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# Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail

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## Abstract

*Andrew Guzman declares that customary international law is in trouble. I disagree. It is those who seek to explain it who are in trouble. Theoretical efforts are plagued with descriptive insufficiencies (for example, the formation of various customary norms takes place within a heterogeneous, opaque process that resists any general and meaningful description in specific cases), systemic uncertainties (for example, locating the source of rules that govern the formation of customary norms), semantic problems (such as what exactly is general practice) and the divergence of conceptions articulated within international practice. These difficulties, which hamper a better understanding of international law itself, originate from the conceptual level. This article will therefore focus on certain symptomatic conceptual and methodological problems. Nine of them are outlined, and three will be analysed in greater detail, namely the relationship between *opinio juris* and acceptance, the characteristics of the concept 'general practice' and the failure of attempts to describe customary international law by dichotomies. As a conclusion, the author identifies seven requirements of, and assumptions about, a possible, workable theory of customary international law.*

Considerable theoretical efforts have been made in the last three decades to explain the formation and operation of customary international law or to propose desirable and viable approaches to it. Frederic Kirgis' sliding scale theory, various forms of rational choice theory, Brian Leppard's and Guzman's subjective approaches, Anthea Roberts' reflective equilibrium theory or a refined, pragmatic consent theory (Olufemi Elias and Chin Leng Lim) have all exercised a perceptible effect on views regarding customary

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international law.<sup>1</sup> Despite these and other attempts, the doctrine on customary international law, which has remained paralyzed by ontological, epistemological and conceptual problems, is far from settled.

I presume that difficulties arise at the conceptual level. If one fails to entertain fundamental issues at this level and to provide a definite and defensible solution to these difficulties, it will be impossible to attain a sufficiently coherent theory. No high theories may survive without a proper conceptual background. My general aim in this article is to map out some of the fundamental conceptual and methodological problems related to customary international law and to provide some clarifications to contribute to and ground a defensible, future theory. Here, I will not develop and defend my own theory. My critical appraisal of the standard approaches will be immanent and limited, focusing merely upon their symptomatic and fundamental conceptual and methodological problems. At the end, my observations will conclude into seven propositions about the basic framework of a workable theory on customary international law.

## 1 Fashioning the Concept of Customary Law: Clarifications

### *A Primary Strategies for Fashioning the Concept of Customary Law: Monism and Dualism, Inclusionism and Exclusionism*

The first and most fundamental issue in customary international law must be that of its constituent elements or the criteria of existence. Monist theories hold that customary law implies only one – either subjective or objective – requirement. A further difference must be made between theorists for whom this component is a subjective one (subjectivist monism) and those who claim that customary law only consists of an objective element – that is, usage (objectivist monism). In international law, this monist claim might not be consistent with the text of Article 38(1)(b) of the Statute of the International Court of Justice (ICJ Statute), which appears to assume at least one objective requirement (general state practice) and one subjective one (acceptance).<sup>2</sup> Monist theories of customary international law must therefore explain this inadequacy.<sup>3</sup>

The sweeping majority of theorists in contemporary international law share the dualist (two-component or bipartite) conception, according to which the nature of

<sup>1</sup> See Kirgis, 'Custom on a Sliding Scale', 81 *American Journal of International Law (AJIL)* (1987) 146; J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005), at 23–43; B.D. Leppard, *Customary International Law: A New Theory with Practical Applications* (2010); Guzman, 'Saving Customary International Law', 27 *Michigan Journal of International Law* (2005) 115; O.A. Elias and C.L. Lim, *The Paradox of Consensualism in International Law* (1998); Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *AJIL* (2001) 757.

<sup>2</sup> Statute of the International Court of Justice 59 Stat 1031.

<sup>3</sup> Though monist views are not widespread in the doctrine of customary international law, there are some subjectivist authors who believe that state practice is not a necessary element of customary international law (e.g., Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' 5 *Indian Journal of International Law* (1965) 23, at 45; Tesón, 'Two Mistakes about Democracy', 92 *American Society of International Law Proceedings* (1998) 126, at 127; Leppard, *supra* note 1, at 8). Alternatively, objectivist monism nowadays seems somewhat archaic, but Hume, for example, did not require *opinio juris* or consent for the formation of customary international law; he only saw them as

customary international law depends on two irreducible components (elements) – one objective (material) and the other subjective (psychological). However, the dualists' greatest problem is delineating the boundaries of the two elements in practice. The occurrence of a subjective requirement can be inferred from state practice, which is the other element of customary international law. Yet how can state practice be one constituent element and, at the same time, evidence of the other element?<sup>4</sup>

Some commentators have sought to provide an answer to this problem by excluding states' linguistic acts (statements) as proof of *opinio juris* from state practice, the material element of customary international law (exclusionist dualism). The idea behind this construction is simple. If we have two criteria for customary international law, then we also have to make a clear distinction at the level of proof. Thus, exclusionist dualists take the view that there are two types of proof of customary international law (the linguistic acts of states and state actions or omissions), each corresponding basically to one of the components, and that they must be strictly separated from each other.<sup>5</sup>

The majority of dualists do not accept this separation of various types of evidence, because *opinio juris* and state practice are mutually constitutive elements of customary international law, not distinct entities that could exist independently and appear separately from each other.<sup>6</sup> They therefore hold that linguistic acts should be included in state practice (inclusionist dualism). The linguistic acts of states may be taken as proof of both objective and subjective elements depending on the context and characteristics of particular cases.<sup>7</sup> On the other hand, states' physical conduct in a narrow sense may also signify the existence of subjective content (the *mens rea* analogy

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necessary for the persistence of existing customary norms. See Gillroy, 'Justice-as-Sovereignty: David Hume and the Origins of International Law', 78 *British Yearbook of International Law (BYBIL)* (2007) 429, at 475. Most recently, Mendelson has taken an objectivist-monist standpoint, viewing subjective elements as superfluous, but this position seems to collapse as he has built the concept of customary norms on legitimate expectations. Mendelson, 'The Formation of Customary International Law', 272 *Recueil des Cours (RdC)* (1998) 155, at 184–185, 290–292.

<sup>4</sup> The distinction made by such authors as Kammerhofer between state act as regular behaviour (a sheer fact) and state act as evidence of the subjective element (the normative aspect) is unconvincing because it only works in the case of states' linguistic acts (statements) but does not work when states act in a narrower, physical sense. Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15 *European Journal of International Law (EJIL)* (2004) 523, at 528. In the latter case, I fail to see how one could generally and theoretically separate different (factual and normative) aspects of the same physical act. Compare *North Sea Continental Shelf Cases*, ICJ Reports (1969) 3, at 44, para. 76 (denying that the states, which had not become parties to the Geneva Conventions, 1125 UNTS 3, followed the equidistance rule as customary legal rule in their actions).

<sup>5</sup> See, first of all, A.A. D'Amato, *The Concept of Custom in International Law* (1971), at 88–90. Although the practical application of this somewhat artificial classification is dubious at best, there are some arguments to support the conclusion that verbal acts are not parts of state practice for the purposes of the formation of customary law. For these arguments, see Roberts, *supra* note 1, at 757; Mendelson, *supra* note 3, at 206; Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL', 16 *EJIL* (2005) 213, at 231; Kammerhofer, *supra* note 4, at 525–530.

<sup>6</sup> Exclusionist dualism has been fiercely criticized by Akehurst, 'Custom as a Source of International Law' 47 *BYBIL* (1975) 1, at 1–3.

<sup>7</sup> Charlesworth, 'Law-Making and Sources', in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (2012) 187, at 193; Mendelson, *supra* note 3, at 204–207.

of criminal law). Although the debate between the two strands has been fierce and heated in academic commentaries since the 1970s, the International Court of Justice (ICJ) has clearly taken the side of inclusionism.<sup>8</sup> However, the strength of these strategies has often been lessened by conceptual and methodological deficiencies.

## B Five Common Conceptual Mistakes

In the following discussion, I outline five conceptual mistakes that tend to surface in the discussion on customary international law.

1. It is misleading to suggest that customary international law is one of the sources of international law.<sup>9</sup> Customary international law forms part of international law. If it is part of international law, then it cannot be its source. (What is the source of a phenomenon cannot be part of this phenomenon at the same time.) It is customary international law itself, as part of international law, which may be said to have a source or sources.<sup>10</sup> What these sources are and how they can be determined are separate questions.
2. The concept of customary international law has traditionally been connected to Article 38(1)(b) of the ICJ Statute ('the Court ... shall apply: ... international custom, as evidence of a general practice accepted as law'). Some authors claim that the provision offers a definition of customary international law, but this is hard to believe *prima facie*.<sup>11</sup> First, the ICJ Statute does not concern expressly customary international law, only international custom, thus raising the issue of the relationship of custom to customary norm. Second, the provision does not tell us what customary law (or custom) is (a lack of *genus proximum*). It only sets forth two connecting circumstances (general practice and its acceptance as law), which occur along with custom, without giving particulars of how custom can be evidence of them.
3. Many commentators come to regard general practice as one of the two 'elements', 'components' or 'building blocks' of which customary international

<sup>8</sup> *Fisheries Case (United Kingdom v. Norway)*, ICJ Reports (1951) 116, at 137–138; *North Sea Continental Shelf Cases*, *supra* note 4, at 33, para. 47 and 44, para. 76; *Jurisdictional Immunities of the State (Germany v. Italy)*, available at <http://www.icj-cij.org/docket/files/143/16883.pdf> 1 (last accessed 23 April 2014), at 24, para. 55 and 33, para. 77 (treating states' linguistic acts as part of state practice).

