

Contemporary trends on *opinio juris* and the material evidence of international customary law

Paulo Borba CASELLA *

The method of the generation of customary international law is in the stage of transformation from being an individualistic process to being a collectivistic process. This phenomenon can be said to be the adaptation of the traditional creative process of international law to the reality of the growth of the organized international community.

ICJ, *South West Africa Cases* (judgment of 18 July 1965, Dissenting Opinion–Judge TANAKA)¹

The emergence of the present post-modern, interdependent, multipolar and growingly complex world context needs no further comment. The same is evident, whether we like it or not. The Gilberto AMADO Memorial Lecture delivered in Geneva, 17 July 2013, can be a timely and relevant opportunity to consider some of these aspects, in view of *opinio juris*.

The role of international law to regulate such post-modern, interdependent, multipolar and growingly complex world is also clear – as this is a question for the survival of mankind.² The question is how can international law react to the changes and face the challenges presented by such world context: some claim it should become universal,³ that it should become ‘intercivilizational’ – which means a step further from a multicultural approach, merely keeping things apart – or could be featured as

* Full professor for Public International Law and Vice-Dean of the University of Sao Paulo Law School.

¹ ICJ, *South West Africa Cases* (judgment of 18 July 1965, ICJ Reports, 1966, //www.icj-cij.org/docket/files/46/4945.pdf//, Dissenting Opinion – Judge TANAKA, p. 250 ff. quoted p. 294) although I differ from the view stated in the following phrase, as to: “*It can be characterized, considered from the sociological viewpoint, as a transition from traditional custom-making to international legislation by treaty*”.

² Christian TOMUSCHAT, **International law**: ensuring the survival of mankind in the eve of a new century: general course on public international law (RCADI, 1999, t. 281, pp. 9-438, quoted p. 23-24): “It is becoming ever more urgent to examine international law as a tool designed to further universal common interest policies”. As he considers: “International law has a mandate at the service of humankind in general, although formally its main subjects continue to be sovereign States.” TOMUSCHAT comes to the conclusion (1999, p. 435-436) that “Humankind has developed an impressive legal framework in the awareness that close international co-operation is necessary for the discharge of a number of tasks of worldwide dimensions”. And thus, “it will be the challenge of the coming decades to strengthen the existing systems of co-operation”;

³ Carl SCHMITT, **Der Nomos der Erde** im Völkerrecht des Jus Publicum Europaeum (Berlin: Duncker & Humblot, 1988); see also the French translation, **Le nomos de la terre** dans le droit des gens du *Jus Publicum Europaeum* (trad. de l’allemand par Lilyane DEROCHE-GURCEL, revise, présenté et annoté par Peter HAGGENMACHER, Paris: PUF – Quadrige, 2001, impr. 2008); and also Jonathan L. CHARNEY, *Universal international law* (in *The American Journal of International Law*, Oct. 1993, vol. 87, no. 4, p. 529-551, esp. p. 536-542, published by The American Society of International Law, //www.jstor.org/stable/2203615//).

‘transcivilizational’,⁴ while others claim that it has already turned to be ‘post-modern’,⁵ considering the “imaginative remaking of international law to meet rapidly changing societal conditions and needs and also community expectations”.⁶ Different names can be given to describe the phenomenon; different approaches can be adopted to face the change. But the ongoing structural change in international law cannot be denied; and its impact is irreversible.

Sometimes a burden from the past can be turned into a positive development. A paramount example of a liability turned into an asset: “The notion of the ‘sacred trust of civilization’, an ideology used to justify colonial domination, was taken over by the League of Nations’ mandate system, and has been used to criticize not only South Africa’s rule over Namibia, but the activities of the United States in Micronesia, and of Australia, New Zealand and the United Kingdom in Nauru. In the final analysis, what scholars can do is to strive, through professional detachment and scholarly technique, to minimize doctrinal distortions – to eliminate them is impossible – and to assume, in full awareness of the political realities, responsibility for those

⁴ Yasuaki ONUMA, *Eurocentrism in the History of International Law* (in **A normative approach to war: peace, war and justice** in Hugo Grotius, edited by Y. ONUMA, Oxford: Clarendon Press, 1993, *Appendix*, p. 371-386, and also p. 370): “Seeing the tragedy of the Thirty Years War, GROTIUS shut his eyes to the structural violence of ‘peace’ and focused his efforts on reducing overt violence. Against this background, it is interesting to ask what would be the equivalent work in today’s world”. [...] See also Y. ONUMA, **A Transcivilizational Perspective on International Law** (RCADI, 2009, vol. 342; also published as The Hague: Pocketbooks of the Hague Academy of International Law, 2010); Y. ONUMA, *The ICJ: an Emperor without clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law* (in **Liber amicorum Judge Shigeru ODA**, ed. by Nisuke ANDO et al., New York: Kluwer Law International, 2002, at 191) casting doubt on the traditional reliance on article 38 sources. On the issue, see also Arnulf BECKER LORCA, *Eurocentrism in the history of international law* (in **The Oxford Handbook of the History of International Law**, edited by Bardo FASSBENDER e Anne PETERS, Oxford: Univ. Press, 2012, chap. 43, p. 1034-1057).

⁵ P. B. CASELLA, **Fundamentos do direito internacional pós-moderno** (foreword by Hugo CAMINOS, São Paulo: Quartier Latin, 2008). As Erik JAYME had already proposed for Private international law, i.a., in *Le droit international privé du nouveau millénaire: la protection de la personne humaine face à la globalisation* (RCADI, 2000, vol. 282, pp. 9-40; also published in **O novo direito internacional: estudos em homenagem a Erik JAYME**, ed. by Claudia Lima MARQUES and Nadia de ARAUJO, Rio de Janeiro: Renovar, 2005, pp. 3-20); E. JAYME, **Identité culturelle et intégration: le droit international privé postmoderne: cours général de droit international privé** (RCADI, 1995, vol. 251, pp. 9-267).

⁶ Edward McWHINNEY, *The time dimension in international law, historical relativism and intertemporal law* (in **Essays in international law in honour of judge Manfred LACHS / Études de droit international en l’honneur du juge Manfred LACHS**, ed. by Jerzy MAKARCZYK, The Hague: Martinus Nijhoff / Institute of State and Law of the Polish Academy of Sciences-Institut de l’état et de droit de l’Académie polonaise des sciences, p. 179-199).

(perhaps limited) realms where doctrine may have some effect”.⁷ These are areas for consideration about both teaching⁸ and learning international law.

The best aspect is that international seems to be permanently a ‘work in progress’. Structurally reinventing and redrawing itself. This is purely post-modern: a letter from the past may be imprinted with new contents. As it happened with the ‘*sacred trust of civilization*’ is also the case with *opinio juris*.

The paradox of international law is that it builds itself, as a system, in consideration of its evolution in time.⁹ It is necessary to have a “long term” perspective,¹⁰ in order to view this as a feature required for understanding phenomena of human civilization.

Codification of international law has been one of the great achievements in our area, during the second half of the XIXth and along most of the XXth century.¹¹ Particularly as the work of codification was performed by the

⁷ ONUMA Y. (op. cit., 1993, p. 370): “Ultimately no learning can be vivid and creative unless backed by imagination and intellectual curiosity. Without these there will no longer be learning, only the skeleton of learning.”

⁸ Thus, in his turn, Manfred LACHS talked about **Teachings and teaching of international law** (RCADI, 1976, vol. 151, p. 161-252, quoted p. 168): “The didactic element is essential to my theme. There is the importance of, on the one hand, ‘the teachings’ on international law and its evolution, and, on the other hand, the continuous process of ‘teaching’. The two of course interpenetrate, and form a vast topic”.

