Opinio Juris

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3 Opinio Juris: Between Mental States and Institutional Objects

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> *Certes, il existe des coutumes sages qui sont lentement dégagées des fait immémoriaux, établis sur une tradition mentale, mais on voit aussi récemment, des coutumes sauvages dont l'excroissance soudaine puise sa racine plus dans les volontés alertées que dans des esprits assoupis par une longue habitude.*
> […]
> *[La règle] assume une mission que la coutume sage ne peut remplir en raison de sa somptueuse lenteur; elle agit comme la coutume sauvage, avec la même ardeur, mais ele réagit contre la barbarie du monde technologique et industriel; elle puise sa sagesse dans la science qui a dénoncé les péril, son dynamisme dans la necessite de fair vite. Elle est tout à la fois coutume savante et alertante.* [1]

In a well-known 1974 piece, from which the words above have been extracted, René-Jean Dupuy sheds light on many aspects of importance for the present discussion about the role of international organisations in the formation of Customary International Law, specifically, in the formation of *opinio juris*, in the present times. Dupuy starts by affirming a tension between fact and mind, and by highlighting the role of *consciousness* in the formation of international custom.[2] His now famous distinction between wise and wild custom arises from the different roles that, he argues, *consciousness* plays in the formation of customary international law. Wise custom arises slowly from immemorial facts and is established by a *mental tradition*,[3] and wild custom arises in Bergsonian time,[4] out of the *vigilant will* of the States.[5] Dupuy claims that modern custom is both wild and wise – developing quickly and drawing wisdom from *science*.[6] Dupuy does not explicitly

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[1] René-Jean Dupuy, 'Coutume sage et coutume sauvage' (1974) La communauté internationale Mélanges offerts à Charles Rousseau 75, 76, 86 ("Coutume Sage").
[2] Dupuy (n 1), 75.
[3] Ibid, 76.
[4] Ibid, 85.
[5] Ibid, 76
[6] Ibid, 86-87.

refer to *natural* sciences, but the context in which the term appears – pollution – suggests that he has natural sciences in mind.[7] (Even if this is not the case – in the present chapter, the word "science" and derivatives refer to "natural sciences" unless explained otherwise.) What is more, Dupuy suggests that international organisations may promote collective consciousness about present-day problems – and pursuant to the values that reflect their own ethics.[8] Likewise, Dupuy claims that international organisations can coordinate processes that lead to the crystallisation of new custom.[9]

The claims that Dupuy make should be critically placed against the background of the literature on the topic. For instance, does *Coutume Sage* ascribe too much importance to *consciousness* in the formation of custom? Is it not the case that States "awake" too late, when custom has already crystallised? Recall that, in *Normative Dilemma,* Alain Pellet argues that this is exactly the case.[10] Further, Pellet argues that only practice is constitutive of customary international law and that *opinio juris* appears much later.[11] Moreover, Pellet is sceptical about the role that Dupuy ascribes to international organisations in the formation of custom.[12]

Be it as it may be, even if we accept Dupuy's claims in respect to the roles of consciousness and international organisations in the formation of custom, the question that I want to raise is whether international organisations are able to activate consciousness and coordinate processes of formation of custom in manners that the custom in question be consistent with any given standards – and to simplify the discussion I place focus on scientific standards. The idea of *shaping* rules of customary international law in a desired form is not new – having been contemplated, e.g., in the field of law of armed conflicts.[13] Given the historic moment we live, the question gains importance. One just need to phrase it in respect to, e.g., Climate Change, to realise its relevance – would an international organisation such as the United Nations be able to promote, or at least influence the formation of custom that is consistent with findings and recommendations of the Intergovernmental Panel on Climate Change? *Coutume Sauvage* would probably justify an optimistic answer to this question.

With some caveats, I agree with many of Dupuy's assertions: that modern custom might be promoted by the vigilant will of States – in other words, that States' consciousness of problems might eventually force them to adapt their behaviour to tackle such problems; that time should be accounted for also in terms of quality – though not necessarily through a Bergsonian perspective;

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[7] Ibid, 86.
[8] Ibid, 80.
[9] Ibid, 84.
[10] Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1989) 12 Australian Yearbook of International Law 22 ("The Normative Dilemma").
[11] Ibid.
[12] Ibid, 36.
[13] Sufyan Droubi, 'Institutionalisation of Emerging Norms of Customary International Law through Resolutions and Operational Activities of the Political and Subsidiary Organs of the United Nations' (2017) 14 International Organizations Law Review 276.

that modern custom reflects the needs and expectations of a society undergoing deep transformations – but at a much higher pace than Dupuy could have imagined in 1974; that international organisations might activate collective consciousness and promote the emergence of rules of customary international law – but that they have very restricted control (if they have any control at all) of these processes. In other words, I do not share Dupuy's optimism.

Elsewhere, I argued that a rule of customary law can be seen as an advanced stage in the life cycle of an international norm.[14] This chapter looks into some of the challenges that are involved in the transition into this more advanced stage. In the present chapter, I am mostly concerned with *opinio juris*. I argue that, although international organisations have a wide array of instruments to affect and even shape the collective behaviour of States, they face almost unsurmountable challenges when it comes to shaping the *opinio juris* of States in a desired form – notably, in a form that is consistent with scientific standards. To develop my argument, I organise the chapter in two main parts – a study into the concept of *opinio juris*, and a study into the ability of international organisations to promote *opinio juris* with a desired content. I depart from the framework provided by the work of Dupuy and Pellet to articulate a working understanding of *opinio juris* (1), and place this understanding within a broader context (2). Against this background, I distinguish, now drawing on the work of John Searle,[15] between *opinio juris*, which I define as an institutional object, and the *underlying mental states* which support it (3) – the endpoint being that international organisations intervene in the formation of both. Section 4 launches the second part of the chapter; and it discusses the dynamics of the formation of custom, accounting for the impact that free will, time frames and the complexity of certain events have in the consciousness of decision-makers and lawyers; and laying bare the challenges that international organisations face in affecting the *opinio juris* of States (4). The chapter ends with some concluding remarks (5).

1 *Coutume sage* and *the normative dilemma*: consciousness and conscience in modern times

In what reminds us of the old debate between materialism and idealism, Dupuy identifies a constant tension between *fact* and *consciousness* in the formation of customary international law.[16] Dupuy attributes this tension to the dynamic character of international custom and the different functions that, arguably, it plays.[17] On the one hand, wise custom plays a creative function through continued evolution, and it becomes backward-looking and conservative – not only this is typical of a homogeneous society – Dupuy claims – but also is it expressive of the latter's common ethics.[18] On the other hand, Dupuy identifies what he calls the revisionist and, further still, revolutionary

[14] Sufyan Droubi, 'The Role of the United Nations in the Formation of Customary International Law in the Field of Human Rights' (2017) 19.1 International Community Law Review 68.
[15] Notably but not solely, JR Searle, *Making the Social World* (Oxford University Press 2011).
[16] Dupuy (n 1), 79.
[17] Ibid.
[18] Ibid 79-80.

character of international custom: its capacity to challenge the established order. Accordingly, he argues that at the time of his writing (1970s) the main challenge was put up by new States, on grounds of self-determination, against universal customs.[19] Accordingly, Dupuy argues that this type of *contre-coutume* is typical of an increasingly heterogeneous society.[20] Further, he claims that this custom is articulated through unilateral acts, declarations, domestic legislative measures, in coordination among domestic and international organisations.[21]

Against wild custom, one may invoke the brevity of the precedents which support it.[22] However, Dupuy argues that this challenge is relative.[23] While the passage of a short span of time becomes an argument of resistance of non-conforming states,[24] States supporting this wild form of custom, explains Dupuy, see time in Bergsonian terms.[25] Essentially, Bergson' contribution to the topic,[26] which Dupuy probably had in mind, consists in rejecting the identification of time mechanical movement: Bergson differentiates time as a magnitude, the clock time, and time as quality, conscious time or duration.[27] On the one hand, there is what Bergson defines as concrete duration, i.e., duration as *quality*, and the feeling it produces in consciousness; on the other hand, there is the abstract, mechanical concept of time used by mathematicians and physicists.[28] Whether Dupuy, in referencing Bergson, means much more than suggesting that some States are more concerned with the quality, and less with the amount of, time elapsed – is not clear.[29] In any case,

[19] Ibid, 83.
[20] Ibid, 83.
[21] Ibid, 83.
[22] Ibid, 84.
[23] Ibid, 84.
[24] Ibid, 85.
[25] Ibid, 85 ('ils ont conscience d'assumer une misère ou une pauvreté que confère à leur temps psychologique plus de valeur et de poids qu'un temps historique que la plupart d'entre eux ne vivent que depuis une independence encore recente').
[26] Henri Bergson, *Creative Evolution* (Arthur Mitchell tr, Henry Holt and Company 1911); Henri Bergson, *Matter and Memory* (Nancy Margaret Paul and W Scott Palmer trs, The Macmillan Company 1929); Henri Bergson, *Time and Free Will* (FL Pogson tr, First, George Allen & Unwin Ltd 1950).
[27] Bergson, *Time and Free Will* (n 26).
[28] Ibid.
[29] *See* V Jankélévitch, *Henri Bergson* (Alexandre Lefebvre and Nils F Schott eds, Nils F Schott tr, English Tr, Duke University Press 2015); and G Deleuze, *Bergsonism* (Zone Books 1991). The Bergsonian theory of time lost steam after the fateful debate between Bergson and Einstein. See the interesting account provided in J Canales, *The Physicist and The Philosopher: Einstein, Bergson, And The Debate That Changed Our Understanding of Time* (Princeton University Press 2016), and J Canales, 'Einstein, Bergson, and the experiment that failed: Intellectual cooperation at the League of Nations', 120 Modern Language Notes 1168–1191 (2005). However, there have been recent attempts to revive the 'Bergsonian time' (by which it is often meant time as quality), for instance, in respect to time on the Web (eg M Vafopoulos, 'Being, space, and time on the Web', 43 Metaphilosophy 405–425 (2012).

Dupuy argues that the structure of international custom is altered to the benefit of the volitive element: *the idea precedes the facts*. In wild custom, there is a factual projection of the politico-legal idea.[30]

Dupuy argues that wild custom arises on "other fronts" like environmental law.[31] He exemplifies with the emerging rule of customary international law that makes states responsible for the pollution they cause. He argues that this rule had been hidden behind soft law, arising out of the work of experts within international conferences under the aegis of the United Nations, of declarations and international conventions, many of which still lacking ratification.[32] This is a consequential point: Dupuy suggests that international organisations might coordinate processes that trigger the emergence of rules of customary international law because, inter alia, international organisations benefit from the work of experts, within which I include scientists, to articulate, e.g. in their resolutions, norms which might provide content to rules of customary law.[33]

However, there remains the need of States adapting their behaviour and attitude in accordance with the norms that a resolution articulates. Dupuy is not very clear about this move. Apparently, resolutions would trigger States' *consciousness* (awareness) of a given problem and shape their *conscience* (sense of right of wrong) about their behaviour and attitude. It is their *conscience of the danger* of environmental pollution that forces States to accept the rule in question,[34] and that *imposes* the rule on pollution into the *opinio necessitatis* of the world.[35] So it seems that after becoming conscious of the dangers of pollution, States cannot but adopt the rule. But the devil is in the detail, and Dupuy does not explain how exactly the move from *consciousness* and *conscience* to *intention* to *behaviour* occurs – as if one's intention could not clash with one's awareness of a danger and one's sense or right and wrong. Be it as it may be, for Dupuy, wild custom works as a *continued S.O.S alert*. It assumes a function that *wise custom cannot display* because of the latter's characteristic slowness. Dupuy claims that wild custom is a reaction to the barbarity of the technological and industrial world,[36] *that it draws its wisdom from science*.[37] I note the subtle tension that Dupuy describes between technology and science – something to which I revert later in the chapter.[38] Ultimately, Dupuy says that modern custom is at once wise and wild – which allows it to respond spontaneously to the contradictory needs of the international society.[39]

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[30] Dupuy (n 1), 84.
[31] Ibid, 86.
[32] Ibid, 86.
[33] I have addressed this role of international organisations in Droubi 'Institutionalisation of Emerging Norms' (n 13).
[34] Dupuy (n 1), 86.
[35] Ibid, 86.
[36] Ibid, 86.
[37] Ibid, 86.
[38] *See* note 194 and accompanying text.
[39] Dupuy (n 1), 87.

