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Revisit the Concept of International Custom in International Space Law

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Abstract

International custom is one of the primary sources of international law. For long there has been little dispute that an international custom is composed of two elements: general practice and *opinio juris* of States. However, these traditional two elements seem to be challenged by the development of space law. While general state practice requires consistency, uniformity and generality, space activities have developed just from the second half of the 20th century, with a limited number of players. In the context of international space law, general practice, instead of being a constitutive and indispensable element, would merely be considered as evidence of the existence and contents of the underlying rule and of the requisite *opnio juris*. On the other hand, *opnio juris* is the essence-some would argue the only constitutive element-of international customary law. In international space law, before an international treaty is concluded, *opnio juris* may be reflected in, for example, the UN resolutions, bilateral or multilateral treaties, or national legislations. These sets of rules form "instant international customary law", as proposed by a number of scholars. This paper will further look into some rules or principles (such as principles relating to the remote sensing, principles relating to the NPS, principles concerning the use of geostationary orbit and mitigation of space debris), as established in the UN resolutions, bilateral or multilateral treaties, national legislations, or instruments of other international organizations. With reference to the concerning rules and principles, this part will try to find out whether they already form instant customary law, their respective binding force in different cases and the requirement of an instant custom in international space law.

I The Concept of International Custom

Black's Law Dictionary defines "custom" as "a usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or the subject-matter to which it relates. It results from a long series of actions, constantly repeated, which have, by such repetition

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and by uninterrupted acquiescence, acquired the force of a tacit and common consent."[1] Although occasionally the terms are used interchangeably, "custom" and "usage" have different meanings, especially when referring to source of law. A usage is a general practice which does not reflect a legal obligation, while a custom could be legally binding and forms a source of law.[2]

International custom is referred to in Article 38 of the Statute of International Court of Justice "as evidence of a general practice accepted as law" Although ranking second to "international treaties" in this provision, this provision is not stated "to represent a hierarchy",[3] and international custom is considered as a formal source and one of the primary sources of international law.

In terms of its traditional definition, a customary international law is composed of two elements: one is *corpus*, the material or objective element; the other is *animus*, the psychological or subjective element.[4]

1 Objective Element: General Practice

As for the objective element, i.e. general practice, several criteria are taken into consideration, including duration, uniformity, consistency and generality.[5]

The element of duration requires the practice has lasted for certain period of time. In practice, however, there is no strict requirement on duration. In some areas, such as rule related to air and space and continental shelf, rules "have emerged from a fairly quick maturing of practice", while in other areas, the formation of rules takes a very long process. The international courts and tribunals do not emphasize the time element as such in practice.[6]

Uniformity and consistency of the practice is an essential criterion for determination in many cases, such as in the Fisheries Case[7] and Asylum Case.[8] As stated by the International Court of Justice, "The party which relies on a custom must prove that . . . the rule invoked . . . is in accordance with a constant and uniform usage practiced by the States in question."

Generality of the practice is an aspect "which complements that of consistency". For long, scholars have debated what kind of activity constitutes state practice and disagree on the duration and frequency of the activity that is necessary to satisfy the definition. Absolutely it seems practically impossible to ascertain the practices of the nearly 200 states in the international community. Thus,

1 Black's Law Dictionary 385 (6th ed. 1990).
2 Ian Brownlie, *Principles of Public International Law*, (7th edition, 2008) at 6.
3 Ibid at 5.
4 Bin Cheng, United Nations Resolutions on Outer Space: 'Instant' International Customary Law? In *Studies in International Space Law*, Clarendon Press (1997), at 137.
5 See eg. Brownlie, *supra* note 2, at 7; V.S. Vereshchetin & G.M. Danilenko. Custom as a Source of International Law of Outer Space, 13 *lnternational Space Law* 24 (1985), cited in Andrei D. Terekhov, PASSAGE OF SPACE OBJECTS THROUGH FOREIGN AIRSPACE: INTERNATIONAL CUSTOM? *Journal of Space Law*, vol.25 (1997), 1 at 3.
6 See eg. Brownlie, *supra* note 2,at 7; D'Amato, Concept of custom (Cornell University Press 1971), 56-58.
7 ICJ Reports (1951) 116 at 131.
8 ICJ Reports (1951) at 276-277.

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a survey of customary international law is often highly selective and takes into account only major powers and the most affected states.[9]
In determination of existence of an international practice, these factors are considered in a comprehensive way. The emergence of a constant and uniform state practice in a new field of international relations, which requires legal regulation, leads to the establishment of new rules of customary international law.

