

1975

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## Recommended Citation

Richard J. Erickson, *Soviet Theory of the Legal Nature of Customary International Law*, 7 Case W. Res. J. Int'l L. 148 (1975)  
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## Soviet Theory of the Legal Nature of Customary International Law

**I**N MUNICIPAL LAW<sup>1</sup> custom is an important source of law for the Soviet state, but this fact has not disposed the USSR to embrace it enthusiastically. John Hazard has observed that:

Customary law was applied under the Imperial regime to relations among the peasants. As has been indicated earlier, more than three quarters of the nation had no occasion, except in the event of serious crime, to appeal to the Codes of the Empire. . . .

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Some of this heritage remains. Division of property belonging to a peasant household communally and inheritance of such property still is governed by peasant custom. A vil-

lage "comradely" court of peasants settles such matters, and cases have been reported in which the question in issue was whether a family was a peasant family or a worker's family living in a village. The latter would be subject to the civil code's provisions concerning the ownership of property and not to peasant custom. In spite of this situation, Soviet text writers are very cautious in viewing custom as a source of law.<sup>2</sup>

Soviet writers approach customary international law with equal caution. Although traces of customary law were implicit in the actions of the Soviet state from the very beginning, Soviet spokesmen at first refused to recognize custom as a primary source of law, placing reliance solely upon treaty law.<sup>3</sup> But ever since Evgenii B. Pashukanis' penetrating question in 1935, "Why should

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<sup>1</sup> The term "municipal law" refers to the domestic or internal law of a nation-state.

<sup>2</sup> J. Hazard, *The Future Codification in the USSR*, 29 TUL. L. REV. 239, 243-244 (1955).

<sup>3</sup> See R. ERICKSON, *INTERNATIONAL LAW AND THE REVOLUTIONARY STATE* (1972); J. TRISKA & R. SLUSSER, *THE THEORY, LAW AND POLICY OF SOVIET TREATIES* (1962).

<sup>4</sup> Evgenii B. Pashukanis, Soviet educator and practitioner of international law,

the Soviet Government be deprived of those rights which require no treaty formation and derive from the very fact that normal diplomatic relations exist?", the Soviet Union has openly accepted custom as a primary source of international law.<sup>5</sup>

Today, Soviet scholars are in general accord that treaty and custom are the only primary sources of international law, although treaty is emphasized as the more important source.<sup>6</sup> Grigorii I. Tunkin, Chief Legal Advisor to the Soviet Foreign Ministry, has conceded, "Nobody has ever contested that there are customary norms of international law."<sup>7</sup> He has further stated, "It is also indisputable that many of the rules of international law are rules of custom."<sup>8</sup> Even more revealing is Tunkin's statement, "[D]aily observation manifests the considerable role in international law of customary norms; states constantly refer to them in their inter-state relations."<sup>9</sup>

Notwithstanding Soviet acceptance of customary international law in the 1930's, a clear statement of its actual legal nature was not forthcoming until the post-Stalin period.<sup>10</sup> It was at this time that

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was from 1930 until his disappearance in 1937 editor of the leading official law journal *Sovetskoe Gosudarstvo i Revoliutsiia Prava* [Soviet State and Revolutionary Law]. In 1936 he was appointed Vice-Commissar of Justice, but shortly thereafter became a target of criticism during the purges. He was labled an "enemy of the people" and presumably executed.

<sup>5</sup> E. Pashukanis, *OCHERKI PO MEZHDUNARODOMU PRAVU* (Essays on International Law), ch. 2 (Moscow, 1935).

<sup>6</sup> See F. Kozhevnikov, U.N. YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, A/CN.4/SR237/46 (August 11, 1953) at 367; S. Krylov, U.N. YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, A/CN.4/SR378/189 (June 29, 1956) at 278; and Akademiia Nauk SSSR, Institut Prava, INTERNATIONAL LAW 12. See western writers on the Soviet position: C. DeVisscher, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 163 (1957); and Triska and Slusser, *supra* note 3, at 9-31.

<sup>7</sup> G. Tunkin, *Coexistence and International Law*, 95 RECUEIL DES COURS (Collected Lectures) 9 (1958).

<sup>8</sup> G. Tunkin, *Forty Years of Coexistence and International Law*, 1958 SOVETSKII EZHEGODNIK MEZHDUNARODNOGO PRAVA [Soviet Yearbook of International Law] 42 (1958).

<sup>9</sup> G. TUNKIN, DROIT INTERNATIONAL PUBLIC [Public International Law] 76 (Paris 1965). It is doubtful whether Tunkin would go so far as to agree with his Polish colleague Karol Wolfke that, "Premature it seems is the recently expressed opinion that, as a result of the accelerated tempo and growing complexity of international law, customary law is rapidly losing its importance. Customary law being more elastic and best adaptable to new conditions and needs is evolving with the evolution of international life." K. WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 9-10 (Mroclaw 1964).