⁹ In the sense of historical perspective for the study and understanding of international law, P. B. CASELLA, **Direito internacional no tempo antigo** (São Paulo: Atlas, 2012); **Direito internacional no tempo medieval e moderno até VITORIA** (São Paulo: Atlas, 2012); **Direito internacional no tempo de SUAREZ a GRÓCIO** (São Paulo: Atlas, 2013). See also: Ernest NYS, **Les origines du droit international** (Bruxelles: Alfred Chastaigne / Paris: Thorin & Fils, 1894); **Les fondateurs du droit international public: leurs oeuvres, leurs doctrines** (« avec une introduction de » A. PILLET, Paris: V. Giard & E. Brière, 1904); Wilhelm GREWE, **Epochen der Völkerrechtsgeschichte** (Baden-Baden: Nomos, 1984); Arthur NUSSBAUM, no seu **A concise history of the law of nations** (New York: Macmillan, 1954); Jérôme HÉLIE, **Les relations internationales dans l’Europe moderne 1453-1789** (Paris: Armand Colin, 2008); Martti KOSKENNIEMI, **The gentle civilizer of nations: the rise and fall of international law (1870-1960)** (“Hersch Lauterpacht Memorial Lectures”, Cambridge: University Press, 1st. published 2001, reprinted 2005); Bardo FASSBENDER & Anne PETERS (edited by, with Simone PETER and Daniel HÖGGER, assistant editors), **The Oxford Handbook of the History of International Law** (Oxford: Univ. Press, 2012, quoted p. 2) where it is warned: “The Eurocentric story of international law has proven wrong because it is incomplete.” See also the several volumes by J. H. W. VERZIIL, **International law in historical perspective** (Leiden: A. W. Sijthoff, 1968 etc). For a critical review on the role of History for the study of international law, H. STEIGER, *Was heisst und zu welchem Ende studiert man Völkerrechtsgeschichte?* (in I. APPEL, G. HERMES e C. SCHÖNBERGER (hrsg.), **Öffentliches Recht in offenem Staaten** – Festschrift für Rainer WAHL zum 70. Geburtstag, Berlin: Duncker & Humblot, 2011, p. 211-223).

¹⁰ As explained by the French Historian Fernand BRAUDEL, *Histoire et sciences sociales. La longue durée* (originally published in 1958, republished in **Écrits sur l’histoire**, Paris: Flammarion/Champs, © 1969, printed 1984, reprinted 1989, pp. 15-38).

¹¹ Topic dealt in each and all handbooks on international law, allow mentioning my own, as evidence that I have long been stressing – not only today and here at this venue – the relevance of the work performed by the ILC, along with Ambassadors Hildebrando ACCIOLY (1888-1962) and Geraldo Eulálio do NASCIMENTO E SILVA (1917-2003). See: ACCIOLY – NASCIMENTO E SILVA - CASELLA, **Manual de direito internacional público** (São Paulo: Saraiva, 20th ed., 2012, esp. 1.4, ‘*codificação do direito internacional*’, p. 211-255); also my comment to Article 13 of the UN Charter, P. B. CASELLA, *Artigo 13* (in **Comentário à**

International Law Commission of the United Nations Organization, since it was created in the late 1940's.

Nevertheless, codification of international law cannot set aside customary law. Not even successful codification of international law – as illustrated by one of the best performances in the process of codification of international law ever reached. The preamble of the **Vienna Convention on diplomatic relations**, 1961: “stating that rules of international customary law should continue to govern questions not expressly regulated in the provisions of this Convention”.

Beyond the fashionable labels and the theoretical issues, a substantial change has been going on for decades, in the role and scope of international law, since it was ruled in accordance with the classical pattern of interstate rules of coexistence, moving towards cooperation. How can a sense of community interest be built into international law, as such? To describe changes claiming that we are moving out of international law is not a way to solve the problem.

In short, how can international law make sense, out of the present state of the art, in view of future developments? How should it be featured in order to cope with the challenges? ¹²

As in other aspects of international law, turning to the ‘classics’ may be an apt way of coping with present-day challenges. According to this post-modern approach, let's check the lessons given, i.a., by A. GENTILI (1598), F. SUAREZ (1612), H. GROTIUS (1625) and C. van BYNKERSHOEK (1737). More than simply looking into the past, they can provide now answers applicable for the future.

At the very end of the sixteenth century, GENTILI, in his **De jure belli** (1598) ¹³ pointed that “the law of nations is that in use among all peoples, as

Carta das Nações Unidas, ed. by L. N. C. BRANT, executive coord. P. I. R. DINIZ, Belo Horizonte: Cedin, 2008, p. 273-304, quoted p. 275), the scope of fostering the development of international law and its progressive codification, as inserted in the UN Charter, illustrates the progressive change in the role of legal scholarship, from the individual work of the great classical masters, to the work of assisting the process of codification of international law: “Campos inteiros do direito internacional foram consolidados nas últimas décadas”.

¹² P. B. CASELLA, *International Law: the post-modern approach to the classics and the new challenges* (course given in Rio de Janeiro, August 2009, published in the **XXXVI Curso de derecho internacional**, ed. by the Interamerican Legal Committee of the OAS, Washington: Organization of American States, 2010, vol. 36, p. 3-46); see also: Martti KOSKENNIEMI, *What is international law for?* (in **International law**, ed. by Malcolm EVANS, Oxford: Univ. Press, 1st publ., 2003; 3rd ed., 2010, p. 32- 57); A. WATTS, *The importance of international law* (in **The role of law in international politics** – Essays in International relations and International law, ed. by M. BYERS, Oxford: Univ. Press, 2000, p. 5-16).

¹³ Alberico GENTILI, **De iure belli libri tres** (originally published in 1598) of which the following editions: **De jure belli libri tres** (in 2 vols. Vol. I – a photographic reproduction of the edition of 1612, a list of Errata, x+viii+742 pages; Vol. II – a translation of the text, by John C. ROLFE, with an Introduction by Coleman

established by natural reason for all men, and equally observed by all. This is the law of nature”.¹⁴

GENTILI explains the origin of customary law: “Not by any other way is introduced unwritten law, as precisely is the case with custom”.¹⁵ Thus, “in a certain way, it can be said that our legal scholars have collected such law from all peoples. [...] “We can have notice of the unknown by what is known”.¹⁶ And “such is the binding force of custom, as unwritten law, both within the cities, as well as for the entire universal city, even though it may not serve all, and some may contradict it”.¹⁷ Custom does not mean judging by examples, but what “has been observed in a certain and constant way appears more solid as a judgment that is confirmed by the opinion of the majority.”¹⁸

In the seventeenth century, Francisco SUAREZ in his **De Legibus ac Deo legislatore** (1612)¹⁹ stressed that the commands of the law of nations were introduced by free consent of men, and he names it as “of all humanity, or the largest share of the same”. These commands are not, thus inscribed in the hearts of men, by the author of nature. This is human law, not natural law.²⁰

PHILLIPSON, and Indexes by John C. ROLFE, li+vi+479 pages, Oxford: Carnegie, 1933. Classics of International Law, No. 16 of the series); Alberico GENTILI, **Direito de guerra** (do original de 1598, trad. Ciro MIORANZA, intr. Diego PANIZZA, Ijuí: Ed. Unijuí, 2004).

¹⁴ GENTILI (1598, ed. 2004, I.I.5, p. 55-56).

¹⁵ GENTILI (1598, ed. 2004, I.I.5, p. 56).

¹⁶ GENTILI (1598, ed. 2004, I.I.5, p. 57-58).

¹⁷ GENTILI (1598, ed. 2004, I.I.5, p. 58).

¹⁸ GENTILI, **Direito de guerra** (1598, ed. 2004, I.I.6, p. 59-60): “E BALDO DEGLI UBALDI acrescenta: O que o mundo aprova não serei eu a desaprová-lo”.