While Dupuy emphasises the role of *intention* in the formation of customary international law, at the other end of the spectrum, Alain Pellet affirms that in the modern world the traditional threshold of international law – namely, State *will* (i.e. intention) – has in fact *disappeared*.[40] Looking at the wording of Article 38 of the Statute of the International Court of Justice, Pellet argues that "acceptance … is, by no means, achieved by the expression of will of individual States, but a general, communal acceptance of some more or less openly expressed conviction by States or by international bodies".[41] This prompts Pellet to emphasise the material element of customary international law and to reduce the importance of the will of the State. Pellet lays bare many of the shortcomings of the voluntarist approach to the formation of law and, what is of more interest, the formation of international custom.[42] Hence, he affirms that practice and *opinio juris* are not "on the same footing" and "*it is only practice which is 'constitutive', opinio juris* can only appear after the event".[43] He underlines the wording used by the International Court of Justice in *North Sea Continental Shelf* to assert: "a 'feeling' that an obligation exists is a very different thing from a will"[44] – and he notes, citing Jimenez de Arechaga, that the International Court of Justice had "not required strict proof of the specific acceptance of the defendant State, thus rejecting the voluntarist approach to custom".[45] Interesting, Pellet does not identify this feeling with belief – and we are left without a clear explanation of what exactly this "feeling" entails. For the present purpose, I define it as a degree of belief.[46]

Pellet also addresses *consciousness*, and submits that "in most cases, States do not care; *practice develops without them being aware of the process*" and concludes: "when they 'awake', that is, when the time of *opinio juris* has arrived, it is too late – the evil is done and the rule does exist."[47] Correctly, Pellet differentiates between the individual and collective consciousness and highlights that the latter is not the sum of the wills of the individual States.[48] Importantly for what ensues, this reminds us of Emily Durkheim, who explains that "the totality of beliefs and sentiments common to the average members of a society forms a determinate system with a life of its own. It can be termed the collective or creative consciousness".[49] Finally, Pellet rejects "wild

[40] Pellet (n 10), 45*ff*.
[41] Pellet (n 10), 41 (for the difference between will and consent), 46 and 47 (role of consent in modern times). Also, see A Pellet, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (Second Edition, Oxford University Press 2012).
[42] Pellet (n 10), 41
[43] Ibid, 41. Emphasis added.
[44] Ibid, 41.
[45] Ibid 37.
[46] *See* n 108 below.
[47] Pellet (n 10), 37. Emphasis added.
[48] Ibid, 37.
[49] E Durkheim, 'From mechanical to organic solidarity' (2010) 2 Sociology: Introductory Readings 25. *Cf*. n. 116 and accompanying text.

custom" as customary international law. Although he sees merit in Dupuy's concept of *coutume sauvage*, Pellet argues that "it has more to do with resolutions than with customs, and, in any case, it relates more to the 'mental' or 'psychological' element of custom than to practice".[50] But, interestingly, he clearly reaffirms the importance of resolutions in terms of soft law, and ascribes to the latter a much higher standing that the mainstream literature often assigns to it.[51]

This discussion gives us a working definition of *opinio juris*. Whether intention or belief, *opinio juris* arises as a *mental* state. This discussion also brings to light the role that consciousness and time play in the process of emergence of this mental state. For Dupuy, consciousness and conscience shapes intention, which is crucial in the formation of modern custom, because it allows the latter to develop quickly in response to present-day problems. Pellet argues that States become aware only too late – and that the material element is constitutive of custom.

2 Consent, belief, statement: what is *opinio juris*?

Note that the difference between Dupuy's and Pellet's approaches to the subjective element is not ontological – they both speak of *mental* states.[52] Their difference respects the *type* of mental state and the *relevance* they ascribe to it. Dupuy emphasises intention and Pellet emphasises acceptance (belief). Dupuy clearly ascribes to both mental states more relevance than Pellet does. This clash of opinions reflects an old debate that is worth recalling.

Walden provides a good mapping of the different approaches to the psychological element.[53] He distinguishes between *consent* theories, which emphasise the role of intention, and whose purpose is that of explaining how the norm comes to being; and *declaratory* theories, which emphasise belief, and whose purpose is that of explaining the difference between customary international law and non-law (morality, comity etc.).[54] In this regard, Walden identifies two major schools. The *classical* school, represented by for instance Rachel (1628-91), Vattel (1714-67), and Triepel (1868-1946), affirms that the consent of the State is a necessary requirement for the formation of customary international law. The *historical* school, represented *inter alia* by Blackstone (1723-80), Rivier (1835-98) and Gény (1861-1959), challenges the idea that law is a conscious product of human will. For this school, law is a spontaneous product of the *Volksgeist*. On Walden's account, the historical school was responsible for articulating the concept of *opinio juris* as *belief*.[55] Walden notes that, since its first articulation, probably by Alphonse Rivier, [56]

[50] Pellet (n 10), 36.
[51] Ibid, 47.
[52] Ibid 749 (explaining that *opinio juris* is often referred to as psychological, intellectual or subjective element) and 753 (adopting the "psychological element" terminology).
[53] RM Walden, 'The Subjective Element in the Formation of Customary International Law' (1977) 12 Israel Law Review 344.
[54] Ibid 357 *et seq*.
[55] Ibid 358.
[56] Ibid, 358. Mendelson shares this understanding, but Crawford claims that Franz von Liszt was the first to use the term in 1898. *Cf*. M Mendelson, 'The Subjective Element in Customary

different publicists came to define the *opinio juris* in different manners – conviction that a practice is binding, conviction that it is binding as law, binding as social necessity, binding on natural law grounds.[57]

On his part, Walden challenges the historical school on the account that it is necessary to go beyond the declaratory theory *without* mixing *opinio juris* with consent.[58] He draws on Herbert Hart' work to define *opinio juris* in terms of *internal point of view*.[59] Then, Walden differentiates between fact-created custom and law-created custom.[60] Although this differentiation looks artificial in some points, it does offer an insight into need to attend to the context in which *opinio juris* is expressed, and into the *fluidity* of the mental state. It begins by arguing that, in certain circumstances ("law-created" custom), a secondary rule "stipulates how and under what conditions a rule of customary law comes to being".[61] That is, "the conduct of the subjects of a legal system is only recognised as generating customary law, if … the practice is treated as standard of *legal* behaviour".[62] Consequently, "those who follow the practice, and treat it as a legal standard of behaviour, *may be doing so with deliberate legislative intention*".[63] Based on this, Walden elegantly brings to light the fluidity of *opinio juris* – "what starts as an *intention to create law* ultimately *becomes a belief* that the law in question *exists*".[64] This description, which I adopt with several qualifications,[65] offers an important insight into the dynamics of the formation of *opinio juris* for the present purposes.[66]

Moreover, Walden also looks at the relationship between *opinio juris* and the normative *language* to submit that, although "*opinio juris* is evinced by the use of normative language, it is *not identical* with it, and may be held by a State, even if that State has never expressed it in

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International Law.' (1996) 66 The British Year Book of International Law 177, 194; J Crawford, *Chance, Order, Change: The Course of International Law* (Ail-Pocket 2014) 62–5. D'Amato attributes the concept to Gény; *see* A D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 48-9.

[57] Walden (n 53) 362-3.

[58] Walden (n 53), 363-4.

[59] RM Walden, 'Customary Interantional Law: A Jurisprudential Analysis' (1978) 13 Israel Law Review 86, 98.

[60] Ibid 90-1; 96-7.

[61] Ibid 97.

[62] Ibid 97.

[63] Ibid 97 (Emphasis added).

[64] Ibid, 98 (Emphasis added). Similarly, JF Williams, *Aspects of modern international law: an essay* (Oxford University Press, 1939), 44-6, *as quoted in* Jenks CW, 'Fischer Williams – The Practitioner as Reformer' (1964) 40 British Yearbook of International Law 233, 245.

[65] *See* n. 176 and accompanying text.

[66] Sender and Wood explain that the framework which Walden articulates is compatible with the approach that the International Law Commission adopts in the Conclusions. *See* O Sender and M Wood, 'A Mystery No Longer? Opinio Juris and Other Theoretical Controversies Associated with Customary International Law' (2017) 50 Israel Law Review 299.

words".[67] With this, Walden rejects a *third* approach to *opinio juris*, which defines the latter as *statements* and, hence, which ascribes to it a different ontology – an approach developed, to an extent, by D'Amato (theory of promulgative articulation),[68] and by Akehurst (*opinio juris* as statements).[69] In a telling passage, D'Amato explains:

> Of course a practice based on comity or expediency might become a rule of customary law, this is what allegedly occurred in the case of the Paquete Habana. But a necessary ingredient of change is the *articulation* of the practice *as an issue of international law*. Simple repetition is insufficient.[70]

I have already addressed aspects of D'Amato's theory elsewhere and I will not come back to them here.[71] The crux of the matter, in my view, is that, for D'Amato, *opinio juris* derives from a mental state (in the case, intention) that is necessarily *manifested*, *articulated*, and *communicated*.[72] I should also emphasise that both articulation and communication might occur verbally or through certain behaviours. On this point, recall that D'Amato draws on Lon Fuller's approach to promulgation,[73] – and on McDougal's concept of promulgative communication.[74] It is interesting to see how both authors deal with rituals in the context of customary law:

> I would assert […] that a significant function of ritual is precisely that of communication, of labelling acts so that there can be no mistake as to their meaning.[75]
>
> …when a constitutive process is thoroughly established, its strategies tend to combine rational persuasion with ritualized acceptance. … Promulgative strategies may comprise the ritual of a judicial decision, the signature and ratification of an international agreement, a parliamentary vote, and so on. Many of these acts, in addition to publicizing the communication, impart a degree of authority to it.[76]

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[67] Walden (n 59) 99. Emphasis added.
[68] *See* D'Amato (n 56). *Cf.* Walden (n 59) 99.
[69] M Akehurst, 'Custom as a Source of International Law' (1976) 1974–75 The British Yearbook of International Law 1.
[70] D'Amato (n 56), p. 78.
[71] Droubi 'Institutionalisation of Emerging Norms' (n 13) 272.
[72] See, e.g., A D'Amato, 'Manifest Intent and the Generation by Treaty of Customary Rules of International Law' (1970) 64 The American Journal of International Law 892.
[73] See LL Fuller, 'Human Interaction and the Law' (1969) 14 American Journal of Jurisprudence 1; and LL Fuller, *The Morality of Law* (Yale University Press 1969) 45–9. Note the close relationship between communication and promulgation.
[74] MS McDougal, HD Lasswell and WM Reisman, 'The World Constitutive Process of Authoritative Decision' (1966) 19 Journal of Legal Education 253, 426.
[75] Fuller, 'Human Interaction and the Law' (n 73) 6.
[76] McDougal, Lasswell and Reisman (n 74) 407, 426.