<sup>9</sup> E.g., M.E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (1997), at 58; Guzman, *supra* note 1, at 121; Lepard, *supra* note 1, at 3; J. d'Aspremont, *Formalism and the Sources of International Law* (2011), at 166.

<sup>10</sup> For a similar point, see Dinstein, 'Customary International Law and Treaties', 322 *RdC* (2006) 243, at 261; R.C. Hingorani, *Modern International Law* (1979), at 20.

<sup>11</sup> Guzman, *supra* note 1, at 123; A. Cassese, *International Law* (2005), at 156; Mendelson, *supra* note 3, at 187; D.J. Bederman, *Custom As a Source of Law* (2010), at 136; Bradley and Gulati, 'Withdrawing from International Custom', 120 *Yale Law Journal* (2010) 202, at 209–210; I. Brownlie, *Principles of Public International Law* (2003), at 6; Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, Final Report, Sixty-Ninth Conference, London (2000), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/30> (last accessed 23 April 2014), at 2 [*ILA Report*]; M. Seara Vazquez, *Derecho Internacional Público* (1979), at 69; Dinstein *supra* note 10, at 265; Dupuy, 'L'unité de l'ordre juridique international' 297 *RdC* (2000) 9, at 157.

law consists (see the previous subsection).<sup>12</sup> However, I cannot see how general practice could be an element of a rule.<sup>13</sup> In a sense, the abstract customary rule ‘torture is prohibited’ might have ‘elements’, but general practice is clearly not among them. State practice can be, for example, the source, manifestation, evidence or confirmation of this customary rule but not an element of it.<sup>14</sup> Furthermore, these theoretical options, which differ significantly in their premises and consequences, paint different pictures of the features of customary rules and should not be confused. If one were to take general practice as the source of a customary norm and define a customary norm in such a way as to include a reference to its source, then general practice (like *differentia specifica*) will be an element of the definition of customary norm, but not an element of the customary norm itself.<sup>15</sup>

4. It is widely held that, as one of the requirements for a customary norm, general practice is material or objective in nature.<sup>16</sup> This is a simplistic approach that stands in the way of a more realistic and nuanced description of how customary norms operate. Let us suppose that there exists a customary international rule that prohibits the national appropriation of celestial bodies and that nothing (neither acts, omissions nor statements) has happened in the national or international practice of states as of 1 January 2012 that would pertain to this norm. In international legal discourse, customary rules are regarded as having continuous existence after they have arisen. The question

<sup>12</sup> J. Touscoz, *Droit international* (1993), at 226; Lepard, *supra* note 1, at 6; Baker, ‘Customary International Law in the Twenty-First Century: Old Challenges and New Debates’, 21 *EJIL* (2010) 173, at 184; Guzman, *supra* note 1, at 122–123; Cassese, *supra* note 11, at 160; Stern, ‘Custom at the Heart of International Law’, 11 *Duke Journal of Comparative and International Law* (2001) 89, at 91; Brownlie, *supra* note 11, at 7; G.J.H. van Hoof, *Rethinking the Sources of International Law* (1983), at 72; M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), at 130 and 148; Bederman, *supra* note 11, at 137; Bradley and Gulati, *supra* note 11, at 209–210; *ILA Report*, *supra* note 11, at 6.

<sup>13</sup> More neutral expressions or terms are therefore used sometimes to relate general practice (or acceptance/consent or *opinio juris*) to customary law. Many scholars apply the terms requirement or criterion, not specifying what general practice or *opinio juris* counts as a requirement or criterion. The International Court of Justice (ICJ) has also used the expression ‘role’ in this context. *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986) 14, at 98, para. 184 [*Military Activities in Nicaragua*].

<sup>14</sup> It has also long been debated how international custom can serve as evidence of general state practice, as the wording of the provision is ‘amazingly deficient’. Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, 281 *RdC* (1999) 9, at 324. See also C. Rousseau, *Droit international public*, volume 1 (1970), at 310; Bederman, *supra* note 11, at 142–143; van Hoof, *supra* note 12, at 87. However, as Higgins observes, Article 38(1)(b) is interpreted in practice as if it set forth international custom as evidenced by a general practice accepted as law. Higgins, ‘International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law’, 230 *RdC* (1991) 9, at 44.

<sup>15</sup> This also holds true for the statement that state practice is an element in the formation of customary international law. *ILA Report*, *supra* note 11, at 29–30.

<sup>16</sup> For the claim that it is material or objective (or even physical), see, e.g., Cassese, *supra* note 11, at 158; Rousseau, *supra* note 14, at 315; P. Guggenheim, *Traité de Droit international public avec mention de la pratique internationale et suisse*, volume 1 (1967), at 102; Kamto, ‘La volonté de l’Etat en droit international’, 310 *RdC* (2004) 9, at 263.

is how this customary rule could continuously exist on 1 January 2012 if one of its supposed elements (general state practice) was absent. A possible answer is that general state practice is not an element of this customary norm (on this matter, see the previous paragraph). Another account for the continuance of the norm may be based on the idea that in determining state practice one disregards those intervals of time when nothing happens concerning this practice and only identifies tendencies or patterns that prevail generally through a certain period of time. If this is correct, then general practice will not be objective or material, only an abstraction, a mental construct by which one artificially (conceptually) creates continuance in the life of a norm. Thus, general state practice is either not an element of customary norms or not objective and material in nature. I shall provide arguments for the contention that general practice is not objective or material in the third section of this article.

5. Article 38 of the ICJ Statute is traditionally held to determine the sources of international law (treaties, international custom and general principles). International custom will therefore be the source of international law and, particularly, of customary international law. If this is correct, then there are ultimately two concepts we need to distinguish: custom (as source) and customary norm.<sup>17</sup> However, in placing custom in opposition to customary norm, one encounters at least three intricacies. First, custom as the source of customary law would be something like (state) practice having the property of generality – it would be ‘practice-like’ in character. The provision in the ICJ Statute reads that ‘the Court ... shall apply: ... (b) international custom’. However, it is not custom, conceived in this sense, that the ICJ applies in various cases, but the customary rule itself of which custom is the source in terms of this distinction.<sup>18</sup> Only a norm-like phenomenon (customary norm) can suitably be applied in a case, and not its source, which is a practice-like phenomenon.

Second, if custom is conceived as the source of customary norms, what is general practice? It seems to be either the direct source of customary norms<sup>19</sup> (in this case, the role of custom is not clear); a phenomenon of which custom is evidence (for example, under the wording of the article); only evidence of *opinio juris*<sup>20</sup> or, in contradiction to the text of the ICJ Statute, a constituent element of custom,<sup>21</sup> where the custom is the

<sup>17</sup> Accordingly, if custom and customary law differ, it is reasonable to identify custom with usage (practice). See, e.g., E.C. Stowell, *International Law: A Restatement of Principles in Conformity with Actual Practice* (1931), at 26.

<sup>18</sup> As far as I know, Kelsen was the first to make this point, as cited by Mendelson, *supra* note 3, at 187. The ICJ also speaks about ‘rules deriving from custom’. *Continental Shelf (Libyan Arab Jamahiriya v. Malta)* ICJ Reports (1985) 13, at 29, para. 27.

<sup>19</sup> In Baker’s view, general practice and *opinio juris* represent the two sources of customary international law, which may imply that custom is equal to customary law. Baker, *supra* note 12, at 173–174.

<sup>20</sup> *North Sea Continental Shelf Cases*, *supra* note 4, at 44, para. 77.

<sup>21</sup> Cassese, *supra* note 11, at 157.

only direct source of customary norms.<sup>22</sup> At first blush, it is not clear what the significance of these distinctions is and which approach is the most plausible.

Third, in another respect, the text of Article 38(1)(b) also runs counter to the thesis that custom is the source of customary international law and that the two concepts are to be distinguished. How can state practice be accepted as law? State practice, as a practice-like phenomenon, does not take the form of a norm in itself. I am of the view that it is not state practice but, rather, the rule or regularity of which state practice is a manifestation that can be accepted as law. If this is true, then, as a result of this acceptance, custom will have a norm-like character that signifies (legal) rules and will be different from state practice. Here, custom then coincides with customary norm because accepting something as law implies normative abstraction, and custom, a result, 'evidence' or form of this abstraction, will take on a normative (norm-like) character that signifies the customary norm itself.<sup>23</sup> The abstraction 'torture is prohibited' is discerned from state practice and accepted as law – that is, the custom in this sense is not different from the customary norm 'torture is prohibited'.<sup>24</sup>

These three problems might signify that custom is not the source of customary international law, but it is identical with customary law under Article 38(1)(b).<sup>25</sup> As a result, on the one hand, Article 38 might be mistakenly said to provide for the sources of international law – it only sets forth the applicable forms or parts of international law. (It follows that treaties and general principles will also be the forms, and not the sources, of international law.) On the other hand, this conclusion does not exclude the idea that general state practice can be taken as the source of custom identified with customary law.