¹⁹ Francisco SUAREZ, **Tractatus de legibus ac Deo legislatore** in decem libros distributus (originally published Conimbricæ: apud Didacum Gomez de Loureiro, 1612), of which the following editions: Francisco SUAREZ (S.J.), **Tractatus de legibus ac de Deo legislatore / Tratado de las leyes e de Dios legislador** en diez libros (facsimile of the editio princeps, Coimbra, 1612, with Spanish transl. by J. R. EGUILOR Muñozguren (S.J.), gen. intr. Luis VELA Sanchez (S.J.), Madrid: Instituto de Estudios Políticos, 1967-68); VITORIA et SUAREZ, **Contribution des théologiens au droit international moderne**, préface par James Brown SCOTT, Introduction par Yves de la BRIÈRE, Paris: Pedone, 1939, “Deuxième partie: Conceptions majeures du droit des gens d’après Fr. Suarez S.J.”, pp. 147-208, original texts in latin & transl. into French); Fr. SUAREZ, **Selections from three works** (1944, containing **De Legibus ac Deo legislatore**, 1612; **Defensio fidei catholice et apostolice adversus anglicane sectae errores**, 1613; **De triplice virtute theologica, fide, spe, et charitate**, 1621, in two volumes: vol. I. A Photographic Reproduction of the Selections from the original Editions; vol. II. An English version of the texts, prepared by Gwladys L. WILLIAMS, Ammi BROWN, and John WALDRON, with certain revisions by Henry DAVIS, S.J.; together with an Introduction by James Brown SCOTT, an Analytical Table of Contents, Indexes and a Portrait of SUAREZ, Washington: Carnegie Endowment for International Peace – The Classics of International Law / Oxford: At the Clarendon Press / London: Humphrey Milford, 1944).

²⁰ SUAREZ, **De Legibus** (II.XVII.8): “praecepta iuris gentium ad hominibus introducta sunt per arbitrium et consensum illorum, sive in tota hominum communitate, sive in maiori parte; ergo sunt iuris humani, et non naturalis.”

The law of nations was thus viewed by him as resulting from uses shared among peoples (*Gentium, quod ex communi usu Gentium habetur*) – peoples have common uses among them. And questioning how to determine such common uses remains until our days.

To the extent rules are based on custom, then which custom can count as source of the law, and can thus generate international law? Here a crucial distinction is drawn by SUAREZ: there are customs shared by many kingdoms and republics, such as those pertaining to buying and selling. These uses are traditionally encompassed as *ius gentium*, under Roman law.²¹ SUAREZ denies that: these are certainly rules shared by all nations – and they thus generate a sort of transnational set of rules – but these are not rules among nations, properly stated. They are part of an *ius intra gentes* – law common to various peoples; they are not, however, international law. International law properly (*ius gentium*) is law among nations, or *ius inter gentes*, a rule existing among different political communities.²² Custom would rule the behavior of states at the time, as for instance, when the state would wage war, to set off damages suffered or injuries received from another state.

During the first half of the XVIIth century, with SUAREZ, a great step forward was taken, in the specific sense of a positive international law. Contrary to the role allegedly played by SUAREZ simply following the Scholastic tradition,²³ he had in mind not a divinely inspired ‘natural law’, but a human law, built by consensus: “unwritten law, which is called custom” (*de lege non scripta, quae consuetudo appellatur*).

The process of change of rules is different for international law and for civil law. In civil law, it can be modified by a kingdom or a republic, acting by itself; whereas the law of nations can only be modified by consensus among several states.²⁴ According to SUAREZ, custom as much precedes as follows the enactment of law: it precedes it, inevitably, as custom is unwritten law and comes before it is put into writing; it also follows it, as custom is always present. The expressions, used by SUAREZ, to render²⁵ custom – *usus, mos,*

²¹ SUAREZ, *De Legibus* (II.XVIII.8).

²² SUAREZ, *De Legibus* (II.XVIII.8).

²³ See P. B. CASELLA, *Direito internacional no tempo moderno de SUAREZ a GRÓCIO* (São Paulo: Atlas, 2013, esp. chapter XV).

²⁴ SUAREZ, *De Legibus* (II.XX.7): “In quo etiam adverto talem mutationem aliter posset contingere in iure gentium quod solum est commune propter convenientiam plurium nationum in tali vel tali lege; aliter vero in illo, quod est commune ex usu et more gentium, quatenus inter se habent societatem, aliquam seu communicationem.”

²⁵ SUAREZ, *De Legibus* (1612, chapters I to XX of Book VII, ‘*De Lege non scripta, quae consuetudo appellatur*’).

consuetudo – are much closer to each other in sense, and result from free and properly human action.²⁶

For his younger contemporary, Hugo GROTIUS, as stated in his masterpiece, **De jure belli ac pacis** (1625)²⁷ besides positive law (*jus voluntarium*), whose existence derives from the will of states, there was the law of nature, dominating the former, as it is eternal and not subject to change. This is not for him a simple theory; it is mandatory law for all states; the only distinction from positive law is its source. It results from reason. It is the application to states, of the same divine law, that rules individuals.²⁸

As evidence of custom without words, GROTIUS considered “mute signals that can mean something, in accordance with custom”:²⁹ as among Macedonians raising the weapons; among the Romans putting the shields on top of the head, as signs evidencing surrender and asking for mercy, thus obliging to drop arms, and “in our days, white flags are a tacit signal of a requested interview. They oblige no less than a *viva voce* request”.³⁰

H. GROTIUS (1625) considered the elements for featuring ‘custom’,³¹ as it “interests Human society that power be established in a safe way, away from rivalries. Everything that is presumed could be useful for such society should be seen favorably”.³²

²⁶ J. BROWN SCOTT, **The Spanish conception of international law and of sanctions** (Washington: Carnegie Endowment for peace, 1934, p. 112): “The word ‘free’ is of no small importance, because it implies voluntary action, and without voluntary action custom, as such, can not arise, as SUAREZ demonstrates”.

²⁷ Hugo GROTIUS, **De jure belli ac pacis libri tres** (first published 1625) of which the following editions: **De jure belli ac pacis** (vol. I – a photographic reproduction of the edition of 1646, xxiv+663 pages, Washington: Carnegie, 1913; Vol. II – a Translation of the Text, by Francis W. Kelsey, with the Collaboration of Arthur E. R. Boak, Henry A. Sanders, Jesse S. Reeves, and Herbert F. Wright, with an Introduction by James Brown Scott, Oxford: Carnegie, 1925, xlv+946 pages., coll. Classics of International Law, No. 3 of the series); **O direito da guerra e da paz** (1625, introduction by Antonio Manuel HESPANHA, translated by Ciro MIORANZA, Collection ‘clássicos do direito internacional’, Ijuí: Ed. Unijuí, 2004, 2 vols.); **De jure belli ac pacis** (facsimile of the translation by Jean BARBEYRAC, “avec les notes de l’auteur même, qui n’avoient point encore paru en françois; & de nouvelles notes du traducteur”, originally published in Amsterdam, chez Pierre DUCOUP, 1724, Caen: Publications de l’Univ. de Caen, 1984, 2 vols.).

²⁸ On the contribution of H. GROTIUS to modern international law, see P. B. CASELLA, **Direito internacional no tempo moderno de SUAREZ a GRÓCIO** (São Paulo: Atlas, 2013, chapter XVIII on H. GROTIUS).

²⁹ GRÓCIO (op. cit., 1625, III.XXIV.V).

³⁰ GRÓCIO (op. cit., 1625, III.XXIV.V and also III.XXIV.VI) considered the possible extension of ‘*tacit approval of a guarantee*’).

³¹ H. GRÓCIO (op. cit., 1625, II.IV.V.2) for setting up a custom: “excepting what civil laws only admit after lapse of a certain time and in a certain way, it can be introduced by the same facts that tolerates the one having sovereignty. As for time required for the custom to have any effect as law, it is not limited, but should be long enough in order to reach consensus”.

³² H. GRÓCIO (op. cit., 1625, II.IV.VIII.3 and II.IV.VIII.4): “it can be presumed that each one will tend to keep what he owns, and thereby a stronger presumption is not to believe that anyone would let a long time elapse without presenting any inkling of its will”.

