

The Search for Custom: Traditional Views

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Material and Psychological Elements

Only in the last several decades have writers on international law focused upon the analysis of general customary law. Previously the major contributions were made by students of various domestic legal systems. Nevertheless, these early studies were highly significant for international law, since international publicists at the turn of the twentieth century were familiar with them and drew upon them in their own treatises.

Prior to the nineteenth century, no writer had addressed himself to the details of custom-formation. But then, in that century, Puchta and Savigny took the first step, helped by Hugo, Moser, and Austin.¹ These writers inquired into the ultimate foundation of positive law. Puchta and Savigny held that this foundation resided in the spirit of the people; in their view, custom was merely the immediate and spontaneous revelation of the common popular sentiment.² The importance of their work to international law lay not in their conclusion but in their emphasis on the cognitive or psychological aspect of custom. Before their time, this aspect had been almost entirely ignored (as was true in many fields other than jurisprudence). Yet, typically, the corrective was carried too far. For in the theories of Puchta and Savigny, if "law" is the expression of popular consciousness or will, then the overt or tangible aspect of custom dwindles in relevance and importance. So long as we can discover the popular sentiment, what need is there for an overt act or "precedent"? Indeed, the overt act may be only one kind, but not the only kind, of evidence of the popular will. And what if there were contrary overt acts? Which of them would be the true evidence of the *Volksgeist*?

At least Puchta and Savigny had shown that customary law has a psychological aspect, like all "law" addressed to conscious beings in an attempt to influence their behavior. But there was need for a reconciliation of the psychological and the overt elements of custom, for otherwise the choice was simply between the Savignian psychological view or the pre-Savignian stress on material precedent. François Géný provided the synthesis in his *Méthode d'interprétation et sources en droit privé positif*, published in 1899. Although Géný was not writing about international law, his thoughts on custom in French law immediately influenced the great international scholars of his day. He argued that the important question was not whether overt acts ("usage") reflected the psychological element of will or command, but whether each and every overt act constitutes custom, as opposed to those acts which reflect the psychological element. Indeed many acts "remain outside the positive legal order," such as "the habits of daily life, what we call the mores of the people or of certain social classes, the commercial and other economic usages, the rules of civil behavior, the social conventions, or even moral or religious practices."³ All of these, in Géný's words, would "claim in vain the character of a source of positive private law." Something clearly was needed to distinguish legal custom from other usages, and this Géný called the *opinio necessitatis*, a psychological component which was "truly specific of customary law."⁴

Summing up, Géný offered two elements of custom: usage (repeated practices) and

opinio juris seu necessitatis, the latter meaning that the usage must amount to the "exercise of a (subjective) right of those who practice it." Usage is the "material and detectable element" in custom, and *opinio juris* the "immaterial and psychological element."⁵

But although Gény's identification of the two elements of custom passed immediately into international legal thinking, most writers forgot or overlooked Gény's reason for making the categorization—that *opinio juris* was necessary solely for distinguishing legal usage (custom) from social usage. By neglecting the function of Gény's classification, many important publicists have formed themselves into two camps: those who argue that the "material" element of custom is the only real one and those who stress the overwhelming importance of the "psychological" element.

In the latter camp may be found writers of positivist persuasion who argue that all rules of international law stem either from explicit or tacit treaties. Custom is a tacit treaty, binding only those states which have tacitly consented. Custom, in the representative writings of Anzilotti, Corbett, and Strupp, amounts only to a uniting of wills of independent states.⁶ Thus the psychological element is paramount, and the overt acts of states are at best the evidence of this implied consent (or at worst its illegal contradiction). Thus, we find that writers of this school play down the material element of custom. Karl Strupp, for instance, denies the necessity of repetition in the material element of usage.⁷ G. I. Tunkin argues that usage need not be of long duration, may be discontinuous, and may consist of abstentions as well as practices.⁸ And most recently, Bin Cheng has argued that there need be "no usage at all in the sense of repeated practice" provided that the *opinio juris* can be "clearly established." A resolution of the General Assembly of the United Nations may thus constitute "instant" customary law.⁹ But how can the bulk of international rules be proved *apart from* usage? We have seen that there is no satisfactory nor even plausible way to ascertain national decision-makers' collective views of the content of international rules (see chapter 2). A state may make certain claims in its diplomatic correspondence, but these often clash with competing claims of other states and thus are not a reliable indicator of the content of international law. In addition, a given state's legal advisers, even when they are not divided among themselves as to the legal status of any alleged rule, are reluctant to give out opinions on the content of international law in the absence of a concrete dispute or a codification convention. Some evidence of a state's "psychological" position on international law may be gleaned from its correspondence with the International Law Commission, but only on the topics the Commission has selected. Even then, a state may be expressing *not* its view of what the law is, but its view of what it would desire the law to be in the final draft of the Commission's report. Finally, and most significantly, in their disputes with their counterparts, national decision-makers manifest a preference for having their *acts* cited against them rather than their prior statements or expressions of will. For a state may say many things; it speaks with many voices, some reflecting divisions within top governmental circles, some expressing popular opinion via mass media, and some being "trial balloons" or other argumentative tactics. But a state can act in only one way at one time, and its unique actions, recorded in history, speak eloquently and decisively. The situation is analogous to that of a legislature: its statutes "count" as law, not its committee hearings or deliberations. The greatest difficulties arise if one would neglect the final product—the statute in the case of a legislature, or the act in the case of a state in its international relations.