## C Four Methodological Deficiencies in Fashioning the Concept of Customary Law

### 1 Confusion of Perspectives

We have three fundamental perspectives that govern general discussions on customary international law: (i) what are customary norms; (ii) how are customary norms

<sup>22</sup> E.g., Lopard, *supra* note 1, at 16.

<sup>23</sup> Therefore, Brownlie sets 'custom' against 'usage' – the latter is state practice that does not reflect normativity (a practice-like occurrence), while the former seems to be the customary law itself in his interpretation. Brownlie, *supra* note 11, at 6, similarly G. Scelle, *Précis de Droit des Gens* (1934), at 310.

<sup>24</sup> The ICJ treats custom as customary law. e.g., in *Asylum (Colombia v. Peru)*, ICJ Reports (1950) 266, at 276 [*Asylum*]. Accordingly, many commentators simply identify custom with customary international law. E.g., A. Aust, *Handbook of International Law* (2010), at 6; Rousseau, *supra* note 14, at 311; Higgins, *supra* note 14, at 44; Stern, *supra* note 12, at 89; Cassese, *supra* note 11, at 156–160; P. Reuter, *Droit international public* (1976), at 92–93; M. Sibert, *Traité de droit international public: Le droit de la paix*, volume 1 (1951), at 33; Touscoz, *supra* note 12, at 226; Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, volume 1: *Peace* (1992), at 27; Hingorani, *supra* note 10, at 20. Von Glahn makes a distinction between 'custom' (simply signifying habit) and 'legal custom' ('usage with a definite obligation attached to it') and implicitly identifies the latter with a customary legal rule, but he fails to tell us whether 'custom' as set forth by Article 38 covers custom or legal custom. G. von Glahn, *Law among Nations: An Introduction to Public International Law* (1981), at 20.

<sup>25</sup> Being so, one wonders how custom can be the source of customary law, if custom, conceived as normative phenomenon, is identical with customary law. E.g., A. Ross, *A Textbook of International Law* (1947), at 88–90; Seara Vazquez, *supra* note 11, at 69. Dupuy simply treats custom as an ambiguous term. Dupuy, *supra* note 11, at 158.

formed and (iii) how can customary norms be recognized or identified? These three perspectives are connected and even overlapping, but failing to separate them will lead to considerable theoretical confusion.<sup>26</sup> In assessing and analysing such requirements as general state practice or *opinio juris*, one has to make it clear whether they are treated as elements, sources or manifestations (evidence) of customary norms.<sup>27</sup> These three concepts relate to three distinct perspectives in the discussion: the concept of an element relates to the nature of customary norms; the concept of a source to their formation;<sup>28</sup> and the concept of the evidence/manifestation of these norms to their identification or justification. Confounding these controlling concepts and underlying perspectives brings about difficulties in describing and understanding the operation of customary international law.<sup>29</sup>

These threads might show themselves in various theories related to *opinio juris*. Some commentators regard *opinio juris* as one of the sources of a customary norm (constitutive theory).<sup>30</sup> However, this conclusion might imply the so-called chronological paradox.<sup>31</sup> Therefore, others assign another function to *opinio juris*. It will only be a manifestation, and not the source, of an existing customary norm (declaratory theory).<sup>32</sup> However, this declaratory theory cannot explain the formation of customary norms. The most common view seems to be that *opinio juris* is simply an ‘element’

<sup>26</sup> For the confusion of first and second perspectives – namely what is customary international law (definition) and how it is formed – see the following contention: ‘The standard definition of customary international law is that it arises from the practices of nations followed out of a sense of legal obligation.’ Bradley-Gulati, *supra* note 11, at 209. In relation to these perspectives, it is clear that claiming that beliefs create customary norms (where beliefs are sources of customary norms, Guzman, *supra* note 1, at 157 and 167) is not the same as claiming that customary norms are beliefs (where beliefs are the forms in which customary norms exist, Guzman, *supra* note 1, at 146). For another illustration of such confusions, see, e.g., the definition of customary international law offered by P. Manin, *Droit international public* (1979), at 22.

<sup>27</sup> I would not rule out, in advance, that general practice or *opinio juris* might play a double role (e.g., they might be, for example, both the source and manifestation of customary international law), but one has to offer an account for how and under what circumstances this can happen. For attempts to attribute a double role to *opinio juris*, see, e.g., Tasioulas, ‘Customary International Law and the Quest for Global Justice’, in A. Perreau-Saussine and J.B. Murphy (eds), *The Nature of Customary Law* (2007) 307, 320–324; Elias and Lim, *supra* note 1, at 26–27.

<sup>28</sup> Fauchille explains that the concept of source signifies the mode in which law is formed. P. Fauchille, *Traité de Droit international public*, volume 1 (1923), at 40. See also *ILA Report*, *supra* note 11, at 12. However, it seems unconvincing that a source of a customary norm could also be its element at the same time. E.g., van Hoof, *supra* note 12, at 8 and 284.

<sup>29</sup> For some authors, identifying a customary norm simply means knowing how it was created. Kammerhofer, *supra* note 4, at 524; similarly Elias and Lim, *supra* note 1, at 4. This peculiar position does not account for the role of those state acts that give proof of an already existing customary rule.

<sup>30</sup> E.g., Baker, *supra* note 12, at 176; Bederman, *supra* note 11, at 138; A.P. Sereni, *Diritto Internazionale I* (1966), at 126; Akehurst, *supra* note 6, at 53.

<sup>31</sup> This paradox has many formulations. The core of the problem is that *opinio juris* presupposes state acts taken in the false belief that they are required by a pre-existing customary rule. Swaine, ‘Rational Custom’, 52 *Duke Law Journal* (2002) 559, at 568–569; Tasioulas, *supra* note 27, at 320–321; Elias and Lim, *supra* note 1, at 4; Walden, ‘Customary International Law: A Jurisprudential Analysis’, 13 *Israeli Law Review* (1978) 86, at 97; D’Amato, *supra* note 5, at 66–68, 73.

<sup>32</sup> E.g., Seara Vazquez, *supra* note 11, at 70; *Military Activities in Nicaragua*, *supra* note 13, at 98, para. 184.



of custom or of a customary norm. Furthermore, *opinio juris* is even said to be much more a part of the existing form of customary norms than it is a part of their source or manifestation or just an element.<sup>33</sup>

## 2 Using Non-Textual Requirements without Proper Doctrinal Explanation: *Opinio Juris*

The issue of *opinio juris* has already been the subject of much scholarly speculation. (This is understandable because the way one handles *opinio juris* will determine the conceptual structure of customary international law.) In this discussion, I shall only emphasize that the requirement of *opinio juris* cannot be taken for granted, although a large number of authors and the ICJ consider it indispensable for the existence of customary international rules.<sup>34</sup> However, some doctrinal explanation must inevitably be offered as to why we should use the concept of *opinio juris* in terms of customary international law with especial regard to the fact that we have another subjective, arguably parallel, but textual requirement mentioned in Article 38(1)(b), namely acceptance.<sup>35</sup>

One has at least four options to explain the introduction of *opinio juris* into a theory of customary international law. First, *opinio juris* is identical with the textual requirement of acceptance. Second, if they differ, *opinio juris* must have come from another, unidentified source, and, therefore, Article 38(1)(b) cannot be the source, or the only source, of the rules to govern the formation and operation of customary international law (the problem of parallel source). Third, Article 38(1)(b) has suffered desuetude (*desuetudo*), and international practice has significantly altered the conditions of its application by entering a new, non-textual requirement.<sup>36</sup> Fourth, *opinio juris* is not particular to customary norms but, rather, something generally inherent in (international) legal norms, of which customary international norms are part. In view of these options, the relationship of *opinio juris* to the other subjective requirement of acceptance as required by the ICJ Statute is central to the concept of customary international law.<sup>37</sup>

## 3 The Fallacy of Dichotomies

By dividing proof of customary international law in half according to the two requirements, modern exclusionist theories typically rest on dichotomies. The essence of this known method is that theorists attempt to describe a process or phenomenon as the interplay of two contradictory or opposed concepts. In the next section, I shall

<sup>33</sup> Leopard, *supra* note 1, at 8.

<sup>34</sup> *North Sea Continental Shelf Cases*, *supra* note 4, at 43–45, paras 74–78; *Military Activities in Nicaragua*, *supra* note 13, at 99–100, para. 188.

<sup>35</sup> This explanation should be not only doctrinal but also historical. Bederman, *supra* note 11, at 138–140.

<sup>36</sup> Either *desuetudo* or the existence of a parallel source might be indicated by the theories of regional custom (*Asylum*, *supra* note 24, at 277–278) or bilateral custom (*Right of Passage over Indian Territory (Portugal v. India)*, ICJ Reports (1960) 6, at 39) because, by definition, they conflict with general custom. See Akehurst, *supra* note 6, at 29.

<sup>37</sup> The concept of acceptance presents a great many difficulties, and the various theories of customary international law or international courts are hard-pressed to find their proper place and plausibly describe the relation to *opinio juris*.

demonstrate that in using this method there is a real danger of distorting or analysing away the important intricacies that would be important in explaining the operation of customary international law.

