© *EJIL* 2004

Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems

Jörg Kammerhofer*

Abstract

Uncertainty abounds in international law and customary international law is no exception. This article seeks to delineate this uncertainty and explain its causes. Not only is there uncertainty surrounding the exact nature of the two elements considered necessary for custom-formation — state practice and opinio juris *— we also do not know how custom-formation works. It is not clear what precisely 'state practice' is, nor do we know how we can have a belief that something is already law in order to create it. The particular uncertainties of customary international law point directly to systemic uncertainties at a higher level. Article 38 of the Statute of the International Court of Justice is convenient, but is it authoritative? What is the basis of our knowledge regarding customary law-making? This article argues that two commonly used approaches to provide a theoretical underpinning — deduction and induction — are fundamentally flawed in their pure forms. Their problems are alleviated, but not solved, by combining them. Without a dominant legal culture and without a written constitution to blind us to other possibilities, not even a pragmatic outlook can save us from uncertainty. However, even where the law is not disputed, it remains an ideal, not real. Law is based on the fiction that it exists.*

This article focuses on one of the problems faced by customary law and, indeed, international law as a whole today. In answer to the question, 'What is uncertain in customary international law?', I will provide an exemplary cross-section of the uncertainties that exist by describing the range of uncertainty in the law on law-making — the meta-law of sources.

* Mag. iur. (Vienna), LL.M. (Cantab.). I wish to thank George Neuspiel, August Reinisch, Alfred Rubin, Karl Zemanek and, in particular, Jason Beckett for their help. This paper would have made much less sense had it not been for their feedback. All errors, whether formal or substantial, remain mine alone.

Uncertainty in international law mainly manifests itself in doctrinal disputes; states do not normally publish abstract views on which norms form international law. Judicial decisions, such as judgments of the International Court of Justice, are concerned primarily with resolving disputes set before them by the involved parties and their responses are tailored to that task. I will seek to demonstrate the range of uncertainty in international law by emphasizing the argumentative structure of jurists' writing, since our understanding of a concept of law is based essentially on what other lawyers before us have said, not on any objective 'proof'. A full discussion of what has been written on customary international law is beyond the scope of this study and, I submit, is not necessary.

Before we begin, it is worth clarifying a crucial point: there is a difference between different levels of law and, with this, different levels of uncertainty. First, we are faced with substantive norms, which are norms of customary international law (for instance, 'innocent passage'). Second, there are norms which regulate the making of 'simple', first-order norms, the meta-rules on the making of customary law (i.e., 'state practice and *opinio juris*').[1] Third, there are questions (rather than proven norms) about customary international law as a category, which refer to difficulties that the very concept of customary norms faces. In this article I shall confine myself to discussing the source-law and its fundamental problems.

The reader will find that my analysis of this topic exhibits my beliefs on what is the law and how it is made, and I would have to be superhuman to be able to write this piece without tainting it with my personal views on what the law is. What I hope to make clear to the reader is that my views do not constitute *the* solution to uncertainty in international law, but merely present *a* theory of customary international law amongst others; unfortunately, they amount to a further contribution to uncertainty. Of course, my approach to this topic makes *tacit* assumptions about the nature and processes of international law. The reader will become aware that I see the construction called 'norm' as the central element of law. My current position on the *ontology of normative systems* is best described as neo-Kelsenian. I submit that it is *impossible* not to presuppose elements of a legal or normative theory. In fact, one of the aims of this piece is to illustrate why we must assume (and assume rather than prove) the foundations of law.

1 Areas within Meta-customary Law Where the Law is Unclear

In this section I will look at some examples of problems associated with finding customary law. Finding customary law means knowing how the law is formed. Customary law is not written and has no 'authoritative' text, which has an inherent 'thereness' and whose meaning need only be 'extracted'. Therefore, the application of

[1] For this distinction see Walden, 'Customary International Law: A Jurisprudential Analysis', 13 *Israel Law Review* (1978) 86, at 87, who uses Hart's terminology of 'secondary rules'. I shall abstain from doing so, because I think that use of this term implies espousal of Hart's theory. I shall call this level 'meta-law'.

customary law involves a recreation of its genesis; one needs to show how it has come about and that the process has been consistent with the meta-law on custom. The difference between this approach and others will be that I do not intend to extract a *synthesis*, but to demonstrate the extent and form that the uncertainty takes. Unlike others,[2] this article does not intend to force a consensus or lowest common denominator upon academic differences.

A *State Practice*

1 The Nature of State Practice — What is State Practice?

The first question, which is contentious, is the nature of state practice. We are not concerned here with deciding which precise events form state practice and which should be discounted, but with what one has to ask oneself before deciding whether, for example, press statements are a form of state practice: What does practice mean? Behind the apparent dichotomy of 'acts' and 'statements'[3] lies a more important distinction: that between one argument that sees practice as the exercise of the right claimed and the other that includes the claims themselves and thus blurs the border between the concepts of 'state practice' and '*opinio juris*'. In a sense, all that states can do or omit to do can be classified as 'state practice', because their behaviour is what they do (the 'objective element') and it is also our only guide as to what they want, or 'believe', to be the law.[4]

This familiar debate may be best exemplified by looking at the views of Anthony D'Amato[5] and Michael Akehurst.[6] D'Amato is clear: 'a claim is not an act. . . . claims themselves, although they may *articulate* a legal norm, cannot constitute the material component of custom'.[7] What is crucial for him is not the making of a claim, but 'enforcement action' — 'what the state will actually do'.[8] This category also includes decisions not to act in situations where the state could have acted, as well as commitments to act. In contrast to this theory, Michael Akehurst believes that the majority view, as evidenced by judgments of international tribunals, is that

2 J. Kirchner, *Völkergewohnheitsrecht aus der Sicht der Rechtsanwendung: Möglichkeiten und Grenzen bei der Ermittlung völkergewohnheitsrechtlicher Normen* (1989).

3 Or, rather, the question to the answer the uniform acceptance of 'verbal acts' as somehow relevant to the customary process gives us. For this acceptance see e.g. Akehurst, 'Custom as a Source of International Law', 47 *BYbIL* (1977) 1; Bos, 'The Identification of Custom in International Law', 25 *German Yearbook of International Law* (1982) 9; M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999); A. D'Amato, *The Concept of Custom in International Law* (1971); Danilenko, 'The Theory of International Customary Law', 31 *German Yearbook of International Law* (1988) 9; International Law Association — Committee on the Formation of Rules of Customary (General) International Law, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (2000), available at http://www.ila-hq.org/pdf/customarylaw.pdf; Mendelson, 'The Formation of Customary International Law', 272 *RdC* (1999) 155.

4 For the difficulties associated with the 'subjective element' of customary law see Section 1B.

5 D'Amato, *supra* note 3.

6 Akehurst, *supra* note 3.

7 D'Amato, *supra* note 3, at 88.

8 *Ibid.*

statements are a form of state practice. Contrary to D'Amato's argument that statements of a state may conflict with its actions while a state 'can only act in only one way at one time',[9] he correctly observes that physical acts can conflict with each other, either with those of other states, at different times or within different government departments.[10] Akehurst states that he thinks it 'artificial to distinguish between what a State does and what it says'. Important acts of state behaviour, such as recognition of another state, do not need a physical act.

This is the starting-point of the traditional debate and few, if any, international lawyers would unambiguously deny the validity of verbal acts for the formation of customary law if the debate were only about these issues. Before we can discuss the ideas of those who have partially lifted the veil of the 'acts versus statements' debate, we need to look at the consequences of the majority view; the collapse of *opinions* of states into the concept of practice. Maurice Mendelson states this when he writes:

> Verbal acts, then, can constitute a form of practice. But their *content* can be an expression of the subjective element — will or belief. . . . Whether we classify a particular verbal act as an instance of the subjective or of the objective element may depend on circumstances, but it probably does not matter much which category we put it into.[11]

The problem with such an approach becomes obvious to us when we read on:

> What must, however, be avoided is counting the same act as an instance of *both* the subjective and the objective element. If one adheres to the 'mainstream' view that it is necessary for both elements to be present, and in particular for the subjective element to be accompanied by 'real' practice, this must necessarily preclude treating a statement as both an act and a manifestation of belief (or will).[12]

This 'collapse' therefore either results in a 'double counting', or, as Mendelson goes on to argue, state practice as such *implies* the subjective element[13] and thus is not merely one phenomenon giving rise to two conclusions, but results in a denial of the separate proof of a second element. This leads us to an interjection, which might well be offered at this point: '[T]he origin of misunderstanding caused by considering verbal acts as custom-creating practice lies in confounding such practice with its evidence or with the evidence of acceptance of the practice as law'.[14] Karl Zemanek is quick to denounce such a distinction; for him, 'distinctions between "constitutive acts" and "evidence of constitutive acts" . . . are artificial and arbitrary because one may disguise the other'.[15] Yet despite such a proposition one can argue that the only

[9] *Ibid.*, at 51.

[10] Akehurst, *supra* note 3, at 3.

[11] Mendelson, *supra* note 3, at 206.

[12] *Ibid.*, at 206–207 (emphasis in original).

[13] *Ibid.*, at 283–293.

[14] K. Wolfke, *Custom in Present International Law* (2nd ed., 1993), at 42; H. Thirlway, *International Customary Law and Codification* (1972), at 57.

[15] Zemanek, 'What is State Practice and Who Makes It?', in U. Beyerlin *et al.* (eds), *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt* (1995) 289. He follows Akehurst in adopting an inclusive view of state practice, but does so for a rather more pragmatic purpose than suggested in this discussion.

way either state behaviour or the views of states can be discovered is through what states do or do not do and that such a distinction might be an essential element of custom-formation.