<sup>10</sup> A discussion of the post-Stalin shift in focus from ideological questions of reconciling Marxism and customary law to pragmatic questions as to the legal nature of custom may be found in ERICKSON, *supra* note 3, at ch. I.

Tunkin called for less dogmatism and more pragmatism, for a concentrated effort to deal with real world problems rather than ideological generalities. Prior to 1953, books and articles devoted to a legal analysis of custom were virtually unknown. After 1953, such writings began to appear with increasing regularity.<sup>11</sup> Soviet writers began posing such questions as: What is customary international law? How is customary law created? When ought a customary norm cease to be binding? The significance of this development cannot be over-emphasized. It marked a shifting of focus away from ideological analysis of the class nature of customary law. Instead, Soviet scholars would begin to contribute to the body of legal thought concerning international custom.

#### CUSTOM VERSUS TREATY IN THE SOVIET VIEW OF INTERNATIONAL LAW

The Soviet Union recognizes custom together with treaty as the only primary sources of international law. Yet Soviet writers carefully and consistently stress treaty law as the more important of the two. This valuation of custom may at least partially be explained in terms of the combined influences of Soviet ideology and pragmatic foreign policy considerations.

Soviet ideology attributes to customary international law a "bourgeois character."<sup>12</sup> Insofar as it is perceived as evolving from the practice of capitalist states, ancient custom is suspect as serving primarily capitalist interests. A Soviet law text observes, "Exaggeration of the importance of international custom . . . is in line with the policy of certain imperialist circles, a policy of violating treaty obligations and giving legal form to illegal international

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<sup>11</sup> See P. LUNKIN, *ISTOCHNIKI MEZH DUNARODNOGO PRAVA* [Sources of International Law] (Moscow 1960); N. MINASIAN, *ISTOCHNIKI SOVREMENOGO MEZH DUNARODNOGO PRAVA* [Sources of Contemporary International Law] (Rostov on Don 1960); N. MINASIAN, *PRAVO MIRONOGO SOSUSHGHESTVOVANIA* [The Law of Peaceful Coexistence] (Rostov on Don 1966); G. TUNKIN, *VOPROSY TEORII MEZH DUNARODNOGO PRAVA* [Theoretical Questions of International Law] (Moscow 1962); and Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, 49 CALIF. L. REV. 419-430 (1961).

<sup>12</sup> For a depreciation of custom by Soviet writers, see: Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, *supra* note 11, at 428-429; Talalayev and Boyarshinov, *Unequal Treaties as a Form of Subjugation to Colonial Dependency of the New States of Asia*, 1961 *SOVETSKII EZHEGODNIK MEZH DUNARODNOGO PRAVA* [Soviet Yearbook of International Law] 156 (1961); and Zakharova, *Bilateral Treaties of Friendship, Collaboration, and Cooperation Among Socialist States*, 2 *SOVETSKOE GOSUDARSTVO I PRAVO* [Soviet State and Law] 80 (1962).

practices under the label of 'international custom.'"<sup>13</sup> As long as the Soviet Union continues to view custom as composed chiefly of norms created prior to the Great October Revolution, a certain aloofness from customary international law is to be expected on ideological grounds.

The fact that many international legal customs antedate the creation of the Soviet state may also give rise to dissatisfaction with customary law on the more pragmatic level of policy-making. Legal norms delineate what is proper and what is improper in the interaction of states. There must exist a certain uneasiness among Soviet practitioners at having their conduct circumscribed by a body of customary law which they had no part in developing. This is not a feeling unique to the Soviets. The new nations of the Third World have expressed similar dissatisfactions.

On the other hand, Soviet scholars have come to argue that a series of new and progressive customary norms, such as peaceful coexistence, national self-determination, and disfavor of unequal treaties, have been introduced into international law at Soviet insistence.<sup>14</sup> As a result, Soviet perceptions of the "bourgeois character" of custom may be weakening somewhat, and the USSR may presently feel that customary international law bears a recognizable Soviet imprimatur.

A final reason for Soviet disfavor of custom may lie with the unwritten nature of customary law. In Soviet eyes, unwritten law is uncertain law as to principles and their meaning. Such qualities run counter to the Soviet belief that relations with opposing social systems ought to be developed strictly upon the basis of negotiations and agreements.<sup>15</sup> As the USSR grows in strength and acquires a greater sense of security in dealing with non-communist states, it is possible that Soviets may be willing to accept more uncertainty and make greater use of legal custom.

For the present, Soviets have tended to rely on custom only if a treaty source cannot be located and only if there exists a felt need to cite an authoritative source of law. But although treaties are re-

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<sup>13</sup> *Academiya Nauk SSSR, Institut Prava, INTERNATIONAL LAW, supra* note 6, at 12. The normal predilection of lawyers for precedent becomes a "bourgeois deviation" if it involves reference to bourgeois writers, bourgeois legislation, or bourgeois norms in such a way as to point up their superiority to that of socialist writers, socialist legislation, or socialist norms (an ideological problem).

