State immunity and cultural objects on loan
van Woudenberg, N.

Citation for published version (APA):
van Woudenberg, N. (2011). State immunity and cultural objects on loan

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
Chapter 2  The notion of customary international law

“It is indisputable that national anti-seizure legislation must be taken as relevant State practice and an expression of opinio juris.”¹

Since in this study I examine the question whether cultural objects belonging to foreign States are immune from seizure on the basis of customary international law while loaned to another State for a temporary exhibition, a short chapter on customary international law cannot be absent in this study.

Without going into too much detail² on whether and when a rule could be considered as a rule of customary international law, certain questions need to be raised and answered. Such as: what is necessary for a rule of customary law to be established? When can we consider something as being a rule of customary international law? What constitutes State practice? How much practice is needed? How much consistency is required? What evidence is required of opinio juris? And more questions can be asked. I will therefore touch upon custom as a source of international law, address State practice and opinio juris, and will illustrate my text with several judgments of the International Court of Justice.

2.1 Custom as a source of international law

For centuries, customary law has been the main and most important source of international law, evolving from the practice of States. Nowadays, although still of utmost importance,


customary law is one of the various sources of international law. This can be illustrated by the Statute of the International Court of Justice that acknowledges the existence of customary international law in Article 38(1)(b) and forms an integral part of the UN Charter by virtue of Article 92 of the Charter. Article 38(1) of the Statute reads:

“The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
  b. international custom, as evidence of a general practice accepted as law;
  c. the general principles of law recognized by civilized nations;
  d. subject to the provisions of Article 59, judicial decisions and the teachings by the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

Since all member States of the United Nations are ipso facto parties to the Statute by virtue of Article 93 of the UN Charter, it may be assumed that Article 38(1) expresses “the universal perception as to the enumeration of the sources of international law”. In the Nicaragua case it appeared that customary law can be an extremely important source of international law, even if the norms belonging to treaty law and customary law are identical in content. The International Court of Justice (ICJ) stated:

“There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty law and on that of customary international law, these norms retain a separate existence […]”

---

3 In 1997, it has been stated in literature that customary law has still retained its predominance over treaty law or other sources in several areas, such as State immunity. See: Ibid. (Malanczuk), p. 35. Meanwhile, the 2004 UN Convention on Jurisdictional Immunities of States and Their Property has been adopted. However, the convention did not yet enter into force.

4 The Statute can be found on the website of the International Court of Justice: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0. [Last visited 27 May 2011.]

5 Article 92 of the UN Charter: “The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.”

6 Article 93 of the UN Charter: “All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice. […]”


8 Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America, Merits, Judgment, ICJ Reports 1986, p. 14, hereinafter the Nicaragua case. In this case, Nicaragua accused the United States of recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing (para)military actions in and against Nicaragua, and that by these actions the United States had violated its obligations under international law to Nicaragua. See: Summary of the Judgment of 27 June 1986, to be found at http://www.icj-cij.org.

9 Ibid., pp. 14, 95.
Thus, both treaty law and customary international law are separate sources of international law. Treaties are written conventions and bind only those States which have expressed their consent to be bound by them, usually through ratification or accession. Customary international law, on the other hand, is unwritten, and because of that it may be difficult to prove that a certain rule can be considered as a rule of customary international law. However, the distinction is not that strict as presented here: customary international law can be embodied in a treaty, or treaty provisions may become customary law.

In practice, the drafting of treaty norms may have a very considerable influence on the subsequent behaviour and legal convictions of States. The International Court of Justice recognised this already in the North Sea Continental Shelf cases, but formulated in its judgment in the Continental Shelf case very accurately that “[...] multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.”

It happens regularly that certain States are not a Party to important conventions. If the rules in those conventions can be considered as customary law, then those States are bound by those rules, although they are not a Party to the convention concerned. Furthermore, there may be situations or areas where a convention does not yet exist. It can thus be important to know whether a rule of customary international law is existing.