Who, then, has taken up the question underlying the traditional dichotomy? Three authors I have read make promising remarks. Let us first discuss Hugh Thirlway's *International Customary Law and Codification*. That 'States have done, or abstained from doing, certain things in the international field', he thinks, is the 'substance of the practice required'.[16] From this alone we cannot determine whether he makes a distinction merely between certain types of practice or whether this is a determination of the question of the nature of practice. However, he goes on to determine that state practice is material, that the 'occasion of an act of State practice . . . must always be some specific dispute or potential dispute'.[17] He denies the validity of a mere assertion *in abstracto* as an act of state practice. This means that his theory merely expands the scope of an 'acts only' approach to state practice and, I submit, is only concerned with the traditional dichotomy.[18]

Second, Rein Müllerson promises the reader a discussion of the meaning of the word 'practice'. He acknowledges a difference 'between a state claiming the right of innocent passage through territorial waters of other states, on the one hand, and an exercise of such a passage, on the other'.[19] But next he states that it may be impossible to differentiate 'actual' practice from other forms of practice. Nevertheless, he does talk about the issue: if one were to adopt a broad meaning of practice, one would have to ask 'how to separate practice from what is usually called *opinio juris sive necessitatis*'.[20] After analysing the views of writers he tells us that the perspectives just reviewed by him include 'different manifestations of subjective attitude of participants of international legal relations to various patterns of behaviour'.[21] Indeed, he argues that 'state practice always includes both elements — objective and subjective',[22] but denies that this subjective element always qualifies as *opinio juris*. For him, subjective attitudes of states towards behaviour may be implicitly present in the act of behaviour itself.

This brings us to Karol Wolfke. He ostensibly sets out to discuss the conventional problem of acts versus statements and tells us up front that he thinks that 'customs arise from acts of conduct and not from promises of such acts'.[23] We are faced with a counter-argument to my insistence that the 'real' question does not concern the kinds of practice, but what practice is. Wolfke writes:

> True, repeated verbal acts are also acts of conduct in their broad meaning and can give rise to

16 Thirlway, *supra* note 14, at 58.

17 *Ibid.*

18 He is accordingly criticized by Akehurst within the traditional debate. Akehurst, *supra* note 3, at 4–8.

19 Müllerson, 'The Interplay of Objective and Subjective Elements in Customary Law', in K. Wellens (ed.), *International law: Theory and Practice: Essays in Honour of Eric Suy* (1998) 161, at 161.

20 *Ibid.*, at 162.

21 *Ibid.*, at 164.

22 *Ibid.*

23 Wolfke, *supra* note 14, at 42.

> international customs, but only to customs of making such declarations etc., and not to customs of the conduct described in the content of the verbal acts.[24]

The crucial difference to the other views is that 'conduct' and conduct *described* within one type of conduct, namely statements, are two different things. While, say, the passage of a ship has no 'content', but is simply the passage of a ship, a verbal act is both the verbal act and its content. If a state makes a statement on, say, the continental shelf, it can be used as state practice on making statements. What Wolfke would not accept, however, is that the statement on the continental shelf is an act of state practice on the continental shelf. He continues:

> The unquestionably possible role of verbal acts in the formation of international custom is the source of additional confusion in doctrine, because it mixes up the basic practice — the material element of custom — with various practices consisting, *inter alia* also of verbal acts, which, depending on their content and other circumstances, can constitute direct or indirect evidence of subjective element of custom, that is, the acceptance of the basic practice as law.[25]

The underlying difference hopefully becomes clear at this point. There are two different concepts of state practice: the first option is a narrow and purposeless concept of state practice. A state acts in its international relations. All these actions and omissions are neutral — they are no indication that the state wishes this behaviour to be prescribed. The passage of ships through a strait is a behavioural regularity, nothing more. These regularities of behaviour constitute the material element and can only be employed for customary law-making if the will or belief on the part of the subjects of law — the subjective element — is added. Only the subjective element lets us know which of these become customary law. In essence this means that state practice is merely a regularity of fact, not a norm. Yet at the same time, the material element will form an important part of the customary norm: while the subjective element is the condition which makes the regularity a norm, the regularity determines which behaviour will be prohibited, allowed or required, in short: the prescribed behaviour.[26] It may form the first part of a typical legal norm: *if* 'action or omission' (*Tatbestand*), *then* 'legal consequence' (*Rechtsfolge*); one could call it the '*prospective prescribed behaviour*'. No other function is fulfilled by state practice according to this concept: the regular making of statements on the continental shelf, seen as state practice, may lead to no other rule than a prescription of the making of statements on the continental shelf. However, such statements are not disqualified from evidencing the will that something be law or the belief that something is law; in contradistinction, only the act, not its content, is eligible as state practice.

The second option is a wide and purposive concept. 'State practice means any act or statement by a State from which views about customary law can be inferred'.[27] It certainly includes states' normative convictions and some writers admit only behaviour from which such a normative element can at least be *inferred* as state

[24] *Ibid.*, at 42, 70.

[25] *Ibid.*, at 43.

[26] As discussed above: see Wolfke, *supra* note 14, at 70.

[27] Akehurst, *supra* note 3, at 53.

practice. The essence of state practice is its 'autonomy', as opposed to *opinio juris*. Because the content of the manifestations of states' wills is necessarily incorporated within the concept, one can clearly identify what state practice is without looking at what states want to have prescribed.

The subjective element as the sense of an act of will[28] is both bound not to be immediately perceptible as such and bound to be perceived through its manifestation. This manifestation is everything that constitutes an 'Is' in Kelsen's terminology: reality.[29] In another sense, everything states can do or omit to do, if it is a manifestation of their will, can become a manifestation of *opinio juris*. So while this does not 'solve' the problem of the nature of state practice, it helps us insofar as we become aware that as long as we cannot rethink what states will, we are stuck with the physical manifestations thereof.

A second, ancillary question concerns the role of omissions in state practice. Most commentators would more or less readily admit non-actions.[30] Maurice Mendelson feels he needs to restrict the role of abstentions to those which are not ambiguous in the circumstances.[31] This is a reasonable precaution within the framework of his theory, since if one can infer the subjective element from state acts one might find that if one admits abstentions as an 'act', a norm could be 'created' by a state simply doing nothing and meaning nothing by it. A distinction between 'abstention from acts' and 'passive practice' is introduced by Gennady Danilenko. Whereas the first category probably refers to the reaction of other states *vis-à-vis* a state's active practice (and, he thinks, increases the precedent value of the active practice), the second category refers to what I have called omissions. He sees the value of that type of practice in the fact that 'usual or habitual abstentions from specific actions may constitute a practice leading to a rule imposing a duty to [a]bstain from such actions in similar situations, i.e., a practice constituting a prohibitive norm of international law'.[32]

Again, I am tempted to shift the focus of the problem away from state practice. The views that jurists adopt of the 'eligibility' of abstentions, omissions, non-acts, passive practice or whatever one chooses to call it will probably depend on the view one adopts of the nature and function of *opinio juris*:

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so-, for only if such abstention were based on their *being conscious of having a duty to abstain* would it be possible to speak of an international custom.[33]

[28] H. Kelsen, *Allgemeine Theorie der Normen* (1979), at 131. See Section 2D.

[29] The essential duality of '*Sein*' ('Is') and '*Sollen*' ('Ought'). Kelsen, *supra* note 28, at 44. See Section 2C.

[30] See *inter alia* Akehurst, *supra* note 3, at 10; Bernhardt, 'Customary International Law', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1992), Vol. 1, 898, at 900; H. Günther, *Zur Entstehung von Völkergewohnheitsrecht* (1970), at 123–127; Kunz, 'The Nature of Customary International Law', 47 *AJIL* (1953) 662, at 666; Wolfke, *supra* note 14, at 61.

[31] Mendelson, *supra* note 3, at 108.

[32] Danilenko, *supra* note 3, at 28.

[33] *The Case of the S.S. 'Lotus'*, 1927 PCIJ Series A, No. 10, at 28 (emphasis added).

If a subjective element is somehow included in the concept of state practice, as some seem to hold, then one will have a basis for discrimination. If one does not follow that theory, then one will have to distinguish by reference to an external element of state intentions, will or belief.

2 *The Quantity of State Practice — How Much and for How Long?*

Others[34] have devoted much more space to these questions than I intend to give them. I submit that it is not necessary to duplicate their efforts in order to show where the uncertainties lie. The standard exposition of the quantity of state practice needed is to be found in the *North Sea Continental Shelf* cases before the International Court of Justice (ICJ):

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are especially affected, it should have been both extensive and virtually uniform in the sense of the provision invoked . . .[35]

I dare say that there is general acceptance amongst writers on this topic; that is to say that in one form or another most jurists would rather think that a practice has become customary law[36] over another practice if it exhibited longer and more consistent usage by more states than a practice which had been in use for a shorter time, and with less repetition and generality than the first. Dissent seems to come from Karol Wolfke: 'The requirement of a practice being uninterrupted, consistent and continuous also no longer holds good.'[37] Read in context it becomes clear that he merely wishes to express the view that modern international society needs less time and repetition than was required in the past and so is in line with the majority. Bin Cheng, in his oft-cited article on space law, seems to be able to do without repetition or time — instant customary law — but this comes at a price: state practice is no longer a required element for the formation of customary law.[38] This puts him outside the spectrum we are considering here; for if one does not need practice, one needs neither a little nor much of it.

No-one imposes exact limits on the amount of state practice needed to create law. While there might not be significant disagreement amongst writers and the tribunals on the criteria, there is still uncertainty. Thus, uncertainty in international law is not just a function of academic and judicial disagreement. It is arguable that it is impossible or impractical to delimit the quantity, but the question of whether a known number of precedents is enough to have made law is highly relevant in practice. In an

[34] Akehurst, *supra* note 3, at 12–22; ILA, *supra* note 3, at 20–29; Mendelson, *supra* note 3, at 211–227.

[35] *North Sea Continental Shelf*, ICJ Reports (1969) 3, at 44 (para. 74).

[36] . . . questions of *opinio juris* aside . . .

[37] Wolfke, *supra* note 14, at 60.

[38] Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 *Indian Journal of International Law* (1965) 23, at 45.

imaginary dispute one might argue, for example, over whether the invasion by state 'A' of state 'B' was lawful. A claims that a customary international law norm of 'humanitarian intervention' has come into 'existence' and legitimizes this use of force. For the sake of the argument, both parties agree on the number of precedents there have been. While A says that these were enough to create international law, B denies that the number was adequate. It simply remains uncertain, as long as the law does not make the number known or knowable.