<sup>14</sup> See D. Levin, *OSNOVNYE PROBLEMY SOVREMENNOGO MEZH DUNARODNOGO PRAVA* [Basic Problems of Contemporary International Law] 11 (Moscow 1958); and Tunkin, *supra* note 8, at 35.

<sup>15</sup> See De Visscher, *supra* note 6, at 163.

lied upon in preference to custom, in the absence of a treaty custom serves the valuable function of providing an authoritative legal source. Occasionally, however, Soviet practitioners will refrain from identifying the specific source of a given principle of international law or will obscure the source in ambiguous language. Two forms of such ambiguity are discernible. The first is simply to claim that a norm has acquired binding force because it is a "general principle" of law. Since Soviet lawyers refuse to recognize "general principles" as an independent source of international law, and since they hold that "general principles" can acquire binding force of law only if incorporated through treaty or custom, it is ambiguous merely to identify a source of law as a "general principle" without further specifying whether it was embodied through either treaty or custom. A second sort of ambiguity occurs when Soviet scholars assert that a legal rule has its source in the United Nations Charter. Since the Soviets hold that the UN Charter may give rise to treaty as well as customary law, without further clarification the actual source of the rule remains clouded.<sup>16</sup>

Generally speaking, the task of the Soviet lawyer is to state specifically how a customary norm is created and in what manner it ceases to be binding. By asserting guidelines Soviet attorneys set forth the standard by which they will judge the process of customary law-making. No doubt the interplay of international politics will confine Soviet interpretation of this process within certain limits. Nonetheless, the Soviet lawyer may be expected to claim some latitude for his Foreign Ministry in deciding on the crucial factors necessary for the creation or termination of a customary norm of international law. Tunkin realized the significance of this task when he observed:

There may hardly be any doubt that the problem of customary international law is one of the most difficult of all the problems of international law. It is also one of the most important. Upon the solution of this problem [how custom is created and terminated] depends to a very great extent the whole concept of international law.<sup>17</sup>

## PRACTICE AS AN INDICATION OF CUSTOM

"Customary norms of international law grow out of internation-

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<sup>16</sup> The question of the United Nations Charter as a source of customary law could easily be the subject of another separate and extensive article.

<sup>17</sup> Tunkin, *supra* note 7, at 9.

al practice," Tunkin told those assembled for his 1958 Hague Academy Lectures.<sup>18</sup> The practice of states may consist of their either taking or abstaining from action in a given situation. "As a rule," Tunkin notes, "it is much easier, of course, to establish the existence of a customary norm of international law in the presence of positive action by states, but there is no reason to deny the possibility of a customary norm of international law being established by the practice of abstinence from action."<sup>19</sup>

Chief among the positive acts of states which have resulted in customary norms of international law are diplomatic practices. Certain prescribed actions are expected to be performed by states with respect to diplomatic officers as a matter of law.<sup>20</sup> The abstinence from action, or rather the negative actions of states undoubtedly may lead to the creation of a rule of conduct that may also become a judicial norm.<sup>21</sup> Tunkin writes:

It should be pointed out that many principles and norms of international law involve, in one measure or another, commitments on the part of states to refrain from certain actions in their relations with other states. Thus, the respect-of-sovereignty principle commits states to refrain from any action constituting a violation of the sovereignty of another state. In accordance with the principle of non-intervention in the internal affairs of another member of the international community, every state is obliged to abstain from any action constituting interference in the internal affairs of another state. Even the open seas principle, for instance, involves an obligation of a negative character, which is that states must abstain from any action likely to injure the "interests of other states in their exercise of the freedom of the high seas." (Convention on the High Seas, Article 2, A/CONF. 13/L.35/1958, A/CONF. 13/38, Vol. II). Could these customary norms of international law appear if we were to deny that the practice of abstinence can also lead to the creation of a customary norm of international law?<sup>22</sup>

Western scholars are in general accord with their Soviet counter-

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<sup>18</sup> *Id.* See also Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, *supra* note 11, at 419.

<sup>19</sup> Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, *supra* note 11, at 421.

<sup>20</sup> It is recognized that the United Nations Convention on Diplomatic Inter-course and Immunities has weakened this example.

<sup>21</sup> Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, *supra* note 11, at 421. See also Tunkin, *supra* note 7, at 11-12.

<sup>22</sup> Tunkin, *supra* note 11, at 422. Implicit in these words of Tunkin is that sovereignty, non-intervention in the domestic affairs of other states, and freedom of the high seas are, in whole or in part, customary norms.

parts. Wheaton, Brierly, Rousseau, and Kunz agree that "customary international law is the generalization of the practice of states."<sup>23</sup> Several western writers have, however, called attention to an ambiguity of terms and a confusion of logic. Hans Kelsen has forthrightly declared the term "custom" to be equivocal, since it denotes at one and the same time the factual situation creating a rule and the rule itself created by that factual situation, hence the term "customary rule."<sup>24</sup> This confusion notwithstanding, Soviet and western scholars are agreed that practice, whether of a positive or abstaining variety, is an indicator of custom.