Accordingly, other writers have sought to base custom entirely on the material element by

proving that *opinio juris* is impractical, almost impossible, or logically contradictory. Torsten Gihl argued that the psychological element in custom is so difficult to determine that courts or textbook writers would not possibly have the time to do so, and that only "special researches" into the motives of governments could uncover this element (see chapter 1).¹⁰ Kelsen in 1939 argued that it is "almost impossible" to discover the sentiments or thoughts of national decision-makers as a component of custom. He noted that although the World Court in the Lotus Case rejected an alleged rule on the ground of the absence of *opinio juris*, the Court never actually proved in any of its cases the positive existence of an *opinio juris* to support a rule of custom. Additionally, many courts had derived a rule of customary law from its articulation in a certain number of treaties, but those courts had never employed *opinio juris* in making their derivations. Although Kelsen in his "pure theory of law" did not actually reject the psychological component of custom, he came close by arguing that the determination of this element is a matter for the absolute arbitrary discretion of an international tribunal.¹¹ Paul Guggenheim in a leading text in 1953 adopted Kelsen's view, stating that in reality there is only one constitutive element in custom, that of usage. In his view, a court has unfettered discretion to decide whether a prolonged and constant repetition of positive or negative acts amounts to a legally binding custom or merely to a usage having no legal effect.¹²

A more basic objection is that *opinio juris* is logically contradictory and hence impossible to prove. The phrase *opinio juris sive necessitatis* suggests usage that has taken place, in Oppenheim's phrase, "under the aegis of the conviction" that the usage is, "according to International Law, obligatory or right."¹³ But if custom *creates* law, how can a component of custom require that the creative acts be in accordance with some prior right or obligation in international law? If the prior law exists, would not custom therefore be, in Eric Suy's term, "superfluous" as a creative element?¹⁴ This objection was cogently presented in the discussions of the International Law Commission in 1950 over Judge Hudson's draft formulation of customary law (see chapter 1). Judge Hudson had argued that a component of custom is the "conception that the practice is required by, or consistent with, prevailing international law."¹⁵ J. M. Yepes objected that the word "required" could not stand, and that if custom must be *consistent* with international law it "ceases to be a source for that law." Georges Scelle, the chairman, agreed that there was a contradiction in arguing that custom on the one hand is the basis of law and on the other that it must be consistent with prior law. Moreover, Yepes observed that, unless custom could depart from prevailing international law, it had no *raison d'être*.¹⁶ Against these views Judge Hudson was willing to modify his formulation to read "not inconsistent with prevailing international law" instead of "consistent with," and later offered "practice not forbidden by prevailing international law."¹⁷ But apparently these modifications did not satisfy the stated objections, for Judge Hudson's entire text was voted to be deleted by the Commission in a seven-to-three vote.¹⁸

The preceding difficulties have led some writers to abandon the attempt to discover *opinio juris* independently, and rather to infer its existence from the evidence of the material element of usage. Charles DeVisscher, for instance, argued on the basis of the Asylum Case that *opinio juris* "may perfectly well be inferred from the external qualities of the precedents invoked, especially from their coherence or discordance."¹⁹ However, the Asylum Case dealt with special and not with general custom (see chapter 8). Additionally, the Court in that case did not infer the existence of *opinio juris*; rather, all that it actually *held* was that in the "inconsistency" of the

practice there was no "constant and uniform usage, accepted as law."²⁰ Thus the Court did not arrive at a finding of "usage" in the sense needed for special custom, and much less at a finding of a psychological element. The Asylum Case therefore does not constitute persuasive support for the position asserted by DeVisscher. Yet other writers have taken essentially the same position. In a recent study, Karol Wolfke argues that *opinio juris* is fulfilled "only by means of presumption."²¹ Similarly, in a leading article Seferiades argued that *opinio juris* can be "deduced" from consecutive material acts.²² A weaker version of the same argument can be found in Sørensen's study on the sources of international law, in which he confines *opinio juris* to the role of placing the burden of proof upon the party affirming the existence of a custom.²³ But altering the burden of proof appears contrary to the World Court's practice in which it is well settled that the judges may conduct their own researches into international law in order to determine the existence of rules of law. Moreover, cases are sometimes submitted under a compromise that deliberately leaves in the balance the issue of the burden of proof. To support his position, Sørensen cited the Lotus Case, in which the World Court invoked a psychological element to defeat the French claim of exclusive flag-state jurisdiction in collision cases on the high seas.²⁴ But Judge Lauterpacht in 1958 cited the Lotus Case for exactly the opposite position, that "the accurate principle on the subject consists in regarding all uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the *opinio necessitatis juris* except when it is shown that the conduct in question was not accompanied by any such intention."²⁵ Thus Sørensen and Lauterpacht, citing the same case, would reach contrary conclusions as to the location of the burden of proof. Not only are both presumptions apparently unsupported by the practice of states, but like all the presumptions just mentioned they are essentially fictionalizations of the psychological aspects of custom.

