

CUSTOM AT THE HEART OF INTERNATIONAL LAW

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By way of custom “that which ‘is’ becomes that which ‘must be.’”

This lapidarian formula, used by Judge Armand Ugon in his individual opinion in the *Rights of Passage Case*,¹ raises endless questions for all those who are preoccupied by the fundamental question of the relationship between fact and law.

That customary rules exist in the international legal system is not contested. Phrased differently, it cannot be denied that certain international practices, when they display certain characteristics, are considered in international law to create or manifest norms, the content of which is precisely such as to render these practices obligatory.

It is not contested either that custom enjoys privileged status in the international order: “custom is even more central than the treaty,”² according to the terms used by Professor Reuter.

Moreover, it is established that if an agreement can easily be reached on the existence in international law of customary rules, the analysis of these rules almost invariably leads to anguished inquiries as to the “foundation” of law and lively doctrinal controversies: it is clear that custom disturbs.

Why, one can therefore ask, does the problem of custom stir such passions?

It is, we think, because the obligatory character of custom—defined as *a certain state of fact considered to be law*—raises, in an isolated case, the same type of question as is raised by the obligatory character of the entire legal order on a global scale, since what is a legal system after all, if not *a certain order of fact considered to be law*?

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1. Rights of Passage Case (Portugal v. India), 1960 I.C.J. 6, 82.
2. PAUL REUTER, INTRODUCTION AU DROIT DES TRAITÉS 38 (1972).

The characterization of the state of fact which can give birth to custom, and the order of fact which can constitute a legal order, seem to confirm this analogy.

In both cases, the fact must have achieved a sufficient density to manifest “at least a provisional stabilization of the interests present.”³

More precisely, the state of fact which can give birth to the customary rule must result from a repetition of practice; phrased differently, it is the *effectiveness* of a certain behavior which is determinative.

Similarly, the order of fact which can be considered as a legal order must be composed of norms which are, according to Kelsen’s well-known expression, “largely and generally applied and observed”⁴: the criterion here is therefore also the *effectiveness* of certain kinds of behavior.

In other terms, custom plays a role in unveiling—in laying bare—the legal system. It is so troubling because it constantly gives rise to the question of the origin of obligation in a legal system which fairly easily disregards the essential question of the foundation of its obligatory character, which is impossible to resolve on a strictly legal basis, in favor of the existential question of the foundation of the obligatory character of its different norms, which can be resolved in a very reassuring way within the framework of its formalistic structure.⁵

Custom therefore raises the problem of the original creation of law and not that of the production of law by the legal system. Due to its *autonomous* emergence in the fine arrangement of law, custom provokes again the initial question which was masked by the same arrangement: that of the appearance, which is also autonomous, that is to say, not capable by definition of depending on a pre-existing legal norm, of the legal order itself. And in this sense, an analysis of that which is international custom may perhaps allow us to bring certain elements into the eternal debate over the nature of the legal order.

But let us leave these few intuitions aside and see, before trying to verify them, how doctrine has treated the problem of the obliga-

3. Charles De Visscher, *Coutume et traité en droit international public*, 59 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [R.G.D.I.P.] 353, 356 (1955).

4. HANS KELSEN, THÉORIE PURE DU DROIT 287 (Charles Eisenmann trans., 1962).

5. Hence, in the study of treaties, the problem of the origin of the obligatory character of conventional rules is often masked by the circumstantial study of the formalities and procedures of treaties: negotiation, signature, ratification, eventually wrapped up with a quick reference to *pacta sunt servanda*.

tory character of international custom, that is to say, of the existence of customary rules in international law.

In reality, the analysis of the international customary rule gives rise to two theoretical problems which are not always distinguished from one another: one of the *general theory of law* (why is law law?); the other of the *conception of international law* (who determines what is international law?). But the problem is made still more complex by the fact that custom does not in *international practice* escape the general relativism of international law, neither in the determination of its content, nor in its definition.

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What then is this phenomenon before which international doctrine is placed? On the one hand, it is a “general practice accepted as law,” that is to say according to the most classic analysis,⁶ a material element and a psychological element, *opinio juris sive necessitatis*, and on the other hand, it is a norm.

In the face of this equation “material element + *opinio juris* = norm,” that is to say, in the face of the established passage of fact into law, from the world of *Sein* into the world of *Sollen*, doctrines will essentially adopt two attitudes, which themselves refer, in our opinion, to two distinct approaches with respect to the legal order in its entirety: these may, in effect, either seek to explain the appearance of the norm—to “found” law—or they may limit themselves to recording the existence of the norm, to establishing the existence of law.