Before a rule of customary international law exists, it first needs to be formed. The starting point can be the conduct of one single State, which is followed by others. A proposal made

---

10 The Vienna Convention of the Law of Treaties (Vienna, 23 May 1969; 1155 UNTS 331) gives in Article 2(1)(2) the following definition of a treaty: “An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”
11 There is no hierarchy between custom and treaties; they are of equal status. See also: Abdul Ghafur Hamid, ‘Sources of International Law: a Re-evaluation’, International Islamic University Malaysia Law Journal, 2003, Vol. 11, No. 2, pp. 203-240, para. 8. See also: op. cit. n. 2 (Malanczuk), p. 56.
12 North Sea Continental Shelf cases, Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands, ICJ Reports 1969, p. 3. The North Sea Continental Shelf cases concerned a dispute between Germany, on the one hand, and the Netherlands and Denmark, on the other hand, with regard to the delimitation of their respective continental shelves.
by the International Law Commission can also be a point of departure, especially when in the end adopted by consensus by the international community of States. Such a proposal is normally followed by comments from States and deliberations between States,\textsuperscript{15} for instance in the Sixth (Legal) Committee of the UN General Assembly. In Chapter 3, we will see that process in regard to the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. As provisions of treaty law can eventually become customary law, also a convention (or a provision thereof) can be the starting point of the formation of a rule of customary international law. But what in the end matters the most, is whether States exhibit a certain pattern of conduct, thereby giving rise to a rule which is suitable to be transformed into a rule of customary law.\textsuperscript{16}

It is important that the rule is being applied in practice. Customary international law is built on repetition. A convention is a written text and characterised by its explicit acceptance by the parties to it; a rule of customary law is to be distinguished from treaty law through repeated practice. To use the words of H. Meijers: “Without repetition of similar conduct in similar situations there can be no custom, and without custom, there can be no customary law.”\textsuperscript{17}

2.2 State practice and opinio juris

In order to be considered as a rule of customary law, a rule needs to be based on a widespread, representative and virtually uniform practice (or usage) of States, accompanied by the conviction that this practice is accepted as law\textsuperscript{18} (often referred to as \textit{opinio juris}).

The ICJ noted in the \textit{North Sea Continental Shelf} cases:

“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the \textit{opinio juris sive necessitatis}. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”\textsuperscript{19}

\textsuperscript{15} See related to this also the positions of Denmark and the Netherlands in the \textit{North Sea Continental Shelf} cases, \textit{op. cit.} n. 12, pp. 3, 55.
\textsuperscript{16} \textit{Ibid.}
\textsuperscript{17} \textit{Op. cit.} n. 14 (Meijers), p. 16 (Dutch version); p. 13 (English version).
\textsuperscript{18} As stated in Article 38(1)(b) of the Statute of the International Court of Justice.
\textsuperscript{19} \textit{Op. cit.} n. 12 (\textit{North Sea Continental Shelf} cases), pp. 3, 44.
And in the *Continental Shelf* case, the ICJ stated that the substance of customary international law must be “looked for primarily in the actual practice and *opinio juris* of States”:

“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining the rules deriving from custom, or indeed in developing them.”

Thus, we see here that the determination of whether there is a rule of customary law depends upon two elements: general State practice and *opinio juris* of States. Or, as the ICJ states: “The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.”

The International Law Association has pointed out that customary law by its very nature is “the result of an informal process of rule-creation, so that the degree in precision found in more formal processes of law-making is not to be expected here.” It considered State practice as the most characteristic and most important component of customary international law. Sources or evidence of practice can be: judgments, diplomatic correspondence, policy statements, legal advice by governmental legal counsels, rules and regulations, reservations and declarations when signing or ratifying treaties or memoranda of understanding. So, State practice can cover in principle any act or statement by a State from which views about customary law may be inferred. But it is important that these acts or statements are

In the *Nicaragua* case, the ICJ followed a similar approach. See: *op. cit.* n. 8, pp. 14, 108-109.

20 *Op. cit.* n. 13 (*Continental Shelf* case). The central question in this case was: “What principles and rules of international law are applicable to the delimitation of the area of continental shelf which appertains to the Republic of Malta and the area of continental shelf which appertains to the Libyan Arab Republic, and how in practice such principles and rules can be applied by the two Parties in this particular case in order that they may without difficulty delimit such area by an agreement as provided in Article III [of the Special Agreement between the Libyan Arab Jamahiriya and Malta for the purpose of submitting to the Court the dispute between them concerning the delimitation of their respective continental shelves].” *Op. cit.* n. 13, p. 16.