In other words, *opinio juris* is a mental state that is not only articulated and communicated – rather, it is a mental state that is articulated and communicated in specific contexts that allow for the mental state in question to be understood as having legal relevance.[77]

But it is Akehurst, more than D'Amato, who develops the third approach to its fullest extent. Akehurst acknowledges the importance of D'Amato work for recognising that "what matters are statements, not beliefs".[78] However, Akehurst goes on to affirm that "a statement by a State about the content of customary law should be taken as *opinio juris* even if the State does not believe in the truth of the statement".[79] Now, acquiescence by other States – already relevant in D'Amato's work[80] – will play a definitive and crucial role: the "true" mental state – true belief, true will – of the State making a statement *is irrelevant* – "if other States acquiesce, a new rule of customary law comes into being".[81] (The important role of acquiescence had already been affirmed by many authors,[82] and recently also by the International Law Commission, notably on the importance of ascertaining States reaction to the practice of international organisations.[83])

Hence, in ascertaining *opinio juris*, this third approach de-emphasise the importance of the "true" or "subjective" mental state. Rather, it emphasises the importance of the manifestation of the mental state in the form of statements or (in the case of nonverbal manifestation) of what can be expressed through statements. Moreover, in ascertaining the existence of *opinio juris*, this approach looks at statements in the specific contexts in which they are expressed. By doing all this, this approach inadvertently introduces the concept of *opinio juris* as an *institutional object*. Nevertheless, the concept is very incipient because the third approach fails to look at the institutional roles that *opinio juris* play in the formation of custom.

More recently, other scholars have drawn on this third approach. Roberts, in a well-received piece, expressly adopted "D'Amato distinction between action (state practice) and statements (*opinio juris*)".[84] Roberts distinguishes between traditional and modern custom.

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[77] This aspect complements what I describe in Droubi 'Institutionalisation of Emerging Norms' (n 13).
[78] Akehurst (n 69) 36.
[79] Ibid 37. *Cf.* n. 125-128 below.
[80] D'Amato (n 56) 82.
[81] Akehurst (n 69) 37.
[82] For instance, IC MacGibbon, 'Customary International Law and Acquiescence' (1957) 33 The British Yearbook of International Law 115.
[83] UNGA Res 203 (73rd Sess) (11 January 2019) 'Identification of customary international law' A/RES/73/2-3, Annex Conclusion 10(3). *Also,* International Law Commission, 'Identification of Customary International Law, Text of the Draft Conclusions and commentaries thereto' [2018] Report of the International Law Commission Seventieth session (30 April–1 June and 2 July–10 August 2018) International Law Commission Report, A/73/10, 2018, chap. V, para. 66 ("Conclusions and Commentaries"), Conclusion 10(3) and its commentary.
[84] AE Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 The American Journal of International Law 757, 757. ("action can form custom only if accompanied by an *articulation* of the legality of the action" [Emphasis added]).

Roberts draws on the work of Kirgis and Tasioulas (custom on a sliding scale) and Dworkin (law as interpretation) to define traditional custom as based on a descriptive approach to custom and the modern custom, on a normative approach to custom.[85] The former "focuses primarily on state practice in the form of interstate interaction and acquiescence" and it places *opinio juris* in a secondary place – its objective is solely to distinguish between law and non-law.[86] For Roberts, traditional custom "is identified through an inductive process in which a general custom is derived from specific instances of state practice".[87] *Modern* custom, in contradistinction, is "derived by a deductive process that begins with general statements of rules rather than particular instances of practices".[88] For Roberts, this approach "emphasises *opinio juris* … because it relies on statements rather than actions".[89] Crucially, Roberts claims – similarly to what Dupuy submits in respect to wild custom – "this process can develop quickly because it is deduced from multilateral treaties and declarations by international organs such as the General Assembly".[90] Again, we have the idea of international organisations operating as coordinators and promoters of the process. After identifying the limits of both approaches, Roberts makes the very important submission that neither is "completely descriptive or normative, because both recognize the importance of state practice and *opinio juris* to varying degrees".[91]

It is important to note that Roberts articulates a *reflective interpretive approach* to the exercise of identifying custom. I believe that this approach helps understanding the *process of* ascertaining customary international law and the significant discretion that lawyers enjoy in it, a point to which I come back later. Roberts proposes to *first* define the relevant data (preinterpretation);[92] *second*, to interpret this data accurately in view of past practice (dimension of fit);[93] *third*, to ascertain whether the "content of custom is substantively moral and whether it is derived by a legitimate process" (dimension of substance);[94] and, *then*, to balance fit and substance in a coherent manner, and decide between the resulting interpretations in a process

[85] Ibid 757–60, and 764 ("practice is descriptive, while *opinio juris* can be descriptive or normative").
[86] Ibid 758.
[87] Ibid 758. *Cf.* with B Simma and P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1989) 12 The Australian Yearbook of International Law 82.
[88] Roberts (n 84) 758. and 762-3 ("traditional custom is closely associated with descriptive accuracy because norms are constructed primarily from state practice – working from practice to theory" and "modern custom derives norms primarily from abstract statements of *opinio juris* – working from theory to practice").
[89] Ibid 758.
[90] Ibid.
[91] Ibid 767.
[92] Ibid 774.
[93] Ibid 775.
[94] Ibid 778.

similar to Rawls' mediation between intuitions and moral principles.[95] Note that this account, and the third stage in particular, coheres with Walden account on the relevant behaviour that triggers customary international law;[96] and that it brings to light the significant role that lawyers play in the establishment of customary international law.[97] After applying her approach to some cases, Roberts concludes that the "best balance between fit and substance varies according to the relative strength of the practice and principles involved" so that "strong substantive considerations may compensate for a relatively weak fit, while equivocal substantive considerations will require a finer balance between fit and substance.[98] Furthermore, Roberts submits that custom is a "fluid source of law", which can "change and harden over time". [99] In Hart's terminology, it would be a "primitive source of law because it lacks clear rules of change".[100] Finally, Roberts emphasises the process through which customs are formed – optional conduct becoming habitual, then obligatory, then decaying through deviations.

With this background, I propose to distinguish between the underlying mental state (belief or will) and *opinio juris* as an institutional object and to pay close attention to the process of affirming and ascertaining *opinio juris*.

3 *Opinio juris*: from mental state to institutional object

The theories described in the prior sections operate against the background of the old dualism between mind and body, seemingly presupposing that a tension marks their relationship. Because they also anthropomorphise the State, they lead to a sharp tension between the subjective and the material elements of custom: some theories say that mind precedes bodily movement and others say the opposite. I start by rejecting this dualism (as well as the anthropomorphisation of the state,[101] a topic that is beyond the present work) on grounds that it is artificial and that it makes it difficult to understand certain aspects of the emergence of *opinio juris*. John Searle shows the impossibility of separating mind from body, or mental from physical states, and cogently demonstrates that they are better understood as different levels of a system.[102] If this is the case, then *opinio juris* cannot be, or cannot only be, about mental states.

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[95] Ibid 779.
[96] *See* n 61-64 above.
[97] *See* n 151*ff* and accompanying text.
[98] Roberts (n 84) 783.
[99] Ibid 784.
[100] Ibid 784.
[101] For a critique of the anthropomorphisation of the State, see the chapter of Maiko Meguro in this volume.
[102] JR Searle, *Intentionality: An Essay in the Philosophy of Mind* (Cambridge University Press 1983) ch 10.

As Searle explains, mental processes trigger consciousness and intentionality,[103] which are part of the human biology – brain, consciousness and intentionality are part of the same system.[104] Intentionality consists in the capacity of the mind to represent objects and states in the world.[105] Intentional states are literally *states*, which are caused by neurophysiological processes, i.e., they are "caused and realised in the brain".[106] At the most fundamental level, these states are triggered by primordial forms of intentionality, namely, perception and action.[107] Beliefs and desires are "etiolated forms of more primordial experiences in perceiving and doing".[108] Henceforth, I refer to both beliefs and intentions as primary intentional states. It is a characteristic of beliefs that they are supposed to match an independent reality, and they may be true or false depending on whether they succeed or fail to match it.[109] In contradistinction, intentions are supposed to change the reality, and they may succeed insofar as the reality effectively changes.[110] Intentions rests on the desire to change a state of affairs and on the belief that this change is possible.[111] Given that intentional states never come in isolation;[112] notably, given the close relationship between beliefs and intentions, I will not attempt to isolate one from the other. So the first point to make is that the separation between intention and belief is a theoretical and rather artificial exercise.

Intentional states may not be conscious, but they are always accessible through consciousness.[113] Consciousness can be defined as sentience or awareness.[114] Both consciousness and intentionality are typical of humans and certain animals. It is through cooperation, through *collective* intentionality, that human beings ascribe intentionality to objects and that they create *institutional* objects.[115] It is the "*we*-intend", rather than the "*I*-intend", which creates institutions.[116] Hence, it is collective rather individual intentionality that is of relevance here.

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[103] Searle *Intentionality* (n 102), 3.
[104] Ibid, ix.
[105] Ibid, 1, 4.
[106] Ibid, 15. Governments and international organisations have derived intentionality (n 118 below).
[107] Ibid, 36, 75.
[108] Ibid, 36. I adopt Searle's broad definition of beliefs and desires so as to encompass degrees of conviction and degrees of desire. Ibid, 29.
[109] Ibid, 6–8.
[110] Ibid, 6–8.
[111] Ibid, 34
[112] See the discussion below (n 169-171).
[113] Ibid 2.
[114] JR Searle, *Consciousness and Language* (Cambridge University Press 2002) 7 ("Subjective states of sentience or awareness that begin when one awakes in the morning … and continue throughout the day until one goes to sleep at night").
[115] Searle, *Making the Social World* (n 15) 43, and ch 5.
[116] Note that collective intentionality is not necessarily a sum of individual intentionalities: the form "we-intend" *might occur* to an individual *irrespectively* of occuring to others of the collective. Searle *Making the Social World* (n 15) 47 *et seq*., and 50 *et seq*. *Cf*. n 49 and accompanying text.

Indeed, for their capacity to *symbolise* and *cooperate*, humans may ascribe intentionality to entities that are not "intrinsically intentional".[117] This is what Searle defines as *derived* intentionality.[118] Through cooperation, humans can impose intentionality on sounds and visual objects – e.g., they create language.[119] Not only it is the case that intentional states can be expressed through language, but it is also the case that some intentional states *require* language – there are intentional states that can only be expressed through propositions.[120] This can be better understood by means of a simple example. Imagine that the foreign secretary of a particular country utters the following words: *humanitarian intervention without United Nations Security Council authorisation is lawful in certain circumstances*. The content is the proposition "humanitarian intervention without Security Council authorisation is lawful in certain circumstances" – and the object is the reality, the state of affairs that the proposition represents. The psychological mode may be either the *belief* that it is the case that *humanitarian intervention is lawful* or the *intention* that *humanitarian intervention be lawful*. This introduces us to the relationship between intentional states and *speech acts*.[121] Essentially, there are five types of speech acts, namely, assertives (expressed in statements), which correspond to beliefs; directives (orders), which correspond to desires; commissives, i.e., promises, which correspond to intentions; expressives, i.e. apologies, thanks, etc., which correspond to feelings; and declarations (statements), which correspond *to both beliefs and intentions*.[122] Not only speech acts express intentional states; they also *carry the psychological mode* of the intentional state they express.