6. Many nuances could be developed here on the “equilibrium” effected by different authors between these two elements. If the large majority consider that the two elements are indispensable, some think that the psychological element is the sole determinant, even if its proof necessitates the existence of the material element (certain voluntarists, particularly KARL STRUPP, *ÉLÉMENTS DU DROIT INTERNATIONAL PUBLIC* 13 (1930); see also Oppenheim, in XXV NIEMEYERS ZEITSCHRIFT FÜR INTERNATIONALES RECHT 12 (1915); PIERO ZICCARDI, *LA COSTITUZIONE DELL' ORDINAMENTO INTERNAZIONALE* (1943)). Others consider that only the material element is necessary, either because we can presume *opinio juris* on that basis (JEAN HAEMMERLÉ, *LA COUTUME EN DROIT DES GENS D'APRÈS LA JURISPRUDENCE DE LA C.P.J.I.* (Georges Thomas ed. 1935); HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 350 (1958)), or because it is sufficient in and of itself (Kelsen in his early writings, notably in *Théorie du droit international coutumier*, *REVUE INTERNATIONALE DE LA THÉORIE DU DROIT [R.I.T.D.]* 265-66 (1939); Paul Guggenheim, *Les deux éléments de la coutume en droit international*, in 1 *LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC, ÉTUDES EN L'HONNEUR DE GEORGES SCELLE* 278 (1950); Lazare Kopelmanas, *Custom as a means of creation of international law*, 18 *BRIT. Y.B. INT'L L.* 127, 151 (1937); NORBERTO BOBBIO, *LA CONSUETUDINE COME FATTO NORMATIVO* (1942); ROLANDO QUADRI, *DIRITTO INTERNAZIONALE PUBLICO* (2d ed. 1956)).

May we be permitted to make two quick remarks at this juncture? The first is that one should not take the proposed equation letter for letter, as it is only an easy method of illustration. In particular, the two “constitutive elements” of custom are not two juxtaposed entities, but rather only two aspects of the same phenomenon: a certain action which is subjectively executed or perceived in a certain fashion. The second is that the classification outlined here is unusual and does not cover other, more familiar cleavages, either resulting similarly from divergent conceptions of the nature of law, such as the cleavages that separate those who see in the customary process an act of law creation and those who do not see anything other than an act of declaration, or the cleavages resulting from divergent conceptions of international society, such as that which opposes voluntarists to non-voluntarists.

Two attitudes then, we have said. The first consists in declaring that the equation has no solution without having recourse to a supplementary extra-legal *datum*. In other words, the first attitude consists in *explaining* and *justifying* the passage of fact into law by the existence of something other than the factual state of the custom—independently of the eventually divergent analyses, of this factual state—which explains how this factual state becomes a norm: divine law, natural law, which are purely idealist concepts; history, objective law, which are notions which mix ideal considerations and realist considerations, or even social necessities.

Voluntarists, as well as objectivists, adopt this first approach. Voluntarists, such as Grotius, who believe that the existence of a customary rule results from its genesis, conform to a voluntarist procedure foreseen by the order of reference. Objectivists such as Le Fur, Scelle, or Basdevant believe that it results from the adequacy of its content to the imperatives of the order of reference, whether this be natural, objective, or social. Thus one part of the doctrine has sought to explain the feeling of obligation⁷ which is consubstantial to custom—as it is to the legal order—according to very diverse options which may be interesting from a philosophical, political, or sociological viewpoint, but which do not teach us anything on the legal plane. More precisely, it seems that the vast majority of doctrinal writings have not resisted the temptation of effecting a mutation of *the explanation of the feeling of obligation into a justification of its obligatory character*. It should be noted that this type of explanation, which

7. We will use the term “feeling of obligation” to signify “feeling of legal obligation.”

tends more or less to mask the brutality of the passage of fact into law by justifying it through reference to an extra-legal datum, has been adopted by the vast majority of doctrinal writings.

In our opinion, moreover, the “why” question as to the existence of the feeling of obligation comes under legal sociology, as we shall develop it later, a veritable science of law having to limit itself in establishing the existence of this feeling of obligation.

A few people have successfully sought to follow this approach. For them, a legal order is an objective reality whose existence is established in history and with regard to which the task is to recognize the legal order, “not to found it on ideal facts or principles.”⁸ The second attitude therefore consists in *recording* this transformation of fact into law, something which can be accomplished in many ways: either by imagining a purely hypothetical explanation, or by supposing a spontaneous transformation.

It is possible first to hypothesize that the transformation took place, this approach being, moreover, not totally unrelated to the eternal temptation of justifying the legal order. This is the somewhat tautological position adopted by those who refer to a fundamental hypothetical norm, be they voluntarists such as Anzilotti for whom this hypothetical norm is *pacta sunt servanda* or normativists like Kelsen for whom “the fundamental norm is the norm which institutes the factual state of custom as a law-creating act.”⁹

It is then possible to record the result of this transformation of fact into law: the equation is therefore no longer interpreted as providing a real or hypothetical explanation of the customary process, but as offering a description of the customary rule. The material element and the *opinio juris* do not participate as constitutive elements of a process; they simply allow one “to recognize the existence of rules of customary law.”¹⁰ But if the rule does exist, it is because it is born through a kind of spontaneous generation: this is the not-very-explanatory position adopted by Professor Ago, a position which seems, however, to call attention to a just intuition insofar as that intuition concentrates attention more on the customary rule than on the customary process.

