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Wroclaw Review
of Law, Administration & Economics

UNILATERAL ACTS OF A STATE IN THE PROCESS OF FORMING CUSTOMARY INTERNATIONAL LAW*

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I.

Regardless of how broad acceptance within the academic community is for the formula that domestic legislation is acknowledged in international law as merely a fact[1], nearly equally prevalent is the conviction that the unilateral acts of states can be the basis for the creation of customary norms of international law. They can initiate and reinforce a practice constituting one of the two primary elements comprising the creation of a customary norm. They therefore do not constitute in and of themselves such a basis, but a certain practice has arisen in conjunction with them. They must be implemented. In any case, law-making practice can arise and establish itself without any written act or verbal declaration. It can simply be the result of the behaviour of states – their acts and omissions. However, K. Wolfke rightfully reminds us that such practice cannot be defined in advance and *in abstracto.* Yet it always comprises a fundamental and essential element of customary law. Wolfke says it may be held that "in present international law there are no binding precise, pre-established conditions for custom creating practice, except the basic one that such practice must be sufficient foundation for at least a presumption that the states concerned have accepted it as legally binding."[2] He adds that the decision ascertaining this criterion has been met "must be thoroughly investigated in each case in the light of all circumstances by the organ ascertaining the existence of the custom."[3]

The problem, however, is to be found in the multiplicity of unilateral acts of states, as well as the fact that these acts differ from one another diametrically in many ways. P. Saganek rightly points out that until we investigate and explore each of them thoroughly, we will be unable to

DOI: 10.1515/wrlae-2018-0034

* Paper presented at a conference dedicated to the memory of Professor dr Karol Wolfke 15 February 2015.

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[1] In French legal scholarship they are referred to as *actes juridiques.* See e.g. JP Jacqué, *Eléments pour une theorie de l'acte juridique en droit international public* (1972) particularly 46-70.

[2] K Wolfke, *Custom in Present International Law* (2nd ed.1993) 44, 169.

[3] ibid 44.

formulate a general, universally accepted definition of such an act[4]. I fear that even if we succeeded in familiarizing ourselves with all types of unilateral acts of states, then their sheer diversity would make it impossible to create one universal definition encompassing all of them. The International Law Commission has come to understand the problems associated with these issues, managing with great difficulty the task given to it by the UN General Assembly of codifying unilateral acts of states: it was able to codify only one such act, the declaration (promise).

In recent years, however, our knowledge concerning unilateral acts has expanded, and certain general observations and conclusions have been formulated in a convincing manner.[5] They also apply to a certain extent to unilateral acts of states potentially leading to a law-making practice in the system of international law. Thus, it can generally be declared what characterises a unilateral act of a state, including one leading to the establishment of a practice serving as grounds for the creation of a norm of customary law, as well as what characterises thus type of practice.

The leading characteristic of a unilateral act of a state is its roots in one state, or more precisely in one entity that can be comprised of multiple states. Such an act can be of a political, economic, or legal nature. It need not be in written form, and may result directly from the behaviour of a state, *id est* from its actions and omissions.

Unilateral acts of a legal nature fall under a basic divide into autonomous acts in their capacity to generate legal effects, and non-autonomous acts. Autonomous acts can by themselves evoke the intended legal consequences, such as promises. On the other hand, non-autonomous acts can only evoke legal effects in conjunction with other legal acts, such as ratification in connection with a given treaty.

Finally, these autonomous legal acts can only be a source of duties, and those are binding solely upon their author (like in the case of promises), or they may be the source of rights and duties, such as in the case of the seizure of unclaimed territory or expansion of jurisdiction of a seaside state on the waters of the open sea. Unilateral acts of states, which play an important and generally acknowledged role in the process of forming customary international law, have been excluded from the scope of material covered by the Commission in its codification efforts. Little is known of them. Scholars of the subject emphasize that the knowledge available on the process which leads to the establishment of a custom "is still meagre."[6]

When reviewing the most extensively prominent examples of both the law concerning the territory of states and that of the sea, it can be declared that unilateral acts of states composed of elements of practice leading to the establishment of a customary norm are not of an autonomous

[4] P Saganek, *Akty jednostronne państw w prawie międzynarodowym* (2010) 88.