Nor is the problem solved by a unique suggestion of Helen Silving: "What happens is probably that whereas a given number of acts performed throughout a given time would be sufficient to show the factual element, the residue of repetition and time may be used to show the existence of an *opinio*."²⁶ But why would a litigant or a court ever want to prove the "factual element" short of custom? Such a proof would have no legal consequence. One might as well suggest the contrary assumption: the first few acts demonstrate an *opinio juris*, and the remaining acts prove the "factual element" of usage.²⁷ Thus one could argue that the remaining acts were undertaken under the conviction of a preexisting *opinio juris* that was formed out of the first few

Quantitative Analysis: Usage

In the writings of those concerned with the overt component of custom, we may discern acts. Of course, either way these presumptions reduce to a position that in proving custom there is no need for evidence of a psychological element independent of the material element. Yet Gény's original objection remains unanswered: What do you do when you have a long and repeated usage that is simply a social habit?

An attempted resolution of the problem of whether either or both the material and psychological elements are necessary components of custom will be offered in the next chapter. For the present, a closer look at each alleged component in light of traditional theories is necessary as groundwork for the functional approach of chapter 4. Four modalities which, though not entirely separate from one another, at least offer a convenient classification: duration,

repetition, continuity, and generality.

The temporal element of usage covers the broadest possible range in traditional writings, from the "immemorial custom" of the classicists to the "single act" theories of some contemporary writers. But the former phrase in fact was used for purposes of pleading and did not correspond with reality. Indeed, in early society, as Plucknett has observed, "there was much less insistence upon actual or fictitious antiquity," whereas in canon law ten years was considered sufficient for a "long" custom and forty years for an "ancient" one.²⁸ According to Matesco, France traditionally required custom to be of forty years' duration, whereas in Germany only thirty years was necessary.²⁹ But then, after the theories of Puchta and Savigny, writers such as Lambert began to argue that if usage reflected the will of the people or the transcendent law, a single act would reveal this law unambiguously; any further acts would be redundant.³⁰ A similar conclusion would seem to follow from Blackstone's insistence upon adherence to judicial precedent, a single precedent apparently being of sufficient force to compel adherence.³¹ An examination of the doctrine of "jurisprudence constante" in French civil law suggests that a single judicial precedent is not sufficient as an authoritative interpretation of vagueness in the code, but writers are uniformly unclear as to how many precedents are necessary, and in any event, despite some arguments of Lebrun, the interpretation of a civil code is not analogous to the creation of law out of whole cloth in international customary law.³² Among writers on international law, the current prevailing view as summarized by Sir Humphrey Waldock is that the time needed to form a custom varies "according to the nature of the case."³³ Even "a single precedent could be sufficient to create international custom," according to Gilberto Amado.³⁴ James L. Brierly argued in the International Law Commission that the principle of national sovereignty over airspace arose "at the moment the 1914 war broke out."³⁵ Waldock contrasts this rapid rise of air law with the slow development of the principle of freedom of the seas.³⁶ But no writer has succeeded in specifying which types or areas of law are susceptible of rapid as contrasted to slow development. Helen Silving suggested that the timing depends on the "length of time during which the conditions giving rise to such custom are in existence," but all she means by this is the exclusion of impossible conditions. For she offers as an illustration the "custom of sending the first originals of a bill of lading by air mail and the second originals by ocean-mail" which she says could not have existed "before the inauguration of airmail service."³⁷ In brief, the literature contains no standards or criteria for determining how much time is necessary to create a usage that can qualify as customary international law even if different cases were assumed to need differing amounts of time.

Even so, the time factor cannot be ignored. Karol Wolfke has suggested a relevant covariance: the establishment of custom required a long time in the past when international life was slower and communication primitive, but today custom may be formed rapidly since "every event of international importance is universally and immediately known."³⁸ This argument suggests a communications factor in custom, reminiscent of Matesco's observation that in France a custom had to be "notorious" in order to be valid.³⁹ The idea of communication or notice indeed may be more basic to custom than the mere fact of duration, a point to which we shall return in the next chapter.

Other writers have contended that the "density" of usage, in Waldock's term, is more significant than the temporal factor.⁴⁰ As Slouka puts the case, what transpires within a certain time is more important than the mere lapse of time.⁴¹ Yet if communication or notice is a basic

factor in custom, clearly duration cannot be separated entirely from density, since both serve to call attention to the overt acts making up the usage. Tunkin's observation that "juridically the element of time cannot in itself have a decisive significance" would appear to apply equally well to the element of density.⁴²

Another interlocking element suggested by many writers is that of "continuous" usage.⁴³ Sørensen has indeed argued that the requirement of continuity precludes the establishment of usage by virtue of a single act.⁴⁴ On the other hand, upon looking at the problem more closely, many writers have agreed with Basdevant's observation that few if any rules of international law have been created by a practice in which continuity was never interrupted.⁴⁵ Discontinuity, according to Tunkin, cannot be decisive in destroying a rule of law.⁴⁶ And Wolfke even suggests that discontinuity may help establish a rule when the international community observes that the practice is resumed following interruption.⁴⁷

