actionable right against the state for its failure duly to implement those commitments. The Civil Code of the Netherlands, specifically Article 6:162 and Article 6:106, can sustain the state's liability for damages (in negligence/tort) as a result of an invalid administrative act.[485] The argument made is that a failure to implement non-self-executing treaty commitments allows the state to purse such action otherwise limited or restricted thereby, and by virtue of the breach of that duty, the state conduct in issue has led to actionable injury to property, interest, or person. Indeed, the argument has also extended to obligations in customary international law as well. The courts have not been receptive to these claims. On the one hand, they assume for the purposes of argument that the claimants may invoke non-self-executing international law, only to dismiss the claim in substance. Such was the result in both challenges to stationing nuclear weapons in the Netherlands. The 1989 *Cruise missiles* case, I reviewed above. The issue was revisited again in the 2001 *NATO Nuclear Weapons* case, this time in connection with the Netherlands' commitments to NATO and its deployment of strategic nuclear weapons.[486] While the court was prepared to accept the standing of the special interest groups,[487] and their invocation of international law, their claim failed in substance principally because they had not demonstrated a sufficient degree of specific and actual risk necessary to ground a Civil Code Article 6:162 cause of action, nor could they demonstrate on the (international) authorities that the use of nuclear weapons was prohibited in each and every circumstance.

On the other hand, the courts may also deny standing to the individual, private claimants, on the basis that non-self-executing treaties, or their provisions, apply only as between states and therefore do not indirectly create rights as between private parties. This has been the position of the Hoge Raad certainly since its *Cognac (No. 2)* decision. There it rejected a cause of action in a tort/negligence via the Civil Code predecessor Article 1401 between private parties, for breach of standards set by a treaty held to be non-self-executing.[488] In the 2002 *Kosovo* decision, the Hoge Raad rejected a damages action brought by Serb soldiers against the Netherlands for its participation in the 1999 NATO bombing of the Federal Republic of Yugoslavia.[489] The claimants failed to demonstrate an interest necessary and sufficient under Civil Code Article 6:106; the substance of the claim addressed political and defence questions which fell outside the purview of the courts, and could not elicit any relevant, enforceable private rights out of the international law and the UN Charter cited. Inasmuch as the international instruments were relevant, they were not directly applicable by and for private parties.

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[485] See, e.g., HR *Van Gog/Nederweert* 31 May 1991, AB 1992 290. In the case of treaties, Fleuren 1995, p. 260 also suggests Article 6:168 BW.

[486] HR *NATO Nuclear Weapons* 21 Dec. 2001, NJ 2002 217.

[487] The State had not challenged their standing at the right time or in the right way: HR *NATO Nuclear Weapons* §3.8.1.

[488] HR *Cognac (No. 2)* 1 June 1956, NJ 1958 424.

[489] HR *Kosovo* 29 Nov. 2002, NJ 2003 35.

A 2004 attempt to revisit the issues, this time in the case of the Afghanistan conflict, was also rejected by the Court.[490] The claimants there sought to read the (not directly applicable) provisions of the UN Charter, specifically Articles 2(4), 42 and 51, and other norms of international law, into a positive and legally enforceable duty of the state under Article 90 Constitution. That Article calls upon the government to promote the development of the international legal order.[491] The Hoge Raad rejected this reading of Article 90. Reaffirming the non-self-executing nature of those UN Charter provisions (and associated international law), it read Article 90 as a hortatory provision, the concrete implementation of which was a matter of policy and politics, outside the jurisdiction of the courts.

[490] HR *Afghanistan* 6 Feb. 2004, NJ 2004 329.

[491] See, e.g., Besselink 2003 (and pp. 134–5 on HR *Afghanistan* 6 Feb. 2004, NJ 2004 329).

