

CUSTOMARY LAW: A FEW MORE THOUGHTS

ABOUT THE THEORY OF “SPONTANEOUS” INTERNATIONAL CUSTOM

by

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1. When, on a Spring day of an unspecified year (though situated among the late eighties and the early nineties) George Abi-Saab, in the course of a Gilberto Amado lecture to the International Law Commission, stated that the Italian School of International Law stood as one man behind the concept of international custom as a “spontaneous” law, I impolitely shouted, as loudly as I could, that I for one – a member, however modest, of that renowned school – did not, with respect, share that theory. I added that the same was presumably true for a number of other members, surely less modest, of that same school. Since then, I have occasionally given a thought to writing something, in English, in order to rectify George Abi-Saab’s opinion. I trust that Jean Salmon, to whom this article is dedicated, will not mind if I seize the occasion of this *Festschrift* to do so. There may be, perhaps, more than just a personal interest in discussing the concept.

My subject is, precisely, a discussion of that theory of international custom as a “spontaneous” law that seems to be still accepted by a portion of the Italian school (not to mention a few distinguished outsiders). It is a theory that I find increasingly inappropriate to describe customary, unwritten or general international law. It is based, in my view, upon a non-existing, untenable analogy between customary rules within the framework of a national society, on the one hand, and the customary rules of international law, on the other hand.

2. Indeed, the first concept to be evoked is that of custom within a national society. It is unquestionable that within such a framework – an aggregation, mostly, of millions or at least tens of thousands of individuals – the formation and the vicissitudes of customary rules present traits that justify the definition of the phenomenon as a kind of spontaneous law. According to Santi Romano:

“non bisogna dimenticare che la consuetudine [-he was thinking surely of custom in a national society-] – viene in considerazione quando è già formata; che l’attività da cui risulta è nel suo svolgimento giuridicamente irrilevante, che essa è del tutto anonima, giacché quella dei singoli vi resta sommersa; che è manifestazione non di volontà, ma di *opinio*, se non di semplici tendenze non sempre consapevoli: né più né meno come anonima, involontaria, inconsapevole è l’attività da cui scaturisce la lingua parlata.”¹

It is surely in view of features so authoritatively summed up – from which I would take the liberty to remove (as a *lapsus calami*) the words “giuridicamente irrilevante”² – that the formation and essence of national customary law is rightly indicated at times as a “mystery”. The latter image, which is rightly resorted to also in other areas of any law, is justified by the fact that in any society of individuals custom comes into being, prospers, evolves and eventually disappears by the concurrence of actions, omissions, words and attitudes – positive, negative or indifferent – of innumerable human beings, not identified or identifiable – in that sense anonymous – and normally exempt from any intent, consciousness or expectation of participating in the creation, the modification or the extinction of legal rules. In that sense the phenomenon is spontaneous.

3. Despite the clearly non consensualist notion generally professed about customary rules within national legal systems, international custom has pretty generally been viewed for some time as a tacit agreement: a view I consider to be rightly abandoned for most unwritten rules of international law. Only one of the best-known formulations of the concept – a concept that goes back to Grotius – is de Vattel’s definition of “Droit des gens coutumier”:

"Certaines maximes, certaines pratiques, consacrés par un long usage, et que les Nations observent entre elles comme un sorte de droit, forment *le droit des gens coutumier*, ou la *coutume des Nations*. Ce droit est fondé sur le consentement tacite, ou, si vous voulez, sur une convention tacite des nations qui l’observent entre elles. D’où il paraît qu’il n’oblige que ces mêmes Nations qui l’ont adopté, et qu’il n’est point universel, non plus que le *droit conventionnel*. Il faut donc dire aussi de ce *droit coutumier*, que le détail n’en appartient point à un Traité systématique du droit des gens, mais que nous devons nous borner à en donner une théorie générale, c’est-à-dire, les règles qui doivent y être observées, tant pour ses

¹ Santi ROMANO, *Frammenti di un dizionario giuridico*, Milano, Giuffrè, 1947, p. 45 (ristampa Milano, Giuffrè, 1983, p. 45). I read the Norberto BOBBIO’s use of the terms “spontaneo”, “naturale”, “incosciente” as referring to custom in a national legal system (*Consuetudine e fatto normativo*, in *Contributi ad un dizionario giuridico*, Torino, Giappichelli, 1994, p. 16). Bobbio’s reference to Ago’s theory (p. 17) seems to me to be merely descriptive.

² Unless, of course, it were understood simply to mean “not intended as part of a legal transaction or as an *acte juridique*”. Any individual behaviour (I am speaking here of national law), while susceptible of participating in the creation of a customary rule, may obviously well be relevant under an existing legislative (or even customary) rule and thus acquire, for good or evil, a juridical *relevance*.

effets que par rapport à sa matière même: et à ce dernier égard, ces règles serviront à distinguer les coutumes légitimes et innocentes, des coutumes injustes et illicites."³

A similar concept was to be professed, throughout the 19th century and the first part of the 20th, by a number of writers, including, for example, Dionisio Anzilotti⁴, Karl Strupp⁵, Alfred Verdross⁶, Arrigo Cavaglieri⁷, and Tomaso Perassi⁸. According to the latter, national customary law was contemplated by a “secondary” rule (in Hart’s sense) (“norma sulla posizione giuridica”) not as an act but as a norm-making process: a process which included *diuturnitas*. The latter element would instead be absent, according to that same author, in international custom conceived by him as a *pactum tacitum*⁹.

Set aside by Western European scholarship following the Second World War, the tacit agreement theory of international custom met a great favour in the literature and (less obviously) in the diplomatic practice of the so-called Socialist States; and it was espoused at least for some time in the Third World Countries. These States looked naturally with *méfiance* at any rules of law in the formation of which they had not had a part or would not have, due to scarce weight, adequate chances to participate.

4. However, the apparent rigidity of the *tacitum pactum* theory had been considerably attenuated, in the literature of the early part of the twentieth century, by the introduction, within the framework of consensualism, of objective elements drawn precisely from analogies with features typical of custom within national systems and inconsistent, indeed, with the tacit agreement theory. For the sake of brevity, I confine my references to just a few of the most significant among these inconsistencies. A remarkable example is that of Karl Strupp. In describing international custom as resting upon the “conviction of the existence of a legal obligation – a point that marks a not

³ De VATTEL, *Le droit des Gens ou principes de la loi naturelle* etc., nouvelle éd., tome premier, Paris, Ailland Librairie, 1830, paragraph 25 (pp. 50-51). Italics in the l’original. The condition of consent is reiterated in the following paragraph 26 under the title “Règle generale sur ce droit” (p. 51).

⁴ *Cours de droit international; I: Introduction, Théories générales*, (trad. Gilbert Charles GIDEL), Paris, Sirey, 1929, pp. 70-77.

⁵ K., STRUPP, “Cour général de droit international public”, *Hague Rec.*, 47 (1934-I, pp. 301-324)

⁶ *Die Verfassung der Völkerrechtsgemeinschaft*, Wien-Berlin, 1926, p. 54. Verdross’ view was to change soon. See, for example, “Règles générales du droit international de la paix”, *Hague Rec.*, vol. XXX (1929-V), pp. 293-296. That author mentions a number of adherents to the *pactum tacitum* theory.

⁷ *Corso di diritto internazionale*, Napoli, 1925, v. I, p. 56.

⁸ *Corso di diritto internazionale*, Napoli, 1922, v. I, p. 41; and “Teoria dommatica delle fonti del diritto internazionale”, *Rivista di diritto internazionale*, 1917, pp. 195-223 and 285-314.

⁹ “Teoria dommatica etc.”, pp. 302-303.

minor departure from strict consensualism – he refers explicitly to Colin and Capitant’s manual on French civil law: where, *à propos* of custom within that area, it is stated that “la coutume ou droit non écrit désigne l’ensemble des règles juridiques [...] qui sont spontanément issues des besoins et des usages de la vie sociale”. Even more explicit analogies with the objective nature of national customary law are registered by Balladore Pallieri – one of the earliest “spontaneists” of international customary law¹⁰ – in his presentation of a number of authoritative consensualists. As stressed by Balladore, it is particularly remarkable that the consensualists are obliged to recognize, at least in part, the spontaneous and unconscious origin of custom. One example was Cavaglieri, who stated that the formation of custom is, in international relations, just a bit more conscious than it is in national law “avendo sempre un’origine, almeno fino ad un certo punto, *calcolata e voluta*” (emphasis added)¹¹. Another example was Anzilotti, in whose words “[l]e consuetudini, essendo manifestazioni spontanee, quasi incoscienti, di certe esigenze della vita in comune, precedono storicamente i trattati, che presuppongono una cooperazione volontaria, un’opera riflessa e quindi una coscienza più sviluppata delle esigenze e dei fini della collettività”¹². Ottolenghi, for his part, did not hesitate to admit that *voluntas* has, in the formation of custom, “una funzione affatto secondaria”¹³. Santi Romano, instead, had decidedly parted company, as well as Balladore Pallieri, from the consensualists:

“Le consuetudini hanno sovente un’origine quasi incosciente e quindi involontaria, e il loro valore non deriva dal fatto che si è avuta l’intenzione di costituirle, ma dalla convinzione che sia obbligatorio osservarle, e la convinzione non è atto di volontà, ma qualche cosa che domina e vincola la volontà. Se così non fosse si dovrebbe ammettere che una consuetudine sorga appena due o più Stati convengano tacitamente di seguire una data regola; invece la consuetudine non deriva da un accordo simultaneo, non acquista efficacia d’un tratto, ma si forma lentamente attraverso un periodo più o meno lungo di tempo, mentre nell’accordo tacito, che può aversi in un solo e dato momento, quest’uso reiterato non esiste”¹⁴.

