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## Remarks On the Juridical Nature of Customary Norms of International Law

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THE PROBLEM of customary norms of international law is one of the most important, as well as one of the most complex problems of international law. The whole concept of international law depends upon whether this problem is solved one way or another. It is only natural, therefore, that the question of customary norms of international law has for centuries drawn the attention of international law experts.

Customary norms of international law are being formed in international practice, as a rule, gradually. What are the basic elements of international practice that lead to the formation of customary norms of international law?

Historically a customary norm of international law appears as a result of reiterated actions of states. The element of repetition constitutes the point of departure of its formation. In the majority of cases it is precisely the repetition of certain actions in analogous situations that leads to such practices becoming a rule of conduct. It is conceivable, however, for the element of repetition in some cases not to occur and for the rule of conduct to appear as a result of one precedent only.<sup>1</sup> But such instances are rare.

Duration, or in other words, the element of time, also plays an important role in the process of formation of a customary norm of international law. However, the element of time does not in itself create a presumption in favor of the existence of a customary norm of international law. There is even less ground to think that juridically it is necessary for the customary rule to be "old" or of long standing.<sup>2</sup>

Indeed, the description of this or that rule as "old" may have two aspects. On the one hand, it may mean that the given rule, having been

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<sup>1</sup> I ROUSSEAU, *PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL* para. 482 (1944).

<sup>2</sup> Basdevant, *Règles générales du droit de la paix*, 58 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL* [hereinafter cited as *RECUEIL DES COURS*] 476, 513, 518 (1936); Kunz, *The Nature of Customary International Law*, 47 *AM. J. INT'L L.* 662, 666 (1953).

observed for a long time in international practice, has passed the test of time. But at the same time this very description poses the question: In what measure does this "old" rule answer present-day requirements?

Although in fact time plays a big part in the process of formation of a customary norm of international law, juridically the element of time cannot in itself have a decisive significance. Depending on circumstances, a customary norm may take a long time to develop but may also be formed in a short period of time.<sup>3</sup>

It has been repeatedly indicated in literature on international law that not all repetition creates a customary norm of international law. Repetition of one and the same action may not lead to the establishment of a rule of conduct, and even if such a rule of conduct does appear it does not necessarily become a juridical norm; it may merely be a norm of international ethics or a norm of international courtesy. In international law, ambassadorial law in particular, there are a good many norms of very old standing that are not, however, norms of international law. Thus, exemption of diplomatic baggage from customs inspection, and a number of privileges for diplomats in third countries are usually accorded by all states. Such norms are not regarded as international norms, but only as norms of international courtesy.

Some authors are of the view that only continuity of international practice can lead to the establishment of a customary norm of international law.<sup>4</sup> This is not so, however. It would be more correct to say that not one norm of international law has appeared as a result of international practice that had no interruption.

Let us take, for instance, the principle of non-interference, one of the generally recognized principles of modern international law. This principle appeared for the first time in international law during the 18th century bourgeois revolutions. It won ever-growing recognition, but has been forced at times to retreat under the pressure of reactionary forces. The 19th century, particularly its first half, witnessed many interventions which violated the principle of non-interference (the Napoleonic wars, the policy of the Holy Alliance, etc.). Yet, despite these disruptions, the non-interference principle has gradually become a generally recognized principle of international law.

It would be wrong to assert, however, that an interruption in international practice does not affect the formation of customary norms of international law. Discontinuity may destroy a customary rule of conduct still

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<sup>3</sup> See VERDROSS, *VÖLKERRECHT* 85 (4th ed. 1959).

<sup>4</sup> See, for instance, Cavaglieri, *Règles générales du droit de la paix*, 26 *RECUEIL DES COURS* 316, 336-37 (1929); MORELLI, *NOZIONI DI DIRITTO INTERNAZIONALE* para. 18 (3d ed. 1951); Kunz, *supra* note 2, at 666.

in process of formation and may even result in the rule of conduct not being formed at all; it all depends on what character the discontinuity assumes. At the same time—and this is of chief importance—like the element of time, continuity does not play a decisive role in the formation of a norm of international law.