Chapter 4
Customary International Law and Judicial Power

4.1 The Basics

From treaties, we turn now to the second branch of international law, customary international law, and examine in similar fashion where and how it intersects with the doctrine and practice of the separation of powers. Until the twentieth century, when written instruments of international law came to overshadow this second component, customary international law was the principal and most important device to convey norms of international law.[1] Much of the body of international law has its foundation in, or continues to exist as, customary international law in some form or other, despite the modern concentration on written instruments. The classic doctrines of sovereign immunity, on war, conquest, and territorial cession, piracy, and on the law of prize—to name but a few—all developed and were maintained in customary international law. This modern preference may perhaps derive in no small measure from an equally modern positivistic attitude favouring black letter law, written and certain, attributable to a legitimate source, rather than the interpretative exercise of tracing out rules drawn organically from a body of conventional practices. Indeed, from a constitutional and conceptual optic, (multilateral) treaties and the formalities associated therewith come as close to representing an international legislative instrument as seemingly possible in an order notorious for its lack of any central legislative and judicial powers able to serve as the institutional repositories for (international) social meaning and legitimacy. The absence of those two institutional components place greater burdens on national courts called to address customary international law in cases before them. These burdens are not simply additional encumbrances on procedures and resources. Rather they test the accepted equilibrium among the three branches of state authority—legislative, executive, and judicial—making up the separation of powers.

[1] See generally Villiger 1985; D'Amato 1971.

D. Haljan, *Separating Powers: International Law Before National Courts*,
DOI: 10.1007/978-90-6704-858-3_4,

But before we can investigate these, we need first to sketch out what customary international law is. This does not purport to be a full exposition on customary international law, nor a discussion of all what ails customary international law. Rather, I intend to provide a brief survey of the current situation, and focus on the aspects particularly relevant for national constitutionalism and the separation of powers doctrine.

Customary international law is the collection of informal, uncodified rules or norms of international law, taken as binding by and on states, and established thus among them by their consensus, all as evidenced from their conduct in international affairs. By "informal" and "uncodified" we distinguish those rules from others (intentionally) produced through certain formalities in some institutionalised process, like treaties or national legislation.[2] And as with municipal law, we must understand customary international law to adopt that concept of "law" taken as a rule compelling a state to act in a certain way despite and contrary to its own interests of the moment.

The conventional starting point for a modern definition of customary international law cites Article 38(1) of the *Statute of the International Court of Justice.* This provides:

> The Court, whose function it is to decide in accordance with international law, shall apply:
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> (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
> (b) international custom as evidence of a general practice accepted as law;
> (c) the general principles of law, recognised by civilised nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although the Article makes no mention of "customary international law", of course subclause (b) speaks of "international custom" evidencing law. This then undergoes a transposition into "customary international law", as one of the sources of international law. The language is substantially the same as that under Article 38 of the Statute of the Permanent Court of Justice, established under the League of Nations.

Approaching the subject from this vantage point, Article 38 becomes the touchstone for any discussion of international law, one which treats the categories there as reflecting different types of international law, or at the very least, different routes of creating international law.[3] But it would be misleading to understand Article 38(1) as listing customary international law as a separate constituent or separate source of international law. In effect, this reads Article 38(1) as listing the authoritative ways of creating international law: treaties, custom, general principles

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[2] The modern tendency is to consider treaties and UN Council instruments as evidence of customary international law: Brownlie 2008, p. 15; Shaw 2008, pp. 83ff, 115ff. See also Villiger 1985, and Thirlway 1972.

[3] Brownlie 2008, p. 5, n. 4.

of law, and with judicial decisions and academic commentary bringing up the rear. The temptation would then be to draw direct analogies to legislation, common law, and so on. One principal difficulty with such an interpretation is the clear lack of any real, practicable institutional foundations to support the analogy, even accounting for the UN and the ICJ. A second, and related, difficulty is just the nature and practice of international law in general, which does not allow for any consistent and coherent, let alone neat and tidy, classifications of types of legal rules. It is not necessary here to have adopted O'Connell's justifiable view that the substance of international law is in fact custom.[4] Hence treaties are mere "contracts which secure the endorsement of the law"; the general principles of law are a seedbed to be drawn upon as inspiration or in supplement of insufficient practice, and the decisions of courts offer proof of a custom or grounds to build analogies in the development of law. Even a cautiously optimistic view of international law must realistically concede that identifying its norms or rules is always an inductive, interpretative exercise. Rather than a process of deduction of what the law is, as laid out in one or more authoritative source documents, international law necessitates a process of induction, inferring an operative rule from a collection of facts considered relevant and reliable evidence.[5] Hence treaties, practice, general principles, judicial decisions, and commentaries all represent simply the wellspring of evidence to be analysed to determine the crystallisation of commonly held international rules of conduct.[6]