According to Louis LE FUR, GROTIUS knew the theories of modern legal positivism, according to which justice is determined by opinion and by custom.³³ But he allegedly abhorred such doctrine as a “heretic plague”.

In the first half of the XVIIIth century, Cornelius van BYNKERSHOEK **Quaestionum juris publici** (1737),³⁴ in turn, warned that “all Republics are in such a way that neither great perfidy should be objected to them, nor singular virtues nor magnanimity should easily be expected from them”.³⁵ Thus, states are what they are: as quoted, neither great perfidy nor great virtue and magnanimity should be expected of each state. Republics – or kingdoms, all the same – are as they are, and they should not be expected to change. BYNKERSHOEK warned about the need to control “that beast ... called the reason of state”.³⁶

States tend to view themselves first, and the rest after. And this applies both internally and also externally. Therefore, limits are to be set to states: and this should always be remembered.³⁷ States should not go untamed,³⁸ around the world and beyond.³⁹

³³ Louis Érasme LE FUR, **La théorie du droit naturel depuis le XVII^e siècle et la doctrine moderne** (RCADI, 1927, t. 18, p. 259-442, quoted p. 323-324). With some reservations to the immutable character of natural law, as LE FUR called a “confusion between legal and moral obligation”, he considered that “the developments in GROTIUS can still be admitted in their broad lines”.

³⁴ Cornelius van BYNKERSHOEK, **Quaestionum juris publici libri duo** (originally published in Leyden, 1737; 2 vols. Oxford: Carnegie, 1930, Vol. I. A Photographic Reproduction of the Edition of 1737, xxiv+417 pages, Vol. II. A Translation of the Text, by Tenney FRANK, with an Introduction by J. de LOUTER. xlvii+304 pages, index, coll. Classics of International Law No. 14 of the series).

³⁵ Cornelius van BYNKERSHOEK, **Quaest. juris publici** (liber II, caput X): “*Sed prudentiae erit haec omnia omittere, hoc duntaxat superdicto : omnium Rerumpublicarum han ferem indolem esse, ut neque grandem perfidiam iis recte objeceris, nequem singularem animi magnitudinem ab iis facile expectaveris.*”

³⁶ C. van BYNKERSHOEK, **Quaest. juris publici** (II.XXV.X). Rendered particularly colourful in French: “cette bête ... qui s’appelle raison d’état”

³⁷ For that reason, should be remembered both that ‘the state is created for man and not man for the state’ as warned by C. Wilfred JENKS, **Economic and social change and the law of nations** (RCADI, 1973, t. 138, pp. 455-502, p. 495); also Mohammed BEDJAOUI and Hubert THIERRY, ‘*Avenir du droit international*’ (in **Droit international: bilan et perspectives**, ed. by M. BEDJAOUI, Paris: Pedone/ UNESCO, 1991, chap. LVI, pp. 1305-1317, quoted p. 1313, par. 29): « C’est ainsi en fonction des limitations qu’il impose à la souveraineté que le droit international se construit. »

³⁸ Christian TOMUSCHAT, **Obligations arising for states without or against their will** (RCADI, 1993, t. 241, pp. 195-374); Chr. TOMUSCHAT, **International law: ensuring the survival of mankind in the eve of a new century: general course on public international law** (RCADI, 1999, t. 281, pp. 9-438).

³⁹ As shown by the consolidation of outer space law, based on the premises that no sovereignty and no military use of outer space should be allowed, for the benefit of all. See: P. B. CASELLA, **Direito internacional dos espaços** (São Paulo: Atlas, 2009, esp. chap. XXII, ‘*espaço ultraterrestre*’, p. 597-626); P. B. CASELLA and O. BITTENCOURT Neto, **Desafios do direito espacial** (in **Direito internacional, Humanismo e Globalidade** – Guido F. S. SOARES Amicorum Discipulorum Liber, ed. by P. B. CASELLA et al., São Paulo: Atlas, 2008, p. 118-135); Bin CHENG, **Studies in International Space Law** (Oxford: Clarendon Press, 1998); Claude-Albert COLLIARD, *Le droit de l’espace ou le ciel et la terre* (in **La communauté internationale – Mélanges offerts à Charles ROUSSEAU**, Paris: Pedone, 1974, p. 63-74) ; I. H. Ph. DIEDERIKS-VERSCHOOR, **Similarities with and differences between Air and Space law**

After almost three centuries since BYNKERSHOEK, his statement not only remains true, but no changes should be expected in the ‘nature’ of states. Nevertheless, substantial changes have occurred in the international system, not only in the way that system is operated – wider group of members and more complex shared agenda – but especially as regards its contents – adding values and principles to the system, on top of the usual and older rules of coexistence.⁴⁰

Of such added value in international law the emergence and consolidation of concepts like *jus cogens*,⁴¹ *erga omnes* rules and of *opinio juris* are material evidence, of this search for ‘community’ values, or ‘universal’ principles, that could guide the international institutional and legal system.⁴² Not by chance these notions raise controversies and triggers much discussion about the contents of the concepts themselves, as well as about the levels of possible implementation and effect they can have on the international legal scene.

These added values and principles have to be ordered within the so-called post-modern international law system: these are major changes, as international law no longer remains a strictly interstate matter, but growingly

primarily in the field of private international law (RCADI, 1981, vol. 172, p. 317-423); D. GOEDHUIS, **Conflicts of law and divergencies in the legal regimes of air space and outer space** (RCADI, 1963, vol. 109, p. 257-346); Armel KERREST (ed. by), **L’adaptation du droit de l’espace à ses nouveaux défis – Mélanges en l’honneur de Simone COURTEIX** (Paris: Pedone, 2007); M. LACHS, **The international law of outer space** (RCADI, 1964, vol. 113, p. 1-116); Gabriel LAFERRANDERIE, *Basic Principles governing the use of outer space in future perspective* (in **Space Law, current problems and perspectives for future regulation**, ed. by M. BENKŐ and E. JOLLEY, Utrecht: Eleven, 2005, p. 5-28).

⁴⁰ Putting it bluntly would mean the line of division that separates international relations from international law – is the basic line is drawn by states, playing the game of power politics, or by an international institution and legal system? As considered in P. B. CASELLA, **Fundamentos do direito internacional pós-moderno** (foreword by Hugo CAMINOS, São Paulo: Quartier Latin, 2008, esp. XII, ‘*direito e relações internacionais: coexistência pacífica?*’, p. 877-958). I do not quite follow the line drawn by Anne-Marie SLAUGHTER, **International law and international relations** (RCADI, 2000, vol. 285, p. 9-249). For criticism against too much power politics into international law, see for instance: Sandra VOOS, **Die Schule von New Haven – Darstellung und Kritik einer amerikanischen Völkerrechtslehre** (Berlin: Duncker & Humblot, 2000, quoted p. 17): “Die Schule von New Haven, die auch ‘*policy-oriented approach*’ genannt wird, vertritt eine eigenständige, sich von herkömmlichen Vorstellungen in der Völkerrechtslehre erheblich unterscheidende völkerrechtliche Theorie und Methodik.” See also Lucie DELABIE, **Approches américaines du droit international – entre unité et diversité** (Paris: Pedone, 2011, ‘*introduction*’, p. 11-24, quoted p. 11): “Peut-on considérer le droit international comme un ‘langage commun’? Au vu des oppositions entre juristes européens et américains on peut en douter. S’ils se réfèrent aux mêmes normes, ils n’apportent pas les mêmes réponses juridiques aux problèmes internationaux. Ces incompréhensions sont si fortes, qu’elles provoquent un véritable ‘schisme’ entre les deux communautés scientifiques. L’acuité des débats sur le recours à la force en droit international en témoigne.”

