1. Introduction

This short paper will make two arguments, based on my previous work on the uncertainties of the sources of international law in general and customary international law in particular. The first contention (Section 2) is that customary international law, in order to ‘work’ as (i) norms which are (ii) created by a customary mechanism, needs both opinio iuris and (state) practice. One element theories of customary international law-formation, those making do without both a subjective and an objective element, do not describe customary international law eo nomine. The second contention (Section 3) is, however, that the first argument is not of the knock-down variety, particularly as we are talking about a non-empirical phenomenon. With law, the matter is vastly more complex than falsifying the hypothesis that no neon-pink butterfly exists by pointing to a specimen in the garish colour. Pure theorising, eg about what requirements customary international law should or could have, does not change the law. Law, as the Pure Theory of Law is famous for arguing, regulates its own creation, hence the coming-about of customary international law is – has to be – based on further law. While uncertainty abounds, we do at least know that both the requirements for the creation and the way these requirements themselves come about must be rule-governed on a legal (normativistic) view-point. In particular, crypto-empirical ‘observation’ of customary international law ‘actually’ coming-about does not provide us with reliable criteria. Equally, on a truly autonomously legal view, the level of sources does not mean that we can switch to either the realm of Is (and conduct a sociological exercise) or to the realm of pure Ought (and discern the requirements from perceived necessities of the eternal ‘cosmos of values’). All these argumentative stratagems are used in international legal scholarship; the right sort of legal theoretical approach can help us guard against these syncretistic fallacies.

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4 Kammerhofer (2010) supra note 1 at 204–205.
2. Why it Needs Both *Opinio Iuris* and *Usus* to ‘Work’

In a nutshell, the reason why both elements can be seen to be necessary is that without *usus* it would not be customary and without *opinio* it would not be law. This means that in a specific sense, customary international law would cease to ‘work’ – ‘work’ as advertised by orthodox scholarship and practice for the last hundred years or so, one might add. Both of my co-panelists are very well known for holding ‘single-element theories’, at least to some extent. This section does not mean to ‘disprove’ their theories, just to show what taking their theories to the bitter end would lead to. The next section will question the argumentative basis for their theories just as much as that of the orthodox two-element theory.

It is very important to stress, however, that there are two rather important limits to scholars’ freedom to construct theories on customary law: First, as will be discussed in Section 2.1, making away with any normativity-endowing element in customary international law-creation (whatever shape it may take) has graver consequences than doing away with practice, as the very ‘existence’ (validity) of law is its normativity, its standard-setting element. Second, as discussed in Section 3, because theories need to reflect the law, that is what needs to be shown. The orthodox theory has, however, the advantage of being the orthodoxy – which is a slight advantage in the realm of theory, but of immense value on the pragmatic level: orthodoxy is the unmoved mass and its inertia is considerable.

2.1 *Opinio Iuris* is a Necessary Condition

The scepticism as to the pedigree of *opinio iuris* *(sive necessitatis)* is wholly warranted. There are good reasons for believing that customary law and the subjective element in particular, was not thought of in Roman Law in the same terms as we do in international law today. So *opinio iuris* probably does not have as much of a tradition as we may think. But it seems that there was a discrete distinction at least in continental European legal history between *usus* and customary law (even if it was ‘only’ called *consuetudo*), between behavioural regularities and the law, even if this difference was due to factors like *tacitus consensus* or *recta ratio*. Thus, even if its historical pedigree is weak and its precise formulation is uncertain, some form of subjective element needs to be present.

