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A Mystery No Longer? *Opinio Juris* and Other Theoretical Controversies Associated with Customary International Law

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This contribution is a reflection on the article 'The Subjective Element in the Formation of Customary International Law' by Raphael M Walden, originally published in (1977) 12 *Israel Law Review* 344.

Offering a current reflection on Raphael Walden's 1977 article, 'The Subjective Element in the Formation of Customary International Law', this contribution seeks to illustrate that considerable clarity has been achieved over the decades with regard to several long-standing questions associated with customary international law, not least those surrounding opinio juris*. Accumulated practice and constructive scholarship have supplied insights into, and indeed answers to several of the controversies that have bedevilled the theory of this central source of international law. While it may inherently defy exact formulations, and some theoretical questions remain, customary international law is thus today not only as present in the international legal system as it has always been but is also better understood.*

Keywords: customary international law, *opinio juris*, acceptance as law, state practice

1. Introduction

The reprinting of Raphael Walden's article, 'The Subjective Element in the Formation of Customary International Law',[1] forty years after its first publication, is a timely opportunity to examine briefly the current health of some of the long-standing theoretical controversies associated with customary international law, including *opinio juris*. For decades, these have provided scholars with a fertile research agenda, so much so that customary international law has been depicted as no less than 'a riddle inside a mystery wrapped in an enigma';[2] but such controversies have also proven to be, well, theoretical. They have not stood in the way of courts, practitioners and writers in regularly identifying and applying customary international law: the academic torment that accompanied this source of law in the books has not impeded it in action.[3] Such accumulated practice, for its part, has clarified much about the operation of customary

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[1] Raphael M Walden, 'The Subjective Element in the Formation of Customary International Law' (1977) 12 *Israel Law Review* 344.

[2] David P Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law' (1996) 39 *German Yearbook of International Law* 198 (borrowing the words of Sir Winston Churchill).

[3] Omri Sender and Michael Wood, 'The Emergence of Customary International Law: Between Theory and Practice', in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 133–59.

international law and supplied both authors and practitioners with insights into, and indeed answers to several of the difficulties. As a result, customary international law today is not only as present in the international legal system as it has always been; it is perhaps also better understood than before.

2. THE SUBJECTIVE ELEMENT

Let us begin by looking at *opinio juris*, the subjective element of customary international law that Thirlway so memorably described as the 'philosopher's stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules'.[4] In taking on this subject, Walden joined a fascinating conversation spanning centuries of legal thought: the 'extra ingredient' necessary to transform a general practice into a binding rule, as Kadens and Young have argued, 'has *always* been the central problem' in theorising customary (international) law.[5] Walden grappled with the writings of such jurists as Ulpian and Suarez, Grotius and Vattel, as well as Tunkin, Kelsen and Lauterpacht, in identifying and dissecting two central theories that have previously been put forward to explain the nature of the subjective element. The first, that of tacit consent, he found to have the merit of recognising custom as law-creative (as opposed to strictly declarative of pre-existing law) but ultimately defective in implying that states cannot be bound by customary rules to which they have not agreed. He appreciated the second theory, or rather theories, based on the classical doctrine of *opinio juris*, as providing a criterion for distinguishing between customary international law and mere usage; but he rejected it, too, because it treated custom as merely declarative and not also constitutive of rules of law.[6] Writing as a practitioner informed by, inter alia, the development of the customary international law of the continental shelf and the recognised potential role of United Nations (UN) resolutions in the customary process,[7] Walden

[4] Hugh WA Thirlway, *International Customary Law and Codification* (AW Sijthoff 1972) 47.

[5] Emily Kadens and Ernest A Young, 'How Customary is Customary International Law?' (2013) 54 *William & Mary Law Review* 885, 907.

[6] Those who followed Walden in putting the subjective element under the microscope have certainly benefited from his account and analysis: see, for example, Maurice Mendelson, 'The Subjective Element in Customary International Law' (1995) 66 *British Yearbook of International Law* 177–208; Olufemi Elias, 'The Nature of the Subjective Element in Customary International Law' (1995) 44 *International and Comparative Law Quarterly* 501–20; Tiyanjan Maluwa, 'Custom, Authority and the Law: Some Jurisprudential Perspective on the Theory of Customary International Law' (1994) 6 *African Journal of International and Comparative Law* 387–410; and Brian D Lepard, *Customary International Law: A New Theory with Practical Implications* (Cambridge University Press 2009). For a more comprehensive bibliography on the subjective element ('acceptance as law') see Michael Wood, Special Rapporteur, Fourth Report on Identification of Customary International Law (25 May 2016), UN Doc A/CN.4/695/Add.1. Tasioulas's 'disjunctive account of *opinio juris*' appears to offer an approach that is particularly compatible with that of Walden: John Tasioulas, '*Opinio Juris* and the Genesis of Custom: A Solution to the "Paradox"' (2007) 26 *Australian Year Book of International Law* 199–205.

[7] Educated at Oxford and the London School of Economics, Walden worked in various legal and diplomatic positions for the Israel Ministry of Foreign Affairs from 1974 to 2000. He was Director of the Treaty Division (1974–80), Counsellor with the Embassy in Copenhagen (1980–84), Director of the International Law Division (1984–87), Minister and Deputy Head of Mission, Israeli Mission to the UN in Geneva (1987–91, 1993–97), and Ambassador to Eritrea (1997–2000). He was Deputy Agent in the *Taba* arbitration, and participated in many UN meetings and in the negotiations for the Peace Treaty with Egypt. Among his special interests within

then proposed, in a companion paper published in the *Israel Law Review* in 1978, his own approach to the subjective element of customary international law.[8] Borrowing from HLA Hart's theory of the 'internal aspect' of rules (and following in Thirlway's footsteps), he there suggested that the troubled concept of *opinio juris* should be reformulated to acknowledge that the subjective element accompanying the relevant practice 'may be, not a belief that the practice is *already* legally binding, but a claim that it *ought* to be legally binding'.[9] By this he tackled head-on the so-called '*opinio juris* paradox' that authors have described 'in loving detail';[10] held *opinio juris* to be an observable fact rather than an indiscernible inner feeling; and, ultimately, treated the enigmatic Latin phrase[11] as just another juridical term in the service of mediating between real-world facts and the law.

Such an approach does appear to correspond with the development of much of contemporary customary international law, and is compatible with the wording of the almost century-old formula in the Statute of the International Court of Justice (ICJ Statute), which refers to international custom as a general practice that is 'accepted as law'.[12] It also makes it possible to take account of early practice in assessing the requirement of generality, as 'has undoubtedly been the practice of international

international law are 'history and theory': Jennifer Byford (ed), *Who's Who in Public International Law* (Crestwall 2007) 419–20. When writing on this subject, Walden was Director of the Treaty Division of the Israeli Ministry of Foreign Affairs, a position that surely influenced his approach, even though it seems to have been his fascination with customary international law generally that led him to investigate the topic. The papers contain the usual caveat that '[t]he views expressed are wholly personal to the author'.

[8] Raphael M Walden, 'Customary International Law: A Jurisprudential Analysis' (1978) 13(1) *Israel Law Review* 86–102.

[9] ibid 97. In other words, '[f]or customary law to be generated, conduct must be treated as a standard for behaviour; this may take the form either of complying with an existing standard, or of creating a new one … What starts as an intention to create law, ultimately becomes a belief that the law in question exists … Thus this analysis has a flexibility which the usual doctrine of *opinio juris* lacks': ibid 98.

[10] Edward T Swaine, 'Rational Custom' (2002) 52 *Duke Law Journal* 559, 569. The so-called paradox refers, of course, to the argument that a new rule of customary international law can never emerge if the relevant practice must be accompanied by a conviction that such practice is *already* law (see, for example, Hiroshi Taki, '*Opinio Juris* and the Formation of Customary International Law: A Theoretical Analysis' (2008) 51 *German Yearbook of International Law* 450).

[11] It seems that there is nothing like Latin to provide a legal concept with an added ring of mystery. Tiersma has suggested that 'a great majority of legal maxims are indeed in Latin, partly for historical reasons, but sometimes also to mask the fact that many of these maxims are self-evident banalities made to seem more impressive by being expressed in a dead language': Peter Tiersma, 'The New *Black's*' (2005) 55 *Journal of Legal Education* 386, 397. Reisman has written, with reference to *opinio juris* in particular, 'I warn my students that if they confront something in Latin, it is usually a signal that jurists are unsure of what they are talking about and are trying to conceal their confusion behind a solemn and pretentious Latin phrase': W Michael Reisman, 'Jonathan I. Charney: An Appreciation' (2003) 36 *Vanderbilt Journal of Transnational Law* 23. Both are cited in Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press 2009) viii.

[12] Statute of the International Court of Justice (entered into force 24 October 1945) 3 Bevans 1179, art 38.1(b). See also Carlo Santulli, *Introduction au droit international* (A Pedone 2013) 50 ('Le statut de la Cour internationale de Justice considère en son article 38 que la coutume est une pratique "acceptée". Ainsi le statut rompt-il avec une tradition qui aimait présenter *l'opinio iuris sive necessitatis* comme la "conscience" d'obéir à une règle de droit'); Alain Pellet, 'Article 38', in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 819 (referring to the *travaux préparatoires* of art 38.1(b) of the ICJ Statute and to the practice of the Court when suggesting that '"acceptation" is not necessarily restricted to the will of the States but to an "acceptance", which can be interpreted less strictly'); IC MacGibbon, 'Customary International Law and Acquiescence' (1957) 33 *British Yearbook of International Law* 115, 129

tribunals faced with problems of the existence or non-existence of rules of customary law'.[13] Furthermore, this approach is in line with the current work of the International Law Commission (ILC) under the heading 'Identification of Customary International Law'. While the ILC has been able to avoid some of the theoretical debates connected with the formation of customary international law given its focus on identification, it has recognised that in practice the two cannot always be considered in isolation and partly for that reason has opted to refer to the subjective element primarily by the term 'accepted as law' in the ICJ Statute (with *opinio juris* retained in parentheses, given its prevalence in legal discourse).[14] The Commission has also offered a non-exhaustive list of potential forms of evidence of acceptance as law, having surveyed numerous decisions that have once again illustrated that establishing *opinio juris* has not 'present[ed] as much difficulty as the writers have anticipated'.[15] The list refers to public statements made on behalf of states, official publications, government legal opinions, diplomatic correspondence, decisions of national courts, treaty provisions, conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference, and inaction (under certain circumstances).[16] Guidance has also been provided on how to distinguish between acceptance as law and other motives that may accompany a certain practice.[17] All of this suggests that the subjective element is not (or is perhaps no longer) an elusive, intangible notion in dire need of deciphering.