2 Subjective Elements: *Opinio Juris*

Opinio juris simply means recognition by law or accepted as law. It is intended to mean the acceptance or recognition of, or acquiescence in, the binding character of the rule. The acceptance or recognition can be indicated in legislative move, diplomatic statement, statement in international courts, and so on. Both the Permanent Court of International Justice and the International Court of Justice have in a number of cases stressed the importance of the subjective element of *opinio juris*.[10]
Considering which of the two elements have priority when determining an international custom, there are two schools of thoughts. Traditionally, these two elements are considered together, and the general practice might be focused more. Practice was the crucial constituent element in the traditional understanding of customary international law. Courts and international tribunals concentrated on this objective element and tried to identify certain patterns of state behavior. Customary law was thus determined with an inductive approach by collecting and systematizing facts of state conduct.[11] Some authors such as Guggenheim and Kelsen, proposed to dispense with *opinio juris* as a constituent element of custom and to rely only on practice.[12]
However, the method of establishing rules of customary law has changed significantly in modern legal scholarship. The range of state behavior that is considered practice has broadened in scope considerably. Not only explicit conduct, but also paper practice—such as the conduct and pronouncements of international organizations—is recognized as practice by a majority of legal scholars.[13]

II The Idea of Instant Custom

With the rapid development of international relations and emergence of international activities, it is no longer appropriate to strictly follow the two elements

9 Niels Petersen, CUSTOMARY LAW WITHOUT CUSTOM? RULES, PRINCIPLES, AND THE ROLE OF STATE PRACTICE IN INTERNATIONAL NORM CREATION, *American University International Law Review* (2008), 275 at 277.
10 Cheng, *supra* note 4, at 137.
11 See e.g., Lotus Case (France v. Turkey), 1927 PCIJ (ser. A) No. 10, at 18 (Sept. 7).
12 Paul Guggenheim, Les Deux Eléments de la Coutume en Droit International, in *LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC: ETUDES EN L'HONNEUR DE GEORGES SCELLE* (Charles Rousseau ed., 1950), at 275-284; Hans Kelsen, Théorie du droit international coutumier, 1 *REVUE INTERNATIONALE DE LA THÉORIE DU DROIT* (1939) at 253-274.
13 See Rudolf Bernhardt, Customary International Law, in 1 *Encyclopedia of Public International Law* 898, 900 (Rudolf Bernhardt ed., 1992).

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for determination of customary rule, especially in the field of air and space law, or activities involving electronic technology or internet. It is impractical to require a practice to last as long as in traditional activities. For example, the emergence of civil aviation is a little more than 100 years ago, and space activities have developed for a little more than half century, while the rules of diplomatic and consulate relation have developed for hundreds of years. Nor do these modern activities be taken universally. Up to now, only a few states are really capable to take space activities in a real sense. Not to mention the element of "consistency", because there has been little practice at all.

In 1965 Professor Bin Cheng published an article on instant international customary law,[14] in which he proposed the concept of "instant international customary law", pointing out that there is no need to take the element "usage" into account "provided that the *opinio juris* of the States concerned can be clearly established", and consequently, "international customary law has in reality only one constitutive element, the *opinio juris*."[15]

In terms of generality, from the analytical point of view, as argued by Professor Bin Cheng, the binding force of all rules of international law ultimately rests on the consent, recognition, acquiescence of States, or the principle of estoppel. If States, consider themselves bound by a given rule as a rule of international law, it is difficult to see why it should not be treated as much insofar as these States are concerned. The *Asylum Case*[16] and the *Right of Passage Case*[17] have shown that it is possible for such *opinio juris* to exist among a limited number of States or even between two States so that, besides rule of universal international customary law, one finds also local and even bipartite international customary law.[18]

"Instant customary law" is supposed to be established in the field that lacks written legislation, without sufficient, consistent, general practice, as well as developing with a rather astonishing speed. Space law is a typical field where "instant customary rules" are said to exist. Besides, other fields of law, such as aviation law, also bring in this concept. A typical example is the rule of prohibition of the use of weapons against civil aircraft in flight, which has been adopted in the 1984 Protocol Amending the Chicago Convention (currently Article 3 *bis* of the Convention).[19] This protocol already had 138 parties on 16 July 2008, which can be regarded as state practice, extensive and virtually

14 Bin Cheng, United Nations Resolutions on Outer Space: 'Instant' International Customary Law? In *Studies in International Space Law*, Clarendon Press (1997), 125-149. This article was first published in 5 *Indian Journal of International Law* (1965), 23-48.