25 See also: *op. cit.* n. 11 (Ghafur Hamid), para. 4.1.2. With regard to judgments of national courts, Ghafur Hamid states: “Even decisions of domestic courts, if they deal with matters of international law, may provide important evidence as to the practice of States, particularly in fields such as State immunity […].” See para. 5.1.

recognisable to a reasonably alert State.27 It is not only necessary to assess what States do, but also what States say.28

Also resolutions of the UN General Assembly or Security Council can be of importance for the formation of customary international law.29 Resolutions of the UN General Assembly “may in some instances constitute evidence of the existence [of a rule of] customary international law; [or] help to crystallize emerging customary law; or contribute to the formation of new customary law. But as a general rule [...], they do not ipso facto create new rules of customary law.”30 Not only with regard to State practice, but also with regard to opinio juris General Assembly Resolutions may be of importance. In its Nuclear Weapons Advisory Opinion,31 the International Court of Justice stated that “General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris.” And the International Criminal Tribunal for the former Yugoslavia (ICTY) stated in the Prosecutor v. Dusko Tadić case that certain resolutions unanimously adopted by the Security Council are of great relevance to the formation of opinio juris.32 Infra, I shall come back to opinio juris.

Practice can also take the form of jurisprudence. In this study, a number of national court cases will be addressed, as well as opinions expressed by national authorities. Thus, in determining whether a rule of customary international law exists with regard to immunity

29 Op. cit. n. 2 (ILA), p. 19. The ILA pointed out that organs of international organisations, and notably the UN General Assembly, from time to time adopt resolutions containing statements about international law. Formally, since the decision is recorded as a resolution of the organ of the organisation, its adoption is a piece of practice by the organisation. However, in the context of the formation of customary international law, it is probably best regarded as a series of verbal acts by the individual Member States participating in that organ, according to the ILA. Such verbal acts consisting in voting in favour, voting against or abstaining, along with explanations of vote. As the UN General Assembly is composed of representatives of States, its practice can be regarded as the practice of the States. The same goes for other international organisations or institutions composed of States.
32 Prosecutor v. Dusko Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, 2 October 1995, para.133: “Of great relevance to the formation of opinio juris to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held ‘individually responsible’ for them. (See UN Security Council Res. 794 (3 December 1992); UN Security Council Res. 814 (26 March 1993).)"
from seizure of works of art of foreign States, those cases and opinions are, without any
doubt, of relevance.\textsuperscript{33} It is first and foremost the actions of States in their international legal
relations which give rise to rules of customary international law. In its working definition, the
ILA describes a rule of customary international law as “one which is created and sustained by
the constant and uniform practice of States and other subjects of international law in or
impinging upon their international relations, in circumstances which give rise to a legitimate
expectation of similar conduct in the future.”\textsuperscript{34}

National legislation also can play a role in providing proof of customary law. The enactment
and application of a law is a form of State practice.\textsuperscript{35} Different States, for instance Turkey,
France and the United States, have cited the laws of various States as proof of a rule of
customary law.\textsuperscript{36} And in the \textit{North Sea Continental Shelf} cases, some of the judges included
national laws or parliamentary bills among the State practice which could give rise to rules of
customary law concerning the continental shelf.\textsuperscript{37}

\subsection*{2.3 Duration of the practice}

When considering the particular practice by States, elements that need to be taken into
account are its duration, consistency, repetition and generality. With regard to the duration,
this is not considered to be the most important aspect of State practice.\textsuperscript{38} In international law,
there is no rigid time element; it all depends upon the circumstances of the case and the nature

\textsuperscript{33} Thus, decisions of national courts can be considered as evidence of national State practice. Decisions of
international courts are of importance, as a ruling by an international court that a rule of customary international
law exists constitutes persuasive authority to that effect. However, it should be kept in mind, that sometimes the
Executive Branch and the Judicial Branch have different views. We will see that, for instance, in the country
related (sub)chapters of the United States and Germany.

\textsuperscript{34} \textit{Op. cit.} n. 2 (ILA), pp. 8-9 and n. 19.

\textsuperscript{35} The International Law Commission also treats national laws, regulations and judgments ‘as primary evidence

\textsuperscript{36} \textit{Ibid.}, pp. 8-9.