#### 4 *Floating Theories*

Customary law is often treated as an isolated phenomenon, a strange species of animal, sharply separated, at least theoretically, from other forms of legal rules. However, it should be borne in mind that a customary rule is, first and foremost, a (legal) rule. In exploring the concept of customary law, therefore, one cannot set aside the question of what it means for a customary rule to exist.<sup>38</sup> How does the property of an international legal rule, modified with the adjective customary, change, if it does at all, the nature of the rule itself? How does the customary rule ‘torture is prohibited’ differ from the treaty norm ‘torture is prohibited’? They surely differ in their formation, source, justification or legal effects, but I do not think that these two legal rules with the same content significantly diverge in their nature.

Therefore, a plausible theory of customary international law cannot be devoid of a theory, thesis or, at least, a hypothesis related to the very nature of a (legal) norm.<sup>39</sup> Otherwise, concepts such as general practice, accepting something as law or *opinio juris*, which are crucial in describing the nature and operation of customary international law, will lose their point of reference, namely the (legal) norm itself.<sup>40</sup> In the sections that follow, three issues will be highlighted: the relationship of non-textual to textual requirements, namely *opinio juris* to acceptance (consent); an exploration of the nature of general practice and problems with a methodology based on dichotomies. In the final section, I shall outline the premises of a defensible theory of customary international law.

## 2 *Opinio Juris* and Accepting Something as Law under Article 38(1)(b)

Clarifying the conceptual relationship of the textual requirement of accepting something as law (consent) to the non-textual requirement of *opinio juris* is a key issue in delineating a concept of customary international law. Without a sound explanation, no proper account can be provided. Commentators have taken very different positions on the connection between acceptance and *opinio juris*: (i) some simply identify *opinio*

<sup>38</sup> Similarly Beckett, *supra* note 4, at 217–218.

<sup>39</sup> Although Mendelson views the subjective element (*opinio juris*) as being of limited value because it is dispensable in describing the formation and identification of customary rules, he passes over the first perspective – that is, the possible necessary subjective aspect of the customary rule itself. Mendelson, *supra* note 3, at 246–247.

<sup>40</sup> This failure would lead to consistency problems between theories of customary international law and other forms of international law or the law in general. For example, I do not see how Guzman’s definition of customary international law (‘to be those customary legal rules that affect behavior’) can be mapped into any standard, general theory of (international) law. Guzman, *supra* note 1, at 133 and 139.

*juris* with acceptance (consent);<sup>41</sup> (ii) others assume some kind of strong connection between them, although they do not equate them with *expressis verbis*;<sup>42</sup> (iii) in other views, they are two distinct and different phenomena without a significant connection;<sup>43</sup> (iv) treating acceptance as consent, proponents of a few types of consent theory seem to do away with *opinio juris* altogether<sup>44</sup> and (v) many authors avoid the problem by not setting one against the other.<sup>45</sup> In this section, I shall argue that *opinio juris* and acceptance are two distinct, different but correlative concepts and phenomena. This conclusion requires some analysis of the nature of *opinio juris*.

The ICJ famously refers to *opinio juris* as belief in the *North Sea Continental Shelf Cases*, and many commentators also maintain that it should be understood as belief or something like belief.<sup>46</sup> If this is so, then *opinio juris* cannot be acceptance, knowledge, conviction, desire, intention or a sense of legal obligation (although many authors think just the opposite). Since this proposition is particularly significant, I shall offer a more detailed argument for this view.

What is belief forming the substance of *opinio juris*? Although it is not an uncontroversial issue in philosophy, a simplified, sketchy and provisional description will do for our purposes. I shall take belief as a (propositional) attitude that expresses a certain level of trust or confidence in the truth of a proposition (*P*) or possibly other cognitive content (for example, a state of affairs or some sort of mental representation).<sup>47</sup> To believe *P* represents an epistemic commitment where the subject takes a stance that *P* is true. The belief that torture is prohibited has the content of the proposition that

<sup>41</sup> E.g., Brownlie, *supra* note 11, at 8; Jennings and Watts, *supra* note 24, at 27; Touscoz, *supra* note 12, at 226; Reuter, *supra* note 24, at 93; Bederman, *supra* note 11, at 142; Rousseau, *supra* note 14, at 315; Sibert, *supra* note 24, at 507; Elias and Lim, *supra* note 1, at 4–24; A.V. Lowe, *International Law* (2007), at 38; Tomuschat, *supra* note 14, at 324; Kamto, *supra* note 16, at 270–271; P. Kovács, *Nemzetközi közjog [International Public Law]* (2011), at 145.

<sup>42</sup> E.g., Guggenheim, *supra* note 16, at 105; Norman and Trachtman, 'The Customary International Law Game' 99 *AJIL* (2005) 541, at 542 (understanding '*opinio juris* as a way of referring to the intent of states to propose or accept a rule of law that will serve as the focal point of behavior'); Guzman, *supra* note 1, at 123 ('*opinio juris* ... requires that the practice be accepted as law').

<sup>43</sup> Guzman, *supra* note 1, at 147–148; M. Sorensen (ed.), *Manual of Public International Law* (1968), at 137–138.

<sup>44</sup> E.g., von Glahn, *supra* note 24, at 21; A.S. de Bustamante Y Sirven, *Droit international public*, translation by Paul Goulé, volume 1 (1934), at 67. For other examples, see Mendelson, *supra* note 3, at 246. Other forms of consent theory tolerate the concept of *opinio juris*, see, e.g., Elias and Lim, *supra* note 1, at 27.

<sup>45</sup> E.g., Aust, *supra* note 24, at 6–7, and A. Kaczorowska, *Public International Law* (2010), at 39, who simply treat *opinio juris* as the psychological element of customary international law.

<sup>46</sup> *North Sea Continental Shelf Cases*, *supra* note 4, at 44, para. 77. For the scholarly views that treat *opinio juris* as belief, see, e.g., Mendelson, *supra* note 3, at 246; Guggenheim, *supra* note 16, at 102; Walden, *supra* note 31, at 97–98. This position seems to be supported by the philosophy of mind and epistemology. Daniel Dennett, one of the eminent contemporary philosophers in this field, argues that 'opinion' is a 'linguistically infected' reflection of the state of belief when one shapes the content of belief with words. D. C. Dennett, *The Intentional Stance* (1989), at 19. See also Engel, 'Introduction', in P. Engel (ed.), *Believing and Accepting* (2000), at 7.

<sup>47</sup> In view of this definition, the distinction between honest and dishonest or genuine and not genuine beliefs does not make sense. Guzman, *supra* note 1, at 140; Akehurst, *supra* note 6, at 37; Elias and Lim, *supra* note 1, at 11. One cannot believe dishonestly that torture is prohibited. Beliefs are always 'honest' or 'genuine' because they are not under reflective, voluntary control.

is expressed by the statement ‘torture is prohibited’ and accompanied by the attitude of taking it to be the case. One may have very different attitudes directed towards the same proposition. One may not only believe that torture is prohibited but also might, for example, assume, doubt, fear, guess, hope, imagine, know, suppose, suspect, think, trust or be convinced that torture is prohibited. Here the proposition is represented within frameworks of different psychological modes. The conceptual boundaries of these verbs that refer to different attitudes can be vague, but there are focal verbs (know and believe) and more or less peripheral ones (suspect and trust).<sup>48</sup>

*Opinio juris* as belief is a kind of cognitive attitude that has truth-value (that is, it is capable of being false or true). The *opinio juris* that torture is prohibited in universal international law may be true or false, depending on whether the relevant state of affairs obtains or not. However, belief, and therefore *opinio juris*, does not mean knowledge. One who believes something has a certain level of confidence in, but not enough justification for, its being true. Belief and *opinio juris* have an air of epistemological uncertainty and come in degrees. The strength of a belief or *opinio juris* depends on, and is proportionate to, the amount of evidence available for the subject, which provides support for the belief that corresponds to the state of affairs that prevails in the real world. Believing *P* will turn into knowing *P* if it is substantiated by evidence that is strong enough to justify the fact that *P* is the case.