[5] See eg VD Degan 'Unilateral Act as a Source of Particular International Law'(1999) 5 The Finnish Yearbook of International Law, 1999; JD Sicault 'Du caractère obligatoire des engagements unilateraux en droit international public' (1979) 83(3) RGDIP; K Zemanek, 'Unilateral Acts Revisited' in K Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (1998); P Saganek (n 4) or K Skubiszewski, 'Unilateral Acts of States' in M Bedajaoui (ed.), *International Law: Achievements and Prospects* (1991).

[6] See eg Wolfke (n 2) 170.

nature. They cannot evoke legal effects in and of themselves. Their intended effects can only emerge from practice based on them and adopted by other states as an expression of a customary norm already established. In this procedure, the emergence of customary international law norms contains a certain element of bilateralism. A practice developed by one state can be held other states interested in that practice as determining a new customary norm. In other words, the practice of some states and the *opinio juris* of other states not participating in that practice. For example, the customary right of passage through Indian territory was confirmed by the ICJ not as resulting from one such passage, but from multiple instances of such passages amounting to a law-making practice creating a customary norm. The Court declared that there was "...a constant and uniform practice allowing free passage between Daman and the enclaves...[and] that practice was accepted as law by the parties and has given rise to a right and a correlative obligation."[7] Similarly, in the Norway-UK dispute the Court did not invoke the Norwegian decrees alone as law-making acts, but rather the practice resulting from and grounded in them as proof of Norway's right to expanded territorial waters.[8] There was, however, one difference: insofar as the absence of protest from the Indian side against passage through Indian territory was sufficient for the creation of a customary law, in the case of decrees issued by the King of it was necessary for those states interested or negatively impacted in some way by those decrees to accept the practice developed on their basis, or at least to refrain from protesting. These examples indicate that depending on the scope of a practice, both particular and general norms of international law can arise.

In respect to such a practice in the law of the sea, a distinction must be made between unilateral acts intended to create the foundation for establishment of customary law in an area unregulated by international law in a given time, and unilateral acts causing changes in a specified area of generally applicable international law.

In the former case, the unilateral act need not violate anything in the existing legal regime. One familiar example is an internal – and thus unilateral – act issued by the United Kingdom, titled "Code for the Signage of Ships for the Use of All Nations". Although this act was directed at other states in general, it was not an autonomous act, it was not binding on other states, and its legal force was limited only to British vessels. But other states voluntarily adopted other acts, and on their basis arose a generally-applied practice for the marking of ships, leading in turn to customary norms binding on the international community. It was only a few years later, in 1871, that the Supreme Court of the United States based a ruling addressing a dispute arising out of a collision between ships of the United Kingdom and the United States on the open sea on the international customary norm that had arisen on the basis of that very material.[9]

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[7] *Right of Passage over Indian Territory (Portugal v India)* [1960] ICJ Rep 40.
[8] *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 138-139.
[9] N Shaw, *Prawo międzynarodowe* (2000) 73-74.

However, in the latter situation, demands advanced by states for rights generally beneficial to them, presented in the form of unilateral acts, remain in contrast with international law in force for a given area. They are therefore unlawful, advanced for reasons other than legal – economic, political, or still others. As they clash with the law in effect, they can be countered by the legitimate protests of other states, in which case they fail to achieve their intended legal effects. In respect of the Norwegian decrees, themselves inconsistent with then-obliging international law, having gone unprotested by other states they led to Norway acquiring the customary right and historical title to an expanded strip of territorial waters. The ICJ held that the United Kingdom had lodged its protests far too late.[10]

But if states decide that the demands made by another state, in spite of their incompatibility with international law presently in effect, are beneficial to them, and then proceed to adopt similar acts, the practice arising out of them can lead to the formation of a new customary norm of a general nature. This new general norm the proceeds to replace the previous norm.