It is perhaps possible to venture further down this path. If we refuse to refer to an extra-legal element justifying the passage from fact

8. Roberto Ago, *Science juridique et droit international public*, 90 RECUEIL DES COURS 850, 954 (1956).

9. Kelsen, *supra* note 4, at 259.

10. Ago, *supra* note 8, at 937.

into law in the customary phenomenon as an approach which is foreign to a veritable legal science, while still not being able to find satisfaction in an explanation of a hypothetical or spontaneous transformation, then the presupposition underlying all the preceding developments should perhaps be abandoned—namely that the world of *Sollen* is radically different from, and irreducible to, the world of *Sein*. It remains then to be admitted that the only solution which allows us to solve the equation is to suppose that it provides a *definition*—the definition of a particular modality of *Sein*—which is called a customary norm. In other words, the customary rule is simply fact considered as law. This approach also indicates that, if our initial intuition is correct, law is nothing but a particular factual modality, a legal order that can define itself as a factual order considered as law,¹¹ without anything needing to be added to this definition.

Of course this first result in the debate on the nature of custom—and as a consequence, of the legal order—is but one step. One must still ask by whom the norm or the legal order must be considered to be law in order for it to be law effectively, that is to say, “to produce those effects which legal science recognizes and characterizes as legal effects.”¹² The answer to this question will obviously vary according to the structure of the society which will govern the legal order.¹³

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This explains that, in addition to the controversies concerning “the foundation” of law, divergences are added which result from *different conceptions of international law* and which lead to differing descriptions of what should be considered a customary rule.

Still more exactly, it is not so much the formal description itself which causes disagreements as it is the interpretation of the two constitutive elements. In effect, as Professor Reuter emphasizes, “the exact scope of these two elements and their practical consequences are strongly influenced by the general conception which we have

11. See also M. Troper, *Nécessité fait loi. Réflexions sur la coutume constitutionnelle*, in MÉLANGES OFFERTS AU PROFESSEUR CHARLIER 21 (1981).

12. Ago, *supra* note 8, at 932.

13. A confirmation of this analysis may be provided by the conclusions reached by P. Vincent-de-Paul Perret: “Despite the fluctuations that we were able to observe in this doctrine concerning the basis of the obligatory force of custom, we nevertheless discovered a foundational unity there. What changes is the personality invested with the creative power. But the *essential* foundation is *formally* the same: it is the will of the one who has the authority to create the law.” *Les origines romaines de la doctrine de la coutume en droit canonique*, BULLETIN DE LITTÉRATURE ECCLÉSIASTIQUE 18 (1935).

formed of the legal nature of custom and notably of the role which the will of the state plays therein.”¹⁴

In reality, the controversies essentially concern the psychological element. With regard to the material element, it is sufficient that it manifests a certain attitude without ambiguity; it is very generally admitted that the material element is constituted by the repetition of a certain number of facts for a certain length of time, these different variables being modulated according to different situations.

The psychological element is analyzed differently depending on the place accorded to the will of the state, that is to say, the sovereignty of the state in international law. The question is therefore one of knowing by whom a certain type of behavior must be considered as conforming with the law in order effectively to be law. Must it be all states or just the majority? Who has to have the *opinio juris*, the feeling that law exists, in order for law to exist in reality? In other words, who is vested with the authority to create international law?

It is not inexpedient to recall, in order to situate the definition of custom in a historical perspective, that the concept of *opinio juris*—which sometimes seems inherent to the notion of custom in our accustomed minds—was only introduced as such in the definition of custom during the nineteenth century.¹⁵

But the question which deserves to be raised is whether the idea, if not the actual expression of *opinio juris*, did not already previously exist.

Before the nineteenth century, doctrinal writings seemed to emphasize consent: consent of all and conformity to divine reason for Suarez, consent of all and conformity to nature for Binkershoek, consent of the majority and conformity to reason for Zouche, consent of the majority for Grotius, consent of all for Martens. Two tendencies then: one which demands unanimous consent, the other which is satisfied with a general consent.

From the nineteenth century onwards, there is no more talk of consent, but of *opinio juris*. The vocabulary changes, but the two tendencies can still be found and the concept of *opinio juris*, in fact, divides in two, into what we may call the “*opinio juris assentiment*” and the “*opinio juris sentiment*.” And according to whether they

14. PAUL REUTER, *DROIT INTERNATIONAL PUBLIC* 94 (5th ed. 1976).

15. See the definition of “coutume” in *DICTIONNAIRE DE LA TERMINOLOGIE DU DROIT INTERNATIONAL* (1960). See also Paul Guggenheim, *L'origine de la notion de 'opinio juris sive necessitatis' comme deuxième élément de la coutume dans l'histoire du droit des gens*, in *HOMMAGE D'UNE GÉNÉRATION DE JURISTES AU PRÉSIDENT BASDEVANT* (1960).