⁴¹ Henri de RIEDMATTEN, **Le catholicisme et le développement du droit international** (RCADI, 1976, t. 151, p. 115-159, cit. p. 140), considered the possibility « même si l’on rénonce à dresser une énumération des normes qui composent le *jus cogens*, de dégager un principe d’interprétation, donnant à cette notion une valeur plus concrète. »

⁴² These are vast and complex topics of international law. Nevertheless, to some extent, the same are related, so much for *opinio juris* as well as *jus cogens* and *erga omnes* rules.

brings in the human being to its very centre. This is a fascinating topic, but it is not within the scope of this paper. Interesting enough is that ‘custom’ can be viewed both as ‘old’ way of ascertaining rules⁴³ or as a ‘new’ driving force in the formation of international rules – showing that, controversies apart, the category remains present and necessary in today’s international law.⁴⁴ As it was exactly hundred years ago.⁴⁵

⁴³ As every handbook on international law will contain a chapter on the topic, exhaustive review of the matter would be utterly impossible. As a test for the approach adopted, see, for instance, along review of the “sources of international law”, whether ‘custom’ comes before or after ‘treaties’ as sources of international law. This may be a telling evidence of the approach adopted by the author(s). See for instance Ciro LIPARTITI, *Consuetudine (diritto internazionale)* (in **Novissimo Digesto Italiano**, ed. by Antonio AZARA and Ernesto EULA, Torino: Unione Tipografico-editrice Torinese, vol. IV, p. 327-333, quoted p. 327-328): “La norma consuetudinaria è diritto perchè espressione del senso della giuridicità collettiva che le conferisce ragion di essere e autorità”. And the time element has a role to play, in the consolidation of a customary rule: “Nel contempo si perfeziona, cioè si distacca dal procedimento della sua produzione, allorchè la giuridicità di essa si afferma”. As evidence of the ‘traditional approach’ on custom, follows: “la consuetudine è precisamente un sistema di apporti volontaristici e spontanei dei singoli partecipante nello stesso senso di condotta come portato dalla univoca coscienza giuridica dei partecipanti medesimi che da essa sono guidati.” But the main feature remains outstanding as: “una conformità di atti secondo il criterio del giusto che vive nella coscienza di ognuno e d’onde ciascuno trae il proprio imperativo agente, cioè quel senso della giuridicità che non consente di seguire un indirizzo diverso senza sollevare ostacolo nella propria coscienza come sofferenza dell’ingiusto”.

⁴⁴ For instance of these contradictory perspectives, see i.a.: D. P. FIDLER, *Challenging the classical concept of custom: perspectives on the future of customary international law* (German Yearbook of International Law, 1996, vol. 39, at 198, 216, 220); J. L. GOLDSMITH and E. A. POSNER, *A theory of customary international law* (University of Chicago Law Review, 1999, vol. 66, p. 1113-1177); the same also, *Understanding the resemblance between modern and traditional customary international law* (Virginia Journal of International Law, 1999-2000, vol. 40, p. 639-672); J. HWANG, *A sense and sensibility of legal obligations: customary international law and game theory* (Temple International and Comparative Law Journal, 2006, vol. 20, at 111, 130); J. P. KELLY, *The twilight of customary international law* (Virginia Journal of International Law, 1999-2000, vol. 40, at 449, 543); A. E. ROBERTS, *Traditional and modern approaches to customary international law: a reconciliation* (American Journal of International Law, 2001, vol. 95, p. 757); D. F. VAGTS, *International relations look at customary international law: a traditionalist’s defence* (European Journal of International Law, 2004, vol. 15, at. 1031, 1040).

⁴⁵ Just to limit review to two examples of 1913, reflecting international law just before the first World War: José MENDES, **Direito internacional público** (São Paulo: Duprat & Cia., 1913, these VII – fontes do direito internacional, § 30 – noção de costume internacional, p. 98-99): refers the classical definition from Roman Law “*Mores sunt tacitus consensus gentium longa consuetudine inveteratus*” and then as ‘costume jurídico internacional’ explains: “é a observância constante de uma norma reguladora das relações internacionais, que se não baseia em tratado”. Custom according to the lesson by MENDES (1913, § 32 – elementos do costume, p. 100) is composed of two elements: “the external element is the use, the constant observance” and the “internal element is the *opinio necessitatis*, the conviction of the necessity felt that such use is in accordance with the law” (*convicção da necessidade sentida de constituir direito esse uso*). On his turn, Franz VON LISZT, **Le droit international** – exposé systématique (“traduction française d’après la 9^e édition allemande (1913)” par Gilbert GIDEL avec le concours de Léon ALCINDOR, avant propos de James Brown SCOTT, Paris: Pedone, 1928, ‘introduction’, § 2 – les sources du droit international, p. 12-15, quoted p. 12): “Le droit international a pour fondement la conscience juridique commune des États civilisés: il existe dans la mesure où cette conscience a pris corps par une expression de la volonté juridique commune. Cette volonté juridique commune se manifeste à l’extérieur: partie au moyen de la pratique juridique, partie par l’établissement formel de règles de droit. Le droit coutumier ou non-écrit résulte de la répétition des faits envisagés comme manifestation de la conscience juridique (*opinio juris sive necessitatis*).” And VON LISZT explained where the same was to be found (op. cit., locus cit., note 2): ‘C’est à la conscience juridique commune que l’on

The new feature in present day international context is that in addition to the individual level of action by states – be it unilateral, bilateral and multilateral – there is a growing area for the formation and the development of common consent – as *opinio juris*.⁴⁶ The determination of the contents⁴⁷ and scope⁴⁸ of it is not an easy task.⁴⁹

pense comme dernière source interne du droit, lorsque l'on range inexactement parmi les sources externes du droit la nécessité (GAREIS) ou la reconnaissance (HOLTZENDORFF)

⁴⁶ Literally *opinio juris* can be translated as 'legal opinion'. The expression used to describe the conviction of legal scholars about a certain legal matter, as in *opinio doctorum* or *communis opinio*. Also occurs as *opinio communis doctorum*, whereby the opinion has the force of law, has the same value as law, dealing with the interpretation of a certain question, as given by the acknowledged Catholic Church Doctors (*doctor ecclesiae*) where for a minimum of seven doctors was required, as mentioned about *opinio doctorum* by Silvio de MACEDO, in the respective entry in the **Enciclopédia Saraiva do Direito** (general editor R. LIMONGI FRANÇA, São Paulo: Saraiva, 1981, vol. 56, p. 146-147), thereafter the *opinio doctorum* was no longer accepted at the same level as the Bible or the Canon law, coming just below both, in the hierarchy of legal sources: "The *Doctor ecclesiae* is an expression that aims to unite two concepts [i.e., doctor = the wisest and saint = pure, sacred] thereby justifies a certain authority to speak, and consequently to order".

⁴⁷ I.a., see P. B. CASELLA, '*Opinio juris*' e a questão da materialidade emergente no direito internacional pós-moderno (Rio de Janeiro: Revista de direito do estado - RDE, ano 3, n. 10, abril-junho 2008, ISSN 1807 550-X, p. 367-386); Olufemi ELIAS, *The nature of the subjective element in customary international law* (in *International and Comparative Law Quarterly*, vol. 44, July 1995); Arthur R. C. GIANNATTASIO, A '*opinio juris sive necessitatis*': do elemento subjetivo consuetudinário à intersubjetividade jurídica (in **Direito internacional** – homenagem a Adherbal MEIRA MATTOS, ed. by P. B. CASELLA and A. de CARVALHO RAMOS, Brasília: FUNAG/São Paulo: Quartier Latin, 2009, p. 575-617).

⁴⁸ Thus, for instance, René-Jean DUPUY distinguished between what he called '*Coutume sage et coutume sauvage*' (in **La communauté internationale** – Mélanges offerts à Charles ROUSSEAU, Paris: Pedone, 1974, p. 75-87).