1. But let us start with the few writers who place exclusive emphasis on state practice – an exceedingly rare breed. Maurice Mendelson’s theory, for example, is crucially short of a complete disavowal of the subjective element. Following an exhaustive analysis of the ICJ’s jurisprudence, Mendelson concludes that the subjective element is a sufficient, but not a necessary condition for the coming-into-existence of a customary norm. But this does include state will, because subjective notions are contained in his conception of state practice; therefore, the subjective element is presumed. What are the consequences of integrating opinions

6 *Usus* and *opinio*, the two-element-doctrine, was, at best, conceived of as usage accompanied by *tacitus consensus populi* (the clearest (post-classical) source for this is D.1.3.35) and even this is less than clear. The doctrine might, for example, have been a product of the German Historical School or even of late 19th century private law scholarship; it might also have been part of the ordinary gloss to the *Decretum Gratiani* (see the glossa ‘institutum’ to *Decretum* D.1 C.5 (col. 3 in the Rome 1582 edition) and ‘conseutudinem’ to D.8 C.7 (col. 31)).


of states into the concept of practice? Mendelson writes: ‘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.’\textsuperscript{10} The problem is obvious: ‘What must, however, be avoided is counting the same act as an instance of both the subjective and the objective element.’\textsuperscript{11} This collapse therefore results in double counting, or state practice as such implies the subjective element.\textsuperscript{12} An important interjection is that ‘the origin of misunderstanding caused by considering [e.g.] 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.’\textsuperscript{13} Viewing it in this manner may alleviate some of the more notorious problems. On this view, the two elements of customary law-making (state practice and \textit{opinio iuris}) are categorically different from the methods and evidences to prove their ‘existence’. State practice and \textit{opinio iuris} may be categorically different things, but we may look for proof of either element in the same place. This, however, should not confute the underlying categorical difference. Mendelson’s theory\textsuperscript{14} already incorporates the distinction in his theory of state practice and he may, therefore, not need the subjective element, because he talks about the \textit{evidentiary} function of physical reality, rather than the objective element as such.

The first problem with this approach is that we have stopped taking scholars at their words when they claim that ‘state practice’ is evidence of \textit{opinio iuris}: the term ‘state practice’ does not refer to the objective element, but merely to the evidentiary superstructure to prove \textit{either} element. The second problem is this: how do we know which fact is legitimate evidence of an element? What evidentiary value does this or that type of ‘manifestation’ have? Is there a free appraisal or ‘rules of evidence’ for the proof of the elements of customary international law?

2. But what if we do not reconstruct theories of this type as merely requiring the absence of independent proof of \textit{opinio iuris} but making do with practice and thus make away with the subjective element itself? Would that work as law, understood as a particular type of positive normative order? What would the consequences be if we did so? The argument will proceed in three steps: first, it will be claimed that (on the positivist-normativist theory espoused here) all positive norm-making requires an act of will; second, that, despite its problems \textit{opinio iuris} can be reconstructed as act of will; third, that the net result of eliminating the subjective element is a disavowal of either the positivity or of the normativity of customary international law.

a. Law is positive if it has been \textit{positus}, i.e. set/put into the world, as the sense of an act of will (\textit{Willensakt}). Hans Kelsen writes that ‘the positivity of morals and law lie … in this act of creation by human acts. … the Is-Fact… of Being-Enacted [is a] condition… for the validity of a norm, but not validity itself.’\textsuperscript{15} Now this strand of positivism has faced predictable criticism, particularly relevant here, claiming that, plainly, an act of will is not required for the creation of law under all sources of international law, particularly for the creation of customary international law and general principles of law. This argument is largely based on a \textit{petitio principii}, as many writers argue that we can tell how law is created by looking at how law has ‘actually’ been created in the past.\textsuperscript{16} However, we cannot know how law is created if we do

\begin{thebibliography}{10}
\bibitem{Mendelson1999note10} Mendelson (1999) \textit{supra} note 10 at 207.
\bibitem{Mendelson1999note11} Mendelson (1999) \textit{supra} note 10 at 283–293.
\bibitem{Mendelson1996note8} Mendelson (1996) \textit{supra} note 8; Mendelson (1999) \textit{supra} note 10.
\bibitem{Lammers1999} See e.g. Johan G Lammers, ‘General Principles of Law Recognized by Civilized Nations’ in Frits Kalshoven, Pieter Jan Kuyper and Johan G Lammers (eds), \textit{Essays on the Development of the International Legal Order}
\end{thebibliography}
not know the rules of law-creation. The role that positivity plays in the Pure Theory of Law is entirely different: the positivity of a norm is merely one of its properties, while validity is its form of ‘existence’. In positive normative orders, the successful creation of a ‘lower’ norm requires two elements: first, the ‘existence’ (validity) and the fulfilment of the conditions of a ‘higher’ empowerment norm, a norm authorising the creation of further norms (e.g., a constitution authorising and regulating the creation of statutory law); second, the act of will by a human or humans directed towards the creation of that norm, as specified in the empowerment norm. The first element ensures its validity as a norm of that normative order; the second ensures its membership qua positivity. As mentioned above, law-making within a normative order is itself positivised; the positivity element is not an a priori meta-legal construct, but a feature of positive law and determined by it.