¹⁰ According to the cited author, “se, come non sembra contestabile, delle consuetudini esistono nel diritto internazionale, esse sono necessariamente, a meno di non confonderle con altri atti giuridici che nulla hanno a che vedere con esse, un *prodotto incosciente* e spontaneo della comunità internazionale, non la manifestazione di una volontà, sia pur tacita, degli Stati”, and he reiterates insistently both the spontaneity of the phenomenon and its analogy with national custom throughout a number of pages of his article (notably pages 341-350; G. BALLADORE PALLIERI, “La forza obbligatoria della consuetudine internazionale”, *Rivista di diritto internazionale*, VII (1928), pp. 338-374. This definition is clearly very close to the definition of custom in internal (national) law as “un prodotto incosciente e spontaneo della [...] coscienza giuridica [degli] “individui”] ma non un prodotto cosciente e riflesso di un loro atto di volontà”).

¹¹ *La consuetudine giuridica internazionale*, Padova, Cedam, 1907, pp. 55-56.

¹² *Corso di diritto internazionale*, 3rd ed., 1928, republished by Padova, Cedam, 1955, p. 73.

¹³ *La personalità internazionale delle Unioni di Stati*, Torino, 1924, p. 46, and *Rivista di diritto internazionale*, 1925, p. 388 and 461.

¹⁴ S. ROMANO, *Corso di diritto internazionale*, Padova, Cedam, 1926, p. 29.

5. Casually evoked by the writers cited so far by way of a mere analogy with national custom, the notion that international custom is a “spontaneous” phenomenon was later erected into an elaborate theory, mainly by three authors. Mario Giuliano first proposed the concept in 1946¹⁵ and elaborated on it further in 1950 and later¹⁶. Roberto Ago worked out a more complete theorization in his “Scienza giuridica e diritto internazionale”¹⁷. In that elaboration, also presented in French at the Hague Academy¹⁸, international custom was decisively defined as a “complesso di norme di formazione spontanea”, “diritto spontaneo”¹⁹, as opposed to positive law such as treaty law, “diritto la cui formazione è opera di procedimenti normativi”²⁰. The theory of spontaneous law was further developed by Giuseppe Barile, who put even more emphasis, if possible, on the distinction between customary “spontaneous” law as the “law of conscience”, on the one hand, and “diritto della volontà” (treaty law), on the other hand²¹.

Despite secondary differences of emphasis, all three cited scholars seem to agree with Giuliano’s view that the rules of customary international law, due to their “spontaneous” nature, do not have a source (“fonte”) in the sense in which conventional

¹⁵ “Considerazioni sulla costruzione dell’ordinamento internazionale”, *Comunicazioni e studi dell’Istituto di diritto internazionale e straniero dell’Università di Milano*, II (1946), p. 175 ff., esp. 198 ff.

¹⁶ *La comunità internazionale e il diritto*, Padova, Cedam, 1950, pp. 152-189, 221, 283, esp. 159, 161 ff., 181 ff.

¹⁷ Milano, Giuffrè, 1950, esp. p. 78 ff. and 84 ff. The concept of spontaneous law was to be further developed by Ago in *Diritto positivo e diritto internazionale*, *Scritti di diritto internazionale in onore di Tomaso Perassi*, Milano, Giuffrè, 1957, vol. I, pp. 3-64, where he rejects the traditional concept of positive law as “diritto vigente” (opposed to natural law) and proposes a theory in which the concept of positive law is restricted to the law created by specifically regulated procedures as opposed to spontaneous law in general, particularly custom (cited work paras 8 ff., pp. 37-64). According to Ago, cited *Scienza giuridica*, pp. 107-108, international law “non dispone di un fatto normativo capace di produrre norme di diritto comune”; and he contests in the conclusive chapter of his cited 1956 Hague Academy course, that one could speak of a “source” for “spontaneous” international law: a view expressed also earlier in the cited *Scienza giuridica*, p. 78 ff., esp. 100 f. and confirmed in *Diritto positivo* (p. 40 ff.), within the framework of his restrictive concept of positive law, as opposed to spontaneous law.

¹⁸ “Science juridique et droit international”, *Hague Rec.*, 1956-II, p. 857-954.

¹⁹ The latter concept having been already largely emphasized by Giuliano throughout his cited pages.

²⁰ *Scienza giuridica*, pp. 78, 86, 107-108, *passim*.

²¹ “Tendenze e sviluppi della recente dottrina italiana di diritto internazionale (1944-1951)”, in *Comunicazioni e studi cit.*, IV (1952), p. 404 ff.; “La rilevanza e l’integrazione del diritto internazionale non scritto e la libertà di apprezzamento del giudice”, in *Comunicazioni e studi*, V (1953), p. 150 ff.; “Diritto internazionale e diritto interno, I, Diritto della coscienza e diritto della volontà”, *Rivista di diritto internazionale*, 1956, p. 448 ff. In the last cited work Barile considered the distinction between the two species of law to be so radical as to justify a different treatment of customary law and treaty law for the purposes of the relationship between international and national law: in the sense that national and international law would be separate in the area of “diritto della volontà” but not so – or not quite so – in the area of “diritto della coscienza”, namely customary law. Barile placed the foundation of general international law in “la coscienza giuridica ‘diffusa’ of the members of the international community”, that conscience conceived as a sociological reality, the birth, the change and the extinction of which was not the consequence of “un fatto normativo di produzione giuridica previsto da una specifica norma” (*Lezioni di diritto internazionale*, 2nd ed., Padova, Cedam, 1983, p. 73 ff.). Compared with this author’s previous works, especially *Diritto internazionale e diritto interno*, Barile’s distinction between “diritto della coscienza e diritto della volontà”, appears in *Lezioni* less decisive, and the element of “volontà” seems to interact with “coscienza” in the latter work (esp. at pp. 76-78) in such a way as considerably to attenuate if not contradict, in my view, the alleged “spontaneity” of international customary law. The author seems still to maintain (*Lezioni*, p. 229) the position that he took earlier with the regard to the relationship between international law and municipal law (*Diritto internazionale e diritto interno*, 1956).

rules have one. In Giuliano's words, in particular, the spontaneous rules in question do not pose to legal science "alcun problema relativo alla loro origine, ma soltanto il problema della loro esistenza: esistenza che si potrà considerare provata ogniqualvolta una serie di manifestazioni sufficientemente significative della vita di relazione internazionale consenta di concludere che le regole in questione sono effettivamente presenti nella coscienza dei membri del corpo sociale ed operanti nella loro vita di relazione"²².

6. The concept of "spontaneous" international law has played an important role in the justified reaction to the *pactum tacitum* theory. The concept was particularly favoured, in view of its "objectivity", by those who hoped to enhance the normative role and weight of general international law, especially after the emergence of *ius cogens*, in strengthening international organization through a "soft law" process gradually – and in that sense, perhaps, "spontaneously" – hardening to fill in the *lacunae* of the United Nations Charter, and especially the huge gap left open by unimplemented provisions of the collective security system put on paper at San Francisco. It was that thought that led the present writer, in the early 1970s, to profess, albeit guardedly, a concept of international customary law which perhaps approached the "spontaneous" law theory although it did not really adhere to it. Pretty early, though, he was bound to realize that that theory was unpersuasive, particularly with regard to its denial of any decisive role of the will and deliberate choices of States in the formation of customary international law²³.

7. Firstly, while the concept of spontaneity fits perfectly, as shown in the quoted Romano's definition in para. 1 *supra*, with the formation, vitality and application, but mainly to the formation of customary law in a national society, it does not fit with the unique features of the community of States. Much as the analogy seems to be broadly accepted, as shown above, among the consensualists as well as the objectivists (or "spontaneists")²⁴, it holds water with regard to *none* of the features accompanying spontaneity in Romano's or any other "civilian's" definition. The *milieu* of States –

²² M. GIULIANO, *Diritto internazionale, I, La società internazionale e il diritto*, 2nd ed., Milano, Giuffrè, 1983, p. 217.

²³ "Consuetudine (III-Diritto internazionale)", *Enciclopedia giuridica* "Treccani", vol. VIII, 1988, pp. 1-11 of *tirage à part*.

²⁴ Paras. 3 and 4 *supra*.

sovereign and independent entities – is obviously the less congenial to a “spontaneous” or unconscious normative formation of the kind in question.

Until the first World War, the number of States was about fifty. That number has now quadrupled and it is hardly plausible that an increase of more than a few units, at most a dozen, will occur in the future. Within such an aggregation of independent political entities, anonymity of behaviour – especially at the present stage of communications but surely since time practically immemorial – is simply inconceivable. Any commissive or omissive behaviours and any attitudes of States, among the facts that concur in the making of an international unwritten rule – although the “spontaneists” tell us at times that, I wonder why, the origin of international customary rules is of no interest and need not to be sought – is punctually and precisely attributable to a given State or group of States. The same must be said about the time, the circumstances and at least the presumable reasons why the conducts or attitudes in question occur. Particularly nowadays any action or omission of a State is known all over the world with the immediateness of a ray of light. This renders anonymity improbable, if not impossible.

Unconsciousness? Considering the way most States are (and have been for some time!) structured, it is extremely unlikely, if at all possible, that the relevant actions, omissions and attitudes positively or negatively affecting the formation or vicissitudes of a customary rule in any area of international relations, present the degree of unconsciousness or “spontaneity” which is typical of the parallel phenomena within a national society or any aggregation of human beings. On the contrary, every act or omission – and “actions are words and words are actions”, as noted by Emerson (quoted by Mendelson) – is the result, within each State’s fabric, of cooperation, consultation, discussion among a number of individuals, offices and institutions, before it manifests itself to the outside world. Furthermore – and more decisively – the relevant acts or omissions are deliberately and designedly accomplished, and attitudes designedly assumed, with the intent of provoking, prompting, favouring or thwarting the formation of a customary rule. Examples abound. No comparison would hold water with the notoriously unconscious nature of the parallel, allegedly identical phenomenon within an aggregation of human beings. The anonymity and “involuntarity” of the relevant behaviours and attitudes of States is also contradicted by the fact that any properly organized and governed State is provided with specialized personnel entrusted with the task of monitoring the possible implications of any action or omission, of its

own or of other States, which could have – unless indifferent or immaterial – any positive or negative impact on the *status* of given rules of unwritten international law. In the formation of customary law within a national society an analogy can be found only with regard to the formation and the technical “monitoring” of those constitutional or administrative unwritten rules or conventions that in their turn resemble the features of that “*private law writ large*” which is the law of international relations²⁵.