Consequently, taking these characteristics of belief and *opinio juris* into account, accepting something as law cannot be identified with *opinio juris* – accepting is not believing. Although acceptance is also an attitude that has propositional content, it is an active, pragmatic, volitional, context-dependent mental act as opposed to belief, which is a passive, context-independent attitude that indicates epistemic commitment towards its propositional content. There are numerous differences between the two attitudes, including the following six suggestions. First, unlike acceptance, belief is not under the direct voluntary control of the subject; one believes a number of propositions involuntarily. Second, beliefs are cognitive in nature and shaped by relevant evidence. It would be irrational to believe against a variety of proof available on the subject (epistemic commitment); however, propositional content might rationally be accepted without believing that it is true – the absence of epistemic reasons can be supplemented by other practical or prudential reasons. Third, believing *P* is not dependent on the situation in which the subject believes *P*. One cannot believe *P* in one situation and not believe *P* in another (context-independency), whereas one can accept something in one situation and not accept it in another (context-dependency). Fourth, acceptance does not come in degrees. A proposition is either accepted or not. Belief has strength. One can believe *P* to a certain degree in proportion to confidence or trust in *P* based on the evidence that supports the epistemic commitment. Fifth, in contrast to belief, acceptance generally is an active attitude, a product of intention, a mental act sometimes involving a decision with a view to future plans and further

<sup>48</sup> Cappelli, ‘Antonymy and Verbs of Cognitive Attitude: When Know Is the Opposite of Think and Believe’, in M. Bertuccelli Papi, A. Bertacca and S. Bruti (eds), *Threads in the Complex Fabric of Language* (2008) 529, at 531.

action (pragmatic commitment). Belief is less pragmatic and more passive; it sometimes only happens to the subject. Sixth, belief has an amorphous temporal aspect. In many cases, the subject does not know when a belief has been formed, and, while it is permanent in nature, proof to the contrary may lead to its disappearance. The temporal dimension of acceptance is sharper. As a mental act, it can be tied to a certain state of consciousness and a certain relatively short period of time.<sup>49</sup> Of course, acceptance may be tied to belief. One may accept *P*, which will sometimes contribute to the formation or confirmation of a belief in *P*, while in many cases believing *P* may be an epistemic antecedent to, or even grounds for, expressly and wilfully accepting *P*.

It also follows from the foregoing description that *opinio juris* is not knowledge<sup>50</sup> and cannot be equated with the conviction that a legal obligation exists,<sup>51</sup> because these states of mind indicate a considerably higher level of epistemic commitment. One can believe *P* without being convinced of *P*; however, one cannot be convinced of *P* without believing *P*.<sup>52</sup> This axiom also holds true for knowledge. Furthermore, it is clear that *opinio juris* as belief is not intention either.<sup>53</sup> Intention is a volitional mental act without a significant epistemic aspect.

Belief is not compatible with desire. Setting forth a new form of a subjectivist-monist view about customary international law, Lepard offers the following definition for *opinio juris* constituting customary law in itself: 'A customary international law norm arises when states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct.'<sup>54</sup> At least five doubts can be voiced about this desire-based definition (which was developed to avoid the chronological paradox that involves false beliefs and to find a way to channel moral principles into the concept of customary international law).<sup>55</sup> First, a belief in a desire does not point to the existence of a legal rule but, rather, to the existence of the desire for a legal rule. Why would it be *opinio juris* (in the regular, familiar sense) if the subject with such a belief knows that the desired legal rule to which the *opinio* could be related does not yet exist? Second, the construction is too complex. One has a belief with the propositional content that there exists a desire that has further (secondary) propositional content, namely the legal rule, which is desirable. Third, although one can believe that something is desirable without desiring it, the desire for a legal rule that encapsulates a value judgment may provide sufficient

<sup>49</sup> For these arguments, see Engel, *supra* note 46, at 3, 6–12.

<sup>50</sup> For *opinio juris* as 'collective knowledge', see Byers, *supra* note 12, at 148.

<sup>51</sup> For the view that *opinio juris* is a kind of conviction of the states that a given course of action is required or permitted by or reflects an international legal rule, see, e.g., Cassese, *supra* note 11, at 156; Reuter, *supra* note 24, at 93; Rousseau, *supra* note 14, at 309; Villiger, *supra* note 9, at 48; Lowe, *supra* note 41, at 50; Scelle, *supra* note 23, at 304; Dupuy, *supra* note 11, at 163.

<sup>52</sup> Hacker, 'Of the Ontology of Belief', in M. Siebel and M. Textor (eds), *Semantik und Ontologie* (2004) 185, at 194.

<sup>53</sup> For *opinio juris* as intention, see Guggenheim, *supra* note 16, at 103; Beckett, *supra* note 5, at 234; Kamto, *supra* note 15, at 270–271; Walden, *supra* note 31, at 97–98.

<sup>54</sup> Lepard, *supra* note 1, at 8.

<sup>55</sup> See, e.g., Kernohan, 'Desiring What Is Desirable', 41 *Journal of Value Inquiry* (2007) 281, at 281–282; S. Guttenplan (ed.), *A Companion to the Philosophy of Mind* (1996), at 244–246.

reason for the state to behave in a manner that corresponds to this prospective rule. However, I fail to see how a general belief about the desire for a specific legal rule could contribute to the formation of this legal rule within a monist conception. A desire remains a desire, even in spite of its generality, but how and when will a general desire turn into a legal rule?<sup>56</sup> Fourth, if we take the only evident answer – that the legal rule comes into existence through states' behaviour that corresponds to the propositional content of the desire – then the definition presupposes *usus* and necessarily represents a dualist approach. Fifth, this construction is not suitable for eliminating false beliefs from the customary process. Believing that a legal rule is desirable presupposes that the rule does not exist. Were the rule to be established in the meantime, the belief that points to the existence of desire would become false.<sup>57</sup>

*Opinio juris* as belief is not a 'sense of legal obligation' (or a feeling of legal obligation), because having a sense of something is not believing something.<sup>58</sup> Although having a sense of something is an ambiguous expression, it cannot be identified as believing something, not even under the most friendly and flexible interpretation. First, if a sense is viewed as a kind of awareness about a proposition or other content, some of its characteristics set it against belief. Its phenomenological nature clearly comes out, because it is not directed to the truth of its content, like belief, but, rather, to the presence of the mentally represented forms of this content. Whereas a sense of something may presuppose some evidence of its content, as a mental state it is indifferent to its evidentiary support and justificatory conditions and does not display an identifiable epistemic commitment, like belief.<sup>59</sup> Second, if sense is taken as a kind of awareness about a belief itself, the concept of the sense of legal obligation becomes conceptually superfluous for the purposes of customary international law. Here, the sense of legal obligation turns into the sense of the presence of *opinio juris* (as relevant belief). However, why should we say that one acts out of a 'sense of the presence of *opinio juris*', and not that one acts directly from *opinio juris*, as an existing belief?<sup>60</sup>

<sup>56</sup> Guzman correctly reasons that states cannot create customary rules by wishing that they would exist. Guzman, *supra* note 1, at 140. Roberts also argues that only statements of *lex lata* can directly contribute to the formation of custom. Roberts, *supra* note 1, at 763. In the same vein, see also *North Sea Continental Shelf Cases*, *supra* note 4, at 38, para. 62.

<sup>57</sup> In order to avoid the false belief problem, some dualist authors also resort to the desire-based belief conception of *opinio juris*, following Kelsen's famous criticism of Gény's position that allows false beliefs in the formation of customary law, see, e.g., Walden, *supra* note 31, at 97. My doubts, with the exception of the fourth one, also apply to these views that prevail within the dualist framework.

<sup>58</sup> For *opinio juris* as a sense or feeling of legal obligation, see, e.g., from the vast literature, Scelle, *supra* note 23, at 304; Brownlie, *supra* note 11, at 8; Baxter, 'Treaties and Custom', 129 *RdC* (1970) 25, at 67; Charlesworth, *supra* note 7, at 193; Stern, *supra* note 12, at 96. Similarly, the ICJ's famous wording in *North Sea Continental Shelf Cases*, *supra* note 4, at 44, para. 77: '[T]he states concerned must therefore feel that they are conforming to what amounts to a legal obligation.'

<sup>59</sup> For this argument, see Guttenplan, *supra* note 54, at 468–469.

<sup>60</sup> I think that a sound approach to customary international law founded on *opinio juris* as belief has to make these distinctions because these concepts denote significantly different attitudes or mental states. It is unsatisfying that, though attempting to develop a subjectivist-monist belief theory of customary international law, Guzman occasionally substitutes belief for sense (feeling), expectation or perception. Guzman, *supra* note 1, at 146, 149, 154, 156.

Consequently, *opinio juris* as belief fundamentally differs from the textual requirement of accepting something as law. This conclusion requires a sound theory of customary international law to explain how the textual requirement of acceptance as a volitional mental act connects with *opinio juris* as a form of belief and where *opinio juris* as a requirement for a customary norm comes from, in view of the fact that Article 38(1)(b) of the ICJ Statute does not provide for any such requirement.

### 3 An Ontological Challenge: General Practice as Mental Construct

The other textual requirement – that is, the concept of general practice – also needs some clarification. As I noted previously, efforts towards developing an effective theory of customary international law have been thwarted by a simplistic conception of general practice as an objective or material requirement. What does the term general (state) practice actually refer to? By itself, it suggests a step in classification: there exists a class or set of joint or individual particular actions (or omissions) of states, which fits into a predefined pattern. Under Article 38(1)(b), the basis for this pattern is a regularity or rule, which may become the content of a customary rule if other conditions are met. General practice is an abstract idea that indicates specific characteristics or relations of particular state actions with something in common according to this pattern. In addition, its generality suggests that, in international interactions, the number or weight of the state actions belonging to this class overwhelmingly exceed the number or weight of state actions that are inconsistent with this pattern. Taking all of these into account, general (state) practice under Article 38(1)(b) refers to the overwhelming preponderance of state actions that share the property of being a manifestation of, or coinciding with, the regularity or rule *R* over those state actions that are inconsistent with *R*.