But present discontinuity would appear to be quite different from discontinuity in the past, for one could not know whether a resumption of the former line of conduct would ever take place. Yet, could an argument be made that a single contrary act suffices to overturn a former line of conduct? Or is not the contrary act by definition illegal since it violates the prior custom? If illegal, might it still contain the "seeds" of a new customary rule to the opposite effect? These questions remain largely unexplored in the literature, although a clue appears in the following passage of Myres McDougal: "[I]n a context such as prevails with respect to the claims to inclusive use and competence in outer space in which the assertion of new customary prescription does not entail the change of pre-existing prescription, or of pre-existing rights, the requirement of duration in past practice has commonly been reduced to the bare minimum necessary for the mediation of shared subjectivities of future commitment."⁴⁸ This passage implies that duration, or any of the other modalities of usage, varies directly according to how well-established the prior law happened to be. Fewer acts over a shorter period of time are needed to establish a rule in a new arena of law than to overturn an existing rule in an old arena. However, McDougal does not cite any evidence of usage to back up his argument; his reference to the law of outer space refers to an arena involving claims but not customary practice (exclusive of earth-circling artificial satellites).

On the other hand, the notion of continuity raises the question: How valid is it to speak of "acts" of states? There are to be sure numerous manifestations of discrete state behavior that we may call "acts," such as seizing a pirate ship, declaring war, arresting a diplomat, or expropriating a foreign company. But even more numerous occasions of continuing behavior that we do not normally call "acts" can be identified, such as providing tourists with police protection, maintaining warning signals on offshore drilling rigs, processing millions of pieces of foreign mail through reciprocal postal arrangements, or extraditing criminals. And perhaps the largest class of manifestations of state behavior involves restraints on action. Louis Henkin observed that the United States' "failure . . . to commit aggression against Canada 'takes place' every day of the year."⁴⁹ But although not normally called "acts," these behavioral manifestations are certainly equally valid as evidence of state practice. Yet if they are equally valid, then the somewhat arbitrarily rigid prescriptions of many writers with respect to duration, density, and continuity must be revised.

One tendency in recent years has been to include among the acts constituting usage instances of failure to act. G. I. Tunkin has argued that "there is no reason whatsoever to deny the

possibility of creating a customary rule by way of a negative practice. The continued habit of not taking actions in certain situations may certainly lead to the formation of a rule of conduct which may be a legal rule." Yet he adds, referring to his previous discussion of the modalities of usage: "[I]t goes without saying that all that has been said before concerning the element of repetition and time applies as well to the negative practice."⁵⁰ This flat assertion raises the question of the meaning of duration and repetition in the context of non-acts. Jan de Louter once suggested that the concept of negative practice proves that continuity, and not repetition, is the basic characteristic of custom.⁵¹ But clearly anything that has never been done has *ipso facto continuously* never been done, and that therefore continuity is not a distinguishing characteristic. Moreover, by emphasizing continuity or repetition in the context of negative practice, one would find it difficult to explain how new laws can readily arise in new legal arenas (such as outer space or human rights) when centuries of non-acts have allegedly created strong negative rules in these arenas.

But the question is still more complex, since we may identify two basically different types of non-acts: a failure to act because of (1) discretion and (2) legal obligation. If a state does not send a rocket to the moon, whether because of choice or technological incapacity, its failure to act is in present international law purely discretionary and no legal consequences arise therefrom. Quite different is the case when a state has a duty not to act. This case arises frequently; indeed a duty to refrain from acting is the correlative of *every* rule of international law that lays down a right. For example, the right of freedom of the high seas obliges all states not to act in such a manner as to interfere unreasonably with states that are exercising that freedom in navigation, fishing, or some other permitted manner.⁵² Sometimes the correlative duty not to act is more subtle, in that certain kinds of actions may be prohibited while others are not. In the *I'm Alone* Case, for example, an international commission ruled that the United States Coast Guard might have used necessary and reasonable force to board, seize, and bring into port a Canadian schooner suspected of illegally smuggling liquor into the United States, but the Coast Guard had no right intentionally to sink the vessel.⁵³ Here, although we may not speak of any primary right of the Canadian schooner to smuggle liquor, nevertheless the United States had a duty toward that vessel not intentionally to use unnecessary force. Despite distinctions like this, however, a fairly clear separation pertains in international law between discretionary non-action and obligatory negative practice. The difficulty with respect to the theory of custom consists in identifying such a distinction when non-acts are cited as giving rise to *new* rules of law. Here, in order to avoid tautology, a nonlegal but nevertheless qualitative standard of distinction must be used. But publicists have not articulated a standard of this sort and hence a new formulation will be suggested in the next chapter.