I am not aware of any attempt, on the part of the founders of the “spontaneist” theory, to explain such striking peculiarities distinguishing international from national custom, particularly with regard to the formative process. Nor do the “spontaneists” explain – one is bound to insist – why they exclude so thoroughly that any problems arise, at the stage of determination and application, with regard to the origin – namely the formation or vicissitudes – of a customary rule or principle.

8. The role of will in the formation of international custom – deliberate choices, rationally planned and carried out actions and omissions, monitoring of the state and evolution of customary law – is confirmed, if it were necessary, by other aspects of the formation and application of customary international law. These are illustrated in the learned writings of scores of the scholars who have dedicated themselves to the study of the phenomenon. I refer particularly to Maurice Mendelson’s 1998 Hague course on “Formation”²⁶.

I need hardly mention the phenomenon of the “persistent dissenter(s)” and that of the entry of numerous new States into the “community” as an outcome of the decolonisation process. In both phenomena the role of *voluntas* is manifest. May I refer, also with regard to these aspects, to Tullio Treves’ re-edition of the Giuliano-Scovazzi-Treves manual, now in the latter’s exclusive hands. Although he seems to maintain a strong faith in the “spontaneity” theory inherited by him from the concept’s first proponent, his treatment of the whole subject tells much, to the careful reader, about the exiguity of the role of “conscience” and “spontaneity” as compared to that of wilful and deliberate choices and carefully designed actions, omissions and attitudes²⁷.

²⁵ This is part of T. E. Holland’s definition of international law. That author’s complete definition is reported in G. ARANGIO-RUIZ, *The Friendly Relations Declaration and the System of the Sources of International Law*, Sijthoff, Alphen a/d Rijn, 1979, p. 77.

²⁶ “The Formation of Customary International Law”, *Hague Rec.* 272 (1998), pp. 150-410. *Adde*: *The International Court of Justice and the Sources of International Law*, in Lowe and Fitzmaurice (eds.), *Fifty years of International Court of Justice, Essays in honour of Sir Robert Jennings*, Cambridge, 1996, pp. 63-89; and “The Subjective Element in Customary International Law”, *British YearBook of International Law*, v. 68 (1995), p. 177 ff.

²⁷ T. TREVES, *Diritto internazionale, problemi fondamentali*, Milano, Giuffrè, 2005, pp. 221-270.

It is hardly necessary to stress that the role of wilfulness has actually become even more visible since international bodies, albeit mostly through non-binding resolutions, have joined incisively in the building of that “soft law” which in a number of vital areas of inter-State relations has accompanied the formation of customary rules: a role which is too manifest – and has faced in its turn so clearly, within the said international bodies, the equally wilful resistance of the conservative governments – for the theory of “spontaneity” to hold any water. This “new” process *seconda maniera* obviously coexists with the old one.

Someone speaks of the phenomenon – namely the role of international organs or conferences or of codification – as a “remontée of voluntarism”²⁸. It is not, in my opinion, a matter of voluntarism, surely not of voluntarism in the sense of *tacitum pactum*, a theory which is untenable except in cases where custom comes not, or comes very doubtfully, into play. It is, simply, the obvious enhancement of the role of will, thanks to the mutual and public confrontation of wilful words and votes, manifesting itself, within collective bodies, between “conservative” and “progressive” member States. And that confrontation shall be pursued, with a not less decisive role of wilful choices and words, in that phase of consolidating practice – with accompanying *opinio* – by those not less wilful actions and omissions that will effect – *if* the formation of custom proceeds beyond the collective body “soft law” phase – the completion of the custom-formative process. At that point it surely will not be a matter of *pactum tacitum*. It will be a matter of custom with just a higher dose of wilfulness.

9. For the textual evidence to be drawn, with regard to a discussion of the “spontaneous” theory of customary international law, from Article 38.1 of the Statute of the ICJ (and its preparatory work) as well as from the jurisprudence of the ICJ (up to the middle eighties) I refer to a previous writing of mine, where the core of the relevant data are tentatively assembled²⁹.

Considering the limited object of the present article, I need not go into the problematic aspects of international customary (unwritten or general) law other than the one on which the present article is focused: namely, the allegedly spontaneous nature of the phenomenon. A few points, however, must be touched upon.

²⁸ G. ABI-SAAB, *op. cit.*, p. 64, who refers to the development in question as *coutume sage*.

²⁹ Cited “Consuetudine, III-Diritto internazionale”, *Enciclopedia giuridica “Treccani”*, vol. VIII, 1988, paras. 5.1-5.2, pp. 8-9 of *tirage à part*.

Regarding the old debate over the two ingredients of *diuturnitas* and *opinio* I venture to believe that any old issues relating to their respective and combined roles in the formation and application of customary rules, and any further developments that those issues may have undergone, particularly with regard to what René-Jean Dupuy called *coutume sauvage*³⁰, are overcome, in a measure, by the clearer, better perception of the peculiar features of international custom as compared to national custom. I refer both to the necessity of the presence of both elements and, more particularly, the related question of the time necessary for the uniform *diuturnitas* requirement – obviously a secondary element - to be met. On the first point, the motivated rejection of the concept of spontaneity emphasizes and specifies the role of *opinio*. If, for the purposes of recognition and application of the rule, *opinio* would be rightly understood in the merely literal sense of that term, for the purposes of the *formation* of the rule (a matter obviously not irrelevant for the purposes of recognition and application), the term *opinio* is to be read instead to mean *more* than just an opinion. It must have meant, at the formation stage, the deliberate, wilful, nature of the actions, the omissions or the attitudes that concur – and are frequently meant to concur, especially in the so-called *coutume sauvage* process – either to the coming into being of the rule or to thwarting the process. This should reduce, if it were necessary, the preoccupation of those scholars who wondered whether customary law might be based upon an error. At the formation stage there is a matter of design and intent; and a matter of design and intent it is as well at the stage of preservation, modification or erosion of the unwritten rule.

Regarding the time factor, it is likely that Bin Cheng is right when he speaks of the possibility of instant custom. As others have already remarked, the two traditionally identified factors operate, throughout the process, in close interrelationship: and when they are not present with equal intensity, the scarcity of the one may well be compensated by the abundance of the other. It is thus perfectly conceivable, especially – although not exclusively – in the formation of *sauvage* custom, that *opinio*, inclusive of a particularly high degree of intent, compensates for the lack of scarcity of *diuturnitas* for the instant custom hypothesis to materialize. The best example is the formation of the law of the Exclusive Economic Zone³¹. The Outer Space and Celestial Bodies event is another case in point. But this is precisely because the process is anything but “spontaneous” or even “unconscious”; and because *opinio* is more than just a matter of opinion (or “conscience”). The opposite, as also has been noted, can

³⁰ Para. 12 *infra*.

³¹ Sh. ODA, “Exclusive Economic Zone”, in *EPIL*, vol. II, p. 305 ff., esp. paras. 1 (c), 2 (a), 3 (b), and 4.

obviously happen: namely, that a very protracted and generalised usage create such a degree of *diuturnitas* as to make the formation of the rule almost a matter of immemoriality.

10. The circumscribed object of the present writing suggests that the treatment of the textual evidence be reduced to a minimum. The presence of deliberation, design and wilfulness in the formation of international customary rules is confirmed by the definitions of that law in the international instruments in which those rules are contemplated. Despite the frequent use of general terms such as “custom” and “general practice”, the rules in question are presented, when they are defined or proved, in terms evoking acceptance, recognition, consent, assent, lack of dissent, or even acquiescence: concepts hardly understandable as spontaneous, anonymous or unconscious participation in the phenomenon.

The most important example is, of course, subparagraph (b) of paragraph 1 of Article 38 of the ICJ’s Statute, to which I fail to extend wholeheartedly the label of “malhereux” (applied to the whole article, *inter alios*, by Dionisio Anzilotti). Considering the specific purpose of Article 38, namely, to indicate to the Court which rules it is to apply in handling the cases submitted to it, the sentence “international custom, as evidence of a general practice accepted as law” does not seem to be so “malhereuse”³². It covers both *opinio iuris* and conduct (the generality of the practice being applicable, after all, even to local customary rules ... generally applied by a few States or even two). By not mentioning any time requirement, it leaves the door open to the possibility that the brevity of a practice be compensated by a higher intensity of *opinio*; and it is not excluded that it could be viceversa. As for the term “accepted”, it seems to me to disprove any notion of “spontaneousness” in the relevant attitudes of States. This reading is comforted by the language of Article 38 of the Law of Treaties Convention: (“*règle ... de droit international reconnue comme telle*” (“*recognised as such*”; “*reconocida como tal*”) and by Article 53 of the same Convention, which defines an imperative general rule as “*une norme acceptée et reconnue ... en tant que norme à la quelle aucune dérogation n’est permise et qui ne peut être modifiée que par un nouvelle norme du droit international général ayant le même caractère*”.

If in the Hague Court’s jurisprudence the wilfulness of the formation process may occasionally be merely implicit, it is because, of course, the Court is normally only

³² D. ANZILOTTI, cited Cours, (Gidel’s translation), 1929, p. 104.

concerned with the evidence available at the stage of application. The wilful element, however, is often so manifest as almost to justify the abhorred *tacitum pactum* theory. In *Lotus* the Permanent Court asserts that “*The rules of law binding upon States... 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 the coexisting independent communities or with a view to the achievement of common aims*”.

Within a context otherwise controvertible, a similar concept seemed to inspire, half a century earlier, the Supreme Court of the United States in the *Scotia* case (1871), where it asserted that the law of the sea rests “*like all the laws of nations, upon the common consent of civilized communities*” and is preserved “*by the concurrent sanction of ...nations.*” The same Court referred to a “*general consent of the civilized nations*” in other cases, such as *The Paquete Habana*, (1900)³³; and described international customary law as a “*generally recognised rule*” in the arbitral decision in *Great Britain (Eastern-Extension, Australasia and China Telegraph Co. Claim v. United States, 1923*³⁴. The use, in this and similar *dicta*, of terms implying explicit or implicit manifestations of will or wilfulness (“consent”, “acceptance”, “sanction”) is equally indicative of a normative intent pursued in the formation or preservation (“*established in order to regulate the relations*”). This seems not to conform at all to Romano’s very clear concept of custom in national law quoted in paragraph 2 *supra*. The terms used in the cited decisions seem rather to be, *prima facie*, closer to the *pactum tacitum* theory of international customary law.