\textsuperscript{37} \textit{Op. cit.} n. 12 (\textit{North Sea Continental Shelf} cases), pp. 3, 129 (Ammoun), 175 (Tanaka) and 228-229 (Lachs);
see also: \textit{op. cit.} n. 26 (Akehurst), p. 9. In the literature, it has also been stated that it is indisputable that national
anti-seizure legislation must be taken as relevant State practice and an expression of \textit{opinio juris}. See: \textit{op. cit.} n.
1 (Weller), p. 1006. The same would be true for immunity from seizure declarations, issued by States. I agree
that indeed it can be seen as evidence of State practice. However, enactment of anti-seizure legislation or the
issuance of immunity from seizure declaration does not necessarily need to be based on \textit{opinio juris}; it is very
well possible that it is primarily based on pragmatism, or comity. In my investigations, I got the impression that
the acts were based on a combination of the two: both legal belief and pragmatism played a certain role, as I will
show later in this study.

\textsuperscript{38} \textit{Op. cit.} n. 2 (Shaw), p. 76, n. 19.
of the practice in question.

In the *North Sea Continental Shelf* cases, the ICJ ruled that when there is a very short period of practice, which is in itself not a bar to the formation of a rule of customary international law, the conduct of the States should be both extensive and virtually uniform. The short period is therefore balanced by heavier demands on the State practice. This was held to be indispensable to the formation of a new rule of customary international law:

“Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”

By using the qualification of ‘virtually uniform’, the ICJ made clear that it was not a question of repetition of identical conduct, but only of similar conduct.

In the literature, it has been stated that the number of States taking part in an act or acts is considered as more important than the time over which the acts are spread. That brings me to the uniformity of the practice.

### 2.4 Uniformity of the practice

With regard to the consistency or uniformity, it should be pointed out that complete uniformity is not required, but a substantial uniformity is. In the *Fisheries* case, the ICJ emphasised its view that a certain level of uniformity amongst State practices was essential before a custom could come into existence:

“[…] the Court deems it necessary to point out that although the ten-mile rule has been

---

adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.\textsuperscript{43}

However minor inconsistencies do not prevent the creation of a customary rule:

\begin{quote}
“The Court considers that too much importance needs not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice.”\textsuperscript{44}
\end{quote}

It is not necessary that a rule is entirely accepted worldwide. A practice should reflect wide acceptance among the States particularly involved in the relevant activity.\textsuperscript{45} In the words of the ICJ, “States whose interests are specially affected”\textsuperscript{46} must belong to those participating in the creation of the rule. The absence of practice by other States does not prevent the creation of a rule of customary law.\textsuperscript{47}

This can also be seen from the Advisory Opinion of the ICJ in the \textit{Legality of Nuclear Weapons} case, where it found that it could not ignore the “practice referred to as ‘policy of deterrence’, to which an appreciable section of the international community adhered for many years”.\textsuperscript{48} This referred to the practice of certain nuclear weapon-States, not to the practice of the international community at large.\textsuperscript{49}

The ILA argued along the same line. It stated:

\begin{quote}
“Given the inherently informal nature of customary law, it is not to be expected, neither is it the case, that a precise number or percentage of States is required. Much will depend on circumstances and, in particular, on the degree of representativeness of the practice […]. Provided that participation is sufficiently representative, it is not normally
\end{quote}

\textsuperscript{43} \textit{Ibid.}, pp. 116, 131.
\textsuperscript{46} \textit{Op. cit.} n. 12 (\textit{North Sea Continental Shelf} cases), pp. 3, 43.
\textsuperscript{47} \textit{See also} Jean-Marie Henckaerts and Louise Doswald-Beck, \textit{Customary International Humanitarian Law}, Cambridge 2005, p. xxxviii: “One reason why it is impossible to put a precise figure on the extent of participation required is that the criterion is in a sense \textit{qualitative} rather than quantitative. That is to say, it is not simply a question of how many States participate in the practice, but also \textit{which} States.”
\textsuperscript{48} \textit{Op. cit.} n. 31 (\textit{Legality of Nuclear Weapons} case), pp. 226, 263: “Nor can [the Court] ignore that practice referred to as ‘policy of deterrence’, to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlateloco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.”
\textsuperscript{49} \textit{See: op. cit.} n. 2 (Malanczuk), p. 42.
necessary for even a majority of States to have engaged in the practice, provided that there is no significant dissent."50