In this sense, general practice is not material or objective in nature.<sup>61</sup> The common view might consider it material or objective because it treats general practice as simply that which refers to a more or less definite set of state actions as objective facts or events.<sup>62</sup> However, this approach is too simplistic. No general practice as such exists in the objective world, and it is not equal to a set of state actions.<sup>63</sup> However, being the result of a complex mental process that includes abstraction, comparison, interpretation, selection, evaluation, weighing and generalization, general practice is a mental construct that refers to a relation and is basically characterized by the regularity or rule around which it is conceptually organized in specific cases.<sup>64</sup>

<sup>61</sup> For the claim that it is material or objective in nature, see, e.g., Cassese, *supra* note 11, at 158; Rousseau, *supra* note 13, at 315; Guggenheim, *supra* note 16, at 102.

<sup>62</sup> E.g., Thirlway views state practice as accumulation of acts. Thirlway, as quoted by Akehurst, *supra* note 6, at 29.

<sup>63</sup> For a similar conclusion, see Beckett, *supra* note 5, at 236.

<sup>64</sup> Stowell emphasizes the role of reason in assessing usage and points out that customary rules must be deduced from principles that are formulated upon existing usage. Stowell, *supra* note 17, at 28–29.

Although construing and defining general practice in a concrete issue starts with, works on, or uses particular state actions as grounds, at least three significant subjective aspects can be determined.<sup>65</sup> First, the pattern (rule or regularity) with which particular state actions will be matched in construing general practice in a particular case is in itself a mental construct that must be inferred and defined by an observer to be able to select the perspective of general practice. Second, in construing a contextual idea of general practice, the relevant properties of particular state actions at issue should be identified, extracted and described in appropriate, general terms. This step of abstraction is followed by matching these abstracted and properly described properties with the properties of the pattern (rule or regularity) predefined by the observer. Third, in attributing generality to practice, the next logical step is to compare the weight of state actions subsumed under state practice with that of state actions that are inconsistent with the rule or regularity manifested by this state practice. All of these three steps of abstraction, matching and comparison involve a significant interpretation of events that have taken place on the international scene.

It must be stressed that general practice can theoretically be construed in three general forms. It is up to the agent that assesses international interactions to describe a non-normative general practice as displaying only regularity in state actions, to construe it as having a normative quality, where state actions are interpreted as manifestations of a non-legal (moral, social) rule, or to confer legal quality on it, where state actions will be viewed as manifestations of a legal rule. In the third case, the mode of construing general practice necessarily involves an attribution of *opinio juris* to the actor states or, possibly, an act of acceptance of the relevant rule.<sup>66</sup>

General practice conceived as mental construct may shed a different light on its relationship to acceptance or *opinio juris* as mental act and mental state. What is clear is that, since general practice is not a given state of affairs, it is the agent of acceptance (for example, the actor state) that will work up the object (propositional content) of acceptance. Furthermore, if an observer (international court) refers to general practice, it will be the observer itself who, *ex post facto*, retrospectively constructs this general practice as part of a justificatory process related to the existence of a customary norm.<sup>67</sup> Thus, general practice will be mostly a subjective, and not simply a material or objective, factor in the justificatory process.

<sup>65</sup> I use the model of heuristic classification, as famously set forth by Clancey, 'Heuristic Classification', 27 *Artificial Intelligence* (1985) 289, at 289–350. See also A. Boer, *Legal Theory, Sources of Law and the Semantic Web* (2009), at 152–153. Statements reflecting rule *R* require less complex mental processes by which they can be turned into the basis for general practice related to rule *R*, but the use of these statements for such purposes may also presuppose interpretation, abstraction, generalization and so on.

<sup>66</sup> This runs against the common view that establishing general practice and *opinio juris* is a two-step process. E.g., Bederman, *supra* note 12, at 144; Byers, *supra* note 12, at 136.

<sup>67</sup> If this is so, general practice will only be a subsequent justification for customary norms and not their source. For other reasons, Guzman also claims that state practice is best treated as evidence of customary international law and not as its source because practice does not directly contribute to the existence of customary norms. Guzman, *supra* note 1, at 122 and 149. See also Kamto, *supra* note 16, at 267–8. These interim conclusions raise further, important issues, which I cannot pursue in this article, for this would necessitate an extended analysis into the problem of how general practice gains normative quality and the distinction between specific and collective acceptance (or *opinio juris*), which would be far beyond the scope of this article.



## 4 Failure of Exclusionist Methodology Based on Dichotomies

Many dualist authors try to handle the alleged duality of general practice and *opinio juris* (or acceptance, consent) by applying an attractive method based on dichotomies. The core of this known, dialectic method consists in identifying two contradictory concepts and describing a process or phenomenon as an interplay of these two concepts. A dichotomy conceptually splits up reality and determines the framework and direction of the analysis. The controversial features, properties or elements of a process or phenomenon are separated and channelled into the contradiction embodied by the two opposite parts of the dichotomy. Martti Koskenniemi's 'apology and utopia' represent an elegant, familiar and oft-cited example where the author runs these two concepts through many controversial issues of international law, providing a conceptual framework for the analysis.<sup>68</sup>

Exclusionists are predisposed to apply this method, which follows from their dualism and their two differentiating, opposite (linguistic and non-linguistic) types of proof of customary norms. They use several dichotomies supposedly gleaned from controversial and ever-changing international legal practice: (i) state statements (representing *opinio juris*) versus state actions (constituting state practice);<sup>69</sup> (ii) traditional custom (overwhelmingly based on state practice) versus modern custom (mainly based on *opinio juris*);<sup>70</sup> (iii) inductive reasoning (in which traditional custom is derived) versus deductive reasoning (in which modern custom is derived);<sup>71</sup> (iv) the evolutionary formation of customary international law (traditional custom) versus declaratory formation (modern custom);<sup>72</sup> (v) facilitative customs (mostly traditional customs) versus moral customs (mostly modern customs);<sup>73</sup> (vi) descriptive accuracy (focusing on what the state practice has been – an inductive or ascending method of justification for traditional customs) versus normative appeal (focusing on what the state practice ought to be – a deductive or descending method of justification for modern customs);<sup>74</sup> (vii) customary law as 'dinosaur' versus customary law as 'dynamo';<sup>75</sup> (viii) procedural normativity versus substantive normativity (which varies depending

<sup>68</sup> M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989; reprinted 2006).

<sup>69</sup> Originally D'Amato, *supra* note 5, at 88–90.

<sup>70</sup> Roberts, *supra* note 1, at 758; d'Aspremont, *supra* note 9, at 168–170; Hoffmann, 'Dr. *Opinio Juris* and Mr. State Practice: The Strange Case of Customary International Humanitarian Law', 47 *Annales Universitatis Scientiarum Budapestiensis de Rolando Eötvös Nominatae* (2006) 373, at 376–377.

<sup>71</sup> Alvarez-Jiménez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence', 60 *International and Comparative Law Quarterly* (2011) 681, at 686–689; Roberts, *supra* note 1, at 758; Kammerhofer, *supra* note 4, at 537;

<sup>72</sup> Roberts, *supra* note 1, at 758. Similarly, Abi-Saab makes the distinction between '*processus sauvage*' and '*processus sage*'. Abi Saab, 'Cours général de droit international public' 207 *RdC* (1987) 9, at 178.

<sup>73</sup> D'Aspremont, *supra* note 9, at 169; Roberts, *supra* note 1, at 764; Hoffmann, *supra* note 70, at 381. For a similar distinction, see Tesón, *supra* note 3, at 127.

<sup>74</sup> Roberts, *supra* note 1, at 762.

<sup>75</sup> Dinstein, *supra* note 10, at 262.

on the moral and facilitative characteristics of a customary rule) and so on.<sup>76</sup> However, thinking in terms of dichotomies leads to two evident traps – namely oversimplification when setting up such dichotomies and the difficulty of reconciling the opposite features, properties or elements of the practice since synthesis is indispensable to a coherent theory.

It must be recalled that setting up such dichotomies entails considerable simplification. Despite the theoretical elegance that these constructions display, dichotomies often collapse in practice or even in theory. Analysing this methodology would merit another article. Here, I merely indicate some of the problems. For example, Roberts, an eminent exclusionist who sets up several dichotomies in grounding her reflective equilibrium theory, calls those customary rules facilitative that ‘promote coexistence and cooperation but do not deal with substantive moral issues’ at the one extreme, against those rules that have strong moral content (moral customs) standing at the other end of the spectrum.<sup>77</sup> However, such distinctions raise conceptual, practical and methodological difficulties.

First, coexistence and cooperation are themselves values. Therefore, anything that promotes them has moral content. By definition, even ‘pure’ facilitative rules or customs (for example, ships must pass on the left) have some moral content, although they do not ‘deal with’ moral substantive issues, and it is conceptually flawed to contrast them with moral rules or customs. Alternatively, shared values make cooperation between states easier, even in those matters that do not fall under the practical scope of the realization of those values. If so, moral rules or customs that bear cooperative values both as rules and moral rules cannot be determined against facilitative rules or customs that promote cooperation and coexistence because in this respect moral rules or customs necessarily have a facilitative feature.