The concepts of consent, assent or recognition are also present in the British Court’s decision in *West Rand Gold Mining v. The King* of 1905. In this decision one finds concepts like “*common consent of nations*”, “*assent of our country*”, “*really accepted as binding*”, and the judges speak of *recognition* on the part of the United Kingdom, or of an *acceptance*. One refers to international law as the rules that “*have received the express sanction of international agreement or gradually have grown to be part of international law by their frequent practical recognition*”. One also quotes a *dictum* according to which international law “*is the sum of the rules or usages which*

³³ Herbert W. BRIGGS, *The Law of Nations, Cases, Documents, Notes*, New York, Appleton-Century-Crofts, 1952, p. 31.

³⁴ H. W. BRIGGS, cited work, p. 35.

*civilized states have agreed shall be binding on them in their dealings with one another*³⁵.

It must be noted in particular that in referring to *opinio iuris* or conscience in the sense of awareness of the binding nature of the rules – elements which are typical of national customary law – the practice in question seems mostly to stress acceptance, choice, assent, agreement, acquiescence, lack of dissent, or voluntary (wilful) action or omission. Nothing seems to point to spontaneousness or spontaneity.

Of a “*concurrent assent of nations*”, of “*assent of the nations who are bound by it...*”, of an “*assent*” that can be “*express, as by treaties or... implied from established usage...*” one speaks insistently in the *Franconia (Regina v. Keyn)* case of 1876³⁶. In that same case, furthermore, one speaks, in connection with unwritten customary law, of the “*acquiescence of the States*”³⁷, of norms “*exercised and acquiesced in*”³⁸ and of the “*assent of nations*”³⁹.

The evidence offered by the cited case is confirmed by ICJ judgements or advisory opinions: Nowhere, in cases such as *Corfu Channel*, *Gulf of Maine*, *North Sea Continental Shelf*, *Legality of Use or Threat of Nuclear Weapons*, *Military and Paramilitary Activities in and against Nicaragua* does any hint appear that the rules of general international law evoked by the Court came into being and exist as a “spontaneous” phenomenon. The particular emphasis put by the Court upon *opinio* (actual practice appearing not infrequently like a secondary element) confirms the wilful, deliberate nature of *opinio*⁴⁰. In the *Nuclear Weapons* opinion, for example, it was clearly a confrontation of long-persisting choices between the Nuclear-Weapon States on the one hand, and the Non-Nuclear Weapon States, on the other hand – surely far from spontaneous – with regard to the issues submitted to the Court.

Of “acceptance” speaks the Court in the *Nicaragua* case (1986)⁴¹. Of “recognition” speaks the *North Sea Continental Shelf* Judgement⁴². Of “acceptance” – within the

³⁵ L. C. GREEN, *International Law through the Cases*, London, Stevens, 1959, p. 27.

³⁶ L. C. GREEN, Cited work, p. 408 gg.

³⁷ L.C. GREEN, cited work, p. 414-415.

³⁸ L. C. GREEN, cited work, p. 416.

³⁹ L. C. GREEN, cited work, p. 416.

⁴⁰ The decisiveness of *opinio* is recently stressed by G. PALMISANO, “Determining the Law on the Use of Force: the ICJ and Customary Rules on the Use of Force”. This paper, presented by the author to the University of Macerata’s Symposium on *Customary International Law on the Use of Force, A Methodological Approach*, 2005, was kindly made available to me in advance by Professor E. Cannizzaro and P. Palchetti, who are editing the volume containing the Symposium records.

⁴¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgements, *ICJ Reports*, 1986, pp. 99-100, para. 188.

⁴² *ICJ Reports*, 1969, p. 43, para. 74.

context of Article 38 of the Court Statute – speaks the Court in the *Colombian-Peruvian Asylum Case*⁴³.

11. Two well-known examples clarify the lack of spontaneity. The 1945 Truman proclamation asserting an exclusive spatial right of the United States over that State's continental shelf was presumably not conceived as an agreement proposal to any other State or States. It was and remained a unilateral claim addressed, in principle, to no State in particular. If it was addressed to any State, it was due, I assume, to some exceptionally close relationship relating to the continental shelf in question. Who knows, perhaps Canada? Be that as it may, when other States took similar public action with regard to their respective continental shelves, they did not enter into a tacit agreement with the United States. The latter States' acts were unilateral and addressed neither to the United States nor to any other State in particular. They remained unilateral acts with regard to the United States as well as with regard to any other States whether the latter pursued or did not pursue a similar course. The result was, precisely, the formation of that customary rule that was first codified in the 1958 Law of the Sea Convention⁴⁴. Similarly, when the United States and the Soviet Union started their Outer Space operations it is of course possible – although I am unable to say – that they tacitly agreed on the non-appropriability of the Moon and other Celestial Bodies. So, there might have been a tacit agreement or no agreement at all. Be that as it may, it is likely that by the time the Outer Space Treaty was concluded a general rule of customary law had come into being: but if such was the case the formation of that general rule was the product neither of adhesions by other States to a more or less plausible, although possible, bilateral tacit agreement between the United States and the USSR, nor of a tacit general agreement. It was the product of attitudes that a number of States had unilaterally assumed with regard to the matter: unilaterally as amongst themselves as well as *vis-à-vis* the United States and the USSR – and surely, as well as the latter two States, not “unconsciously” but wilfully⁴⁵.

Be it as it may of more or less plausible agreements, in neither case the justified rejection of the consensual or tacit agreement theory of international custom purports the least concession to the imaginative but undemonstrated concept of customary

⁴³ Judgement of Nov. 20th, A50, *ICJ Reports*, 1950, pp. 276-277.

⁴⁴ Christos L. ROZAKIS, “Continental Shelf”, in *EPIL*, vol. I, pp. 783-792.

⁴⁵ Nicolas MATEESCO MATTE, “Space Law”, in *EPIL*, vol. IV, pp. 552-557; *ID.*, “Outerspace Treaty”, in *EPIL*, vol. IV, pp. 836-839.

international law as a “spontaneous” normative phenomenon. None of the behaviours involved in the two processes – and in which these processes consisted – was a “spontaneous” deed or word, nor, for that matter, was it anonymous. The decisive deeds and words in question reflected designed, wilful, conscious choices by given, perfectly identifiable actors.

12. It is well-known that a distinction has been imaginatively suggested by René-Jean Dupuy between *coutume sage* and *coutume sauvage*, the first concept applying to the traditional, long vintage custom. *Coutume sauvage* would instead be that kind of customary law the formation of which is affected, more or less significantly, by resolutions of international bodies and conferences (especially the UN General Assembly) or by the codification process⁴⁶. These factors affect custom from the viewpoint of both the acceleration of the process and its contents (possibly more sensitive, for instance, to the viewpoint of the generality of States, particularly to those of the Third World). In both the kinds of custom-making processes, spontaneity seems not to play a significant role, if any.

Whatever one’s preferences may be with regard to the degree of *sagesse* of any given custom-making methods or processes (although the *coutume sauvage* process consists in a measure, of course, also of procedures), there is no doubt, for the specific purposes of the present writing, that from the viewpoint of the formation as well as its lifetime and evolution the *sage* custom and the *sauvage* – my preference going, surely, to the *sauvage* – are characterized by a sufficient degree of wilfulness as to contradict the concept of those rules as “spontaneous”. The only unwritten, customary rules with regard to which that concept could more appropriately (or less inappropriately) apply are, as noted earlier, the possible, though controversial, fundamental or constitutional rules (para 13 *infra*).

Although the presence of wilfulness and design is obviously more manifest in the *coutume sauvage* process, it is not less surely perceptible in René-Jean Dupuy’s

⁴⁶ It is also known that the view has wittingly been expressed that the two adjectives’ destination should be inverted, the term *sauvage* being more apt to apply to traditional custom-making, characterized by both the preponderant influence of old world States and the slow timing of the process. *Sage* would more appropriately describe, according to Abi-Saab, the post-second World War and post-decolonization custom, the formation of which is characterized by the weight of the new States and the impact of international organizations. In Abi-Saab’s words, « [I] a coutume traditionnelle, celle que le Professeur Dupuy appelle la "coutume sage" lente et imperceptible, est en réalité la "coutume sauvage"; et la nouvelle coutume la vraie "coutume sage", apprivoisée et mise en service commandé » (G. ABI-SAAB, *La coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté, Le droit international à l’heure de sa codification, Études en l’honneur de Roberto Ago*, vol. I, Milano, Giuffrè, 1987, p. 53 ff., at 61).

coutume sage process. It is worth noting, anyway, that that very regretted, genial writer not only relegated the concept of “spontaneity” to the customary law of primitive societies⁴⁷. He also placed the objective theory and the tacit agreement theory on one and the same plan⁴⁸. In addition, he repeatedly mentioned the presence, in international customary law, of a voluntary element⁴⁹, especially in *coutume particulière*⁵⁰ and in the ICJ decision on the *North Sea Continental Shelf* case⁵¹. *A fortiori*, the voluntary element’s impact is stressed by René-Jean Dupuy where he deals with his *coutume sauvage*, with the confrontation between the freedom of the high seas and the Latin-American two-hundred miles claims⁵², or the confrontation of the Old World with the “Socialist” States and those of the New World with regard to private property, State succession, “diritti quesiti”⁵³ or also, more generally, “l’écèlement du droit coutumier traditionnel”⁵⁴, recognizing finally that in the *coutume sauvage*’s more ... composite process “l’élément volontaire” prevails to such a degree as to make the very notion of custom rather questionable⁵⁵.

Be it as it may of “wise” and “wild” international custom, I believe there are sufficient reasons to set aside a theory of spontaneous international custom, manifestly based upon an acritical transposition, into the unique fabric of international law, of a concept of custom which belongs to national law. There is, no doubt, *some* resemblance, but no more than a vague resemblance⁵⁶.