The ILA stated that “it is not simply a question of how many States participate in the practice, but which States.”51

‘Uniformity’ also does not mean that the practice needs to be worldwide. It is possible that there is a regional or local rule of customary international law, thus restricted to a certain region. Custom may in fact be created by only a few States,52 provided those States are intimately connected with the issue at hand, for instance because of their special relationship with the subject-matter of the practice.53 In the Asylum case,54 a regional or local customary rule was addressed, and also here the ICJ stated that a customary rule needs to find ground in “a constant and uniform usage”:

“The Party which relies on a custom of this kind55 must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom ‘as evidence of a general practice accepted as law’.”56

In the Right of Passage over Indian Territory case57 the ICJ stated that

“[w]here [...] the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining the specific rights and obligations. Such a particular practice must prevail over any general rules.”58

The ICJ explicitly recognised the possible existence of bilateral customary law in this case:

52 Matthias Weller states that a rule of customary international law may well emerge quickly and even on the basis of one particular act of practice if supported by general acceptance as law. See: op. cit. n. 1 (Weller), p. 1006, thereby referring to Albert Bleckman, Völkerrecht, Baden-Baden 2001, p. 74.
53 See: the ICJ in the Nicaragua case (op. cit. n. 8), where it judged that States which interests are specially affected should be involved.
54 Asylum case, judgment of 20 November 1950, Colombia v. Peru, ICJ Reports 1950, p. 266.
55 Referred to is an alleged regional or local custom peculiar to Latin-American States.
57 Right of Passage over Indian Territory case, Portugal v. India, Judgment of 12 April 1960, ICJ Reports 1960, p. 6. Portugal claimed that there existed a right of passage over Indian territory as between the Portuguese enclaves and referred to local custom; India denied this and stated that no local custom could be established between two States.
“It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.”

2.5 Practice accepted as law: *opinio juris*

As stated *supra*, the requirement that this practice be ‘accepted as law’ is often referred to as *opinio juris*. So, there is a first element, a material or objective part, being the actual behaviour of States, and a second element, the psychological factor, regarding the belief by a State that it was under a legal obligation to act in a certain way. In legal terminology it is known as *opinio juris sive necessitates*. So, it is important, even essential, that there has to be an aspect of legality about the behaviour and that States do not regard their behaviour as merely a political or moral gesture. Mostly, the element of acceptance as law is fulfilled tacitly.

*Supra*, in Chapter 2.2, I referred to the *North Sea Continental Shelf* cases, where the Court emphasised the importance of the aspect of *opinio juris*. With regard to *opinion juris*, the Court stated:

“The States concerned must [...] feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”

---

58 *Ibid.*, pp. 6, 44.
60 Whereby we have to take into account that certain behaviour can be ‘legal’, without being customary law.
61 It is interesting to realise that the ILA was of the opinion that “it is not always and probably not even usually, necessary to prove the existence of any sort of subjective element in addition to the objective element [...]” See: *op. cit.* n. 2 (ILA), p.31; see also: Jan Wouters and Cedric Ryngaert, *The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law*, Catholic University Leuven, Faculty of Law, Institute for International Law Working Paper No. 121 - February 2008, p. 5, n. 6. And Malcolm N. Shaw stated: “The existence of customary rules can be deduced from the practice and behaviour of States and this is where the problems begin. How can one tell when a particular line of action adopted by a State reflects a legal rule or is merely prompted by, for example, courtesy?” Malcolm N. Shaw, *International Law, Fifth Edition*, Cambridge 2003, p. 69.
But how to ‘prove’ an opinio juris? Malanczuk argued, correctly in my view, that “the modern tendency is not to look for direct evidence of a State’s psychological convictions, but to infer opinio iuris indirectly from the actual behaviour of States.” It may be very difficult and largely theoretical to strictly separate the elements of practice and legal conviction. Quite often, the same act reflects both practice and legal conviction. The International Law Association also stated that it is in fact often difficult or even impossible to disentangle the two elements. It appeared to the ILA that “in the conduct of States and international courts and tribunals, a substantial manifestation of acceptance (consent or belief) by States that a customary rule exists may compensate for a relative lack of practice, and vice versa.”

