

SELECTED PROBLEMS IN THE THEORY OF CUSTOMARY INTERNATIONAL LAW**by Robert Kolb¹**

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1. INTRODUCTION

As with everything which cannot be seen or grasped, customary law remains something of a smiling sphinx in the realm of legal theory. Over the centuries, it has tended to generate puzzling questions of understanding and of construction, some linked to the concept of custom itself, others linked to the conception of custom within the context of a specific society with its special structure. In societies where custom continues to play a paramount role, that is, in societies deprived of a centralised legislator, the predominance of custom imports into the law and law-making the many uncertainties invariably linked with it. This is particularly true of international law. The objective of this short contribution is to address some of these problems in the form of brief commentaries following a concise statement of the point or problem at issue.

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2. THESES AND COMMENTARIES ON SOME PROBLEMS OF CUSTOMARY INTERNATIONAL LAW

2.1 The two-elements theory of customary law

Thesis

Custom emerges out of the conjunction of two interrelated elements, namely practice and *opinio iuris*.² As has often been emphasised, the substance of this source is to be found in the practice of states.³ To this practice, or external element, there must be added a subjective element. Its function has been described as follows:

‘When inferring rules of customary law from the conduct of States, it is necessary to examine not only what States do, but also why they do it. In other words, there is a psychological element in the formation of customary law. State practice alone does not suffice; it must be shown that it is accompanied by the conviction that it reflects a legal obligation.’⁴

There are thus two main modalities of law-creation in the international society. In the first, conventional, method, law is *made* in a conscious and wilful process akin to legislation, whereas in the second, customary, method, law *grows* through a process which weaves together acts of practice and belief. The first leads to negotiated and rationally exposed norms, held together by an expression of auton-

2. See Art. 38(1)(b) of the Statute of the ICJ, which reads as follows: ‘The Court ... shall apply: ... international custom, as evidence of a general practice accepted as law.’ In the case-law of the ICJ, see *North Sea Continental Shelf Cases*, ICJ Rep. (1969) p. 44, para. 77; *Continental Shelf (Libya/Malta)*, ICJ Rep. (1985) pp. 29-30, para. 27; *Military and Paramilitary Activities in and Against Nicaragua*, ICJ Rep. (1986) p. 97, para. 183; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. (1996-I) p. 253, para. 64. According to the *Dictionnaire de droit international public* published under the lead of J. Salmon, custom may be defined as: ‘*La coutume est le résultat de la conjonction d’une pratique effective et de l’acceptation par les Etats du caractère juridique – et donc obligatoire – des conduites constitutives d’une telle pratique.*’ (*Dictionnaire de droit international public* (Brussels, Bruylant 2001) p. 284).

3. Cf., R. Jennings and A. Watts, eds., *Oppenheim’s International Law*, Vol. 1, 9th edn. (London, Longman 1992) p. 26. To this, the practice of other subjects of international law may be added, e.g., that of international organisations. See M. Mendelson, ‘The Formation of Customary International Law’, 272 *RCADI* (1998) pp. 198 et seq.

4. See P. Malanczuk, ed., *Akehurst’s Modern Introduction to International Law*, 7th edn. (London, Routledge 1997) p. 44. According to the ICJ, in the often-quoted passage of the *North Sea* 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 *opinio juris sive necessitatis*. The states concerned must therefore 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’ (*supra* n. 2, at p. 44, para. 77).

mous will. The second results in norms which are moulded by complex molecular forces, holding together a series of disparate acts and facts.⁵

Commentary

The conception of custom which has been presented needs to be reviewed and refined. There are some authors who challenge its appropriateness quite generally. They claim that customary law always grows out of a process which is different from that presented by most scholars and by the International Court through the two-elements theory. Thus, for example, it has been said that customary law is the result of a tacit agreement,⁶ that it emerges only through regularities of practice without there being a need of *opinio iuris*⁷ (or that the *opinio iuris* is in some way implicit in practice),⁸ that it emerges in a sociological process which is either spontaneous

5. As was admirably said by Ch. De Visscher, in his *Théories et réalités en droit international public*, 2nd edn. (Paris, Pedone 1955) p. 190: '*Les incertitudes qui subsistent au sujet de la formation coutumière concernent surtout le processus mental par lequel l'esprit humain associe la normativité (idée de l'obligation) à certaines régularités sociales. Le lien qui, après coup, s'établit ici ne peut être précisé en termes généraux. C'est que l'idée d'ordre qui, sur ce point, guide la pensée juridique, procède elle-même d'une représentation de valeurs, de certains impératifs moraux et sociaux qui, dans les rapports internationaux surtout, n'ont rien d'immuable. Ni les données de fait à utiliser (nombre, spécificité), ni la direction dans laquelle ces données s'enchaîneront pour prendre un jour forme et figure de "précédents" constitutifs de la coutume ne sauraient être l'objet de généralisations dans une théorie de la coutume.*' Or, in the words of R.J. Dupuy: '*[D]ans la coutume classique, la multiplication de faits produit une croissance de la conscience juridique, selon un processus existentiel dans lequel l'existence précède l'essence, qualifiée après coup par le droit ...*' ('Communauté internationale et disparités de développement', 165 *RCADI* (1979-IV) p. 171).

6. One might also say that this school reads the convergence of *opinio iuris* required by the mainstream as evidencing the existence of a tacit agreement. This view was generally sustained by the positivistic and voluntarist stream of international lawyers. See, e.g., D. Anzilotti, *Corso di diritto internazionale* (Rome, Atheneum 1928) pp. 63 et seq., 68; S. Seferiades, 'Aperçus sur la coutume juridique internationale et notamment sur son fondement', 43 *RGDIP* (1936) pp. 131-132, 135, 145. On this school of thought, see H. Günther, *Zur Entstehung von Völkergewohnheitsrecht* (Berlin, Duncker & Humblot 1970) pp. 22 et seq.; G. Gianni, *La coutume en droit international* (Paris, Pedone 1931) pp. 59 et seq.; A. Verdross, 'Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts', 29 *ZaöRV* (1969) pp. 636-637; M.H. Mendelson, 'The Subjective Element in Customary International Law', 66 *BYIL* (1995) pp. 184 et seq.; P. Ziccardi, 'La consuetudine internazionale nella teoria delle fonti giuridiche', 10 *Comunicazioni e studi* (1958/59) pp. 191 et seq.; J. Kunz, 'The Nature of Customary International Law', 47 *AJIL* (1953) pp. 663-664. See also P. Haggemacher, 'La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale', 90 *RGDIP* (1986) pp. 13-15; R. Walden, 'The Subjective Element in the Formation of Customary International Law', 12 *Israel L Rev.* (1977) pp. 350 et seq. See also the materials quoted in R. Kolb, *La bonne foi en droit international public* (Paris, Presses Universitaires de France 2000) p. 316.

7. See, e.g., Mendelson, loc. cit. n. 3, at pp. 289 et seq.: widespread practice suffices, *opinio iuris* does only serve in some cases in order to exclude acts which are clearly meant to stay outside the realm of law, e.g., acts of courtesy (*opinio non iuris*). See also H. Kelsen, 'Théorie du droit international coutumier', 1 *Revue internationale de la théorie du droit, nouvelle série* (1939) pp. 264 et seq.; P. Guggenheim, *Traité de droit international public*, Vol. I (Geneva, Georg 1953) pp. 46 et seq.

8. This can be claimed in several ways, e.g., that if there is a constant practice *opinio iuris* may be presumed unless the contrary is proven: see Seferiades, loc. cit. n. 6, at p. 144; M. Sørensen, 'Principes de droit international public', 101 *RCADI* (1960-III) p. 51; Diss. op. Azevedo, *Asylum case*, *ICJ Rep.*

and irreducible to description⁹ or is based upon an interaction creating legitimate expectations,¹⁰ or even other views than those mentioned here.¹¹

It is, however, also possible to accept that custom is created through the two elements of practice and *opinio iuris*, but to specify that this description covers only a part, or even a reduced part, of the customary process as it is operating today. In fact, custom has diversified itself tremendously in the last hundred years. Progressively, all unwritten international law has coalesced around it, from constitutional principles of the international community, to instant custom, or the ‘*coutume sauvage*’ created through resolutions of international institutions.¹² It might be

(1950) p. 336. Another way of reaching the same result is to claim that practice and *opinio iuris* are indissolubly intertwined in the same acts, statements and behaviours, which form the basis of customary law. See also Haggemacher, loc. cit. n. 6, at pp. 108 et seq., pp. 113-114: ‘*L’établissement d’une norme coutumière ne se réduit pas à vérifier objectivement la réalisation du pseudo-processus de formation suggéré par la doctrine classique et à en constater passivement le résultat: le juge ne se borne pas à cueillir un fruit mûri sur l’arbre de la pratique au soleil de l’opinio juris. Son rôle est au contraire créateur, quasi-législatif, et il demande à être saisi comme tel. S’inscrivant dans la dynamique concrète de la procédure, telle que la façonnent les parties, il implique une perspective spécifique: il y a toujours saisie globale et rétrospective d’un ensemble complexe de données, à la lumière d’une norme disputée, à propos d’un litige concret. C’est l’objet concret du différend qui commande en définitive toute la démarche. Jamais celle-ci ne consistera en une reconstruction historique, linéaire et détachée, du prétendu processus qui aurait conduit à l’émergence de la norme. C’est à contre-courant que l’interprète cherche à saisir la coutume. Sa démarche ne reproduit en rien celle des acteurs censés avoir engendré la règle. Leurs actes poursuivaient des fins concrètes, mais n’entendaient guère promouvoir des normes et des principes. C’est l’interprète, après coup, qui en dégage cette composante insoupçonnée des acteurs; et il le fait en fonction d’un problème présent qui, tel un éclairage inattendu, imprime aux faits épars du passé une signification nouvelle.*’

9. The authors associated with these schools of thought are in the vein of the tradition established by the historical school of law of the 19th century. See, e.g., R. Ago, *Scienza giuridica e diritto internazionale* (Milan, Giuffrè 1950) pp. 78 et seq.

10. According to this view, customary law emerges as an ever-changing aggregate of claims, counter-claims and decisions, which shape a web of shared expectations about the course of conduct which is expected. For some authors this mechanism is of a prevalently empirical nature, i.e., the expectation which becomes the basis of the customary rule is seen as a fact: see, e.g., the New Haven school, M. McDougal, ‘International Law, Power and Policy: A Contemporary Conception’, 82 *RCADI* (1953-I) pp. 137 et seq.; M. Reisman, ‘International Law-Making: A Process of Communication’, *ASIL Proceedings* (1981) pp. 101 et seq. For other authors, the mechanism is of a more normative nature. It is based on the idea of ‘legitimate expectations’ according to what could and should be expected by the States Parties to the interaction in good faith: see, e.g., J.P. Müller, *Vertrauensschutz im Völkerrecht* (Cologne, Carl Heymans Verlag 1971) pp. 77 et seq.; Günther, op. cit. n. 6, at pp. 138 et seq.; Mendelson, loc. cit. n. 3, at pp. 184-186, 188, 292.