### THE SOVIET VIEW OF TIME, REPETITION, AND CONTINUITY AS FACTORS IN CUSTOMARY LAW

According to the Soviet view, duration, or the time element, is important in the process whereby the positive or negative actions of states are converted into customary law. "However, the element of time does not *in itself* create a presumption in favour of a customary norm of international law."<sup>25</sup> A norm can be created almost instantaneously as in the practice of sending satellites into cosmic space over the territories of other states. Expressing the Soviet viewpoint, Karol Wolfke, a Polish international lawyer, writes, "The fact that the Soviet Union and the United States mutually tolerate such practice and do not raise objections against such flights for peaceful purposes over their territories, and that other states, who do not as yet participate in this practice, have not protested, justifies the conclusion that [a customary principle has evolved, because] states do not consider such flights as infringing their sovereignty and even that sovereignty does not extend into outer space."<sup>26</sup>

Moreover, Tunkin notes, "There is even less ground to think

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<sup>23</sup> Fisheries Case [1951] I.C.J. 191. See also Keith (ed.), 2 *Wheaton's Elements of International Law* 10 (6th ed. 1929); J. BRIERLY, *THE LAW OF NATIONS* 59-60 (6th ed. 1964); C. ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* 64 (Paris 1953); and Kunz, *The Nature of Customary International Law*, 47 *AM. J. INT'L L.* 666 (1953).

<sup>24</sup> H. Kelsen, *Théorie du Droit International Coutumier* [The Theory of Customary International Law], 1 *REVUE INTERNATIONALE DE LA THÉORIE DU DROIT* 262 (1939).

<sup>25</sup> Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, *supra* note 11, at 419-420 (emphasis supplied).

<sup>26</sup> WOLFKE, *supra* note 9, at 64. It is recognized that the Outer Space Treaty has weakened this example.



that juridicially it is necessary for a customary rule to be 'old' or of long standing."<sup>27</sup> The description of a rule as "old" may mean one of two things: either that the given rule, having long been observed in international practice, has passed the test of time, or that "this very characteristic may give rise to some doubts as to whether a rule of such an ancient origin corresponds to the present circumstances."<sup>28</sup>

The element of repetition constitutes for the Soviet scholar another factor in the formation of custom; it is the reiterated actions of states with the passage of time. Tunkin believes that "In the majority of cases it is precisely the repetition of certain actions in analogous situations that leads to such practices becoming a rule of conduct."<sup>29</sup> But not every repetition of a particular action creates a customary norm of international law. The "habit of doing certain actions may not result in forming a norm of conduct, and if a norm of conduct has been formed this norm may not necessarily be a legal norm. This may be a norm of international morality or a norm of *comitas gentium* [international comity or courtesy]."<sup>30</sup> In ambassadorial law there are many practices of long standing, repeated daily, which are not norms of international law; for example the exemption of baggage from customs. It is also conceivable, though such instances are rare, for a customary rule to result from a single precedent without repetition.<sup>31</sup>

Continuity is a third element important in the development of custom. Soviet writers reject the view that "international practice leading to the formation of a customary rule must have been con-

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<sup>27</sup> Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, *supra* note 11, at 419. It is interesting to note that on this point Tunkin cites in his article, *supra* note 7, at 9-10, two western authorities for his position: Basadevant, *Règles Générales du Droit de la Paix* [General Rules of the Law of Peace], 58 *RECUEIL DES COURS* 518 (1936); and Kunz, *supra* note 23, at 666.

<sup>28</sup> Tunkin, *supra* note 7, at 10.

<sup>29</sup> Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, *supra* note 11, at 419.

<sup>30</sup> Tunkin, *supra* note 7, at 10. Tunkin makes the same distinction between "custom" and "usage" as do his western colleagues. He writes, "but it is generally accepted and with good practice that 'custom in its legal sense means something more than mere habit or usage' (James Brierly, *The Law of Nations*, 1955, p. 60)." *Id.* at 12. Other western writers cited to support his view were: A. VENDROSS, *VÖLKERRECHT* [International Law] 119 (Wien 1955); and Kunz, *supra* note 23, at 667.

<sup>31</sup> This writer was unable to find an example given by a Soviet writer of a customary norm created by a single precedent. It may be presumed that the launching of Sputnik I created a customary norm concerning the passage of satellites over the territory of foreign states in a single act.

tinued and repeated without *interruption* of continuity."<sup>32</sup> This view is untenable, for according to Tunkin, "no rule of international law has ever been created by practice without interruption of continuity."<sup>33</sup> This does not mean that an interruption in international practice has no effect upon the formation of a customary rule of conduct. "Discontinuity," Tunkin adds, "may destroy a customary norm which is still in the process of formation; it all depends on what character the discontinuity assumes."<sup>34</sup>

In the Soviet view, the three dimensions of custom discussed above; time, repetition, and continuity, do not play a decisive role in the formation of a norm of international law, either individually or together.<sup>35</sup> Each dimension may be necessary for the creation of a customary norm, but none of them is alone sufficient. It is not possible to speak of agreement between western and Soviet writers as to the importance of time, repetition, and continuity because western writers do not agree among themselves.<sup>36</sup> Western thinking on this subject is in a transitional state. The traditional view seems to have been that the development of customary international law is a very slow process. However, the rapidity with which event follows event in contemporary international relations has led to a re-evaluation of this position. For western scholars, then, there exists some confusion over the nature of custom.