3 The Impossibility of Change in Customary International Law?

Let me discount a widely held but wholly erroneous belief which plagues state practice and the nature of customary international law in general: It is said that traditional customary law theory leads to the conclusion that change in customary international law is not possible, because the practice that 'seeks' to establish a diverging norm must necessarily be a violation of the previously established norm. Since 'this line of reasoning . . . runs counter to the maxim *ex iniuria jus non oritur*', one of these authors claims, law cannot be formed thus. 'It must be an extraordinary system of law which incorporates as its main, if not the only, vehicle for change the violation of its own provisions.'[39]

The peculiarity of this mode of creating law is that its norms are created in part by acts which are precisely an application of the resultant norm. In a nutshell, it is the *very idea* of customary law that the subjects' factual behaviour patterns, i.e. *customs*, irrespective of their legality, count. Let us assume, for example, that most subjects wear a red hat. They also believe that the law obligates the wearing of a red hat. The act which makes law is necessarily the act to which the law is applied. While the wearing of a red hat makes the 'red hat norm', as soon as that is a valid norm, the wearing of a red hat *vel non* is a question of the application of a norm — the red hat norm. If one were to distinguish legal and illegal behaviour and only legal behaviour could be counted as state practice then, of course, customary law could not change.

The above-cited maxim is breached only if the law (e.g. our 'red hat norm') were claimed to be changed solely by the puissance of facts which constitute a violation of the law. The difference here is that there is a *meta*-law on customary law creation *specifying* practice as a *Tatbestand* for the creation of law. Scholars confuse two separate norms: on the one hand we have the substantive norm, on the other hand there is the meta-norm on custom-creation. The creation and the application of norms are two different things. The first is the application of the meta-law on law creation and the second is the application of the 'simple' customary law of behaviour. Mr. X wears a green hat. As an application of the 'red hat norm', it is a violation. As an application of the 'change in customary law' norm, it is a building block for a possible new norm. For example, after the coming-into-validity of the 'red hat norm' acts of practice are an application of the 'red hat norm' and, if they break the 'red hat norm', they are violations of the 'red hat norm'. Yet, they are not disqualified from constituting the building-blocks of a modified 'green hat norm'. Once the 'event

[39] G. J. H. van Hoof, *Rethinking the Sources of International Law* (1983), at 99.

horizon' of the 'green hat norm' is crossed, the 'green hat norm' becomes law, but only from that moment, and deviating instances between the coming-into existence of the 'red hat norm' and the 'green hat norm' remain violations of the 'red hat norm'. Why would violations not be eligible as state practice? Customs (behavioural regularities) have no 'legality' for their purpose as building-blocks of (new) law. The act has two meanings, given to it by two different norms. The legal consequences of the two norms might be called incompatible, but only from a political or practical, not from a logical or normative point of view. I do not see a logical contradiction in saying that the wearing of a green hat is to be punished and that it is part of law-making; there are two norms at work here.[40]

B Opinio juris

The concept of *opinio juris* is arguably the centrepiece of customary international law. It is the most disputed, least comprehended component of the workings of customary international law. At the heart of the debate lies an important conflict: on the one hand, customary law-making seems by nature indirect and unintentional. On the other hand, law-making normally requires some form of intentional activity, an act of will. In the international legal system, great value has traditionally been placed in the states' agreement or consent to create obligations binding upon them; 'no state can be bound without its will' might be a typical statement.

An interesting development is the ascendancy of the *opinio juris* theory. The reader will be aware that earlier surveys of the literature on customary law had included many other theories which radically differed from the subjective element as it is now understood.[41] It is true that nowadays the *opinio juris* theory is neither clearly defined nor is it the only interpretation of the subjective element,[42] but while it then was just one theory amongst others it has advanced to the status of 'orthodoxy' or '*herrschende Lehre*'.[43]

Within the complex of problems associated with the subjective element, the first and elemental question to be solved is the nature of *opinio juris*: What exactly *is* this element? What is it meant to represent? Is it a necessary or a contingent ingredient? The uncertainty here is influential for all the problems associated with the subjective element. I have set myself the task of exposing the bandwidth of opinions relevant in today's discussions of customary international law.

We will assume, just for a few paragraphs, that orthodox *opinio juris* theory is not orthodox at all. For an understanding of the fundamental questions — and for an

[40] For a more precise formulation of the relationship between the application and creation of law see H. Kelsen, *Reine Rechtslehre* (2nd ed., 1960), at 240.

[41] E.g. Günther, *supra* note 30, at 15–58, 149–154; Kirchner, *supra* note 2; R. Fidelio Unger, *Völkergewohnheitsrecht — objektives Recht oder Geflecht bilateraler Beziehungen: Seine Bedeutung für einen 'persistent objector'* (1978).

[42] For a recent re-interpretation of *opinio juris* see Roberts, 'Traditional and Modern Approaches to Customary International Law', 95 *AJIL* (2001) 757.

[43] Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law', 39 *German Yearbook of International Law* (1996) 198.

understanding of the subtle differences of opinion within orthodoxy — we need to analyse the nature of the subjective element on a level playing field, without giving preference to orthodoxy. This I hope to achieve by counterposing two somewhat polarized concepts — namely that of 'voluntarism' and the '*opinio juris* approach'[44] — discussing their merits and demerits, and by subsequently clouding the strict dichotomy by loosening the strictures of the theoretical models. I am not concerned with the merits or demerits of their respective ideological and philosophical foundations, I shall not discuss them here.

1 *Consent*

The theory of consent[45] requires that every state needs to agree to being bound by a norm of customary international law. It is said that this theory can easily describe *intentional* customary law-making (as may have happened with the 1945 Truman Proclamations) — the processes of 'initiation, imitation and acquiescence'.[46] Another advantage is that one of the problems plaguing the opposite approach, the '*opinio juris* paradox', is avoided by taking the element of 'belief in a law' away and supplanting it with 'consent that something be law'. As Raphael Walden put it: 'The tacit consent theory, in all its forms, has the great merit of recognising the *constitutive* nature of custom.'[47] Its greatest problem is inferred consent. It is unlikely that the majority of states actively participate in the making of any one norm of customary international law. Most of them will neither consent nor protest developments. The question is — and it is one that has puzzled many commentators over the years — how to connect this 'inert mass' of non-participating states to the creation of customary law? The staple solution has been to *infer* consent: this is a kind of 'qualified silence' called acquiescence.[48] Only affected states which knew, or might have been expected to know, of the practice can be said to have acquiesced to it.[49] This raises the valid question, and indeed is the *crux* of consent theories, of whether implied or inferred views can really be said to evidence what states will.[50] At best this is a fiction; one may ask, however, whether silence equals consent.[51] The proponents are open to the charge of being inconsequent,[52] since individual consent means a positive emanation of will by every state bound, not only by some.

[44] The distinction is taken from Mendelson, 'The Subjective Element in Customary International Law', 66 *BYbIL* (1996) 177, but I do not propose to portray the two concepts as he does.

[45] E.g. Danilenko, *supra* note 9; Elias, 'The Nature of the Subjective Element in Customary International Law', 44 *ICLQ* (1995) 501; Wolfke, *supra* note 14.

[46] Mendelson, *supra* note 44, at 185.

[47] Walden, 'The Subjective Element in the Formation of Customary International Law', 12 *Israel Law Review* (1977) 344, at 355 (emphasis added).

[48] MacGibbon, 'Customary International Law and Acquiescence', 33 *BYbIL* (1958) 115.

[49] Aptly distilled by Mendelson, *supra* note 44, at 186, from the ICJ's reasoning in *Fisheries*, ICJ Reports (1951) 116, at 138–139.

[50] Byers, *supra* note 3, at 144.

[51] *Qui tacet consentire videtur?* Mendelson, *supra* note 44, at 186; 'On the whole it is difficult to draw any conclusion from the fact that a state has taken up a passive attitude.' Gihl, 'The Legal Character and Sources of International Law', 1 *Scandinavian Studies in Law* (1957) 51, at 79.

[52] Kirchner, *supra* note 2, at 17.

2 Opinio juris *Properly So Called*

The second part of this dichotomy is the theory of the *opinio juris sive necessitatis*.[53] This view has traditionally[54] been summed up by quoting from the Court's judgment in the *North Sea Continental Shelf* cases:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a *belief that this practice is rendered obligatory by the existence of a rule of law requiring it*. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough.[55]

While this may be the way the theory turned out to be, it has other roots. The origins of the concept lie in theories which take customary 'law' to be a manifestation of pre-existing law.[56] This presents no particular problem because the belief in law that already exists is not constitutive, only declaratory. Were it to be seen as constitutive one might ask what is the result of the customary process if we have and are able to prove pre-existing law? With François Gény's *Methode d'interpretation et sources en droit privé positif* (1899) international legal scholarship identified a turning-point in the development of this view of the subjective element. He is said to have coined the expression *opinio juris sive necessitatis* and he abandoned the view of the pre-existing law.[57]

The so-called '*opinio juris* paradox' has become a persistent problem in international legal scholarship. If it is the belief that something *is already* law that counts, then it can only be used to identify existent customary international law.[58] The belief cannot be true with respect to conduct that had either hitherto not been covered by a norm or by a different norm, believing something to *be* law which is only *becoming* law. Therefore, the belief is necessarily, not just ordinarily, a mistaken belief:[59]

> Gény concludes that at the source of the formation of custom, there *must* be an erroneous belief on the part of those who are the creators of custom that they are already legally bound by the very rule which they are in the process of creating: 'an error seems at least at the beginning of a usage a *sine qua* condition for the conviction that such usage is binding. . . .'[60]

[53] Also called the '*Zwei-Elementelehre*', '*Theorie von der Rechtsüberzeugung*' or 'belief theory'.
[54] Akehurst, *supra* note 3, at 31.
[55] *North Sea Continental Shelf*, *supra* note 35, at 45 (para. 77) (emphasis added).
[56] E.g. the *Volksgeist* of the German *historische Rechtsschule* (Puchta, von Savigny) described by D'Amato, *supra* note 3, at 47–48; Walden, *supra* note 47, at 357–359.
[57] Benson, 'François Gény's Doctrine on Customary Law', 20 *Canadian Yearbook of International Law* (1983) 267.
[58] 'Here, *opinio juris* is at worst a harmless tautology.' D'Amato, *supra* note 3, at 73.
[59] Kelsen, 'Théorie du droit international coutumier', 1 (N.S.) *Revue internationale de la théorie du droit* (1939) 253, at 263.
[60] Benson, *supra* note 57, at 276 (emphasis in original).