⁴⁷ Cited article, p. 77.

⁴⁸ *Ibidem* (p. 77).

⁴⁹ Cited article, where the author notes that “nombre de coutumes sont d’origine volontaire et émanent des grandes Puissances” et rappelle (en citant Charles de Visscher) l’impulsion [clearly designed and deliberate] donnée par les Etats-Unis au développement du droit de la neutralité” (p. 77).

⁵⁰ *Ibid.*, p. 82

⁵¹ *Ibid.*, p. 79.

⁵² *Ibid.*, p. 83.

⁵³ *Ibid.*, p. 83.

⁵⁴ *Ibid.*, p. 83.

⁵⁵ *Ibid.*, p. 84 (“coutume sauvage à la croissance rapide comme une plante tropicale”).

⁵⁶ In distinguishing international from national customary law I find only *some* comfort in Norberto BOBBIO’s important remark, reported in M. GIULIANO, T. SCOVAZZI, T. TREVES “Diritto internazionale, I”, *La società internazionale e il diritto*, 2nd ed., at. P. 203, note 40, that just in the area of international studies “*in cui sono state per lo più prese d’acatto le varie dottrine sulla consuetudine elaborate dai giuristi statualistici per l’ordinamento statale, ci si accorge, a ben osservare, che queste non sono trasferibili, se non con molti accorgimenti, ... ad altra sede giuridica, e quindi ci si riconferma nell’idea della necessità di studiare la consuetudine giuridica sgombrando, quanto più è possibile, il terreno da pregiudiziali pratiche e tecniche*” (emphasis added by me).

After verifying the exactitude of the above quotation at p. 28 of BOBBIO’s, *La consuetudine come fatto normativo* (a precious work I had inadequately studied before), I have given more thought to the criticism therein addressed (in my view quite rightly) to (unidentified) international law scholars. However, that leads me to wondering about the following: points: (i) who is taking “d’acatto” the concept of custom from national law? - are not the “spontaneists” of international custom precisely those who borrow the concept of custom from national law? - but if so, how come a keen scholar like Giuliano, once aware of Bobbio’s sacrosanct criticism, did not deem it necessary to tell his readers what he thought of that criticism and why that criticism did not affect in the first place his (Giuliano’s) *own* concept of “spontaneous” international custom so obviously derived from the questionable national custom analogy?; (ii) how

13. The area where “spontaneousness” or “spontaneity” might have a role to play is that set of controversial “fundamental” or “constitutional” rules, norms and principles which, in the opinion of a number of scholars, would be situated at the ultimate basis (or at the summit) of international law and, in particular, above both treaty and custom. Reading from Giuliano’s⁵⁷ and Treves’⁵⁸ ample descriptions of the said scholarly opinions (and leaving out, for the sake of brevity, Giuliano’s reservations on the plausibility of the theory), the fundamental or constitutional principles in question derive from the very structure of the international society, impose themselves by the fact of the latter’s existence and would be, according to Romano, neither voluntary nor customary. Among such rules on principles Romano places the principle of equality, the principles allowing (or not condemning) war and reprisals, *pacta sunt servanda*, and other principles. While Fenwick wrote cautiously of general principles of “lawfulness” and “unlawfulness”, Balladore Pallieri spoke of “original norms” – and “constitutional norms” that come into being with the very formation of an international community and deriving their binding force not from having been created in one way or another, their value and justification remaining, for the jurist, “mysterious”. Norberto Bobbio, for his part, wrote that above or beyond customary law there would be

come Bobbio himself, who repeatedly seemed to adhere, after 1942, to a concept of international custom as a “spontaneous” phenomenon, did not rectify the view he had expressed in 1942 about the national law analogy?: I refer to pp. 17-18 of Bobbio’s “Consuetudine e fatto normativo” in *Contributi ad un dizionario giuridico*, Giappichelli, Torino, 1994, and the same author’s “Consuetudine” in *Enciclopedia del diritto*, Giuffrè, Milano, vol. IX, pp. 426-427; (iii) how come, finally, the continuators of Giuliano’s theory (Ago and Barile) took no notice either of Bobbio’s criticism or of Giuliano’s silence thereon?

I find it all rather puzzling, except with regard to Bobbio, whose interest in international law was, in my tentative view, if not scarce, not particularly keen. I also feel that Bobbio’s reference to Ago’s criticism of positive law’s traditional concept (mentioned by Bobbio as related to Ago’s concept of international custom as spontaneous law) implies *not his adherence* to Ago’s restrictive concept of positive law. Preferring as I do the traditional concept of positive law (which also includes custom) I find on that issue in Bobbio more comfort (especially at pp. 35-38 of *Teoria generale del diritto*, Giappichelli, Torino, pp. 35-38) than on the issue of the international custom’s alleged spontaneity. I find, lastly, even more comfort in Norberto Bobbio’s treatment of customary law in general (but particularly, I assume, in national law).

Norberto Bobbio’s theory of custom has proceeded a long way beyond his cited 1942 monograph. The topic is treated by him again in “Consuetudine (Teoria generale)”, *Enciclopedia del diritto*, Milano, Giuffrè, vol. IX, 1961, pp. 426-443; in *Teoria generale del diritto*, Giappichelli, Torino, 1993, *passim*; and, more importantly, in “Consuetudine e fatto normativo”, *Contributi ad un dizionario giuridico*, Torino, Giappichelli, 1994, pp. 17-57.

Bobbio mentions “spontaneity” in *Contributi ad un dizionario giuridico*, Torino, Giappichelli, pp. 17 and 18 (19; at p. 18 he refers to international law, as the privileged field of custom, which would have supplied the main argument for (Ago’s) restrictive concept of positive law. But “spontaneity” is not attributed by Bobbio – if I understand correctly – specifically to *international* custom. He clearly deals mainly, in *Contributi* as well as elsewhere, with *national* customary law.

⁵⁷ M. GIULIANO – T. SCOVAZZI – T. TREVES, *Diritto internazionale, I, La società internazionale e il diritto*, 1983, pp. 206-213.

⁵⁸ T. TREVES, *Diritto internazionale etc.* (2005), p. 277 ff.

“regole insite nella natura stessa dei fatti e dedotte direttamente dalla logica del principio universale di giustizia (contemperamento della libertà con la coesistenza), regole che non hanno bisogno di alcun fatto normativo che le ponga in essere, perché il fatto normativo viene a coincidere col fondamento ideale delle regole stesse”⁵⁹.

As the point is taken by an eminent French scholar:

“Plus simplement on peut se demander si l’on ne se heurte pas ici à un problème du même ordre que celui de la détermination du fondement du droit conventionnel, lequel ne comporte pas et ne peut pas comporter de solution exclusivement juridique. Il suffirait alors – ainsi que l’ont indiqué plusieurs auteurs contemporains – de chercher le fondement de la coutume dans la nécessité de la vie sociale, dans les exigences de la vie internationale dont elle serait justement issue »⁶⁰.

The phenomenon was called by Bobbio “*il diritto naturale vigente*”⁶¹, a concept later adopted by Ago and Barile⁶². In the view of the same author, the *pacta sunt servanda* rule “è un principio che non ha bisogno d’autorità, per il semplice fatto che è evidente tanto è vero che non si può immaginare gruppo sociale in cui immediatamente non viga nel momento stesso in cui il gruppo si costituisce”⁶³. The hypothesis of “norme primarie” or “norme e principi generali”, whose formation was only historically explainable, was admitted by Perassi in the more recent among his writings⁶⁴. Morelli, for his part, has rejected the notion of fundamental or constitutional rules since the very first editions of his *Nozioni*⁶⁵. As rightly pointed out by Giuliano and Treves, the theory of the said fundamental rules or principles represents a substitute for the theory of fundamental rights and duties of States on which Phillmore gave a classic course at the Hague Academy in 1923⁶⁶.

Be it as it may of the merits of the theory of fundamental or constitutional norms and principles, some of which seem *prima facie* to be evoked between the lines of the

⁵⁹ *La consuetudine* pp. 46 ff., 70 f., 80 ff. It must be stressed again, however, that the cited work’s object was, mainly, customary law in national societies, not without references to the universal *human* society to be (p. 80 f.).

⁶⁰ Charles ROUSSEAU, *Droit international public*, Paris, Sirey, 1953, p. 64; Id., *Droit international public*, Dalloz, 5^{ème} éd., 1970, pp. 79-80.

⁶¹ *La consuetudine come fatto normativo*, Padova, Cedam, 1942, p. 46 s.

⁶² R. AGO, *Scienza giuridica*, p. 96, note 1; G. BARILE, *Lezioni*, p. 79.

⁶³ *La consuetudine etc.*, p. 46.

⁶⁴ See M. GIULIANO – T. SCOVAZZI – T. TREVES, *Diritto internazionale* etc. (1983) cited, at pp. 210-211 and note 58 thereunder.

⁶⁵ G. MORELLI, *Nozioni di diritto internazionale*, Padova, Cedam, 1955, p. 22 f.; and “Cours général de droit international public”, *Hague Rec.*, vol. 89 (1956-I), p. 450 f.

⁶⁶ T. TREVES, *Diritto internazionale, problemi fondamentali*, 2005, pp. 237 and 238. The theory of fundamental rights and duties was sharply criticized in a well-known chapter of Dionisio Anzilotti’ article on “Trattati generali di diritto internazionale pubblico”, in the fourth number of *Rivista di diritto internazionale*, I, (1906) no. 1 and 2, reprinted in D. Anzilotti, *Scritti di diritto internazionale pubblico*, (Padova, Cedam, 1956), vol. I, pp. 245 ff., especially 273-279.

ICJ's reasonings in *Corfu Channel* and *Gulf of Maine* judgments and in the *Nuclear Weapons Opinion*⁶⁷ – it is perhaps with regard to such norms or principles that the concept of “spontaneity” could be appropriate⁶⁸. This was before the appearance of Giuliano's, Ago's and Barile's theory of international custom as “spontaneous” law.

On constitutional rules I prefer not to commit myself at this time. Perhaps the only real constitutional rule is that there is on earth no power over and above States – not even, as yet, the United Nations⁶⁹ – and that no State has any power over another. I would rather confine myself, although it exceeds the specific scope of the present writing, to a very few considerations on the problem of the foundation of international customary law.