adopt the one or other conception, the authors do not reply—in principle—in the same way to the question of knowing whether a customary rule does or does not apply to a state which has not participated in its formation. The answer to this question is of the highest importance:

Of all the controversies relative to the nature of the international customary rule, one of the best-known is that which divides those for whom custom emanates only from the will of states and as a consequence only binds those states which have engaged in precedents establishing this custom and those for whom the obligatory force of custom is not the expression of their will alone, such that one could oppose the existence of a universal custom against a state even if that state had not expressly recognized it.¹⁶

Opinio juris is conceived by the different objectivist authors as the expression of a collective conscience of the international community, as the *feeling of being bound by a rule which is imposed out of necessity*; these authors subdivide into different schools of thought according to the necessity to which they refer: according to them then, the feeling of being bound by a legal obligation comes from conformity to divine law (Suarez), natural law (Pufendorf, Le Fur), the imperatives of the social group (Savigny), objective law (Gény, Scelle) or even social necessity (Basdevant, Reuter). *Opinio juris* is therefore only the *effect* of the legal obligation which results from a pre-existing necessity. It is *opinio juris* which *reveals* the rule that, according to these doctrines, can only conform to *the general interest* of international society as embodied in the specific concept (divine law, reason or natural law, history, objective law, social necessities) employed by the different theories.

Of course, a *general opinio juris* would suffice for the existence of a customary rule—the reference to a necessary order justifying the fact that sovereignty must adapt to it. This position is illustrated perfectly by the remarks of A. de Lapradelle:

It is not necessary that the legal conviction should be universal; it is enough that the legal conviction is general because . . . what constitutes the value of custom is not assent itself, it is the conformity which consent establishes between practice and a superior legal conviction and as soon

16. Paul Reuter, *Organisations internationales et évolution du droit*, in L'ÉVOLUTION DU DROIT PUBLIC; ÉTUDES OFFERTES À ACHILLE MESTRE 449, 450 (1956).

as this legal conviction is defined as being the positive conviction held by the majority, it is clear that the legal conviction of a small number would be unable to resist it.¹⁷

But as certain authors, in particular Kelsen, have emphasized, there is a certain logical contradiction in this approach. Thus, in those doctrines which interpret *opinio juris* as the feeling of being bound because the rule is obligatory, customary law can only arise following an error on the part of the subjects constituting the custom. This is the case since, either they are acting in the conviction that they are obeying a legal rule, which is a falsity during the process of creating the norm as the latter only exists as a legal norm in a latent state; or, according to certain authors who are sensitive to the contradictions of the preceding formula, they are acting in the conviction that they are obeying morality or justice. Again, however, they wrongly hold the feeling that they are so obliged according to positive law, since these norms are not legal norms in the sense of positive law.

But it is sometimes enough to believe in love for it to exist. Why can the belief in the existence of a norm on the part of a state, which is simultaneously the subject and creator of international law, not be at the origin of the emergence of such a norm? The objections of Kelsen may be overcome if one understands *opinio juris* as the feeling of being bound by a norm to which one consents, giving it existence through this consent.

Opinio juris is thought by the voluntarist school, in all its different tendencies, to be the assent of all, to be *the feeling of being bound by a rule to which one consents*.

Opinio juris is therefore the immediate *cause* of the legal obligation. It is the coming together of the wills of states, as manifested by their behavior, that *creates* the rule on the legal plane, whatever way this coming together is analyzed and its ability to create law explained: an auto-limited will with the ability to create international law through the mutual recognition of states according to Jellinek, a fusion of wills with the ability to create international law by virtue of the constitutional rules of states according to Triepel, a tacit pact with the ability to create international law by virtue of the principle *pacta sunt servanda*, which in turn has been considered a principle of natural law (for example, by Grotius, Charles de Visscher, Verdross), or as a truth which is certain yet impossible to prove within the domain

17. A. de Lapradelle, in *COURS DE DOCTORAT SUR LA JUSTICE INTERNATIONALE*, 1932-33, 18th lesson, at 11.

of legal science even if it can be within that of legal sociology (for example, by Perrasi), or as a hypothetical norm (by Anzilotti in his early writings).

In so far as the will of states is the determinative element in the emergence of a customary rule, the latter can only conform to a “balancing” of the individual *interests* of all the states for whom the customary rule is valid.

The logic of voluntarism requires the acceptance of a custom to be absolutely *unanimous* within the community that the customary rule is supposed to govern. Within the framework of a strict voluntarism, it is unreasonable to claim that once custom has been formed it must govern all the states that are part of the international community, independently of their will. Indeed, a custom would hardly be considered incumbent upon states which were not involved in its creation or which have not adhered to it historically.¹⁸

But too strict an application of these principles would leave scarcely any room for the appearance of universal rules and therefore for a minimum global international legal order.