15 Cheng, *supra* note 4, at 138.

16 ICJ Rep 1950, at 266.

17 ICJ Rep 1961, at 6.

18 Cheng, *supra* note 4, at 138-139.

19 ICAO Doc 9436, Protocol relating to an Amendment to the Convention on International Civil Aviation (signed at Montreal on 10 May 1984, coming into force on 1 October 1998).

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uniform.[20] This rule can be compared with space activities here, because, firstly, it was not long (at most half a century) before the rule was incorporated in the Convention (lack of "duration" element); secondly, not many countries took part in civil air transportation at that time (lack of "generality" element); and thirdly, this "rule" has been breached from time to time, especially in the Second World War and the Cold War (lack of "consistency" element), but it was still considered as an international customary rule in international civil aviation, which had been accepted by a large number of states,[21] and the breach of such rule has been found internationally responsible.[22]

Rules regulating space activities is a similar case here. It absolutely does not strictly fulfill the element of general practice: development within only half a century (some activities even a few years), a handful of players, diverse state practice (sometimes even contradicting with each other). However, according to Professor Bin Cheng, some rules can be regarded as "instant customary rules" and thus become legally binding, as long as it satisfied the requirement of *opinio juris*.

III "Instant Custom" in Space Law?

1 Existing Precedent and Instant Customary Law: the Consideration of "Consistency"

The very first issue in space law concerning "instant customary law" is possibly the innocent passage of space object through foreign airspace into outer space or re-entry to earth. It was highly debated in the field of space law in 1980–1990s. Various commentators in the space law field, such as Vereshchetin and Danilenko, S. Gorove, P.P.C. Haanappel, V. Kopal, Bin Cheng, Manfred Lachs and T. L. Masson·Zwaan, have offered numerous views.[23] This issue also appeared in a questionnaire of Space Committee of the American Branch of the International Law Association ("Does of international customary law exist with respect to the passage of space objects through foreign airspace in the course of their ascent to or descent from outer space under normal conditions?") The answers of the five legal experts (Stephen Gorove, Harry H. Almond, Jr., Carl Q. Christol, Paul G. Dembling and Edward R. Finch, Jr.) also diverse. It is noted that "have occurred since the upper boundary of national territorial air space so far has not been determined by international agreement or international customary law. If there is an international customary law, it is based

20 Status of Convention on International Civil Aviation (signed at Chicago on 7 December 1944). Available at http://www.icao.int/icao/en/leb/3bis.pdf, last visited September 8 2012.

21 See e.g. Guillaume., G, The Destruction on 1 September 1983 of the Korean Airlines Flight 007, ITA Magazine No.0-18 September 1984 at 34; See also, Jiefang Huang, *Aviation Safety and ICAO* (2009), at 88.

22 For example, the Flight KAL 007 Case in 1983.

23 Terekhov, *supra* note 5, at 4-6.

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on common perceptions and shared expectations of international authoritative decision-makers regarding such passage and supported by cardinal principle of freedom of exploration and use of outer space embedded in the Outer Space Treaty of 1967 and generally recognized to the extent and in line with existing state practice."[24]A similar question ("Are there precedents with respect to the passage of aerospace objects after re-entry into the Earth's atmosphere and does international customary law exist with respect to such passage?") appeared in the questionnaire of UNCOPUOS in 1996, which was only circulated to the 61 members of COPUOS and 14 substantive responses was received in the same year. In their respective response, the Czech Republic, Germany, Pakistan, the Republic of Korea and Syrian Arab Republic state that the existence of precedents of such does not mean a customary rule has been formed; on the other hand, the Russian Federation, Chile, Greece and Kazakhstan (Such passage was provided for under the Agreement between the Russian Federation and the Republic of Kazakhstan of 28 March 1994 on the Main Principles and Conditions for Utilization of the Baikonur Launch Site).[25]

2 UN Resolution and Instant Customary Law: The Consideration of "*Opinio Juris*"

Recommendatory resolutions of international organisations are an important component of the international system. They represent a special type of social norm. There are three basic points of view concerning the binding force of resolutions of the United Nations General Assembly: (1) recommendatory resolutions, or at least some of them, are legally binding for States; (2) they only possess political and moral significance; (3) they do contain a certain legal element even though they are not legally binding.[26]