11. E.g., A. d’Amato, *The Concept of Custom in International Law* (Ithaca, Cornell University Press 1971).

12. This new custom is handled as a means of legislation, mainly through resolutions of international organs accepted so widely that it becomes possible to claim that the resolution expresses the will of the international community. This ‘wild custom’ is used consciously with the aim of producing law within an integrated and institutionalised framework (especially that of the United Nations) and is often formulated in a general and abstract way. In the words of R.-J. Dupuy, essence here precedes existence, contrary to classical customary law, where the rule emerged out of a multiplicity of disparate acts and facts. On this new custom, see among others R.-J. Dupuy, ‘*Coutume sage et coutume sauvage*’, in *Mélanges C. Rousseau* (Paris, Pedone 1974) pp. 75 et seq.; G. Abi-Saab, ‘*La coutume dans tous ses*

expected that such a diversification of a phenomenon might have produced an equivalent broadening in its legal construction. However, the dominant view still constructs custom around the safe havens of the two elements, being ready only to modulate somewhat their relation to one another¹³ and their way of operating,¹⁴ in order to fit better the new phenomena. This, it seems, may not be enough. It may be necessary to envision a new construction of custom, by which different categories of it are distinguished and placed within the framework of different modalities of formation or creation. In other words, the heading 'custom' may have become too narrow and too misleading as applied to a series of phenomena of modern law-creation in international society, which are subsumed under this heading only for lack of another – new – accepted basis of law-making outside of treaty law.

Some writings have been devoted to the subject of the diversification of custom. However, as they were produced only erratically, i.e., outside a general system which integrated them comprehensively, they did not produce far-reaching results. Their most visible effect was to contribute to a further blurring of the main elements of the concept of custom, leading to an increasing conceptual softness. Two examples may be mentioned. First, some Italian authors suggested the possibility of distinguishing between a '*consuetudine-fondamento*' (custom as basis of international law) and a '*consuetudine-fonte*' (custom as a source of international law).¹⁵ Their starting point is the following: in a system of law based on the equality of its members, that is in the absence of a centralised legislator, customary law is necessarily the supreme source. But this custom at the root of the system might not be of the same nature as the ordinary custom involved in the day-to-day creation of law. This supreme custom is founded either in a logical premise or in social psychology ('the juridical conscience of people'), which internalises the fact that

Etats ou le dilemme du développement du droit international général dans un monde éclaté', in *Mélanges R. Ago*, Vol. I (Milan, Giuffrè 1987) pp. 53 et seq.

13. It has thus been said that recent developments show that practice relies more and more on the subjective element to the detriment of the objective one, postulating that a norm arises out of some statements or some constructive collective commitments gathered out of soft law texts instead of concrete acts of state practice. See, e.g., P. Weil, 'Le droit international en quête de son identité: cours général de droit international public', 237 *RCADI* (1992-VI) pp. 173 et seq. at p. 173: '*La doctrine en a fréquemment fait l'observation: depuis quelques années l'opinio juris tend à prendre le pas sur la pratique, celle-ci n'étant plus appelée qu'à confirmer l'opinio juris si tant est qu'elle n'en dispense pas complètement. L'évolution n'est certes pas monolithique, car des arrêts récents continuent à se référer à la pratique; la minimisation de la pratique n'en est pas moins indéniable.*' The famous conception of 'instant custom' is equally based on the – in this case extreme – prevalence of the subjective element over the objective one. The basis for discussion of instant custom is the celebrated article of B. Cheng, 'United Nations Resolutions on Outer Space: Instant International Customary Law?', 5 *Indian JIL* (1965) pp. 23 et seq.

14. Thus, e.g., with the growth of international fora allowing an expression of collective will, (abstract) statements have been incorporated into the elements of practice and of *opinio iuris*, thus widening the empire of custom. Cf., M. Akehurst, 'Custom as a Source of International Law', 47 *BYIL* (1974/5) pp. 1 et seq.

15. See, e.g., the reflections of G. Sperduti, *La fonte suprema dell'ordinamento internazionale* (Milan, Giuffrè 1946) pp. 155 et seq.

the law is based in the life of a historically grown community.¹⁶ Thus, this supreme custom is ultimately based only on an *opinio iuris* which is not ascertained by empirical inquiry but which is assumed. Conversely, at the level of ordinary law-creation, we may encounter the classical concept of custom as a source, based on practice and *opinio iuris*.

Second, a slight variant of such a hierarchical theory is often referred to today, even if implicitly. With the growth of an international public order,¹⁷ i.e., a series of norms giving expression to fundamental values of the international community,¹⁸ there is a tendency to construct a sort of constitutional international law dealing with the protection of these interests in inter-state relations. Obviously, such essential norms must be placed on some higher footing than the ordinary norms of customary international law if their function is to be preserved. Thus, they are often put into a special category of norms, usually termed *ius cogens*, and assigned a higher level of normative hierarchy; they take precedence over ordinary norms of international law.¹⁹ At the same time, they are usually declared to be customary. Thus, *ius cogens* is construed to be a form of higher customary international law, where the element of necessity, or abstract *opinio iuris*, counts more than the actual practice. The analogy with the Italian conception presented above thus becomes apparent, even if the finality of the two constructions is different.

This tendency to a sort of specially defined custom can also be found outside the confines of *ius cogens* in the strict sense, particularly in fields close to it. It is thus, especially in the field of human rights and humanitarian law, that custom is defined more readily according to an *opinio iuris* than to practice. This is easily understood; the actual practice of states is characterized by too many violations to serve as a sound basis of induction. Thus, it is often claimed that greater weight must be given in these matters to *opinio iuris* or to 'principles' of the law.²⁰ Moreover, in many fields of international law (e.g., environmental law), there is an urgent need to create norms; the rapidity of contemporary developments mandates quick action. However, customary law is often too burdensome or simply not forthcoming at a given

16. See P. Ziccardi, *La costituzione dell'ordinamento internazionale* (Milan, Giuffrè 1943) pp. 161 et seq.

17. On this concept the literature is abundant: see, e.g., B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *RCADI* (1994-VI) pp. 229 et seq.; J.A. Carrillo Salcedo, 'Droit international et souveraineté des Etats, cours général de droit international public', 257 *RCADI* (1996) pp. 132 et seq.; C. Tomuschat, 'International Law: Ensuring the Survival of Mankind in the Eve of a New Century', 281 *RCADI* (1999) pp. 77 et seq. On the concept of 'international public order', see G. Jaenicke, 'International Public Order', in *Encyclopedia of Public International Law* (hereinafter: *EPIL*), Vol. II (E-I) (Amsterdam, North-Holland 1995) pp. 1348-1351.

18. One often mentions, e.g., the norms on the prohibition of aggression or the fundamental human rights (including the prohibition of genocide, crimes against humanity or grave breaches of international humanitarian law).

19. See the doctrine quoted in R. Kolb, *Théorie du ius cogens international* (Paris, Presses Universitaires de France 2001) pp. 68 et seq., pp. 124 et seq.

20. See, e.g., Tomuschat, loc. cit. n. 17, at p. 334; R. Abi-Saab, 'Les conflits internes aujourd'hui', in *Mélanges J. Siotis* (Bruxelles, Bruylant 1995) pp. 323-325.

moment. Thus, the international interpreter will tend to postulate norms of customary law (the only ones binding all states) without a convincing analysis of the practice. This is not a reflection of the laxity of the interpreter,²¹ but an indication of the urgency of creating general norms of international law.²² Here custom tends to become a postulate, an assessment of what the law requires.²³ One may mention the field of international criminal law, where the two *ad hoc* tribunals for the former Yugoslavia and Rwanda were confronted with many gaps left by the post-World War II jurisprudence. In order to perform their function, their only option was to fill these gaps by declaring customary some positions without further inquiry, which would have proven awkward.²⁴

In all the aforementioned cases, one may still apply the model of practice / *opinio iuris*, albeit in a somewhat modified way. But in other cases, this proves to be more difficult. Thus, if, as often happens, general principles of law are characterized as customary, special problems arise. In the case of such general principles of international law as the non-use of force or the obligation to use peaceful means of dispute settlement, the old scheme of practice and *opinio iuris* may still apply. In some instances, however, this proves unconvincing. Thus, considering the principle of sovereign equality, as enshrined in Article 2(1) of the Charter of the United Nations, it will be difficult to envision it as an ordinary customary rule. For, sovereign equality is in reality the presupposed basis upon which modern international law is erected.²⁵ It is not the result of practice but the very starting point which accounts for the possibility of state practice and custom created by states; if states were not sovereign and equal, it would not be accepted that their practice, the practice of all states, could produce customary norms. Some authors have gone further and have put in a category of 'deductive customary law'²⁶ a series of general principles of international law which are particularly fundamental, or which are more directly linked than others with the very idea of law. Thus, according to this view, a set of cornerstone rules, later refined by state practice, can directly be deduced from the

21. As to some extent suggested by Weil, loc. cit. n. 13, at pp. 175-176.

22. See G. Abi-Saab, 'L'éloge du "droit assourdi" – Quelques réflexions sur le rôle de la soft law en droit international contemporain', in *Nouveaux itinéraires en droit, Essays in Honour of F. Rigaux* (Bruxelles, Bruylant 1993) pp. 59 et seq. In this sense, international is 'hungry of norms'.

23. See also K. Zemanek, 'The Legal Foundations of the International System – General Course on Public International Law', 266 *RCADI* (1997) pp. 165-167.

24. On the state of the jurisprudence after the Nuremberg, Tokyo and follow-up trials, see United Nations War Crimes Commission, ed., *Law Reports of Trials of War Criminals*, Vols. I-XV (London, HMSO 1946-1949).

25. Thus it has been said that sovereign equality is an axiomatic assumption of international law which was inherited by the modern inter-state system and neither created conventionally nor created through practice. Cf., L. Henkin, 'General Course of Public International Law. International Law: Politics, Values and Functions', 216 *RCADI* (1989-IV) pp. 45 et seq.

26. See C. Tomuschat, 'Obligations Arising for States Without or Against their Will', 241 *RCADI* (1993-IV) pp. 292 et seq.

constitutional foundations of the international community.²⁷ This would be the case for the non-use of force, the *sic utere tuo ut alienum non laedas* or the non-use of nuclear weapons.²⁸ In another formulation, this deductive customary law concentrates on principles expressing core values of the international community.²⁹ At this point, a link with the already discussed concept of international public order is established. In the context of ‘deductive customary law’, so the argument goes, it is neither necessary nor appropriate to empirically collect, first the relevant practice and, second, *opinio iuris*. The correct method would be to look at the impact on the sovereignty of third states. Since sovereignty is equally protected, one can then directly deduce the illegality of certain behaviour.³⁰ The international community, or some international constitution expressing a supreme common will, thereby become a basis of normative deduction, quite independently from the real behaviour of states. Moreover, this deduction will be used to impose an obligation where the behaviour of states has not yet created a clear customary norm. This deductive custom is therefore something of a ‘contra-factual custom’, a concept very far indeed from the classical conception of customary law.

If the general principles of law recognised by civilised nations, derived from the century-old legal tradition of municipal jurisprudence, are put into the category of

27. For a strong and eloquent argument against the deductive method in international law, which he equates with law-making in disguise, see G. Schwarzenberger, *The Inductive Approach to International Law* (London, Stevens and Sons 1965); *idem*, ‘The Fundamental Principles of International Law’, 87 *RCADI* (1955-1) pp. 200 et seq.; *idem*, *International Law – As Applied by International Courts and Tribunals*, Vol. I (London, Stevens and Sons 1957) pp. 4 et seq.; *idem*, *A Manual of International Law*, 5th edn. (London, Stevens and Sons 1967) pp. 21 et seq.

28. With respect to nuclear weapons, see also the strictly deductive reasoning of H. Mosler: any means which negates the survival of mankind and the very existence of the international legal community must be considered unlawful under international law: H. Mosler; ‘Völkerrecht als Rechtsordnung’, 36 *ZaöRV* (1976) p. 44. Cf. also, G. Dahm, *Völkerrecht*, Vol. I (Stuttgart, Kohlhammer 1958) p. 39.