Many theories have been developed to circumvent this problem.[61] The first is a tempting invitation by Hans Kelsen to accept that states act in error in making new customary law, but he withdraws this invitation, '*puisque cette "norme" n'existe pas encore tant que dure la procedure de la création coutumiere*'.[62] The usability of the belief is thereby conditioned upon the truth of the belief. It bears pointing out, however, that 'really *is* law' is a different concept to 'states really *believe* it to be law' and this, again, is different from 'states *say* they believe it to be law'.[63] Kelsen later modified his views on the subjective element (he had originally rejected a need for *opinio juris*)[64] to the point that states ought only to believe in the existence of *a* norm, not specifically a legal norm.[65] This modification misses the point: the reason why the subjective element, formulated as *opinio juris*, is considered necessary is first to determine between 'mere' usage and customary *norms* and second to delimit between customary *law* and other normative orders. Hugh Thirlway and Raphael Walden widen the concept to include both the belief that the practice is required by law (whether erroneously or not — *opinio juris*) and the belief that practice ought to be law (*opinio necessitatis*).[66] 'Only if the view that the custom *should* be law has the effect of making it law (provided it is coupled with sufficiently general usage), can subsequent practice be coupled with the correct view that the custom is law.'[67]

3 A Dichotomy Resolved — Or Eased?

The dichotomy between the voluntarist and intellectualist camps is wrong and cannot be maintained.[68] The prevalent theories of customary law neither recognize pre-existing law as the basis of customary international law, nor is it approximated to an unwritten agreement. While traditionally the elements of 'consent' and '*opinio juris*' are seen as irreconcilable antagonists, modern theories tend to smudge the two extreme notions. I submit that these theories all tend towards the inclusion of an act of will within their notion of customary law. It is an acknowledgement of the constitutive function of *opinio juris*. But this 'smudging' of the two extremes leads to further uncertainty and that is a direct result of the solution of the dichotomy: the lines between 'will' and 'belief' become unclear: can one say that a belief, especially if formulated as 'belief that the practice *becomes* or *ought to be* law', is not an act of will? On the other hand, is the 'belief that something *is* law' really an act of will?

[61] Nearly every monograph and many articles on customary law contain descriptions of those efforts; e.g. Slama, '*Opinio juris* in Customary International Law', 15 *Oklahoma City University Law Review* (1990) 603, at 620–625; Yee, 'The News that *opinio juris* "Is Not a Necessary Element of Customary [International] Law" Is Greatly Exaggerated', 43 *German Yearbook of International Law* (2000), 227, at 231–234.

[62] '. . . because this "norm" does not exist during the procedure of custom-formation', Kelsen, *supra* note 59, at 263 (author's translation).

[63] Akehurst, *supra* note 3, at 36.

[64] Kelsen, *supra* note 59, at 264.

[65] H. Kelsen, *Principles of international law* (1952), at 307.

[66] Walden, *supra* note 1, at 97.

[67] Thirlway, *supra* note 14, at 55.

[68] Elias, *supra* note 45, at 501.

In a sense, the uncertainties of customary international law provide support to the orthodoxy. The solution to the problem we identified earlier, that there needs to be a *mistaken* belief in law where there is none, is no longer quite as unattractive. Because of the uncertainty it is impossible to distinguish between what the law is and what it ought to be. One would have to know what the law is in order to distinguish between the *lex lata* and *lex ferenda*: The object of ascertaining the *opinio juris* is to find out what the law is and that is what has to be proven. Due to uncertainty, it is difficult to tell when a norm of customary law has emerged. Thus, if a state believes some norm to be valid customary international law, it has no means of knowing whether this belief is true. States are not in a position to know whether the proposed norm they are championing has actually become law. The 'mistake' is no longer clear nor 'necessary' and the constitutive function of the states' beliefs comes to the fore.[69]

What follows from a constitutive function? First, the nature of the subjective element is that it contains an act of will. It is precisely an act of will that makes law positive rather than hypothetical. (Section 2B) Second, because the subjective element does not have to correspond to some pre-existing legal 'reality', i.e. the claims made do not have to be 'truthful', it is the fact of the making of the claim, not of the 'value' of the claim that is relevant. A constitutive view of *opinio juris* requires that the veracity of the beliefs be secondary to the *existence* of the belief. This may involve making an error of judgement into a condition for the creation of customary law. If that were so — and it is doubtful whether a mistake need necessarily be made — that might well violate lawyers' sense of aesthetics, but I submit that there are no *a priori* reasons why such a conception should not be a method of making law. Orthodoxy does not demand 'that *existence* [of law] is made a condition for [its] creation',[70] but rather that the *existence of the belief* is made a condition for the validity of customary international law. The difference is the essence of the constitutive function — its presence, not its content, is the decisive factor in the creation of law.

2 Fundamental Problems of Customary International Law

The theoretical problems of customary international law are the theoretical problems of international law as a whole. Therefore I thought it best to emphasize the two closely related problems which bedevil law-making and its perception. First, international law does not seem to have a constitution which regulates the nature, foundation and interrelation of sources. It is an all-pervading problem, one that will haunt us throughout this section. It threatens to cripple the whole endeavour of 'finding the law'. There is no (perceptible) constitution of international law:[71] we can neither adequately know the rules of custom-formation nor how those rules come about.

[69] In a sense this was discussed by Walden, *supra* note 1, re-interpreting the 'internal aspect' of rules developed by H. L. A. Hart, *The Concept of Law* (2nd ed., 1994).

[70] Hoof, *supra* note 39, at 93 (emphasis added).

[71] 'There is no international "constitution" specifying when acts become law.' D'Amato, *supra* note 3, at 91.

The second issue to be considered is the duality of induction *versus* deduction in the approaches to international law. All works of legal literature on customary law must find a method of stabilizing the findings of their research, and must have a set of criteria which determine whether those findings are 'valid'. I shall classify the methods employed as inductive or deductive. The criterion of the inductive method is the correspondence of the thesis developed by an author with the 'facts' of international life. Authors who espouse that method will try to induce the law on customary law-making from instances where customary law has been created in the past, a sort of state practice concerned not with rules of customary law, but with the way in which these rules come about. The criterion of the deductive method is an abstract affair. Since this method deduces the rules from more general propositions, international lawyers who take this as their method are left with an argument from logic or another normative order ('natural law' or morals); in any case they must use extra-legal, non-factual 'authorities'.

Both approaches have strengths and weaknesses. Induction's results immediately resemble provable facts, an empirical correspondence. Deduction has the benefit of internal logical consistency. The first approach, however, violates the duality of norm and fact: law is precisely not facts, it is not (necessarily) a description of reality — unless everybody obeys the law — but a prescription for future behaviour. The second approach, on the other hand, is improvable. Its arguments are based on anything but the law (or things the law says determine the relevant law) and it must remain a fiction.

The counter-positing of these two views will remind the acute reader of Martti Koskenniemi's dichotomy of 'Apology' and 'Utopia'.[72] In a sense, this is true. The duality of 'normativity' and 'concreteness'[73] is a view of how international law in general is made. The dichotomy I intend to discuss is very near to his, but crucially different in some respects. First, whereas he sees the two patterns as mutually exclusive (and irreconcilable), whereas he sees the legal discussion as trapped in constant movement between those two patterns and whereas Koskenniemi regards the patterns as tending towards their logical conclusion — the extreme — I doubt that the extreme is the tendency nor are the patterns *a priori* irreconcilable. The basic assumption of his and Kennedy's, namely that international law has as *a priori* foundations *either* consent *or* abstract substantial principles of justice (and the like) and that either, but not both, principles *must* be the pre-positive foundation of that legal system, is simply wrong. It depends, I submit, on the positive normative order one is describing. Second, when discussing customary international law Koskenniemi bases his fundamental critique on a dichotomy I have not perceived as constituting the essential problem, but rather as an important detail of customary law: the duality of 'psychologism' and 'materialism'.[74] While the 'descending', non-consensual

[72] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

[73] He calls them 'descending' and 'ascending' patterns of justification. *Ibid.*, at 40–41. For a similar distinction see D. Kennedy, *International Legal Structures* (1987), at 29 *et seq.*

[74] Koskenniemi, *supra* note 72, at 362–389.

pattern is represented by the material element — state practice, the 'ascending' state will, belief or interest is embodied in the subjective element — *opinio juris*. In his view, the *crux* lies within the two constituent elements of the law:

> [W]e cannot automatically infer anything about State wills or beliefs — the presence or absence of custom — by looking at the State's external behaviour. The normative sense of behaviour can be determined only once we first know the 'internal aspect' — that is, how the State itself understands its conduct. . . . [D]octrine about customary law is indeterminate because circular. It assumes behaviour to be evidence of the *opinio juris* and the latter to be evidence of which behaviour is relevant as custom.[75]

The reader will know that above (Section 1A1) I proposed that this is actually a *different* problem: it can only become fundamental if one does not differentiate behavioural regularities that constitute state practice from the material evidence of *opinio juris*. Only the view of state practice I then called the 'wide concept' can be subject to Koskenniemi's criticism and only if the proponent cannot distinguish the two elements contained within his so-called 'state practice'. As lawyers we will always have to work with the factual for the determination of the non-factual: every criminal court, for example, must determine the *mens rea* of the defendant without being able to open up his brain and read his thoughts. It is the same with the ascertainment of *opinio juris* in customary international law.