The development of international space law can be roughly divided into three stages: firstly from discussion to resolution, then from resolution to treaties, and then from treaties to resolution again.[27] Since the 1979 Moon Agreement, no international treaties on space law emerged. Instead, principles adopted by the General Assembly of the United Nations became the main form of instrument regulating space activities, although their binding force have been questioned. Although lack of treaties, space activities like the use of nuclear power sources, the use of telecommunications satellites, or of remote sensing satellites, as well as other possible commercial uses, therefore, "are not confronted with

24 Terekhov, *supra* note 5, at 7.

25 Terekhov, *supra* note 5, at 8-11.

26 Grigory I. Tunkin, International Law And Other Social Norms Functioning Within the International System, in Bin Cheng and E.D.BROWN (eds.), *Contemporary Problems of International Law: Essays in honour of George Schwarzenberger on his eightieth birthday*, at 282.

27 Stephan Hobe, Current and Future Development of International Space Law, in Proceedings of the United Nations/Brazil Workshop on Space Law, DISSEMINATING AND DEVELOPING INTERNATIONAL AND NATIONAL SPACE LAW: THE LATIN AMERICA AND CARIBBEAN PERSPECTIVE (2005).

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a complete legal vacuum".[28] Some scholars tend to believe that the constant conduct and respect for such resolutions may build up to eventually become customary international law, even if they have been adopted for a few years.[29] Arguments in favour of legally binding force of the UN resolution believe that the attitude of respective State, no matter consent or acquiescence, express *opinio juris*, as long as the resolution is adopted. "A certain category of decisions of the General Assembly are binding on Member States but . . . it is not every resolution that has a binding character. If there is unanimity in the Assembly during the vote, all are bound, provided the subject falls within its competence. If the vote is divided then those States that vote for a particular resolution by the requisite majority are bound on the ground of consent and of estoppel. Those that abstain are also bound on the ground of acquiescence and tacit consent since an abstention is not a negative vote; while those that vote against the resolution should be regarded as bound by democratic principle that the majority view should always prevail where the vote has been truly free and fair and the requisite majority have been secured."[30] This indeed was the view of the Italian delegate to the Legal Subcommittee of the UNCOPUOS. In such cases, General Assembly Resolutions fulfill "the function of identifying" the latent *opnio juris* of Member States of the United Nations.[31]

However, the view is also expressed that there is the binding force of a resolution provided two requirements are satisfied. Firstly, the necessary *opinio communis juris* among member of the UN that what they are enunciating in the resolution represents binding rules of international law. Secondly, the wording of the resolution must not merely identify clearly the contents of the rules in question, but must also unequivocally express this *opinio communis juris*.[32]

Considering abovementioned requirements, the UN Resolution 1721A and Resolution 1962, "merely expresses non-binding existing rules of international law governing the activities of states in the exploration of outer space".[33] The General Assembly does not declare that States are actually "bound by" these principles. Delegations from France, UAR, Czechoslovak and Australia consider it more recommendatory rather that binding.[34] He remarks that both in regard to Resolution 1721A and 1962, when a Member State merely says that it "supports", "subscribes to", "re-endorses to", "would be scrupulously guided by" or "would conscientiously respect", "intends to respect", or even "is prepared to respect", the principles embodies in the resolution, it does not mean that it is

28 Ibid.

29 See e.g. ibid, and Cheng, *supra* note 4. Cheng's article, first published in 1965, was two years before the first space treaty and only four or five years after the adoption of the UN Resolution 1721 A (XVI) of 20 December 1961 and Resolution 1962 (XVIII) of 13 December 1963, which, at that time, is real "instant custom".

30 T.O. Elias, *Africa and the Development of International Law* (1972) 74-75, cited in ibid at 283-284. See also Cheng, *supra* note 4, at 139.