29. See Tomuschat, loc. cit. n. 17, at pp. 355-357. According to this author, some basic moral considerations are directly applicable as law, e.g., through the ‘elementary considerations of humanity’ as expressed in the *Corfu Channel* case. This means that obligations may arise for states directly from the ‘constitution of the international community’ in which certain core values are entrenched, in particular peace, human life and dignity. According to Tomuschat, the United Nations Charter and the Declaration of Human Rights of 1948 may also serve as a basis for such reasoning.

30. Tomuschat here quotes the International Court, whose Chamber stated in the *Gulf of Maine* case (1984): ‘[Customary law] in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas’ (*ICJ Rep.* (1984) p. 299). The Chamber seems to enunciate the existence of two types of custom, one rooted in the very structure of the international community (constitutional custom) and another rooted in the actual practice of states (administrative custom). But the sentence can also be read otherwise, specifically in the sense that in the first category practice and *opinio iuris* are already settled, whereas in some new areas (for example, the law of maritime delimitation, with which the Chamber was dealing) one must see to what extent an opinion on the law is confirmed by actual practice.

international custom³¹ rather than their own, special category,³² further problems arise. At least three of them may be quickly mentioned. First, as in the case of principles of international law, the general principles at stake here contain some normative propositions which are axiomatic and thus not dependent upon the strictures of practice and opinion. This is the case, in particular, for the important principles of *pacta sunt servanda* and good faith. These propositions cannot be established inductively since they are *a priori* yardsticks of behaviour; moreover, their violation does not render them invalid (as in the case of other norms) since these principles are necessary prerequisites for the existence of an international legal order.³³ Thus, they involve a maximum dissociation between the *Sein* and the *Sollen*, maintaining themselves as supra-factual: whatever the amount of contrary facts, they cannot be negated. This of course is incompatible with the very notion of custom. Second, one does not see very well what practice and *opinio iuris* could mean in this context. For the principles at stake are already law, they are not simply facts. Ordinarily, the *opinio iuris* criterion has the function of transforming facts of practice devoid of intrinsic legal value into law by incorporating into them a legal element. *Opinio iuris* thus transforms facts into law. It is a sort of philosopher's stone. But in the case of principles derived from secular legal experience (as, for instance, the principle of prescription), neither practice, nor *opinio iuris* as traditionally understood really fit. With respect to practice, it is not really international practice that counts, but that of the various internal legal orders. However, it seems odd to consider this aspect under the criterion of customary practice, since it may seem evident that such principles have been put into practice; otherwise they would not have emerged as a legal term of art. The only question which arises is whether the principle is known in the various legal systems, which raises questions of comparative law. The two perspectives are not identical. If the criterion of practice is to be maintained, one should speak of a special practice, i.e., that the principle represents the main forms of legal thought known in the world. The same can be said for *opinio iuris*. It cannot mean that the principle is considered binding in law, since that is beyond question. It could only mean that the principle is considered to be binding in international relations as well, there being a sort of *opinio iuris internationalis*. It goes without saying that an inquiry into such a specific *opinio iuris* has never been performed; no international interpreter has ventured into such territory. Nor are these contingencies considered by the internal judge, for example when he applies private law.³⁴

31. This happens relatively frequently. See, e.g., B. Conforti, *Diritto internazionale*, 4th edn. (Naples, Editoriale Scientifica 1992) pp. 42 et seq.; *idem*, 'Cours général de droit international public', 212 *RCADI* (1988-V) pp. 77 et seq.

32. As does the Statute of the International Court of Justice, Art. 38(1)(c).

33. As for *pacta*, see, e.g., Henkin, quoted in footnote 25. As for good faith, see, e.g., Tomuschat, quoted in footnote 26, p. 322; H. Mosler, 'General Principles of Law', *EPIL*, Vol. 7 (1984) p. 91; and even Schwarzenberger 1955, loc. cit. n. 27, at pp. 325-326.

34. See, e.g., Kolb, op. cit. n. 6, at pp. 41-42.

Third, it has been claimed that a custom derogating from fundamental legal principles essentially linked with the idea of law is intrinsically impossible.³⁵ An *opinio iuris* cannot have as its object a departure from a rule inherently necessary in a legal order; the legal opinion cannot want to free itself from the law. Thus a practice contrary to these principles will by legal fiction be non-customary since it will be deprived of *opinio iuris*. The *opinio iuris* is not taken here in its ordinary sense, as a conviction that accompanies a practice. Instead, it is divorced from effectiveness and rooted in purely normative considerations. In these areas custom is not any more simply practice and *opinio iuris*.

The insufficiency of the traditional theory of custom is equally visible in the field of international jurisprudential law. Continental writers of positivistic allegiance, in particular, were, for a long time, reluctant to admit that the law declared and shaped by the judge contributed to the formation of custom – and indeed sometimes created the body of customary law.³⁶ This is most obviously the case in the domain of maritime delimitations. It seems quite clear that the usual scheme of practice and *opinio iuris*, shaped around the idea of political actors whose action is later reduced to legal categories, is inappropriate here. Thus, a proposition does not become customary because a judge practices it uniformly, consistently and generally. What would that mean? Would a proposition first have to be practised by many different international tribunals in order to become ‘generally’ accepted? Obviously not. A single declaration by the judge that a proposition applies outside the nexus of the purely conventional law of the parties would make that proposition a norm generally applicable in international law, since by legal fiction the courts declare the law. And what about *opinio iuris*? A tribunal cannot do other than enunciate the law – unless it says that it exercises a non-legal function, e.g., adjudication *ex aequo et bono* or expressing a wish.³⁷

Summing up, it can be said that the time has come to put *à plat* the theory of custom and to articulate different types (and thus elements) of it in relation to different subject matters and areas. There is not one international custom; there are many international customs whose common family-bond is still to be shown. Consequently, a new map of international customary law has to be drawn, reflecting the varying contours of international life, instead of artificially pressing the growing diversity of that experience into the Procrustean bed of traditional practice and *opinio iuris*. At a minimum, this reconceptualization would have to take account

35. On this notion, see Dahm, *op. cit.* n. 28, at p. 17; F.A. von der Heydte, ‘Glossen zu einer Theorie der allgemeinen Rechtsgrundsätze’, 33 *Die Friedenswarte* (1933) pp. 296-297.

36. See on this point Mendelson, *loc. cit.* n. 3, at pp. 198 et seq.; Kolb, *op. cit.* n. 6, at pp. 37-38, with many quotations.

37. This is sometimes done by the International Court of Justice, e.g., in the *Passage through the Great Belt* case (Provisional Measures), *ICJ Rep.* (1991) p. 20, where the Court invites the parties to negotiate. See also the *Qatar v. Bahreïn* case, *ICJ Rep.* (1994) p. 125, para. 38. The old Central American Court of Justice, which existed from 1908 to 1918, frequently took a diplomatic, as opposed to judicial, approach, a fact which contributed to its ultimately being discredited. See N. Politis, *La justice internationale* (Paris, Hachette 1924) pp. 139 et seq.

of the following elements: (1) There is a category of constitutional norms containing supreme principles of law and public order considerations which are either axiomatic or in any case of a superior legality. In this area, the reasoning is more deductive than inductive and consequently the shape of applicable custom has to be moulded to it. Custom is here close to what is generally considered to be socially necessary at the moment the interpretation is performed. We are here confronted more with 'principles' than with ordinary 'customary rules'. (2) There are areas where *opinio iuris* (eventually differently defined) has more weight than practice, e.g., in the field of humanitarian law and human rights law. This seems to be the case also in the field of the non-use of force (and eventually other duties of abstention), where the practice is difficult to weigh, as much for what is done as for what is not done.³⁸ (3) There are further areas where the requirement of practice is softened in the face of quite urgent social needs, e.g., in the realm of environmental law or of criminal international law, both under the sign either of survival or of combating impunity. (4) Custom is differentiated according to the actors shaping it, i.e., *ratione personae*. In the context of state practice, there is a certain context for practice and *opinio iuris*. This context changes when we deal with the practices of international organisations or other subjects of international law (e.g., the ICRC), and even more when we deal with organs of international law contributing directly to custom, as for example

38. Thus, the ICJ gave preference to *opinio iuris* over practice by looking, e.g., to the text of Resolutions of the General Assembly of the United Nations: *Military and Paramilitary Activities in and Against Nicaragua*, *ICJ Rep.* (1986) pp. 99-100, para. 188: 'The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an *opinio iuris* as to the binding character of such abstention. This *opinio iuris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, must thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security ...' See also the Threat or Use of Nuclear Weapons Opinion, *ICJ Rep.* (1996) p. 255, paras. 70-73. On the approach of the Court in the *Nicaragua* case, see H. Charlesworth, 'Customary International Law and the Nicaragua Case', 11 *Australian YIL* (1984-7) pp. 1 et seq.; J.I. Charney, 'Customary International Law in the Nicaragua Case, Judgment on the Merits', 1 *Hague YIL* (1988) pp. 16 et seq.; W. Czaplinski, 'Sources of International Law in the Nicaragua Case', 38 *ICLQ* (1989) pp. 151 et seq.; A. d'Amato, 'Trashing Customary International Law', 81 *AJIL* (1987) pp. 101 et seq.; M.H. Mendelson, 'The Nicaragua Case and Customary Law', in W. Butler, ed., *The Non-Use of Force in International Law* (Dordrecht, Nijhoff 1989) pp. 85 et seq.; P.P. Rijpkema, 'Customary International Law in the Nicaragua Case', 20 *NYIL* (1989) pp. 91 et seq.

international tribunals. Custom is here necessarily *à géométrie variable*. (5) Sociologically speaking, the element of 'practice' will play a more prominent role in periods of social stability and continuity; whereas the element of 'opinion', understood in its widest sense, will predominate in periods of social upheaval and rapid change. In this last case, the necessity of quick adaptations of the law will produce a sort of fever-like custom, tending to emerge out of impulsive and/or hazy projections.

Further reflections and elaboration of such categories, including the precise legal requirements governing them, would be interesting and rewarding.

2.2 Customary law as type of inductive law

Thesis

It is often claimed that customary international law represents the archetype of a source gathered through inductive reasoning. There are first a series of more or less loosely connected precedents, which at a second stage have to be linked together and moulded in an intellectual process to a unitary rule of law. Thus, Viscount Sankey, L.C., said of customary international law in the context of piracy: 'It is a process of inductive reasoning.'³⁹

Commentary

Apart from what has already been said about 'deductive custom' (*supra* section 2.1), there may be little doubt that customary law is based on some induction. But this assertion needs much more comment than is usually offered, since it is replete with problems. In particular, there is no induction without a prior element of axiomatic or deductive reasoning. It is impossible to induce anything if the framework within which the induction shall take place is not defined. For example: what are the relevant acts of practice which lend themselves for induction? What is the level of generality into which a precedent must be placed in order to get a comparable chain of events, the starting point for the induction? This second point is crucial and often overlooked. In effect, you cannot compare acts of practice, which, because of their disparity, offer in themselves no common ground. You cannot compare Swiss francs and US dollars unless you have established a rate of exchange. Equally, you cannot compare the arrest of a ship and the visit and release of a ship, unless the whole context and the relevant teleological element linking both precedents are established. At the level of raw facts, nature is not consonant: *natura naturata non est consona*, according to a formula of the Middle Ages.⁴⁰ It follows that the precedents must first be 'prepared', as is a hospital patient before being operated. Quite often, the usefulness of a precedent depends on the possibility of abstracting from it some hard

39. *In re Piracy Jure Gentium* [1934] AC 588. According to Schwarzenberger 1965, op. cit. n. 27, at p. 35 custom is a 'superstructure of a comparative analysis of State practice'.