3. The Objective Element

The element of practice, which 'both defines and limits' customary international law,[18] has not been free of controversy either. The role that verbal acts play in the formation of customary rules, in particular, once sharply divided those who thought it 'legally unacceptable to exclude

('[As compared with the term '*opinio juris*',] [t]he phrase "accepted as law", however, may admit of interpretation in senses which more accurately reflect the actual processes of evolution from practice or usage to custom').

[13] Thirlway (n 4) 55; this would be in addition to practice accompanied by *opinio juris* in its traditional sense.

[14] Michael Wood, Special Rapporteur, Second Report on Identification of Customary International Law (22 May 2014), UN Doc A/CN.4/672, para 68; Report of the International Law Commission, Sixty-Eighth Session (2 May–10 June, 4 July–12 August 2016), UN Doc A/71/10, 75–115, containing the ILC's 16 draft conclusions, with commentaries, adopted on the first reading in 2016 (ILC Draft Conclusions). A second reading is expected in 2018.

[15] Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff 1998) 21. See also, for example, Charles De Visscher, *Theory and Reality in Public International Law* (Princeton University Press 1968) 154; International Law Association (ILA), London Conference (2000), Final Report of the Committee, Statement of Principles Applicable to the Formation of General Customary International Law (ILA London Statement of Principles) 30 ('… in the real world of diplomacy the matter [of the subjective element in customary international law] may be less problematic than in the groves of Academe').

[16] ILC Draft Conclusions (n 14) 99, Conclusion 10 'Forms of evidence of acceptance as law (*opinio juris*)'.

[17] ILC Draft Conclusions (n 14) 97, Conclusion 9 'Requirement of acceptance as law (*opinio juris*)' and accompanying commentary.

[18] See Dissenting Opinion of Judge Spender in *Case concerning Right of Passage over Indian Territory (Portugal v India)*, Merits, Judgment of 12 April 1960 [1960] ICJ Rep 6, 99 ('The proper way of measuring the nature and extent of any such custom, if established, is to have regard to the practice which itself both defines and limits it. The first element in a custom is a constant and uniform practice which must be determined before a custom can be defined').

communications, written and spoken words, from the world of State practice',[19] and those who considered that 'a State has not done anything when it [merely] makes a claim'.[20] The former have clearly had the upper hand: it is widely accepted today that practice may take a wide range of forms, including both physical and verbal acts (and, under certain circumstances, inaction).[21] Such an approach, which finds much support in judicial practice, recognises that states exercise their powers in various ways and do not confine themselves only to some types of act. The alternative is too restrictive, especially as action may at times consist solely in statements (for example, a protest by one state addressed to another) and because accepting such a view may be seen as encouraging confrontation and even the use of force.[22]

Writers have also been divided on the question of whether practice may be relevant for the purposes of customary international law only when it relates to a situation at the international level and to some actual incident of making a claim (as opposed to assertions *in abstracto*).[23] However, such positions seem by now to have been abandoned. The development of international human rights law, for example, has illustrated that conduct within the state (such as a state's treatment of its own nationals) may also be relevant to international law, and that it may very well be that 'the materials not related to sudden crises are more likely to represent a

[19] Rudolf Bernhardt, 'Custom and Treaty in the Law of the Sea' (1987) 205 *Recueil des Cours* 267. See also, for example, Mark E Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of Interrelation of Sources* (2nd edn, Kluwer Law International 1997) 19–20 ('there is much merit in qualifying verbal acts as State practice. First, and most important … States themselves as well as courts regard comments at conferences as constitutive of State practice'); Clive Parry, 'The Practice of States' (1958) 44 *Transactions of the Grotius Society* 168; Michael Akehurst, 'Custom as a Source of International Law' (1977) 47 *British Yearbook of International Law* 1, 53 ('State practice means any act or statement by a State from which views about customary law can be inferred'); Rein Müllerson, 'On the Nature and Scope of Customary International Law' (1997) 2 *Austrian Review of International & European Law* 341, 342 ('even if one would be eager to make a clear-cut distinction between 'actual' practice and other forms of practice (non-actual?) it is not easy and sometimes it is simply impossible').

[20] Anthony A D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 88. See also, for example, GJH van Hoof, *Rethinking the Sources of International Law* (Kluwer Law and Taxation 1983) 108; *State v Petane*, South African Supreme Court Decision (3 November 1987), ILDC 1348 (ZA 1987), paras 59F–G, 61D–E ('customary international law is founded on practice, not on preaching … One must … look for state practice at what states have done on the ground in the harsh climate of a tempestuous world, and not at what their representatives profess in the ideologically overheated environment of the United Nations where indignation appears frequently to be a surrogate for action').

[21] ILC Draft Conclusions (n 14) 91, Conclusion 6 'Forms of practice'.

[22] See also Rein Müllerson, 'The Interplay of Objective and Subjective Elements in Customary Law', in Eric Suy and Karel Wellens (eds), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (Martinus Nijhoff 1998) 161, 162 ('if only seizures, invasions, genocide and other similar acts were state practice then in some areas of international law (for example international humanitarian law) only so-called rogue states would contribute to the development of customary law … it would [also] increase even more the role of powerful states in the process of international law-making. Finally … in many areas of international law only a few states may have such ['actual'] practice or states may become involved in 'actual' practice only occasionally').

[23] See, for example, Josef L Kunz, 'The Nature of Customary International Law' (1953) 47 *American Journal of International Law* 662, 666; Thirlway (n 4) 58 ('State practice as the material element in the formation of custom is, it is worth emphasizing, *material*: it is composed of acts by States with regard to a particular person, ship, defined area of territory, each of which amounts to the assertion or repudiation of a claim relating to a particular apple of discord').

mature and consistent view of the law'.[24] It is no longer seriously contested, moreover, that relevant practice may emanate from any organ of the state, and not only from those authorised to represent the state in its international relations.[25]

The length of time required for the formation of a rule of customary international law has also been the subject of disagreement. Some, attached perhaps to a conception of custom in domestic societies (or, perhaps, to an outmoded view of customary international law), have argued that '[c]ertainly practice over a more or less long period is an essential ingredient of customary law'.[26] The jurisprudence of the ICJ, however, has clarified that there is no specific requirement with regard to how long a practice must exist before it can ripen into a rule of customary international law. In the oft-cited words of the *North Sea Continental Shelf* judgment, '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' where a general practice that is accepted as law may be observed.[27] On the other hand, it is equally clear by now that, despite continuing academic fascination with the term,[28] there is no such thing as 'instant custom'.[29]

Another dispute that belongs in the past concerns the extent of consistency that ought to be observed before a certain practice may be said to be general. It is widely held that absolute uniformity is not required, and that some inconsistencies and contradictions are not necessarily fatal to a finding of 'a general practice'. Here, too, the case law of the ICJ and of other courts and tribunals, and the work of authors and of bodies such as the International Law Association and the ILC, have provided useful guidance, including on how variations in the relevant practice are to be assessed.[30]

There is also general agreement with respect to the proposition that the acts of entities other than states (and in some circumstances intergovernmental organisations) – such as non-

[24] Ian Brownlie, 'Some Problems in the Evaluation of the Practice of States as an Element of Custom' (2004) 1 *Studi di diritto internazionale in onore di Gaetano Arangio Ruiz* 313–14.
[25] ILC Draft Conclusions (n 14) 90, Conclusion 5 reads: 'State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions'.
[26] Robert Y Jennings, 'The Identification of International Law', in Bin Cheng (ed), *International Law: Teaching and Practice* (Stevens & Sons 1982) 3, 5.
[27] *North Sea Continental Shelf*, Judgment of 20 February 1969 [1969] ICJ Rep 3, 43 para 74; see also ibid Separate Opinion of Judge Ammoun, 124; ibid Dissenting Opinion of Judge Lachs, 230; ibid Dissenting Opinion of Judge Sørensen, 244. The Inter-American Court of Human Rights has similarly held that 'it is not essential that the conduct should be practiced over a specific period of time': *Baena Ricardo and Others v Panama* (2003 Inter-Am Ct HR), Judgment of 28 November 2003, IHRL 1487, para 104; ILC Draft Conclusions (n 14) 94, Conclusion 8(2) reads: 'Provided that the practice is general, no particular duration is required'.
[28] See the much debated article by Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 *Indian Journal of International Law* 23, 37 ('there is no reason why an *opinio juris communis* may not grow up in a very short time among all or simply some Members of the United Nations with the result that a new rule of international customary law comes into being among them. And there is also no reason why they may not use an Assembly resolution to "positivise" their new common *opinio juris*').
[29] See also ILC Draft Conclusions (n 14) 94, Conclusion 8 Commentary; van Hoof (n 20) 86 ('customary law and instantaneousness are irreconcilable concepts. Furthermore, it is detrimental to the effective functioning of international law, as an ordering and regulating device, to water down the meaning of its sources to almost the vanishing point').
[30] Wood (n 14) 55–57.

governmental organisations, non-state armed groups, transnational corporations and private individuals – do not count for the formation or identification of customary rules (but may have an important indirect role).[31] Official statements and publications of the International Committee of the Red Cross (ICRC), for example, may serve as helpful records of relevant practice (and acceptance as law) and play an important role in shaping the practice of states, but they are not practice that itself gives rise to or reflects customary international law.[32]

4. THE SIGNIFICANCE OF THE TWO CONSTITUENT ELEMENTS

Controversy has also surrounded the very need for the two constituent elements in the formation and identification of customary international law. Several writers, in particular, have argued that customary rules need not all be pressed into 'the Procrustean bed of traditional practice and *opinio iuris*'.[33] Some have argued that widespread and consistent state practice may alone suffice for constructing customary international law,[34] while others, straying even further from the standard notion of customary law, were willing to relax the practice requirement to a vanishing point and concentrate instead on *opinio juris*.[35] As advocates of 'modern' custom, the latter have sought to turn the ascertainment of customary rules into a normative exercise rather than an empirical one, 'attach[ing] greater relative weight to what ought to be than to what is',[36] particularly in the fields of international humanitarian law, human rights law and environmental law.