To facilitate the analysis, I will deal solely with one class of speech acts, *declarations*, which often materialise in *statements*, because they have a crucial role in the formation of institutional objects,[123] e.g. they explain how certain groups of human beings can impose intentionality on governments and international organisations, and how certain other groups of human beings can establish *opinio juris*. Indeed, declarations are often the realm of individuals who enjoy a special status in their society: authorities who are capable of declaring a state of affairs. As mentioned, it is a characteristic of declarations that they express *both* a belief and an intention:

> …since the illocutionary point of the declaration is to bring about some new state of affairs solely by virtue of the utterance, declarations [express belief and intention]. For this to work the speech act must be performed within some extra-linguistic institution where the speaker is appropriately empowered to bring about new institutional facts solely by the

[117] Searle, *Intentionality* (n 102) viii.
[118] JR Searle, 'Insight and Error in Wittgenstein' (2016) 46 Philosophy of the Social Sciences 527.
[119] Searle *Making the Social World* (n 15) ch 5.
[120] Searle *Intentionality* (n 102) 6, 7.
[121] JR Searle, Speech Acts: An Essay in the Philosophy of Language (Cambridge University Press 1969).
[122] For a summary of the argument, Searle *Making the Social World* (n 15) 69.
[123] Ibid 12, 13.

> appropriate performance of speech acts… all declarations bring about institutional facts, facts which exist only within systems of constitutive rules, and which are, therefore, facts by virtue of human agreement. [124]

Moreover, speech acts carry the presupposition that the speaker in fact meant what he or she uttered.[125] Evidently, it is possible that the speaker has a different intentional state than that which he or she expresses.[126] Besides the possibility of lying, an individual may dissociate him or herself from their speech acts and this is often what occurs with, e.g., State representatives – they express the belief/intention of their respective States. Thus, the individual's real intention in uttering the declaration (e.g. the intention to deceive, or to speak "on behalf of") is different from the intentional state that the declaration carries with it. The individual who intends to utter certain sounds and utters them, satisfies the object of his or her real intention. However, by uttering certain sounds in a public language, the individual cannot escape the fact that these sounds carry publicly held meanings (this is sincerity condition).[127] Note that a person does not publicly commit him/herself to anything just by having intentional mental states like beliefs/intentions, but a person commits him/herself by expressing these and other states in words of a public language.[128] This insight is crucial for the understanding of how an institutional object comes to be: through *speech acts*.[129]

In analytical terms, institutional objects are established by the operation of declarations which have the form "X in circumstances C counts as Y" or "it is the case that Y status function exists in circumstances C".[130] In the first case, institutional objects derive from the collective attribution of deontic status and function (therein the expression *status function*) to other objects; which can be either brute facts, which exist independently of the human mind; or which can be social objects (to which a new status function is attached). With the imposition of a certain status on an object, it acquires a function that otherwise it does not have.[131] So, the original object is *represented* as being something else.[132] In the second case, a status function can be established where no prior object exists (this case is often referred as free standing Y term).[133] In both cases, collective *acceptance* is required for the maintaining of the new status function. In both cases, the representation (Y) carries a deontology – e.g. it gives individuals desire-independent reasons for

[124] Searle *Intentionality* (n 102), 171-2.

[125] Ibid 9, 10, 164.
[126] Ibid 9, 10.
[127] Ibid 9, 10.
[128] Searle *Making the Social World* (n 15) 87-8.
[129] Ibid 100, 101.
[130] Ibid 97-100.
[131] Ibid 59-60, 94.
[132] Ibid 95.
[133] JR Searle, 'Language and Social Ontology' (2008) 37 Theory and Society 443 <http://link.springer.com/10.1007/s11186-008-9068-y> accessed 2 December 2019.

action.[134] In general, "there is no a specific moment at which there is a specific act of Declaring, but there must be some speech ac or set of speech acts and other sort of representation that constitute representing" the new object.[135] To be clear – a set of different speech acts may serve as an informal declaration. Still, the context – or the non-linguistic institution – in which the speech acts occur remain important.[136] However, and crucially, there are circumstances in which declarations must comply to some formal requirements so that they can constitute a new reality. This occurs, e.g., when declarations must conform to prior declarations, the so-called standing declarations, which establish

> …into the indefinite future that anything that satisfies the X condition counts as having the Y status function. Thus, for example, getting a majority of votes in the Electoral College counts as winning the presidency of the United States. And anyone who wins and is subsequently sworn in counts as the president of the United States. This is why you do not need separate acts of acceptance for each individual case. By accepting the constitutive rules you're committed to accepting the cases that fall under those rules… Once you have accepted the constitutive rules the facts of the case determine whether it has the appropriate institutional status and your commitment to the rules commits you to accepting that status.[137]

Standing declarations allow individuals to *speak on behalf of an institution*. Consequently, by making a declaration on behalf of an institution, e.g. a government or an international organisation, individuals impose intentionality on said government or international organisation. In fact, standing declarations might allow individuals to impose intentionality on governments and international organisations through means other than declaration – other speech acts or *even actions that serve as* speech acts. Consequently, governments, as well as international organisations, have a form of *derived* intentionality, but intentionality it is. It is often the case that international organisation's *intentionality* is denied on the basis on not being "really" autonomous or independent vis-à-vis the Member States.[138] However, subordinate intentionality continues to be intentionality – and let us not forget that governments also have intentionality that is derived from human intentionality. Thus, international organisations have intentionality – whether manifestations of their intentionality should qualify as *opinio juris* constitutes an entirely different

[134] Searle Making the Social World (n 15) ch 5. See F Kratochwil, Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs (Cambridge University Press 1991).
[135] Searle *Making the Social World* (n 15) 96.
[136] On this point, *cf.* with n 61 (above), D'Amato drawing on Fuller and McDougal (n 75 and 76) and Roberts (n 91ff).
[137] Searle, 'Language and Social Ontology' (n 133).
[138] See the chapters of Catherine Brölmann, Nikolaos Voulgaris, and Lorenzo Gasbarri in this volume.

question, as I hope to clarify. With these aspects in mind, let us give a more realistic gloss to our example.

> As set out in the note of the [United Kingdom] government's legal position published on 29 August 2013 in connection with possible United Kingdom military action against Syria, if action in the Security Council is blocked, the position of the government is that it is permitted under international law to take exceptional measures in order to avert a humanitarian catastrophe.[139]

And –

> I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it ... if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.[140]

The picture that arises is different from mere utterance of words. The United Kingdom Minister formally *declares* the position (on behalf) of the United Kingdom government in respect to humanitarian intervention. The declaration is uttered by the Minister in his official capacity. Irrespectively of the *sincerity* of the Minister towards the object of the declaration, the latter carries the psychological modes (i.e. belief and intention), as well as the sincerity condition, that define it as, and make it identifiable as, a declaration. Moreover, the Minister makes a declaration in circumstances and in a manner in which the declaration indeed *becomes* a declaration by United Kingdom government.[141] Consequently, the mental states the declaration expresses are ascribed to the United Kingdom government. Something similar happens with the United Nations Secretary-

[139] United Kingdom Foreign and Commonwealth Office, 'Further Supplementary Written Evidence from the Rt Hon Hugh Robertson MP, Minister of State, Foreign and Commonwealth Office: Humanitarian Intervention and the Responsibility to Protect (USA 19)' (*Just Security*, 2014) (hereinafter UKFCO 2014) <http://justsecurity.org/wp-content/uploads/2014/01/Letter-from-UK-Foreign-Commonwealth-Office-to-the-House-of-Commons-Foreign-Affairs-Committee-on-Humanitarian-Intervention-and-the-Responsibility-to-Protect.pdf> access 09 February 2019.

[140] United Nations Secretary General, 'In Larger Reedom: Towards Development, Security and Human Rights for All' (2005) A/59/2005 ("In Larger Freedom"), 135. To be clear, unless the case is that of an *imminent* threat that falls within the scope of Article 51 of the United Nations Charter (*see In Larger Freedom*, para. 124), it is for the Security Council, and not for States without a Security Council mandate, to adopt enforcement action (*In Larger Freedom* para. 126).

[141] For a different, interesting approach that also emphasises the actors behind the State, see the chapter of Maiko Meguro in this volume.

General[142] – with the difference that Kofi Annan apparently *does not dissociate himself* from the declaration, as he assumed the role of norm entrepreneur in respect to the promotion of the responsibility to protect or simply responsibility to protect principle.[143] I call derived intentional states that speech acts like these express and impose on institutions *underlying intentional states* – and, to be clear, I differentiate them, on the one hand, from primary, non-derived intentional states that occur to individuals and, on the other, of the speech acts that express them. As it happens with primary intentional states, it seems rather difficult to isolate an underlying intentional state.

Opinio juris is neither the primary intentional states that occur, not in isolation but in profusion, to decision-makers; nor the underlying intentional states, many times ambiguous or conflicting, expressed through speech acts; nor the speech acts themselves. Rather, *opinio juris* constitutes is an institutional object, a complex status function which – (a) is imposed on speech acts, which carry underlying intentional states (beliefs or intentions), and which are uttered by specific classes of individuals in specific circumstances – and (b) has the purpose of promoting the emergence or facilitating the identification of customary international law. Analytically, *opinio juris* is established through a declaration:

"X in circumstances C counts as Y"

Where:

X = speech acts that carry certain underlying intentional states;

C = uttered by certain individuals in certain circumstances

Y = *opinio juris*.

The *function* of this status is that of *promoting* the emergence or *facilitating* the identification of customary international law (Z). Note that we can distinguish a standing declaration that establishes that in all cases where speech acts in certain circumstances constitute *opinio juris*, from declarations that establish individual occurrences of *opinio juris*. Henceforth, I differentiate between *opinio juris* as an institution as opposed to individual occurrences – or *tokens* of occurrences – of *opinio juris*. In individual occurrences, "x" (e.g. speech acts carrying the intention/belief that humanitarian intervention be/is lawful without Security Council authorisation) in circumstances "c" (uttered by Foreign Ministers etc.) counts as "y" (*opinio juris* that humanitarian intervention be/is lawful without Security Council authorisation). The function of "y" is to promote/facilitate the emergence/identification of "z", a rule of customary international law that authorises humanitarian intervention without Security Council authorisation. Evidently, the expression *opinio juris* may be replaced by *acceptance as law* and similar formulations – the process remains the same.

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[142] For a precise account of the implications and the influence that a declaration by the United Nations Secretary-General can have, *see* the chapter of Jean-Baptiste Merlin in this volume.

[143] *See* I Johnstone, 'The Role of the UN Secretary-General: The Power of Persuasion Based on Law' (2003) 9 Global Governance 441; Droubi 'The Role of the United Nations' (n 14). (Both address, inter alia, the role of the Secretary-General as norm entrepreneur).