Whether a customary norm of international law springs from positive actions only or may result also from abstinence from action is a much mooted question. Professor Basdevant, addressing the Permanent Court of International Justice in 1927 on behalf of France in the "Lotus" case, voiced a view on this subject that has been much quoted since. He said: "The custom observed by states to refrain from prosecuting foreign citizens charged with causing collisions of vessels in the open sea constitutes a customary norm of international law."<sup>5</sup>

An opposite view was taken by the Turkish representative and Justices Nyholm and Altamira, who maintained that cases of abstinence from action do not create a customary norm of international law.<sup>6</sup>

Customary norms of international law stem from international practice. The practice of states may consist in their taking definite action under certain circumstances or, on the contrary, abstaining from action. As a rule, it is much easier, of course, to establish the existence of a customary norm of international law in the presence of positive actions by states, but there is no reason to deny the possibility of a customary norm of international law being established by the practice of abstinence from action. The custom to abstain from action under certain circumstances may undoubtedly lead to the creation of a rule of conduct that may become a juridical norm. Obviously, everything said before about the elements of repetition, time, and continuity applies equally to the practice of abstinence.

It should be pointed out that many principles and norms of international law involve, in one measure or another, commitments on the part of the states to refrain from certain actions in their relations with other states. Thus, the respect-of-sovereignty principle commits the states to refrain from any action constituting a violation of the sovereignty of another state. In accordance with the principle of non-interference in the internal affairs of another member of the international community, every state is obliged to abstain from any action constituting interference in the internal affairs of another state. Even the open seas principle, for instance, involves an obligation of a negative character, which is that states must abstain from any

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<sup>5</sup> See The Case of the S.S. "Lotus," P.C.I.J., ser. A, No. 10, at 25 (1927).

<sup>6</sup> See The Case of the S.S. "Lotus," P.C.I.J., ser. C, No. 13-II, at 112 (1927); P.C.I.J., ser. A, No. 10, at 59, 96 (1927). A similar view was taken by GIANNI, *LA COUTUME EN DROIT INTERNATIONAL* 126 (1931); Strupp, *Règles générales du droit de la paix*, 47 *RECUEIL DES COURS* 263, 307 (1934).

action likely to injure "the interests of other States in their exercise of the freedom of the high seas."<sup>7</sup> Could these customary norms of international law appear if we were to deny that the practice of abstinence can also lead to the creation of a customary norm of international law?<sup>8</sup>

The elements listed above do not in their sum total constitute a customary norm of international law. They merely testify to the existence of usage. The term "usage" has not been accepted by the Soviet international law literature and practice. Instead, we use the term "custom." To avoid confusion we recommend that "custom" be used only when referring to a customary rule that is not a norm of law. The term "customary norm of international law" should be used in describing international customs which are juridically binding.

Thus, noting the existence of an international custom (usage) is not tantamount to noting the existence of a customary norm of international law, inasmuch as custom, a customary rule of conduct, is not necessarily a juridical norm.

Formation of a custom constitutes a definite stage in the process of formation of a customary norm of international law. The consummation of this process is the recognition by the states of the custom as juridically binding, in other words, recognition of a customary rule of conduct as a norm of international law. Only as a result of such recognition is the process of formation of a customary norm of international law completed, and international custom (usage) becomes an international law custom, *i.e.*, a customary norm of international law.<sup>9</sup>

This is precisely the interpretation to be given, in our opinion, to point "b" of Article 38 of the Statute of the International Court, according to which one of the sources of international law is "international custom, as evidence of a general practice accepted as law." Customary norms of international law are premised first of all on universal practice. But universal practice is insufficient in itself as an indication of the presence of a customary norm of international law. A rule of conduct, being the result of

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<sup>7</sup> Convention on the High Seas, art. 2 (A/CONF.13/L.53), found in 2 U.N. CONFERENCE ON THE LAW OF THE SEA OFF. REC. 136 (1958) (A/CONF.13/38) (U.N. Pub. Sales No. 58:V.4, Vol. II).

<sup>8</sup> See 1 ULLOA, DERECHO INTERNACIONAL PUBLICO para. 48 (1957); Guggenheim, *Les deux éléments de la coutume en droit international*, 1 ÉTUDES EN L'HONNEUR DE G. SCHELLE 280 (1950); GOUET, LA COUTUME EN DROIT CONSTITUTIONNEL INTERNE ET EN DROIT CONSTITUTIONNEL INTERNATIONAL 73 (1932); SØRENSEN, LES SOURCES DU DROIT INTERNATIONAL 98-101 (1946).