It should be heavily emphasized here that without regard to whether a given unilateral act of a state is designed to create a customary norm in an area not yet encompassed by legal regulation, or whether its aim is to amend existing regulation, in and of itself it cannot lead to the legal effects intended by it. However, it can serve to join a previously-existing practice or start a new one leading to the occurrence of such effects. Of course, we do keep in mind that such a practice is only one of two primary and essential elements constituting a customary norm in international law. This practice must be acknowledged as a manifestation of the customary norm arising out of it.

In summarizing these initial, general remarks and observations, it can be said that the practice of states which lies at the foundation of the emergence of a customary international law is a collection of repeated unilateral acts performed without objection expressed by states not participating in that practice. It is therefore action on the one hand, and tolerance of that action on the other. The absence of protest and presumption of acceptance of a practice as an expression of an existing and respected customary norm is sufficient.[11]

With a certain degree of simplification it can be said that in contrast to the sometimes stormy negotiations accompanying the conclusion of a treaty, customary international law rather arises in the silent course of a unilaterally adopted and developed practice, with its quiet tolerance by other states interested in that practice.

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[10] *Fisheries case* (n 8) 116, 138-139.

[11] It is sometimes emphasized in the scholarship that when a practice leading to the emergence of a customary norm or historical law benefiting a given state was based on an act that contradicts the law in effect, "the element of acquiescence must exist with full knowledge of other states". See: G Fitzmaurice, 'The Law and Procedure of the International Court of Justice' (1953) 30 BYIL 68-69.

II.

Presently, as a result of the generally accelerated pace of all things, particularly the absolute explosion in the capacity for immediate communication without regard to distance, the measured and quiet process of forming customary international law is being increasingly called into question. A serious impulse in this direction came in the 1945 proclamation of President Truman concerning the continental shelf, as well as the space flights begun in 1957 by the Soviet Union. Many authors attempt to prove that in both cases there was an immediate establishment of a customary norm, without the necessity of invoking practice. By the same token, a unilateral state act is assigned an entirely new meaning. Its legal nature changes, as does its role in the process of forming a new norm of customary law.

Let us therefore look through the prism of the preceding general conclusions in respect of the process of forming customary international law, and observe how the well-known *casus* of the written proclamation on extension of the United States' jurisdiction to the adjacent continental shelf as presented to the world in September 1945 by President H. Truman, and the equally well-known 1957 *casus* of the first *Sputnik* being unceremoniously blasted into space without any notice or notification being provided to any other state. What is obviously at issue is the new theory arising around these two events, which concerns a unilateral act of a state in the formation of a customary norm in the contemporary system of international law. It should be emphasized that both of these important events were acknowledged by scholars, including the Commission, and by the ICJ as unilateral acts of states undoubtedly contradictory to the international law regulation in force in their respective areas at the time.[12]

In the doctrine of international law it is held that from the 1950s and 1960s there has been a growth in acceptance of views which reduce the formation of a customary norm to only one element: *opinio juris.* The second element of custom, that of practice, is entirely discarded. For example, many cite the view of the respected jurist J. L. Brierly, who declared to the ILC in 1950 that practice is not significant in the creation of a norm of customary international law, but rather *opinio juris,* which can be formed "at a moment's notice". Confirmation is provided in an example that comes from before the Truman proclamation and the blast-off of Sputnik. Brierly makes reference to the development of the legal rule establishing the sovereignty of a state in the air space above its territory. He demonstrated that "the moment the 1914 war broke out the principle of sovereignty which had been a matter of opinion up to then was settled at once."[13] And thus the

[12] See e.g. ILC, 'Third report on unilateral acts of States, by Mr Victor Rodríguez Cedeño, Special Rapporteur' UN doc A/CN.4/505 (2000) 22 (para. 164-166), or ILC, 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto' (2006) 379.
[13] (1950) 1 YILC 5.

customary principle of sovereignty of a state in the airspace above its territory was said to appear suddenly and based exclusively on *opinio juris*, without any prior practice. Reasonable doubts may, however, be had as to whether this rule came about suddenly and in the form of a customary norm, or if it was rather established in 1919 in the Convention on the Regulation of Aerial Navigation. Until the beginning of the 20th century, the Roman rule was applied according to which authority over a territory extended without limits into the sky: *cuius est solum, eius est usque ad coelum*.[14]