Frederic Kirgis has speculated that there might be a ‘sliding scale’:

“On the sliding scale, very frequent, consistent State practice establishes a customary rule without much (or any) affirmative showing of an opinio juris so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an opinio juris is required. At the other end of the scale a clearly demonstrated opinio juris establishes a customary rule without much (or any) affirmative showing that Governments are consistently behaving in accordance with the asserted rule.”

In the Advisory Opinion of the ICJ with regard to the Legality of Nuclear Weapons, the Court held that if States are clearly divided on whether a certain conduct constitutes the expression of opinio juris, then it is impossible to find that there is such opinio juris:

“[…] the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an opinio juris. Under these circumstances, the Court does not consider itself able to find that there is such opinio juris.”

The International Court did not always put so much emphasis on the element of opinio juris, but sometimes simply referred to the practice of States, without any reference to the

---

64 See: op. cit. n. 2 (Malanczuk), p. 44.
66 Op cit. n. 2 (ILA), p. 7, para. 10(c).
67 Ibid., p. 40.
subjective element. On the other hand, however, the Court has not expressly said that *opinio juris* is unnecessary.

### 2.6 Dissenting States

A rule of customary international law is in principle binding upon all States, even if the States concerned did not take part in the formation of the rule, except for such States that have dissented from the start of that custom. Evidence of objection must be clear, repeated as often as circumstances require, and be illustrated by consistent behaviour; probably there is even a presumption of acceptance which needs to be rebutted. Generally when States are silent with regard to the behaviour of other States, the assumption will be that such behaviour is accepted as being legitimate. This is called the ‘doctrine of acquiescence’ or the rule of ‘presumed consent’ or ‘tacit acceptance’. States concur in the creation of customary international law by absence of protests, thus, by not reacting.

However, it should not be ruled out that the silence stems from lack of time or lack of interest. The ICJ in the *Gulf of Maine* case defined acquiescence as “equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent” and as founded upon principles of good faith and equity.

What we see here, is a situation that differs from treaty law. For becoming a party to a convention, one has to do *something*, whereas for becoming bound to a rule of customary

---


71 See: *op. cit.* n. 12 (*North Sea Continental Shelf* cases), pp. 3, 38, 130; see also: *op. cit.* n. 26 (Akehurst), p. 24. The ILA mentions that there is fairly widespread agreement that a persistent objector rule only applies when the customary rule is in the process of emerging. *Op. cit.* n. 2 (ILA), p. 27.

72 It is well recognised by international tribunals. See: *op. cit.* n. 54 (*Asylum* case), pp. 266, 277-278; *op. cit.* n. 42 (*Fisheries* case), pp. 116, 131. See also: *op. cit.* n. 12 (*North Sea Continental Shelf* cases), pp. 3, 26-27.

73 “Even silence on the part of states is relevant because passiveness and inaction with respect to claims of other state scan produce a binding effect creating legal obligations for the silent state under the doctrine of acquiescence.” See: *op. cit.* n. 2 (Malanczuk), p. 43.


76 *Gulf of Maine* case, *Canada v. United States of America*, *ICJ Reports* 1984, pp. 246, 305. This case concerned the delimitation of the maritime boundary in the Gulf of Maine area.
international law, it is generally sufficient to do nothing.\textsuperscript{77} The fact that a treaty has received few ratifications is not in itself necessarily an argument for not regarding it as an expression of customary law. It may even be the case that States are not ratifying a treaty because they consider the rules contained in that treaty already as reflecting customary law.

Thus, even if not followed by some States, a rule can be considered customary law. Dissent by some States does therefore not necessarily prevent the creation of new rules of customary international law by other States; it is merely that the persistently dissenting States in the formation period of a rule of customary international law are not bound by these new rules.\textsuperscript{78} Furthermore, when a rule of customary international law is violated or denied by a State, but such violation or denial is generally condemned by other States, “this practice tends to reinforce the existence of the rule rather than to weaken it.”\textsuperscript{79} Moreover, the ICJ stated:

“If a State acts in a way \textit{prima facie} incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.”\textsuperscript{80}