⁴⁹ Custom as source of international law occupied relevant place in the writings of Michel VIRALLY, such as in his essay *À propos de la lege ferenda* (in **Le droit international: unité et diversité** – Mélanges offerts à Paul REUTER, Paris: Pedone, 1981, p. 519-533); also VIRALLY, **Le droit international en devenir** – Essais écrits au fil des années (Paris: PUF / Publications de l'Institut universitaire de hautes études internationales de Genève, 1990, p. 213-227) and VIRALLY, **Panorama du droit international contemporain** – Cours général de droit international public (RCADI, 1983, vol. 183, p. 9-382, quoted note 6, p. 182): "En réalité, le droit coutumier est l'expression des contraintes résultant de la coexistence d'une pluralité d'États et de la nécessité ressentie par ceux-ci de conduire leurs relations mutuelles de façon réglée". See also: Pierre-Marie DUPUY, *À propos de l'opposabilité de la coutume générale: enquête breve sur l'objecteur persistant* (in **Le droit international au service de la paix, de la justice et du développement** – Mélanges Michel VIRALLY, Paris: Pedone, 1991, p. 257-272); Julio A. BARBERIS, *La coutume est-elle une source de droit international?* (in **Le droit international au service de la paix, de la justice et du développement** – Mélanges Michel VIRALLY, Paris: Pedone, 1991, p. 43-52) came to the conclusions: "a) les normes coutumières ne sont créées au moyen d'aucun procédé juridiquement établi, autrement dit la coutume n'est pas une source de droit international; b) l'existence de normes coutumières internationales peut être constaté par les juges ou par les organes des États grâce à certaines règles techniques, dont l'une est constitué par la présence de l'élément matériel et de l'*opinio juris* dans la formation d'une pratique déterminée."

Extensive case-law⁵⁰ of both the Permanent Court⁵¹ and the ICJ⁵² dealing with the existence and contents of *opinio juris* is evidence thereof. Whereas, on the one hand, the Court came to the conclusion that no customary rule forbids the use or the threat of use of nuclear weapons,⁵³ on the other hand, the Court found reason to state that no acquisition of territory can be admitted by force,⁵⁴ and that self determination of peoples not only became part of international law in force,⁵⁵ but can be claimed as one of the major developments of international law in the second half of the past century.⁵⁶

Opinio juris is no longer to be viewed as individual opinion of one or of certain states, but presently as collective statements, issued by the

⁵⁰ The conviction about the lawfulness of a practice goes beyond the scope of law, and can find support in morals, in interest, in sheer use, or other reasons. To the extent the customary rule exists, the state has no choice in its practice, but to observe the same: he must conform to a binding legal rule. It can be stated that it is not required that the rule exists, but that subjects of international law applying the same do believe that it exists: “*La conviction ne doit pas être confondue avec l’obligation. Il s’agit ici d’une conscience ‘collective’ de vouloir créer l’obligation, et une fois acquise, la coutume lie les sujets indépendamment de leur concours à sa formation (sauf opposition par protestations expresses et dûment et régulièrement manifestées). Ce qui permet de différencier la coutume de la convention qui est une manifestation de volonté limitée aux cercles des états contractants*”. Moncef KDHIR, **Dictionnaire juridique de la Cour internationale de justice** (Bruxelles: Bruylant, 2^e éd., 2000, p. 248-250): “*Opinio juris* est la conviction dans une pratique de se conformer à une obligation juridique. La CIJ évoque le sentiment ou la conscience de se conformer à ce qui équivaut à une obligation juridique. La Cour vise une concordance de sentiments. La coutume internationale n’existe qu’avec le concours nécessaire et cumulatif de deux éléments: un élément matériel – une pratique répétée et un élément psychologique – l’*opinio juris*. Celle-ci est difficile à prouver puisqu’il faut évaluer l’existence d’un sentiment psychologique, dépourvu de données objectives. La preuve de l’*opinio juris* se révèle parfois impossible à obtenir.”

⁵¹ Among many others, since for instance the **Lotus Case** (1927), when the PCIJ considered that exclusive criminal competence of the flag state was not a customary rule for lack of *opinio juris*: “C’est seulement si l’abstention était motivée par la conscience d’un devoir de s’abstenir que l’on pourrait parler de coutume internationale. Le fait allégué ne permet pas de conclure que les États étaient conscients de pareil devoir.” PCIJ, **Recueil** (Series A, n. 10, p. 4).

⁵² The ICJ has considered the lack of *opinio juris* in the judgment of the **North Sea Continental Shelf case** (20 Feb. 1969) concerning the rule of equidistance: “Il faut que la pratique des États ait été fréquente et pratiquement uniforme [...] et se soit manifestée de manière à établir une reconnaissance générale du fait qu’une règle de droit ou une obligation juridique est en jeu”. Just material evidence is not enough: “Les États intéressés doivent avoir le sentiment de se conformer à ce qui équivaut à une obligation juridique. Ni la fréquence, ni même le caractère habituel des actes ne suffisent [...] Il existe nombre d’actes internationaux, dans le domaine du protocole par exemple, qui sont accomplis presque invariablement, mais qui sont motivés par des simples considérations de courtoisie, d’opportunité ou de tradition, et non par le sentiment d’une obligation juridique”. See ICJ, **Recueil** (1969, p. 43-44).

⁵³ ICJ, Legal opinion on the **licitude da ameaça ou do uso de armas nucleares** (ONU e OMS) (8 de julho de 1996).

⁵⁴ ICJ, **Legal consequences of the construction of a wall** (Legal Opinion, 9 July 2004, esp. pars. 115, 117 and the mention to Res. 242 (1967) of the Security Council, at par. 74).

⁵⁵ ICJ, *Advisory Opinion on the Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (General List No. 141, 22 July 2010). ”

⁵⁶ ICJ, *Advisory opinion on Kosovo*, 22 July 2010, paragraph 82: “one of the major developments of international law during the second half of the twentieth century has been the evolution of the right to self determination”.

international community, as a whole, or a substantial part of it. *Opinio juris*, as such, will be featured not only reflecting the views of the dominant powers of the age, but as reflecting the conviction of the legal content of a certain statement – the *opinio juris*, in a strict sense – and not just as an accessory to the repetition of acts, performed in the same way. As was reflected, for instance, in the assessment of the *opinio necessitatis*.⁵⁷

From the former dominance of sheer practice, of certain states, and their added statement that this should be *the* law, or at least *their* law, we may be moving towards a more comprehensive view and treatment of the common values, the basic principles, as considered by the **Vienna Convention on the Law of Treaties**, 1969, as required, ascertaining the existence and contents of *jus cogens*, in accordance with articles 53 and 64 of that instrument. Not by chance the recognition of it still triggers reluctance and objections.⁵⁸

Opinio juris in present day international law can also be ascertained through the action of institutional bodies already existing and operating for decades, the Intergovernmental organizations, especially since world wars I and II, or more than a century, considering the first initiatives adopted in that sense, during the second half of the nineteenth century, for regulation of technical areas of international relevance such as industrial and intellectual property, which coalesced into WIPO, the World Intellectual Property Organization, or also telegraph, radio and satellite communications, which coalesced into ITU, the International Telecommunication Union, not forgetting other equally relevant areas of international law, where consistent and widely acknowledged *opinio juris* has been built out of sheer necessity, such as International Civil Aviation, within ICAO, or World Health issues, within the WHO. These work properly and are fields of effective operation and implementation of international law because these areas mandatorily require rules being at the same time ‘effective’ and ‘international’.

⁵⁷ *Opinio necessitatis* renders the opinion of each one, thus called as the own conviction, that a certain customary rule must be observed and complied with. *Opinio necessitatis* would thus be the so-called ‘internal’ feature of custom, of which the external element was the repetition of the practice. Custom as an unwritten source of law would necessarily combine both elements, of practice and the *opinio necessitatis*.

⁵⁸ Not extending speculation too far and wide, France and the United States of America, for instance are not yet part to the Vienna Convention on the Law of Treaties, 1969. Brazil took long time to join in: this was completed only in 2009. Reluctance against being bound by *jus cogens* rules against the will or without having given consent of the state to be bound by an international rule of mandatory nature was long stated in the Brazilian Lower House of Congress as the reason for the delayed ratification.