However, the conceptual stretching espoused by single-element approaches results in a distortion or even a denial of customary international law, and risks severely undermining its stability and legitimacy. As Wolfke explained:[37]

[31] ILC Draft Conclusions (n 14) 87–88, Conclusion 4 'Requirement of practice', and accompanying commentary.
[32] ibid.
[33] Robert Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 *Netherlands Yearbook of International Law* 119, 128.
[34] See, for example, Lazare Kopelmanas, 'Custom as a Means of the Creation of International Law' (1937) 18 *British Yearbook of International Law* 127, 129–30; Hans Kelsen, 'Théorie du Droit International Coutumier' (1939) 1 *Revue Internationale de la Théorie du Droit* 253, 263 (stating a position that he later abandoned); Paul Guggenheim, 'Les deux éléments de la coutume en droit international', in Charles Rousseau (ed), *La Technique et les Principes du Droit Public: Etudes en l'Honneur de Georges Scelle* (Librairie Générale de Droit et de Jurisprudence 1950) 275, 280; Anthony D'Amato, 'Customary International Law: A Reformulation' (1988) 4 *International Legal Theory* 1 ('My work was considered radical by other scholars; with the passage of time I have reluctantly concluded that it may not have been radical enough. Instead of trying to work within the notion of *opinio juris*, I should have discarded it entirely').
[35] See, for example, Bin Cheng, 'Epilogue', in Bin Cheng (n 26) 203, 223 ('The main thing, therefore, is to recognise that usage (*consuetudo*) is only evidential, and not constitutive, of what is commonly called "international customary law", however else one may wish to label it'); Andrew T Guzman, 'Saving Customary International Law' (2005) 27 *Michigan Journal of International Law* 153–54; Lepard (n 6).
[36] Igor I Lukashuk, 'Customary Norms in Contemporary International Law', in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International, 1996) 488, 493.
[37] Karol Wolfke, *Custom in Present International Law* (2nd edn, Martinus Nijhoff 1993) 40–41.

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> Without practice (*consuetudo*), customary international law would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law. On the other hand, without the subjective element of acceptance of the practice as law the difference between international custom and simple regularity of conduct (*usus*) or other non-legal rules of conduct would disappear.

In any event, such a 'veritable revolution in the theory of custom'[38] has gained no traction with states and no significant following among practitioners. The ICJ 'has repeatedly laid down … [that] the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris*'.[39] The ILC, too, has recently confirmed that, in all fields of international law, 't[o] determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)'.[40] Such authoritative determinations, and even more so their reception by states, have made it clear that alternative approaches to the formation and identification of customary international law are, essentially, policy proposals. As such they may be instructive, but they remain policy, not law.[41]

5. THE ROLE OF UN GENERAL ASSEMBLY RESOLUTIONS

Another theoretical controversy that seems to have been largely put to rest concerns the ability of resolutions adopted by a body composed of states, in particular the UN General Assembly, to create, simply by their adoption, rules of customary international law. That such resolutions may sometimes have a significant role as evidence of, or impetus for customary international law is widely accepted. Some, however, have taken this potential 'normative value'[42] of resolutions to mean that, albeit very exceptionally, they are capable of giving rise to customary international law by the mere fact of their adoption.[43] Such a position runs counter to the terms of the

[38] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 435.

[39] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment [2012] ICJ Rep 99, 122, [55]; see also Peter Tomka, 'Custom and the International Court of Justice' (2013) 12 *The Law & Practice of International Courts and Tribunals* 195, 197 ('In fact, the Court has never abandoned its view, firmly rooted in the wording of the Statute, that customary international law is "general practice accepted as law"').

[40] ILC Draft Conclusions (n 14) 82, Conclusion 2 'Two constituent elements'.

[41] Reisman's words may come to mind here (n 11) 24: 'Just as it would be intellectually dishonest and profoundly immoral to try to impose a contract on a party that had never agreed to it, it is intellectually dishonest and immoral to try to reach the same result by pretending that a customary international rule has been formed, without systematically determining that state practice accompanied by the necessary attitudes has generated a customary rule'.

[42] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996 [1996] ICJ Rep 226, 254–55, [70] ('The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*').

[43] See, in particular, ILA London Statement of Principles (n 15) 61 ('Resolutions accepted unanimously or almost unanimously, and which evince a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption …'). This proved highly contentious when the London Statement was adopted.

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UN Charter,[44] which does not provide the General Assembly with any such power, and to the basic two-element approach, which requires not only a sense of a legal right or obligation but also a general practice embodying it. In Tomka's words:[45]

> The resolution does not have any legal force of its own, and it must be considered whether there is indeed a general view, held by States, that the resolution expresses a binding rule of international law, such that instances of State practice in accordance with that rule could be said to be motivated by that rule.

The ILC's unequivocal statement that '[a] resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law'[46] reflects the current views of states.

6. THE PERSISTENT OBJECTOR RULE

The ILC's draft conclusions under the heading of 'Identification of Customary International Law' include a provision on the persistent objector rule, according to which a state that objected to a rule of customary international law while that rule was in the process of formation is not bound by the rule for as long as it maintains its objection.[47] This is another issue that has proved to be less contentious than in the past, when it was suggested that the rule 'played a surprisingly limited role in the actual legal discourse of states'.[48] In fact, judicial proceedings, in particular, furnish a number of instances where states have sought to rely on the rule (and courts and tribunals have acknowledged its existence).[49] In addition, there is other state practice in support of the rule,

[44] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI.
[45] Tomka (n 39) 211 (adding that '[i]n the end, it is the "general practice accepted as law" that constitutes the source of custom, but determining that States accept a certain General Assembly resolution as normative will be important evidence implying that concordant practice is accepted as law'). See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 28 ('one must take care not to use General Assembly resolutions as a short cut to ascertaining international practice in its entirety on a matter – practice in the larger world arena is still the relevant canvas, although UN resolutions are part of the picture. Resolutions cannot be a substitute for ascertaining custom: this task will continue to require that other evidences of state practice be examined alongside those collective acts evidenced in General Assembly resolutions'); Stephen M Schwebel, 'The Effect of Resolutions of the UN General Assembly on Customary International Law' (1979) 73 *Proceedings of the Annual Meeting* (*American Society of International Law*) 301 ('It is trite but no less true that the General Assembly of the United Nations lacks legislative powers. Its resolutions are not, generally speaking, binding on the States Members of the United Nations or binding in international law at large. It could hardly be otherwise. We do not have a world legislature … not a phrase of the Charter suggests that it is empowered to enact or alter international law').
[46] ILC Draft Conclusions (n 14) 106, Conclusion 12(1) 'Resolutions of international organizations and intergovernmental conferences'.
[47] ILC Draft Conclusions (n 14) 112, Conclusion 15 'Persistent objector'.
[48] Ted L Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 *Harvard International Law Review* 457, 463.
[49] Michael Wood, Special Rapporteur, Third Report on Identification of Customary International Law (27 March 2015), UN Doc A/CN.4/682, paras 86–87. As emphasised in the ILA London Statement of Principles (n 15) 27, there are no decisions that challenge the rule.

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such as official government statements that recognise it explicitly.[50] An initially sceptical author who not long ago set out to write a monograph denying the existence of the rule found, as his research progressed, that 'the more I read and the more deeply I delved into state practice, the more support for the rule I found … the rule *does* exist and is, moreover, well worth examining'.[51] In the recent debates on the matter in the ILC and in the Sixth Committee of the General Assembly, the Commission's draft conclusion stating the rule was widely supported and met with only limited opposition.

7. CONCLUSION

It is no longer (if it ever was) accurate to assert that 'in customary international law nearly everything remains controversial'.[52] As the brief survey above indicates, considerable clarity has been achieved over the decades, and some long-standing questions – much like the controversy as to whether customary international law still has any role to play in modern international law[53] – do appear to have been settled. Throughout this time, customary international law has very much retained its core elements and characteristics.

This is not to say that all issues concerning the formation and identification of customary international law have now been resolved or are straightforward. Given custom's inherent qualities, such questions as the exact moment at which a customary rule comes into being or the number of states required for a given practice to be recognised as general, cannot be answered in the abstract. Theoretical discussions on customary international law are also bound to continue since they are intimately 'connected with ideas about law in general and of international law in particular'.[54] Furthermore, as customary international law adapts to the changing circumstances of the international society that it is meant to regulate, new issues arise and require elucidation. For example, the ways in which and the extent to which the practice of international organisations may contribute to the creation and expression of customary rules may well benefit from further clarification.