It being difficult to establish an unanimous acceptance by all states in the international community, voluntarists consider that a general acceptance deserves the *presumption* of a universal acceptance—a presumption founded on the silence of the minority state which has not protested and on the silence of the new state at the moment of its accession to independence. Thus Strupp, a classical voluntarist, declares that

one can talk of general law if one finds oneself in the presence of norms which, whereas they are not *in force* for all states as subjects of the law of nations, nevertheless are in force *for more than half of those states which are qualified as international persons*. One can assert . . . that in this case . . . there is a normal presumption, *presumptio juris*, which can therefore be refuted, in favor of the validity of the norm for all states.¹⁹

Professor Tunkin, a Marxist voluntarist, echoes this view, declaring: “Of course, a general acceptance of a certain rule as a customary norm is a good reason to assume that this norm is universally recognized, but it is only a good reason for a presumption and not for a de-

18. See generally DIONISIO ANZILOTTI, *COURS DE DROIT INTERNATIONAL* (Gilbert Gidel trans., 1929).

19. Karl Strupp, *Les règles générales du droit de la paix*, 47 *RECUEIL DES COURS* 258, 310 (1934) (emphasis added).

finitive conclusion.”²⁰ Up to this point nothing contradicts the premises of voluntarism.

But it appears that numerous voluntarists have not been able to accept that this presumption is refutable for all international rules and that they have had to introduce, in contradiction to their own reasoning, a certain number—albeit limited—of customary norms for which the presumption cannot be questioned. Thus Strupp affirms:

Firstly there are norms, . . . which . . . must be accepted even by new states entering the circle of their peers. . . . The fundamental international rights and obligations of states have often been talked about . . . One could assert that their existence depends on an irrefutable *presumption*, a *presumptio iuris* and of *jure strictissimo*.²¹

Anzilotti himself can also not help having recourse to certain necessary rules. In fact, he declares:

General international law is substantially the product of a long historical evolution. . . . First there were common convictions which then gradually acquired the force of obligatory norms for all those states between which relations were being established, norms which were so closely linked to the character and demands of these relations that the fact of maintaining the relations appeared to be inseparable from the observance of the norms and that the entry of a new member into the international community seems inseparable from the acceptance of these norms as general and common principles of historic origin, stemming from the community itself.²²

Here then, there is a recourse to an unquestionable presumption of universal acceptance in the case of a general acceptance of certain norms considered to be of essential importance.

Some go further and appear to have recourse to this unquestionable presumption in all cases. It is clear in this hypothesis that when one departs from voluntarist premises one ends up with conclusions which are very close to those of the objectivists. For these authors, it is as if general acceptance, the international avatar of Rousseau's general will, could only manifest the acceptance of all. This is because the general acceptance signifies that the rule conforms to the

20. Grigorii I. Tunkin, *Coexistence and International Law*, 95 RECUEIL DES COURS 3, 19 (1958).

21. Strupp, *supra* note 19, at 309 (emphasis added).

22. ANZILOTTI, *supra* note 18, at 89-90.

general interest of the international community. In the same way that Rousseau wanted to force men, through the general will, to be both free and subject to the law, we try to force states to be sovereign while still necessarily being subject to the rules of customary international law. Thus Oppenheim, while still declaring himself to be a voluntarist, affirms that in order for there to be a customary rule it is sufficient that there be “the express or tacit consent of a majority which is so overwhelming that those dissenting have no importance and disappear absolutely in the eyes of those who seek the collective will as an entity distinct from the will of its individual members.” When is the majority so overwhelming? It is, says Oppenheim, “if the number and the importance of the states are such as to allow one to admit that the rule in question refers to imperative interests of the entire community of states.”²³

Does not the reference to this kind of “general international interest” imply that, since the general will cannot be mistaken and is necessarily oriented toward the general interest, the presumption of acceptance by states which have not positively participated in the emergence of this general will is beyond question? Kelsen understood this well when he remarked that “besides, one only invokes this requirement of an imperious interest of the international community here in order to create the appearance of a unanimous consent which would not in fact exist if it were not all those who are bound by the rule who had to have participated in its formation.”²⁴ General acceptance can absolutely no longer distinguish itself from the collective conscience to which the objectivists refer.

If controversies concerning the foundation of law in general have very little impact on the analysis of the positive legal system, controversies resulting from different conceptions of international law leading to differing definitions of the factual state of custom—a general practice accepted by all or a practice generally accepted—can, by contrast, have consequences for positive law. This is because one cannot prevent international legal actors from being motivated by their current interests in one or another description of custom, in order to accept, to a greater or lesser degree, certain practices as possibly being at the origin of a customary norm.

23. LASSA OPPENHEIM, I INTERNATIONAL LAW 17 (1905).

24. KELSEN, *supra* note 4, at 242.

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In addition, if a scientific analysis of law can be satisfied in maintaining that which is determinant on the legal plane for the existence of a customary rule—namely the *existence* of *opinio juris*—it is required to investigate legal practice in order to ascertain whether this *opinio juris* has to be general or unanimous. But the response from practice will be marked by the general relativism of international law. Of course, this relativism also affects treaty rules, but as the objective characteristics of customary rules are not as clearly defined as those of treaty rules, it affects customary rules even more.