<sup>9</sup> Professor de Visscher correctly points out: "In this case the fact precedes the juridical qualification, but the latter has a decisive significance, while uniformity and outward repetition of a certain conduct do not offer ground for the conclusion that it has a normative significance." Visscher, *Coutume et traité en droit international public*, 59 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 353, 357 (1955).

universal practice, becomes a customary norm of international law only if it has been accepted or recognized by the states as juridically binding as a norm of law.<sup>10</sup>

What does this recognition or acceptance by states of a definite rule as a norm of law stand for? What is the essence of this recognition? Recognition or acceptance by a state of this or that customary rule as a norm of law is, in its juridical sense, an expression of the will of the state of its agreement to regard this or that customary rule as a norm of international law.

Such recognition or acceptance represents a tacit proposal to other states to regard this rule as a norm of international law. If such a tacit proposition is accepted by other states, *i.e.*, if other states demonstrate by their actions that they recognize the given customary rule as juridically binding, it may be taken that a customary norm of international law has appeared.

We thus come to the conclusion that the essence of an international custom as a process or means of creating a norm of international law consists in agreement among states.

Some international lawyers, while denying the "tacit agreement" concept, support the view that "recognition," "acceptance," or "agreement" to regard a rule as juridically binding constitutes the decisive element in the process of creating customary norms of international law. Thus Basdevant, while rejecting the concept of agreement as relating to customary norms of international law, says that custom "appears to be the result of precedents which testify to the recognition of such a rule as law (*opinio juris*)."<sup>11</sup> Elsewhere Basdevant says that customary norms "which are born spontaneously, out of the requirements of international life, acquire a positive character by being recognized by those with the power to have them applied in international life."<sup>12</sup>

Although rejecting the concept of tacit agreement, these authors refer to *opinio juris* as an essential element of a customary norm of international law. In the opinion of Professor Basdevant, *opinio juris* means that "the respective rule has been recognized as a norm of law."<sup>13</sup> Professor de Visscher writes: "From what we regard as a totally fictitious conception that custom is a tacit agreement, it is necessary to distinguish the demand of *opinio juris sive necessitatis*, which in this case reflects the attitude of the authorities to a definite practice."<sup>14</sup> We cannot help noting that such an

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<sup>10</sup> See TUNKIN, *PRINCIPLES OF MODERN INTERNATIONAL LAW* 13 (1956).

<sup>11</sup> Basdevant, *supra* note 2, at 513.

<sup>12</sup> *Id.* at 516.

<sup>13</sup> *Id.* at 513.

<sup>14</sup> VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC* 188 (2d ed. 1955). See also MORELLI, *op. cit. supra* note 4, at paras. 15, 17.

interpretation of *opinio juris* is practically tantamount to the concept of recognition of a certain customary rule as a norm of international law.

Often, however, the term *opinio juris* receives a totally different interpretation. Thus Professor Kunz defines *opinio juris* as follows: "The practice must have been applied in the conviction that it is legally binding."<sup>15</sup> At the same time Kunz is forced to admit the difficulties involved in the concept of *opinio juris*. He points out that on the one hand the assertion is made that practice plus *opinio juris* creates a customary norm of international law, but on the other, in order that such a norm may be formed the states must proceed from the conviction that they are acting in accordance with juridical duty. Since, however, the customary norm of international law has not yet been formed, such conviction does not rest on a juridical foundation. In this connection Kunz adds: "Hence, the very coming into existence of such norm would presuppose that the states acted in legal error."<sup>16</sup>

Indeed, the term *opinio juris* thus interpreted means that the states must proceed from the belief that the respective norm of international law already exists, hence, such a norm could not have resulted from the practice of states but must be assumed to exist independently of this practice. Such a line of reasoning inevitably leads to the conclusion that the customary norm, according to this concept, is by no means a customary norm stemming from the international practice of states, but is a norm preceding such practice.

Difficulties arise from the fact that the approach to the question of "recognition of practice as a norm of law" or to *opinio juris* is undialectical. The creation of a customary norm of international law is an historical process; the elements of the norm of law evolve gradually.

*Opinio juris* signifies that the states treat this or that customary norm as juridically binding. When other states, too, express a will in this direction, a tacit agreement is formed to recognize the customary rule as a norm of law.

In this context it is necessary to touch upon the normative concept that international practice is in itself a norm of international law that does not require its recognition by the states as a norm of law.

<sup>15</sup> Kunz, *supra* note 2, at 667. See also Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 BRIT. Y. B. INT'L L. 127, 129 (1937). Scelle, in accordance with his general conception, sees the criterion of compulsoriness in customary rule conforming to "the common good and social aims." He says: "Custom stems from repetition of a similar conduct, individual or collective. It is secured by the belief . . . that such conduct is in accord with the common good and social aims." SCELLE, *COURS DE DROIT INTERNATIONAL PUBLIC* 10 (1948). Rousseau speaks of the belief in the "necessity of practice." ROUSSEAU, *op. cit. supra* note 1, at para. 494.