Igor Lukashuk goes farther and states that not only scholars, but also international organs are "decisively" in favour of the possibility of a customary norm of international law being established without any preceding practice by states.[15] The increasingly popular and sharply-defined view is being propagated that a norm of customary law can arise *instantly.* A new concept in custom is invoked, called *instant custom.* Under this approach, the essence of the creation of a customary international law norm consists simply in shifting the focal point from the requirement of producing proof of practice to *opinio juris.* What was once known as *evidence of practice* is increasingly referred to now as *evidence of opinio juris.*[16] This amounts to abandonment of substantive examination of the element that is the practice of states. The popular opinion of Bing Cheng is invoked, who demonstrated long ago that customary international law has only one constitutive element, namely, *opinio juris*[17] I. I. Lukashuk is also doubtlessly right to say that, for decades, lawyers have been pointing out the duration of a practice is not the decisive element in the formation of customary law. The time necessary for a customary norm to be constituted depends in every event on the specific circumstances, and may differ from case to case.[18] It is obvious that the required practice can be longer or shorter, depending on the nature of a particular situation, but it is and remains the fundamental substantive ingredient in an emerging custom. In conclusion, Lukashuk limits the potential for the emergence of an *instant custom* to only exceptional situations. He states clearly that in circumstances involving rapid transformations and the emergence of new, serious problems demanding immediate decisions, customary legal norms can appear without practice preceding them.[19]

This is precisely the perspective, held generally by those authors who acknowledge the possibility for the emergence of an *instant custom,* that the potential for the sudden appearance of a law without any prior practice coming before it is only applicable in respect of particular exceptional situations and cases, such as the Truman proclamation, or a

[14] See eg L Ehrlich, *Prawo międzynarodowe* (1958) 520-521 or HW Briggs, *The Law of Nations. Cases, Documents, and Notes* (2nd ed. 1952) 322-326.

[15] II Lukashuk, 'Customary Norms in Contemporary International Law' in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21-st Century. Essays in Honour of Krzysztof Skubiszewski* (1996) 504, 505.

[16] Lukashuk (n 15) 503-505.

[17] Bin Cheng 'United Nations resolutions on outer Space: "Instant" International Customary Law?' (1965) 5 Indian YIL 36, II Lukashuk (n 15) 506.

[18] Lukashuk (n 15) 503.

[19] Lukashuk (n 15) 506.

flight into space. The question arises, however, of whether we also may identify in these examples something resembling at least the outlines of prior practice. What follows, we may inquire as to whether in these cases *instant custom* indeed took place at all.

A particularly interesting and intriguing observation in respect of the first question was formulated by K. Wolfke. However, it should first be recalled that in his famous work in which he prepared an exceptionally thorough analysis of both the scholarship and the case law, he arrived at the conclusion that in the present international law regime there were no exact, pre-defined conditions addressing *custom-creating practice*, with the exception of the sole fundamental condition of law-making practice.[20] And for certainty, he adds that while there are no requirements established in advance for a practice, it must at least provide "sufficient foundation for at least the presumption that the states concerned have accepted it as legally binding."[21] It should be emphasized that, when captured in this manner, the presumption may only refer exclusively to the acknowledgment of an existing practice as binding, *id est* to *opinio juris.* A practice, on the other hand, must be capable of being objectively ascertained. However, as did other authors, he acknowledged both the Truman declaration and the Sputnik launch as entirely separate exceptions departing from the normal procedure for the formation of a customary norm. Distinctly from other authors, however, he attempted to remain faithful to the conception of a customary norm comprised of two elements: practice and *opinio juris.* He did not cease to perceive in even these particular exceptions to the rule some aspects of practice, and attempted to prove their existence.