A *What is Meta-customary Law?*

Two preliminary questions will be tackled in this section. First, what kind of law are these laws on law-creation? Second, does Article 38(1)(b) of the Statute of the International Court of Justice constitute the formal source itself? It is only after the uncertainties in these areas are explained that we can discuss the duality of induction and deduction: How do the authors writing on the subject get hold of the norms/rules/regularities they say govern the making of customary international law? The last section will tackle the 'penultimate giant'[76] amongst international legal theoretical problems: we will try to get to grips with constitutional and hierarchical uncertainty mentioned earlier.

1 *The Nature of the Meta-norms*

The question of what form these meta-norms of law-creation take might be considered secondary. It is quite important, however, for the endeavour that is called international legal scholarship to find clues as to where one might find the laws on law-creation and that depends on the form these meta-laws take. Taking the law to be an *ontology of norms*, we can describe the 'kinds' of law as the phenomena through which the norms manifest themselves: a *Rechtsformenlehre*.[77]

The question is answered in different ways: First, scholars contend that norms on

[75] *Ibid.*, at 388.

[76] . . . the ultimate giant being the foundation — source of validity — of all norms.

[77] W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (1983), at 38.

the making of customary international law are themselves customary international law. Herman Meijers and Raphael Walden take H. L. A. Hart's idea of secondary rules to international law, something the latter author had not done.[78] Their contention is that the secondary rules of law-creation are customary rules.[79] Gennady Danilenko ascribes to Hans Kelsen the view that 'a positive customary rule cannot determine custom as a law-creating procedure'.[80] This is not accurate, because the Austrian jurist clearly does not support that view in the place cited:

> . . . wenn die Verfassung der Rechtsgemeinschaft nicht im Wege der Satzung, sondern im Wege der Gewohnheit zustande gekommen ist . . . Diese Situation kann man nicht dahin deuten, daß Gewohnheit von der durch Gewohnheit erzeugten, also positivrechtlichen, Verfassung als rechtserzeugender Tatbestand *eingesetzt* wird. Das wäre eine *petitio principii*. Denn wenn die positivrechtliche Verfassung . . . im Wege der Gewohnheit erzeugt werden kann, *muß schon vorausgesetzt werden*, daß Gewohnheit ein rechtserzeugender Tatbestand ist.[81]

In effect, all he is saying is that it is a *petitio principii*[82] if, *and only if*, the constitution is itself customary law. Assuming the existence of this constitution would mean assuming customary law to be a source of law. In the spirit of Kelsen one might ask, however, whether customary international law always *has to* relate to a factuality, i.e., an action or omission, whether it always has to be a prescription of *behaviour*? How about the other two normative functions (authorization to create norms and derogation)?[83] One can indeed argue that customary international law is incapable of itself empowering the creation of further norms. State practice cannot be directed at an 'Ought', an 'Is' cannot regulate the relationship to a norm. No practice is possible with respect to rules creating rule-creating rules, creating rules, unmaking rules (formal abrogation), because such a 'practice' would necessarily be in the ideal realm and precisely not real — which is what practice *per definitionem* is. If one therefore were to either assume a *Grundnorm* or to have a non-customary norm which would make customary law a formal source of law, then customary law could not itself create further 'steps' of the normative pyramid. All customary norms would be on the same normative level. This would not exclude a hierarchy along the lines of *jus cogens*, because this is an extrinsic quality of norms added, not a superordinate source of law.

[78] 'These constitutive requirements [for the making of treaty and customary law] are themselves also rules of treaty law and customary law.' Meijers, 'How is International Law Made? — The Stages of Growth of International Law and the Use of Its Customary Rules', 9 *Netherlands Yearbook of International Law* (1979) 3, at 3 n. 1; Walden, *supra* note 1, at 88 *et seq*. In contradistinction see Hart, *supra* note 69, at Ch. X.

[79] The specifics of Hart's theory and its espousal by international lawyers will be discussed below. (Section 2C)

[80] Danilenko, *supra* note 3, at 17.

[81] '. . . if the constitution of a legal community was not created by legislation, but by way of custom . . . This situation cannot be seen as the constitution which has been created by custom, that is [a] positive [constitution], *empowering* custom as legislative *Tatbestand*. That would be a *petitio principii*. If the positive constitution . . . can be created by custom *one must presuppose* that custom is a legislative *Tatbestand*.' Kelsen, *supra* note 40, at 232 (author's translation, emphasis added).

[82] The existence of the *petitio principii* was pointed out by Danilenko as the reason for Kelsen's purported rejection of the thesis.

[83] Kelsen talks about four functions of norms: prescription, permission, authorization, derogation. Kelsen, *supra* note 28, at 76 *et seq*.

Subordinate sources could not be created by customary norms — which somewhat relativizes the claim that '*pacta sunt servanda*' is merely a norm of customary international law. (Section 2E1) If one were to make this assumption, one would have to conclude that meta-customary law cannot be customary law. G. J. H. van Hoof thinks that the problem mentioned can be solved by a widening of the two requirements of customary international law, 'encompass[ing], for instance, also abstract or general declarations on the part of States.'[84]

Second, one could imagine a kind of constitutional law on a higher level, a truly superior meta-law, something which German legal language might call '*Völkerverfassungsrecht*'. There seems to be no constitution, however, which makes such designs positive rather than hypothetical.[85] Third, Alfred Verdross had proposed, in a 1969 paper, a multiplicity of custom-creative processes.[86] He was guided by the deficiencies he identified in common theories about custom-formation; the resultant theory would mean that the unity of all customary international law would be destroyed and that 'unwritten international law' would take its place as a mere empirical *Sammelbegriff*, not as a normative system.[87] Fourth, the view is not uncommon that the constitutional norms themselves originate outside any sources as direct product of a formless consensus of states.[88] Gennady Danilenko, though distancing himself from the contention just mentioned, himself espouses an indistinguishable position just sentences later.[89] The argument that law is not just *ultimately*, but that even its sources are *directly*, based on facts or other ideals, that law has no role in determining what procedure creates law is certainly extreme,[90] but an extreme which is surprisingly widely held. It can be associated with both the inductive and deductive methodologies and shall be further discussed there.

[84] Hoof, *supra* note 39, at 107. The argumentation in this paragraph ties in with the crucial question of the nature of state practice. (Section 1A1)

[85] See Section 2E.

[86] Verdross, 'Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts', 29 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1969) 635. Helmut Strebel talks about the '*durch das Dogma von der Allgemeingültigkeit des Gewohnheitsrechtsbegriffs und, andererseits, die unverkennbare Unterschiedlichkeit der Entstehungsbedingungen und Erfordernisse von Gewohnheitsrecht geschaffenen Dilemma*'. 'the dilemma created, [on the one hand] by the dogma of the generality of the term "customary law" and, on the other hand, [by] the unmistakeable diversity of the conditions for the creation of customary law". Strebel, 'Quellen des Völkerrechts als Rechtsordnung', 36 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1976) 301, at 322 (author's translation).

[87] Incidentially, Verdross had earlier sought to found *both* treaty and customary international law on the *Grundnorm*: *pacta sunt servanda* — which differed from Kelsen's conception of that term. A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926).

[88] A. Verdross, *Die Quellen des universellen Völkerrechts* (1973) 20; H. Mosler, *The International Society as a Legal Community* (1980) 16, cited in Danilenko, *supra* note 3, at 17.

[89] 'In practice, the recognition of custom by States as a source of international law, as well as the recognition of other sources, is determined by objective extra-legal factors inherent in the structure of the international community.' Danilenko, *supra* note 3, at 17.

[90] For a scorching criticism of that view, see Günther, *supra* note 30, at 97.

2 *Article 38(1)(b) as Authoritative*

Almost all works on the sources of international law and the relevant chapters in general works on international law start with Article 38 of the Statute of the International Court of Justice as the fountainhead of their discussion of the sources.[91] Few works go beyond the well-known *trias* and most of those only present supplemental, additional sources,[92] but do not question or do away with Article 38 as the basis.

A few authors see Article 38 as an *authoritative statement* (formal source) of the sources of international law.[93] I use the term 'formal source' in this article as the norm which is the source both of validity and the origin of new norms dependent upon that first source. The authors above consequently state that (in the case of custom) Article 38(1)(b) of the Statute *itself* is the norm which gives all (presumably post-1920) customary international law norms their validity, makes them international law and is their 'pedigree'. It seems curious to find such a fundamental norm of international law in an, admittedly important, treaty[94] defining the applicable law for an, admittedly important, but nevertheless *particular* international tribunal. Also, how can a treaty include the formal source of treaties in general (Article 38(1)(a))? On what legal basis does the Charter operate? What legal basis did treaty or customary norms have which were concluded or have evolved before the entry into force of the UN Charter?[95]

Many others do not subscribe to such an extreme view. They see Article 38 merely as a *correct* statement of what the formal sources of international law are.[96] The difference is one of kind, not just of degree. In effect, the latter position is that the provision *recognizes* non-Charter norms while the former position is that the Charter provision *is* the norm-giving binding force. It is, however, doubtful whether even that is the case. First, there may be yet other sources of international law not mentioned in Article 38.[97] Second, there are those who do not believe that Article 38 is the

[91] E.g., A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd ed., 1984), at 321–412; R. Y. Jennings and A. Watts (eds), *Oppenheim's International Law* Vol. 1 (9th ed., 1992), at 24; Pathak, 'The General Theory of the Sources of Contemporary International Law', 19 *Indian Journal of International Law* (1979) 483, at 484.

[92] Such as 'certain decisions of international organizations'. Bos, 'The Hierarchy among the Recognized Manifestations ("Sources") of International Law', 25 *Netherlands International Law Review* (1978) 334, at 334.

[93] B. Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001), at xvii-xviii. Nobody doubts, however, that it is authoritative for the Court as an 'applicable law' clause. Cf. Fitzmaurice, 'Some Problems regarding the Formal Sources of International Law', in F. M. van Asbeck *et al.* (eds), *Symbolae Verzijl. Présentées au Prof. J. H. W. Verzijl á l'occasion de son LXX-ième anniversaire* (1958) 153, at 173.

[94] The Statute of the International Court of Justice is, of course, an 'integral part of the [United Nations] Charter', as Article 92 of the Charter reminds us.

[95] 24 October 1945.