b. But can opinio iuris ever be reconstructed as an act of will? On first glance, this seems impossible, for customary law-making seems by nature indirect and unintentional. Even if we do not subscribe to voluntarist and state-centric conceptions of international law – for the record: the Vienna School of Jurisprudence does not – it seems difficult to construct positive normative orders without acts of will of some sort. It is also necessary to distinguish this problem from the so-called ‘opinio iuris paradox’, in which the assumption that the belief that something is already law is required, but can only be used to identify existent customary international law, not emerging norms (for which the belief that something is law which is only just becoming law cannot be true). But the subjective element does not have to correspond to some pre-existing legal ‘reality’. In other words: the claims made do not have to be truthful, but are themselves constitutive of customary law. It is the fact that the claim is made, not the value of the claim, that is relevant. This ‘paradox’ is soluble and does not need to detain us, but we are immediately faced with the core of the problem identified above.

To restate: the ‘positivity problem’ of the subjective element is that only if a norm is the ‘sense of an act of will’ can it be called a ‘positive norm’ – all other norms are fictional. Since the objective element – practice – by definition cannot contain will, but consists of factual patterns, the subjective element needs contain an act of will in order for customary international law to be able to exist as positive norms. This requirement has led to sharp criticism that this postulate adopted necessitates an artificial search for an act of will within the customary process. As Martti Koskenniemi points out:

The psychological element might either be: 1) the belief or conviction that something is law; 2) the will of the State that something be law. The opinio might be understood as pertaining to what the State knows or believes or it might be thought of as a voluntas, a conscious, law-creating will. … They are not merely different, but mutually exclusive and defined by this exclusion.

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(Sijthoff and Noordhoff 1980) 53–75 at 56. He argues that the question whether general principles of law ‘do exist or not, must be ascertained on the basis of empirical research.’ This ‘empirical research’ can only cover the discovery of specific principles, not of general principles as source of international law, as the scholar conducting such ‘research’ already presupposes what she or he sets out to find.

17 Kelsen (1960) supra note 3 at 10 (trans. at 10).
18 Kelsen (1979) supra note 15 at 238.
19 Moreover, a fictional norm cannot be part of a positive normative order just as little as a positive norm can be created from a fictional normative order; see Kammerhofer (2010) supra note 1 at 222–223.
20 Anthony A D’Amato, The Concept of Custom in International Law (Ithaca: Cornell University Press 1971) 73: ‘Here, opinio iuris is at worst a harmless tautology.’
21 Kelsen (1939) supra note 7 at 263.
23 Kelsen (1979) supra note 15 at 4, 221.
How, indeed, can a belief (opinion, statement) be a will? Is it the will to create norms? Is the positive norm as the sense (meaning) of an act of will created by the specific form or content of the sense of the act of will? Could we not say that the act of will need not be a specific will to create a norm, but can also be a belief that implicitly accepts that a norm may be created, in analogy to dolus eventualis in criminal law? Would it not be possible to argue that an unspecified will is contained in the belief? For Kelsen, ‘custom is, just like a legislative act, a mode for creating law’. Both enactment of a statute and the customary process represent acts of will, but are merely different ways of manifesting that will. He explains the change from belief to will thus:

Only when these acts [the practice] have been occurring for a certain amount of time, the idea develops in an individual that it ought to behave, as the members of the society usually behave, and the will that other members of society ought to behave in this manner. … Thus custom becomes a collective will, whose subjective sense is an Ought.27

Norms resulting from the customary process are thus positive norms by virtue of a collective will.28 However, this may be an expression of the Pure Theory’s deconstructive side, for if customary international law cannot fulfil the strict criteria for positiveness, then on that approach, customary international law simply is not positive law.29 Either the customary process cannot even abstractly work to make norms – which would mean that customary international law cannot be a source of international law – or the conception of opinio iuris as belief is wrong and the subjective element needs to be an act of will properly speaking. Either possibility makes unintentional and unwilled international law-making impossible. The point here is not that orthodox doctrine is incommensurate with a particular scholar’s ideas, but that it is incommensurate with international law’s nature as a positive normative order.

2.2 Opinio Iuris is not a Sufficient Condition

A different set of consequences obtains where scholars make do without usus in their conceptions of customary international law. For example, one could mention Ben Ching’s work.30 Starting from a consensualist viewpoint, he finds that ‘in international society States are their own law-makers’;31 for him, ‘the role of usage in the establishment of rules of international customary law is purely evidentiary: it provides evidence of the contents of the rule in question and of the opinio iuris of the States concerned.’32 Customary international law has ‘only one constituent element, the opinio iuris.’33 We may be tempted to ‘resolve’ this as a switch

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26 ‘la coutume est, tout comme l’acte législatif, un mode de création du droit’ Kelsen (1939) supra note 7 at 259; Kelsen (1979) supra note 15 at 113–114.
28 Kelsen (1960) supra note 3 at 9 (trans. at 9).
31 Cheng (1965) supra note 30 at 37.
32 Cheng (1965) supra note 30 at 36.
33 Cheng (1965) supra note 30 at 36.
to the level of evidence, but Cheng is far less positive on the ‘underlying’ elements than Mendelson.

But it is not just etatist-consensual scholars who hold such views. Amongst those imbued with the ‘quest for global justice’, as John Tasioulas has helpfully put it, those with a normative agenda, particularly in the fields of human rights and humanitarian law, also develop approaches to customary international law-making that make do with opinio iuris only. Brian Lepard – our other co-panelist – is, however, in the relevant respects similar to Cheng.

In terms of ‘workability’ or ‘norm-engineering’, this variant of the one-element approach to customary international law-formation, dispensing with state practice, has a better stance. It is possible for norms to be successfully created on the basis of these actus reus conditions for law-creation. In other words, the meta-law on customary international law-formation (its Rechtserzeugungsregel) could specify a collective will (on what ought to become law) to create international law. There is both a minor and a slightly more weighty objection to this, however.

First, as Cheng himself and others have observed, without practice, customary law is no longer based on custom, but constitutes mere general international law; the specific element that makes customary law based on custom is missing. Practice as regularities of behaviour (usus) constitutes the material element of the prospective norm; the regularity determines what behaviour will be prohibited, allowed or required – the prescribed behaviour. It may form the actus reus condition of a typical legal norm: if ‘action or omission’, then ‘legal consequence’. One could call this element the prospective prescribed behaviour. The second objection brings us to the problems in Section 3 – how do Lepard or Cheng know that this is the way the law comes to pass – does customary international law come to pass thus (or thus) just because a theorist makes his theory thus (or thus)? On the approach chosen here, this matter is regulated by (positive) law, not by a form of practical reason. On this approach, therefore, arguments such as those employed in Lepard’s book remain assertions of what the law might be; the proof that the meta-meta-law is thus (and not as orthodoxy would have it) is missing. In the face of an orthodoxy against which alternative designs are measured, this, however, is a serious shortcoming.