In fact, what is the customary rule if not a certain factual situation which has been given a certain qualification, a certain subjective signification: a certain motivation by the act's author, a certain interpretation by subjects other than the author. These qualifications, however, do not necessarily coincide and none of them encroaches upon another precisely because of this relativism, unless the conflict is brought before a third party capable of settling it with binding force. But even then the relativism does not disappear: in fact, the decision of the judge or arbitrator cannot escape relativism, because the decision is only valid within the sphere defined by the principle of the relative authority of the thing being judged. However, the arbitrator and international judge are still instances of relative objectivity insofar as they substitute themselves for the intended recipients of the eventual norm, in order to proceed to the analysis of the conditions of its appearance.

Moreover, it is absolutely clear that if, for example, the Court were to affirm the existence of a general rule of customary international law in a case between two states, this position could not help but have a certain impact above and beyond the two states concerned.²⁵

It is always the case that controversy as to the existence of a customary rule, referring to the element of *opinio juris*, undeniably gives the judge a very wide margin in which to maneuver. And there is a great deal of truth in that which Kelsen affirmed in his early writings where he considered that *opinio juris* simply masks the role of the judge in the creation of law. Recently this idea has been taken up again by one author in a magisterial formula by which he describes

25. See Paul Reuter, *Principes de droit international public*, 103 RECUEIL DES COURS 424, 558 (1961).

the customary rule as “a jurisdictional hypothesis, an inductive reasoning sanctioned by the authority of the thing being judged.”²⁶

But one must go further and state that the role of *opinio juris* is also to mask the role of the sovereign appreciation of all subjects of international law when faced with a repeated practice.

But if the Court or states have total freedom to affirm whether or not *opinio juris* exists in a given case, they are equally free to require a unanimous or general *opinio juris* as necessary for the appearance of the customary rule. Insofar as there is no instituted authority in international society which decrees the law governing states, there is a struggle for power and the decree of norms, and therefore conflict between different conceptions of custom:

on the part of each state there is a claim of sovereignty, that is to say a claim for auto-determination of what is a legal norm; but this aspiration clashes with the identical aspirations of other governments and is only realized in so far as the unstable balance of forces, the competition of circumstances allow.²⁷

What then are the terms of this conflict between the doctrines on custom?

And first, what is the socio-political significance of these different doctrines?

Voluntarist doctrines would seem to assure *the guarantee of the sovereignty of each state*, if they follow their logic through to the end—something that very few voluntarist theorists have managed to do.

In contrast, objectivist doctrines would seem to assure *the guarantee of the international legal order* by placing something “above” the will of states, thereby justifying the existence of the international legal order by analyzing custom in a certain way which ostensibly refers to objective givens without really casting a shadow over the sovereignty of states, as a state will agree more readily to submit to an objective fact than to the sovereignty of other states. But in reality, all these objectivist doctrines have a function, clearly revealed by Kelsen, which consists in masking the fact that this so-called “objective” order is defined by the will of states; in other terms, they obscure the fact

26. MAX GOUNELLE, LA MOTIVATION DES ACTES JURIDIQUE EN DROIT INTERNATIONAL PUBLIC: CONTRIBUTION A UNE THÉORIE DE L'ACTE JURIDIQUE EN DROIT INTERNATIONAL PUBLIC 79 (1979).

27. Georges Scelle, *Règles générales du droit de la paix*, 46 RECUEIL DES COURS 331, 333(1934).

that a majority of subjectively convinced states—perhaps even a minority of states which are sufficiently important—in fact defines the necessary objectives. This is what Kelsen affirms when he declares:

Opinions of what is legally just, and this is precisely what we call legal conscience, are as numerous and varied as the groupings of interests which constitute the community established by the positive legal order. These opinions are defined by the interest of one of these groups or by a compromise reached between some of these groups.²⁸

In other terms, the reference to a so-called objective concept is there to mask the actual relations at the origin of the adoption of a customary rule, and the relations of domination or the effects of dominance which characterize international society are all the more ignored when the concept of reference which “founds” the obligatory character of custom, as it does that of the legal order, is further distanced from reality, more abstract. Thus the actual functioning of international society is completely ignored by the proponents of divine or natural law. Some objective law theorists are already partially conscious of this functioning. Georges Scelle, for example, admits that the reception of objective law can “become the exclusive if not predominant function of the holders of the greatest power.”²⁹ And of course, all those who refer to social necessities recognize in the same way the direct link between custom and the state of international relations³⁰ established with greater or lesser clarity between different states. Thus Basdevant writes that “customary rules which arise spontaneously from the demands of international life are endowed with a positive character due to the fact that they are recognized by those who are in a position to assure them a certain degree of application in international life.”³¹ The central position of effectiveness in the creation of custom and the preponderant role of the Great Powers and those states which are particularly interested in the question governed by the customary norm are emphasized perfectly.