[96] R. S. Pathak calls it the '*repository* of those sources'. Pathak, *supra* note 91, at 484 (emphasis added). '... is at present incorporated into treaty law by Art. 38', Danilenko, *supra* note 3, at 17.

[97] 'Nowhere it is laid down that the list in Article 38 is exhaustive, hence it is possible to have other sources of law ...'. Menon, 'An Enquiry into the Sources of Modern International Law', 64 *Revue de Droit International, de Sciences Diplomatiques et Politiques* (1986) 181, at 182.

'foundation for the doctrine of the sources of International Law'.[98] Alf Ross comes to this conclusion, because for him the sources of law are themselves not based in law, but in facts.

The formulation of Article 38(1)(b) has repercussions on customary theory for, if that formulation were either *the* authoritative statement or a correct statement of what customary international law is, meta-law would have to conform to its particular wording. In the end it all depends on the view one has with regard to the theory of sources.

B *Deductive Methodology and the Problem of the Hypothetical Law*

In the next two sections I will try to portray a polarized view of theoretical approaches to international law. It is the extreme, the consequent application I am interested in, because these radical positions reveal the underlying principles far better than the 'middle-of-the-road' theories which form orthodoxy. It will also become clear that I have far less to say on deduction than on induction. First, far more scholars today hold relatively clear inductive views than pure deductive views. While natural law and the like may still be popular, a derivation of a legal system from pure reason alone is not to be found; an element of human interaction is present in every theory. Second, the main problem of inductive approaches is far more easily overlooked and muddled with a bit of creative writing than that of deduction. It is easy to say that one merely wishes to 'ground' a theory in 'the facts of life'. Third, in a sense, deduction's 'crime' is less grave than induction's. Many theories approaching the problem with the former theory in mind at least respect the nature of norms, their *ideal existence*, their non-factuality. This, however, is not to apologize for its problems.

The method to be discussed now sometimes seeks to base international law on a higher instance, an authority which is precisely not included in the legal order described. There are many versions of deductive theories, the reader will be aware of many of them, let me just mention Alfred Verdross and his demand for '*eine objektiv gültige, im Kosmos der Werte verankerte Norm*'.[99] In any case, the origin of the normative order is *assumed* and a system is deduced from it. The advantage of this approach is that it keeps the norm apart from the facts, this approach does not mix the ideal with the real.[100] It can be an internally consistent system.

The problem is that a deduction of norms means that these are not the result of a human act of will, a human legislation in the widest sense. In short, these norms are no longer 'positive' norms, but hypothetical norms; if one were less diplomatic one might call them 'imagined' norms existing only in the mind of the proponent. This is the criticism directed by Hans Kelsen against the *Vernunftrecht*:

> *[D]ie Normen des Vernunftrechts [stellen sich] als der Sinn von Denkakten dar, [sie sind] nicht*

[98] A. Ross, *A Textbook of International Law* (1947), at 83; cited in Fitzmaurice, *supra* note 93, at 173.

[99] 'an objectively valid norm, anchored in the *Kosmos* of values'. Verdross, *supra* note 87, at 31 (author's translation).

[100] See Section 2C.

> *gewollte, sondern gedachte Normen.... Aber ich kann mir eine solche Norm nur als den Sinn eines von mir mitgedachten Willensaktes denken. Ich kann mir eine Norm so denken, als ob sie von einer Autorität gesetzt wäre, obgleich sie tatsächlich nicht gesetzt wurde, es tatsächlich keinen Willensakt gibt, dessen Sinn sie ist.*[101]

For empiricists like Dr. van Hoof, 'the basic tenets of his theory ultimately prove scientifically unverifiable by others. From the point of view of "non-believers" all Natural Law theories start from presumptions and, therefore, are a kind of "faith".'[102] If one adopts a deductive view one cannot know whether the superstructure is there or not, because one cannot rely on empirical evidence to support one's views. It is thus an epistemological problem: While the result of the deduction might or might not correspond to positive norms, a pure deduction will not establish any signs for human-willed activity and thus this approach cannot give much insight into a *positive* legal order like international law. But the reader must not jump to conclusions at this point. Such a deductive normative order *can* be described by the normative scientist, but one has to be aware that it is not positive norms he describes. Any member of a positive normative order (bar *Grundnorm*) needs to be *positus*, enacted by humans, i.e. the '*Sinn eines Willensaktes*'[103] in order to belong to it.

C *Inductive Methodology and the Violation of the Duality of* Sein *and* Sollen

The inductive approach's advantages are, on the one hand, that the positive element of law, the factual connection which makes a norm positive, is discoverable. On the other hand, but related, the inductive approach is a weapon against 'doctrinal attempts to blur, rather than to clarify, the borderlines between *lex lata* and *lex ferenda*'.[104]

1 H. L. A. Hart's Secondary Rules and International Law

Let me give the reader an example of the inductive method applied to the international law of sources. In his 1983 book *Rethinking the Sources of International Law*, G. J. H. van Hoof has managed to apply H. L. A. Hart's theory of 'secondary rules of recognition' to international law. Conformity to this rule is the test for the *validity* of a primary rule;[105] in effect, it is the source of that rule. However, a foundation for the secondary rule itself is not needed: 'No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid

[101] '[T]he norms of the *Vernunftrecht* [are] the sense of an act of cognition, [they are] not willed, but *imagined* norms.... I can imagine such a norm only as the sense of a *presupposed* act of will. I can imagine a norm, *as if* it had been enacted by an authority, even though it has not been, in fact, enacted, [even though] there is in fact no act of will whose sense [the norm] is.' Kelsen, *supra* note 28, at 5–6 (author's translation).

[102] Hoof, *supra* note 39, at 32.

[103] Kelsen, *supra* note 28, at 4, 114. Section 2D will look into the relationship of 'positivity' and customary international law.

[104] G. Schwarzenberger, *The Inductive Approach to International Law* (1965), at 4.

[105] Hart, *supra* note 69, at 94.

but is simply *accepted as appropriate* for use in this way.'[106] For him, 'the question of whether a rule of recognition exists and what its content is . . . is regarded throughout this book as an empirical, though complex, question of fact.'[107] The validity of a rule is determined by another rule, except for the (final) secondary rule(s) where the 'justification' shifts from a further norm — as is required in Hans Kelsen's theory with the *Grundnorm* — to a question of fact. We are, in effect, asked to study which rules are *in fact* seen as creating rules; aptly exemplified by the English constitution where, so Hart thinks, Parliament and the courts are simply *recognized* as law-givers which *makes* them the valid law-givers.

As I have indicated above (Section 2A1), Hart did not see international law as sufficiently developed to presume that this system had secondary rules. The factual basis of law is transferred to the primary rules themselves, its rules are valid 'simply because "they are accepted and function as such"'.[108] Van Hoof is not convinced that international law has such a simple structure. This belief evidences another difference between Kelsen and Hart: the former thinks that the *Grundnorm* is a logical necessity for all normative systems:

> *Die Grundnorm einer positiven Moral-oder Rechtsordnung ist . . . keine positive, sondern eine bloß gedachte, und das heißt eine fingierte Norm . . . Nur wenn sie vorausgesetzt wird . . . können diese Sinngehalte als verbindliche Moral- oder Rechtsnormen gedeutet werden.*[109]

Hart believes that secondary rules are a luxury found in 'developed' legal systems, but not in primitive ones, like international law.[110] G. J. H. van Hoof is understandably amazed at this incoherence in Hart's theory and he proposes to adopt the rule of recognition for international law. The resulting rule is 'that the consent of States has to be regarded as the constitutive element of rules of international law' on which he bases the rest of his book.

The problem with this and similar approaches[111] is that they mix the description of reality and prescription. This approach in effect negates the nature of all norms as an *ideal*, the Ought. Ideals cannot be deduced from reality alone — *Kein Sollen vom Sein allein*. It is the essential and dissoluble duality[112] of 'Is' and 'Ought' as the very idea of the ideal that is norms. All law needs to be based on a law authorizing its creation: 'Nur eine Norm *kann der Geltungsgrund einer anderen Norm sein*.'[113] This is one of the lasting accomplishments of Hans Kelsen's theoretical work. Kelsen would not be able to stop at the level of 'material constitutional norms', because one must not base a

[106] *Ibid.*, at 109 (emphasis added), cf. also 292–293.

[107] *Ibid.*, at 292.

[108] Hoof, *supra* note 39, at 53, citing Hart, *supra* note 69, at 235.

[109] 'The basic norm of a positive moral or legal order is . . . not a positive, but merely a hypothetical norm, that is, a fiction . . . Only *if* it is presupposed . . . can the contents of these significations be seen as binding moral or legal norms.' Kelsen, *supra* note 28, at 206 (author's translation).

[110] Hart, *supra* note 69, at 236.

[111] Walden, *supra* note 1, and Mendelson, *supra* note 3, adopt a methodology explicitly based on Hart.

[112] Kelsen, *supra* note 28, at 44–46.

[113] 'A norm can base its validity *only on a norm*.' Kelsen, *supra* note 28, at 206 (author's translation, emphasis added).

legal system's validity on empirical facts, as Hart purports to do. Rather, Kelsen accepts the fact that the foundation will have to be laid in an assumption of logic.

If we were to apply the contentions of this method to customary international law we would be trying to prove the existence of custom-creating norms by the 'practice of states' alone. The proof for the formula: 'customary international law is state practice plus *opinio juris*' would be obtained by a look at facts, in this case: state behaviour. This, however, is a *circulum vitiosum*. One presupposes a method of proof which itself is the object of the investigation. If I model my explanation of the status of the law on what its subjects actually do, how can I then distinguish between the custom-based rule-conforming behaviour and the violation of a customary norm? If all behaviour were to transform law that would be a negation of the very concept of law as an *ideal*, something reality can be measured against! How could one distinguish between fact and law when every fact is made law, every application law-making?

