is slow, too. Therefore, although the technique of general multilateral convention may appear at the first blush a more efficient and speedy device than international custom, it is doubtful whether it is more efficacious than the process of establishing custom for achieving a change in general rules of international law on a universal basis, especially if it involves controversial matters.³² It is not

30. Statute of the International Court of Justice, T.S. 993.

31. Judge Hudson called this "international legislation." M.D. HUDSON, *INTERNATIONAL LEGISLATION*, Vol. I, xiii-xiv (1931).

32. Lord McNair states this difficulty when he concludes, after a study of the European Convention of 1950 for the Protection of Human Rights and Fundamental Freedoms, that "in the sphere of international relations it is often easier to proceed upon a regional than on a universal basis." McNAIR, *THE EXPANSION OF INTERNATIONAL LAW*, 28 (1962).

the intention here to understate the very important role which general and multilateral treaties or conventions play in the development of international law, and no argument is made here to discourage the use of this device in the progressive development of international law. But the expectations from this device must not be exaggerated for either deleting an old rule or introducing a new one in the body of general international law. General multilateral treaties and a regularly repetitive pattern of bilateral treaties on a particular matter may give rise to general norms, which, given sufficient concordance of practice, may acquire authority of a general rule of international law, the requisite attitude of regarding the practice as obligatory being implicit in the fact of convention or treaty. The new rule would emerge in this manner not as a direct consequence of treaties and conventions, but because an international custom has been created by the practice of states.

Thus, under the existing theory of international law, the formative process of this law, as distinguished from that of the law of world society mentioned earlier, is dominated by custom. The means available to the new states for achieving the desired adjustment in its rules of general or universal application must be sought in its custom-making process.³³ The adjustment of particular application may be achieved by means of treaty among states which are willing to conclude it. But the treaty would bind only those states which are party to it, or, in other words, the willing states, and not others. The adjustment of general application is a function of the custom-making process of international law.

THE PROCESS OF ESTABLISHING NEW CUSTOM

Thus, from the viewpoint of the new Asian and African states, the next question is: What procedures are available to establish a new rule

33. When the new states of Asia and Africa effect the change on their own, without waiting for it to be incorporated in the corpus of international law in accordance with the existing theory of international law, they justify their action by arguing that the traditional rule disputed by them is not a neutral rule of law which could possibly resolve a conflict between a western and a non-western state, but, rather, it is a statement of western interests and how best they have been achieved in the past. According to them, it may represent a policy for promotion of western interests, but it really is not a rule of law applicable to the present structure of the society of states. If this so-called rule is a statement of western interests and of their superior position to the interests of the emerging nations, the new states of Asia and Africa are not disposed to accepting it as creating legal obligations upon them, because this is precisely what they had rebelled against under the rubric of independence from colonialism. SINHA, *supra* note 20, at 143-144.

of customary international law, whether superseding an old rule or adding to the existing one. In other words, what is the process of custom making in international law?³⁴

The process of formation of international custom is not spelled in law. Its source is the way of life of the international community, whose product it is.³⁵ The process of its formation is a continuous phenomenon, international relations themselves being a continuous process.³⁶ The precise moment when a customary norm begins to have binding effect is intangible and cannot be ascertained.³⁷ Nor is it necessary for the legal solution of a problem to know that precise moment. It is sufficient to know whether the alleged rule existed at the moment claimed.

Certain writers have attempted an explanation of the mechanism of the formation of international custom either in terms of the custom-creation process of the municipal law, or by analogy to it. For example, the mechanism is viewed as repetition of actions in similar situations,³⁸ or acts receiving assent of the international society and achieving obligatory character by being recognized as such,³⁹ or general acceptance

34. This is different from the problem of establishing the elements of an international custom, which have generally been accepted to be (a) a general practice, and (b) its acceptance as law.