40. In other words: in nature, the gap between the 'is' and the 'ought' is infinite. It can be bridged only by an intellectual effort of man.

core principle by a process of teleological reduction. This work of the interpreter is highly creative and introduces into custom an axiological and subjective bent, which hardly jibes with the usual view that custom is simply the faithful reproduction of state practice. It is not. Custom is a legal and intellectual construct, developed through a complex process of analogical reasoning reducing to an 'artificial' unity a series of unconnected facts and acts. It is only this analogical reasoning which allows the establishment of a common 'rate of exchange', i.e., a bridge connecting the 'is' to an 'ought', a fact to a regularity, and finally to declare the existence of a rule. Thus, the process of establishment of custom, truly speaking, is neither inductive nor deductive, but both at once, which is to say that it is a process of analogy, or of legal hermeneutics.⁴¹

To this problem of harmonising the precedents in order to give them a common ground, one further aspect must be added. The interpreter cannot limit himself to preparing the precedents. He must also ask himself what level of generality he wants to reach through induction. In effect, it is much easier to establish a customary rule if one is prepared to formulate such a rule at a very high level of abstraction. For a very general principle, all the particularities of the specific context can be ignored and only the most general essence retained. But if the interpreter wants to formulate a more specific rule, he may well find that on the same matter there is no custom since the practices at this level are too disparate. If this is true, the question arises: who decides to what level of generality the induction (or analogy) is to be taken? Does this simply depend on the preferences of the interpreter, and in particular on his wish to postulate a rule or rather to deny it? This crucial problem⁴² warrants closer scrutiny, up to now hardly undertaken. At any event, this result-oriented element further imports a level of axiology and subjectivity into the customary process.

An example may illustrate the foregoing. If one seeks to establish the existence of rules relating to state immunity, one can choose different levels of action. These may, for our purposes, be somewhat exaggerated in order to better illustrate the point. First, it is possible for the interpreter to look to see whether there is a general principle of immunity which, once induced, could be taken as a basis for his

41. As to this concept of analogy (or hermeneutics), see among others A. Kaufmann, *Analogie und Natur des Sache: Zugleich ein Beitrag zur Lehre vom Typus*, 2nd edn. (Heidelberg, Decker & Müller 1982); *idem*, *Rechtsphilosophie*, 2nd edn. (Munich, Beck 1997) pp. 78 et seq., 83 et seq.

42. The same problem exists in the establishment of the general principles of law defined by Art. 38(1)(c) of the Statute of the ICJ. See Kolb, *op. cit.* n. 6, at p. 53: '*La solution de la question de savoir si un principe est commun aux divers ordres juridiques dépend du degré d'abstraction sur lequel on choisit a priori de se placer. La démarche a de quoi troubler. On se doute que le choix de ce niveau dépendra le plus souvent d'un préjugé favorable ou défavorable à l'existence d'un principe commun régissant la matière à examiner. Plus un opérateur se placera sur un plan abstrait et plus une règle pourra se révéler "générale"; tout ce qui monte converge a-t-on dit avec raison. Plus l'opérateur sera concret, et plus il sera confronté aux réglementations particulières auxquelles est soumis un principe qu'il risque fort de ne plus considérer suffisamment "général". Il n'y a guère de règles liant l'interprète dans le choix du niveau d'abstraction.*'

reasoning (eventually adding to it fresh deductive, teleological, or other elements). Second, the interpreter could stop at the level of the distinction between *acta iure imperii* and *acta iure gestionis*, as usually happens, and pinpoint that as the customary rule. He thereby implies that the concrete definition of what these formulae mean is left to internal law, i.e., to the *lex fori*, to the extent that international law contains no specific rules. This result may seem straightforward, since one is used to the formula *iure imperii / iure gestionis* – but in reality it is not. It is a creative choice, in which one specific delimitation of international law with respect to municipal law is preferred over another. For, third, the interpreter could also look into what is concretely understood by the two concepts in the various legal systems or *leges fori*. Then he would probably conclude that there is no common rule, since the conceptions on the mission of the state are too different across the world.⁴³

In other cases, such shifting options might not be open. For example, for a long time, it has been extremely controversial as to whether there is a common rule concerning the breadth of the territorial sea. While the practice of the maritime powers, especially the United Kingdom, maintained the 3-miles rule (20 states), there were several other practices, e.g., the 4-miles rule (3 Scandinavian states), the 6-miles rule (14 Mediterranean and Near East states), the 12-miles rule (17 states, USSR, Eastern European states) and even a 200-miles claim (10 Latin American states).⁴⁴ It might seem that, due to the divergence in practice, there was no common rule as to the breadth of the territorial waters and thus no agreed custom. But the interpreter is not in fact forced to stop here (even if this was often the case). According to the figures mentioned, he could conclude that the customary rule is a territorial sea limited between 3 and 12 miles, with a minimum of 3 miles; or that the three miles rule is not customary (or any other single rule for that matter); or, further, that there is a common rule of 3 to 12 miles with a possibility of claiming more on some specific basis, such as acquiescence or persistent objection (or the opposite because of the principle of the freedom of the seas); or else that there are a series of regional customary rules. Now, in any of these cases, the inferences as to the state of law are different. Thus, if it is said that there is no established custom, there seems to be some presumptive freedom of the states, which conversely does not exist if one says that the rule is 3 to 12 miles, and not less and not more, etc. One imagines the field left open to divergent reasoning.

Charles De Visscher has, some fifty years ago, given a highly eloquent description of the uncertainties inherent in the complex process of ‘analogsation’ entrusted to the interpreter:

‘Les incertitudes qui subsistent au sujet de la formation coutumière concernent surtout le processus mental par lequel l’esprit humain associe la normativité (idée de l’obligation) à certaines régularités sociales. Le lien qui, après coup, s’établit ici ne peut être précisé en termes généraux. C’est que l’idée d’ordre qui, sur ce point, guide la pensée juridique,

43. See on this point the criticism of Zemanek, loc. cit. n. 23, at pp. 75 et seq.

44. See D. Bardonnet, ‘La largeur de la mer territoriale’, 66 *RGDIP* (1962) pp. 34 et seq.

*procède elle-même d'une représentation de valeurs ... Ni les données de fait à utiliser (nombre, spécificité), ni la direction dans laquelle ces données s'enchaîneront pour prendre un jour forme et figure de "précédents" constitutifs de la coutume ne sauraient être l'objet de généralisations dans une théorie de la coutume.*⁴⁵

From the preceding, at least three points may be retained: (1) There is no direct induction from precedents, but a complex process of harmonisation of the precedents undertaken by the interpreter; (2) there are no rules as to the level of abstraction or concreteness of the customary norm to be established; (3) the common result of both preceding facts is that in the formation of customary law perceptions about social needs, particular interests, legal values, general convenience or reasonableness, outweigh the so often stressed objective aspect of induction from precedents. In slightly exaggerated terms one could say that custom is not an objective reality emerging from a bundled set of facts, but a subjective projection of beliefs grounded in values to the extent these are not contradicted by practice. The element of practice often serves more as limit to the establishment of a rule than as its basis.

2.3 The interplay of the elements making out customary practice

Thesis

The objective element of universal customary law, the practice, is based on three elements: duration, uniformity and generality.⁴⁶ These three elements cover the aspects *ratione temporis*, *ratione materiae* and *ratione loci*. No single element should be seen in isolation, as they are, in fact and law, tightly inter-linked. Weaknesses in one element can be overcome by the relatively greater strength of the others. Thus, the International Court of Justice said in the celebrated *North Sea Continental Shelf* cases (1969):

‘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 ...’⁴⁷

In other words, a greater intensity and uniformity of the relevant practice can compensate defects in its duration. Such an interplay could be imagined also between the other elements, e.g., a more pronounced generality of the practice could cure some weaknesses in its uniformity, or vice versa.

45. Ch. De Visscher, *op. cit.* n. 5, at pp. 190-191.

46. See, e.g., the short statements by I. Brownlie, *Principles of Public International Law*, 4th edn. (Oxford, Clarendon Press 1990) pp. 5-6.

47. *ICJ Rep.* (1969) p. 43, para. 74. See also Akehurst, *op. cit.* n. 14, at p. 15.

Commentary

The authors, and to some extent the jurisprudence, thus express the idea that one element is relative to another. They thereby delineate a theory of 'general relativity' of the three elements without really spelling out the precise consequences of such an implication, as was done by physicists for the physical universe. First, the relativity of the elements is nothing else than the expression that customary law belongs to the category of imponderables, i.e., that there can be no approach to custom under the Euclidean logic of hard and fast figures or thresholds.⁴⁸ There is for instance no precise number of states that make a custom 'generally' practised; there is no precise time period before one can speak of a constant practice; and there is no simple model against which to judge the uniformity of the relevant acts.⁴⁹ However, this simply means that the elements are (1) quantitative, and not qualitative, and (2) are not self-sufficient, but depend relatively on the configuration of the others. Consequently, customary law is a '*Raumzeituniversum*', where one element is formative of the other rather than simply adding itself to it. Customary law is not duration + uniformity + generality, but rather a complex integration of all three. Moreover, the subjective elements could easily be integrated in this scheme as a fourth element participating in the described relativity. This is the principal reason why customary law is so difficult to grasp. Unlike treaty law, which is self-sufficient and neat, customary law belongs to the realm of non-self-sufficient and contextual law – both being necessary in order to constitute a complete legal system.

The relativity described here is of value, not only in the analysis of the relationships of the three (or indeed four) elements *inter se*. It can also be usefully related to the facts. Thus, for example, what generality and uniformity mean can be understood differently, at the outset, if one takes account of the factual frequency with which certain instances of practice occur. In the field of state and diplomatic immunities, practice produces every day new instances and cases dealing with this subject matter. It therefore seems clear that even a relatively large amount of practice in a given case may prove insufficient in order to establish a rule, for there might be still greater amounts of divergent practice. However, if one considers subject areas which generate very little practice, then even three precedents, which are consistent and reaffirm that a course of conduct was invariably followed, may prove sufficient to establish a rule. Thus, in the field of angary,⁵⁰ and especially of angary applied to property other than ships (e.g., airplanes), the practice is extremely sparse. This is not due to an absence of legal determination of what should happen in such cases, but rather to the fact that the situations giving rise to an exercise of that right are very rare indeed. One therefore sees that what 'general', 'uniform' and 'constant' practice is depends not only on an *inter se* context, but also on the often neglected fact of how frequently the relevant problem arises in reality. For only then is it

48. See on this point Mendelson, loc. cit. n. 3, at pp. 170 et seq.

49. On these points see the explanations of Akehurst, op cit. n. 14, at pp. 12 et seq.

50. On this concept, see R. Lagoni, 'Angary', *EPIL*, Vol. I (A-D) (1992) pp. 165-167. See also R. Kolb, in J. Salmon, *Dictionnaire de droit international public* (Bruxelles, Bruylant 2001) pp. 64-65.

possible to judge the quality of the three elements mentioned and to see if they manifest a representative pattern of behaviour. There are thus three levels of relativity: (1) the relativity of the three (or four) elements in relation to the facts they cover; this is the ordinary level of subsuming the facts to the legal categories. (2) The relativity of the three (or four) elements in their mutual relations; this is the level of the relative definition of the elements, each being partly backed by the others. (3) The relativity of both facts and legal elements of custom with respect to the real frequency with which certain situations tend to arise in reality; this is a sort of preliminary relativity.