But this is only part of the story. Because *opinio juris* is not sufficiently regulated, the standing declaration (X in Circumstances C counts as Y) is not strong enough to dispense with specific acts of declaration and of *acceptance* of each individual occurrence. Let us go back to our two examples. They might suggest that we have individual occurrences of *opinio juris*: in the case of the United Kingdom, *opinio juris* that humanitarian intervention without Security Council authorisation be/is lawful, and in the case of the United Nations, *opinio juris* that Security Council authorisation is required. However, I do not think this is the case – on their own, the examples offer instances of underlying mental states. The *establishment* of an occurrence of *opinio juris* escapes the *sole* authority of an individual State or international organisation – because there needs be acts that serve as declaration that an occurrence is present, and because there needs be continuous acceptance that this is indeed the case. *Opinio juris*, by definition, is created by, and it serves, the collective which it addresses. Let us recall that the collective of States *may not accept* that all those who participate in it enjoy the same level of law-making capacity. Evidently, for the United Kingdom and all clearly recognised States, the question of law-making capacity does not arise – but for international organisations, States that do not count with general recognition and other entities,[144] the question may and does arise. The question even arises in respect to the concept of "specially affected States", i.e., "States that are particularly involved in the relevant activity or are most likely to be concerned with the alleged rule".[145]

Besides, occurrences of *opinio juris* should be established on grounds of speech acts that express *somewhat stable shared* beliefs/intentions. By stable I mean that the same psychological modes about certain propositions are distinguishable in different speech acts. By shared, I mean collective intentional states. In order to clearly differentiate between the collective and individual intentional state, let us see how the United Kingdom looks at the responsibility to protect. In the excerpt below, we see that the United Kingdom government *shares* the United Nations collective belief/intention in the responsibility to protect principle, which forces it to *justify* its own belief/intention in the legality of humanitarian intervention without the Security Council authorisation.

> The Summit's adoption of the "Responsibility to Protect" was politically significant, and one that the *Government welcomed and has continued to promote*. But the "Responsibility to Protect" … *does not* address the question of unilateral State action in the face of an overwhelming humanitarian catastrophe to which the Security Council *has not* responded.[146]

Ultimately, there might be a very weak line separating individual from collective beliefs/intentions, and speech acts may simply reflect this ambiguity. To summarise the argument so far: there must be continuous acceptance of each occurrence of *opinio juris*, which is established on the basis of speech acts that carry *shared* underlying intentional states.

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[144] *See*, e.g., the chapters of William T. Worster and Antal Berkes in this volume.
[145] International Law Commission Conclusions (n 83) Conclusion 8, Commentary para. 4.
[146] UKFCO 2014 (n 139).

The practice of identifying *opinio juris* supports the argument above. Lawyers often remark that it is impossible to know the "real" beliefs of a State.[147] Consequently, lawyers turn to written and unwritten materials and, at times, behaviours – in order to ascertain which "beliefs" they evince.[148] From the available material, lawyers infer the belief of a State – notable in this respect is the possibility to infer a "belief" from failure to react to a certain practice.[149] They need not concern with all States. Then, on the basis of the evidence, lawyers are able to affirm occurrences of *opinio juris* and, on its basis, they are able to affirm customary international law.[150] If we stick to the traditional definition of *opinio juris*, namely, a *primary* intentional state, then, at different moments, the exercise looks artificial: how exactly does the lawyer isolate a belief from an intention; how exactly does the lawyer navigate from individual to collective intentionality; how can belief or acceptance, as mental states, be inferred from lack of action? The artificiality breaks down if we look at *opinio juris* as an institutional artefact – now, "belief" or "acceptance" and even "intention" acquire another meaning, with a different ontology than mental states or speech acts: "belief" or "acceptance" or "intention" qua *opinio juris* is that what lawyers establish in each case, on the basis of speech acts serving as evidence, for the specific purpose of ascertaining a rule of custom.

Henceforth, for analytical purposes only, I differentiate between the collective of individuals who mostly contribute to the formation of the *underlying* beliefs, like policy-makers and norm-entrepreneurs;[151] and those who mostly contribute to the establishment of *opinio juris*, namely, international lawyers broadly defined, including those working in Foreign Offices and in Secretariats and other organs and procedures of international organisations, or as judges and arbiters in international courts and tribunals. In a certain manner, a token of *opinio juris* is that

[147] International Law Association, 'Final Report of the Committee on Formation of Customary (General) International Law: Statement of Principles Applicable to the Formation of General Customary International Law' ("ILA London Statement"), 33, Principle 16 Commentary (b) ("it is not so much a question of what a State really believes (which is often undiscoverable, especially since a State is a composite entity involving many persons with possibly different beliefs), but rather a matter of what it says it believes, or what can reasonably be implied from its conduct")
[148] International Law Commission (n 83) Conclusion 10.
[149] International Law Commission (n 83) Conclusion 10 (2) and commentary. Interesting, the word "deduce" was present in the 2016 version of the Conclusions and Commentary. *Cf*. International Law Commission, 'Identification of Customary International Law, Text of the draft conclusions and commentaries thereto' [2016] Report of the International Law Commission Sixty-eighth session (2 May-10 June and 4 July-12 August 2016) International Law Commission Report, A/71/10, 2016, chap. V, para. 63, Conclusion 10, Commentary 1 ("Draft conclusion 10 concerns the evidence from which acceptance of a given practice as law (opinio juris) may be *deduced*" – Emphasis added)
[150] International Law Commission (n 83), Conclusion 9.
[151] *See* the chapter of Jean-Baptiste Merlin in this volume (arguing that the United Nations Secretariat and Secretary-General, given their independence as per United Nations Charter, Article 100, can contribute to customary international law).

what international lawyers say it is. Clearly, there is a self-referentiality in the concept;[152] but there is no circularity because the expression "*opinio juris*" is, paraphrasing Searle, a "node in a whole network of practices", and it functions as "a placeholder for the linguistic articulation of all these practices".[153] These are the practices, we should not forget, of ascertaining customary international law. As an institutional artefact, *opinio juris* only makes sense in the ascertaining of customary international law and individual occurrences of *opinio juris* will only make sense in the ascertaining of rules of customary international law. This may explain an oft-noted fact: not every affirmation of a rule of customary international law – by, say, the International Court of Justice – rests on a prior affirmation of *opinio juris*.[154] The reason for this may be that if international lawyers, should they be able to establish, in any given case, the existence of a rule of customary international law without getting enmeshed in the intricacies of discussing *opinio juris*, they may simply avoid the latter. This does not necessarily mean that, in such cases, there is no *opinio juris* – it may be that international lawyers have internalised the rules of the game to an extent that they use *opinio juris* in an unconscious manner.

Moreover, the activity of ascertaining *opinio juris*, which the international lawyer undertakes, is a *politico-legal* activity. Its outcome has politico-*legal* value. Let us look at it more closely. Technically, the international lawyer should only affirm an occurrence of *opinio juris* on grounds of speech acts that evince shared intentional states. Insofar as the United Kingdom belief in the lawfulness of humanitarian intervention without Security Council authorisation remains the individual belief of the United Kingdom government[155] – it should not qualify as an occurrence of *opinio juris*. At the moment other States come to share the belief/intention, the situation changes. However, the activity which the lawyers carry out is a politico-legal, and not a scientific activity, which is mostly uncodified and full of inconsistencies. Consequently, it seems possible that international lawyers establish an occurrence of *opinio juris* on grounds of speech acts which, under close scrutiny, express only individual beliefs/intentions.[156] In fact, it may be impossible for

[152] Drawing on Tuomela, it could be argued that it depends on the *continued* acting of the collective on the agreement that it is *opinio juris*. See Tuomela R, *The Philosophy of Social Practices: A Collective Acceptance View* (2002).
[153] JR Searle, *The Construction of Social Reality* (Penguin Books Ltd 1996) [ebook].
[154] For all, *see* N Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (2017) 28 European Journal of International Law 357.
[155] Note that from a United Kingdom domestic perspective, it necessarily constitutes the belief of a collective. However, at the international plane, which interests us here, it should be treated as an individual belief. What goes beyond the present scope is the manner that a belief shared by a collective within one country can dissipate to collectives in other countries. As I tried to show elsewhere, international organisations seem to play an important role in this respect. *See* Droubi 'Institutionalisation of Emerging Norms' (n 13).
[156] In practical terms, an international lawyer may be tempted to qualify as collective *opinio juris* the individual belief of his or her own State or International Organization. *See*, e.g., the discussion in the chapter of Jean-Baptiste Merlin in this volume.

the lawyer to distinguish, from the available evidence, individual and collective mental states. In any case, the "premature" or "improper" affirmation of an occurrence of *opinio juris* might be either rejected or accepted by other lawyers – which, in turn, might either undermine or strengthen the underlying speech acts. The effects of a premature or improper affirmation of *opinio juris* depends on different factors, such as the degree of legitimacy and authority of the lawyers in question; or the presence of active norm-entrepreneurship in promoting the underlying beliefs/intentions.

With this background, Section V turns to the dynamics of the formation of tokens of *opinio juris* – with the objective of understanding the extent to which emergence of *opinio juris* might be considered the outcome of processes that individuals carry out consciously; and of understanding how international organisations might influence these processes.

4 International organisations and *opinio juris*: between politics and science

A good exercise is to look at the formation of a new rule of customary international law that transforms settled law. As the International Law Association notes, "it is hard to see how a State, if properly advised, could entertain the belief that its conduct is permitted (or required) by existing law when that conduct is, by definition, a departure from it". [157] Indeed, decision-makers tend to be very cautious when making statements or acting on behalf of their respective institutions; in fact, it is often the case that only certain individuals are authorised to speak on behalf of governments and international organisations in matters that have an international dimension. The acts of parliaments and the decisions of domestic courts, which may also amount to evidence of opinio juris, are also the outcome of detailed politico-legal processes. In turn, international lawyers, diplomats and professionals dealing with issues of international law tend to be careful when dealing with these materials for the purpose of ascertaining opinio juris. These professionals have mastered and internalised the "rules of the game" – e.g., the international legal concepts such as responsibility, precedence, unilateral acts, acquiescence and estoppel – to a point that makes them naturally very cautious in these matters. Let us say that all these factors form part of a Background. [158]

Therefore, it can be hypothesised that, by the time the processes through which speech acts start being used to ground the establishment of an occurrence of opinio juris, it is already clear to all involved that these processes are in movement. Apparently, decision-makers and, notably, lawyers are conscious of these processes and time seems to be in their favour – giving them

[157] ILA London Statement (n 147) 1, 33, Principle 16 Commentary (c).
[158] I am using the term background to refer to background "of capacities, dispositions, tendencies, practices, and so on that enable the intentionality to function" as well as to the network of "beliefs, attitudes, desires, and so on that enable specific intentional states to function". Searle, *Making the Social World* (n 15) 155.

opportunity for reflection.[159] However, if there is opportunity for reflection, the argument that Dupuy makes – that international organisations might be able to trigger consciousness and coordinate these processes – seems pertinent. Indeed, as a substantial constructivist literature in international relations shows, international organisations are able to trigger collective consciousness; to promote the diffusion of norms across jurisdictions and to influence State behaviour.

However, the picture above is incomplete – it does not distinguish between the promotion and diffusion of international norms, which might or not be accompanied by a change of behaviour to comply with the norm, and the promotion and diffusion of an *opinio juris* to the effect that a norm is customary international law; it does not account for the role that *free will* plays in the process of establishing and ascertaining *opinio juris*; it does not account for the effect that different time frames – and certain categories of events – have on consciousness and, consequently, on underlying intentional states. I will deal with these factors in turn.