Subclause (b) stipulates "a general practice accepted as law", of which international custom serves as evidence. Hence, the kernel of customary international law is thus parsed into two components: the factual element of conduct, acts, and the psychical or mental element of juridical compulsion. (An analogy to the *actus reus* and *mens rea* components in criminal law would not be amiss to give some texture to these two elements.) The ICJ and commentators have translated these two aspects into "state practice" or "the material fact", and "*opinio juris sive necesitatis*"[7] or "the psychological fact". Both combine to demonstrate acceptance of a definable rule, rather than mere happenstance, or behaviour serving some transitory, isolated occurrence or interest. State practice absent the additional mental element obviously cannot account for the obligatory nature of that mere usage. And the obligatory aspect without state practice is merely idealism, wishful thinking, or empty moralising.

This rather simple, straightforward definition of customary international law masks a far more complex problem and uncertainty on what is necessary and sufficient as state practice and *opinio juris* to constitute a norm of customary international law.[8] The growth of academic treatment of international law, tracking

[4] O'Connell 1970, vol. 1, pp. 7–8.

[5] Following Schwarzenberger 1947.

[6] Brownlie 2008, p. 4.

[7] Coined by Geny in 1899: Shaw 2008, p. 75.

[8] Hence, Lepard 2010, pp. 9–10 ("conceptual and practical enigmas"). See also Perrean–Saussine and Murphy 2007.

and intensified by international efforts to rationalise and institutionalise it (as best exemplified by the UN system and its output, together with the growth of treaties) also has brought increased scrutiny upon just what composes customary international law. Its diffraction into practice and *opinio juris* has also tended to separate commentators (not counting the sceptics doubting the legal character of international law) into two principal streams according to their emphasis on the one or other component.[9] The placing of greater emphasis on state practice generally suggests a more generous and accommodating view of what constitutes (customary) international law. By contrast, valuing more highly *opinio juris* tends to contract the body of international law significantly. Nor is the division limited simply to the empirical. Positions expressly—but more often implicitly—held concerning the moral value of the international rule in issue also affect the interpretative exercise. A leaning towards natural law and universal values has always been present in international law, from the earliest commentators through to the present, particularly in the field of human rights (political, social, economic, and so on). In extreme cases, it can blur the line between the law as it is (*de lege lata*) and the law as the commentator would like to see it (*de lege ferenda*), thus expanding international law. Whatever the desired balance between state practice and *opinio juris*, there remain further fundamental, doctrinal questions on just what make up the two, and indeed, whether any state has actually met those requirements.

4.1.1 State Practice

The action of a state, by the conduct of its officials, in transacting foreign relations in peace and in war constitutes, in broad terms, "state practice". Relevant here are actual examples of what states have done in their international affairs. The particular reasons why a state may chose one course of action over another are not, for the moment, relevant. It is from the pattern of conduct thus evidenced by states that we can begin to discern a rule of action covering those circumstances. Indeed, were it necessary, we could draw analogies from the national level regarding the growth and development of customary law, common law and social mores more broadly.[10] The recurrence of certain types of behaviour, both actions and reactions, gives rise to a constatation and an expectation. First, states come to recognise that a certain type of act "A" generally, consistently provokes a certain type of reaction "R". Second, states should come to expect or rely on other states reacting in that given way. This recurring behaviour in given circumstances, of action and possibly reaction, constitutes the hard evidence of state practice. The further step of

[9] Consider thus D'Amato 1971; and Kirgis 1987 and D'Amato 1987 (both comments on *Military and Paramilitary Activities in Nicaragua* ICJ Reps 1986 14).