Second, as Roberts herself also allows, every customary rule has moral and facilitative content that varies according to the subject matter, and ultimately the dichotomy turns into a matter of degree. I admit that in practice the distinction may work more or less in the case of clear, prototype customs (for example, technical standards versus human rights obligations), but, in many practical cases, this distinction is blurred. For example, it may be open to doubt whether a customary rule in the domain of international environmental law will be moral rather than facilitative in nature. Moreover, the moral/facilitative attributive opposition does not work in many instances of customary rules because this opposition is not characteristic of a range of such rules at all. I doubt that either moral or facilitative attributes are appropriate for characterizing the right of coastal states to exploit contiguous continental shelves, although this rule has some (though relatively weak) moral and facilitative content.

Third, the moral/facilitative dichotomy is aligned and joined with other dichotomies supposedly typical of customary rules. Therefore, facilitative customary rules will be at the same time traditional, descriptive and evolutionary in nature and derived

<sup>76</sup> Roberts, *supra* note 1, at 766.

<sup>77</sup> *Ibid.* at 764.

in an inductive process.<sup>78</sup> However, associating parts of parallel oppositions may lead to simplification in describing and characterizing customary rules. As concluded earlier, the facilitative (or descriptive, evolutionary or so on) nature of a customary rule is a matter of degree. The question is whether a customary rule will be facilitative to the same extent as it is descriptive or evolutionary. I do not think so. For example, on the one hand, the local remedies rule, which is a customary rule of international law,<sup>79</sup> may be taken as descriptive and evolutionary in nature but arguably has much weaker facilitative content. On the other hand, there are instances where the linking of such attributes creates confusion. For example, the requirements for the state of necessity to preclude the wrongfulness of a state act can be considered a customary rule,<sup>80</sup> which has arguably stronger moral content than facilitative. It is nevertheless evolutionary and descriptive in the sense that Roberts uses these terms.

Fourth, exclusionist dichotomies imply another fundamental difficulty – that is, how to work towards a synthesis and how to join the two opposite parts of the dichotomies, primarily state practice and *opinio juris* (or consent) in this case.<sup>81</sup> As the factors required for customary international law work together in international legal practice, after splitting up the processes of the formation of customary international law, in turn, they must again relate *opinio juris* to state practice, or vice versa, and find principles based on which they can do so.<sup>82</sup> Furthermore, after walling off the proof of the two criteria, they have to find a solution for those situations where deficiencies of one requirement would prevent customary international law from being established in spite of the strong presence of proof of the other requirement (for example, many statements from many states would suggest the existence of a customary norm, but the paucity of state practice weighs heavily against it).

Modern exclusionist theories aim to set up complicated principles and conceptual constructions by which the opposed categories or properties can be combined in order to synthesize the dichotomies that are particular to customary international law and that follow from dualism.<sup>83</sup> Kirgis' explanatory theory attempts to find a

<sup>78</sup> *Ibid.*

<sup>79</sup> *Interhandel (Switzerland v. United States of America)*, ICJ Reports (1959) 6, at 27.

<sup>80</sup> *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports (1997) 7, at 40–41, para. 52.

<sup>81</sup> This problem is greater for them than for other dualists who keep the construction more flexible and do not separate statements from state acts in correspondence with the two criteria of customary international law. See, e.g., Akehurst, *supra* note 6, at 1–3; *ILA Report*, *supra* note 11, at 40–42.

<sup>82</sup> Beckett, *supra* note 5, at 220.

<sup>83</sup> On account of its perspective, the currently fashionable rational choice theory has added little to a synthesis of the subjective and objective elements. In fact, the relationship between the objective and subjective elements and their reconciliation are primarily problems for the standard positivist accounts of customary international law. With a focus on rational behavioural strategies and patterns based on state interests and preferences, even those rational choice theorists who stand on the ground of dualism deny or downplay the importance of state practice as a constituent element of customary international law and concentrate on the subjective element as an incentive or motivation for state behaviour to capture and portray remnants of normativity in a picture of self-interested state policies, actions and interactions. Norman and Trachtman, *supra* note 42, at 541–542; Guzman, *supra* note 1, at 153. For Swaine, who is admittedly a dualist, but drifting towards a monist position, state practice only serves as a subsequent (but necessary) confirmation of the states' declared willingness to be obligated by a nascent customary rule. Swaine, *supra* note 31, at 614.

balance between traditional and modern custom, state practice and *opinio juris* by making the two elements of customary international law interchangeable (sliding scale theory).<sup>84</sup> Capitalizing on Kirgis' insights, John Tasioulas puts the sliding scale theory in the framework of Ronald Dworkin's interpretive theory by setting up a double sliding scale.<sup>85</sup> Roberts somewhat streamlines this construction and reduces Tasioulas' double duality back to one duality by plainly associating the duality of state practice and *opinio juris* with the dimensions of fit and substance but, at the same time, bringing in the Rawlsian concept of 'reflective equilibrium' in a considerably simplified form.<sup>86</sup> The shortcomings of these conceptions have been subject to various criticisms.<sup>87</sup> Here, I would only suggest that the simplest lesson, relating to this fourth difficulty, is that it is advisable to avoid dubious dichotomies in describing the operation of customary norms in order to get round the difficulties posed by sophisticated reconciliation theories.

## 5 Concluding Remarks: Seven Pillars of a Workable Theory

As a conclusion, I devise seven propositions on which a workable theory of customary international law may rest. These propositions have been prompted by the foregoing considerations, and they are partly assumptions necessitated by the ways in which customary international law function in international practice. (I call them assumptions because space does not permit a full discussion of the arguments that support them.)

1. *Customary international law exists, even if it is not easy for one to determine exactly what its existence boils down to.* As the claims denying its existence are well known (as well as partly outdated) and analysing these claims would distract us from the focus of this article, I will shortcut the problem of the existence of customary international law by simply relying on everyday legal discourse in which participants (courts, diplomats, theorists and so on) speak of customary international

<sup>84</sup> A general and highly consistent pattern of state behaviour may serve as the basis for a customary rule even if there is very weak evidence of *opinio juris*. Alternatively, scarce state practice can be compensated by strong (evidence of) *opinio juris*. Thus, he places the two elements of customary international law on a sliding scale where the trade-off between state practice and *opinio juris* is determined by the reasonableness of the supposed customary rule. Kirgis, *supra* note 1, at 148–150.

<sup>85</sup> First, he relates the state practice and *opinio juris* duality to the Dworkinian direction of fit (what the previous legal practice has been) to identify one or several eligible interpretations that previous legal practice (taken as including both state practice and *opinio juris*) may allow. If more than one eligible interpretation surfaces, then the dimension of substance (what a particular rule ought to be) will control the process of choosing the best interpretation. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', 16 *Oxford Journal of Legal Studies* (1996) 85, at 111–115; Roberts, *supra* note 1, at 773.

<sup>86</sup> She takes reflective equilibrium as a process in which the two ends of certain dichotomies (e.g., practice and principles) can be reconciled and included in a coherent interpretation and justification. Roberts, *supra* note 1, at 779–782.

<sup>87</sup> E.g., Beckett, *supra* note 5, at 231–232; Guzman, *supra* note 1, at 156; Petersen, 'Customary Law without Custom? Rules, Principles and the Role of State Practice in International Norm Creation', 23 *American University International Law Review* (2008) 275, at 283–284; Tasioulas, *supra* note 27, at 330–333.

law as an existing set of international legal norms or refer to a particular legal rule as a valid customary norm.<sup>88</sup>

2. *A comprehensive and coherent theory of customary international law must provide defensible answers to at least two fundamental problems: what a customary norm is and what it means when we say that a customary norm exists.* In the absence of a general thesis or hypothesis on the nature of normativity or legal norms of which customary international law is part, theories lose their conceptual and doctrinal framework and thus their coherence (see section 1 of this article).
3. *A subjective requirement is necessary for the concept of customary international law.* David Hume's objectivist monism has not gained acceptance in legal theory, Peter Hagenmacher's and Iain MacGibbon's objectivist ideas have suffered fierce criticism,<sup>89</sup> Paul Guggenheim and Hans Kelsen have not sustained their original, tentative idea that the formation and working of customary international law can be adequately described without such a subjective element.<sup>90</sup> Whether it is *opinio juris*, acceptance or both, in exploring customary law one cannot avoid using these terms to refer to the subjective aspects of formation or to the operation of customary norms. Why is this so? The essence of normativity is that it is connected with various mental states of legal subjects. Even if a court or other observer is able to legally assess an act or state of affairs without taking the mental state of the actor or actors into consideration and to view applicable legal rules as abstractly given, the formation and existence and effectiveness of norms cannot be detached from human mental experience.<sup>91</sup> Only by the help of the terms denoting some mental act or mental state (acceptance, *opinio juris*, consent, belief and so on) may one ascribe normative (legal) aspect to the (non-normative) regularity displayed in practice.<sup>92</sup> However, it is crucial to properly single out the specific mental state or act that provides the best explanatory

<sup>88</sup> The legal discourse argument that refers to the content of law talk prevailing in various human communities seems to be effective against any extreme reductionist approach. Swaine uses this against Posner and Goldsmith in criticizing their position that customary international law is only a sheer coincidence of behavioural regularities motivated by state interests. Swaine, *supra* note 31, at 563–564, 590.