An analysis seeking to deepen the understanding and implications of these relativities, which are constitutive of the theory of custom, would be as urgent and rewarding, as it is difficult.

A further comment may be ventured concerning the element of 'generality'.⁵¹ The question relating to this element is typically posed in positive terms: *how many* states must take part in the practice in order for it to be labelled 'general'? The answer is invariably that there is no precise figure; that everything depends on context;⁵² that in any case unanimity is not required while a simple majority is not enough.⁵³ Sometimes specific criteria have been proposed in order to provide a yardstick. Thus, it has been said that the number of states needed to create a rule of customary law varies according to whether there is any conflicting practice. If there is no divergent practice whatsoever, the amount of states needed to create a new rule is small and vice versa.⁵⁴ This criterion belongs to the realm of ordinary

51. As to which see, e.g., Oppenheim, *op. cit.* n. 3, at p. 29; Akehurst, *op. cit.* n. 14, at pp. 16-19; Mendelson, *loc. cit.* n. 3, at pp. 214 et seq.; J.A. Barberis, 'L'élément matériel de la coutume internationale d'après la Cour de La Haye (1922-1966)', 14 *NTIR* (1967) pp. 367 et seq.; K. Skubiszewski, 'Elements of Custom and the Hague Court', 31 *ZaöRV* (1971) pp. 810 et seq. See also the general literature on customary law: J.A. Barberis, 'Réflexions sur la coutume internationale', 36 *AFDI* (1990) pp. 9 et seq.; M. Bos, 'The Identification of Custom in International Law', 25 *GYIL* (1982) pp. 9 et seq.; d'Amato, *op. cit.* n. 11; G.M. Danilenko, 'The Theory of International Customary Law', 31 *GYIL* (1988) pp. 9 et seq.; V.D. Degan, *Sources of International Law* (The Hague, Nijhoff 1997) pp. 142 et seq.; L. Ferrari Bravo, 'Méthodes de recherche de la coutume internationale dans la pratique des Etats', 192 *RCADI* (1985) pp. 237 et seq.; D.P. Fidler, 'Challenging the Classical Concept of Custom', 39 *GYIL* (1996) pp. 198 et seq.; Gianni, *op. cit.* n. 6; Günther, *op. cit.* n. 6; Haggemacher, *loc. cit.* n. 6, at pp. 5 et seq.; L. Kopelmanas, 'Custom as a Means of Creation of International Law', 18 *BYIL* (1937) pp. 127 et seq.; A. Penaranda, *La costumbre en el derecho internacional* (Madrid, Universidad Complutense 1988); H. Thirlway, *International Customary Law and Codification* (Leyden, Sijthoff 1972); *idem*, 'The Law and Procedure of the International Court of Justice, 1960-1989', 61 *BYIL* (1990) pp. 31 et seq.; K. Wolfke, *Custom in Present International Law*, 2nd edn. (Dordrecht, Nijhoff 1993); *idem*, 'Some Persistent Controversies Regarding Customary International Law', 24 *NYIL* (1993) pp. 1 et seq.

52. Cf., Malanczuk, *op. cit.* n. 4, at p. 42.

53. See, e.g., Diss. op. Tanaka, *South West Africa cases*, *ICJ Rep.* (1966) p. 291; Sep. op. Ammoun, *North Sea Continental Shelf cases*, *ICJ Rep.* (1969) p. 130.

54. Akehurst, *op. cit.* n. 14, at p. 18: 'The number of States needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule. A practice followed by a very small number of States can create a rule of customary law if there is no practice which conflicts with the rule.'

relativity, as discussed above. It may, however, be asked if a further step should not be taken, abandoning any idea of a positive 'numeric' requirement. The question of generality seems not to be concerned with how many states participate in a particular practice. It rather seems to focus on the reverse side of the coin, namely how many affected states *tolerate or do not protest* a practice initiated by some states. A fresh look at generality would thus seem warranted, trying to construct it under a negative perspective focussed on the duty to react: when must a state oppose a practice; when must it protest in order to prevent such practice from hardening into custom? This perspective is not fundamentally different from that usually proposed, in which considerations of protest play an essential role. Yet, any requirement that a certain number of states participate in a practice – the normal way of framing the matter – is intrinsically misconceived. This is true, not simply because of some accident or lack of precision, but by the very nature of things. What counts is precisely not how many do something, but how that is received at large. Those who do something will in most cases be a slight minority; a practice then becomes customary by non-opposition, not by action. And this is precisely the flaw of the traditional theory: it puts the active element at the centre, i.e., practice, not the passive part, the silence. There is hardly any exaggeration in saying that custom is mainly silence and inaction, not action. Legal theory needs to take account of this.

2.4 Universal, general, local customary law

Thesis

With respect to geographical scope, there are two types of custom: general customary law binding all states of the world, and particular customary law, binding some states in a given region or with given ties (cultural, religious, political, etc.). It is argued that the two categories are complementary, leaving no gaps. Thus, in the formulation of Oppenheim's classical textbook: 'A practice which is not general, but limited to a number of states ... and accepted as law by them, may still constitute a customary rule of law, but of particular rather than general application.'⁵⁵ In other words, either a practice is general, or it is local (particular).

Commentary

It is submitted that this scheme is incomplete.⁵⁶ In fact, there seem to be three circles of customary law: (1) universal customary law; (2) general customary law; and (3) regional / local customary law. The difference between the first and the second circle is that there are some rules which peremptorily bind all states (and other subjects of international law) in the same way, i.e., integrally and without exceptions. No persistent objection, no derogation by treaties, no derogation by particular custom, no exception by acquiescence, estoppel or recognition, and the like are

55. Oppenheim, op. cit. n. 3, at p. 30.

56. See also, e.g., Mendelson, loc. cit. n. 3, at pp. 217-218.

admitted. One obviously thinks of the great principles of international law, partaking of *ius cogens*, such as the prohibition of aggression or of genocide. Conversely, there are some rules binding all the states of the world only by presumption, since they allow derogation by specific acts, performed by particular states. Thus, the persistent objector is not bound by a rule, which however does not cease to be general, i.e., to apply potentially to all other states. And the same could be said of the other mechanisms of flexibility and bilateralisation known in international law, mentioned above. In this category, we find the bulk of rules of (non-peremptory) customary law, such as that relating to the 12-mile limit of the territorial sea, as expressed also in Article 3 of the Law of the Sea Convention of 1982. Consequently, there is only a difference of degree between circle (2) and (3), whereas there is a qualitative difference between circle (1) and the other two. To a large extent, the differences between (1) and (2) can be boiled down to the distinction between peremptory and non-peremptory norms of international law.

2.5 The paradox of *opinio iuris*

Thesis

The admission of a subjective element in the construction of customary law, i.e., the necessity of an *opinio iuris*, leads to a paradox. This paradox has been expressed in the following terms:

‘Si l’on définit l’élément subjectif de telle sorte que l’agent de l’Etat doit avoir la conviction de se conformer ou d’obéir à ce qui est déjà le droit, on présuppose l’existence antérieure des règles juridiques, et la coutume, par conséquent, ne peut pas être le processus par lequel le droit est créé. Si, d’autre part, on rejette la conception d’un droit préexistant, tout en exigeant que la pratique, dès le début, soit basée sur la conviction d’une obligation ou d’une autorisation d’agir, on exige en effet, comme base de la coutume, que l’agent se trouve en erreur.’⁵⁷

Thus, *opinio iuris* cannot be a constitutive element in the formation of customary law. If the customary process is envisaged as formative of legal norms, the *opinio*

57. Sørensen, loc. cit. n. 8, at p. 50. Or, in the words of N. Bobbio, *La consuetudine come fatto normativo* (Padova, CEDAM 1942) pp. 53-54: ‘*Il che viene a dire [tramite la dottrina dell’opinio iuris], a parole tutte spiegate, che la norma consuetudinaria presuppone per il suo formarsi la convinzione, in chi l’osserva, che una norma giuridica preesista. Il circolo vizioso è evidente: da un lato si considera l’opinio come elemento costitutivo della norma consuetudinaria, ciò che in altre parole significa: l’opinio è un presupposto necessario dell’obbligatorietà; dall’altro, si definisce l’opinio come convinzione di sottoporsi ad una norma giuridica, ciò che in altre parole significa: l’opinio presuppone un obbligo preesistente. La norma consuetudinaria non si costituisce se non c’è l’opinio; ma l’opinio a sua volta implica una norma già costituita. Da questo circolo vizioso non si può uscire che per due vie: o si considera l’opinio fondata sopra un errore, nel senso che la convinzione di sottoporsi ad una norma giuridica sia una convinzione erronea, perché riferita ad una norma ritenuta esistente ma in realtà inesistente ...; oppure si ammette che vi sia una norma realmente costituita prima del manifestarsi della convinzione, e allora si svuota di ogni autonoma validità giuridica la norma consuetudinaria ...’*

can express only the result of the process; it cannot constitute one of its preconditions. It is because the norm is created that there is an *opinio iuris*; it is not that the norm is created because of an *opinio iuris*, which cannot at that stage exist, since there is as yet no legal obligation.

Commentary

This classical paradox, as often stated⁵⁸ as refuted,⁵⁹ must first be evaluated according to the precise meaning one accords the term '*opinio iuris*'. This element can be understood in many different ways, which in turn have profoundly different implications for the stated paradox. First, the *opinio*-criterion may mean that there must be some *pre-existing legal norm*, from which the belief can be derived. This narrow view was seemingly advanced by the International Court in the *North Sea* cases (1969), through the words 'feel that they are conforming to what amounts to a legal obligation'.⁶⁰ It is also the position of some eminent specialists of customary law, such as Bobbio.⁶¹ Second, the *opinio*-requirement can be understood in a larger sense. It may indicate that a state believes it is acting in accordance with legally relevant criteria, for example what is desirable⁶² or emerging in law. It is not, in other words, acting for extra-legal reasons, including courtesy, *ex gratia* acts, ceremonial, or policy reasons. Third, some other authors have a still wider concept of *opinio iuris*, adding to it the old formula '*sive necessitatis*'. For these authors, the notion that practice is rendered necessary or even warranted by some extra-legal criterion declared to be relevant to the law (e.g., the idea of justice,⁶³ urgent social needs,⁶⁴ etc.) may be sufficient to establish the subjective part of a new customary rule. Further nuances in the conception of the *opinio*-criterion could be advanced, but are unnecessary to the present discussion.

The three meanings given the concept of *opinio* have different consequences for the paradox. The first and strictest conception is also the one which is most subject

58. See, e.g., Kelsen, loc. cit. n. 7, at p. 263; Mendelson, loc. cit. n. 3, at p. 279, particularly on the question of new rules departing from old ones: 'The concept of *opinio juris*, as traditionally formulated in terms of the recognition of a right or obligation, is definitively unhelpful when it comes to the creation of new rules. For if the practice is a new one involving a departure from (and breach of) previous law, as with the Truman Proclamation regarding the continental shelf, how can the State concerned possibly entertain the opinion that it is acting in accordance with the law?'

59. See, e.g., Sørensen, loc. cit. n. 8, at p. 50, according to whom this objection is 'too logical to be legally convincing'. See also Verdross, loc. cit. n. 6, at p. 640; B. Simma, *Das Reziprozitätselement in der Entstehung des Völkergewohnheitsrechts* (Munich, Fink 1970) pp. 33-34.