Theoretical controversies are not inherently pernicious. On the contrary: with customary international law, as with any other subject, they are often instrumental in achieving greater

[50] Wood, ibid para 87 fn 212; GM Danilenko, *Law-Making in the International Community* (Martinus Nijhoff 1993) 112 ('the possibility of effective preservation of the persistent objector status should not be confused with the legally recognized right not to agree with new customary rules').
[51] James A Green, *The Persistent Objector Rule in International Law* (Oxford University Press 2016) ix.
[52] Karol Wolfke, 'Some Persistent Controversies regarding Customary International Law' (1993) 24 *Netherlands Yearbook of International Law* 1, 2.
[53] Omri Sender and Michael Wood, 'Custom's Bright Future: The Continuing Importance of Customary International Law', in Curtis A Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press, 2016) 360.
[54] Tullio Treves, 'Customary International Law', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) para 4; Serge Sur, *International Law, Power, Security and Justice: Essays on International Law and Relations* (Hart 2010) 167 ('[G]rand doctrinal conceptions have clashed over international custom. It has polarised debates, syntheses and hypotheses and thereby creates a sort of microcosm of the principal debates in the field of international law').

understanding and agreement. Scholarship that remains in touch with reality and is committed to solving actual legal problems, like that of Walden, will doubtless continue to have a particularly important role in making customary international law more tangible and comprehensible. The latter are attributes of utmost importance to any law, not least one which underlies the international legal system as a whole and is a central means of bringing under one legal regime all members of a large and heterogeneous international community.

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THE SUBJECTIVE ELEMENT IN THE FORMATION OF CUSTOMARY INTERNATIONAL LAW

*By Raphael M. Walden**

1. *Introduction*

The purpose of this paper is to consider and discuss theories as to the nature of the subjective element in the formation of customary international law that have been propounded by various publicists, and to point out certain difficulties which attend all hitherto existing theories. An attempt will be made in a subsequent paper to develop a theory which avoids these difficulties.

2. *The Tacit Consent Theory of Custom*

(a) *Roman, Canon, and Civil Law*

The doctrine which based customary law on the tacit consent of its subjects had its origins in Roman Law, and was taken for granted by all jurists until the beginning of the nineteenth century. It was expressed in the well-known words of Ulpian: "Custom is the tacit consent of the people, preserved by long-standing usage."[1]

The fullest account of the nature of custom contained in the *Digest* is the following:

> Immemorial custom is observed as a statute, not unreasonably; and this is what is called the law established by usage. Indeed, inasmuch as statutes themselves are binding for no other reason than because they are accepted by the judgment of the people, so anything whatever which the people show their approval of, even where there is no written rule, ought properly to be equally binding on all; what difference does it make whether the people declare their will by their votes, or by positive acts and conduct. On this principle it is also admitted law, and very rightly so, that statutes are abrogated not only by the voice of one who moves to repeal them (*suffragio legislatoris*), but also by the fact of their falling out of use by common consent.[2]

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1 *Tit. ex corpore Ulpiani* 1, 4. "...*Mores sunt tacitus consensus populi longa consuetudine inveteratus.*

2 *D.* 1.3.32.1. The translation is taken from *The Digest of Justinian,* translated by Charles Henry Monro (Cambridge U.P., 1904).

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In this passage, custom, like legislation, is treated as one of the methods by which the people creates law. In legislation, the people expresses its will in written words, in custom, *"rebus ipsis et factis"*. *"Voluntas"* and *"consensus"* are used more or less synonymously, to refer to the law-creating act by which the people gives expression to its will.

This approach to the nature of customary law was adopted by the Civilians and Canonists, but its consequences were worked out by them in greater detail than had been attempted by the Roman jurists. They concerned themselves with such questions as the ways in which the tacit consent of the people manifested itself; whether the consent of the whole people was necessary, or whether the consent of a simple majority sufficed; and whether there should be included in the reckoning those members of the community, such as women, to whom Roman Law denied the right of access to legislative Assemblies.[3]

A characteristic example of the approach to custom developed by these jurists is that formulated by Suarez.[4] He enumerates the different conditions which have to be satisfied in order that a legally binding custom should come into being. Many of these relate to the material side of custom, with which we are not at present concerned. But on the subjective side, the conditions which he lays down are as follows:

1. The majority of the people must consent to the custom.[5]
2. The custom must be adopted voluntarily by the people.[6]
3. There must be the intention to create a legally binding custom.[7]
4. The tacit consent of the prince must be given.[8]

These conditions will now be explained.

1) *The consent of the majority:* This is required, according to Suarez, because by natural law the power to legislate is vested, not in individuals, but in man collectively regarded, and insofar as they are organised into communities. In such communities, the consent of one man, or of a minority, cannot be regarded as that of the whole community, but the consent of the majority can. As Suarez says: "In every community, the consent of a majority thereof is usually sufficient for the validity of its acts in matters where law has not made some special provision. Thus, in the case of a corporate body, the consent of the major part is held to be that of the whole body... Therefore in the present case, the custom of the greater part of the community is to be held as that of the whole community, and hence, this is sufficient."[9]

3 Lambert, *La Fonction du Droit Civil Comparé* (1903) 125.
4 *De Legibus ac Deo Legislatore* (1612, ed. and trans. by J.B. Scott, Classics of International Law) vol. 2.
5 *Ibid.*, at 527–529.
6 *Ibid.*, at 545–553.
7 *Ibid.*, at 564–566.
8 *Ibid.*, at 553–561.
9 *Ibid.*, at 527–528.

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This doctrine is particularly interesting since, as will be shown later, in the case of *ius gentium,* the consent of a majority of States was not deemed capable of binding the rest.[10]

2) *Voluntary adoption by the people:* This, according to Suarez, is implied by the first requirement, that of the consent of the majority. This consent is given not expressly, but tacitly, by the way in which the people behave. The behaviour must, however, be voluntary or it cannot be said to give rise to consent.

3) *Intention to create a legally binding custom:* This is required because the creation of law by custom is an act of legislation, and legislation can only be carried out intentionally. Furthermore, voluntariness presupposes intention, since no act, according to Suarez, can be voluntary unless it is intentional.

The doctrine that customary law is created by an act of voluntary and intentional law-making, and that this is what is meant by basing it on the tacit consent of the people, was the chief target of the historical school. It seemed clear to them that customary law was the spontaneous and unconsciously formed product of the spirit of the people, and in no way to be confused with legislation. This point will be discussed in more detail below.[11]

4) *Consent of the Prince:* This, according to Suarez, is required in those communities in which the power to legislate has been delegated by the people to the prince, for in that case, no legislation not approved by the prince can be binding. However, the consent need not be express. It may be tacit, and manifested by his toleration of a certain course of usage.

It should be noted that the focus of attention both in Roman law and in the writings of the later jurists was not a theoretical investigation of the nature of custom, but simply a description of the legal rules which have to be complied with for a legally binding custom to come into being. It is not so clear what the authority for these rules themselves is, whether they are derived from natural law, or from some other source. This points to the fact that the rules as to the binding force of custom are themselves rules of positive law, which have no intrinsic necessity, but are as variable as any other rules of law.

(b) *Classical International Law*

It was agreed among the classical writers on international law that if there was any positive law governing relations between states, then it must be founded on custom. What divided them was the question whether there was any such law. For Grotius, relations between states were governed mainly by natural law, but to a large extent also by *ius gentium,* which he regarded

10 See *infra* from n. 13–14.
11 See *infra* from n. 47–49.

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as purely positive law, and based on the practice of states. Of the naturalists, Pufendorf denied that any part of international law was positive in origin, while Wolff and Vattel allowed custom only a very subordinate role. On the other hand, for positivists, such as Bynkershoek, Zouche, Rachel, and Von Martens, custom was the main source of international law.

But no matter what importance the various schools attached to custom, all were agreed on the following two essentials, (1) that it was based on tacit consent,[12] and (2) that it bound only those states that had adopted it in their practice.[13]

The first of these points is not surprising, since the authorities naturally accepted the general theory of customary law which was current in their day. As regards the latter point, however, one might have expected at least some of them to adopt the view which was commonly held as regards civil and canon law, and which as we have seen, Suarez expressly adopted, that a custom practised by the majority of the members of a community would bind the minority that did not practice it. None of them did so, however, not even Suarez in his discussion of the nature of *ius gentium*. A very clear explanation

12 See Grotius, *De Jure Belli ac Pacis* Prolegomena, paras. 11, 40; Book One, Ch. 18, para. 4; Wolff, *Jus Gentium Methodo Scientifica Pertractatum* Prolegomena, para. 24; Vattel, *le Droit des Gens* Introduction, paras 25, 26.

13 The Classical writers do not, on the whole, treat this point explicitly, but it is apparent from the general tenor of their references to custom that they do not contemplate the possibility of its binding non-consenting States. Thus Grotius writes (*op. cit.* Book One. Ch. 1, para XIV) "The Law which is broader in scope than municipal law is the law of nations; that is the law which has received its obligatory force from the will of all nations, or of many nations. I added 'of many nations' for the reason that, outside the sphere of the law of nature, which is also frequently called the law of nations, there is hardly any law common to all nations. Not infrequently in fact, in one part of the world there is a law of nations which is not such elsewhere . . ." Again, Wolff writes (*op. cit.*, prolegomena, para. 24) "The customary law of nations is so called, because it has been brought in by long usage and observed as law. It is also frequently called simply custom . . . Since certain nations use it one with the other, the customary law of nations rests upon the tacit consent of the nations, or if you prefer, upon a tacit stipulation, and it is evident that is is not universal, but a particular law . . ." And Vattel, *op. cit.*, Introduction, para. 25, writes: "Certain rules and customs, consecrated by long usage and observed by nations as a sort of law, constitute the customary law of nations, or international custom. This law is founded upon tacit consent, or rather upon a tacit agreement of the nations which observe it. Hence it evidently binds only those nations which have adopted it and is no more universal than the conventional law". And Von Martens writes in *Summary of the Law of Nations* (trans. by William Cobbet, 1795) Introduction s. 3: "But on the other hand it is clear, that what is become a law between two or three, or even the majority, of the powers of Europe, either by treaty or from custom, can produce neither rights nor obligations among the others".