[10] See the survey and discussion in older works on international law, e.g. Wheaton 1916 and Phillimore 1854.

abstracting from the constatation and expectation to generate a normative conclusion—a rule, in other words—either that states ought to do A, or avoid doing A on pain of R, pertains to the considerations of *opinio juris*.

What conduct of states, through their officials, actually stand as relevant and persuasive evidence of state practice? The modern "state" or "government" hardly represents a single mind speaking with one voice. It is clearly a short-form referring to all officials, elected and appointed, charged with and responsible for conducting some part of the public administration. And the business of a modern state, the public administration, is a complicated collection of functions, because the modern state makes its presence felt in almost all aspects of our daily life. The state acts in multifarious ways through its officials, from legislation, regulations, Ministerial guidelines, through diplomatic notes and representations, to administrative decisions, court orders and government policy papers, to press statements and speeches. This wide and diverse pool of official action presents a range of evidence from which we might infer possible norms. Perhaps the best evidence for norms of customary international law are the official, statements, representations, and claims made by one state to another, as well as any concrete action, military or otherwise, taken. *A fortiori* where they expressly identify a rule of international law as applicable. We might also include any official certificates or instruments intended to be relied upon in court proceedings as the position of the state. And of course, court judgments may also point the way to state practice.

It is, however, a significant and substantial difficulty that little of this type of direct evidence exists covering the range and scope of all the norms claimed for international law, customary international law in particular. Accordingly, modern commentary favourable to customary international law has tended to expand the types of official conduct acceptably evidencing the required state practice. This broader collection of data would thus facilitate identifying and extracting recurring patterns of conduct by all—or at the very least, a representative number of—states. Arguably, given the many ways in which the modern state does function, and expresses itself, an expansion of the criteria for relevant practice, and probative of a state's acceptance and observance of norms, seems justifiable. After all, strictly speaking, the state practice element is simply evidence of "general practice accepted as law", and neither definitive nor constitutive. Hence, policy statements, government answers to questions asked in Parliament, speeches, legislative and other *travaux préparatoires*, statements made to the press, the record of a state's statements and voting in the UN General Assembly, the Security Council, international organisations and committees, and at international conferences, are examples, among others, of relevant state practice. These examples are taken not so much as concrete acts from which a norm of customary international law might be inferred, but rather as examples of a state declaring what it believes the norm to be.[11] In other words, they would represent the acknowledgement or admission by a State of an extant, applicable rule of customary international law for the circumstances in

[11] See, e.g., Lepard 2010, pp. 122ff, 171ff.

issue. And as such, they bypass any traditional criterion or requirement of actually having been put into practice already.[12] It is by virtue of their "declaratory" character that we may infer (or impute to them) the necessary "general acceptance". A State seeking to rely on such a declared norm of customary international law must logically be presumed to have accepted it as such.

4.1.2 Opinio Juris

Developed in the late nineteenth century, the purpose was to distinguish in the context of the national legal order, acts consciously imbued with juridical significance as opposed to those undertaken out of habit or unreflective usage.[13] It came to be applied to international law in conjunction with the greater scholarly attention paid to international law to explain and elucidate its principles in a comprehensive and coherent fashion. It has remained a prominent part of the discussion about customary international law since then.

In the absence of any concrete, institutionalised system of law, the concept of *opinio juris* was to explain why or justify how certain acts of state carried the element of compulsion. In other words, given the rather obvious and significant absence of any formal law-declaring institutions for the international law system, the concept was to identify the basis of obligation, of how certain declarations carried normative force, and thus to distinguish them from mere usage.[14] But in this attempt at systematisation and structure, the concept brought with the related (if not exposing the inherent) difficulties of definition and proof.