60. See *supra* n. 4.

61. See *supra* n. 57.

62. See, e.g., M. Bos, *A Methodology of International Law* (Amsterdam, North-Holland 1984) p. 223; B. Cheng, 'Custom: The Future of General State Practice in a Divided World', in R.S. MacDonald and D. Johnston, eds., *The Structure and Process of International Law* (The Hague, Martinus Nijhoff 1983) p. 515. *Contra*: Mendelson, loc. cit. n. 3, at p. 281.

63. See, e.g., L. Le Fur, 'Règles générales du droit de la paix', 54 *RCADI* (1935-IV) p. 198.

64. See, e.g., Thirlway 1972, op. cit. n. 51, at pp. 53-54: 'needs of the international community'; Kopelmanas, op. cit. n. 51, at p. 148.

to the tension described in the paradox. Conversely, if one adopts the second meaning, the paradox basically disappears. You can be motivated by legal reasons (but not by the belief that you are already legally compelled) instead of other, extra-legal considerations. You can, for example, consider that a course of action is legally advisable and follow it, instead of basing it on contingent policy considerations to which you do not want to commit for the future. And in the third view, the paradox has no more place whatsoever, since a strictly legal belief is no longer a necessary condition.

From this broader perspective, it is easier to see the somewhat artificial and contrived nature of the paradox. It is, in fact, based on a static conception of the customary process. If one considers the formation of custom as a gradual process, one can perfectly accept that a legal conviction, i.e., a conception that a practice is first legally useful, then legally emerging, finally legally binding, matures gradually. To object that this is not any more *opinio iuris* in the true sense of the word⁶⁵ is to beg the question and to presuppose that there is a true sense of *opinio iuris*, corresponding moreover to one's own definition. The paradox is thus less an argument against the *opinio*-criterion than an argument against the strict conception of *opinio iuris*, identifying it to a pre-existing norm.

It is, however, true that special problems arise when it comes to the creation of new norms departing from the law as it exists at a given moment.⁶⁶ The problem is not so much that a practice which is contrary to the *lex lata* cannot be covered without self-contradiction by an *opinio iuris*; for the *opinio iuris sive necessitatis* can perfectly consist in an opinion *de lege ferenda*, in other words in a conviction that the law ought to take account of new elements and change its stand. This conception fits perfectly within the scheme of the second way of thinking of *opinio iuris*, discussed above. Only a strictly positivistic thinking may find it awkward to envisage such an *opinio iuris* – but, fortunately, positivism is no longer predominant. Thus, if a practice emerges which departs from any non-peremptory⁶⁷ norm of customary international law, everything depends on the reaction of the other states. If they reaffirm their old practice and *opinio*, the new, divergent practice will not establish itself and the old will usually be retained.⁶⁸ If they adapt their practice and

65. See however Mendelson, loc. cit. n. 3, at p. 281.

66. On this case, see, e.g., A. Bleckmann, 'Völkergewohnheitsrecht trotz widersprüchlicher Praxis?', 36 *ZaöRV* (1976) pp. 374 et seq.

67. In the case of peremptory norms, the threshold for the change is higher, since there must be a double *opinio iuris*: first that a new practice is established as law and second that the relevant norm is also peremptory in nature. This requirement of 'parallelism in form' renders more difficult the modification of peremptory norms of international law, which protect in most cases fundamental societal values. On the question see C. Rozakis, *The Concept of Ius Cogens in the Law of Treaties* (Amsterdam, North-Holland 1976) pp. 73 et seq.; G.J.H. van Hoof, *Rethinking the Sources of International Law* (Antwerpen, Kluwer Law Taxation 1983) p. 157; Kolb, op. cit. n. 19, at pp. 85, 95.

68. Thus, for example, when some belligerents in the Second World War started to bomb indiscriminately (*bombardement en tapis*), this did not modify the rule relating to military targets, since not all the belligerents claimed it was legal (but referred to reprisals), whereas the neutral powers continued to assert the illegality of such bombings. See A. Randelzhofer, 'Flächenbombardement und Völkerrecht',

opinio, the new practice will harden into a new rule.⁶⁹ Thus, the ordinary rules apply, albeit with some greater conflict between the old and new legal conceptions, a fact which pushes the *opinio* into a split between an *opinio de lege lata* and an *opinio de lege ferenda*.

A delicate problem may arise at this juncture. What if the new practice and *opinio* are sufficiently strong to destroy the basis of the old custom, but too weak to establish a new customary rule? This may happen every time the new practice destroys the generality of the old rule, but is not yet followed by a sufficient number of states to impose a new norm on the subject matter. This happened, for instance, when third world states began claiming that the use of force by colonised peoples was lawful in their fight against colonialism by virtue of the principles of self-determination and of permanent aggression, whereas the Western states still maintained that the principle of non-use of force applied to such cases. The split of opinion probably produced for a certain time a gap, the old prohibitive rule being too weakly asserted to maintain itself beyond all doubt, while the new claim was too strongly opposed to impose itself.⁷⁰ One could also say that in such cases two sets of regional custom emerge, one for the states heeding the old rule, the other for the states following the new proposition. However, this could be useful only in the case of customary norms which are likely to be applied in the *inter se* relations of the states of each group. If the norm at stake regulates relations which, by necessity, will involve states of the two different groups – and this may precisely be the reason of the split of interests and of opinion – then no real answer will be found to the problem. Consider, for example, the aforementioned case of use of force for the self-determination of colonised peoples. This norm could only apply in relations between third world and western states; it could not be applied within the group accepting it, i.e., third world states, since among them no wars of decolonisation took place. In other situations, the relevant norm can be applied *inter se*, but the facts giving rise to its application will hardly ever arise. This is the case, for example, in the context of expropriation without compensation. Finally, there are cases in which an *inter se* application is perfectly possible and the concept of regional custom makes sense. Assuming, for example, that the norm about *non-refoulement* outside

in H. Kipp, et al., eds., *Um Recht und Freiheit, Essays in Honour of F.A. von der Heydte*, Vol. I (Berlin, Duncker & Humblot 1977) pp. 471 et seq.

69. See, e.g., A. Verdross and B. Simma, *Universelles Völkerrecht*, 3rd edn. (Berlin, Duncker & Humblot 1984) p. 362.

70. In this sense, e.g., Tomuschat, loc. cit. n. 17, at p. 213. Sometimes, in similar cases, a new median rule emerges at more or less equal distance between the opposing claims. Thus, in matters of compensation for expropriation, the third world states claimed the right to expropriate without compensation (by virtue of the principle of compensation for previous exploitation), whereas the Western states claimed that expropriation could only take place against full and prompt compensation. Eventually, a quite hollow rule speaking of 'adequate' or 'just' compensation emerged. See Resolution 1803 (XVII), UNGA, 14 December 1962 and Resolution 3281 (XXIX), UNGA, 12 December 1974. On the question, see, e.g., E. Jimenez de Arechaga, 'International Law in the Past Third of a Century', 159 *RCADI* (1978-I) pp. 297 et seq.; O. Schachter, 'International Law in Theory and Practice', 178 *RCADI* (1982-V) pp. 321 et seq.

the refugee context is not general international law, the European regional norm prohibiting such *refoulement* provides an example of a norm applicable to each state bound by the special custom.⁷¹ What if a new norm arises in two regional systems without there being a previous common norm⁷² at the universal or general level? In such a case, when relations of states belonging to different groups are at issue, there is a gap in the law. If a judge is seized of such a case, he may fill that gap *modo legislatoris*, since by giving their assent to judicial settlement the parties also agree (unless they state otherwise) to allow the judge, as far as possible, to avoid a *non liquet*. If the International Court is seized of a case in which more than two states appear, either as main parties or through intervention, the problem may be further complicated, since different sets of rules may apply in different bilateral relations. Such a case has not arisen to date.

2.6 Customary law as tacit agreement

Thesis

Customary law is not an autonomous source of international law, but is, in fact, based upon a tacit agreement.⁷³ This view, expressed by the positivists, was prominent at the beginning of the twentieth century and still finds many adherents in France.

71. As to the European regional law, see, e.g., the *Avis de droit* of the Direction de droit international public of the Swiss Foreign Ministry, in 4 *RSDIE* (1994) pp. 601-603.

72. If there was previously such a common norm, Akehurst, op. cit. n. 14, at p. 31 suggests a return to a common norm in inter-system relations: 'If the States in the first [regional] group have always dissented from the custom practised by the States in the second [regional] group, and if the States in the second group have always dissented from the custom practised by the States in the first group, then neither group is bound by the custom of the other group. The only solution, unless one is prepared to admit that there are gaps in the law (something which international courts and tribunals have never been willing to do), is to go back in history to a time when the rule accepted by both groups of States did exist, and continue to apply that rule.' This position needs some qualification. The interpreter will need to assess whether the conditions for applying such an ancient rule still apply. It is submitted that this will often not be the case, and for that reason there will have been a change in the law leading to the two new regional systems. It is the dissatisfaction with the old rule which will have led to the new regulation; it would be odd to bind states of both groups – which will both have abandoned the old rule – to a rule which is contrary to their *opinio iuris*. In such cases, it is better to postulate a gap, which does not necessarily mean that there is no legal solution. At the level of direct inter-state contacts, negotiation will be necessary. If a judge is seized of a case, the parties have implicitly agreed that he will make every effort to fill the gap 'acting as a punctual legislator', according to the general principle that the judge must, as far as possible, try to avoid a *non liquet*. Now, if one regional custom corresponds to the old rule, applied to a specific geographic area, and the other regional custom corresponds to a new rule, one might argue that the solution advocated by Akehurst should apply: the old custom, which was settled at the time of partial departure by some states, must be presumed valid and can thus be derogated from only *inter se* but not *erga tertios*.

73. See, e.g., Anzilotti, op. cit. n. 6, at p. 68. For further references, see above, n. 6.

Commentary

What 'tacit consent' means exactly in customary law is less simple than it first appears. Thus, the continental, especially German and Italian, positivist schools understood such consent in its most strict sense: there must be consent by each state. Or, in other terms: no obligation without individual consent. On the other hand, the Anglo-Saxon schools postulating some form of consent were much more flexible. They posited a form of 'common consent' gathered through the practice,⁷⁴ a consent which in fact does not really differ from the doctrine of the two elements as it exists today. It has to be added that even for continental positivists, the term 'tacit pact' proved to be an elastic concept, open to all types of legal gymnastics and often wearing the mysterious smile of a sphinx. Thus, Karl Strupp, a leading German positivist of the thirties, explains that the tacit agreement giving rise to custom is a '*pactum tacitum qualificatum*', since in some cases the consent is presumed, while in others it is even irrevocably assumed.⁷⁵ There could thus be three types of tacit pacts giving rise to custom: truly tacit agreements, legally presumed tacit agreements and the tacit agreements postulated by fiction. The preceding discussion shows that the concept of what is to be understood by 'tacit pact' is far more complex than is often thought. The tacit agreement is a legal construct and not a reflection of reality; for this reason it is complex, designed to fit legal and social needs, and consequently replete with normative elements.

The criticisms levied against this view are well known. It has been said, for example: that this view is based on fictions, postulating agreements wherever necessary without taking account of the real will of the parties;⁷⁶ that it is contrary to reality when taken in its strict sense, since the courts or practitioners of international law have never sought universal consent in order to determine that a state is bound by a customary rule, but merely required a *general* practice; that a new state which joins the international community is automatically bound by pre-existing customary rules without its consent being required; etc.⁷⁷ All these criticisms are well founded, even if the positivists continue to adhere to their theory; after all, postulating legal fictions is no crime.