Thus, he first claimed that some unilateral acts of states could be acknowledged "with certainty" as constituting "evidence of custom-creating practice". As an example of such a case, he cites precisely the proclamation regarding the continental shelf and bilateral treaties demarcating the shelf. He claims that "in such cases the certainty that the verbal acts will be followed by deeds is nearly absolute and may therefore be considered not only as evidence but even for simplification, as elements of custom-creating itself." And thus Wolfke held the announcement of the United States taking control of the continental shelf as a unilateral act, which would with certainty be consummated at the same time as that announcement; therefore, it could be acknowledged not only as an obvious proof of the existence of custom-creating practice, but as such a practice itself. He does not stop with this declaration. He goes on to explain that in such cases like the Truman proclamation, "verbal acts are very often so closely combined with the actual conduct of the state organs" that they can be held "as evidence of custom - making practice and even as its substitute."[22] In other words, certain unilateral acts of states can be found to be either a law-making practice, or a substitute for it. Of course, this act must in such cases

[20] Wolfke (n 2) 44, 169.
[21] ibid.
[22] ibid 42.

constitute an action.

While such a justification of the law-making role of the Truman proclamation, *id est* the appearance of an *instant custom* in respect of the right of coastal states to the continental shelf, does not entirely comport with the general determinations of the author drawn from doctrine and practice, it remains clear that this act was tightly coupled with the authority of the state. A practice was indeed closely linked with the proclamation. As the ILC declared, this unilateral act, contrary to international law, was "issued the same day, which places the natural resources of the adjacent continental shelf under the jurisdiction and control of the United States".[23] The proclamation by the Unites States not only did not encounter any opposition, but was met with general respect, creating the foundation for new relations in the legal sphere in the law of the sea between the United States and all other nation-states.

In reference to Sputnik, launched into outer space in 1957, K. Wolfke neither formulated a similar argument, nor did he associate it with the situation created by the Truman proclamation. He directly addressed the bilateral practice initiated by the Soviet Union and joined by the United States. We may rather agree with his conclusion that even before the conclusion of the Space Treaty Law in 1967, states "did not acknowledge" such flights as violations of their sovereignty, and even that this sovereignty did not extend to outer space. At the same time, one may doubt whether Wolfke rightly invokes the bilateral practice of sending satellites into outer space over the territories of other states as "an example of the development of new customs."[24]

While the cited view of K. Wolfke is certainly deserving of attention, sceptics may feel troubled by the presentation of a unilateral act of a state as a substitute for practice, or even as a practice proper. It would seem to substitute an assumed, concluded practice derived from the nature of a given act for a real, verifiable practice. Justification for such a conception of practice would also seem to be identifiable in the absence of protest on the part of other states against the proclamation by Truman. And thus, by its nature it substitutes *opinio juris* for traditionally understood practice. The presumption of *opinio juris* assumes a real, tangible nature, and practice is to support its presumption.

The matter of unilateral acts of states did, of course, come up in discussions within the ILC forum during the 1950s when considering codification of the law of the sea, and then again at the turn of the century in conjunction with work on codification of unilateral acts of states.

During the first period there were voices arguing that a unilateral act of a state can never contradict existing international law, and even that a newly-formed custom must remain in accord with the existing legal order. The special referee Pelle had to point out that *e.g.* the law of the sea was largely a consequence of the accumulation of unilateralism. Unilateral acts by Norway which eliminated the old customary principle of the 3-mile

[23] ILC, 'Eighth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur' UN Doc A/CN.4/557 (2005) 25 (par. 136), MN Shaw (n 9) 322-333.
24 Wolfke (n 2) 57.