The customary law process is a continuing one; it does not stop when a rule has emerged. “[C]onforming practice after the rule has emerged helps to strengthen it […], while contrary practice can undermine and, if sufficiently constant and widespread, destroy an existing customary rule.”\textsuperscript{81}

\textsuperscript{77} In 1971, the United Nations Institute for Training and Research (UNITAR) instigated a study into the causes and factors that delay or prevent acceptance (in the form of ratification, accession, adherence, succession or any other form by which a State expresses its consent to become a party to a treaty) by States of multilateral treaties adopted under auspices of the United Nations. This resulted, among others things, in the conclusion that non-acceptance or indefinite delay of acceptance is frequently caused by factors that have nothing to do with the substance of the treaties involved, or which do not imply disagreement with the treaties’ aims, but in the administrative inability to timely and sufficiently do everything what is necessary for this ratification or accession. See: O. Schachter, M. Nawaz and J. Fried, \textit{Towards a wider acceptance of U.N. treaties}. New York 1971; see also: \textit{op. cit.} n. 14 (Meijers), p. 5 (Dutch version); p. 5 (English version).


\textsuperscript{80} \textit{Op. cit.} n. 8 (Nicaragua case), pp. 14, 98.

\textsuperscript{81} \textit{Op. cit.} n. 2 (ILA), p. 9 and n. 21.
2.7 Concluding

It has been stated by Malcolm Shaw that

“[i]n a society constantly faced with new situations because of the dynamics of progress, there is a clear need for a reasonably speedy method of responding to such changes by a system of prompt-rule formulation. In new areas of law, customs can be quickly established by state practices by virtue of the newness of the situations involved, the lack of contrary rules to be surmounted and the overwhelming necessity to preserve a sense of regulation in international relations.”

The issue of immunity from seizure of foreign cultural objects can be considered as one of the new areas in law, as I already illustrated in the introductory chapter of this study.

It can be concluded that “[f]or a custom to be accepted and recognised it must have the concurrence of the major powers in that particular field [...]. The duration and generality of a practice may take second place to the relative importance of the States precipitating the formation of a new customary rule in a given field”.

It can therefore be argued that it is not necessary for a rule of customary international law, stating that cultural objects belonging to foreign States are immune from seizure while on temporary loan, to be accepted worldwide or be entirely uncontested. “A practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.” Thus, in determining whether a rule of customary international law exists with regard to immunity from seizure of loaned cultural objects belonging to foreign States, special attention needs to be paid to those States which are the most active and involved in the field of loaning and borrowing cultural objects for temporary cross-border exhibitions.

A rule of customary international law with regard to immunity from seizure may, in principle, be established within a limited timeframe, as well as between a limited number of States.

It is possible that a proposal made, for instance, by the International Law Commission serves

82 Op. cit. n. 2 (Shaw), pp. 78-79.
83 Ibid., p. 80.
as a starting point of the formation of a rule of customary international law, especially when in the end adopted by consensus by the international community of States. Such a proposal is normally followed by comments from States and deliberations between States, for instance in the UNGA Sixth (Legal) Committee.\textsuperscript{85}

Next to concrete State practice with regard to immunity from seizure of cultural objects belonging to foreign States, it is necessary that States not only act this way because of courtesy or pragmatism, but because they consider it a legal obligation to act that way.

National laws, regulations and judgments can be considered as primary evidence of such State practice. The same goes for statements and behaviour of State representatives. National immunity from seizure legislation and immunity guarantees in other form, as well as other behaviour of State institutions in order to protect cultural objects on loan, can also be considered as relevant State practice.

Whether this also can be considered as an expression of \textit{opinio juris} will be more difficult to ascertain. As I referred to \textit{supra}, it may be very difficult and largely theoretical to strictly separate elements of practice and legal conviction, as quite often the same act reflects both practice and legal conviction.

When States are silent in respect of behaviour of other States in regard to the provision of immunity from seizure for cultural objects on loan, this may be an indication that such behaviour is accepted as being legitimate. Even practice followed by a very small number of States can, in principle, create a rule of customary international law if there is no practice which conflicts with the rule.\textsuperscript{86}

\textsuperscript{84} The Restatement (Third), Vol. 1, para. 102.
\textsuperscript{85} The question whether the process with regard to Article 21(1)(e) of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property could be considered as such will be addressed \textit{infra}, in Ch. 12.