74. See, e.g., A.S. Hershey, *The Essentials of International Public Law and Organization* (New York, MacMillan 1927) pp. 24 et seq. As to this idea of common consent, cf., Oppenheim, op. cit. n. 3, at p. 14: 'The basis of international law [rests] in the existence of an international community the common consent of whose members is that there shall be a body of rules of law ... This common consent cannot mean, of course, that all States must at all times expressly consent to every part of the body of rules constituting international law ...' *The Scotia* (1871): 'Like all the law of nations, it [the law of the sea] rests upon the common consent of civilized communities' (F. Deak, *American International Law Cases, 1783-1968*, Vol. I (New York, Oceana Publications 1971) pp. 65 et seq., p. 78).

75. Cf., K. Strupp, 'Les règles générales du droit de la paix', 47 *RCADI* (1934-I) pp. 303 et seq., distinguishing, for example, between a *pactum tacitum simplex* and a *pactum tacitum qualificatum*.

76. Cf., H. Kelsen (ed. by R. Tucker), *Principles of International Law*, 2nd edn. (New York, Holt, Rinehart and Winston 1966) p. 453.

77. See, e.g., M. Bourquin, 'Règles générales du droit de la paix', 35 *RCADI* (1931-I) pp. 62 et seq.

However, the question is not whether customary law can be envisaged as tacit agreement, for it obviously can. The real question, rather, is whether this is helpful. As already suggested, we can take the term ‘tacit agreement’ in a very broad sense, postulating a more or less fictitious pact each time it is necessary. Even legislation, the typical example of unilateral authoritative action, can be construed as a pact, namely as based on a societal pact entrusting to an organ the power to enact laws. However, this view of custom results in some strains. In essence, either one takes the term ‘tacit agreement’ seriously and asks for some form of real consent; but then, the theory is contrary to reality. Or one slides into an orgy of fictitious pacts,⁷⁸ whose function is only to sustain the dogma,⁷⁹ according to which international law cannot bind a state without its agreement, since that would be contrary to sovereignty.

If one reflects on the acts which give rise to custom, one sees that we are far from the world of agreements. An agreement is something intellectual, which is realised at a specific point in time. It presupposes some form of awareness, unless the agreement is just a legal artifice, which turns real legal coercion into nominal consent. Conversely, the acts and facts of custom are completely inarticulate and disparate, and, moreover, spread over time. With each act, no state will be clearly aware that it is committing itself in some form of pact, unless one is prepared to accept the legal monster of a pact infinitesimally split in time. As the present author said elsewhere:

‘Cela tient au fait qu’on ne saurait le plus souvent qu’artificiellement assimiler l’acte juridique, produit d’une projection volontaire réalisée instantanément, et une pratique étalée dans le temps, assurant sa croissance par une accumulation de faits et d’attitudes. Que d’autonomie, de pétition souveraine, d’unité, de pouvoir, de concentration, de simultanéité et de précision dans l’un; que d’hétéronomie, d’interaction sociale, de sélectivité, d’éparpillement, d’alternance et d’approximation dans l’autre. Alors que dans la pratique la multiplication inorganique de faits produit la croissance d’une situation qualifiée après coup par le droit (processus existentiel), à l’inverse, l’expression de volonté précède les faits et leur imprime le sceau de son empire (processus essentiel).’⁸⁰

Postulating by necessity some agreement in that context in order to fit such inarticulate practices leads to postulating non-voluntary agreements. This is, on any account, hardly satisfactory in theory and hypocritical in practice.⁸¹ Consequently, it is better to admit that there are two legally distinct phenomena: one based on sovereign will

78. One then navigated between real, presumed, assumed, emerging, tacit, etc. agreements.

79. As Bourquin, loc. cit. n. 77, at p. 111 very aptly said about the artifices of positivism: ‘Or, on a beau retourner le problème en tous sens, la seule nécessité logique qu’on puisse découvrir en l’espèce est celle de sauver le postulat d’un système [i.e. pas d’obligation sans consentement]. Mais un système précisément qui conduit à cela ne se condamne-t-il pas lui-même?’

80. Cf., Kolb, op. cit. n. 6, at p. 307.

81. Even if such a course may have some advantages (e.g., in preserving the judge from the criticism of having acted too boldly), if he can invoke a presumptive pact he can, in effect, say to the parties subject to his jurisdiction: look, you in fact agreed tacitly to this.

(treaties) and the other based on some form of organic law-making through practice (custom); one voluntary and the other involving some mixture of will-elements (*opinio iuris*) and non-will elements (general practice binding all states).

Not infrequently, the concept of the persistent objector⁸² is seen as evidence that, in the final analysis, custom is based upon the will of states; for if a state can exempt itself from an emerging customary rule by voicing its dissent, is that not proof that consent is necessary in order to be bound by such a rule?⁸³ This view is quite strange. If customary law were really voluntary, the whole doctrine of the persistent objector would be useless. For in not acquiescing in an emerging rule of international law, a state would automatically not be bound by this new rule. A doctrine of persistent objection is consequently completely useless in a system based on tacit consent. Thus, the doctrine attests to the fact that custom is no longer considered a voluntary phenomenon, but is seen, rather, as intrinsically legislative. It is at this juncture that some protection for the dissenting minority becomes useful and the doctrine of persistent objection comes in to fulfil its proper function.

It is against the background of the 'tacit agreement' that the problem of so-called 'instant custom'⁸⁴ can best be analysed. The doctrine implies that, in certain cases, one can discard the significance of state practice and the time factor, relying solely on *opinio iuris*, especially as expressed in resolutions and declarations, in order to affirm the immediate creation of a customary rule. This conception has to be seen in the context of the two poles of law creation mentioned above: the treaty pole and the customary pole. In this spectrum, the treaty pole connotes the '*processus essentialis*', namely the autonomy, instantaneousness, unity, concentration, simultaneity and precision; while the customary pole connotes the '*processus existentiellus*', namely the heteronomy, spread in time, the multiplicity, the selectivity and dispersion, the approximation. In this spectrum, instant custom clearly belongs to the treaty pole. If there is at once (universal) consensus as to the course to be followed, and this consensus is expressed in a solemn declaration, this crystallises some form of agreement (of universal reach). Thus, to the extent the time-element is progressively reduced to a single point, the legal process departs more and more evidently from

82. On this concept, see, e.g., Akehurst, *op. cit.* n. 14, at pp. 23 et seq. See further T.L. Stein, 'The Approach of the Different Drummer', 26 *Harv. ILJ* (1985) pp. 457 et seq.; J.I. Charney, 'The Persistent Objector Rule', 56 *BYIL* (1985) pp. 1 et seq.; P.M. Dupuy, 'A propos de l'opposabilité de la coutume générale: enquête brève sur "l'objecteur persistant"', in *Mélanges M. Virally* (Paris, Pedone 1991) pp. 257 et seq.; D.A. Colson, 'How Persistent Must the Persistent Objector Be?', 61 *Washington L Rev.* (1986) pp. 957 et seq.; J.B. McClane, 'How Late in the Emergence of a Norm of Customary Law May a Persistent Objector Object?', 13 *International Law Students Association Journal of International and Comparative Law* (1989) pp. 1 et seq.; Conforti 1988, *loc. cit.* n. 31, at pp. 74 et seq.; G. Abi-Saab, 'Cours général de droit international public', 207 *RCADI* (1987-VII) pp. 180-181; Weil, *loc. cit.* n. 13, at pp. 189 et seq.; I. Brownlie, 'International Law and the Fiftieth Anniversary of the United Nations – General Course on Public International Law', 255 *RCADI* (1995) p. 42; M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, Clarendon Press 1997) pp. 59 et seq.

83. See, e.g., the explanations in Carrillo Salcedo, *loc. cit.* n. 17, at pp. 92 et seq.

84. On this concept, see, e.g., Malanczuk, *op. cit.* n. 4, at pp. 45-46. See also Mendelson, *loc. cit.* n. 3, at pp. 370 et seq.

the customary pole and moves towards the treaty pole; when the single point in time is reached, the agreement model is clearly the most appropriate explanation. Consequently, 'instant custom' is more properly called an '(instant) agreement' of an informal nature.⁸⁵ If such an approach has not been taken to date, the reason is that customary law is considered to constitute the basic fabric of international law and the prototype of law which is universally binding, whereas the treaty is instinctively regarded as the basis of particular law, to which one may or may not accede. Thus, it appeared there was much to be gained in affirming that a rule is customary and not merely conventional. In reality, there is no significant difference, to the extent that a treaty may be of universal reach and even, according to Article 56 of the Vienna Treaties Convention, non denounceable by nature. One could add that this instant agreement can obviously, at a second stage, turn into customary international law, when sufficient practice and consolidation over time occurs. But this is no longer a problem involving 'instant custom'.

2.7 The relationships between custom and treaties

Thesis

The relationship between treaties and custom is replete with paradoxes.⁸⁶ First, if a treaty proves very successful and secures many ratifications and accessions, it may paradoxically become more difficult to establish that customary law has developed along the lines of the treaty-regime. For the states parties to the treaty will implement it, not because they believe they are obliged to follow this course of action in general international law, absent a treaty, but because they feel obliged to implement the treaty. And this *opinio iuris conventionalis* is not sufficient to establish a customary belief to be bound. Therefore, the more parties are bound by the treaty, the more a non-treaty *opinio iuris* is hard to find.⁸⁷

85. It is sometimes denied that the General Assembly of the United Nations or other comparable international fora can give rise to binding international agreements (see, e.g., Mendelson, loc. cit. n. 3, at pp. 368-370). One of the principal reasons given is that the delegates to the GA have no formal treaty-making power. This argument cannot be accepted. We are not concerned here with the process of formal treaty-making, but with the possibility of expressing informally the will of their state. In important questions, such as those which can give rise to 'instant custom', these delegates ordinarily consult their government, and there is no reason why this would not suffice. International law is not formalistic on such points. Moreover, there are clear examples of resolutions adopted at the GA which were considered to embody an informal agreement or even treaty. See, e.g., Resolution 24(I) of 1946 whereby the United Nations decided the transfer of certain functions of the League of Nations to the United Nations.

86. See, e.g., Zemanek, loc. cit. n. 23, at pp. 220 et seq.

87. R. Baxter, 'Treaties and Custom', 129 *RCADI* (1970-I) p. 64: 'It is only fair to observe that the proof of a consistent pattern of conduct by non-parties becomes more difficult as the number of parties to the instrument increases. The number of the participants in the process of creating customary law may become so small that the evidence of their practice will be minimal or altogether lacking. Hence the paradox that as the number of the parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law de hors the treaty.' See also Zemanek, loc. cit. n. 23, at pp. 221-223; Cheng, op. cit. n. 62, at p. 532.

Second, there is the paradox that the inclusion of a provision in successive treaties may be seen either as a recognition of an existing customary rule, or as recognition that there is no such rule, so that it becomes necessary to include a provision in the treaties to cover the point.⁸⁸

Third, if a codification convention mainly develops international law rather than reflect pre-established rules, and if this convention does not secure wide ratification, it may apply *inter partes* alongside the old custom which will become *lex specialis*. But, in such a case, does the old custom still stand the test of generality? What if there is a split of *opinio iuris* between the parties to the convention and the other states, still abiding by the old rule?⁸⁹ Moreover, a codification process, once launched, may end up weakening a rule which was up to that moment thought to clearly express customary law and thus weaken the fabric of general international law. For example, during the Hague Conference of 1930, it turned out that the 3-mile limit of the territorial sea was not sufficiently accepted to be considered a rule of customary international law.⁹⁰ This may be celebrated as a welcome clarification, but sometimes it would be better to continue to believe in a general rule, and to handle specific disputes on a case-by-case basis. This is understandable in a legal order as replete with uncertainties and gaps as the international one.