territorial sea were obviously "initially inconsistent" with international law. Within the Commission, the discussion focused primarily on the two constituent elements of a custom: practice, and acknowledgement of practice by other states as an expression of a settled customary norm. In this discussion L. Brierly was of the opposing opinion that for the creation of a custom, it is necessary to have "continuation or repetition of the practice over a considerable period of time." He argued that in the formation of a custom, of greater importance is *opinio juris*, which can arise "at a moment's notice". The chair of the session, G. Scelle, explained that the public opinion of various states should be acknowledged as "an international authority based on a consensus of opinion expressed by the authorities which in any given state had the power to establish custom."[25] In the end, the Commission arrived at the conclusion that since the unilateral act of the United States enjoyed strong support on grounds of its *general utility*, such support constitutes a justified basis, but only for recommendation of the acknowledgement of exclusive rights for coastal states to the adjacent continental shelf. Of course, this means recommendation for codification. J. Brierly, a member of the Commission at that time, stated directly that the Commission was generally wary of acknowledging the authority of a legal norm derived from practice based solely on the will of the interested states.[26] As a consequence, it did not acknowledge the existing broad practice of states as a sufficient basis for the emergence of "a customary rule" in respect of the continental shelf.

In the second period of the Commission's work on codification of unilateral acts of states controversy again arose concerning the validity and potential effects of a unilateral act of a state inconsistent with the law in effect. The special referee R. Sedaño in this context directly linked his remarks with the proclamation issued by President Truman. He said to the Commission that it was worth giving consideration to this important example of practice. In his opinion, this act was a significant milestone in the development of the international law of the sea. He also said that while it was inconsistent with the previous customary norm, ultimately it played a decisive role in the formation of a legal norm as it was accepted by states and codified in the new convention on the law of the sea. It thus constituted only "a part of the process of creation of a new customary norm".[27]

And thus, in the opinion of the Commission, the proclamation did play an important and even decisive role, but merely in the formation of a general new customary norm rather than in its final determination. There had been no formation of such a customary norm prior to codification of that section of the law of the sea.

In its verdict concerning the continental shelf of the North Sea, the ICJ granted the Truman proclamation "special status" in both the theory and the practice of international law regulating the legal regime applicable to the

25 (1950) I YILC 6.
26 JL Brierly, *The law of nations* (Sixth edition edited by H Waldock 1963) 213-215.
27 ILC, 'Third report' (n 12) 22 (par. 164-166).

continental shelf. However, it ultimately considered it to be only "a starting point of a positive law",[28] in other words, law codified in the convention on the continental shelf. Here we may also add the opinion of Lord Asquish, who, in arbitrage of "the Abu Dhabi" in 1951 also expressed doubt as to whether a new norm in the law of the sea could be inferred on the basis of the practice initiated by Truman's proclamation. In the opinion of J. Klabbers, these doubts were only removed following codification of the law of the sea. The proclamation issued by the United States could at best be "the beginning of a new rule" in that law.[29]

And thus neither the Commission convened for the codification and development of international law, nor the Court appointed to determine what is and what is not the law treated Truman's proclamation as a sufficient condition for the emergence of a general customary norm, never mind a norm constituting an *instant custom.* The Court continues to place strong emphasis on the necessity of both continual practice and *opinio juris* as conditions for the formation of a customary norm. By the same token, it particularly accents the importance of practice. M. Virally explicitly says that while the Court remarks extensively about the conception of *opinio juris* and the "consciousness of a legal duty", it is nevertheless more interested in "the examination and assessment of the facts proved."[30] Could prof. K. Skubiszewski have therefore been correct in writing that the "instant custom" is an invention of scholars rather than a phenomenon identified within the sphere of legal reality?[31]

III.

The process of formation of customary international law and the role played in that process by a unilateral act of a state is a quite complicated issue, requiring a broad spectrum of primary investigations into the doctrine and practice. In this rather general outline, the focus has been kept solely on attempts at calling into question the traditional understanding of a customary law norm composed of two primary elements - practice and *opinio juris* accepting such practice as the expression of the formation of a new norm qualifying as customary. The foundation for these new views was to be in particular two events of unquestioned importance in international law, namely the issuing of a proclamation by the United States concerning the continental shelf, and the launch of Sputnik into outer space by the Soviet Union.

Primarily, therefore, these two unilateral acts of states are linked with the identification of new international law norms constituting examples

28 *North Sea Continental Shelf (Federal Republic of Germany v Denmark)* [1969] ICJ Rep para. 47 and 100.