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is given by Rachel, but similar reasoning probably underlay the attitude of all the other publicists. Rachel's view is contained in the following passage:

> Now the Law of Nations is founded on the agreement of Nations. For one State has no authority over another, nor is one of them under liability to another of them, and much less are several free peoples and States subordinate to some one power—but each of them has his own *autonomia* and *autokratoria,* independence and self-rule. And so, if they are united to one another by any arbitrary law, to which all those who are so associated must render obedience, that Law cannot but be set up by Agreement. For, just as equal can have no right and power over equal, nor private person over private person, save such as may come from agreement, so also free peoples and races are joined together just as private persons are by agreements, and they are in no way capable of positive Law which shall operate between them with a common binding effect.[14]

Thus the reason why custom in international as opposed to municipal society was conceived to bind only those who had adopted it, lay in the nature of the former. Within the boundaries of a single state, there was always an authority capable of enforcing the law, by whatever means it was created. Custom, therefore, could be conceived as a mode of legislation (and we have seen that Roman Law treated it in this manner) and therefore binding, just as were other kinds of legislation, even on subjects who did not consent to it. But in the case of international law, the absence of a superior authority meant that custom could not be conceived as legislation, and was therefore binding only on those who consented to it.

This approach posed no problems so long as jurists recognised the existence, side by side with positive law, of a natural law which was binding on all states irrespective of their will. For if that was the case, and if, furthermore, most of the rules of international law belonged to natural law rather than to customary law, it was still possible to talk of a single international legal order. But once natural law concepts had ceased to play any significant role in the thinking of publicists, as happened with the triumph of positivism in the nineteenth century, so that all those rules which had previously been regarded as forming part of natural law now had to be treated as rules of positive law, it became necessary, either to concede that international law was not necessarily a universal legal order, or to recognise the possibility that customary rules accepted by the majority of states would bind even the minority which dissented. The latter point of view will be discussed below.[15] The former has had a wide following in this century; it is best considered by reference to the specific doctrines of the more important publicists who

14 Rachel, *De Jure Naturae et Gentium Dissertationes* (Classics of International Law) vol. 2, p. 157.

15 See *infra* at n. 42–45.

have espoused it, even though this will involve the consideration of theories like those of Triepel and Strupp, which can no longer be regarded as influential.

(c) *Some Tacit Consent Theories*

(i) *Triepel:*[16] Triepel's theory of customary law was determined by his doctrine of the nature of the binding force of international law. His starting point was the assumption that a rule of law could only have binding force if it derived from the will of a superior. This confronted him with the task of finding in international society a body superior to the states of which it was composed. Austin, finding no such body, drew the logical conclusion that there was no such thing as international law and that its rules were more properly to be seen as a branch of positive morality.[17] Triepel, however, maintained that under certain conditions, a superior will did come into being in international society, and that it was from this will that the rules of public international law emanated. His account of the circumstances under which this happens rests on the distinction, the elaboration of which is chiefly due to Triepel, between *Vereinbarung (traité-loi)* and *Vertrag (traité-contrat)*. A *Vereinbarung* exists when states enter into an agreement imposing "parallel" (i.e., identical) obligations on them. A *Vertrag* exists, on the other hand, when the agreement imposes different reciprocal obligations on each of the states which are party to the agreement. According to Triepel, only a *Vereinbarung* can be a source of law *(Objektives recht)* whereas a *Vertrag* could be nothing but a source of rights *(Subjektives recht)*. With this latter point we are not concerned. What is important for our purposes is that, in Triepel's view, a *Vereinbarung* gives rise to a common will, superior to and different from the wills of the individual states composing it, and that it is from this will that the rules of international law derive.[18]

On the basis of this theory of the nature of international law, Triepel is able to give a simple explanation of customary international law. A *Vereinbarung* can either be entered into formally, in which case a treaty comes into being, or else "...it is possible...for certain states to make it clear, by their decisive acts, that they wish to be bound by a certain rule. One normally speaks, in such a case, of a 'tacit' declaration of will. An important part of international law has been created in this fashion; it is usually called customary international law."[19]

16 *Cf.* Triepel, "Les Rapports entre le Droit Interne et le Droit International" (1923) *Hague Recueil* vol. 1, pp. 73–121. See esp. at pp. 82–83.

17 Austin, *The Province of Jurisprudence Determined* (Library of Ideas ed., New York, 1954) 142.

18 The distinction between *Vereinbarung and Vertrag* is discussed in H. Lauterpacht, *Private Law Sources and Analogies of International Law* 157.

19 Triepel, *op. cit.*, at 83.

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We are not here concerned with the validity or usefulness of the distinction between *traité-loi* and *traité-contrat* from the point of view of the law of treaties. But what is clearly unacceptable is the belief that a *Vereinbarung* gives rise, in the words of Strupp, to "... a new will, implying the existence of a juridical person endowed with it."[20] As Strupp points out: "One would in every case have to affirm the existence of as many international juridical persons [i.e. one for each *Vereinbarung*] whose task, limited, but extremely important, is to be a kind of international legal person summoned to create international law as a *"Völkerrechtssetzungssubjekt"* properly so called".[21] Clearly a theory of customary law which requires to be supported by such a proliferation of imaginary abstract entities can have little to commend it.

(ii) *Strupp:* Strupp's theory is the most elaborate and interesting of all tacit consent theories.[22] In the first place, he maintains that agreement is the only possible source of international law. His reason for this is that: "If States are equal, and if there exists no superior dictating his laws to them, nor any majority power, then one can only reach the conclusion that there can be no international law without concordant wills, without a treaty".[23] It should be noted that Strupp, unlike Triepel, recognises agreement as a source of law, without feeling any need to postulate the existence of a common and superior will to which the agreement, if it is a *Vereinbarung,* gives rise. We have already seen that Strupp is strongly critical of the *Vereinbarung* doctrine. To this extent his views are an improvement on those of Triepel, but he fails to see that there must be some principle to account for the binding force of agreement.[24]

If agreement is the only possible source of international law, then it follows that custom must be understood as tacit agreement. However, as he points out, custom is usually defined as: "The repetition of permissible acts, in the conviction that one is legally bound by them".[25] This definition apparently contradicts the explanation of custom in terms of tacit agreement, since the wish (*la volonté*) to be bound, which agreement entails, is not the same as the belief that one is already bound, which the traditional definition postulates. The difficulty which Strupp here points to is that of reconciling the tacit agreement theory of custom, which sees the practice

20 Strupp, "Les Règles Générales du Droit de la Paix" (1934) 47 *Hague Recueil* vol. 1, p. 291.

21 *Loc. cit.*

22 An earlier version of this theory is contained in his *Eléments du Droit International Public Universel, Européen et Américain* (2nd ed. revised, Paris, Les Editions Internationales, 1930). This is a simpler account, and diverges from that discussed in the text chiefly in that at this stage of his thinking he still attributed importance to the distinction between *traité-loi* and *traité contrat.*

23 *Ibid.,* at 301. Compare Rachel's similar argument quoted *supra* at n. 14.

24 Strupp, *op. cit. supra* n. 20, at 302.

25 *Ibid.,* at 303.

of states as constitutive of law, with the "*opinio iuris*" doctrine in its traditional interpretation, according to which the practice of states is merely declaratory of already existing obligations.

Strupp meets this difficulty with two arguments. The first, less convincing argument, is that the very fact that a State conducts itself in accordance with a customary rule shows that there is some degree of will involved. The second, main argument, involves an important distinction between two kinds of tacit agreements, which he calls respectively "*pactum tacitum simplex*" (simple tacit agreement) and "*pactum tacitum qualificatum*" (qualified tacit agreement). The first kind, *pactum tacitum simplex,* differs from an ordinary express agreement merely in its form. As an example, he cites the practice of raising a white flag in order to bring about a temporary ceasefire on the battlefield.[26] It is evident that this kind is of little importance. The second kind, *pactum tacitum qualificatum,* is what Strupp identifies with custom. It exists when it may be inferred from the conduct of a State that at some time in the past it has bound itself to observe a given rule towards some other State. It is in this way that Strupp attempts to reconcile the positivist account of custom as based on agreement with the traditional account which bases it on *opinio juris.* As Strupp writes: "The conviction of being internationally bound constitutes, in my view, a reference to a previous declaration of will, which could be of considerable antiquity. If a state, in 1934, is convinced that it is bound by the unquestionable norm of the juridical equality of states, then it is certainly not its competent organs existing *today* that have to *wish* to accept the rule. If one were to formulate it today for the first time, they might strongly reject it. But their *conviction* proves to us, all the same, that these states recognise the fact that at a previous moment, indeterminable and probably indeterminate, their competent organs offered to other states or accepted from them a norm with this content".[27]

Thus, to put it briefly, Strupp's theory of customary international law is that a customary rule binding a given State exists if the conduct of that State shows that it regards itself as having entered into a contractual relationship with one or more other States to observe that rule at some previous time, either by having made an offer to that effect, or by having accepted an offer made by that other State or States.

It should be noted that the existence of the contractual arrangement in the past is necessarily a matter of inference. If it were known when the agreement had been entered into, then we would be dealing not with a "*pactum tacitum qualificatum*", but with an express agreement, and therefore not with custom. But this gives rise to the objection that if the existence of the previous agreement is a mere matter of inference, then it has no explanatory force. We observe the existence of the custom, and from this deduce

26 *Ibid.*, at 302.
27 *Ibid.*, at 303–304.

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that it must have been brought into being by a previous agreement, the existence of which can of necessity not be proved. But if so, then the previous agreement is a mere legal fiction, postulated in order to reconcile the fact of the existence of binding rules of customary law with the assumption made on purely doctrinal grounds that such rules can only be brought into being by agreement.