2 Georg Schwarzenberger's Imperfect Induction

A mutation of the inductive approach is found in Georg Schwarzenberger's *The Inductive Approach to International Law* (1965). The purity of the title is not reflected within, and I dare to contend that it is not really inductive. It is not as far as one sees the basis of validity as the object of the method; it is, if one wants a working method for the identification of norms. In effect he simply *assumes* Article 38 to be *the* relevant provision on which to build his theory; this is a deductive step. The inductive approach needs a referent by which to check the results of the induction or, rather, to clarify the 'arbitrary origin', as engineers would call it, of the induction. In order to do this he postulates Article 38 as 'having its sheet-anchor firmly embedded in the near-universally expressed will of the organised world society'.[114] This *Überbau* of 'law-creating processes and law-determining agencies'[115] is deduced, not induced — it is the dogma Schwarzenberger does not question or validate. While the *content* of this *Überbau* is not objectionable from a strictly inductive viewpoint, the *method* employed to know it is.

The problem which is the main argument of this section is only acute if induction is used as determining the basis of validity of international law, rather than merely as an *epistemological tool* for the ascertainment of what is *lex lata* as determined by superior law. This superior law *must* be determined deductively for the findings to be stable. Schwarzenberger did this, although he did not seem to realize that even if he could rationalize why he chose Article 38, the question remains why the reason for so choosing should be a valid one. Of course, this element of deduction opens up the questions that plague deduction. (Section 2B)

Therefore it can be argued that the inductive approach is redundant, since we cannot discover by induction the higher echelons of law by looking at behaviour and claims alone; and if we either purport to know or assume these echelons we can deduce (with a limited role for induction) the lower level without constructing a

[114] Schwarzenberger, *supra* note 104, at 126.
[115] *Ibid.*, at 129 and 19 *et seq.*

system from scratch by way of induction. I would venture to state that the key might lie in a combination of positivity and normativity rather than the exclusion of either.

D *Norms as* 'Sinn eines Willensaktes'*?*

The reader will remember my *credo* at the very start of this paper that my personal views on legal theory seem to be best described as 'neo-Kelsenian'. The task of the present section is to challenge a preconception Hans Kelsen and those following in his footsteps seem to have had. It is a problem he and the adherents of the 'Vienna School of Jurisprudence' have, namely that positivists *need* human-willed activity to recognize a norm as positive. Customary international law, on the other hand, seems to be *un*intentional, *un*directed and *un*willed human activity, which cannot be described as an 'act of will'.[116] It will have become clear throughout this article that Kelsen postulates that 'positivity' means that a norm is the '*Sinn eines Willensaktes*'.[117]

This has led a number of scholars to criticize him, especially with regard to customary law. Herbert Günther, while otherwise a stout Kelsenian, believes that this postulate adopted necessitates an artificial search for an act of will within the customary process.[118] He thinks that this is the result of a methodological mistake on the Austrian jurist's part — an illegitimate analogy from municipal law to international law. He further alleges that this constitutes a narrowing of the very concept of 'positive law'. It seems wrong, he claims, to conclude from law's positivity that it needs to be enacted in a formal and goal-orientated manner. For Günther '*[soll Positivität] demnach als Eigenschaft verstanden werden, die ausschließlich Rechtsnormen und darunter nur denjenigen zukommt, die . . . in irgendeiner Weise "man-made" sind, ihren Inhalt durch einen von Menschen sich herleitenden Kreationsakt empfangen haben.*'[119] Joseph Raz, on the other hand, makes a crucial mistake in his criticism (incidentally, of the very same statement of Kelsen's) by ascribing to Kelsen that he 'probably thought that the *acts which form the regularity* of behaviour are relevant to the creation of the customary law';[120] something which would amount to a breach of the duality of Is and Ought, a legal theoretical 'crime' which I cannot imagine Kelsen to have committed, because it was Kelsen's work which made this violation a theoretical 'crime'.

For Hans Kelsen, however, '*la coutume est, tout comme l'acte législatif, un mode de* création *du droit*';[121] for him both enactment and the customary process represent such acts of will, they are just different ways of manifesting that will. In contradistinction to Raz's view, a better reading of the Pure Theory of Law is: The will

[116] See Section 1B.

[117] 'Sense of an act of will', Kelsen, *supra* note 28, at e.g. 4, 221 (author's translation). While 'Sinn' could also be translated as signifying 'meaning', I have used 'sense' throughout this article, because I deem it to be a more accurate word.

[118] Günther, *supra* note 30, at 81–83.

[119] '[Positivity ought] to be understood as property only of norms, only of those norms, which . . . are in some way "man-made", whose content is determined by a human act'. Günther, *supra* note 30, at 83 (author's translation).

[120] J. Raz, *The Concept of a Legal System* (2nd ed., 1980) 67 (emphasis added).

[121] '[C]ustom is, just like a legislative act, a mode for *creating* law'. Kelsen, *supra* note 59, at 259 (author's translation); Kelsen, *supra* note 28, at 113–114.

of the subjects of law that subjects of law *ought to observe* the behavioural regularity, i.e. the recognition that the practice is a norm, is the distinguishing feature of customary law.[122] The element called *opinio juris* has become a collective will, not, though, a legislative will — and norms resulting from the customary process are enacted, *positive* norms.[123]

Both critics have read this portion of the book; Günther explicitly recognizes this train of thought, but brings a further argument to bear, one that I have not yet discussed. With respect to one of Kelsen's other postulates, the completeness of law and the impossibility of gaps properly so called, he charges the author with incongruity. While the Austrian sees 'gaps' closed by 'negative legal regulation',[124] which allows every act not prohibited by a norm, the German scholar says that negative regulation is *precisely not* positive regulation and if Kelsen admits to the former he cannot hold the assumption that only 'positive' law is valid.[125] I submit that Günther is wrong. While one can argue that Kelsen's work is incongruent in places — which is not unusual for a scholar who published for more than 60 years — this is not necessarily the case here. Behaviour not covered by any norm is precisely not covered by a norm — norms are not made by default and I further submit that Kelsen did not mean the term 'negative regulation' ('*negativ rechtlich geregelt*') to imply that a norm has been created which covers all 'free' behaviour.[126] It is not a norm, but a 'norm-free area' framed by norms. To imagine law by default would amount to a violation of the positivity of law, a legal theoretical 'crime' which, again, I honestly cannot imagine that Kelsen committed.

E *The Imperceptible or Non-existent Constitution of International Law*

1 *What Is the Constitution of International Law?*

The last and most difficult of the problems I have chosen to discuss in this paper is that of international law's 'constitution'. The very term can provoke outrage; international law, so it is sometimes said, simply does not have a constitution. It certainly does not have a written constitution (the United Nations Charter could be viewed as a written constitution of sorts) and even if it did, the question of non-constitutional or pre-constitutional law[127] remains. In certain municipal laws the legal order based on the constitution is the sole focus of lawyers. Take the Austrian legal order: the 1920/1929 Constitution[128] and law created or adopted according to its terms is simply regarded as the only valid Austrian law. But the question here is this: What sort of constitution *does* the international legal order have? It may be wise to try to

[122] See Sections 1B2 and 1B3.
[123] Kelsen, *supra* note 40, at 9.
[124] E.g. Kelsen, *supra* note 28, at 106.
[125] Günther, *supra* note 30, at 82.
[126] The distinction between freedom which the legal order leaves to humans and freedom guaranteed by the legal order is expressly made. Kelsen, *supra* note 40, at 43.
[127] In the sense of law not deriving its validity from the *Grundnorm* of the (written) constitution.
[128] *Bundes-Verfassungsgesetz* 1920 idF 1929, BGBl Nr. 1/1930.

define the term 'constitution' provisionally. I mean by this the highest echelons of *one* positive legal order, the *Grundnorm* and the sources of law derived from it. A mere *empirical* similarity or classification without a common origin (of validity) is not *one* but *more than one* normative order and thus is not *normatively* connected, connected by a superstructure of *norms*, but of empirical, scientific description or classification.

The task is far too great to attempt to answer it here. The focus of the following is directed towards unearthing the logical possibilities for an 'architecture' of international law's constitution — its source-law and the ontological and epistemological criticism derived from these thoughts. This section will not cover *intra*-source hierarchies; it is the question of the hierarchy of source*s*, an *inter*-source hierarchy *vel non*.

2 The 'Architecture' of the Sources of International Law

It is a presumption of mine that the validity of a positive norm, its membership in a certain normative order, is also the source of that norm's binding force (necessarily so). Validity, as Kelsen never tired of pointing out, is the specific form of existence of norms.[129] Validity means nothing else than 'the claim to be observed'. These two, validity and binding force, are derived from a norm's source — the basis of the validity. Because a norm empowers some human(s) to create norms, the norms created by him or her are valid, i.e. a member of the normative order that the meta-norm belongs to, and binding, i.e. they claim to be observed. However, while the 'source' of a norm and the reason why it ought to be obeyed are the same, one must make a distinction between the source-norm and the conditions for the creation of that derivative norm specified in the source-norm. The human(s) whose act of will creates the norm *do not give validity*, the norm specifying that human act of will as *condition* for the creation of a norm does. A fourth point is the connection between hierarchy and derogatory power: Does any norm of a hierarchically higher kind of norm have derogatory powers over the subservient kind of norm?

Let us now describe what form this architecture may take. Logic, I submit, allows us to formulate three options for the normative order(s) called 'international law'. The first is that one source of law is the supreme source and origin of all that is called 'international law'. All international law would be conceived as one normative order. All other sources would be derived from the supreme source. Hans Kelsen, in his *Principles of International Law* (1952) postulates that customary international law is the highest source, international law's *Grundnorm* is simply: 'The states ought to behave as they have customarily behaved.'[130] The norm '*pacta sunt servanda*', as the *Grundnorm* of the subordinate legal order 'international treaty law' is, he thinks, merely *a* norm of customary international law. Alfred Verdross, in his above-mentioned 1926 opus *Die Verfassung der Völkerrechtsgemeinschaft* founds his construct of the constitution on the *Grundnorm*: *pacta sunt servanda*,[131] which is at once the basis

[129] '"Geltung" ist die spezifische Existenz der Norm', Kelsen, *supra* note 28, at 2.
[130] Kelsen, *supra* note 65, at 418.
[131] Verdross, *supra* note 87, at 29.

for treaties and custom, because one is an express conclusion of a convention and the other is a *pactum tacitum*. [132]

The second option is that while, for instance, 'treaty' as a source is not derived from customary international law, and the two sources are 'two separate branches of law'[133] of equal standing, they are connected by a superstructure of meta-meta-laws which regulates the relationship of sources. This opens up the question of a closed or open catalogue of sources of international law: If we assume a 'constitution' to govern *all* international law (i.e. *one* pyramid of validity — one normative 'thing') then the number is relatively closed and only an addition of a new source conforming to the constitutional law for adding sources (or a subordinate source) adds a new source to the pyramid. That special supra-law would be composed of positive norms. The reader will probably join me in my doubt as to whether such a law exists; I do not perceive such a superstructure (Section 2E3).