An old analogy suggested by Pitt Cobbett has impressed many writers on international law as to the elements of duration, repetition, and continuity in custom-formation: "usage" become "custom" just as footsteps across a common eventually become a "path" habitually followed by all.⁵⁴ Cobbett's point was the difficulty of determining at which time, or after how many repeated trips, the "path" emerges, and yet it eventually does emerge and is recognized as such by everyone. This analogy may describe the slow formation of certain customary rules in the history of international law, but what about other customary rules that were formed rapidly? Long usage was not needed to establish, after World War I, the principle of national sovereignty over superjacent airspace, or the principle of nonsovereignty over the outer space path of Sputnik

I after that artificial satellite had orbited the earth.⁵⁵ Moreover, to the extent that the analogy suggests broad participation in the creation of a path or a rule of custom, that suggestion is belied by some prominent international law cases.⁵⁶ Whereas some writers say that broad general participation in a custom helps solidify it as a rule of law,⁵⁷ others state that the requirement of generality refers only to countries "which hitherto had an opportunity of applying" the practice in question.⁵⁸ Since neither group denies flatly that *limited* participation creates legal precedent (in the absence of broader participation in a supervening *contrary* practice), their arguments apparently say no more than what is obvious in any legal system--that the more cases or instances of application of any given rule, the clearer and more established that rule necessarily is. Along similar lines, Judge DeVisscher and other writers have suggested, referring to Cobbett's analogy, that some users will "mark the soil more deeply with their footprints than others . . . because of their weight."⁵⁹ There is undoubtedly some truth in the proposition, recently reiterated by William W. Bishop, that participation by the major powers in a usage will be regarded as more significant by the international community than would be participation by small states.⁶⁰ However, this result may in large part be due to the notoriety that accompanies major-power participation. Of course, there may be another notion--that might makes right--involved in the emphasis some writers such as the "realists" (of whom DeVisscher is an example) give to major-power participation. But even if this dictum is partially true, it is not a satisfactory differentiating feature of international law, whose very existence is eloquent testimony to the curbing of brute force or naked power. A careful study by William Coplin of the twenty-nine cases before the World Court that involved unequal applications (as distinct from joint submissions under a compromise) shows that twenty-three of them were instituted by the relatively stronger state.⁶¹ Certainly no opinion by the Court, and no diplomatic correspondence that has ever been cited by a writer on international law, uses the argument that the size or military power of a state in a given dispute makes that state's *legal* arguments more persuasive. The recent insistence in the United Nations, among Soviet jurists and many other writers, of the legal equality of all states as a principal foundation for all international relations--and the durability of the one-state-one-vote principle in the General Assembly despite proposals for "reform"--all indicate that might does not make right as far as international *law* is concerned. In sum, repetition, duration, constancy, and generality surely serve to make any given rule more *visible*, but writers have not given any concrete evidence for the loose statements sometimes made that these elements are necessary for the actual *formation* of a rule of customary law.

Qualitative Analysis: Opinio Juris

Writers have been perhaps less convincing and yet more ingenious in dealing with the psychological aspect of custom than they were with the quantitative aspects just examined. The first set of theories we shall examine relates to the circularity of *opinio juris*: How can custom create law if its psychological component requires action in conscious accordance with law preexisting the action? One suggested way around this dilemma has been recently reiterated by Bin Cheng. During the period of formation of the custom the participants acted in error;⁶² they thought that they were acting under a legal obligation which in fact was nonexistent. This attempt to finesse the circularity problem was first suggested by Hans Kelsen in an article published in 1939, but he himself rejected the idea on the basis that a mistake of this nature cannot turn

nonexistent law into positive law; there simply *was* no prior positive law.⁶³ A more obvious reason for rejecting this approach is the difficulty of imagining that all states participating in custom-formation were erroneously advised by their legal counsel as to the requirements of prior international law. Indeed, it may be self-contradictory to imagine this, since states themselves ultimately decide the content of international law. Finally, the "error" hypothesis would be equally difficult to prove as *opinio juris* itself, from an evidentiary point of view, and thus it does not help clarify the nature of the psychological component of custom.

Kelsen actually adopted a variation of the "error" hypothesis—a theory that the states originally participating in the custom felt that they were acting under the compulsion of some norm which however was not a *legal* norm. In 1939 Kelsen proposed that the norm could be a sentiment of morality, equity, or justice.⁶⁴ In 1945 he added that "it is sufficient that the acting individuals consider themselves bound by any norm whatever."⁶⁵ And in 1952 he made the idea as broad as possible by arguing that the individuals "have to regard their conduct as obligatory or right," but "need not believe that it is a legal norm which they apply."⁶⁶ But an immediate objection to Kelsen's hypothesis is that everyone who acts, whether a private individual or a national decision-maker, tends to rationalize his own behavior by thinking that it is "right" and required even when it contradicts established legal obligations known to the individual. Thus Kelsen's broad theory would not enable us to distinguish certain kinds of behavior from others, and accordingly amounts to an unnecessary legal fiction. Moreover, Kelsen's suggestions confuse Gény's functional view of *opinio juris* in separating legal from social usage, since usage that constitutes social courtesy or comity may very well be supported by feelings of morality, equity, or justice, or certainly "any norm whatever." The same objections would apply to McDougal's apparent espousal of Kelsen's theory: "The subjectivities of oughtness required to attend such uniformities of behavior [custom], which subjectivities may on occasion be proved by mere reference to the uniformities in behavior, may relate to many different systems of norms, such as prior authority, morality, natural law, reason, or religion."⁶⁷ Of all these "norms," the concept of observing that perhaps the "norm envisaged by the concept of *opinio juris* is . . . a kind of a 'natural law' norm."⁶⁸ It is hard to find anything concrete, analytical, or useful in any of these hypotheses of *opinio juris*, which only succeed in obfuscating the function of the psychological component.