The problem of proof is for the most part self-explanatory. On the one hand, it tracks concerns raised in proving state practice. What should or ought to count towards *opinio juris*? If the point is to show the state's belief that a particular rule is binding on it, then presumably the best evidence should come from the highest and most authoritative state source, speaking on behalf of the state, regarding the rule in the circumstances. But this is an ideal, rarely if at all matched by everyday practice and events. On the other hand, even opting for a broader catchment area for evidence of binding effect, it does not necessarily follow in any event that a state is acting out of a sense of obligation compelled by a rule, as opposed to merely considering, advocating, or pursuing its interests of the moment.[15] Nor, as D'Amato has pointed out, does the concept account for the ordinary inconsistent

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[12] Hence, an invitation to consider a "third" form of international law, added to customary international law and treaty law, being "declaratory law": Chodosh 1991, and likewise see Petersen 2008.

[13] Shaw 2008, pp. 75, 84ff; D'Amato 1971, p. 66ff.

[14] Lepard 2010, p. 16ff; and see generally, Brierly 1958; D'Amato 1971; Henkin 1979; Franck 1990; Koh 1997; but for the other side: Goldsmith and Posner 2005, p. 23 (rational choice model).

[15] As argued for by Goldsmith and Posner 2005, p. 26ff.

and contradictory representations submitted by states over time.[16] All this feeds into the conceptual problem faced by *opinio juris*.

If there is little by way of settled understanding what ought to count in a practicable and determinative way count towards an acknowledgement of law binding on it, this perhaps may direct some of the blame to uncertainties in what *opinio juris* actually accomplishes.[17] The conceptual problem goes to the nature of *opinio juris.* In the first place, the basis of obligation is unclear, being variously described as founded on consent, coordination of interests, common values and interests, and rightness or moral goodness, or diffuse consensus on principles.[18] These might be categorised into *opinio* situated inside (subjective account), and outside (objective account) the evidence of practice. Certainly for the objective account, then, how that normative core might be established, and by whom, is the next problem. In the second place, the doctrine rests on a type of paradox. If a state is to act out of a sense of obligation, arising out of the jural significance of the act, then that jural nature must precede the act itself. Otherwise, a state could not consider itself bound to act other than the way it has chosen to do. But on the traditional account, it is the actual practice of states which create the jural significance. The paradox is neatly engaged in D'Amato's analysis of protest and divergences from "established custom".[19] As one final consideration, and from the perspective of national law, the judgments of national courts may well evidence the necessary jural qualities to qualify as binding statements of law, binding too on the state and government. But consider the nature of those judgments. They emanate from state courts whose immediate allegiance is to the national polity, and whose legal expertise derives from local cases applying local law.[20] What is more, relying on domestic courts may invite the perception that international law derives from national law, and is therefore subordinate to it.

4.2 Customary International Law and the Separation of Powers

Let us now draw together these diverse strands in the sketch of customary international law into a single coherent thread, to be woven into the whole cloth of the national constitutional order and international law. And in so doing, we of course

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[16] D'Amato 1971, pp. 22ff, 48ff.

[17] See, e.g., Kelly 2000.

[18] Lepard 2010, p. 16 provides a helpful overview; and see Petersen 2008 (diffuse network of consensus).

[19] D'Amato 1971, pp. 4–5; 99ff; 187ff.

[20] Trimble 1986, pp. 717–719. And see *Martin v Hunter's Lessee* 14 US 304 (1816) (per Story J). Yet Falk 1964, pp. 84–114 (reducing international tensions, by being attentive to current social and political dynamics).

focus specifically on those issues where customary international law and the separation of powers intersect, rather than on all the problematic issues in the general doctrine of customary international law. Indeed, we have already adverted to a number of matters where customary international law seemed to engage the separation of powers directly.