14. As everybody knows, the lawyer seeking a foundation for customary law, whether national or international, is confronted with the problem of the “passage from fact to law”: and he can choose, roughly, between two extremes. On one side, there is the normative way, which involves looking for some norm (other than customary) legitimizing custom as a norm-producing process: a search that leads pretty soon to some basic norm, however conceived, logically or sociologically. At the opposite end, there is the factual (also described as “institutional”) way, the assumption being in this case that law is a fact and from fact or facts it ultimately originates. As well as the “spontaneists”, the present writer is inclined to take the latter way, in the (right or wrong) belief that customary law is a “fatto normativo”⁷⁰: and among the many possible concepts he is inclined to adopt the view put forward in Italy by Costantino Mortati. According to this writer, “fatti normativi” are “fatti che ... producono effetti giuridici per virtù propria, non sulla base di norme precostituite”. These are custom and

⁶⁷ *The Corfu Channel Case* (UK v. Albania), *ICJ Reports* (1949); *Case Concerning Delimitation of the Maritime Boundaries in the Gulf of Maine* (Canada/United States of America, *ICJ Reports* (1984); Adv. Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Reports*, 1996. I refer to the evocation of the equality of States, of self-protection, of respect for territorial sovereignty, of “extreme circumstances of self-defence”.

⁶⁸ Prospero FEDOZZI asserted that the fundamental or constitutional norms of international law “sono un diretto e spontaneo prodotto della comunità internazionale”; P. FEDOZZI, *Introduzione al diritto internazionale e parte generale* (1933), vol. I del *Trattato di diritto internazionale* a cura di Fedozzi e Romano, 3rd ed., Padova, 1938, pp. 16, 43 f., 50 f.

⁶⁹ This is a systematically demonstrated view of the present writer. Its basis resides in “Rapporti contrattuali fra Stati e organizzazione internazionale”, *Archivio giuridico Filippo Serafini*, Modena, 1950, and “The ‘Federal Analogy’ and the UN Charter Interpretation, A Crucial Issue”, *European Journal of International Law*, 1997, pp. 1-28, esp. p. 14, where I compare my view with Sir Gerald Fitzmaurice's position. See also “Reflections on the Problem of Organization in Integrated and non Integrated Societies”, *Rivista di diritto internazionale*, 1961 (pp. 585-603).

⁷⁰ By taking the factual way, however, I do not adhere thereby, *in toto*, to Santi Romano's identification of the legal order with the “istituzione” (see Ph. Franciscakis, “Introduction à la trad. Française” (par L. François et P. Gothot) de l' “Ordre juridique” de Santi Romano, 2^{ème} ed. Paris, Dalloz, 1975, pp. V ff., esp. VII-XIV).

the revolutionary establishment of a new legal order⁷¹. Failing any convincing normative solution of the legitimation of custom as a law-making process, I venture to think that Mortati's concept is a plausible explanation of the (surely rather "mysterious") phenomenon of custom in international law as well in national law. An intriguing alternative to Mortati's concept of custom could be sought in the distinction proposed by Francesco Carnelutti between bilateral and unilateral juridical facts. In bilateral facts the initial and the final situation are both juridical. In unilateral juridical facts (or, better, unilaterally juridical facts) either the initial situation or the final situation is juridical, the opposite situation being factual. Custom would be a typical instance of a unilaterally juridical fact of which only the final situation is juridical, the initial situation being factual. *Desuetudo*, viceversa, would be an example of a unilaterally juridical fact only the initial situation being juridical⁷². Considering that it contains, perhaps, a logical weakness (the final situation of desuetude being, strictly speaking, more than just factual) Carnelutti's concept is just a bit less plausible than Mortati's "fatto normativo". I could do, though, with either concept⁷³.

I wonder, though – but I only proffer the idea very tentatively – whether the question of the foundation of international customary law could not also find a reasonable (although in this case "normative") answer, by starting from sub-paragraph 1(b) of Article 38 of the Hague Court Statute. By all means, Article 38 of the Hague Court's Statute is a merely contractual rule performing the well-known circumscribed

⁷¹ C. MORTATI, "Istituzioni di diritto pubblico", 6th edition, Padova, Cedam, 1962, p. 270.

⁷² F. CARNELUTTI, "Teoria generale del diritto", Roma, 1946, p. 183.

⁷³ In a Course on the Friendly Relations Declaration held at the Hague Academy in 1972, I tried to take a tentatively stand with regard to the nature of international customary law. Bearing in mind (perhaps imperfectly) Bobbio's concept, I ventured to envisage custom as that author's "fatto normativo": with the (right or wrong) understanding that custom was a source "neither purely formal nor purely material" (G. ARANGIO RUIZ, *The UN Declaration on Friendly Relations* etc. cit., p. 42). Indeed, between the opposite positions of those who classify custom as a material source and those who call it a formal source, I tentatively thought that a reasonable compromise could be "to admit that international custom really occupies a position that makes it neither fully formal (as treaty, contract or act of parliament) nor merely material (as, for example, the needs of the society which prompt the "creation of the rule, or the general historical factors of such needs, and other indirect factors of formation of a customary rule). Custom would thus appear to be in an intermediate area between formal and material, but closer to the formal sources than to mere historical factors". I was thus (ignorantly) close, somehow, to Carnelutti's concept.

I specified naturally – since I was dealing with a General Assembly Declaration and its possible impact on customary law – that "when it comes to declarations of principles, ..., they undoubtedly qualify as *material* sources in the same *narrow*, proper sense in which the needs calling for a rule, or the general historical factors of a rule – let's say the *indirect*, as distinct from the *direct* factors of a customary rule – are merely [but I would now specify: "*per se*"] *material* sources (*supra* cited work, pp. 42-43). The 1979 *UN Declaration* book was a belated, slightly revised reprint of the 1972 above-mentioned Academy Course ("The Normative Role of the General Assembly of the United Nations and the Declarations of Principles of Friendly Relations", 137 *Hague Rec.* (1972-III)). The pages of the 1979 offprint correspond to pages 472 f. of the latter original edition (para. 24).

Indeed, for the rules "declared" in the Assembly declaration (a *per se* non binding instrument) to become custom, the process must be completed by the confirmation of *opinio iuris* through conclusive State actions or omissions (words possibly included).

function of specifying – for the Hague Court and any parties before it – where must the Court find the basis for its decisions and opinions. It is certainly not, *per se*, a constitutional rule of the international community. It should be considered, though, that that provision binds the whole United Nations membership and, prior to that, all the parties to the Statute. Furthermore, it has now been regularly applied in scores and scores of cases. Should all this not be sufficient to prove that a general unwritten rule exists legitimizing international custom (as defined in Article 38.1.b) as the main or primary source of general international law, such rule having by now assumed the rank of an *unwritten* fundamental constitutional rule. Better, surely, than the theory of the UN Charter as the constitution of the “international community”.

15. The feature distinguishing international custom from treaty law and from *pactum tacitum* is, anyway, not its alleged – original or supervening – “spontaneity”⁷⁴. It is a different feature, which *adds itself* to the wilful, deliberate and designed nature of the participating States’ relevant actions, omissions, words and attitudes. It is the feature that especially characterizes the custom *formation’s* very *process*. Indeed, the essential peculiarity of that *process* resides in the fact that, unlike any form of agreement – whether express or tacit, written or oral – the norms of customary international law come into being through a combination of choices, attitudes, behaviours, words, actions or omissions of States normally taking place – except for the role played by soft law events such as UN or other bodies’ resolutions or declarations – regardless and outside of any *ad hoc* contacts, exchanges, negotiations *et similia*, namely outside of any interactions (with the other ... participating States) of the kind of those that are typical of treaties or tacit agreements⁷⁵. International custom comes into

⁷⁴ According to the Britannica World Language dictionary, “spontaneous” means: “1. Arising from inherent qualities or tendencies without external efficient cause; done or acting from one’s own impulse, prompting or desire. 2. Not having material causation outside itself. 3. Generated or produced without human labour; wild or sporadic; indigenous. 4. *Biol.* Apparently arising independently of external stimulus, influence or conditions”. It is also indicated that the word comes from the Latin *spontaneous-sponte*: of free will. “Spontaneity” is defined as: 1. Spontaneous quality. 2. The tendency to action or behavior independent of external forces, conditions or influences” (I spare the reader the numerous definitions I have found in a number of Italian and French prestigious dictionaries).

Mendelson, who is also not enthused by “spontaneity”, suggests, however, that it “does have the virtue of highlighting how relatively unstructured the process is, and of warning not to expect too much in our search for rules about custom-formation” (*Op. cit.*, at 174). Of course, nobody looks for custom-formation rules: but does “spontaneity” meet that point? Nor do I care much for the term “relatively unstructured”. Although the concept could apply, in a sense, to custom, one must admit that tacit agreement is also unstructured: a term that is not appropriate to describe that process’ *real* peculiarity, either.

⁷⁵ It is useful to recall here, as an illustration, Dionisio ANZILOTTI’s inclusion of “faits réciproques” and “volontés concordantes” (points (c) and (d) at page 76 of the cited *Cours*, 1929) as requirements of customary rules. They are both essential elements in the formation of tacit agreement, nor, surely, in the *formation* of a customary rule. The *content* of the customary rule is, of course, another matter. The subtle distinction between the expression of “contractual will”

being, in other words – although I am not sure I manage to find the right terms in a language that is not my own – among or between States which do not normally engage, for custom-making policies, actions, omissions or attitudes, in *ad hoc* communications or *pourparlers*. Except of course, I repeat, when they operate within the framework of an international permanent or occasional body – and for the role they perform in that capacity in the formation of *coutume sauvage* – States act not, so to speak, “in concert”, not even in an “unstructured” (Mendelson) “concert”.

This view of international custom-making confirms, of course, that it is a process, not a procedure. On that, there is a very broad agreement; and *there* the “spontaneists” take, together with all the objectivists – among whom I place myself – the right view, no procedure being necessary or normally perceptible as amongst the participating States except, of course, within any ... participating international body. Indeed, even the tacit agreement necessarily involves a minimum of procedural features, namely the establishment and pursuit of a contact or relationship relating to the accord’s subject-matter. No such relationship, though, is normally present or, for that matter, necessary for the formation of a customary rule⁷⁶.