<sup>16</sup> Kunz, *supra* note 2, at 667. See also 1 GUGGENHEIM, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 47 (1953); GIANNI, *op. cit. supra* note 6, at 157.

Kelsen, regarding as fictitious the idea that a customary norm is a tacit agreement, says that "international customary law could be interpreted as created by a consent of the states only if it were possible to prove that the custom which evidences the existence of a norm of international law is constituted by the acts of all the states which are bound by the norm of customary law, or that a norm of customary law is binding upon a state only if this state by its own acts participated in establishing the custom in question."<sup>17</sup> Amplifying this idea, Kelsen points out that since customary norms of international law are binding upon all states, it would be necessary to prove that all states have signified their agreement with all customary norms of international law by their actual behavior, by participation in the creation of the respective custom, which testifies to the existence of the customary norm. According to Kelsen, such proof is not a necessity under international law. Customary norms of international law, he asserts, are created not "by the common consent of the members of the international community" but by "long-established practice of a great number of states, including states which, with respect to their power, their culture, and so on, are of certain importance . . . ."<sup>18</sup>

Two propositions are expressed here: first, that practice by states as such creates a customary norm and that there is no agreement or *opinio juris* here; the second, and we shall return to it again below, that norms created by the practice of a large number of states are binding upon all states.

Kelsen also asserts that the concept of agreement implies that all states are obliged to participate in the creation of every norm of international law. But this is not so. It is not at all necessary for a practice leading to the creation of a customary norm of international law to be "universal." A customary rule may be created by the practice of a limited number of states. Being recognized as a norm of law, it may at first be a customary norm with a limited sphere of application. This sphere of application may gradually expand, and the norm in question will then closely approximate a generally recognized norm of international law.

This extension of the sphere of action of a customary norm is analogous in some ways to what happens to conventional norms of international law. Indeed, the norms of this or that international treaty are frequently created only by a few of the states becoming parties to the treaty. The states which join the treaty later did not participate in its creation.

Professor Guggenheim also resolutely objects to *opinio juris*, as well as the concept of "tacit agreement." Like Kelsen, he too holds that usage (*consuetudo*) without any *opinio juris* and without any "recognition by

<sup>17</sup> Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 311-12 (1952).

<sup>18</sup> *Id.* at 313.

states as a norm of law," is a customary norm of international law. In Guggenheim's opinion, acceptance of the *opinio juris* conception of recognition by states of a customary rule as a norm of international law renders a custom superfluous as an independent source of international law. He urges that this "subjective element" be discarded.<sup>19</sup>

In the final analysis, however, Guggenheim arrives at a virtual "admission." He says: "The existence of a custom should be regarded as proven if the positive and negative reiterated actions become an expression of conduct, which is qualified as a custom by bodies competent to apply the proper rule."<sup>20</sup>

But what does "qualify" mean? To qualify is to recognize, to recognize as a norm of international law. Only in this case recognition, according to Guggenheim, comes not from states but from international bodies.

Guggenheim thus actually admits the necessity of recognizing customary rules as norms of law. But by insisting that such recognition must emanate from an international body, he drives his reasoning into a cul-de-sac inasmuch as there is no international body in existence with authority to give a customary rule of conduct juridical power.

One of the basic arguments adduced against the concept that the essence of custom as a specific means of creating norms of international law lies in agreement between states, is the claim that a customary norm of international law binds the states juridically irrespective of the "recognition" or "acceptance" of this norm by the concrete states. Such arguments are advanced both by the proponents and opponents of *opinio juris*.

To begin with, the claim is made that newly emerging states are bound by existing customary norms of international law, irrespective of their attitude toward these norms. "International customary law," says Verdross, "is binding also upon those states which did not exist at the time of its inception."<sup>21</sup> The same view is taken by Professor Basdevant: "All agree that a new state is bound by international customs formed prior to the emergence of this state."<sup>22</sup>

This question is directly related to the question of the sphere of action of customary norms of international law. Must a customary norm of international law, created by the long practice of "a large number of states," be binding upon all other states, regardless of their attitude to the norm? This is an important question.

The thesis that a customary norm of international law recognized by

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<sup>19</sup> GUGGENHEIM, *op. cit. supra* note 8, at 275-80.