29 J Klabbers, *International Law* (2013) 32-33.

30 M Virally, 'The Sources of International Law' in M Sørensen (ed), *Manual of Public International Law* (1968) 134-135; Wolfke (n 2) 50.

31 K Skubiszewski, *Rezolucja Zgromadzenia Ogólnego ONZ a powstanie prawa zwyczajowego,* in: Acta Universitatis Wratislaviensis, N°948, PRAWO CLIX (1987) 138.

of *instant custom.* In other words, norms which are not drawn from practice, but rather based solely on an immediately-formulated *opinio juris* accepting of such events. The term "instant" refers to both the emergence of *opinio juris* and to the customary norms that are supposed to result from that act. Practically the entire construction boils down to the silent acceptance on the part of interested states as to the effects of a unilateral act violating the international legal regime in force in a given area.

This is the manner in which a binding customary norm giving the United States the right to the continental shelf was to arise, as well as one giving the Soviet Union the right to freely make use of flights and research conducted in outer space. It was endeavoured to give these new norms a general character. As a result of the acceptance of the effects generated by these two events, there was to arise general norms ensuring all states the right to the benefits of the continental shelf adjacent to their territory, as well as the right of all states to initiate flights in outer space and conduct research there.

Just this very general overview of the issues summarily presented above can certainly provoke fundamental doubts as to the proper assessment of the law-making role played by these two unilateral acts by supporters of the theory of *instant customs.*

First, even if we assume that both the first and the second unilateral act is, in fact, associated with the emergence of a legal norm binding upon states, serious doubt arises as to rather it can be thought of as a *customary* norm. Indeed, the primary characteristic of a customary norm is that its existence can be inferred from the study of practice. Today there is broad agreement that such practice need not be neither long-term, nor even uniform, but it must provide grounds for deducing a custom. It is thus rather difficult to reduce to a one-off behaviour of a state and supposed future practice based on it.

The fundamental uncertainty in this material, however, is linked primarily with the absence of any convincing evidence that there were any legally binding norms in existence at all prior to the regulation of those two areas in the relevant international conventions. This is precisely the position taken by the ILC, appointed for the development and codification of international law, as well as of the ICJ, whose mandate is to declare what is and what is not the law binding upon states.

It would seem entirely appropriate here to reference the elder of Polish international law and his distinction of international law norms into enacted norms, meaning in general those established in conventions, and customary norms, meaning those created by states by way of practice and consecrated by an international tribunal. L. Ehrlich declares directly, in line with the English school of customary law, that the existence of a binding customary norm is to be determined by a court. Therefore, customary law consists of norms which have already been ascertained and applied in judicial practice. Aware that the court system in international law remains poorly developed, L. Ehrlich adds that customary international law consists of norms already ascertained and applied by a court alongside norms which,

if presented in the course of a judicial action, would not be rejected as grounds for resolving the submitted dispute.[32]

It can be reasonably assumed that the Hague court would decline to adjudicate a dispute based on presumed *instant customs* associated with the proclamation of the United States and the USSR's Sputnik. We should therefore concur with the rather blunt opinion of K. Skubiszewski that the concept of *instant custom* as advanced in some scholarhip is not a phenomenon existing in the sphere of "legal reality", but rather is only a concept emerging from the doctrine of international law.

On the other hand, we may not simply ignore cases arising in present international law relations whose legal merits cannot easily be judged using traditional legal truths. The incredible explosion in the development of electronic communication which facilitates instant transmission of information, as well as an equally instant reaction and discussion among states on a global scale, may serve as fertile soil for the emergence of new means of arriving at a sort of legally binding consensus. In these new circumstances it is not practice, but rather *opinio juris* that can occur instantaneously, and in the absence of protest may play a new role in the formation of international law. New conditions, new phenomena in international relations, and the necessity of rapid and almost immediate reactions can provide states with new paths for legally binding themselves. *Opinio juris* could take on an independent and constitutive character in the formation of international law, but this would not, of course, relate to norms of customary law. Rather, it would be something in the middle, an intermediate level between written law and customary law.

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32 L Ehrlich (n 14) 9-10.

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