It is uncontested that international organisations are capable of promoting the diffusion of international norms across States, for instance as rules of domestic law,[160] and that they are capable of affecting State behaviour.[161] However, this does not necessarily mean that international organisations can affect the content of the *opinio juris* of States on any given matter in a significant manner.[162]

International Organizations can function as *neutral parties* to promote worldviews, within which they define problems and the manner to address them.[163] international organisations can lead the way in defining problems, identifying the actors responsible for creating and for addressing such problems; can articulate new prescriptions of behaviour to tackle behaviours that trigger or accentuate these problems; can adopt resolutions that introduce these prescriptions as norms to the international society; can persuade States to adopt these norms; can oversee

[159] Indeed, in most cases in which States refer to customary international law in, say, the United Nations Security Council, they do so to *deny* that the norm is question has this character. *See* Droubi 'Institutionalisation of Emerging Norms' (n 13).

[160] M Finnemore, 'International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cutural Organization and Science Policy' (1993) 47 International Organization 565; G Porter and JW Brown, 'The Emergence of Global Environmental Politics' (1996) 615 Global Environmental Politics 1; SE Davies, A Kamradt-Scott and S Rushton, *Disease Diplomacy: International Norms and Global Health Security* (John Hopkins University Press 2015).

[161] For instance, R Goodman and D Jinks, *Socializing States : Promoting Human Rights through International Law* (Oxford University Press 2013).

[162] *Note*, e.g., that the Conclusions list "legislative and administrative acts" as evidence of State practice – but not of evidence of *opinio juris*. *Cf.* UNGA RES 73/203 (2019) (n 83) Conclusions 5, 6.2 and 10.2.

[163] The notion and role of neutral parts can be found in F Parisi, 'Spontaneous emergence of law: customary law' (1999) Encyclopedia of Law and Economics , 608.

compliance with the latter, aid States that lack the necessary resources to comply with these norms, administer sanctions on States that refuse to comply with them.[164] We can say that, in these processes, individuals working in the international organisations, often experts in their fields, "quietly inject their thought or take the initiative in offering government representatives ideas and data for mapping an altered or, for that matter, unchanged course."[165] Moreover, international organisations often provide favourable environments to norm-entrepreneurs to act globally in the promotion of these worldviews, definitions of problems and forms of addressing them. These entrepreneurs, who rely on a network of experts from different States, other international organisations and non-governmental organizations, often trigger collective alertness.[166]

Throughout these processes, decision-makers in different governments might learn to see the world through certain prisms; they might become convinced (i.e. come to believe) that the problems, the solutions and norms that international organisations present to them make sense, are warranted; they might imprint such norms onto official policies. In contradistinction, decision-makers *might remain unconvinced* that the problems, solutions and norms are warranted and, nonetheless, they might, for whatever practical or material reasons, imprint such norms onto official legislation and policies (i.e., they give in to social pressure or positive or negative sanctions). It should appear that this latter situation would be covered by the discussion on the sincerity condition.[167] However, it is not. This is so because of one aspect that so far remains underdeveloped. In theory, *opinio juris* requires speech acts that carry an underlying intentional state with a *specific* propositional content, which has the format "international norm 'α' is or should be customary in character". Again, we should account for the inconsistencies of the practice, so it should be expected that tokens of *opinio juris* might be established even when speech acts do not carry an intentional state with said propositional content.

In more precise terms, the move (a) from successfully triggering collective consciousness about a given problem 'μ' and from successfully disseminating a given norm 'α' to tackle problem 'μ' as rule of law in different jurisdictions, and even affecting States behaviour to comply with norm 'α'; – towards (b) the establishment of *opinio juris* to the effect that norm 'α' is custom, is not automatic. Even if States adapt their behaviour to norm "α" this does not mean that there is *opinio juris* to the effect that norm "α" is custom. Considering that *opinio juris* requires continuously reaffirmation lest it decays, it seems that international organisations have different tasks if the objective is to coordinate processes to shape *opinio juris*: they need to promote the belief that 'μ' is indeed a problem (*cf.* climate change); they need to promote the belief that norm 'α' as an effective or at least a proper instrument to tackle problem 'μ' (*cf.* reduction of carbon emissions), and the belief or intention that norm 'α' is or should be customary. It is by no means

[164] Droubi 'The Role of the United Nations' (n 14); Droubi 'Institutionalisation of Emerging Norms' (n 13).
[165] L Gordenker. The UN Secretary-General and Secretariat (Routledge, 2013).
[166] Droubi 'The Role of the United Nations' (n 14).
[167] *See* n. 127 and 141 and accompanying text.

clear that strategies developed for the promotion and diffusion of norms and management of compliance are *effective* for the promotion and diffusion of *opinio juris*. For the present purpose, for lack of better strategies, let us assume these strategies can be effective at least to a certain extent. Even then, there remain serious challenges.

Continuing with the example above, even if norm 'α' is repeatedly affirmed in resolutions of an international organ; even if it becomes inserted as a rule of law into the domestic legislation of different countries, even in face of mounting social pressure for complying with norm 'α', decision-makers and lawyers have much room to operate to jeopardise the processes that would lead to the affirmation of norm 'α' as custom. This is how Searle describes the "causal gap" or free will:

> …we have a special kind of consciousness in which we have a sense of making decisions that are not forced, the kind of consciousness where we choose one thing but we have a sense that we could have chosen something else. In such cases we sense a causal gap between the reasons for our decisions and actions [and here Searle is speaking of rules including legal rules as reasons for decisions and actions]. Though we do act on reasons, the reasons do not normally set causally sufficient conditions for our decisions and actions, and in that sense there is a gap between the causes and the effects.[168]

This gap is, obviously, only a gap between *reasons* and *actions* – it is not a gap in mental states: in fact, the gap allows a human being to *sense* something else, to *believe in* and to *intend to bring about*, a new state of affairs.

Belief and intentions – i.e., the primary intentional states of belief and intention – do not occur in isolation,[169] and they do not simply appear by fiat.[170] These intentional states are necessarily embedded in unique backgrounds.[171] Among the factors that trigger primary mental states are memory, experience and perception.[172] Indeed, successes and failures that the decision-makers and their society *experienced*, and the *memory of* such experiences affect the manner they perceive the present and form their beliefs and intentions. In a simplistic account, the memories, experiences, perceptions, *inter alia*, of an individual trigger his or her intentional states. Social processes allow the individual to share their experiences and memories, their beliefs and intentions with their peers. In these social processes, some factors (like norm-entrepreneurs) trigger individual and collective consciousness. Conscious actors rely on their individual and shared background to test beliefs and question intentions. Decision-making processes, which ground much of the exercise of ascribing intentional states to governments, serve to purge unwarranted

[168] Searle *Making the Social World* (n 15), 133.
[169] Ibid 31.
[170] Ibid 31.
[171] Ibid 31-2.
[172] Ibid.

beliefs and intentions.[173] In a manner, decision-making processes stabilise collective beliefs and intentions. However, these processes can only go so far.

Indeed, individuals in a government may entertain all sorts of beliefs and intentions. Whenever a collective of individuals come to share the belief that an official policy of their government should change, even if this means going against settled law, they have in their favour a variegated range of mechanisms, many of which very subtle, to work on their *intention* to change the policy in question.[174] The classic use that judges make of legal argumentation as a form of civil resistance for the undermining of extant law illustrates the point.[175] Moreover, let us not forget that the object of intentional states, the state of affairs in the world to which they refer, might change. By formally expressing intentions/beliefs that conflict with settled rule of customary international law, decision-makers might work towards the transformation of the rule in question.

This allows us to revisit the argument Walden articulates.[176] The *primary* intention, which certain human beings might share, to change a rule of customary intentional law already comes enveloped in a network of primary intentional states in which it finds support. The primary intention to change a rule is necessarily grounded on the belief that a change of the rule is possible; it might be grounded on the belief that the rule should be changed, which may be grounded on the belief that circumstances changed, or interests changed, and these intentional states are intimately related to many others. The intentionality that is ultimately imposed on a government is the outcome of ferociously dynamic singular and collective *psychological* processes, as well as of live *social* interactions through which individuals come to share their beliefs and intentions, and, through special categories of speech acts, come to impose certain beliefs/intentions on their governments. All things being equal, it should be expected that certain beliefs/intentions resonate, more than others do, with individuals in other governments. It is by no means clear that international organisations can *coordinate* these processes which shape *opinio juris*, which occur often simultaneously at the domestic, transnational levels and international levels. In fact, in face of events like Brexit and the United States official approach to climate change,[177] it seems that international organisations have no means of coordinating processes with this wingspan.

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[173] *See* the developments in the debate in the United Kingdom on the topic of responsibility to protect and humanitarian intervention: United Kingdom House of Commons, Common Affairs Committee 'Global Britain: The Responsibility to Protect and Humanitarian Intervention' Twelfth Report of Session 2017-19 HC 1005 (10 September 2018).

[174] See e.g. S Droubi, Resisting United Nations Security Council Resolutions (Routledge, 2014) 15 et seq.

[175] *See*, e.g., Dugard J, 'Should Judges Resign? - A Reply to Professor Wacks' (1984) 101 South African Law Journal 286; MJ Osiel, 'Dialogue with Dictators: Judicial Resistance in Argentina and Brazil' (1995) 20 Law & Social Inquiry - Journal of the American Bar Foundation 481.

[176] *See* n. 64-65 and accompanying text.

[177] *See*, e.g., CM Brölmann and others, 'Exiting International Institutions: A Brief Introduction' (2018) 15 International Organizations Law Review.

Likewise, when collecting and ascertaining evidence about putative occurrences of *opinio juris*, international lawyers are affected by a multitude of primary intentions/beliefs, which are triggered by their own experiences, memories and perceptions. They certainly express some of them through formal speech acts. Take Judge Koroma's dissenting opinion in *Threat or Use of Nuclear Weapon*: does he not start by recalling the tragedy of Hiroshima to build a powerful argument to affirm, *inter alia*, his own belief in the *emergence* of *opinio juris* whose propositional content is the prohibition of the use of nuclear weapons?[178] By "*emergence* of an *opinio juris*" (emphasis added), does he not suggest, perhaps unconsciously, that he sees intention *and* belief on the part of the States? This example shows us that it is in the *process* of affirming a token of *opinio juris* where lawyers express, in carefully articulated speech acts, their own belief/intention that the token in case exists. It also evinces the high level of discretion that lawyers enjoy.

But for an occurrence of *opinio juris* to be established, there needs be agreement among a collective of lawyers (recall, I am not only speaking of judges here) that it is, indeed, the case that it exists. In the example above, when Judge Koroma affirms the existence of tokens of an emerging *opinio juris* to the effect that the use of nuclear arms is prohibited, is Judge Koroma *describing* a real state of affairs or engaging, even if incidentally, in wishful thinking? But, then, again, are lawyers properly equipped to *describe* the state of affairs that tokens of *opinio juris* expresses? Or, alternatively, are they always engaging in wishful thinking – and, then promoting or demoting the state of affairs in question? As I explained above, I believe that lawyers *establish* occurrences of *opinio juris*. But they do so on the basis of speech acts that evince certain, stable, shared underlying intentional states – their power *is* constrained. However, in borderline, ambiguous cases, their power seems to increase: a lawyer may simply emphasise *emergence* of an *opinio juris* to describe a state of affairs that is not fully developed; and by so doing a lawyer may promote the development of the state of affairs. The question that arises is – how international organisations would coordinate these processes? At most, it seems that international organisations may provide the frameworks within which lawyers work.