35. L. GOULD, *AN INTRODUCTION TO INTERNATIONAL LAW*, 139 (1957).

36. Y. GOUET, *LA COUTUME EN DROIT CONSTITUTIONNEL INTERNE ET EN DROIT CONSTITUTIONNEL INTERNATIONAL*, 57 (1932); G. GIANNI, *LA COUTUME EN DROIT INTERNATIONAL*, 168 (1931).

37. P. Guggenheim, *Les deux éléments de la coutume en droit international*, in *LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC. ETUDES EN L'HONNEUR DE GEORGES SCHELLE*, Vol. I, 275, 281 (1950); J. Basdevant, *Règles générales du droit de la Paix*, Académie de droit international de la Haye, 58 *RECUEIL DES COURS* 471, 534-535 (1936); S. HUBERT, *PRAWO NARODÓW, Cz. I: EWOLUCJA, Cz. II: ZASADY OGÓLNE* [The Law of Nations, Vol. I: Evolution, Vol. II: General Principles], Vol. II, 4-5 (1949); M. SORESENSEN, *LES SOURCES DU DROIT INTERNATIONAL*, 111 (1946); K. WOLFE, *supra* Note 29, at 61.

38. Fauchille explains:

Comment s'établit la coutume? Comme se sont établie toutes les coutumes: par la répétition d'actes semblables. Une relation internationale s'étant produite, les Etats intéressés l'ont traitée d'une certaine façon. La même relation s'étant reproduite à plusieurs reprises, entre les mêmes ou entre d'autres Etats, le même traitement lui a été appliqué—Cette répétition d'actes semblables démontre que la conduite suivie répond aux exigences de la situation. Pourquoi ne serait-elle pas aussi la conduite de l'avenir pour les hypothèses futures?

P. FAUCHILLE, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC*, Vol. I, 42 (8th ed., 1922).

39. J. Basdevant, *Règles générales du droit de la paix*, Académie de droit international de la Haye, 58 *RECUEIL DES COURS*, 475, 534-535 (1936). He explains that custom naît des besoins de la société internationale, s'extériorise par des faits qui, recevant l'assentiment, lui donnent le caractère positif par le procédé de la reconnaissance. La règle, plus ou moins postulée par les exigences de la vie

of a judicial order,⁴⁰ or generalized repetition of similar acts by competent agents of states,⁴¹ or any other similar pattern.⁴² Certain other writers have attempted the explanation in terms of the international life itself. For example, rules of international law are viewed as expectations of pattern of behavior and uniformity of practice resulting from the reciprocal tolerances of the decision-makers in international relations.⁴³ The theory that customary rules of international law represent

internationale, s'affirme dans un cas concret par ce qui n'est, en soi, que l'opinion d'un ou de plusieurs gouvernements ou celle d'un juge international. *Id.*

40. According to de Visscher,

Dans les rapports internationaux, une coutume se forme quand une pratique, par ses applications concordantes, paraît suffisamment implantée pour que l'on puisse y voir l'expression d'un équilibre et d'une stabilisation au moins provisoire des intérêts en présence, par conséquent comme l'élément d'un ordre juridiquement accepté par la généralité des Etats. Elle tend à disparaître quand, avec l'apparition de besoins ou d'intérêts nouveaux, se dessine, généralement incertaine à ses origines, plus ferme par la suite, une pratique différente ou contraire: le droit n'accorde sa consécration à cette orientation nouvelle qu'autant qu'il y découvre les bases généralement acceptables d'un ordre nouveau. C. de Visscher, *Coutume et traité en droit international public*?

59 *RÉVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 353, 356-357 (1955).

41. M. SIBERT, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC—LE DROIT DE LA PAIX*, Vol. I, 32 (1951).

La coutume naît de la répétition généralisée d'actes semblables par des agents compétents d'États qui, se trouvant dans une situation de fait identiques, considèrent ces actes comme *juridiquement nécessaires* pour la maintien et le développement des rapports internationaux.

Id.

42. See, e.g., T. GIHL, *THE LEGAL CHARACTER AND SOURCES OF INTERNATIONAL LAW*, (Acta Universitatis Stockholmiensis, Studia juridica Stockholmiensia, No. 1), 77 (1957).