Lastly we come to the version I will call the 'default theory'. The three main formal sources are not hierarchically ordered[134] and the sources are themselves not normatively connected. Applied to current international law this would mean that both '*pacta sunt servanda*' and '*consuetudines sunt servanda*' are examples of a *Grundnorm*. No constitution which binds these two types of norms in one normative order is cognizable; the subordination of all international law to customary international law is fraught with theoretical difficulties.[135] If neither of these connections can be proven to be positive law, it is possible that no connection between them exists.[136] Both types of law may be part of international law, but may only be *empirically classified as such*. Without an overarching constitution regulating what kinds of formal sources international law has, the two or three sources currently 'recognized' might be two or three different legal normative systems.[137] Let me give a comparison: The constitution of a particular municipal legal system either does not recognize customary law, thereby *denying* its validity, which means that, for the legal system characterized by the constitution, customary law does not exist, just like two concurrent and competing legal systems within one country. On the other hand, it could recognize customary law and could *purport or claim to* subordinate customary law to its legal system. The result regarding the catalogue of sources — if we assume international law to be only an empirical category — is this: the catalogue of sources is open and whatever claim by whomever fulfils the empirical criteria can be counted as belonging to the 'family of international law'. In effect, the difference is between a

[132] *Ibid.*, at 43–44. I have mentioned it before and the reader will know anyway: Verdross later changed his views on the nature of custom and the foundation of the international legal order.

[133] Tunkin, 'Is General International Law Customary Law Only?', 4 *EJIL* (1993) 534.

[134] There are cases where a subordination is obvious. Not every manifestation of norms is completely autonomous. Security Council resolutions derive their validity from the United Nations Charter, so do International Court of Justice judgments.

[135] In Section 2A1 the question was raised whether customary law — especially if state practice were viewed as merely constituting behavioural regularities which form the prospective prescribed behaviour — is theoretically incapable of subordinating another source to it, of creating 'source-law'.

[136] It is somewhat analogous to 'Occam's razor'. See Section 2E3.

[137] This theory raises interesting problems of the succession of treaties by customary law and *vice versa*.

normative link (one normative system and one irrelevant empirical unity) and an empirical communality (more than one — a multitude of — normative system(s) and one defining empirical community). Assuming that this is how the architecture of sources is shaped means that one is faced with the question of the derogatory power of norms of the same quality, but of a different kind.[138]

One legal theoretical solution to the two problems of the norms which control the creation of customary international law is to incorporate *all* conditions for the creation of customary law (e.g. material and subjective element, time-frame, participation level, repetitions, persistent objector) into the postulated *Grundnorm* of customary international law, which, in turn makes all the elements part of one postulated norm on what customary international law is all about. This might be necessary to avoid the problem, first, of the unlikely positivity and imperceptibility (Section 2E3) of meta-customary law and, second, of the impossibility of the creation of further normative 'steps' by customary law. (Section 2A1)

3 Lack of Positivity or Lack of Perceptibility?

Let me boldly state the fundamental problem of the sources of international law: no constitution is apparent. No such thing as a law on the formation of law, a law specifying the forms international law may take, immediately appears to our senses, imposes itself upon us, blinds us to other possible architectures of the highest echelons of law. Those countries which have a written constitution are 'liberated' from the agonizing search for a foundation. But that liberation is pragmatic and not theoretical: municipal legal systems face the same legal theoretical problems, critique is merely more easily ignored.

The constitution of international law may lack positivity, i.e., it may be a product of thought, not of will; it may exist only in the minds of the scholars who have the time to muse about the theory of international law. The law's, the norms', ontology, its ideal existence, is one of boundless possibility, limited and shaped only by the arbitrary act of will of those humans empowered by norms to create norms. If one wants to account for the will of the subjects of law one must adhere to the demand to describe only positive norms. If one takes the demand for positivity seriously, this relationship *cannot* be pre-positive or a matter of logic only, it *must* be positive law. It seems that the humans empowered to will the highest echelons of international law — its constitution, the superstructure and relationship of the sources — are unlikely to have ever formed a will on these rather unpragmatic matters.

The constitution of international law may simply be very hard to perceive. Its unwritten nature, its contentiousness and the structural problem of accurately defining it make it impossible to ascertain which claim to the 'truth' corresponds with positive law. This epistemological difficulty — if, indeed, it is merely a problem of epistemology and not of a lack of norms — results in a lack of provability. As I

[138] Wolfram Karl discusses this topic in Karl, *supra* note 77, at 86 *et seq*. The conclusion he draws from the equality and non-connectedness of treaty and custom is that both can derogate from the other — a statement I do not agree with.

understand the well-known *dictum* of the Permanent Court of International Justice (PCIJ) in the *Lotus* case,[139] it is not the *legal* freedom of states in international law that is to be presumed, but the absence of regulation (i.e. of norms). If the existence of a proposed norm is unclear it should be assumed that a norm has not been created. In short, because we know not how to perceive or prove the constitution, we know not whether it is there or what it looks like.

3 Conclusion

We have reached the end of my study. The reader might feel a certain unease about what I have actually accomplished by approaching the problem in this — admittedly peculiar — fashion. It may well be argued that none of the problems I have taken up in the course of the discussion have been treated with the necessary attention they deserve and the reader might feel that the topics have merely been 'skirted'. That is true, but a fuller discussion would neither have been economical nor was it necessary for the purpose the article was meant to fulfil. That purpose is to show the reader what uncertainty looks like and what causes it. Customary international law just happens to be a topic where uncertainties abound.

The results are now in and I can draw tentative inferences from the various 'test-trenches' to ascertain the layout of the hidden structure called 'uncertainty'. Uncertainty is multi-phenomenal; we have seen throughout this study that it can take many different forms. Let me remind the reader what we have seen:

(a) There is considerable disagreement amongst international lawyers as to the scope and formation (and even existence) of customary international law. While no question of law is undisputed and while international law is especially notorious in this respect, debates on customary international law have been marked with a high degree of latitude in the 'solutions' proposed by scholars and judges.

(b) Sometimes the law cannot be concretized in a sufficient manner to make it 'work' in practice. This 'inoperationalizability' of certain formulae which scholars happen to generally agree on can be seen clearly in the case of the quantity of state practice needed to constitute a behavioural regularity sufficient to constitute the material element.

(c) Due to the peculiar nature of customary international law as a law-making law (a formal source), we may be faced with a problem of self-referral: if customary international law's meta-meta-level is at the same time its

[139] 'The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.' *Lotus*, *supra* note 33, at 18. I interpret the word 'restrictions' to mean the presence of norms of international law: of 'conventions' or 'usages'.

meta-level (i.e. if customary law were made by rules that govern their own creation) we potentially have to know the meta-law before we can ascertain what the meta-law looks like.

(d) Very often, uncertainties simply refer us to hierarchically higher — legal theoretical — questions. The difficulty of arguing for or against the relevance of acts and statements as state practice, for example, results from the unsolved question of the nature of state practice.

These are merely examples of what kinds of uncertainties may be abstracted from this article and this list is by no means exhaustive. Uncertainty is not only multi-phenomenal, but also multi-causal. Section 2 of this article served a dual purpose; not only did I intend to continue unearthing manifestations of uncertainty on the theoretical level, but I also wanted to expose some of the reasons why law — and international law in particular — is uncertain:

(a) There is a marked absence of authoritative texts regarding customary international law. While the presence of such texts may give rise to different problems — the reader will be aware of the problems of interpreting the United Nations Charter, for example — customary law is a law without authoritative texts.

(b) International law does not have a dominant theory, ideology or assumption, not even a dominant legal culture. This is perhaps the most damning of all reasons and it is certainly responsible for the high degree of academic disagreement. If it were simply taken for granted and not seriously disputed, for example, that elements x, y and z make customary international law, or that 24 instances of state practice suffice, the dominance of the theory would smother criticism. While the 'real' law may be different from the dominant theory, it can conveniently be ignored — as is the case with other normative systems *vis-à-vis* a dominant written constitution in municipal law (Sections 2E1 and 2E3). If international law had a dominant legal culture, if it were to be placed squarely within the family of continental legal systems or if it were a common-law jurisdiction, jurists could employ the dominant default theories of their culture. According to the maxim, 'every international lawyer a national lawyer first' our colleagues often bring their preconceptions of how a legal system works — their 'cultural prejudice' — in arguing an international legal case.

(c) Because of the absence of a dominant theory and because there is no written constitution of international law, the structure of the highest echelons of international law is very unclear. This structural uncertainty is not merely a matter for the international legal theorist. It is also relevant for so-called 'technical' questions, because problems of substantive or meta-law often point directly to an unsolved question, an uncertainty, of international constitutional law.

As scholars of international law, we must make *assumptions* of how we think the highest echelons of international law are shaped. At this level of abstractness, we have

no legal argument left, because we are, so to speak, peering over the edge of the disc that is the subject of our study. Our 'anchors', our 'arbitrary origins' that connect international law to other concepts cannot be legal. They might be political or philosophical, practical or logical, but a determination of an object of study by reference to itself is not possible. In the end, a legal order must be based on an *arbitrary* determination by humans of what it is. The law, like all ideas, remains intangible and empirically incognizable — a fiction. Like any ideal, law only exists because we choose to think it. This figment of our collective imagination would only become certain, if all humans thought about the same thing when they thought about 'norms' or 'law'. But this will not happen, not as long as our consciousness is individual consciousness.