To put it bluntly, the States participating in the formative process of a customary rule do so, in a sense, in reciprocal ... *absentia*. They may well be, and in most cases presumably are, unaware of the behaviours, the practices of the other States whose conduct may contribute positively or negatively, together with their own, to the evolution of the custom relating to that subject-matter; and if they were, by hazard or choice, aware of what is transpiring, though one cannot exclude plausible understandings or *ententes* about the matter as amongst a few given States, they normally act without establishing any *ad hoc* connection with the other States possibly involved. There is, of course, the “mystery” of “fatto normativo”, namely of the ... turning of *bloss Faktum* into norm; but no “spontaneity”, or very little, in the factually relevant States’ behaviours and attitudes.

functioning as the initial step to a tacit agreement, on the one hand, and the “propositive element” inherent in a State’s behaviour functioning as a possible step in the formation of a customary rule, on the other hand, is keenly and very finely worked out by Alessandra PIETROBON, *Dalla comity all’opinio iuris: note sull’elemento psicologico nella formazione della consuetudine*, in Andrea GIARDINA and Flavia LATTANZI (eds.), *Studi di diritto internazionale in onore di G. Arangio-Ruiz*, vol. I, pp. 355-374, at 371-374.

⁷⁶ Exceptions are, of course, not just those already alluded to in connection with the so-called *coutume sauvage* (Réné-Jean DUPUY) or *sage* (ABI-SAAB), namely the cases where an important portion of the process takes place – overtly and even publicly – within the framework of an international body like the General Assembly or a diplomatic conference. There may well also be instances, of course, where two or more States consult and behave thereafter “in concert”, so to speak, with regard to the formation, or the thwarting of the formation of a given rule: but these are partial deviations (*e. g.*, a tacit agreement or even a treaty) from the custom-making process proper.

CONCLUSIVE REMARKS

16. It is not easy for a scholar of advanced age – if one may for a moment be personal - to set down to write placidly, in the year 2005, about any subject of international law. The present writer saw in print his first, modest scholarly product in 1946, when the hopes of international lawyers raised by the adoption of the United Nations Charter were still unblemished by the awareness of the East-West rivalry. Even when the hard reality of the Cold War was fully perceived, the Charter system – set up, as well as the League of Nations Covenant a quarter century before, mainly thanks to the wisdom and the will of an American President (the same statesman who had joined the might of the United States to the fight of the United Kingdom against Nazi Germany, Fascist Italy and autocratically ruled Japan) – remained, in the minds of international lawyers, a fairly solid repository of hopes. Although the present writer was (and remains) unable to view that important instrument as embodying the “constitution” of the “international community”, he shared those hopes. The last decades, though, have been and are being marked, most especially during the last lustrum, by such a disconcerting series of disillusionments that only a very *naïf* or cynical observer would be able to refrain from putting into question, not just in the back of his mind, the integrity, if not the survival, of a positive international legal system, including the United Nations Charter. One is bound to wonder “what is the use”; and consider oneself fortunate for having attained the end of his active teaching curriculum since about a quarter of a century. Any reluctance to write, though, is overcome when one considers whom the writing is dedicated to.

To his rich, well-known and highly valued scholarly work Jean Salmon adds an uncommonly constant commitment to the scholar’s vigilance over the respect for international law. I recall, in particular, the well-known *Appel de Juristes de droit international concernant le recours à la force contre l’Iraq*, published in the *Revue belge de droit international*, 2003 – 1, pp. 266-285. It was thanks to his tenacity that that document found the exceptionally broad acceptance which is only partly testified by the number of signatures registered in the cited *Revue belge* issue.⁷⁷ The number of adherents was even higher. Equally impressive, and highly meritorious, was Jean

⁷⁷ The signatures listed in the said issue of *RBDI* cover twelve full pages (274-285).

Salmon's participation (summer 2003) in the drafting – the very first drafting in particular - of the International Law Institute's Bruges Declaration on the prohibition of force and on *ius in bello*, also prompted by the Iraqi war (Jean SALMON, *La Déclaration de Bruges sur le recours à la force*, *Revue belge de Droit international*, 2003 – 2, pp. 566-574). If the first, more explicit and punctual draft of that Declaration, as reviewed by the Secretary General Christian Dominicé (and distributed on August 28), was not formally introduced to the *Institut's* assembly - and debated as much as required, it was only due to the questionably motivated refusal, on the part of the majority of the few members still present at the session, to accept the elementary notion that a confraternity of international legal scholars could not refrain from pronouncing itself on the juridical merits of the matter in the most explicit and punctual terms without contradicting its *raison d'être*⁷⁸. I want also to recall Jean Salmon's *Changements et droit international public*, in ... (ed.) Bruxelles, Bruylant, *Nouveaux itinéraires en droit, hommage à François Rigaux*; and his Course *Le droit international à l'épreuve au tournant du XXIème siècle* (particularly sous-Sections B and D) in *Cursos Euromediterràneos Bancaja de Derecho Internacional* (Jorge Cardona Llorens dir.), vol. VI (2002), pp. 328 ff. and 350 ff, which also played some part in the choice of my subject.

17. Indeed, the issue discussed in the preceding pages, namely, whether or how international custom may rightly be deemed to be a spontaneous kind of law – particularly in its formation and vicissitudes – is more than a matter of speculative terminology, at a time when many scholars have reason to wonder whether the law that they study is not undergoing capital changes with regard to both the content of its norms and the ways and means by which those norms evolve.

The theory of the “spontaneity” of international custom had perhaps a *raison d'être* (although not, in my opinion, a scientific foundation), and may well have served a useful purpose, at the time when it was imaginatively proposed. At that time (1945-1946), it may have represented an answer to the people – clerics and laymen – who could deem it useful, in full Cold War, to entrust to the unwritten law's more promising

⁷⁸ After the original, explicit draft had been withdrawn and watered down in such a way as to omit any reference to the specific event, it was distributed for a vote by mail to the Institute's membership by the Secretariat. The vote (declared on October 20) was 90 in favour, 15 against and 12 abstentions. The revised text and the names of the voters are reported in *Revue belge*, 2003-2, pp. 566-570. A brief *Commentaire* follows at pp. 570-572. At the Bruges session the matter of the Iraqi war had been touched upon severely by both President van Hecke and Secretary-General Dominicé in the course of their opening addresses.

features, especially its relative proximity to natural law, to respond, to the increasing needs of the world's progress, more positively than treaty law, including the UN Charter itself. It is actually what seems to have happened, thanks mainly, perhaps, to René-Jean Dupuy's *coutume sauvage*. A custom that despite its ... wildness – or just because of that – did help, yoked as it was with the relatively less alarming features of Soft Law⁷⁹, to favour decolonisation, the adoption of the tripartition plan for Palestine (and at least the two-States solution), the development of the international protection of human rights and, though much inadequately, the Third World economic and social development. But that was the past. The present is very grim, and not just since the end of the Cold War. We face a despairing situation that no one could foresee as an outcome of that event.

Everybody is familiar with the debate that is going on in many quarters about the impact that hegemonic power might have upon the international rules relating to the use of force. Considering that those rules are (or are believed by not a few to be) mostly conventional and customary at one and the same time, and considering the consequences that any alteration of unwritten, general rules could bring about among the treaty rules themselves, particularly in the essential rules of that unique treaty which is the Charter, the problem is, indeed, a serious one: and it is actually not circumscribed to the international legal régime of the use of force. From that area, it extends not only to matters connected or otherwise related to the use of force, namely, from *ius ad bellum* to *ius in bello*. It extends far beyond those areas to cover a host of matters with regard to which the exercise of hegemonic power is a source of great concern expressed lately in a host of publications. These range, for instance, from the American Journal's recent *Agoras* to the *Agora* promoted by Karl Zemanek and his Colleagues on the Austrian Review of International and European Community law, to the methodological symposium held last year at the University of Macerata on the Customary International Law on the Use of Force, not to mention the numerous individual works in book or article form. A very considerable part of the debate moves inevitably from the threats to which the international rules involved are exposed from the viewpoint of their affectiveness to those even more serious threats to which is exposed the survival and integrity of those rules. That concern dramatically extends to the ways and means by which the erosion could be averted, namely – since no one seems to have seriously

⁷⁹ Daniel THÜRER, "Soft Law", *EPIL*, vol. IV, p. 452 ff., esp. 454 and 458 f.

envisaged, so far, setting aside the United Nations Charter by treaty – to the process or processes of formation and evolution of international custom.

18. As noted by a number of the participants in the Austrian Review's *Agora*, one must register well marked signs, insistently emanating from powerful States – not just from the United States or the Bush Administration – that the prohibition of force, embodied in the Charter in 1946, consolidated in the equivalent unwritten custom, and solemnly re-iterated in the Friendly Relations Declaration of 1970 and in the Helsinki Final Act Decalogue of 1975⁸⁰, has been undergoing for sometime a *de facto* erosion by the considerable *de facto* – I stress *de facto* – broadening of the concept of self-defence⁸¹. A similar (*de facto*) erosion is threatened by more general policies and “doctrines” of “pre-emptive” or “anticipatory” war or self-defence, not to mention the so-called “defensive conquest”⁸². The issue whether any *de iure* erosion of the relevant rules has taken, is taking or may take place in the near or distant future is a matter to be resolved essentially on the basis of both the Charter with related instruments and – of

⁸⁰ Pierre KLEIN, *Vers la reconnaissance progressive d'un droit à des représailles armées?*, in K. Bannelier (ed.), *Le droit international face au terrorisme : après le 11 septembre 2001* (avec préface de G. Guillaume), Paris, Pedone, 2003, p. 250; Olivier CORTEN, “Breach and Evolution of Customary International Law on the Use of Force”, off-print from Enzo Cannizzaro and Paolo Palchetti (eds.) *Customary International Law* etc. (note 40 supra). See also, on the same subject, “The Controversies over the Customary Prohibition of the Use of Force, a Methodological Debate”, *EJIL*, 2005, p. 803 ff.