#### AGREEMENT AS THE DECISIVE FACTOR IN THE SOVIET VIEW OF CUSTOM

A Soviet law review article states, "Practices, even if long standing, are not in themselves norms of international law. They merely mark some particular state in the process of formation of

<sup>32</sup> Tunkin, *supra* note 7, at 10. Among the western scholars who hold this view as cited by Tunkin are: Cavaglieri, *Regles Generales du Droit de Paix* [General Rules of the Law of Peace], 26 RECUEIL DES COURS 315, 336-337 (1929); and G. MORELLI, NOZIONII DI DIRITTO INTERNAZIONALE [Elements of International Law] ¶ 18 (3d ed. 1951).

<sup>33</sup> *Id.*

<sup>34</sup> Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, *supra* note 11, at 420-421.

<sup>35</sup> *Id.* at 421. See also Tunkin, *supra* note 7, at 11.

<sup>36</sup> See BRIERLY, *supra* note 23, at 62-63; DEVISSCHER, *supra* note 6, at 149; G. HACKWORTH, 1 DIGEST OF INTERNATIONAL LAW 1 (1940); M. SØRENSEN, LES SOURCES DU DROIT INTERNATIONAL [The Sources of International Law] 98 (Copenhagen 1946); Kunz, *supra* note 23, at 666; Lauterpacht, *Sovereignty Over Submarine Areas*, 33 BRIT. Y. B. INT'L L. 120-121 (1957).

such a norm."<sup>37</sup> Within the Soviet viewpoint, international practices constitute what might be described as the raw material of custom, but it is the element of acceptance which gives practice the mark of law. The essential element in this process "consists of agreement among states."<sup>38</sup> "It is precisely in this sense, in our opinion," writes Tunkin, "that one must understand subsection (b) of section 1, Article 38 of the Statute of the World Court,<sup>39</sup> under which one of the sources of international law is 'international custom as evidence of general practice accepted as law.'"<sup>40</sup> For Soviet writers, there can be no norms of international law without agreement between states. Karol Wolfke has summarized the Soviet position in this way:

One may risk saying that in present international law there are no precise pre-established conditions for custom-creating practices, except the one general condition that it must give sufficient foundation for the presumption that the state concerned accepted it as binding.<sup>41</sup>

How is "agreement" reached among states? To Tunkin, "agreement, as to the means of creating norms of contemporary international law, is the result of the coordination of wills of different states, which in fact are the wills of their ruling classes."<sup>42</sup> The process of reaching agreement on international norms was described by Tunkin in the following manner:

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<sup>37</sup> Tunkin, *The United Nations 1945-1955 (Problems of International Law)*, 4 SOVIET LAW AND GOVERNMENT 7 (1966).

<sup>38</sup> Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, *supra* note 11, at 423. See also N. MINASIAN, *supra* note 11.

<sup>39</sup> The full text of Article 38 of the STATUTES OF THE INTERNATIONAL COURT OF JUSTICE (also referred to as the Statutes of the World Court) reads as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the consenting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

<sup>40</sup> Tunkin, *supra* note 37, at 7. For a full discussion, see Tunkin, *supra* note 11, at 419-430.

<sup>41</sup> WOLFKE, *supra* note 9, at 51.

<sup>42</sup> TUNKIN, OSNOVY SOVREMENNOGO MEZHDUNARODNOGO PRAVA [Principles of Contemporary International Law] 4 (Moscow 1956).

First, the process of concluding international treaties. In the modern conditions of the coexistence of states belonging to different social systems, the process of conclusion of general international treaties shows that we have a collision of different positions on problems of international law, a collision of wills of states. Then we witness the process of coordinating those wills by negotiation. The result of this process, fixed by treaty, is usually more or less different from what each particular state has originally suggested. In the process of creating customary norms of international law there are no negotiations as such, but as we have shown previously, the essence of this process consists also in framing an agreement between states on the question of recognizing or accepting this or that norm of international law. This agreement is reached not by way of formal negotiations, but by, figuratively speaking, negotiations conducted in the language of fact and action.<sup>43</sup>

“Coordination of wills” of states does not entail merger into some kind of “common will,” “general will,” or “single will” in the process of creating customary norms of international law. For Soviet writers, the “wills” of states cannot fuse because the aims of states belonging to diverse socio-economic systems, a reflection of their class interests, are different and even antagonistic. However, the “wills” of socialist and capitalist states can be “coordinated” so as to establish a definite rule of conduct. “A norm of general international law is an expression not of a ‘single will’ but of ‘coordinated wills,’ *i.e.*, wills equally directed toward a definite aim — recognition of a given rule as a norm of international law.”<sup>44</sup>

How is this “coordination of wills” to be achieved? In the Soviet view, agreements between states promote a mutual conditioning of “wills,” the substance of which is the readiness of one state to recognize a particular rule as a norm of international law on the condition that the other state display a like readiness. This “interconditionality” is the thread which links the wills of different states within the process of developing, extending, or annulling the sphere of operation of a norm of international law.<sup>45</sup> Such a conception sounds very similar to mutuality of consideration in American contract law.