A second group of theories would equate *opinio juris* with consent, acquiescence, or lack of protest. To the extent that this school of thought would find that a rule binds an individual state only if it has expressly or by implication consented to the rule, the theory is a mere reiteration of an old line of reasoning which will be examined critically later (see chapter 7). Moreover, if it stems from a confusion between general and special custom, the analysis in chapter 8 will be relevant. Sometimes the theories take the form of arguments that the only implied consent which must be found is that of the states participating in the formation of the custom; once the customary rule is established, its effects will be generalizable to the international community as a whole. Along this line, I. C. MacGibbon has argued that when state A submits to an act of state B (such as B's collection of import duties), state A has tacitly consented to the act, and that such consent "seems necessarily to involve the further otiose conviction that participants in the course of conduct are entitled to act as they are doing; and this in turn appears to leave little alternative to submission in the belief that submission is obligatory."⁶⁹ Since "belief that submission is obligatory" is another way of saying *opinio juris*,

MacGibbon has purported to derive the latter from inferred consent. Yet this reasoning occurs in too narrow a perspective, for state A may retaliate by engaging in a reprisal against state B (such as legal harassment of B's diplomats), thus showing that in fact it has not consented. Or state A may "consent" because it is a small power and B is a major power, but such consent will not be at all the equivalent of a conviction that B is entitled to act as it is doing. Nor is MacGibbon's suggestion salvaged by his qualification that this equation of consent with *opinio juris* applies only to international rules that are expressive of obligations and not to those expressive of rights. For such a distinction would seem to contradict the immanent correlation between rights and duties in every claim or rule of law; a claim of "right" can only make sense if the claimant is asserting implicitly that others have a "duty" to allow or accede to his claim. More basically, if the rule is already expressive of an international obligation, then the custom that MacGibbon is analyzing is redundant as a creator of international rules.

A broader version of this theory would hold that custom arises if concerned states fail to protest the usages of others. MacGibbon, who as we have seen would equate *opinio juris* with consent, writes that "in the early stages of the development of a customary right other States are faced with the choice of objecting or remaining passive. From their inaction the inference of consent in and acceptance of the validity of the claim may be drawn."⁷⁰ Similarly, Eric Suy concludes after a long study of *opinio juris* that it can be proved "under certain conditions [by the] absence of protests."⁷¹ The most complete argument along this line has been advanced by Wolfke:

What, however, is protest, if not the most evident expression of the will of a State to the effect that it does not acquiesce in a given practice and hence that it does not consent to the formation of a new customary rule? To maintain that objection against a practice is merely evidence of absence of a "conviction" or "feeling" that the practice is in accordance with a duty or right, is at least artificial. The protesting State simply does not want to tolerate this practice and its eventual [sic] legal consequences.⁷²

But failure to protest is often governed by political or diplomatic considerations (including often a realistic sense of the futility of protest). Moreover, if a state is not directly involved in an action or practice, its protest would not only be looked upon as an unwarranted intrusion by the participating states but also might serve to call attention to the usage and help establish its notoriety. Finally, a failure to protest might manifest not acquiescence but a belief that the usage was simply outside the legal realm, belonging to the realm of social courtesy or comity. Thus we cannot infer from a failure to protest an *opinio juris* that would satisfy Gény's function of differentiating between legal and nonlegal usages.

A third set of theories on *opinio juris* concerns the formation of international custom by the inclusion or repetition of rules of law in a number of bilateral treaties or multilateral conventions. Kelsen has observed that international tribunals, in citing rules in treaties as support for general custom, do not inquire whether the parties inserted such rules by way of applying existing law or by way of departing from prior obligations.⁷³ Logically speaking, derogation is just as plausible as reinforcement or clarification. And either alternative would suggest that *opinio juris* itself means the application of preexisting law, a position that we have seen is self-contradictory. Taking a different view of *opinio juris*, Eric Suy has ingeniously suggested that treaties are a constituent element in the formation of custom because their very conclusion means that the parties regarded them as juridically important in an area where regulation was

juridically necessary.⁷⁴ This statement, upon inspection, begs the question, for Suy's criterion of importance applies to all treaties, but outside the realm of treaties it does not help in distinguishing usages constitutive of custom from acts having no legal consequences. The formation of customary law through treaties challenges the idea of *opinio juris*, as Kopelmanas perceived as early as 1937, and must be taken into account in any comprehensive theory of custom as a secondary rule of law-formation.⁷⁵

A final category of theories on *opinio juris* may be disposed of briefly, since it would make the concept so broad as to be functionally useless. K. Venkata Raman, for example, would equate *opinio juris* with "the shared expectations about the requirements of future decision."⁷⁶ Max Sørensen and Lazare Kopelmanas, following the old theories of Puchta and Savigny, suggest that "social necessity" is the basis of *opinio juris*.⁷⁷ A nineteenth-century text found the meaning of *opinio juris* in world public opinion.⁷⁸ And in recent writings the uncritical suggestion is appearing that "consensus" is *opinio juris*.⁷⁹ Similar equations could easily be invented, but none of them can perform the difficult task of analyzing the functional role of the psychological component of custom.