The picture becomes more complex once we bring time to the analysis. It is not possible to do away with the requisite of time by simply arguing that States experience time in a Bergsonian way. A Bergsonian approach would need to go much further than Dupuy goes. A central feature in Bergson's theory is the relationship between time and *free will*.[179] In what interests us here, Bergson builds a critique of the classic schematics of *voluntary* act, which identify a moment for deliberation and following moments for decision and action.[180] Bergson suggests that experience is contemporaneous to action; that the individual *deliberates* after he or she acts to justify the decision they had already made; that, consequently, deliberation generates a circle of justification in which the individual loses him or herself. As Jankélévitch explains, to act *freely*, the individual needs to acquire a direct perception of the world (a "learned naivety"), i.e., a perception cleared of

[178] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* 226, 555, 579.
[179] Bergson *Time and Free Will* (n 25) and Bergson *Matter and Memory* (n 25).
[180] Jankélévitch (n 29).

theories, opinions, and perspectives – cleared of deliberation.[181] In other words, the individual can break the vicious circle though action – but he or she needs to act upon intuition, a type of intuition ("duration intuition") that emanates from a "higher system", which allows the individual to experience the *instant* "from within" and directly.[182] With this, we reach the fundamental idea that the instant when the individual becomes aware of the state of affairs in the world, is irreversible, implying a precise past and future (essentially, this is the idea of "duration"). It does not take much to see that, whatever the time in which States operate or operated at the time Dupuy wrote *Coutume Sauvage*, this is not it. In fact, a Bergsonian approach seems to offer material enough to counter any claim that States act "freely".

Nevertheless, the above invites us to think about the intricacies of understanding the world at the instant one becomes aware of it – the intricacies of understanding the formation of intentional states about world affairs at the instant one becomes aware of the affairs. To help in this analysis, I bring Ruggie's work on timeframes and decision-making.[183] Ruggie differentiates between three temporal forms, namely, incremental, conjunctural and epochal.[184] In the three timeframes, decision-makers bring their own knowledge and world-views to the analysis of information, to the debate and decision-making.[185] In doing so, they *simplify* available information about the phenomena they *define* as socially relevant – they make the information manageable, *usable*.[186] Pursuant to Ruggie, each temporal form frames the "social perceptions" of phenomena.[187] Critically, Ruggie carefully explains the types of *problems* that actors define through these timeframes, and he concludes that these problems differ not only in substance but also *epistemologically*.[188]

Incremental timeframes present the world in a more *familiar* or *knowable* way than conjunctural and epochal timeframes.[189] In incremental timeframes, information and evidence necessary for decision-making are available, and policy-makers will likely adopt a benefits-costs rationale to define problems and policies.[190] However, epochal and, to a certain degree, conjunctural timeframes, respect long-wave processes about which information may be insufficient and

[181] Jankélévitch (n 29).
[182] Jankélévitch (n 29).
[183] JG Ruggie, 'Social Time and Ecodemographic Contexts', *Constructing the World Polity: essays on international institutionalization* (Routledge 1998).
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] Ibid.

evidence may be unconvincing or simply lacking.[191] Ruggie submits that, in such cases, conventional problem-solving rationale – "wherein doing nothing is favoured on burden-of-proof grounds" – can give way to a risk-averting approach – "wherein prudent contingency measures would be undertaken to avoid risks that we would rather not face … much as we do in the realm of *national security*".[192]

I argue that incremental and, to a degree, conjunctural timeframes are *familiar* because the memory of past experience is strong. In long-wave events, memory is weak if existent. In the first case, individuals *recognise* present states of affairs, their past experience (successes, failures) and the memory it left causes certain beliefs and intentions – e.g. it is the unique memories and experiences and perceptions of certain individuals in the United Kingdom that frame the debate on the lawfulness of humanitarian intervention without Security Council authorisation.[193] In long term events, however, individuals *do not* recognise the state of affairs – factors in the background like fears, ideologies, biases, might weight in more heavily in the generation of underlying intentional states.

It would seem that the main problem constitutes long wave events; however, let us look at the potential effects of the Internet and the Web on "incremental timeframes". For Hassan, the digital environment generates and sustains its own temporality (*realtimeness*), displacing temporal relationships that have *traditionally* defined human lives.[194] Notably, he claims that the digital environment *destroys old forms of knowledge*, favours the production of new knowledge that reflects the needs and imperatives of efficiency. Hassan claims that the digital environment emphasises the production of technical knowledge, and jeopardises the production of *critical* knowledge.[195] Consequently, the individual fails to understand the world, which becomes out of control.[196] Hassan argues that, in the name of efficiency, even those "in control" (decision-makers) are out of control because their timeframes for action *are set in the present and near future* ("actions spiral out into an unknown eternity").[197] In contradistinction, Kitchin offers what might be an even darker picture. Responding to the literature that claims that realtimeness "overemphasises the present at the expense of learning from the past and planning for the future" and that posits that temporal dissonance should be recovered – Kitchin claims that people are "enmeshed in several competing temporalities simultaneously", which force them to negotiate "a complex 'chronotopia' of varying pace, tempos, rhythms, scheduling, temporal relations and

[191] Ruggie does not use the expression long-wave event, which I borrowed from T Barnett and Gwyn Prins, 'HIV/AIDS and security: fact, fiction and evidence—a report to UNAIDS' (2006) 82.2 International Affairs 361.
[192] Ruggie (n 183). Emphasis added.
[193] Note the development of the debate by contrasting the document in n. 139 with the document in n. 173.
[194] R Hassan, 'Network Time and the New Knowledge Epoch' (2003) 12 Time & Society 226.
[195] Ibid.
[196] Ibid.
[197] Ibid.

modalities, and these are contingent for different people in different places".[198] Kitchin argues that the implications of this to individuals and to governance are not fully clear, but that the critique should attack the *maintenance* rather than the *recovery* of asynchronous time.[199] Perhaps it is the point that these approaches have in common – the *unfamiliarity* of the state of affairs – which offers a reasonable ground for arguing that individuals might not recognise many present-day state of affairs. If so, Ruggie's approach to incremental time frames might be jeopardised – which is relevant insofar as the Internet and the Web have clear impact on decision-makers and lawyers.
On this note, it could be argued that scientific knowledge could counterbalance the lack of familiarity, offering grounds for actors like international organisations to promote sound beliefs/intentions respecting state of affairs that are not familiar to decision-makers. Indeed, international organisations may facilitate the diffusion of scientific knowledge to States and other actors.[200] Scientific knowledge is indisputably a relevant factor in the background; however, in the present times, it is hard to affirm that it weighs more than other factors in the formation of primary beliefs and intentions of the population at large and of decision-makers and, consequently, in the formation of underlying intentional states. Moreover, problems such as the global financial crisis or climate change deeply challenge the scientific community. There is not a strong agreement in the specialised literature about, e.g., the causes of the global financial crisis,[201] or about the implications, if any, of climate change on violent conflicts or international security.[202] Consequently, decision-makers are left with contradictory narratives. The belief that more financial regulation might prevent another crisis is no stronger than the belief that it makes access to money more difficult for those who might be in most need of it.[203] The belief that reliance of

[198] R Kitchin, 'The Realtimeness of Smart Cities' (2017) 8 Tecnoscienza: Italian Journal of Science & Technology Studies 19 <www.tecnoscienza.net>.
[199] Kitchin (n 198).
[200] For instance, *see* the United Nations actions and processes in respect to climate change, United Nations, 'Climate Change' (2018) <http://www.un.org/en/sections/issues-depth/climate-change/> accessed 6 October 2018.
[201] 'Ten Years after Lehman: Has Finance Been Fixed?' [2018] *The Economist*; M Phillips and K Russel, 'The next Financial Calamity Is Coming. Here's What to Watch' *The New York Times* (New York, 12 September 2018); G Tett, 'Have We Learnt the Lessons of the Financial Crisis?' *Financial Times* (London, 31 August 2018); A Tooze, 'The Forgotten History of the Financial Crisis' [2018] Foreign Affairs <https://www.foreignaffairs.com/articles/world/2018-08-13/forgotten-history-financial-crisis> accessed 6 October 2018.
[202] WN Adger and others, 'Human Security. In': in CB Field and others (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2014).
[203] Contrast, e.g., GB White, 'Trump Begins to Chip Away at Banking Regulations' [2017] *The Atlantic*; with Kamal Ahmed, 'Bank Warns "lax Financial Rules" Are a Route to Failure - BBC News' (*BBC News*, 2018) <https://www.bbc.co.uk/news/business-38913306> accessed 29 September 2018.

fossil fuels should be significantly reduced is no stronger than the belief that such a reduction causes people to lose their job and negatively affect economies.[204]

Whether, in this complex scenario, international organisations may *successfully* promote primary and underlying beliefs/intentions that are consistent with scientific (or other) standards is questionable to say the least. Because the need of constant reaffirmation, the formation of *opinio juris* is a continuous process, which might be jeopardised even if it is in a mature stage if decision-makers begin to resist the process – and they might resist the process because they do not share the same beliefs and intentions of their predecessors – or, simply, because their own beliefs and intentions fluctuate and change. Indeed, for different reasons which go beyond the scope of the present chapter, multitudes of individuals across the globe now see international organisations with deep suspicion.[205] Worse, many *resist* the worldviews, narratives, beliefs and intentions that international organisations espouse and actively promote.[206] In this environment, international organisations are seen not as neutral, but as *interested* parties in the different debates. As they lose the mantle of neutral parties, their ability to promote certain beliefs and intention is jeopardised. All in all, in face of lack of agreement in the scientific community, in an environment that demotes critical knowledge and places the individual in unfamiliar space-times – fears, biases, ideologies might weigh in in the formation of false beliefs and unwarranted intentions – which compete and not rarely prevail over beliefs and intentions that cohere with scientific findings and recommendations. The extent to which international organisations are able to neutralise these factors, and successfully promote beliefs/intentions that make any sense from any scientific viewpoint, is by no means clear. In fact, this constitutes a hypothesis that cannot be dealt with anecdotally and that deserves proper empirical study.

Furthermore, international organisations affect the manner international lawyers carry out the activity of ascertaining *opinio juris*. For instance, more than simply setting parameters for international lawyers, decisions of the International Court of Justice and other courts and tribunals, and the work of the International Law Commission, play a crucial role in developing ontological understandings and epistemological approaches to the identification of *opinio juris*, which become

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[204] *See*, e.g., P Karp, 'Australian Government Backs Coal in Defiance of IPCC Climate Warning' *The Guardian* (London, 8 October 2018) <https://www.theguardian.com/australia-news/2018/oct/09/australian-government-backs-coal-defiance-ipcc-climate-warning>

[205] Brölmann and others (n 177).