Commentary

These paradoxes are well known and do not require extensive commentary. All of them are real paradoxes only when stated in the abstract, while in concrete cases contextual specificities usually dispel them. These are typically paradoxes in theory, not in practice. Some discussion is, however, warranted.

With respect to the first paradox, that of the split of *opinioniones iuris* (*conventionalis and generalis*), there are two points worth making. (1) The *opinio iuris* and practice of the non-parties to the treaty will carry more weight, since in their case any adherence to the treaty-regime is clearly based on a general and not a particular *opinio iuris*. (2) The opinion and practice of the treaty-parties will also merit scrutiny, since the implementation of the treaty may well be linked with a conception that the course of action it prescribes is the most reasonable and convenient way to deal with a matter. If such statements are made, they may be taken as an expression of a general *opinio iuris*.

With respect to the second paradox – where one takes a provision repeated in a treaty as indicating the existence of a customary rule, or as evidence of its absence

88. Baxter, loc. cit. n. 87, at p. 81. See also Thirlway 1990, op. cit. n. 51, at p. 86.

89. Cf., Zemanek, loc. cit. n. 23, at pp. 220-221.

90. See S. Rosenne, *League of Nations Conference for the Codification of International Law* (New York, Oceana Publications 1975) Vols. II (pp. 22 et seq.)-IV. See also A. Raestad, 'Le problème des eaux territoriales à la Conférence pour la codification du droit international', 7 *Revue de droit international* (1931-I) pp. 140 et seq.; J.S. Reeves, 'The Codification of the Law of Territorial Waters', 24 *AJIL* (1930) pp. 486 et seq.; A.S. Bustamante y Sirven, *La mer territoriale* (Paris, Paul Goulé 1930) pp. 189 et seq.; J.G. Guerrero, *La codification du droit international* (Paris, Pedone 1930) pp. 80 et seq.

– the problem can often easily be solved in a concrete context. Both conclusions are logical, as for instance those following either from an *argumentum a contrario* or an *argumentum per analogiam*. But, in a specific context, it will become clear what has to be done, again as with the opposite arguments by exclusion or by analogy.⁹¹ Thus, if the recitation of the provision in several conventions were done ritually in order to express something thought important, it would be absurd to see in it something which is inimical to custom. Conversely, if the provision were inserted because the parties thought that they needed to create some *lex specialis*, this would militate against its customary nature. Thus, the context, as expressed in the *travaux préparatoires* or elsewhere, is crucial. And again, the practice of states which are not parties to these conventions will be very important, for the reasons already stated above. Where there is no trace of any thought of the parties in relation to the provision(s) at issue, it will be necessary to rely on an analysis of the state of customary law, taking specifically into account the practice of states not parties to these treaties. And if the provision is to be found in universal treaties and is repeated there, it would be difficult to deny its customary nature, which ought to be presumed.

As to the third paradox, relating to the potential effect of a new treaty in weakening and abrogating an established custom, one can only say that this is a real risk. The problem here is not so much at the legal, but at the policy level. The risk may be reduced by some techniques of interpretation, for example that a departure from an established custom is not to be presumed. But a split may occur, with an old custom reduced to regional, as opposed to universal, status or killed outright.

With regard to the relation of treaties and customary law, two further remarks may be ventured.

First, the International Court of Justice articulated a somewhat puzzling condition in order that a conventional norm develops into a customary rule. It said: ‘It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded forming the basis of a general rule of law.’⁹² It thus seems that for the Court not all (normative) provisions of a treaty are capable of becoming customary law, but only some restricted category of provisions, namely provisions that display some ‘fundamentally norm-creating character’. Different interpretations of that sentence have been advanced, for example that the Court meant rules capable of binding states generally,⁹³ or the fact that a provision does not contain too many exceptions

91. Thus, for instance, a very exceptional provision, even if capable of analogous extension, will be interpreted strictly and *a contrario*: what is not mentioned in the provision will not be added to it. Conversely, an equitable general principle may be used for considerable normative extension by way of analogy. In the abstract, one may insist on the equivalence of both arguments, in practice only one will impose itself. See also U. Klug, *Juristische Logik*, 3rd edn. (Berlin, Springer 1966) pp. 97 et seq.

92. *North Sea Continental Shelf cases*, ICJ Rep. (1969) pp. 41-42, para. 72. On this dictum, see, e.g., Mendelson, loc. cit. n. 3, at pp. 318-321.

93. Mendelson, loc. cit. n. 3, at p. 318.

which weaken its normative content. In any case, the ‘fundamentally law-creating’ criterion does not seem very convincing. It is based on some form of logical inversion. It is not because a rule is fundamentally law-creating that it may become customary; it is because it will have become customary through the practice of states that it may be termed, if this is desired, fundamentally law-creating.⁹⁴ However, in such a case, the criterion becomes superfluous. It may only mean that in interpreting a provision with a view to establishing its customary nature, it may be reasonable to presume that an excessively narrow or specific norm does not easily qualify as general international law. But this is all. Even a very specific norm (e.g., setting a time-bar in figures), may become customary if states adopt it in their practice. Thus, what really counts is the effective practice of states and eventually their *opinio iuris*, not any intrinsic quality of the norm at stake.⁹⁵ Moreover, one could add that every norm is by its very nature, to some extent, ‘law-creating’, i.e., normative or capable of generalisation. The question is one of degree, and thus for contextual interpretation.

Second, there is the *vexata quaestio* of the effect of reservations on a specific treaty provision with regard to its ability to be considered declaratory of customary law. Is the ability to make reservations and thus to exempt oneself from the reach of a provision not proof that it cannot be considered declaratory of customary law, i.e., generally binding? The International Court did use such an argument in the *North Sea* cases, in order to reject the customary nature of Article 6 of the Continental Shelf Convention.⁹⁶ First, it is worth asking whether this argument is at all convincing. Second, is it the ability to make reservations that is conclusive, or must reservations in fact be made?⁹⁷ We will concentrate here on the first question.

It has been argued that the Court confused general customary law and universal customary law.⁹⁸ If a reservation is permitted on a specific provision of a treaty by express allowance, it could be deduced that this provision is not envisioned as one of *ius cogens* or of public order, which has to uniformly bind all states. But that would not affect the status of this provision as general customary law, since ordinary customary law is not based on such a universal and inalterable obligation. It makes allowance for special regimes, be it through persistent objections or through derogation by treaties or regional custom (or other *inter se* regimes established through acquiescence or recognition). General customary law also allows for some disagreement among states as to the status of a particular rule, since its recognition as customary needs only to be general and not unanimous. In such a case, it might

94. See Baxter, loc. cit. n. 87, at p. 62; K. Marek, ‘Le problème des sources du droit international dans l’arrêt sur le plateau continental de la mer du Nord’, 6 *RBDI* (1970) p. 58; Akehurst, op. cit. n. 14, at p. 50.

95. In this sense, see also Mendelson, loc. cit. n. 3, at pp. 320-321: ‘[T]he right test would be to see what the attitude of States actually was, not to proceed on the basis of unproven assumptions and *a priori* reasoning about “fundamental law-creating character”.’

96. *ICJ Rep.* (1969) pp. 40-41, paras. 66-69.

97. See Baxter, loc. cit. n. 87, at pp. 63-64; Akehurst, op. cit. n. 14, at p. 48.

98. As to these terms, see *supra* section 2.4.

be necessary to permit a state to enter a reservation in a treaty in order to have it participate in the treaty, even though the customary status of the norm is not in doubt.⁹⁹ However, one could ask if a derogation from customary law should be possible on the basis of a unilateral act, such as a reservation, or if such a derogation should not be limited to bilateral acts, such as agreements forming a *lex specialis*. But since unilateral acts possess some normative force in international law, due to the decentralisation of international society, any rigid line between bilateral and unilateral responses (recognition and others) seems unwarranted. The above reasoning leads us to the following conclusions. There may be some inferences drawn from the fact that a provision in a treaty may be burdened with reservations. This may militate against its status as established customary law. But such an inference is not an assumption or even presumption; it is only an element to be taken into account in broader context and is devoid of persuasive force when taken in isolation. One should thus be slow to deny the customary status of a norm because reservations are allowed by a particular treaty.

Moreover, the reservation obviously only expresses an opinion at the moment the treaty is concluded. Thus, reservations do not in any way serve to refute claims that a norm has become customary through the subsequent practice of states, i.e., that it has been constituted through a later customary process. The fact, for instance, that certain human rights treaties, such as the Refugees Convention of 1951, allow for reservations on certain provisions,¹⁰⁰ tells us nothing of their customary nature today. The problem of the effect of reservations on the customary status of a provision is thus only a problem relating to the past (i.e., is a provision already customary at a given time?), or relating to inter-temporal law (i.e., was the provision customary at any given time?).

If the treaty is silent on the subject of reservations, no direct inferences can of course be drawn. Moreover, in such a case, the question of the validity of the reservation remains to be settled according to the rules of the Vienna Treaties Convention of 1969 and, in particular, according to the object and purpose test therein established.¹⁰¹ However, there are some interesting interactions, which can occur with customary law. In some cases, the attempt to insert reservations to a specific provision may be seen as an effort to thwart the efforts of the treaty-community to codify a custom binding all states equally and maintain a unitary regime. In other words, a state may be accused of trying to take advantage of the process of treaty adoption in order to divest itself of an obligation to which it was previously subjected by virtue of customary law. The *acquis* of the codification is thus sometimes protected by objections to purported reservations. In such a case, the (declaratory) customary nature of the provision at stake is reinforced. Consider, for example, the following case. In the context of the Convention on Diplomatic

99. On all these criticisms, see, e.g., Akehurst, op. cit. n. 14, at p. 48, along with the further references given in his footnote 5.

100. See Art. 42 of the Convention.

101. See Art. 19, letter c, Vienna Treaties Convention.

Relations (1961), some states inserted a reservation allowing them to open any *valise diplomatique* on simple grounds of suspicion. Bahrain, for example, did this. Several states objected to the reservation, claiming that the pre-existing customary rule not allowing such opening of luggage was established and still binding. They thus claimed that the reservations at stake were invalid with regard to an established customary norm. The United States of America, the Soviet Union, Belgium, the Netherlands and other states expressed such objections.¹⁰² This is thus a contrary example to the weakening of customary law by reservations. In this case, the customary norm emerged reinforced from the interplay of reservations and objections.

3. CONCLUSION

All unwritten law emerging in some way out of the actual behaviour and normative conceptions of society has wrestled with acute problems of construction and conception. It is a field replete with uncertainties and paradoxes, reflecting the chaotic state of human destiny outside the ordered realm of legislative processes. With customary law, one is not only at the apex of the system of sources, but also at the boundaries of the shadowy world that lies beyond ours, that world which the Greeks called *anoikouméné*. The present article has sought to shed some light on and briefly discuss certain aspects of customary law which have long been debated and invite reflection on these problems. It in no way claims to offer answers to problems which cannot have any definitive solutions. There is, and will never be, in this context any oracle, any '*Roma locuta, causa finita*'.¹⁰³ The author merely hopes to have facilitated further reflection on questions that are no less important than practice, since all practice is influenced by reflection.

102. On this question, see United Nations, ed., *Multilateral Treaties Deposited with the Secretary-General*, status as at 31 December 2000, Vol. I, ST/LEG/SER.E/19, pp. 96 et seq.

103. See St. Augustine, *Sermons*, no. 131, sect. 10.