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36 ‘a customary international law norm arises when states generally believe that it is desirable ... to have an authoritative legal principle rule prescribing, permitting, or prohibiting certain conduct. This belief constitutes opinio juris, and it is sufficient to create a customary law norm. It is not necessary in every case to satisfy a separate “consistent state practice” requirement. Rather, state practice can serve as one source of evidence that states believe that a particular rule is desirable’ Brian D Lepard, Customary International Law: A New Theory with Practical Applications (Cambridge: Cambridge University Press 2010) 8.
40 Wolke (1993) supra note 13 at 70.
3. Epistemic Limits vis-à-vis Source-Law

Even on the approach adopted here, wedded as it is to a structural analysis of the positive norms of a given legal order, there are limits to what we can say about international law at this high level. What we can say with more confidence, however, is what the limits of legal theory are. It has no power to decide how customary international law is created, because theorists are not the makers of the sources of law.

International law does not seem to have a (perceptible) constitution which regulates the nature, foundation and inter-relation of sources. When we ask what the meta-law of customary international law-creation is, we must know how sources come about under international law. There is considerable uncertainty when we try to determine the sources. On a conceptual/theoretical level, the answer to the question where sources come from is clear. We have to look for those norms which authorise the creation of the norms which, in turn, authorise the creation of customary international law or international treaty law. The Pure Theory of Law enjoins us to ask for and find positive norms of international law that create source-law. The norm (or the norms) of international law which authorise the creation of the sources of international law can probably be considered to be international law’s ‘historically first constitution’. These norms are both chronologically and logically prior in the hierarchy of validity.

That does help on a matter of abstract structural analysis, but not in the concrete case of analysing positive international law’s highest echelons. The question, ‘what norm of international law authorises the creation of the norms that authorise the creation of (for example) customary international law?’, enjoins us to find a positive norm authorising source-creation – but what if we cannot? How can we prove that there was a positive act of will creating, say, customary international law, at some point in the past? Our epistemological horizon is too limited to answer this question with more than a presumption. As long as we are presupposing, we could presuppose any norm to found international law, even absurd ones. We need to prove positivity, because mere fictional norms cannot found the validity of sources of positive law.

The fundamental problem of the sources of international law is that no meta-meta-source-law 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 and blinds us to other possible architectures of the highest echelons of law. The constitution of international law may lack positivity, i.e. it may exist only in the minds of the scholars who have the time to muse about the theory of international law. The ideal existence of law as norms is one of boundless possibility, limited and shaped only by the act(s) of will of those humans empowered by norms to create norms. If one takes the demand for positivity serious, this relationship cannot be pre-positive or a matter of logic only. It must be positive law. It seems that the humans empowered to create the highest echelons of international law are unlikely to ever have formed a will on these rather unpragmatic matters. While everyone would agree that a state’s officials (acting as and for the state) would have helped to create the norm permitting innocent passage by contributing to the formation of the element of will within customary international law, it is much less likely that acts of will were formed with respect to the more abstract matters such as the kind and number of sources of international law or its theoretical framework.

The constitution of international law may also simply be very hard or impossible to perceive. Its unwritten nature, its contentiousness and the structural problem of accurately defin-
ing the definition make it impossible to ascertain which claim to the ‘truth’ corresponds with positive law. This epistemological difficulty results in a lack of provability. If the existence of a proposed norm is unclear it should be assumed that a norm has not been created. In short, because we do not know how to perceive or prove the constitution, we do not know whether it is there or what it looks like.

4. Conclusion

If we are to continue to be able to speak of the second formal source of international law as ‘customary international law’, then we will continue to require for its creation both a regularity of practice *qua usus* or (state) practice and an expression of act(s) of will, even if masked as *opinio iuris* (*sive necessitatis*). Omitting state practice has a more terminological result than omitting *opinio iuris* however: customary international law without the custom could still be ‘general international law’ while without the act of will, it is not positive law – and, in the last instance, not law (or even normative) at all. But our information on how customary international law comes about is not authoritative, merely guess-work – neither Article 38 nor jurisprudence nor writings are (that) law. We have no way of (dis)proving theories on customary international law – which privileges orthodoxy immensely. On this level, it is unfortunately (nearly) all speculation – but this does not mean that anything goes. Legal scholarship in particular should be aware that its nimbus (such as it is) is dependent on its perception of objectivity and disinterest.