[206] For instance, M Howard and R Aikens, 'The EU's Court Is Picking Apart Our Laws' The Telegraph (online) 22 June 2016 <https://www.telegraph.co.uk/news/2016/06/22/the-eus-court-is-picking-apart-our-laws/> (reflecting popular dissatisfaction in the United Kingdom towards the European Court of Human Rights). *Also*, M Simiti, 'Rage and Protest' (2015) 3 Contention 33; N Sotirakopoulos and G Sotiropoulos, '"Direct Democracy Now!": The Greek Indignados and the Present Cycle of Struggles' (2013) 61 Current Sociology 443 (describing popular frustration towards the troika formed by European Central Bank, European Commission and the International Monetary Fund).

part of a lawyer's background. In *North Sea*, for instance, the International Court of Justice defined *opinio juris* as a "belief that this practice is rendered obligatory by the existence of a rule of law requiring it",[207] defining *opinio juris* as a mental state. In the same judgment, the International Court of Justice gave the well-known verdict about the passage of time,[208] apparently rejecting the constraints of mechanical time. The International Court of Justice has done more by ascribing, although timidly, normative force to the "belief" in question.[209] The real extent to which lawyers, in the stricter sense of the term, and scholars have internalised these understandings, and the influence of these particular decisions in the process of internalisation, are unknown. At least *prima facie*, it seems that these decisions have been crucial in placing these understandings in the individual and collective background of lawyers and scholars.

Moreover, the manner that the International Court of Justice, and other international courts and tribunals, use *opinio juris* affects the form international lawyers understand and identify *opinio juris*.[210] If the International Court of Justice fails to make a systematic and coherent use *opinio juris* when identifying customary international law, lawyers and academics might ultimately reflect the confusion in their work.[211] If there are instances of authoritative affirmation of customary international law essentially on the basis of *opinio juris*, and instances of affirmation of customary international law without any regard to *opinio juris*; – it is only natural that there are scholarly works strongly affirming the preponderance of *opinio juris*;[212] others doing the opposite;[213] the brilliant sliding scale approach negotiating between them; [214] and some, perhaps

[207] North sea continental shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment) [1969] ICJ Reports 76–7.
[208] Ibid.
[209] Case concerning Right of Passage over Indian Territory (Merits), Judgment (1960) 1960 ICJ Reports 6, 42–3 ('nothing to short that grant of permission was incumbent ... as an obligation'). North sea continental shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (n 207) 74 ('general recognition that a rule of law ... is involved'). Jurisdictional Immunities of the State (Germany v Italy; Greece intervening) [2010] ICJ Reports 1, 55 ('the grant of immunity is not accompanied by the requisite opinio juris').
[210] *Cf*. D'Amato reaction to *Nicaragua* in D'Amato A, 'Trashing Customary International Law' (1987) 81 The American Journal of International Law 101.
[211] Which might explain the phenomenon described by J d'Aspremont, 'Customary International Law as a Dance Floor: Part I' (*EJIL: Talk!*, 2014) <https://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/> accessed 6 August 2018; J d'Aspremont, 'Customary International Law as a Dance Floor: Part II' (*EJIL: Talk!*, 2014) <https://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/> accessed 6 August 2018.
[212] Dupuy (n 1).
[213] Pellet (n 10).
[214] FL Kirgis, 'Custom on a Sliding Scale' (1987) 81 American Journal of International Law 146.

more sensate, qualifying the whole situation as a mess.[215] In his second report to the International Law Commission on the topic of identification of customary international law, Wood touches on the academic deep divergences on the concept of *opinio juris* – but just to dismiss them on the argument "the theoretical torment which may accompany it in the books has rarely impeded its application in practice".[216] However, is it not the inconsistencies in the practice that trigger the academic torment? Wood acknowledges the existence of "different approaches" not only in the academia but also in *practice* – but he does not take the latter aspect forward.[217]

While the perception of a state of affairs is affected by the lawyer's own background, the fact remains that lawyers and their narratives enjoy different levels of authority within the invisible college. The work of the International Law Commission emerges in a different light because – as the work of the International Committee of the Red Cross and the International Law Association before – it amasses, organises and studies a huge literature and case-law, and offers a systematic approach to the ascertaining of *opinio juris* in the Conclusions. While these bodies have *authority*, it is incontestable that the International Law Commission a different level of authority, which arises from it being *the* organ of the United Nations with a mandate on the codification and progressive development of international law. In other words, the Conclusions have a great potential to become a natural part of the collective and individual background of international lawyers – a background that affects their perception of the reality up to the establishment of tokens of *opinio juris*. This potential seems greatly accentuated by the fact that the International Law Commission offers its Conclusions *now*, in a time where the web and the Internet promote certain views – and demote others.

Indeed, the work of the International Law Commission is likely to have a huge impact on the academic work on the subject. The number of scholarly works citing or dealing with *opinio juris* since the International Law Commission has taken the topic and has affirmed *opinio juris* as a necessary element of customary international law, surpasses the number in the previous 12 years, which is greater than the number of the prior six decades.[218] Let us not forget that it was in the 1990s and 2000s that the International Committee of the Red Cross's and International Law Association's efforts also affirmed *opinio juris* as a requirements of customary international law. Where there seems to be correlation between these facts, further research is needed to establish any causation. Should there be any causation we may be witnessing the strengthening of one

[215] AT Guzman, 'Saving Customary International Law' (2005) 115 SSRN Electronic Journal 116, 117 <http://www.ssrn.com/abstract=708721> accessed 13 June 2019.
[216] M Wood, *Second Report on Identification of Customary International Law* (2014) para 66.
[217] *See* Wood (n **Error! Bookmark not defined.**) 27-8.
[218] The data derives from a Google Scholar search "opinio juris" conducted in December 2018, which returned 8,040 results for the period 2012-present; 7,950 results for the period 2000-2012; 1,660 for 1990-2000, and 1,320 for 1950-1990. The meaning of a Google Scholar search of this type is very restricted; it is used here for illustrative purposes only. Nevertheless, it helps emphasising that properly designed empirical research is necessary on this particular aspect.

approach to customary international law and to *opinio juris* in particular to the prejudice of others. If there is indeed causation, the future might bring uniformity and synchronicity, i.e., the adoption by scholars of the same ontological and epistemological approaches on *opinio juris*. However, the question arises, would dissonance serve the cause, of understanding what *opinio juris* is, better?

In reality, the process of synchronisation might be accelerated by the effects of the imposition of a "market logic" on the academia.[219] Paraphrasing Weiler, consciously and subconsciously, this market logic affects the research agenda on the topic: why would someone explore "somewhat esoteric" approaches to *opinio juris* which "will generate less citations, less 'impact'? Or reduce the chances of winning a grant, of getting 'time off'".[220]

Indeed, what the International Law Commission Conclusions do not and, given the ethos and scope of the exercise it undertook on this topic, what they certainly could not show is the ontological and epistemological idiosyncrasies that affect the mainstream approaches to *opinio juris*: How exactly can a mental *state*, i.e., a state that is caused by neurophysiological processes and triggered by a range of factors, be isolated, kept fixed and be ascribed normative force? How exactly one moves from the singular mental state to that of the collective? If the relevant mental state is that of the collective – how to differentiate them in practice? What is the role that lawyers have – i.e. when they agree and affirm the presence of a token of *opinio juris*, do they simply say what law is or do they create law? Should we not openly acknowledge that any affirmation of a token of *opinio juris* always has a constitutive character of the *opinio juris* in question? If there is any possibility that affirmations of occurrences of *opinio juris* are having constitutive force, should we not clearly aim at studying this phenomenon and distinguishing the role of certain categories of international lawyers – e.g. those serving as judges in international courts and tribunals; those sitting in the International Law Commission – play in it? It seems that research on the topic is relevant beyond the limits of the legal research and scholarship – because it can throw light on aspects of collective intentionality and collective action. Let us not forget that the theory that Searle articulates, and on which I draw, remains contentious in many respects.[221]

5 Concluding remarks

In articulating a framework for the understanding of the role of international organisations in the formation of *opinio juris* – this work plays down the possibility that international organisations might be able to coordinate international processes in a manner to shape custom pursuant to desired standards. It seems clear that the challenges involved in the shaping of the *opinio juris* of the States

[219] J Weiler, 'Publish and Perish: A Plea to Deans, Faculty Chairpersons, University Authorities' (*EJIL: Talk! – Publish and Perish: A Plea to Deans, Faculty Chairpersons, University Authorities*, 2018) <https://www.ejiltalk.org/publish-and-perish-a-plea-to-deans-faculty-chairpersons-university-authorities/> accessed 8 November 2018.
[220] Weiler (n 219).
[221] For all, *see* R Tuomela, 'Searle's New Construction of Social Reality' (2011) 71 Analysis Reviews 706.

are much greater than that those involved in the shaping their behaviour (which are complex in their own account). Throughout the work, submissions were made and points were raised which require further research. There are, however, three aspects that deserve being revisited although briefly – whether it is really the case that international organisations *should* have law-making capacity;[222] the *power* lawyers, notably those siting in organs of international organisations, have in ascertaining *opinio juris*;[223] and whether scholars themselves *are unconsciously* affected by certain worldviews and beliefs that international organisations help disseminate.[224]

An arms-length approach seems to require caution as to the *formal* role that international organisations *should have* in the formation of *opinio juris*. Naïve assumptions about international organisations shaping *opinio juris* must be dealt with scepticism and submitted to proper, empirical validation. Especially as they lose, for different reasons, the appearance of "neutral parties", it is far from clear the extension to which international organisations may offer any relief in shaping *opinio juris* in any form, including pursuant to scientific models. A good question to start with is the extent to which a full-fledge law-making capacity would prove counterproductive to its intended objectives. International organisations play a role – this is undeniable. However, whether this role deserves being elevated to its fullest extent, as a law-making role, is far from clear – and it involves questions that go beyond international law. The affirmation that international organisations have the capacity to formally contribute to *opinio juris* is always an affirmation of power. There is a clear need for studies that openly question this power and subjects it to in-depth analyses of its diverse implications.

Lawyers that occupy positions in international organisations enjoy a privileged position vis-à-vis their peers in States insofar as they benefit from the authority and legitimacy that the international organisation in question provides to address a varied range of subject-matters. In fact, their work – as judge or otherwise – deeply affects the ontological and epistemological approaches to *opinio juris*. There is a clear need to understand the depth of the processes that affect the emergence, within the scholarship, of ontological and epistemological understandings of *opinio juris*. Likewise, lawyers serving in international organisations have a higher degree of authority to establish occurrences of *opinio juris*. It appears that, although on very defendable grounds, the International Law Commission missed an important opportunity to address the role of lawyers in the process of affirmation of *opinio juris*.

Finally, there is the role that international organisations play in affecting the academic work on the topic. Study after study addresses both the theory and the practice of establishing and ascertaining *opinio juris* and its individual manifestations. How significantly are academic work on *opinio juris* affected by the lawyers that work within or under the umbrella of an international organisation? How deeply the factors I describe above affect this academic activity? How much power legal academics draw when articulating their approaches to *opinio juris*? How much power

[222] *See* n 145 and accompanying text.
[223] *See* n 210-218 and accompanying text.
[224] *See* n 219-221 and accompanying text.

do they draw when affirming the existence of occurrences of *opinio juris*? In contradistinction, how much power do they renounce when accommodating what more authoritative voices, too often lawyers in international organisations, say? This latter question is particularly problematic – notably in a time when "the teachings of the most highly qualified publicists of the various nations" seem to have lost much of the authority it once had. Operating in an environment that increasingly emphasise *efficiency*, be it in terms of number of publications, be it in terms "impact beyond the academia" – which is ascertained, to a too great extent, by the manner a scholarly work is taken over by *authorities* in the field – slowly, unconsciously and uncritically, legal scholars might be internalising misconceptions about the topic, and synchronising their voices towards uniform understandings of some fundamental aspects of *opinio juris* which, rather, require questioning.