The actual definition of customary law which Strupp accepts is as follows: "The observance of a rule by two or more States under the conviction that they are internationally bound by it".[28] He contrasts this with what he regards as the usual definition of custom, namely, "The repetition of permissible acts, in the conviction that one is legally bound by them".[29]

These two definitions differ in two main respects. Firstly, the requirement of repetition is omitted in Strupp's own definition, and secondly, instead of requiring a conviction on the part of States that they are *legally* bound the conviction is required that they are *internationally* bound.

As regards the first point, Strupp states explicitly that he does not regard usage as an essential element in custom. At an earlier stage of his thinking he had treated repetition, or usage, as an essential element.[30] He subsequently took the view that usage was relevant as evidence of the existence of custom in disputed cases, but no more. Above all, it cannot tell us whether a rule is being observed as a matter of international law, usage, comity, or any other reason. This is consistent with his extreme positivist outlook.

The difference between custom and express agreement, according to him, lies only in the fact that in the former case the existence of *a priori* agreement is inferred from State conduct. Hence, even if usage is not one of the factors giving rise to a binding rule, it is its presence that distinguishes custom from treaty.[31]

As regards his second contention, that States must regard themselves as internationally, and not merely legally bound, a point which he elsewhere makes by saying that what is required is not a mere *opinio juris,* but an *opinio juris gentium,*[32] Strupp's aim is to stress the fact that if a State regards itself as bound merely by a norm of its own internal law, this fact by itself will not suffice to turn it into a norm of international law.

It is interesting to note how far Strupp presses his argument that custom is a form of agreement. His theory of custom is in fact thoroughly contractual in that there must be offer and acceptance, and a State is only bound by a

28 *Ibid.,* at 302.

29 Strupp, *Grundzüge des Positiven Völkerrechts* (1932) cited in Strupp, *op. cit.* at 304.

30 Strupp cites Oppenheim in *Niemeyers Zeitschrift für internationales Recht* (1915) XXV, p. 12 as supporting this view of the place of usage. (*Ibid.,* at 305).

31 Strupp, *op. cit.* at 302.

32 *Ibid.,* at 306.

rule of customary law towards such other States as have accepted the same rule.

From this, Strupp draws two conclusions:

1) That the presence of two States is both necessary and sufficient for the existence of a rule of customary law, and

2) (to quote his own words): "If a State has applied a norm, either in the conviction that it is already international in the sense defined above, or because it wishes it to become so, then by this attitude it makes an *offer* to all other States or at any rate, if its wish is less restrained, to the States which accept the rule in the technical legal sense of the word".[33] This situation, he says, is analogous to that which exists when a State subscribes to the Optional Clause.[34]

The great weakness of Strupp's theory becomes apparent when he deals with the problem of proving a custom against a State that denies it is bound by it. He attempts to solve this problem by distinguishing between three kinds of customary law—1) "universal" rules, 2) common law, and 3) ordinary customary law.

The first kind, "universal" customary law, consists of those rules which are so important that it is unthinkable that any State which is regarded, and which regards itself, as being a subject of international law, should not be bound by them. These are the rules which are so fundamental that they are frequently regarded as being part of natural law. Strupp naturally regards this point of view as unacceptable, but nevertheless they are, he says, "... so linked to the positive law of nations that the latter cannot dispense with them".[35] As examples, he cites the principle *"pacta sunt servanda"*, and the principle of international responsibility. Concerning customary rules of this sort, there is, he says, an irrebuttable presumption *(présumption irrefutable)* a *"praesumptio juris et de jure strictissimo sensu"* that every state is bound by them towards every other State. However, there are, he stresses, very few rules of this sort.

The second kind are the norms of what he calls "common law", that is to say, those which are in force among more than half the States of the world. As regards such norms, there is, he says, a *rebuttable* presumption (*praesumptio juris*) that any given State is bound by them. That is to say, so far as such norms are concerned, the usual burden of proof is reversed, and it is for the State alleged to be bound by such a rule to prove that it is not so bound. The presumption is rebuttable in two senses. A State can either prove that it was never bound by that rule, or that it has subsequently modified or abrogated it.[36]

33 *Loc. cit.*
34 *Ibid.*, at 310.
35 *Ibid.*, at 309–310.
36 *Ibid.*, at 310–311.

Strupp does not specifically mention the third kind, nor does he indicate what proportion of alleged customary law belongs to this category. This is the category of those rules, in respect of which, being neither "universal" nor "common law" the burden of proof is not reversed, and it is for the petitioner to prove that they are binding against the respondent. In view of Strupp's own earlier remarks, it would seem that the necessary *opinio juris gentium* could never in fact be proved, and so this class, on inspection, would turn out to be empty.

The artificiality of Strupp's thesis is apparent. It has already been seen that there is one element of legal fiction in his theory, namely his presumption that wherever a custom, accompanied by the requisite *opinio juris gentium,* exists, there must have been a previous, but unidentifiable agreement, bringing that rule into being. Now there appears a further element of legal fiction, namely the irrebuttable presumption that States are bound by "universal" customary rules, which amounts to the fiction that they have agreed to these rules, even when as a matter of fact they have not done so, and the similar, rebuttable presumption in the case of rules of "common law". Evidently Strupp's aim is to reconcile his belief in the consensual nature of custom with his equally strong belief in the universal character of international law. One may sympathise with this aim, while feeling that this kind of juggling with the burden of proof is not the way to solve the problem.

iii) *Tunkin:*[37] The importance of Tunkin's theory is due to the fact that it may be regarded as expressing the official Soviet attitude to the problem of customary international law. His approach is in fact very similar to that of Strupp, though not so thoroughly worked out.

His account of the nature of custom is as follows: "...a custom is established... when States recognise a custom as legally binding; that is to say, recognise a customary rule of conduct as a norm of international law."[38] This is the meaning that he attaches to the expression "international custom, as evidence of a general practice accepted as law", contained in Art. 38 of the Statute of the International Court of Justice.

He then goes on to explain what he means by "the recognition of a rule as a norm of international law". It does not mean merely regarding such a rule as binding, as it would do if it gave expression to it in its internal legislation. It means regarding itself as bound by that rule towards other States, and hence acquiring the right to demand its observance by other States.

From this, Tunkin draws the conclusion which Strupp had already drawn, that a State is only bound by a rule of customary law as regards other States which have accepted the same rule. They are contractual rules, in the

37 The discussion of Tunkin's views is based on his *Theory of International Law* (English ed., Harv. U.P., 1974).

38 *Ibid.*, at 117–118.

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strict sense of the word.[39] He likewise agrees with Strupp in regarding the consent theory as expressing the true meaning of *opinio juris,* rather than as being opposed to it.

An important point in Tunkin's doctrine is his rejection of the view that international custom is binding on new States without their consent. Such a view, he claims, would be contrary to the basic principles of international law. In law, though not in fact, all States are equal. In practice, it is true, the attitudes adopted by the Great Powers exercise a decisive influence on the process of formation of international law. Nevertheless, the legal position is that a majority of States cannot create rules binding on others. This, he says, is particularly important in contemporary international law, which regulates the relations between States belonging to different social systems. Only a rule recognised by States belonging to both systems can be recognised as a rule of general international law.

It is true, he says, that smaller States are *in fact* generally constrained to recognise rules that have been recognised by the Major Powers. But this factual situation should not be confused with the legal situation. As regards new States, they are entitled to refuse to recognise any given rule of customary law. However, the entry of such States into official relations with other countries means that the new State accepts the *ensemble* of principles and norms of international law which underly relations between States.

Finally, citing Strupp, Tunkin says that the recognition of a customary rule by a significant number of States may give rise to a presumption that the rule has been generally recognised, thereby putting the *onus probandi* on the State denying that it is bound.[40]

Tunkin's treatment of this point is not entirely satisfactory. In the first place, by conceding that the entry of a new State into relations with other States may imply their acceptance of the basic principles of international law, he seems to be yielding most of his case to his opponents; secondly, his theory that where most States have accepted a custom the burden of proof is reversed as regards those that have not, is open to the same criticisms that have been levelled against Strupp's similar doctrine.

(d) *Criticism of the Tacit Consent Theory*

The tacit consent theory, in all its forms, has the great merit of recognising the constitutive nature of custom. However, the version normally propounded by writers on international law, as opposed to that propounded by the Roman Jurists and the Civilians and Canonists, is untenable, because it carries with it the implication that States cannot be bound by rules of international law to which they have not consented. This claim has been expressly made, for example, by Strupp and Tunkin, but it does not reflect the position in con-

39 *Ibid.*, at 124.
40 *Ibid.*, at 129.