Footnotes Chapter 3

1 See 4 Hugo, *Civilistisches Magazin* 4 (1813); Moser, *Patriotische Phantasien* (1774); 1 Puchta, *Das Gewohnheitsrecht* 133-43, 148-55 (1828); Savigny, *Vom Beruf Unserer Zeit für Gesetzgebung und Rechtswissenschaft* 8-11, 13-14 (3d ed. 1840).

2 Puchta and Savigny, *op. cit. supra* n. 1; Savigny, *System des Heutigen Römischen Rechts* (1840-49).

3 Gény, *Méthode d'interprétation et sources en droit privé positif* § 110 (1899). Suarez in 1612 had foreshadowed the distinction in his argument separating legal from "irrelevant" and "civil" customs: Suarez, *A Treatise on Laws and God the Lawgiver* 446 (Carnegie Series, 1944); *cf.* the linkage of custom and courtesy in Pillet, "Le droit international public: ses éléments constitutifs, son domaine, son object," 1 *Revue Générale de Droit International Public* 12 (1894).

4 Gény, *op. cit. supra* n. 3, at § 110.

5 Gény, *op. cit. supra* n. 3, at § 118.

6 See Strupp, "Les Règles Générales du Droit de la Paix," 47 *Recueil des Cours* 263 (1934); 1 Anzilotti, *Corso di diritto internazionale* 73-76 (3d ed. 1928); Corbett, "The Consent of States and the Sources of the Law of Nations," 6 *B.Y.I.L.* 20 (1925).

7 Strupp, *op. cit. supra* n. 6, at 304.

8 Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law," 49 *Cal. I. Rev.* 419, 420-21 (1961). Tunkin herein espouses the idea of custom as a tacit treaty.

9 Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?" 5 *Ind. J. Int'l L.* 23, 35, 36 (1965).

10 Gihl, "The Legal Character and Sources of International Law," 1 *Scandinavian Studies in Law* 53, 84 (1957).

11 Kelsen, "Theorie du droit international coutumier," 1 *Revue Internationale de la Theorie du Droit (New Series)* 253, 264-66 (1939).

13 1 Oppenheim, *International Law* 26 (Lauterpacht ed. 1955).

- 14 Suy, *Les actes juridiques unilatéraux en droit international public* 266 (1962).
- 15 2 Int'l Law Comm'n, *Yearbook* 26 (1950).
- 16 1 *id.* at 6.
- 17 *Ibid.*; *id.* at 275-76.
- 18 *Id.* at 276. For a full discussion, see Wolfke, *Custom in Present International Law* 42-50 (1964).
- 19 DeVisscher, *Theory and Reality in Public International Law* n. 29 (1957).
- 20 1950 I.C.J. Rep. 266, 277.
- 21 Wolfke, *op. cit. supra* n. 18, at 70.
- 22 Seferiades, "Aperçus sur la coutume internationale et notamment sur son fondement," 43 *Revue Generale de Droit International Public* 129, 144 (1936)
- 23 Sørensen, *Les sources du droit international* 108 (1946).
- 24 P.C.I.J. Rep., Ser. A, No. 10, at 4 (1927); see Sørensen, *op. cit. supra* n. 23, at 110.
- 25 Lauterpacht, *The Development of International Law by the International Court* 380 (1958).
- 26 Silving, "'Customary Law': Continuity in Municipal and International Law," 31 *Iowa L. Rev.* 614, 626 (1946).
- 27 *Cf.* the statement by Puchta: "Usage is only the last fact of the process, by which the Right, which has arisen and is living in the members of the people, completely externalizes and embodies itself." Puchta, *Outlines of Jurisprudence as the Science of Right* 39 (Hastie ed. 1887).
- 28 Plucknett, *A Concise History of the Common Law* 307 (5th ed. 1956).
- 29 Mateesco, *La coutume dans les cycles juridiques internationaux* 212 (1947).
- 30 Lambert, *Etudes de droit commun législatif ou de droit civit compare* 140-42 (1903).
- 31 Blackstone, *Commentaries* *69-70.
- 32 See Lebrun, *La coutume: ses sources-son autorite en droit prive* 257-60 (1932); 1 Julliot de la Morandiere, *Droit Civile* 64, 86 (1963); 1 Ripert & Boulanger, *Traite de Droit Civile* 102-07 (1956).
- 33 Waldock, "General Course on Public International Law," 106 *Recueil des Cours* 1, 44 (1962); see also Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law," 30 *B.Y.I.L.* 1, 31 (1953).
- 34 1 Int'l Law Comm'n, *Yearbook* 5 (1950). Wolfke, *op. cit. supra* n. 18, at 68, finds the following writers in agreement as to the sufficiency of a single precedent: Cyprian, Sawicki, Rousseau, Tunkin, and Lukin.
- 35 1 Int'l Law Comm'n, *Yearbook* 5 (1950). Not all writers agree that a wartime precedent automatically becomes a precedent after the war.
- 36 Waldock, *op. cit. supra* n. 33, at 43-47
- 37 Silving, *op. cit. supra* n. 26, at 625.
- 38 Wolfke, *op. cit. supra* n. 18, at 67-68.
- 39 Mateesco, *op. cit. supra* n. 29, at 212.
- 40 Waldock, *op. cit. supra* n. 33, at 44.
- 41 Slouka, *International Custom and the Continental Shelf* 13 (1968).
- 42 Tunkin, *op. cit. supra* n. 8 at 420.
- 43 See, e.g., Hudson, *The Permanent Court of International Justice 1920-1942*, at 609 (1943); Kunz, "The Nature of Customary International Law," 47 *A.J.I.L.* 662, 667 (1953).