⁸¹ The literature is very rich. For the situation in 1991, G. ARANGIO-RUIZ, 3rd *Report on State Responsibility* (Doc. A/CN.4/440 and Add 1), paras. 96-102 (pp. 29-32), *YBILC*, 1991, vol. II, Part One with references, to practice and literature, and 4th *Report on State Responsibility* (1992), Doc. A/CN.4/444 and Add. 1-3, paras. 57-95 (*YBILC*, 1992, vol. II, Part One, p. 23 ff. On the further developments, J. CRAWFORD's, 2000 *Report to the ILC*, Doc A/CN.4/507/Add. 3, p. 26, § 355. See also, however, the *ILC Report to the General Assembly for 1996*, p. 67. For recent developments see esp. P. KLEIN, *Vers la reconnaissance* etc.; note précédente; Thomas M. FRANCK, *Recourse to Force*, Cambridge University press, 2002, p. 45 ff.; and Tarcisio GAZZINI, *The Changing Rules on the Use of Force in International Law*, Manchester University Press, 2005, p. 163, p. 203 f.

⁸² See esp. Thomas M. FRANCK, cited *Recourse to Force*, esp. p. 97 ff. Of “conquest” of Iraq speaks Professor Weissburd (*infra* note 83) A policy of “defensive conquest” has been practiced now for some time by Israel in areas that are intended, by existing law, to become the territory of the Palestinian Arab State. See Giancarlo GUARINO, “La Questione della Palestina nel diritto internazionale”, Torino, Giappichelli, 1994, pp. 27, 100, 126 and 149 ff.; ID. “Personalità giuridica di diritto internazionale: il caso dell'OLP”, in Andrea Giardina and Flavia Lattanzi (eds.), *Studi di diritto internazionale in onore di G. Arangio-Ruiz*, vol. I, p. 85 ff., esp. 104-111, 118 and 130. On the issue of the Arab-Palestinian State's territory see also, *inter alios*, Anthony D'AMATO, the “Legal Boundaries of Israel in International Law” in <http://Jurist.law.pitt.edu/world/israelborders.php>, 8 April 2002; ID. “The Westbank Wall” *ibidem*, part I: Jurisdiction, 24 February 2004; part II: the Merits, 2 March 2004; and the same author's further statement in *ASIL Forum*, 12 March 2006. While appreciating Professor d'Amato's reasoning over the legal basis for the establishment of the Palestine-Arab State and for its borders (a basis placed by him as far back as the United Kingdom's Mandate), I submit that a legal basis for that State and its territory is cogently to be found in customary rules the formation of which is largely attested by the *opinio iuris* generally expressed both in the innumerable United Nations' Resolutions which have followed GA Res. 181 and in the consistent attitudes held by the generality of States within and outside UN bodies. It is a *coutume sage* as well as *sauvage*. May I add that anyone concerned (morally, legally or politically) with the Arab-Israeli question could surely profit from the booklet by the late Samir KASSIR, *Considérations sur le malheur arabe*, Actes Sud, Arles, 2004, esp. chapters I, V and pp. 67-71 (a book translated into Italian as *L'infelicità araba*, Giulio Einaudi editore, Torino, 2006).

course – customary, unwritten law. Regrettably, some scholars seem not to hesitate to lend their expertise to the accomplishment of the threatened erosion of the existing prohibitions⁸³. But the present writing is not the proper occasion to examine in adequate extent and depth the present state of the customary law on the use of force and its more or less likely trends of development. The relevant *de facto* usages are *sub iudice* of both the generality of States, possibly of international courts and, of course, of international lawyers. But for anyone of such actors, it is important in what terms they envisage the formation and the vicissitudes of the rules of customary international law.

Shall or should they look at the allegedly “spontaneous” reactions of States, or to something less vague and ambiguous, such as conscious, wilful acts and firm, deliberate words addressing themselves to the *de facto* usages in question? And should they not act accordingly within the framework of collective bodies by proposing and voting appropriate resolutions and rejecting any proposals explicitly or implicitly condoning the violation of the prohibitions in force? In the view of the present writer it would be inappropriate for the actors concerned to rely on any feeble signs – or, simply,

⁸³ At the recent scholarly Symposium at the University of Macerata, cited in note 40 *supra*, a learned scholar (Arthur Mark WEISSBURD, Professor of International Law, University of North Carolina) expressed the view that in the evolution (and involution) of the customary rules relating to the use (not to mention the threat) of force it would be for the most powerful to exercise the decisive weight (in a sense similar, one could assume, to the sense in which the maritime countries have (factually) more weight in the evolution of the general international law of the sea. But the cited scholar did not confine his statement to that general ... principle. He applied it forthwith, first of all by restricting the special category of the powerful to a single “hyperpower”, and then to the Iraqi “conquest”; and went on to say that *since* force had been used unilaterally with the concurrence of some States, *since* no effective reaction had been opposed on the part of the rest of the world, and *since* a number of UN resolutions “accept[ing] the American occupation of Iraq as a fact ... could be characterized as equivalent to an acceptance of the lawfulness of the actions of the United States”, the question arised whether a “change” in the international customary law on the use of force “has yet taken place”, by the creation of a rule modifying the law. And on the apparent application of the above-mentioned principle (namely, the decisive weight of the strong – or the strongest – in the evolution of international customary law relating to the use of force), the cited scholar concludes that whether the juridical change “comes to exist depends on the unilateral determinations of the United States, unless other States express their disapproval of such a new rule in more concrete ways than they have hitherto”. This conclusion seems to imply that, unless a strong reaction came about from the international community, it would be inevitable to assume, as a matter of customary international law: i) that the United States is exempt from the prohibition of force set forth in paragraph 4 of Article 2 of the Charter and the equivalent customary rule; ii) that the United States is solely entitled to determine unilaterally the cases where the use of force is lawful or unlawful. The essence of the cited scholar’s thought with regard to the *future* of the international rules relating to the use of force would thus seem to be that those “rules are uniform only with respect to discrete groupings of state[s], and that relatively few instances of practice can give rise to such rules, that is, that practice, though consistent, need not be long-subsisting”; and “it is too early to tell whether we find ourselves dealing ... with a situation where one state is the sole member of a class which the law exempts from all restrictions, such exemption deriving from one instance of practice”. The paper I refer to (“Consistency, Universality, and the Customary Law of Interstate Force”) was kindly made available to me, as well as the paper indicated in note 40 *supra*, by Professors E. Cannizzaro and P. Palchetti, who are editing the Symposium’s records.

Regrettably, the last cited author’s position is not an isolated one. Other writers are lately taking attitudes encouraging the most arbitrary unilateralism in the strong States’ choices relating to the use of force. I recall, for example, the novel substitute for the United Nations collective security system proposed by Pierre Pescatore in “The US-UK Intervention in Irak”, in *ASIL Newsletter*, May/July 2001, pp. 1 and 6; or the appalling doctrines proposed in a similar vein (not without significant references to Lasswell’s and McDougal’s theory) in the letter addressed to ASIL President Anne-Marie Slaughter by Frederick S. Tipson, a former consultant with the US Senate Foreign Relations Committee, in *ASIL Newsletter*, March/April, 2003, pp. 1 and 14.

silence – as implied in the theory of “spontaneous” international custom. The issue at stake is such that States should be induced to manifest their opposition to any breach; and no breach of prohibitions of the kind of those in question could be taken as an “unconscious” action. Those breaches are prompted, by the most wilful intent to set aside the law or gradually change it. And for the existing law to be preserved the opposition should be not less designed, not less overt, not less outspoken – and not less loudly manifested, individually and collectively⁸⁴. And the reform of the United Nations should be pursued with determination by all peace-loving governments. To put it with Thomas Franck:

“The world needs a standing transnationally-recruited, volunteer rapid reaction force; its deployment must be by multilateral decision but not subject to one state’s veto; it must be under a centralized international command; its components must include police, intelligence experts and personnel trained in reconstructing civil societies; it must be funded by a flat assessment against the gross national product of every state (or comparable measure); and it must be coinfigured: administratively, and authorized to act in close cooperation with the complementary capabilities of the world’s major powers as well as with the world’s financial, monetary, and economic development institutions. No small task, you say ? Of course not. But what’s the sole superpower’s exalted status for, if not to tackle the world’s really big tasks and do so in a creative but subtle way; so that, when its fifteen minutes are up, we will all be living appreciatively in a better, safer, more civilized place?”⁸⁵

I hope that the Editors of this *Festschrift* will not mind that I close by an appropriate quotation from a scholarly praiseworthy work on the future of the international law relating to the use of force:

“Whether it is an issue of customary law formation, *jus cogens*, or treaty viability, interpretation or modification, it is not enough to look just at practice. The scholar must also pay careful attention to the legal opinion of international actors in connection with that practice. Doing so reveals that *the rules prohibiting the use of force, except in self-defence or with Security Council authorization, remain effective, continuing to reflect the moral consensus of the international community regarding the immorality of war*”⁸⁶.

⁸⁴ Professor Pierre KLEIN of Brussel’s Université Libre mentions twelve countries who condemned the military action in Afghanistan of 2001; and adds that fifty-seven States voiced opposition, at the 2001 Islamic Conference meeting, against any attacks against Arab or Islamic States “sous prétexte de combattre le terrorisme (P. KLEIN, *Op. cit.*, p. 257).

⁸⁵ Thomas M. Franck, “After Austerlitz: The International System in the Age of Rampant American Unilateralism”, *Austrian Review of International and European Community Law*, vol. VIII (2003), p. 47. 2005

⁸⁶ Mary Ellen O’Connell, William B. Saxbe Professor of Law, The Ohio State University, “Taking *Opinio Iuris* Seriously. A Classical Approach to International Law on the Use of Force”, paper submitted to the University of Macerata’s Symposium on *Customary international Law on the Use of Force* etc. (footnotes 40 and 81 *supra*). The manuscript was kindly made available to me by Professors E. Cannizzaro and P. Palchetti in view of the editing by them of the Symposium’s records). Emphasis added.

“Consensus”, to be sure, not just “spontaneity”.