As with our examination of treaties before national courts, the diverse strands relevant to the separation of powers organise themselves along the two dominant themes of function and authority, of "how" and "why". The first is how customary international law is used in domestic proceedings. The second is why it is so invoked; what rules govern such use. Obviously the first depends upon the second: the treatment of customary international law by national courts depends upon what the rules, if any, compel them to do. It is clear enough that the courts decide if and how customary international law applies in function of their duties, under the separation of powers, to interpret and administer the law. And it is likewise clear that the parties to the action will invoke customary international law.[21] The state, when a party, will invoke customary international law to justify its actions, and the denial of some right or the imposition of some burden, within its prerogative as recognised and permitted in customary international law. Private parties will invoke customary international law to limit or qualify acts of state (legislation or executive action) so as to avoid or mitigate some obligation or penalty, or justify a claim of some right or remedy. Both facets, the "how" and the "why", represent arguments grounded in constitutional law. Each rely on the constitution as a source of authority for the exercise of a particular power, and of the limits for that as well. Each supposes, tacitly or expressly, that the international law system is part of the domestic legal and constitutional one, having an authority by and through the constitution itself or, from a Kelsen-inspired perspective, as paramount to the constitution. Under the latter hypothesis, the constitutional order must be understood to derive somehow from the international, as logically prior. All of these considerations figure, of course, in the role and function of the relevant state organs, courts included. They reflect the separation of powers, but defined in function of, as an instrument of, the overall constitutional order of a given state.

As we saw with the subject of treaties, the role of the separation of powers here is not one most helpfully or usefully conceived of as simply prescribing the functions or instrumentalities of state power—the *trias politica*. Merely allocating functions and tasks to one of the Judicial, Executive, or Legislative Branches does not provide an answer, without more, to whether the courts will or do apply international law or even observe the separation of powers where international law is invoked. What is required is an understanding of role of the courts and the law as constitutional organs of state power. It is a matter of the legitimate operation of public power, of sovereignty, as articulated in the law. In other words, why and

[21] In civil law systems, there may also exist a duty on the courts to address international law, *ex mero motu*. Nothing turns on this procedural matter: in both cases, the court must address international law issues.

how a court, as "*bouche de la loi*", may choose to apply international law *qua* law does not depend on the court's function, but to what extent international law is recognised as legitimate and valid law. The separation of powers doctrine is thus better understood as outlining constitutionally prescribed sources of legitimacy for law and law-making.

National courts may refer to customary international law and use it in three distinct ways, in their capacity as gatekeepers to the entrance of customary international law into domestic law.[22] First, and at its highest, customary international law may be treated as binding law determining the issue before the courts. And as such, it may be regarded as having a normative status either equivalent to domestic law (legislation and common law) or paramount thereto. Secondly, customary international law may be referred to as a persuasive authority, among others, but without binding character. For example, the customary international law of sovereign and diplomatic immunity may provide persuasive reasoning and examples by which to interpret domestic sovereign immunity legislation. The courts may nevertheless deviate from or disregard it in favour of binding law or in preference of other authorities and reasons. Thirdly, and at its lowest, the courts may treat customary international law as merely instructive in their interpretation of domestic law, guiding them in one direction or other. Neither binding nor persuasive, customary international law acts as supporting reasons for a particular way of understanding and presenting the law and facts. Its use is discretionary, not mandatory, and the court's reasons for judgment may just as easily stand with any reference to customary international law excised. This third category resembles the use by courts of foreign law and judgments as an aid for interpreting or expressing concepts of domestic law. It stands to reason that these three options available to a court are, in some way, determined by certain rules, and are not simply invoked or observed in arbitrary and inconsistent fashion. Presumably, whether a court treats a particular norm of customary international law as binding, persuasive, or as merely instructive, has to have some foundation in the constitutional and legal order.

Looking at this more abstractly, the use of customary international law to urge a specific interpretation of law and justify a particular result depends upon arguments from authority and from similarity. Under the first, the court is obliged to treat customary international law as determinative of the issues simply because of a constitutionally sanctioned rule of law, legislation or common law as the case may be, prescribing it so. Under the second, the court is encouraged to treat customary international law as determinative because similar (legal) results ought to flow from similar situations. The state is a part of a wider community of legal systems, and participates thereby in a wider consensus on points of law. The courts of all the various states are engaged in a similar exercise with similar objectives, in determining and applying just norms of conduct. Accordingly, the consensus and commitments evidenced in customary international law supplement or elaborate on domestic norms. The results desired are beneficial in and to, as well as

[22] borrowing from Capps 2007.