The *process* of coordinating wills to reach agreement on the formation of customary norms is only one aspect of the element of

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<sup>43</sup> Tunkin, *supra* note 7, at 34-35.

<sup>44</sup> Tunkin, *supra* note 37, at 10. The reader's attention is called to the influence of ideology in Tunkin's legal analysis.

<sup>45</sup> Tunkin, *supra* note 7, at 35-36. Professor Tunkin is concerned at this point with both the creation and termination of customary norms.

agreement. Another is the *content*, that which must substantively be agreed upon in order to create a customary norm. As Soviet writers see it, states of diverse socio-economic systems recognize that a norm which regulates their actions is binding upon them, not because of morality, comity, or courtesy, but rather because it is a rule of law. Norms have the force of law because states accept them "with the intention of being bound by norms of law."<sup>46</sup> This means that either implicitly or explicitly a state must agree to the adoption of a customary norm as law. A state's agreement may be expressed openly, as for example, when it publicly declares its intention to be bound by a certain norm. Professor Tunkin cites as illustrations Soviet declarations on prohibition of aggressive wars, self-determination of nations, and peaceful coexistence.<sup>47</sup> A state may also agree to a norm as law implicitly through its actions. Soviet writers are quick to caution, though, that actions do not always "speak for themselves" and are subject to misinterpretation, a situation calling for the exercise of great care among analysts.<sup>48</sup>

Since Soviet writers hold that customary norms result from agreement among states, they are also led to conclude that a norm's sphere of validity is limited to those states which recognize its legal force. Consequently, customary norms of international law may exist between as few as two states or between all states of the international community. In the latter instance the norm is said to be "universal." It is conceivable, therefore, that in the Soviet view a norm of law may first appear as a norm of legal conduct between a few states and then gradually expand through its acceptance by other states until it finally becomes a universal principle of international law.<sup>49</sup> In this respect Tunkin writes:

The Soviet state has advanced the principle of banning aggressive wars and treating such wars as crimes, the principle of self-determination of nations, the principle of peaceful coexistence, and a number of other principles of international law. In all these cases, the principles originally proclaimed by a single state were gradually recognized by other states and have become, partly by custom and partly by treaty, generally recognized principles of modern international law.<sup>50</sup>

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<sup>46</sup> TUNKIN, *supra* note 9, at 76. See also Tunkin, *supra* note 7, at 13. To support his position, Tunkin cites Strupp, *Regles Generales du Droit de la Paix* [General Rules of the Law of Peace], 47 RECUEIL DES COURS 306 (1934)

<sup>47</sup> TUNKIN, *supra* note 9, at 76

<sup>48</sup> Tunkin, *supra* note 7, at 12-13.

<sup>49</sup> Tunkin, *supra* note 7, at 14; and Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, *supra* note 11, at 428.

<sup>50</sup> Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*,

Tunkin continues, "[o]nly a customary rule which is recognized by the states of both systems can be regarded as a customary norm of international law."<sup>51</sup>

Does this mean that only the great powers in each camp must recognize a particular norm in order for it to become universally binding, or is it necessary for all states, great and small alike, to give their consent? Tunkin suggests, in what he terms the "all states doctrine," that for a given norm to become a universal rule of international law it must be recognized by all states.<sup>52</sup> Over this view, Tunkin has exchanged strong words with Professor Hans Kelsen, a noted western international lawyer. For Kelsen, customary norms are not created by the "common consent of the members of the international community," but rather by "a long established practice of a great number of states, including the states which, with respect to their power, their culture and so on, are of certain importance."<sup>53</sup> In disputing this view Tunkin argues that:

It does not follow from the concept of agreement that all states should participate in creating every specific customary norm of international law. It is not necessary at all that "practice" should be universal. A customary norm of international law may be created by the practice of a limited number of states, and in fact it may become first a customary norm with a limited sphere of application. But to become a norm of international law of universal application it should be recognized by all the states.<sup>54</sup>

Continuing his argument in favor of the principle of the sovereign equality of all states, Tunkin added:

This concept [of Kelsen's] is in complete contradiction with the fundamental universally recognized principles of international law, and especially with the principle of equality of states. There is no doubt that the attitude of the majority of states, including states of both social systems, and especially the position of great powers, is of primary importance in the process of creation of universally recognized norms of international law. It is a factual situation. Judicially, wills of different states in the process of creating norms of international law are equal. In international relations the majority of

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*supra* note 11, at 428. This view of the evolution of universal norms of international law lends itself well to Soviet claims of direct responsibility for positive developments in international law.