28. KELSEN, *supra* note 4, at 260-261.

29. Georges Scelle, *Essai sur les sources formelles du droit international*, in 1 RECUEIL EN L'HONNEUR DE F. GÉNY 400 (1934).

30. *See generally* Paul Reuter, *Souveraineté et ordre international*, LES CAHIERS DE DROIT 30 (1954).

31. Jean Basdevant, *Règles générales du droit de la paix*, 58 RECUEIL DES COURS 470, 515 (1936).

Normativists reach a similar conclusion, their goal being to account for positive law without having recourse to the largely opaque screen of an objective order. Thus, Kelsen considers that

in fact, in order to be able to consider that a norm is applicable in state practice as a norm of customary international law, it is enough if it has been applied or recognized in numerous cases *by those states which by reason of their size and their culture are the most important* for the development of international law.³²

What then, in the face of these different doctrines, are the choices open to states or the Court?

It would appear that in a homogenous society the choice between the competing conceptions of *opinio juris*—unanimous or general—is not fundamentally important: the probability that a general *opinio juris* will represent the acceptance of all, and therefore respect the sovereignty of each state, is strong in such a society. This perhaps explains the fact that classic voluntarists believed they could sometimes depart from the theoretical premises of voluntarism and content themselves with a general—and more or less irresistible—will as the basis for the emergence of a customary rule.

Of course the case is entirely different in a divided world, in a heterogeneous international society such as the one in which we live today. In such a society it would seem *a priori* that those states which are in the minority should require a unanimous *opinio juris* and that those which have power, or are in the majority, a general *opinio juris*. Can this be verified?

Today it would seem that the doctrine of Western states largely adopts the conception according to which a universal customary rule exists as soon as there is a general *opinio juris*. As Professor Chaumont stresses, the “extension of customary rules to new states is generally considered by recent Western doctrine as an essential feature of the definition of custom.”³³

Inversely, insofar as the divergence between general and unanimous acceptance may be sharp today,³⁴ communist states³⁵ and new

32. KELSEN, *supra* note 4, at 260-261 (emphasis added).

33. Charles Chaumont, *Cours général de droit international public*, 129 RECUEIL DES COURS 332, 438 (1970).

34. In effect, “certain ideological oppositions have rendered suspect to one group of states (notably the communist states and underdeveloped countries), a not-insignificant part of the customs of the old world.” Reuter, *supra* note 25, at 466.

35. See generally Tunkin, *supra* note 20, at 13.

states³⁶ require a unanimous *opinio juris* in order for a universal customary rule to arise.

This explains the great theoretical rigidity of voluntarist Marxists who cannot admit that a general acceptance can sometimes unquestionably represent the acceptance of all, however rarely this occasion may arise. This is why a universal norm must be recognized by absolutely all states: in particular, “with respect to new States, they have the ability to not recognize such and such a customary norm of general international law.”³⁷ Of course, this does not exclude having recourse to certain presumptions, but never to presumptions which are beyond further question. Thus, for new states, “the entry into official relations with other countries made without reservations indicates that the new State accepts the applicability of a set collection of principles and norms of international law which form the basis of relations among States.” In the same way, under certain conditions, a general acceptance is a presumption of a universal acceptance: “There is no doubt that the attitude of a majority of States, including States with two different social systems, and particularly the attitude of the Great Powers, is of capital importance in the process of the creation of universal rules of customary international law.”³⁸

Phrased differently, the employment of a presumption of universal acceptance in the case of a general acceptance can only be justified if this “general acceptance” is given a new meaning, the acceptance of a majority certainly, but of a majority which is representative of different socio-economic systems. Judge Lachs expresses this admirably in his dissenting opinion in the *North Sea Continental Shelf Cases* with regard to calculating the number of states participating in the creation of a new rule of law:

This mathematical calculation, which is already so important of itself, must be completed by a spectral analysis, as it were, of the representation of States. . . . Indeed in today’s world, one must take into account an essential factor in the formation of a new rule of general international law, namely the fact that States with different political, economic and legal systems, States from all continents, take part in this process. The time has passed when a general

36. See Milan Sahovic, *L'influence des Etats nouveaux sur la conception du droit international*, in XII ANNUAIRE FRANÇAIS DE DROIT INTERNATIONALE [A.F.D.I.] 30, 34-35 (1966).

37. GRIGORII I. TUNKIN, *DROIT INTERNATIONAL PUBLIC: PROBLÈMES THÉORIQUES* 87 (1965).

38. Tunkin, *supra* note 20, at 18.

rule could be established according to the will of a single or small number of States—or even as was once claimed—by the consensus of European States only.³⁹

The position of developing countries is one of the strangest in this regard since developing countries currently constitute the majority in the international sphere. In fact, they only demand a unanimous *opinio juris* for old customs which arose at a time when they were in the minority—or even nonexistent—whereas they maintain that new customary norms can arise on the basis of a general *opinio juris* emanating from the resolutions of international organizations. It is difficult to reconcile these seemingly contradictory attitudes.