- 44 Sørensen, "Principes de droit international public," 101 *Recueil des Cours* 1, 39 (1960).
- 45 Basdevant, "Regles generales du droit de la paix," 58 *Recueil des Cours* 471, 518 (1936).
- 46 Tunkin, "Co-existence and International Law," 95 *Recueil des Cours* 1, 10 (1958).
- 47 Wolfke, *op. cit. supra* n. 18, at 69.
- 48 McDougal, Lasswell, & Vlasic, *Law and Public Order in Space* 119 (1963).
- 49 Henkin, *How Nations Behave* 43 (1968).
- 50 Tunkin, *op. cit. supra* n. 46, at 12.
- 51 Louter, *Le droit international public positif* 49 (1920).
- 52 The Geneva Convention on the High Seas of 1958, 52 *A.J.I.L.* 842, 843 (1958), calls upon the parties not to interfere unreasonably with "the interests of other states in their exercise of the freedom of the high seas."
- 53 "The I'm Alone," digested in Briggs, *The Law of Nations* 385 (2d ed. 1952).
- 54 I Cobbett, *Leading Cases on International Law* 5 (4th ed. 1922).
- 55 Cheng, *op. cit. supra* n. 9.
- 56 The World Court in the Lotus Case, P.C.I.J. Rep., Ser. A, No. 10, at 4, 29 (1927) cited as decisive precedents cases involving only five states-France, Italy, Great Britain, Germany, and Belgium. See 2 Hudson, *World Court Reports* 43 (1935) for full citations of these cases. In the case of the S.S. Wimbledon, the Court cited only the Suez and Panama canal regimes as "precedents" for the rule involving the Kiel Canal. P.C.I.J. Rep., Ser. A, No. 1, at 15, 25, 28 (1923).
- 57 E.g., Kunz, *op. cit. supra* n. 43, at 666; Lauterpacht, *op. cit. supra* n. 25, at 368.
- 58 Kunz, *op. cit. supra* n. 43, at 666.
- 59 DeVisscher, *op. cit. supra* n. 19, at 149; see Lauterpacht, *op. cit. supra* n. 25, at 368.
- 60 Bishop, "General Course of Public International Law, 1965," 115 *Recueil des Cours* 151, 227 (1965).
- 61 Coplin, "The World Court in the International Bargaining Process," Paper read at the Midwest Political Science Association Annual Meeting 1966, p. 20.
- 62 Cheng, *op. cit. supra* n. 9, at 45 n. 107.
- 63 Kelsen, *op. cit. supra* n. 11, at 263. Cheng appears to be unaware of this early statement of Kelsen's.
- 64 *Ibid.*
- 65 Kelsen, *General Theory of Law and State* 114 (1945).
- 66 Kelsen, *Principles of International Law* 307 (1952).
- 67 McDougal, *op. cit. supra* n. 48, at 117.
- 68 Tunkin, *op. cit. supra* n. 46, at 16-17. Nor is the problem clarified by Guggenheim's suggestion that custom is conduct the transgression of which may be followed by a sanction. Guggenheim, *op. cit. supra* n. 12, at 48. This either begs the question, or substitutes a "threat-of-sanction" norm which does not distinguish legal from social usage (e.g., discourtesy can be "sanctioned" by social reprobation.)
- 69 MacGibbon, "Customary International Law and Acquiescence," 33 *B.Y.I.L.* 115, 131 (1957).
- 70 *Id.* at 130

71 Suy, *op. cit. supra* n. 14, at 266.

72 Wolfke, *op. cit. supra* n. 18, at 57.

73 Kelsen, *op. cit. supra* n. 11, at 264; see Thevenaz, "A propos de la coutume," in *Law, State, and International Legal Order* 318 (Engel ed. 1964).

74 Suy, *op. cit. supra* n. 14, at 242.

75 Kopelmanas, "Custom as a Means of the Creation of International Law," 28 *B.Y.I.L.* 127,135 (1937).

76 Raman, "The Role of the International Court of Justice in the Development of International Customary Law," [1965] *A.S.I.L. Proceedings* 169, 175.

77 Sørensen, *op. cit. supra* n. 23, at 106-07; Kopelmanas, *op. cit. supra* n. 75, at 148.

78 1 Von der Heydte, *Volkerrecht* 67 (1887).

79 See, e.g., Cheng, *op. cit. supra* n. 9, at 37-42; but see D'Amato, "On Consensus," 8 *Canadian Y. B. Int'l L.* 141 (1970).