There is a substantial change in the traditional form of acknowledging custom and customary law.⁵⁹ The old concept of effective custom emphasized much more the ‘action’ than the ‘contents’ thereof. And the action was to be carried by the ‘relevant’ actors in order to be acknowledged as capable of generating a ‘new’ custom – *ex facto jus oritur* – was not a simple operational detail; this was the conceptual premise for the emergence of ‘*consuetudo*’ or custom.

The picture for the formation of the traditional ‘custom’ is aptly described by Charles DE VISSCHER (1953):⁶⁰ “many customs owed their origin only to the decisions or acts of great powers, who following their repetition and their connection, in view specially of the idea of order that resulted therefrom, little by little lost their personal feature, as contingency, in short, as a political act, to adopt the aspect of custom in formation”.⁶¹

Thus ‘custom’ was the embodiment of the opinion and action of the dominant power(s), properly dressed,⁶² and presented as an acceptable standard of conduct for the community of states. It was more act than content. To that extent, custom could to a certain point be compared with reciprocity.⁶³

⁵⁹ I.a., see J. TASIOLAS, *Customary international law and the quest for global justice* (in **The nature of customary law: Legal, historical and philosophical perspectives**, ed. by A. PERREAU-SAUSSINE and J. B. MURPHY, Cambridge: Univ. Press, 2007, esp. p. 97-335). See also Y. DINSTEIN, **The interaction between customary international law and treaties** (RCADI, 2007, vol. , ‘conclusion’, p. 427): “Custom plays an on-going important role as a stratum of international law, in the world of reality”. And he notes that “in certain sets of circumstances, custom (preeminently as *jus cogens*) may annul or terminate a treaty, or bring about its desuetude. In others, a treaty – directly or indirectly (through a binding decision of the Security Council) – may demolish custom altogether or create a *lex specialis*.” He ends pointing out the “tangled interaction between these two mainstays of international law”.

⁶⁰ Charles DE VISSCHER, **Théories et réalités en droit international public** (Paris: Pedone, 1953): “C’est ainsi qu’après avoir imprimé à l’usage une orientation définie, les grandes puissances s’en constituent encore les garants et les défenseurs. Leur rôle qui de tout temps fut décisif dans la formation du droit international coutumier, est de conférer aux usages ce degré d’effectivité sans lequel la conviction juridique, condition de l’assentiment général, ne trouverait pas une base suffisante dans la réalité sociale”.

⁶¹ Ch. DE VISSCHER (op. cit., 1953, loc. cit.).

⁶² Maurice H. MENDELSON, **The formation of customary international law** (RCADI, 1998, t. 272, pp. 155-410, chap. I, ‘introduction and approach’, pp. 165-196) explained two reasons for his approach: first, to render lively a matter which can sound dry and technical; and second, the need to put the formation of international customary law in a socially and legally adequate perspective.

⁶³ Max SORENSEN, **Principes de droit international public** (RCADI, 1960, t. 101, p. 1-254, chap. II, ‘la coutume’, p. 35-51): “Dans une société de structure décentralisée sans pouvoir législatif, la coutume prend forcément une place primordiale parmi les différentes catégories de normes juridiques. Malgré l’essor des organisations internationales, avec leurs tendances centralisatrices, la société internationale n’a pas encore atteint un degré d’unité comparable à celle des sociétés étatiques. L’évolution du droit international par la voie des traités collectifs qui a eu lieu au cours du dernier siècle et demi, commençant par le Congrès de Vienne et continuant à une allure plus vive à l’époque actuelle, n’a pas encore pris la place d’un processus législatif dans le sens national du mot. En outre, les règles relatives à la conclusion des traités, collectifs comme bilatéraux, dépendent elles-mêmes de la coutume. La coutume est donc appelée à jouer un rôle important dans la société internationale contemporaine. Elle constitue l’élément de stabilité qui est essentiel au système juridique, même à une époque de profondes transformations sociales”.

The international community remains to a large extent a customary society. The rule formation in a customary society is totally different from the law enactment in national states. Thereby remains the need to avoid an excessively literal reading of article 38.1.b of the Statute of the ICJ, for “international custom, as evidence of a general practice accepted as law”.

That’s why it sounded easy to criticize or even to dismiss custom as old, and dated. To be replaced by treaty, as codified rules. As so many other things in life, this is not so simple. And it is not viable to be stated in such simplistic distinction: both custom and treaty are needed, and remain present and valid, in the process of formation of rules and principles of international law.

Due to the fact that the international society has no equivalent to the internal or national bodies, for the creation and the implementation of legal rules, the law-making process is necessarily distinct in the international scene. That’s why both treaty and custom, in addition to other devices for the formation of rules of international law remain valid and are considered. To a certain extent, they are debated: which are and is the role of each of the ‘sources’ of international law. But this goes beyond the scope of this conference.

The existence and action of an international institutional body as the UN General Assembly – where almost all states of present international society are present – is a feature that cannot be ignored in this process of transformation of custom, to the extent that the resolutions issued by the UNGA are strong evidence of an *opinio juris* tending to become universal. That body has contributed to the emergence of a collective *opinio juris*, going beyond separate statements and opinion of states.

There is evidence of the reformulation of custom and the formation of international customary rules in connection with the practice of the international organizations. The formation of international custom within the international society, *via* the adoption of statements as the UNGA Resolutions is the foremost example of that – ‘self determination of peoples’ would be a paramount case of such a development.

The importance of ‘self determination of peoples’ was acknowledged by the ICJ in the **Kosovo** Legal Opinion of 2010.⁶⁴ The ICJ expressly stated the

⁶⁴ INTERNATIONAL COURT OF JUSTICE, *Advisory Opinion on the Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (General List No. 141, 22 July 2010, par. 79): “During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. [...] A great many new States have come into existence as a result of the exercise of this right.”

right to self determination as one of the “major developments of international law during the second half of the twentieth century”.⁶⁵

Albeit the same right was already mentioned in the UN Charter (1945), art. 55, the contents of the right to self determination progressively took shape, along the way, with successive UNGA Resolutions. This can be followed by the massive process of the ‘decolonization’ years 1945-1960.⁶⁶

The contents of ‘self determination of peoples’ was built in the practice, within the UNGA, and thereafter echoed outside, and became a ‘major development of international law’: although not each of the Resolutions adopted, *per se*, created, modified or extinguished rights, as a whole, the series of them evidenced the shift in the international law on the topic, and the creation of ‘self determination of peoples’ as one of the *quote* “major developments of international law during the second half of the twentieth century” *unquote*. This is *opinio juris* of the international community as a whole, beyond the scope of the action and opinion of one or other state power.

The resolutions of international organizations can reflect the practice of states or represent *opinio juris*, as general consent. Thus *opinio juris* has turned to be an institutional element in present day international law.

Not only ‘practice’ should be acknowledged: often enough practice can be pointed out. But not necessarily can ‘practice’ be featured as being in accordance with the law. Practice needs to be qualified with the ‘added value’, the conviction that such practice is in conformity with the law.

Just to remain with a paramount example, walls can be built, but while building them states do not often claim and do not feature elements required for building walls to be argued as being in accordance with international law. This is practice. No qualification added.

In addition to the specific subject matter of the requested advisory opinion on **Kosovo**, in 2010, the ICJ drew parallels of this case, compared with other situations, and made clear-cut distinctions such as concerning the status of the Gaza Strip, quoting extensively from its 2004 **Advisory Opinion**

⁶⁵ ICJ, Advisory opinion on Kosovo, 22 July 2010, paragraph 82: “one of the major developments of international law during the second half of the twentieth century has been the evolution of the right to self determination”.