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temporary international law. The most obvious and commonly cited example is that of new States, which are generally regarded as being subject to the existing rules of customary international law, irrespective of whether they have expressed their consent or not. This in fact appears to be the attitude towards international law adopted by the new States themselves. As Sir Humphrey Waldock has written, "The generally held view on the point undoubtedly is that *established* customary rules do automatically extend their ambit of operation to a new State. Nor has any State ever argued before the Court that it was exempt from a general customary rule simply because it was a new State that objected to the rule. In the Right of Passage Case, for example, it never occured to India to meet Portugal's contention as to a general right of passage to enclaves by saying that she was a new State; nor did Poland, newborn after the First World War, ever make such a claim in any of her many cases before the Permanent Court".[41] Again, Richard Falk, whose words carry added weight in view of the fact he evidently writes them in a spirit of criticism, writes as follows: "There is reason to suppose that the bureaucrat in the new State who is called upon to apply international law often turns for guidance to the most conventional text produced by European international lawyers. Although the rhetoric of disaffection from the international legal order may be employed in a speech by an Afro-Asian diplomat at the United Nations, the practice of his country may reveal an exaggerated deference to traditional conservative interpretations of the requirements of international law".[42]

It might be objected that these assertions, if true, prove no more than that new States do in fact consent to be bound by the existing body of international law, not that they would be bound by it even without their consent. A full reply to this will be developed in a subsequent paper; to adumbrate the theory which will there be elaborated, it is suggested that new States do not so much consent to the obligations imposed by primary rules of customary law, as accept the secondary rules which regulate the creation of such primary rules. This approach seems more realistic, since new States certainly do not investigate the rules individually to see which they accept and which they reject. What they accept is the body of rules as such, which means, in effect, that they recognise the process by which they have been created.[43]

Another instance of States being bound by existing rules without giving their express consent is the case where a State falls for the first time within the ambit of a rule which previously did not apply to it. Kelsen gives the

41 Waldock, "General Course in Public International Law" (1962) 106 *Hague Recueil* vol. 2, p. 52.

42 Falk, "The New States and International Legal Order" (1966) 118 *Hague Recueil* vol. 2, p. 24.

43 They may, of course, repudiate individual rules. But this is not the same as repudiating existing customary law en bloc.

example of a State which had previously had no access to the sea, but by a treaty acquires a territory situated between its old territory and the sea. Such a State would now become bound by the norms of customary law regulating the conduct of States on the sea, even though it had had no opportunity to contribute to their formation.[44] In this case, the State in question does not accept the process regulating the creation of customary international law for the first time on its acquisition of the new territory; its recognition of other rules generated by the same process shows that it has already accepted those secondary rules, and thereby any other primary rules so generated.

In addition to the above-mentioned objections, which apply to all versions of the tacit consent theory, some versions of the theory are open to a further objection, namely those which consider that States are bound by rules of customary international law only towards those other States that have accepted the same rules. As we have seen, this is the view expressed by Strupp and by Tunkin. This view is the result of interpreting "tacit consent" to mean "tacit contract". But even on the premises of the tacit consent theory itself, there is no need to go so far. Even if it is true that States can only be bound by rules to which they have consented, it does not follow that they can only be bound towards other States that have accepted the same rule. Consent is not necessarily the same as contract.[45]

We shall now discuss another group of theories, which have in common the stress which they lay on *opinio juris* as the essential element in the formation of customary law.

3. *Theories of Custom Based on the Doctrine of Opinio Juris*

(a) *The Historical School*

We have seen that the classical doctrine of custom which reigned unchallenged until the beginning of the nineteenth century saw it as a kind of implicit legislation, based on the tacit consent of the people, and that this doctrine was applied to all branches of law, whether civil law, canon law, or the law of nations.

At the beginning of the nineteenth century, however, this theory was strongly attacked by the protagonists of the historical school. Their main target was the belief that law was the conscious product of the human will. Instead, they saw it as a phenomenon which, like language, was a spontaneous and natural product of the *Volksgeist,* and not something willed and arbitary. This had two consequences as far as customary law was concerned. In the first place it meant that custom was promoted from a marginal

44 Kelsen, *Principles of International Law* (2nd ed., 1967) 444.

45 It is arguable that all the fallacies of the modern 'tacit consent' schools of thought derive from their quite unnecessary identification of consent with contract.

to the central place in the concept of law. In the second place, it also meant that the traditional theory of custom was no longer acceptable. For if custom was the unconscious product of the *Volksgeist,* then it could not be a form of tacit legislation, since the essence of legislation, as the protagonists of the historical school saw it, was that it was something intentionally imposed on the people, not spontaneously created by them. This meant that they could not accept the idea of custom as being based on tacit consent, since as we have seen, consent (*consensus*) was regarded as synonymous with will (*voluntas*).[46] Hence, in place of tacit consent, they substituted the theory of *Rechtsüberzeugung,* or, in more familiar language, of *opinio juris.*[47]

As originally formulated by the adherents of the historical school, the theory of *opinio juris* was intimately connected with their doctrine which saw law as an expression of the *Volksgeist.* But, as applied to customary international law, it has all but lost this connection, and what remains is the familiar teaching that the behaviour of States gives rise to rules of law

46 See the passage from the *Digest* cited *supra* at n. 2.

47 For accounts of the general attitude towards custom adopted by the historical school, see Gény, *Méthode d'Interprétation et Sources en Droit Privé Positif* (2nd ed., 1954) vol. 1, pp. 340 ff.; Lambert, *La Fonction du Droit Civil Comparé* (1903) 127 ff.; Kosters, *Les Fondements du Droit des Gens,* (Bibliotheca Visseriana vol. IX) 201–202; Allen, *Law in the Making* (7th ed.) 87–97.
The attribution of the origin of the concept of *opinio juris* (or *opinio necessitatis*) to the historical school is made by Guggenheim; see "L'Origine de la Notion de Opinio Juris sive Necessitatis comme deuxieme élément de la Coutume dans l'Histoire du Droit des Gens" in *Mélanges Basdevant* 280; and "Contributions à l'Histoire des Sources du Droit des Gens" in (1958) 94 *Hague Recueil* vol. 2, p. 52ff. According to him the concept was first used in connection with international custom by Alphonse Rivier, who wrote (*Principes du Droit des Gens* (1896) vol. I, p. 35) *"La coutume ou l'usage des nations est la manifestation de la conscience juridique internationale qui s'opère par des faits répétés continuellement avec la conscience de leur nécessité".* According to D'Amato, on the other hand, it was Gény who first used the concept of *opinio juris* in connection with international law. See D'Amato, *The Concept of Custom in International Law* (Ithaca, N.Y., Cornell U. P., 1971) 48–49.
Allen, (*op. cit.* at 137) attributes the concept of *opinio necessitatis* to Blackstone, and Parry accepts this attribution (*Sources and Evidences of International Law,* The Melland Schill Lectures (Manchester U.P. 1965) 61). This attribution, if correct, would refute Guggenheim's claim, but in fact, although the germ of the idea is to be found in Blackstone, it is not developed, and above all, the terminology of *"opinio necessitatis"* is not used by him. What Blackstone actually wrote is: — "Customs, though established by consent, must be when established compulsory; and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated towards the maintenance of a bridge, will be good; but a custom, that every man is to continue thereto at his own pleasure, is idle and absurd, and indeed, no custom at all." (Blackstone, Book One, Sec. 3, para. 98).

only when accompanied by a belief in the binding force of such behaviour. The reason for this belief is that it is only in this way that it is possible to distinguish between rules of custom, which are binding in law, and usage or comity, which are not so binding.

(b) *Custom as Declaratory of Legal Obligations*

The principle of *opinio juris* has been formulated in different ways by different publicists, but what most of them have in common is the belief that a practice, in order to be the expression of a custom, must be applied in the conviction that it is already binding. Sometimes, it is said that there must be a conviction that the practice in question is already binding as law, sometimes, that it is binding as a matter of social necessity: according to Kelsen, it is sufficient if it is considered to be binding according to any norm whatsoever. What all these approaches, for all their differences, share is the belief that custom does not create new obligations, but merely expresses existing ones; it is declaratory, not constitutive.

It is not surprising that the theory of *opinio juris* should be connected with a declaratory theory of the nature of custom, in view of the fact that its source lies in the doctrines of the historical school, for whom, in the words of Savigny, *"Die Gewohnheit macht das Recht nicht, sie lässt es nur erkennen"*.[48] The true source of law is the *Rechtsüberzeugung* of the *Volksgeist,* and the external practice is a mere manifestation of this. It is interesting, in this connection, to consider what the proponents of the historical school said about custom in international law. Puchta, indeed, denied the existence of international law, doubtless because of the absence of any people of whose spirit it could be said to be the expression.[49] Savigny, however, recognised the existence of something analogous to the *Volksgeist* in the international community. Kosters attributes to him the view that: "There can also be born among various peoples a juridical consciousness, like that which maintains positive law in the bosom of a single nation. The basis of this spiritual community consists partly of a community of race, and partly of common religious convictions. On this foundation is based the law of nations, which exists mainly among the Christian States of Europe, and which, imperfect as it is, is positive in nature".[50]

Thus for Savigny international law consists of rules emanating from the consciousness of a group of States sharing a common race or religion. This theory is obviously inapplicable to the contemporary situation in international society and is of purely historical interest.

To turn to more contemporary theories, we may first consider the approach which interprets *opinio juris* as meaning that the practice must be applied

48 Quoted by Allen, *Law in the Making* (7th ed.) 88.
49 Kosters, *Les Fondements du Droit des Gens* 202.
50 *Loc. cit.*

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in the conviction that it is already binding *as law*. Very clear expression is given to this approach by Sir Hersch Lauterpacht in his Hague Academy lectures delivered in 1937,[51] and his position at that time seems to have been that customary international law was binding only because it was an expression of natural law. He does not, indeed, expressly refer to natural law in this connection, but it is hard to see how else one can interpret such a phrase as "custom is in a way the expression of the necessarily objective international law existing independently of the will of the States".[52] Lauterpacht expressed the view which he held at that time most clearly in the following passage:

> Thus conceived and qualified, custom itself is merely evidence of an objective rule existing independently of the will of those who follow it. When we say that uniform action over a long period creates custom, we do not, if we think clearly, mean that such action creates a new rule of law, we mean that it creates valuable and as a rule decisive evidence of an otherwise indefinite and unascertained rule of law.[53]

This passage contains a very clear and explicit formulation of the declaratory theory of custom. It is a theory which is capable of being understood in a number of different ways.

1. The most obvious interpretation is that the legal rules of which custom is the expression exist and are binding independently of the customary behaviour in question, and that they are knowable *a priori*. This would be a pure natural law interpretation, and would amount to a denial that custom was an independent source of law at all. But this is open to serious objections. In the first place, if custom merely gives expression to an already existing rule of natural law, then it is hard to see in what sense it can amount to evidence of its existence, since it is of the essence of natural law that it is ascertainable by pure reason, without any need for empirical evidence. The consequence of this theory would then be the denial of the existence of any positive law of nations, other than treaty law. This is, of course, an arguable point of view. But what is in fact a denial of the existence of custom ought not to be presented as a theory of its nature.