<sup>51</sup> *Id.*

<sup>52</sup> Tunkin, *supra* note 7, at 19-20.

<sup>53</sup> H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW*, 313 (1952).

<sup>54</sup> Tunkin, *supra* note 7, at 17-18.

states cannot create norms binding upon other states; this is an immediate consequence of the principle of sovereign equality of states.<sup>55</sup>

Tunkin's approach is legalistic; before the law, all nations, great and small, are equal. Yet such a view must be compared with the facts of international life. Is it in fact possible for the great powers or a majority of the world community to wield such influence as to force a nation to subordinate its will to their own? It is not clear whether Tunkin would recognize such political influence as actually creating a legal obligation binding upon the pressured nation or whether, on the other hand, he would hold no binding obligation by virtue of coercion and duress. It is similarly unclear whether Tunkin's assessment of such a situation would hinge upon the ultimate political question of which nation, or nations, was doing the influencing and which was being influenced. If Tunkin is entirely unwilling to admit some politics into the legal arena, it is difficult to see how he might justify certain cases of Soviet influence, if indeed he would attempt to justify them. On the other hand, if Tunkin's analysis does recognize some role for politics within international law, his position would not appear that different from Kelsen's.<sup>56</sup>

By way of comparison, it is interesting to note that, like their Soviet counterparts, many western scholars also believe that in addition to the practices of nations (the material element) there is a second condition required for the creation of a customary legal norm. While Soviet writers speak of "coordination of wills" and the acceptance of norms by the various nations, western scholars point to the psychological element of *opinio juris sive necessitatis*. *Opinio Juris* may be defined as "a certain conviction of the judicial necessity of the act in question."<sup>57</sup> Brierly speaks of recognition by states of "a certain practice as obligatory."<sup>58</sup> Hudson requires a conception by a nation that a given action was "enjoined by law."<sup>59</sup> For Schwarzenberger, "it is necessary to prove that they

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<sup>55</sup> *Id.* at 19.

<sup>56</sup> A similar question is raised when considering the issue of the "new" states and "old" norms discussed later in this article.

<sup>57</sup> SØRENSEN, *supra* note 36, at 85.

<sup>58</sup> BRIERLY, *supra* note 23, at 61. Earlier in the same work Brierly states, "Customary rule is observed not because it has been consented to but because it is believed to be binding." *Id.* at 52. This runs counter to the belief expressed by HACKENWORTH, *supra* note 36, at 1, that "Customary . . . international law is based upon the common consent of nations."

<sup>59</sup> Manley O. Hudson as quoted by H. BRIGGS, *THE LAW OF NATIONS* 47 (2d ed. 1952).

[nations] act in such a way because they admit a legal obligation to act or refrain from acting in a certain manner."<sup>60</sup> Oppenheim, Wheaton, Higgins, and Kunz,<sup>61</sup> among others, adhere to the view that it is the psychological element of *opinio juris* which differentiates usage from custom.<sup>62</sup>

## NEW STATES AND OLD NORMS

Western scholars are in general agreement that the need to maintain an ongoing system of world public order demands that states be bound by rules of international law which were formed prior to their statehood.<sup>63</sup> In the Soviet view, the issue of new states and old norms of law is directly related to the question of the sphere of validity of customary norms. Noting the reservation expressed by Professor Verdross that "although the formation of a general customary norm does not imply its application by all states, no general customary norm can appear that contradicts the legal views of any civilized nation."<sup>64</sup> Professor Tunkin continues:

But if recognition of a new customary norm of international law as such is required from an existing state, why must a newly emerging state find itself in an inferior position? Why cannot the new state object to any customary norm of international law if [the new state] disagrees with it?

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<sup>60</sup> G. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 11 (2d ed. 1950).

<sup>61</sup> L. Oppenheim: "International jurists speak of custom when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right," 1 *INTERNATIONAL LAW: A TREATISE* 25 (7th ed. 1948); Wheaton: "... it is usage developed into a rule which is adhered to in the belief that an obligation so to act exists," *supra* note 23, vol. 1, at 10; Higgins: "Custom is more than mere international usage; it is a widespread practice which states engage in because they believe that the law requires it of them," *supra* note 23, at 141; and Kunz: "These conditions are two: usage and *opinio juris*; they have equal importance," *supra* note 23, at 665.

<sup>62</sup> Not all western scholars accept *opinio juris*, however. See Kopelmanas, *Custom as a Means of Creation of International Law*, 1937 *BRIT. Y.B. INT'L L.* 127-151; Kelsen, *supra* note 53, at 262-266; and Guggenheim, *Les Deux Elements de la Coutume en Droit International* [The Two Elements of Customary International Law], 1 *LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC, ETUDES EN L'HONNEUR DE GEORGE SCHELLE* 275-284 (Paris 1950).