<sup>20</sup> *Id.* at 280.

<sup>21</sup> VERDROSS, *op. cit. supra* note 3, at 85.

<sup>22</sup> Basdevant, *supra* note 2, at 515. See also ULLOA, *op. cit. supra* note 8, at para. 48c.



a large number of states is binding upon all other states is widely supported in the modern international law literature of the West.<sup>23</sup>

An interesting reservation is made by Professor Verdross who says that "although the formation of a general customary norm does not infer its application by all states, no general customary law can appear that contradicts the legal views of any civilized nation."<sup>24</sup> But if recognition of a new customary norm of international law as such is required from an existing state, why must a newly emerging state find itself in an inferior position? Why cannot this new state object to any customary norm of international law if it disagrees with it?

The concept that customary norms of international law accepted as such by a large number of states must be binding upon all other states is actually based upon the presumption that the majority of states is able in international relations to dictate norms of international law to all other states. This concept was brought to its logical conclusion by Professor Quadri. Amplifying his conception of a "collective and social will" (*volontà collettiva è sociale*), Quadri says that the will—the decision of a group of states—can create in international relations juridical norms binding upon all states; in other words, create norms of general international law. According to Quadri, international law is founded upon "the decision of the preponderous force of the international community."<sup>25</sup> In another work Quadri explains what he means by "preponderous force." He writes: "It is enough to have the will, decision, and action common to a definite group capable, if necessary, of imposing its power."<sup>26</sup>

This conception is in crying contradiction with the basic generally recognized principles of modern international law, the principle of equality of states, in particular.

It is beyond dispute that equality of states signifies only juridical equality, which may not accord with the actual inequality of states in international relations. There is a certain contradiction here between the real relations and juridical relations. No doubt the position of the majority of states, the Great Powers in the first place, is of decisive significance in the creation of generally accepted norms of international law. Such is the factual position. Juridically, however, the wills of the different states in the process of creation of norms of international law are equivalent to each other. This juridical equality is of great importance. It means that in inter-

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<sup>23</sup> GUGGENHEIM, *op. cit. supra* note 16, at 49; Kelsen, *op. cit. supra* note 17, at 313; MORELLI, *op. cit. supra* note 4, at para. 19; SIERRA, *TRATADO DE DERECHO INTERNACIONAL PUBLICO* 25 (2d ed. 1955); Basdevant, *supra* note 2, at 509; Kunz, *supra* note 2, at 666.

<sup>24</sup> VERDROSS, *op. cit. supra* note 3, at 85.

<sup>25</sup> QUADRI, *DIRITTO INTERNAZIONALE PUBBLICO* 89 (2d ed. 1956).

<sup>26</sup> Quadri, *Le fondement du caractère obligatoire du droit international public*, 80 *RECUEIL DES COURS* 583, 625 (1952).

national relations no group of states, not even the majority of states, can create norms binding upon other states, or has the right to attempt to impose these norms upon other states.

Customary norms of international law being a result of agreement among states, the sphere of action of such norms is limited to the relations between the states which accepted these norms as norms of international law, *i.e.*, the states participating in this tacit agreement.

The sphere of action of a customary principle or customary norm of international law may gradually expand. This, as a rule, is the way customary norms of international law become generally recognized norms. There are several cases of the declaration of a single state becoming a point of departure. Many principles of international law were proclaimed, for instance, by revolutionary France in the 18th century. Among them were the principles of respect of state sovereignty, non-interference in the internal affairs of another state, equality of states, and the principle that war operations must be directed against military objects only and cannot be directed against the civilian population. The Soviet state has advanced the principle of banning aggressive wars and treating such wars as crimes, the principle of self-determination of nations, the principle of peaceful co-existence, and a number of other principles of international law. In all these cases, the principles originally proclaimed by a single state were gradually recognized by other states and have become, partly by custom and partly by treaty, generally recognized principles of modern international law.

This proposition about the spheres of influence of customary norms is of special significance to modern international law, which regulates the relations between states belonging to two opposed social systems. Only a customary rule which is recognized by the states of both systems can now be regarded as a customary norm of international law.

The will of the states expressed in their recognition of a customary norm of international law is a determinist will. Force of circumstances compels the individual states in most cases to recognize as binding those norms which have already been recognized by the overwhelming majority of states belonging to both systems, including the Great Powers. But such a *de facto* position should not be confused with the *de jure* position.