As for the Court, it seems to have progressed from a voluntarist conception—in the *Lotus Case*—to a non-voluntarist conception—in the *North Sea Continental Shelf Cases*. The verification of this widespread analysis, like its interpretation, would be beyond the limits of this study.

Nevertheless, let us note that the Court declared in the *Lotus Case* that “the rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.”⁴⁰ That is to say the Court refers squarely to the general will.

In other words, it would seem possible to say that voluntarists differ from non-voluntarists only on the question of the opposability of universal customs to new states. Otherwise there is agreement such that *in the absence of an express contrary manifestation, a custom arises from a repeated practice generally accepted either tacitly or presumedly*.

Is this not a way of recognizing that the customary rule finally forms on the basis of “consensus,” that is, without an express manifestation of will, whether positive or negative, but by a simple tacit manifestation of will? What is in fact a consensus? A text is adopted by consensus when it is adopted “without vote or discussion as expressing the general feeling.”⁴¹ But Professor Reuter justly emphasizes the ambivalent character of such a procedure; in fact,

39. North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands), 1969 I.C.J. 3, 227 (dissenting opinion of Judge Lachs). See also Reuter, *supra* note 25, at 464-465. This type of analysis also occurs during assessments of the value of resolutions of international organizations.

40. Lotus Case (France v. Turkey), 1929 P.C.I.J. (ser. A) No. 9, at 1 (emphasis added).

41. REUTER, *supra* note 14, at 33-34.

consensus may perhaps oblige the strongest to make certain sacrifices, but it sacrifices the viewpoint of another minority: the one which is not strong enough to make the consensus procedure fail; . . . in spite of the *apparent unanimity* which it represents, it constitutes an instrument of coalition against those who are isolated.⁴²

Does not this analysis apply perfectly to international custom? Thus the creation of a customary rule seems always to result from the actions of an active majority—or even of a very powerful and active minority—which is able to impose its views on all other states, except in those situations where certain states are very strongly determined to resist. This is true whatever interpretation is given to the role of this majority acceptance, a functional role of determining an objective truth (objectivists), a presumed image of unanimity (voluntarists) or simply a role effective in the functioning of international society (normativists, spontaneists).

This leads us to think that, as in the case of the consensus required for the adoption of a text where the silent positions of different states do not assume the same significance, so in the case of international custom, different states' *opinio juris* cannot be explained in the same way.

It is here that one can invoke the doctrines which have sought to explain *opinio juris* in order to provide a basis for law, in a completely different context—in an area other than the science of law, at least for some of the doctrines. It can in fact be tempting when one considers custom—which is unquestionably principally a social fact—to shed light on legal analysis by an incursion into legal sociology. It should not be forgotten that “law is a certain way of being socially powerful, which in no way alters its normative character.”⁴³

And it is precisely because of this that the explanation of the appearance of *opinio juris* is inseparable from an analysis of international relations.

From this perspective it would seem that another error of these doctrines—resulting from their approach itself—is to have sought a single explanation of this feeling of obligation without taking into account the diversity of state structures.

42. *Id.* (emphasis added).

43. W. Heinrich, *Recherches sur la problématique du droit coutumier*, in II RECUEIL EN L'HONNEUR DE F. GÉNY 285 (1934).

In fact, in our opinion, the content of the *opinio juris* of each state will depend on its position of power within the international order. The will of a state, even if it is not a will of power, implies an element of power. Thus, certain states will feel bound because they wanted to be, because they freely consented to be, and other states, on the contrary, will feel bound because they cannot not want to be, because the rule is imposed upon them. Does this indicate that there will be two different explanations depending on the states concerned: in one case custom resulting from will and in the other from the appropriateness to a certain order of things that imposes the rule? We do not think so. On the contrary, *the customary international rule is the one which is considered to be such by the will of those states which are able to impose their point of view*. Thus, there are always wills of states to be found at the origin of customary rules: the free will of those states that have effectively been the first by their actions to contribute to the emergence of the customary rule; and the will conditioned by the irresistible will of the former, of the “silent majority.” And if the will of states creates the customary rule, it is equally only this will which can prevent the rule from being opposable to a state, on condition that this is manifested expressly.

The existence of a customary rule reflects the fact that, at a certain point, everyone will accept something that is sufficiently socially constraining, while still thinking that he accepts through his free will: every customary rule diffuses by a kind of process of attraction, of polarization, which can only be prevented by an explicit manifestation of will, in the inverse sense.

Opinio juris thus represents the dominant ideology of international society,⁴⁴ taken up by all, even though it may be wanted by some and endured by others. Perhaps it is in this way that the so frequently distorted expression *opinio juris sive necessitatis* acquires its whole meaning. According to their position of power in international society, states will voluntarily participate in the elaboration of international custom, either with the feeling of creating *law* or with the feeling of obeying a *necessity*, which results precisely from the will of those states who feel that they are creating law.

44. See René-Jean Dupuy, *Coutume sage et coutume sauvage*, in *MÉLANGES OFFERTS À CHARLES ROUSSEAU* 80 (1974).