⁶⁶ CASELLA, **Fundamentos do direito internacional pós-moderno** (São Paulo: Quartier Latin, 2008): “A autodeterminação dos povos fez-se muitas vezes sem modelos conceituais nem planejamento. Aconteceu em lapso temporal bastante determinado e despeja no sistema internacional, em cerca de quinze anos, número de estados que triplica o total nesse tempo. Ainda recentemente, o caso de *Timor Leste*, mostra que não progrediu o modelo. O impacto e os desdobramentos desse quadro ainda estão sendo absorvidos. O sistema internacional muda irreversivelmente a partir de 1960. / Embora se admita como marco inicial de uso corrente a instauração da autodeterminação dos povos como princípio de direito internacional após a primeira guerra mundial, a idéia remonta ao Iluminismo do século xviii. A inspiração histórica, exportada a partir da França revolucionária, dos conceitos de soberania popular e da renúncia às guerras de conquista, se combina com o tríptico imperativo filosófico do liberalismo, nacionalismo e independência.”

on the legal consequences of the building of a wall in the occupied Palestinian territory, and also mentioning the cases of Cyprus, of Southern Rhodesia, the attempted ‘Republika Srpska’⁶⁷ and also namely and extensively referred the case of Quebec,⁶⁸ as it had been reviewed by the Supreme Court of Canada.⁶⁹

In a growingly fluid world, where the notion and the function of territory is undergoing substantial changes, and tending to be dematerialized,⁷⁰ the building of walls, whether consistent or not with international law,⁷¹ seems to remain a current practice. This can be regretted but cannot be neglected: the Berlin wall is gone, and the symbol of the Cold war era has

⁶⁷ ICJ, Advisory opinion on Kosovo, 22 July 2010, paragraph 81. Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, *inter alia*, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska. The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.”

⁶⁸ ICJ, Advisory opinion on Kosovo, 22 July 2010, paragraph 55: “While many of those participating in the present proceedings made reference to the opinion of the Supreme Court of Canada in *Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada* ([1998] 2 S.C.R. 217; 161 D.L.R. (4th) 385; 115 Int. Law Repts. 536), the Court observes that the question in the present case is markedly different from that posed to the Supreme Court of Canada. The relevant question in that case was ‘Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?’”

⁶⁹ ICJ, Advisory opinion on Kosovo, 22 July 2010, paragraph 56. “The question put to the Supreme Court of Canada inquired whether there was a right to “effect secession”, and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast, the General Assembly has asked whether the declaration of independence was “in accordance with” international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. If the Court concludes that it did, then it must answer the question put by saying that the declaration of independence was not in accordance with international law. It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act, such as a unilateral declaration of independence, not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.”

⁷⁰ On the evolution and transformations of territory and its legal categories in present day international law, see, i.a., P. B. CASELLA, **Direito internacional dos espaços** (São Paulo: Atlas, 2009).

⁷¹ Jean-Marc SOREL (sous la direction de), **Les murs et le droit international** (Paris: Pedone, 2010, Université de Paris I Panthéon Sorbonne – Centre d’étude et de recherche en droit international – Cahiers Internationaux n. 24).

been wiped away with the wall. But new walls turn up, just to show how they miss the point – they do more harm than good. They pile up more illusions than security for either side.

On the one hand can be studied the evolution of *opinio juris* and its present state of development in international law;⁷² on the other hand, to what extent this leads to the formation and the determination of the contents of rules of international law. And the final test will be to what extent the rules can be opposable against states individually considered.

This can be featured and is perceived not only in the case of multilateral treaties, where intergovernmental organizations (IOs) have increasingly played the role of the forum where rules have been generated, negotiated and celebrated, but also⁷³

“many other sources of international obligations involve IOs as parties or beneficiaries, including rules relating to the interpretation of their charter instruments, their legal personality, or to the privileges and immunities enjoyed by them or persons associated with them. And an even larger body of international rules, most of it generated by these organizations, is now subject to various forms of institutionalized dispute settlement, formal and informal, creating an ever increasing body of judicial and quasi-judicial opinions in discrete areas of the law”.⁷⁴

Observance of such provisions even by non-member states of such organizations would suggest such resolutions to be acknowledged as sources of international law.⁷⁵

⁷² Rosario HUESA VINAIXA, *El Nuevo alcance de la ‘opinio juris’ en el derecho internacional contemporáneo* (Valencia: Tirant lo Blanch, 1991, p. 18): “el surgimiento y evolución del concepto de *opinio juris* como elemento subjetivo o psicológico necesario para la existencia de la costumbre jurídica ha desempeñado un papel fundamental, cuyo alcance en el Derecho internacional contemporáneo ha perfilado el Tribunal Internacional de Justicia en su mencionada sentencia en el asunto **Nicaragua c. Estados Unidos**.”

⁷³ José E. ALVAREZ, *International organizations as law-makers* (Oxford: Univ. Press, 1st publ., 2005, reprinted 2006, ‘Preface’, p. ix-xxi, quoted p. ix-x): “Intergovernmental organizations (IOs) have a pervasive impact on the promulgation and implementation of law across all the various sub-specialities of international (and some national) law, and even across the divides that supposedly separate the worlds of ‘public’ and ‘private’ regulation”. [...] “A large portion of the rules that we have to govern nations, both those that are formally legally binding and those that are not, are now initiated, formulated, negotiated, interpreted, and often implemented through the efforts of IOs”.

⁷⁴ J. E. ALVAREZ (op. cit., 2006, loc. cit.); see also Paul SZASZ, *General Law-making Processes* (in Oscar SCHACHTER and Christopher JOYNER, eds., **United Nations Legal Order**, Washington, DC.: American Society of International Law, 1995, 35 at 59).

⁷⁵ A. A. CANÇADO TRINDADE, *Repertório da prática brasileira de direito internacional público – período 1961-1981* (Brasília: FUNAG, 2^a ed., 2012, p. 28) also states the possibility for such resolutions to induce behavior of states, against the usually required lapse of time for the formation of international custom.

Changes that took place in matters connected to international custom, due to the action and participation of international organizations in the international society are diversified and among them , we should mention those resulting from the adoption of statements, by these new members of the international society, as new subjects of international law. Although the full acceptance of these statements – like UNGA Resolutions – as binding rules can be argued, and also remains arguable to what extent they are expressions of international custom, nevertheless the relationship cannot be denied between them and international customary rules.

Conceptual choices are required for ascertaining the existence and the contents of international law, due to the specific features of it as a system, and due to the circumstances in which international law is to be determined, interpreted and applied. Sometimes, radical choices are necessary to attain innovation. Paul REUTER used to state,⁷⁶ these are the reasons that make international law interesting. As no other field of law scholarly work is as relevant as in Public international law. This not only for the complexity and the relevance of the issues, for the incompleteness of this relatively new field of law, and the anarchical features remaining in the international society, but more so for the lack of a formal fundamental basis, as given by constitutions in national legal systems.⁷⁷ To state the sources of international law, or to state the institutions competent to interpret the law and to apply it are fundamental questions not possible to answer in international law without ascertaining scholarly choices.

The final word can be difficult in legal matters in general, and more so in international legal issues. It would not be different as regards *opinio juris*.

⁷⁶ See his *Quelques remarques sur la situation juridique des particuliers en droit international public* (1950, in Paul REUTER, **Le développement de l'ordre juridique international** – écrits de droit international, Paris: Economica, 1995, pp. 51-64, quoted pp. 51-52): « Les constructions systématiques du droit international de ces dernières années qui ont visé à la plus grande rigueur, qui ont voulu ordonner l'ensemble des règles de droit en un tout parfaitement cohérent pour constituer ce que nos anciens auteurs appelaient justement 'un corps de droit' sont nécessairement celles qui sont appliquées à prendre les positions les plus radicales sur la situation des particuliers en droit international public. »

⁷⁷ Substantially different are the conditions in the international legal environment. Elihu LAUTERPACHT, **The development of the law of international organizations by the decisions of international tribunals** (RCADI, 1976, t. 152, p. 377-478, at 468): “the constitutional problems of international organization”. See also, Wagner MENEZES, **Tribunais internacionais** (foreword by P. B. CASELLA, São Paulo: Saraiva, 2013).