<sup>89</sup> Byers, *supra* note 12, at 137, 140–141.

<sup>90</sup> J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010) at 168–172; Byers, *supra* note 12, at 131; Guggenheim, *supra* note 16, at 46–47; Cancado Trindade, 'International Law for Humankind: Towards a New Jus Gentium', 316 *RdC* (2005) 9, at 151. Later, Guggenheim also made an attempt to define customary international law as consisting of nothing more than an objective element (state practice) but then revised his position. Guggenheim, 'Les deux éléments de la coutume en droit international', in C. Rousseau (ed.), *La Technique et les Principes du Droit Public: Etudes en l'Honneur de Georges Scelle*, volume 1 (1950) 275, at 275–280; Fastenrath, 'Relative Normativity in International Law', 4 *EJIL* (1993) 305, at 317.

<sup>91</sup> Rousseau, *supra* note 14, at 310.

<sup>92</sup> *North Sea Continental Shelf Cases*, *supra* note 4, at 43–44, paras 76–77 (referring to the problem of how a state can get the 'sense' or 'feeling' of legal duty). As this is the 'mystical point' of the formation of customary norms, commentators are compelled to use various metaphors to express the transformation when a non-legal expectation becomes legally binding. A course of action is 'ripening into' (most famously Justice Gray in *The Paquete Habana*, 175 US 677 (1900) at 686); 'hardening into' (e.g., Villiger, *supra* note 9, at 53); 'matures into' (e.g., Mendelson, *supra* note 3, at 176); 'distills into' (e.g., Beckett, *supra* note 5, at 230) a legal rule or 'crystallizing' or 'becoming stabilised as' binding custom (e.g., Hingorani, *supra* note 10, at 20).

framework for the nature and operation of customary international law. (On the basis of what I have found in section 2 of this article, I presume that this mental state is a form of belief.)

4. *I assume that psychological or socio-psychological concepts can be applied, at least metaphorically, to states as abstract entities or to the description of properties of state acts (for example, intent and attitude).* This is not a bold assumption but, rather, a clarification since the language of law does attribute mental states to abstract entities such as states, organizations, people or legal persons (for example, the will or consent of a state or people – *opinio juris*).
5. *The double requirements of state practice and opinio juris (or acceptance) cannot be conceptually reconciled in a satisfactory manner in explaining customary international law.* Inclusionist approaches cannot cope successfully with two general, theoretical problems. The first is how state conduct (physical state actions) can be both a requirement for customary norms and evidence of another, subjective requirement. Second, these theories give rise to the problem of a kind of logical circularity, namely that the subjective requirement (*opinio juris*) can be discerned from state practice and, at the same time, relevant state actions are identified with the help of *opinio juris* (epistemological circle).<sup>93</sup> As I see it, inclusionists fail to provide a consistent, theoretical answer. Instead, they tend to refer the issue back to practice, where specific circumstances or facts of cases will decide the problem case by case.<sup>94</sup>

Although the exclusionist strand seems to be able to apply the dualist concept of customary international law to these problems, its more principled, formal and general approach also leads to a cul-de-sac. The reason for this practical failure is relatively simple. All relatively difficult cases usually involve a somewhat or an even highly controversial state practice, which gives rise to more than one interpretation. At the same time, statements (linguistic acts) related to something of an *opinio juris* or consent are also frequently open to different interpretations (as to the assessment of their reflexive nature, their content, their variances and their nature of modality – that is, whether they represent simple soft commitments, moral obligations, legal obligations or so on). These uncertainties resist any stable equilibrium and any meaningful, consistent guidance in particular instances regarding the relationship between the two criteria for customary international law.<sup>95</sup> There is little point in positing that the best balance between state practice and *opinio juris* varies according to their relative strength.<sup>96</sup> If we

<sup>93</sup> Byers, *supra* note 12, at 136–139; Charlesworth, *supra* note 7, at 194.

<sup>94</sup> For example, Dupuy notes that *opinio juris* is manifested in and by state practice, intimating that the reply to the question of how this happens remains to be found case by case. Dupuy, *supra* note 11, at 166; similarly Ross, *supra* note 25, at 88.

<sup>95</sup> Though Roberts' method may work in prototype instances of nascent customary rules with extremely strong moral content (prohibition of torture) or of a technical character (representing an established course of action (e.g., all ships must pass on the left)). However, the method does not seem to be of much use in controversial cases (e.g., the customary nature of the supposed rule of the prohibition of transboundary pollution remains hopelessly contentious with no clear equilibrium in sight, as Roberts herself admits). Roberts, *supra* note 1, at 782.

<sup>96</sup> *Ibid.* at 783.

cannot somehow determine the necessary strength of the two criteria relative to each other in a particular instance, no defensible balance or equilibrium can be reached.

Although it is not impossible to find new analytical frameworks, it now appears that to satisfactorily reconcile the Doctor Jekyll of *opinio juris* and the Mister Hyde of general practice at the level of theory is improbable.<sup>97</sup> So I am of the view that customary international law fits better into a subjectivist-monist model, from which my next assumption follows.

6. I assume, on the basis of the picture, that general international legal discourse suggests that customary international law exists as an inter-subjective phenomenon. Customary international law is not part of the objective world, but, at the same time, it is independent from the mental state of any particular individual or, metaphorically, any particular state.<sup>98</sup> However, inter-subjectivity is a complex and an ambiguous term that needs specification. In the context of social norms (and, therefore, customary international law), inter-subjectivity conveys the picture of some shared view on which a norm is based or which constitutes a norm in itself.<sup>99</sup> It is the shared nature of the view or understanding that should be emphasized,<sup>100</sup> but the term view or understanding is probably not satisfying here because norms do not always reflect an indefinite understanding, a definite view or even common knowledge among members of a community. Thus, my assumption is that a workable theory treats customary rules as norms constituted by some kind of collective mental state, existing in the attitudes and dispositions of members of the relevant community.

This claim commits me to relativism, where the validity of a customary international rule always depends on a particular context and is relative to the conventions and practices of the relevant community. Notwithstanding this relativism, I view propositions about customary international law as having truth-value – that is, they are capable of being true or false.<sup>101</sup> I think that this cognitivist-relativist backdrop is a characteristic of the ordinary legal discourse on customary international law.<sup>102</sup>

<sup>97</sup> Hoffmann, *supra* note 70, at 373. For a similar conclusion with respect to the traditional and modern dualist approaches, see Beckett, *supra* note 5, at 230–235.

<sup>98</sup> See, e.g., S. Taekema, *The Concept of Ideals in Legal Theory* (2003), at 7; Beckett, *supra* note 5, at 214–215. Price and Guzzini also have an account of international norms having ‘intersubjective bases’. Price, ‘Emerging Customary Norms and Anti-Personnel Landmines’, in C. Reus-Smit (ed.), *The Politics of International Law* (2004) at 109; Guzzini, ‘A Reconstruction of Constructivism in International Relations’, 6 *European Journal of International Relations* (2000) 147, at 164.

<sup>99</sup> *Military Activities in Nicaragua*, *supra* note 13, at 98, para. 184.

<sup>100</sup> *Ibid.* at 109, para. 207. For the *opinio juris* as a shared understanding of legal relevance, see Byers, *supra* note 12, at 148–149, 204–206. For a similar pattern, see Solum’s ‘shared-mental-states model of group intentions’. Solum, ‘Living with Originalism’, in R.W. Bennett and L.B. Solum (eds), *Constitutional Originalism: A Debate* (2011) 143, at 162.

<sup>101</sup> For a possible theoretical reconciliation of cognitivism and relativism in metaethics, see Sayre-McCord, ‘Being a Realist about Relativism (in Ethics)’, 61 *Philosophical Studies* (1991) 155, at 160–163.

<sup>102</sup> Naturally, this is not exclusively so, e.g., a Scandinavian legal realist would not accept cognitivism, and natural law theorists would not subscribe to relativism. See also the ‘elementary considerations of humanity’ argument of the ICJ, which is clearly a universalist approach. *Corfu Channel (United Kingdom v. Albania)*, ICJ Reports (1949) 4, at 22.

7. I assume that no theory can fully meet the three basic conditions of a powerful explanatory theory of customary international law: (i) consistency with legal principles of the present international system; (ii) consistency with international legal practice inclusive of the states' practice and jurisprudence of international courts and (iii) conceptual, logical coherence. The main reason is that the content and application of international legal principles (like sovereignty) are uncertain in particular cases, and international legal practice related to customary international law is highly controversial. One can cite statements or authorities to support different or even contradictory views. Alternatively, concepts used to describe various aspects of customary international law are ambiguous and vague and allow different interpretations both in general and in specific instances. Therefore, an explanatory theory of customary international law may have relative value. The most that can be attained is a flexible and general theory that can avoid the fundamental discrepancies and provide a proper explanatory framework for international legal practice and doctrine.<sup>103</sup>

<sup>103</sup> I am not so optimistic in this respect as Lepard, who aims to offer a novel, comprehensive and consistent theory to explain the enigmas of customary international law. Lepard, *supra* note 1, at 8.