43. According to McDougal, "it is not of course the unilateral claims but rather the reciprocal tolerances of the external decision-makers which create the expectations of pattern and uniformity in decision, of practice in accord with rule, commonly regarded as law." M.S. McDougal, *The Hydrogen Bomb Tests and International Law of the Sea*, 49 *AM. J. INT'L L.* 356, 358, n. 7 (1955). He explains that

[f]rom the perspective of realistic description, the international law of the sea . . . is . . . a process of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and

toleration of expression of claims by other states has been applied by certain writers with respect to certain particular areas of this law, such as the law of the sea,⁴⁴ or of outer space.⁴⁵ Others find it valid for customary international law as a whole.⁴⁶ It is beyond the scope of this

expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.

Id. at 356-357. Similarly, G. Tunkin, writes that

proces stanovlenia obycnoi normy mezdunarodnogo prava, tak ze kak i dogovornoj normy, iest proces borby i sostrudnicestva gosudarstv. Formirovane obycnogo pravila proischodit w rezultate obscenia gosudarstv, gde kazdoe gosudarstvo stremitsa k tomu, ctoby zakreplit w kacestve normy povedenia take pravila, kotorye sootvetstvovali by iego interesami.

G. TUNKIN, *VOPROSY TEORII MEZDUNARODNOGO PRAVA*, 85 (1962).

44. For example, Bierzanek writes that the idea that the right of using the high sea cannot be unlimited and that it must be of necessity, as a consequence of the utilization by other states, be subject to limitations is correct. R. BIERZANEK, *MORZE OTWARTE W SWIETLE PRAWA MIEDZYNARODOWEGO* [The High Sea in the Light of International Law], 306 (1960).

45. For example, Machowski (Counselor, Polish Mission to the United Nations), maintains that

whether state sovereignty extends into outer space, has already been tacitly answered negatively by practice and lack of protests on the part of any states in connection with the orbiting of space objects over their respective territories.

J. Machowski, *Selected Problems of National Sovereignty with Reference to the Law of Outer Space*, 55 *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 169, 171 (1961).

Similarly, Johnson (General Counsel, National Aeronautics and Space Administration [of the United States]) states that

[d]uring the past three and one-half years, numerous satellites launched by both the United States and the Soviet Union have repeatedly passed over the territory of every nation on earth. No permission was sought in advance, none was expressly given by any state, and not a single protest has been registered by any other states.

From this he concludes that

no state has the right to exclude other states from the use of any part of "outer space" above this altitude [about 100 miles]. The alternative theory is that, so long as the upward limit of territorial sovereignty is not defined by explicit agreement, the practice of the past three and a half years serves only to establish a right of passage for spacecraft of a scientific, exploratory, and non-military nature; but that the claim of territorial sovereignty might legally still be invoked to exclude other types of spacecraft serving other purposes.

J. Johnson, *Remarks*, 55 *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW*, 165, 167 (1961).

46. For example, MacGibbon suggests that

[t]his description of the forces at work in the formation of the law in a particular sphere is—for the most part—valid in relation to customary international law as a whole; and it may usefully be elaborated in order to

article to describe the sociological process of the mechanism and how it gives birth to international custom. However, from the viewpoint of the new states it is necessary to observe how the mechanism is put into motion so as to achieve the objective stated above.

From this perspective, a functional view may be taken of this mechanism. There are two aspects of this function. First, the initiation of a possible norm. Second, the promotion of its general acceptance as a norm.⁴⁷ The proposed rule must be suggested to the members of the society of states, and efforts must be made to achieve its adoption by them as an imperative mode of inter-state behavior. The performance of these two aspects of the function does not admit of a sharp distinction. The same device or instrumentality often performs both. It may initiate a possible norm as well as help promote its acceptance by states. The initiation of a proposition may take place through, for example, writings of individual jurists,⁴⁸ decisions of courts and tribunals,⁴⁹ in-

clarify the function of acquiescence in the development of international custom.