31 See eg Cheng, *supra* note 4, at 140.

32 Cheng, *supra* note 4, at 141.

33 Cheng, *supra* note 4, at 142-143.

34 Ibid.

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thereby legally bound by them. Nevertheless, States are free by consent to bind themselves to the principles, for example, in the form of unilateral act.[35]
In terms of later UN principles, a differentiated approach must be applied as for development of custom with regard to respective applications in various resolutions: "With regard to the use of telecommunication satellites, the factual development after the end of the Cold War has gone beyond the legal substance of United Nations General Assembly Res. 37/92 of 1982. But with regard to remote sensing by satellites, the current discussion in UNCOPUOS clearly indicates not only that the United Nations General Assembly Resolution 41/76 of 1986 is still not fully consented to but that further consideration is required in view of the growing commercialization of that sector. Indeed, with regard to the use of nuclear power sources, we can in fact speak of a respective custom indicated by the United Nations General Assembly Resolution 47/68 of 1992. The 'space benefits' resolution of 1996 is again an important contribution but maybe not the final word on this matter. One thus sees the different ways in which the international community adapts these United Nations General Assembly resolutions."[36]

3 National Legislations and Customary Law: The Consideration of "Generality"

Being referred to as "soft laws", non-binding documents, such as resolutions, declarations, or principles, adopted by international organizations and bodies of space experts, are said to be "hazardous" and "troublesome" by some authors.[37] Instead, they believe the key to evaluating the authority of documents short of convention law is to evaluate its acceptance by the major space-faring states, the reputation of the contributing publicists, and the evolving state practice, as a state may implement a particular practice in its own domestic law when useful to exercise its supervision obligation and even encourage the implementation by others.[38]
National space legislations often have gone further than international space treaties. Issues that have not reached consensus in an international forum, such as the delimitation of airspace and outer space, launching activities, registration of space objects, space debris mitigation measures, liability of private parties, etc. are all covered under national regulations. In addition, national legislations regulates some other issues have not been dealt with, such as intellectual property rights in outer space activities, requirements of licensing, and space tourism. According to the finding of the working group of "national legislation relevant to the peaceful exploration and use of outer space", nearly 20 states have their national space legislations, almost one third of the total number of the Member States of the OOSA. However, these 20 states cover all major space-faring states and almost all states that have actually conducting outer space activities. Therefore, it is safe to conclude that the common rule in different national

35 Cheng, *supra* note 4, at 143-144.
36 *Supra* note 27, at 5-6.
37 Ronald L.Spencer, Jr., International Space Law: A Basis for National Regulation, in Ram S. Jakhu (ed), *National Regulations of Space Activities*, at 4-5.
38 Ibid.

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space legislations, if there is any, reflect "general practice" of states participating in the outer space activities. As general practice could be recognized even within "a limited number of states", these common rules should be followed.
In case of practice within a limited number of states, the interest of non-space faring states also has to be taken into consideration. For example, in case of innocent passage of space objectives, territorial states would be affected by space objects flying over its territorial airspace and are concerned of the rules thereof. Rules relating to communication satellite concerns the interest of user states in addition to that of operator states.

IV Conclusion

It is undoubted that the traditional concept of "international custom" has been challenged with the emergence of new activities, especially in the field of space law. In terms of objective element, it apparently difficult to argue that "general practice" has emerged from current space activities. In terms of subjective element, "*opnio juris*" of States could be established UN resolutions, bilateral or multilateral treaties, or national legislations. At the beginning of the space activities, a new idea of "instant custom" was proposed, which argued that the only element of a customary rule is "*opnio juris*". Despite the objective element of general practice can be disregard according to this idea, the will to recognize the rules as law and be bound by it has been challenged, especially concerning the UN resolutions. It may be better to be understood as a recommendation or declaration, rather than rules on legal rights and obligations under international law, and therefore, *opnio juris* is reluctant to be established here. However, it is without question that bilateral or multilateral treaties and national legislations reflect *opnio juris*, the will of the states to be bound. Although there are only limited bilateral or multilateral space treaties and national space legislations, it is sufficient to reflect practice of all states conducting space activities, and therefore could somehow be understood as "general" practice, if there is any rule in common, which is actually the most practical and acceptable way to uniform the rules of the recent-emerging space activities.
Another problem concerning this is how an international customary rule is determined. In principle, a court may apply a custom even if it has not been expressly pleaded. In practice, the proponent of a custom has a burden of proof the nature of which will vary according to the subject matter and the form of the pleadings.[39] Could any body other than a court declare the existence of a customary rule? Indeed court is the most appropriate body to determine a customary rule, because in such a case, no customary rule need to be confirmed unless confronted with dispute. However, as there is only limited number of states conducting space activities, other states may gradually start to join this promising industry; by then, they need to follow the existing customs even if they have not declared by courts. Therefore, there is still need to confirm the existence of custom in occasions other than courts.

39 Brownlie *supra* note 2, at 12.