Another difficulty in this interpretation is that it cannot give any adequate account of those rules of customary international law which are ethically neutral, since it is hard to see in what sense such rules can be regarded as being part of the "necessarily objective international law existing independently of the will of States". It might be said that at all events such rules

51 Lauterpacht, "General Rules of the Law of Peace", in *Collected Papers*, vol. 1, pp. 179–444. Originally published in French in (1937) 62 *Hague Recueil* vol. 4, pp. 99–419.

52 *Ibid.*, at 237.

53 *Ibid.*, at 239.

must not be incompatible with the principles of natural law, and indeed Lauterpacht expresses the view that practice cannot become a rule of law if it is obnoxious to what he calls "general notions of law".[54] This is indeed a position that was often maintained in the past, and is comparable to the common law doctrine that custom is binding only if reasonable. But even if, as is questionable, this represents the position in contemporary international law, it is in no way incompatible with the belief that custom creates law and does not merely declare it.

2. Another way of interpreting this theory would be to say that although the rule of law in question exists, irrespective of custom, it is only binding if supported by the practice of States. This would have the consequence that natural law would not be binding unless supported by State practice, a consequence which the proponents of natural law would hardly welcome. Furthermore, it would entail the consequence that custom created new law, and was not merely evidence of existing law, which is the opposite of what Lauterpacht alleges.

3. Another possible meaning is that though the rule exists independently of customary behaviour, it is not knowable save by reference to the custom in which it manifests itself. In other words, the customary behaviour is the only evidence of its existence. This would be a very odd theory, since it would empty the doctrine of pre-existence of all content. For to say that the only evidence of the content of the pre-existing rule is the custom in

54 *Ibid.*, at 238. A similar suggestion was made by Manley Hudson in his working paper on Art. 24 of the Statute of the International Law Commission. (A/CN. 4/16 (1950) *ILC Yearbook* vol. II, p. 25ff) In his list of the elements of customary international law he included "(c) Conception that the practice is required by, or consistent with prevailing international law". In the ensuing debate, ((1950) *ILC Yearbook* vol. 1, p. 4ff) this was criticised by a number of members of the Commission. Yepes said that if custom had to be consistent with international law, then it ceased to be a source for that law; he added subsequently that custom could depart from prevailing international law; otherwise it had no *raison d'être.*

Amado said that custom was the primordial source of law, but to judge from subheading (c), it had ceased to be so. Scelle said it was somewhat contradictory to state on the one hand that custom was the basis of law, and on the other hand that it had to be consistent with law.

In the face of these criticisms, Hudson redrafted subheading (c) to read as follows: — "conception by the States engaged that the practice is not forbidden by prevailing international law". (A/CN.4/R.1 — (1950) *ILC Yearbook* vol. 1, p. 275 footnote). However, in the debate on the revised draft, *(ibid.,* at 275ff.) this met with equally strong criticism, Amado said that he disliked this formulation; custom need not necessarily be in harmony with pre-existing international law. He suggested replacing the words by "recognition of the custom by State practice"). In the end, it was decided to delete the section defining the elements of customary international law from the ILC's annual report.

which it is manifested, is in effect to say that the rule is created by custom. Lauterpacht himself does not in fact go as far as that. What he appears to say is that the rule exists in a vague and undefined form, but that practice gives it clear content and makes it definite. ("It creates valuable and as a rule decisive evidence of an otherwise indefinite and unascertained rule of law").[55] But to make a vague rule more definite is, in effect, to create a new rule. So this approach, too, involves treating custom as a method of law-creation.

The conclusion to be drawn from the above argument is that if the declaratory theory of custom is to be maintained, then *opinio juris* cannot be interpreted as meaning that the practice must be applied in the conviction that it is already binding as *law*. There is another objection to the declaratory theory which should be mentioned here. If it is correct, then customary international law can never change, since the natural law of which it is the expression is immutable. But this is so much at variance with the facts of international life, which manifests a continual process of old rules falling into desuetude and new ones coming into being, as to make the declaratory theory quite untenable.

(c) *Other Theories of Opinio Juris*

Another approach is that which understands *opinio juris* to mean the conviction that the practice in question is already binding, not as law, but as belonging to some other set of norms or values. Thus Scelle speaks of "... the instinct ... of obeying a social necessity".[56] Again Lauterpacht, in his "International Law: The General Part" (in which he departs from the earlier views described above) says that "a course of action, constantly pursued and believed to be dictated by duties of neighbourliness, reasonableness and accommodation, may, in the interest of international stability and good faith, assume the complexion of binding international custom".[57] And Kelsen writes, "The second element is the fact that the individuals whose conduct constitutes the custom must be convinced that they fulfil, by their actions or abstentions, a duty, or that they exercise a right. They must believe that they apply a norm, but they need not believe that it is a legal norm which they apply".[58] According to theories of this kind, the role of custom is to convert extra-legal obligations into legal ones.

The difficulty with all approaches of this sort is that they blur the distinctions which one would naturally wish to draw between international law on the one hand and comity, morality, and practices based on mutual

55 Lauterpacht, *op. cit.*, at 238.

56 Scelle, "Règles Générales" (1933) 46 *Hague Recueil* vol. 4, p. 434.

57 Lauterpacht, "International Law: The General Part" in *Collected Papers* vol. 1, pp. 1–178. The quotation appears on pp. 63–64.

58 Kelsen, *Principles of International Law* (2nd ed.) 440.

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self-interest[59] on the other. This is because if a rule or principle belonging to any of these systems were followed for any of the reasons mentioned above (social necessity, neighbourliness, because it is believed to be morally binding etc.) it would according to the theory under discussion, thereby be transformed into a rule of law. It would be possible in theory for international law to adopt this standpoint, but in practice it does not do so. The lines between law on the one hand and comity, morality, and practices based on self-interest on the other, are strictly drawn, and indeed, since one of the chief reasons for the theory of *opinio juris* is that it is supposed to afford a criterion for distinguishing between law and comity, an explanation of this concept which results in blurring the distinction can hardly be regarded as satisfactory.

A third approach, which is no more satisfactory than the first two, is that outlined by Kunz.[60] From his Kelsenite standpoint, he repudiates the declaratory theory, and stresses that custom, like legislation, is a law-creating process. On the other hand, he insists that it requires the element of *opinio juris,* presumably because he sees this as the only alternative to the *pactum tacitum* theory which he rejects. However, he interprets *opinio juris* to mean that "the practice must have been applied in the conviction that it is legally binding".[61] This leads him into an impasse, since he is unable to explain how rules of international law first come into being. For, "on the one hand it is said that usage plus *opinio juris* leads to such a norm; on the other, that in order to lead to such a norm, the states must already practice the first cases with *opinio juris*. Hence, the very coming into existence of such a norm would presuppose that the states acted in legal error ... There is here, certainly, a challenging theoretical problem which, as far as this writer can see, has not yet found a satisfactory solution".[62] In fact, on Kunz's terms, there can be no satisfactory solution. It is not possible consistently to maintain at one and the same time both that custom is creative of new law and not declaratory of existing law, and also that it always requires to be accompanied by a belief that the conduct in question is already law.

This does not mean that the postulate of *opinio juris* as an element of customary law must be abandoned; but it does mean that a theory of *opinio juris* must be developed which is independent of the declaratory theory. Such a theory will be developed by the writer in a subsequent paper. What must be emphatically repudiated at this stage is the suggestion, made by

59 E.g., what Falk refers to as the "rules of the game". See Falk, *The Status of Law in International Society* (Princeton U.P., 1970) 52–53, and see also Falk and Black, eds., *The Future of the International Legal Order* (Princeton U.P., 1969) 67–68.

60 Kunz "The Nature of Customary International Law" (1953) 47 A.J.I.L. 662.

61 *Ibid.,* at 667.

62 *Loc. cit.*

some of the supporters of the tacit consent theory,[63] that consent itself is to be identified with *opinio juris*. We have already seen[64] that the doctrine of *opinio juris*, as developed by the historical school, was expressly contrasted with that of tacit consent, in order to bring out the difference between their emphasis on the unconscious formation of customary law and the tacit consent school's assimilation of it with legislation. Thus, from the historical point of view, it is undoubtedly a solecism to confound the two theories. It is equally mistaken from the point of view of theoretical analysis, since the two elements of tacit consent and *opinio juris* are postulated in order to solve quite different problems. The tacit consent theory is intended to explain how customary law comes into being, and to identify the States on which it is binding; *opinio juris* is postulated in order to explain the difference between custom on the one hand and comity, usage, etc., on the other. As we have seen, neither theory as usually formulated is satisfactory, but the fact remains that something like consent is needed to explain the first set of problems, and something like *opinio juris*, in order to explain the second. The two elements should therefore not be treated as identical.

Summary and Conclusions

1. The theory of tacit consent is unacceptable as it stands, since it implies that States cannot be bound by rules of customary law to which they have not consented. On the other hand, the theory has the merit of recognising that custom is constitutive and not declaratory.

2. The usual theories of *opinio juris* are unacceptable, since they treat custom as being declaratory and not constitutive. They, on the other hand, have the merit of affording a criterion by which to distinguish between custom and non-binding international rules such as those of usage and comity.

3. A theory as to the subjective element is therefore required which can account for the constitutive nature of custom, and at the same time distinguish between custom and non-binding international rules.

63 E.g. Strupp and Tunkin. In his proposed list of elements of customary international law, Hudson included under subheading (d), "general acquiescence in the custom by other states". In the ensuing debate, in reply to a query by Scelle, Hudson said he thought that the elements mentioned in subheading (c) and subheading (d) corresponded to *opinio juris*. Thus his definition combined, somewhat inconsistently, both a declaratory and a consensual definition of *opinio juris*.

64 See *supra* at nn. 45–47.

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