I.C. MacGibbon, *Customary International Law and Acquiescence*, 33 THE BRITISH YEARBOOK OF INTERNATIONAL LAW 115, 116 (1957).

According to Wolfke,

[t]he most essential element of that mechanism [of the formation of international custom] consists in conduct being expression of certain claims, and the toleration of such conduct (hence claims) by other States. One might say that the general balance of the practice of States, and attitude to such practice, in a certain section of international life—such attitudes accruing or cancelling each other—comprises the current binding customary law in that section. K. WOLFKE, *supra* Note 29, at 65.

For the perception of international custom as the sum total of facts of conduct of states, see also P.I. LUKIN, *ISTOCNIKI MEZDUNARODNOGO PRAVA*, 77 (1960).

47. WRIGHT, *supra* Note 27, at 157, presents a somewhat similar view of the process when he states that to

establish new norms of customary law requires (1) procedures for formulating and publicizing norms likely to be generally acceptable to states and adequate to meet a new situation, and (2) procedures for facilitating the observance, recognition or acquiescence in such norms by all states.

48. The extent to which the classical writers formulated rules of international law in its early development was considerable. However, even today, the influence of the opinion of jurists and publicists cannot be disregarded. C. ROUSSEAU, *PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC*, 818 (1949); M. Sorensen, *supra* Note 37, at 189,190; G.I. TUNKIN, *supra* Note 43, at 142-143.

49. L. Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 THE BRITISH YEARBOOK OF INTERNATIONAL LAW 127, 143 (1937); G. SCHWARZENBERGAR, *INTERNATIONAL LAW*, Vol. I, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS*, 62, 63-66 (3rd ed., 1957); S.B. Krilov, *Les notions principales du droit des gens*, Académie de droit international de la Haye, 70 RECUEIL DES COURS 411, 443 (1947).

ternational usage,⁵⁰ international agreements or treaties, whether bilateral or multilateral,⁵¹ executive declarations,⁵² legislative enactments,⁵³ and practice of international organizations.⁵⁴ In addition to initiating possible norms many of these instrumentalities may also promote their general acceptance by states. It is for the policy-makers of the new states to use these devices and instrumentalities, available within the framework of the existing international system, to achieve the desired adjustment of customary international law. That this is realized by

50. As has been said, G.A. Finch, *Les sources modernes du droit international*, Académie de droit international de la Haye, 53 RECUEIL DES COURS 535, 585 (1935).

Un autre facteur qui a contribué au développement du droit international, et qui doit être étudié par rapport à la coutume, est la courtoisie internationale (Comity of Nations). . . . Le droit international d'aujourd'hui doit beaucoup à la courtoisie internationale, dont ses règles souvent dérivent.

See also G. DAHM, *VÖLKERRECHT*, Vol. I, 33 (1958); J. KOSTERS, *Les fondements du droit des gens*, 4 BIBLIOTHECA VISSERIANA 115, 228 (1925); T. GHIL, *THE LEGAL CHARACTER AND SOURCES OF INTERNATIONAL LAW*, (Acta Universitatis Stockholmiensis, Studia juridica Stockholmiensia, No. 1) 80-82 (1957); L. OPPENHEIM, *INTERNATIONAL LAW*, (ed. by H. Lauterpacht), Vol. I, 25 (7th ed., 1948).