As for the newly emerging states, they have the juridical right not to recognize this or that customary norm of international law. However, if a new state enters without reservations into official relations with other states, this means that it recognizes a certain body of principles and norms of existing international law, which constitute the basic principles of international relations.

The concept that customary norms of international law recognized as such by a large number of states are binding upon all states not only has

no foundation in modern international law but is fraught with grave danger. This concept in essence justifies the attempts made by one group of states to impose upon other states, the socialist states, for instance, or the newly emerging states of Asia and Africa, certain customary norms which, while regarded perhaps by this group of states as customary norms of international law, have never been accepted by the new states and which may prove partly or wholly unacceptable to these new states. Obviously, this tendency to dictate norms of international law to other states is, under present conditions, doomed to failure. But it is no less obvious that such attempts at dictation may lead to grave international complications.

In practically all cases when it is necessary to establish the existence of one or another generally recognized norm of international law, the usual procedure is to investigate if "universal practice" exists; and in case such practice does exist, if it has been recognized as a norm of law, and how many states have recognized such practice as a norm of law.

It may be assumed that recognition of one or another rule as a norm of international law by a large number of states can serve as a basis for the assumption that this norm has won general recognition. However, this is an assumption only, and not a final conclusion.<sup>27</sup>

There is no disputing the fact that it is not always possible, and in most cases even impossible, to determine with mathematical precision that a certain customary norm of international law has been recognized by all states, without exception. But such a situation arises quite frequently in social phenomena, and the difficulties which may come up in the process of such calculation cannot be regarded as undermining the rule itself.

This, it appears to us, was how the International Law Commission acted whenever the question arose of whether this or that customary norm of international law exists. Thus, upon considering the question of the privileges and immunities of the administrative and technical staffs, as well as the service staffs of diplomatic missions, the Commission found that in this sphere "there is no uniformity in the practice of States . . ."<sup>28</sup> Some of the states (the U.S.A., Great Britain, the Soviet Union, and others) grant diplomatic privileges and immunities to the administrative and technical staffs on the basis of reciprocity, others grant them even to the service staffs of foreign diplomatic missions, although the range of privileges and immunities granted varies considerably. Considering that there is no universal practice in this matter, the Commission easily arrived at the conclusion

<sup>27</sup> See, for instance, Strupp, *supra* note 6, at 301-02. He points out that if a customary norm is applied by a considerable number of states "there is a normal presumption, *presumptio juris*, which may be refuted, however, a presumption in favor of this norm being effective for all states."

<sup>28</sup> 2 U.N. YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1958, at 101 (A/CN.4/SER.A/1958/Add.1) (U.N. Pub. Sales No. :58.V.1, Vol. II) (1958).

"that in these circumstances it cannot be claimed that there is a rule of international law on the subject . . ."<sup>29</sup>

On the question of exemption from customs duties of articles for personal use by diplomats, the Commission noted: "In general, customs duties are . . . not collected on articles intended for the personal use of the diplomatic agent or the members of his family belonging to his household (including articles intended for his establishment)." The Commission thus arrived at the conclusion that in this case the practice of exemption from customs duties is in essence universal. At the same time, the Commission noted that such exemption from customs duties "has been regarded as based on international comity." The Commission thus drew the conclusion that while this is a case of universal practice, this practice has not yet been recognized as a norm of law. On its part, the Commission proposed that "since, however, the practice is so generally current, the Commission considers that it should be accepted as a rule of international law." The Commission embodied this proposal in the draft Convention on diplomatic relations and immunities prepared by it.<sup>30</sup>

The conclusion which we should like to formulate is that agreement between states lies at the basis of the process by which customary norms of international law are created.

This concept of agreement conforms to the law governing social development in our time. Inasmuch as the existence of sovereign states at present is historically conditioned, norms of international law binding upon them in their interrelations can appear only by agreement between them. Agreement between states on the basis of equality is the essence of the norm-formation process in customary international law. It is particularly characteristic of the period of co-existence of states belonging to opposed social systems, since the existence of two opposed systems further accentuates the impossibility of creating norms of law binding upon the states of both systems, except by agreement between them based on equality.

The concept of agreement rules out all attempts to dictate or gamble with votes in international relations. It accords with the interests of preserving and consolidating peace. Sound international law and order can be achieved only by negotiation and agreement between the states of the two social systems, on the basis of respect of their sovereignty and equality and rejection of all attempts to interfere in their internal affairs.

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<sup>29</sup> *Ibid.*

<sup>30</sup> *Id.* at 100.