51. As Waldock says, treaties "not infrequently served as an instrument for the creation of customary law when, in dealing with a particular matter, different pairs of States adopted the same treaty provisions in a regular succession of bilateral treaties." H. WALDOCK, *supra* note 18, at 40. See also J. KOSTERS, *supra* note 50, at 221; A. DERYNG, *GLÓWNE TENDENCJE ROZWOJU PRAWA NARÓDÓW W ŚWIELE ORZECZNICTWA STALEGO TRYBUNALU SPRAWIEDLIWOSCI MIĘDZYNARODOWEJ* [The Principal Trends of Development of the Law of Nations in the Light of Decisions of the Permanent Court of International Justice], 39 (1932); N. MATEESCO, *LA COUTUME DANS LES CYCLES JURIDIQUES INTERNATIONAUX*, 250-254 (1947); SCHWARZENBERGER, *INTERNATIONAL LAW*, 563; P.I. LUKIN, *ISTOCNIKI MEZDUNARODNOGO PRAWA*, 87 (1960); P. GUGGENHEIM, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC, AVEC MENTION DE LA PRATIQUE INTERNATIONALE EN SUISSE*, Vol. I, 51-52 (1953).

52. Q. WRIGHT, *supra* note 47, at 157-161; L. GOULD, *AN INTRODUCTION TO INTERNATIONAL LAW*, 610 (1957).

53. GUGGENHEIM, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC*, Vol. I, 50-51; L. KOPELMANAS, *supra*, note 49, at 147-148; Sorensen, *Les sources*, 91; Rousseau, *Principes généraux*, 850-853; G.A. Finch "Les sources modernes," *supra* note 50, at 583; Mateesco, *La coutume*, 220; L. Siorot, *Les lacunes en droit international (Etudes de la fonction judiciaire)*, 345-364 (1958); Q. Wright, "Custom," *supra* note 47, at 157-161; S.B. Krilov, *supra* note 49, at 444; Lukin, *Istocnik*, *supra* note 46, at 131; Tunkin, *Voprosy*, *supra* note 43, at 142-144. See generally H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW*, (1927).

54. C.W. JENKS, *THE COMMON LAW OF MANKIND*, 175 (1958); Q. WRIGHT, *supra* note 47, at 157-161; L. KOPELMANAS, *supra* note 50, at 132-138; M. Sorensen, *Principes de droit international*, Académie de droit international de la Haye, 101 RECUEIL DES COURS 1, 37-38 (1960); M. LACHS, *Współczesne organizacje międzynarodowe i rozwój prawa międzynarodowego*, 12 *PARISTOW I PRAWO* 827-836 (1963); K. Skubiszewski, *Kompetencje prawodawcze wspólnot europejskich*, 1962 *PRZEGLĄD ZACHODNI* 10, 229; S. HUBERT, *Prawo narodów*, Vol. II, 3-4 (1949); TUNKIN, *supra* note 43, at 123-134.

these states is evident from their activity in this direction in, for example, the proceedings of the International Court of Justice, the International Law Commission, the Sixth (Legal) Committee of the United Nations General Assembly, the Asian African Legal Consultative Committee, the special conferences dealing with issues of international law convened by the United Nations and other international organizations, the decisions of their national courts in cases bearing upon the issues of international law, and the relevant proclamations, notifications, and declarations of their governments. From these sources expectations as to the practice of these states may reasonably be constructed.⁵⁵

CONCLUSION

So far as the existing body of international law, as distinguished from the emerging law of world society, is concerned, the new states of Asia and Africa desire a certain adjustment of it so as to reflect and promote their own interests as well as those of western states, and not merely the latter. This has brought certain existing rules in dispute. Since the new states have accepted the system of international law, the means available to them for the desired adjustment must be sought within the framework of this system. Custom is of natal significance to this system. The creation of a new rule of general application, limited neither to a small number of willing states nor to a particular transaction, either superseding an existing rule or adding to the existing ones, is a function of international custom. Treaty may bring about a particular adjustment concerning a certain transaction among willing states. But if the objective is an adjustment of international law itself, resort must be had to international custom. From a functional point of view, custom creation involves the initiation of the desired norm in the society of states and obtaining its adoption by them as an imperative mode of interstate behavior. A number of devices are available for achieving the performance of these functions. It is for the new states to use them. Evidence suggests that they have made some such use.⁵⁶

55. This has been attempted in SINHA, *supra* note 20.

56. This evidence may be found in *Id.* at Part II, Chs. IV-XI.