<sup>63</sup> See Basdevant, *supra* note 27, at 515: "All agree that a new state is bound by international law formed prior to the emergence of this state,"; Kelsen: "The states are bound by general international law without and even against their will. . . . It may be assumed that international law becomes applicable to a newly established community when the latter is recognized as a state by other states," *supra* note 53, at 154; and Verdross: "International customary law is also binding upon those states which did not exist at the time of its inception," *supra* note 30, at 85.

<sup>64</sup> VERDROSS, *supra* note 30, at 85.



The concept that customary norms of international law, accepted as such by a large number of states, must be binding upon all other states is actually based upon the presumption that the majority of states is able in international relations to dictate norms of international law to all other states.<sup>65</sup>

From the Soviet viewpoint the process of creating a universal norm of international law is never permanently accomplished.<sup>66</sup> All states of the international community may consent to a norm as binding law, and at that moment the norm becomes a universal norm of international law. But as soon as a new state is born, that state acquires the same rights as the original states possessed when they first created the binding universal norm, namely, the new state may review the existing universal norm and decide whether it wishes to be bound or not. To refuse to permit new states the right of review would contradict "the basic generally recognized principles of modern international law, the principle of equality of states in particular."<sup>67</sup>

Soviet lawyers have not, however, espoused an unqualified "right of review." Perhaps realizing the dangers inherent in an unlimited right, Soviet spokesmen have circumscribed the right of review by specifying the procedure to be followed in its exercise:

As for the newly emerging states, they have the judicial right not to recognize this or that customary norm of international law. However, if a new state enters without reservation into official relations with other states, this means that it recognizes a certain body of principles and norms of existing international law which constitute the basic principles of international relations.<sup>68</sup>

In the Soviet view, then, if a new state has entered into relations with the international community "without reservation," it is assumed that that state has accepted the existing international legal system, or at least its fundamental principles. A new state's ability to review, therefore, is limited to the early period of its existence. What substantive law gives, procedure takes away.

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<sup>65</sup> Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, *supra* note 11, at 427.

<sup>66</sup> This should not be confused with the fact that a particular state's acceptance of a principle is permanent in the sense that unilateral withdrawal of consent is not permissible.

<sup>67</sup> Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, *supra* note 11, at 427.

<sup>68</sup> *Id.* at 428

## THE SOVIET VIEW OF THE UNITED NATIONS CHARTER AS A SOURCE OF CUSTOMARY NORMS

In the Soviet view, the principles and norms of the UN Charter acquire their binding legal force upon the signatories from the fact that those signatories have explicitly manifested their assent through a treaty, the Charter itself. The question then arises as to what legal force these principles and norms have upon non-signatories such as Switzerland, North and South Korea, North and South Vietnam, and East and West Germany. In the case of *The Free Zones of Upper Savoy and the District of Gex*,<sup>69</sup> the Permanent Court of International Justice (PCIJ) stated clearly the long established principle that treaties cannot bind third parties without their consent.<sup>70</sup> Article 2, paragraph 6 of the United Nations Charter reads:

The Organization shall insure that states which are not members of the United Nations act in accordance with these Principles so far as may be necessary to the maintenance of international peace and security.

This provision of the Charter may express the will of the UN or the desires of its members, but the question remains whether such a provision can in fact create binding legal obligations for nonsignatories. If this sort of provision could give rise to legal obligations for third party states, what effect would this have on the principles of consent and state sovereignty to which Soviet writers subscribe?

Soviet scholars take the position that a provision, such as Article 2, paragraph 6 of the Charter, can never, *in and of itself*, create obligations binding upon third parties. However, Soviet writers do believe that the principles and norms expressed in the UN Charter, *taken as a whole*, are so basic to inter-state relations that the Charter occupies a special position and that consequently its provisions and norms do bind non-signatories. "The UN Charter is not the usual treaty. In the first place, it is the legal basis for the formation of a world wide international organization for peace and security. In the second place, states have given it pre-eminence over all other treaties."<sup>71</sup> These traits endow the UN

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<sup>69</sup> The Permanent Court of International Justice (PCIJ) was the chief judicial organ of the League of Nations.

<sup>70</sup> *Free Zones of Upper Savoy and the District of Gex* [1932] P.C.I.J., ser. A/B, No. 46 at 96.

<sup>71</sup> Tunkin, *supra* note 37, at 8. See also Tunkin, *supra* note 7, at 22.

Charter with a special character in the eyes of Soviet scholars. Vladimir M. Koretskii, Soviet representative to the 1949 session of the International Law Commission (ILC) observed, "the Charter of the United Nations . . . which laid down new principles of international law, is *essentially* a treaty which has been signed by all peace-loving nations in San Francisco."<sup>72</sup> But it was also something more than a treaty. In the words of Tunkin, a later Soviet representative to the Commission, it was a source of customary norms, since "the new principles of the United Nations Charter were binding on non-members as an expression of customary law."<sup>73</sup> It was the unique character of the Charter itself, and not the wording of any particular provision (Article 2, paragraph 6, for example) which gave the principles and norms of that document their binding effect upon signatories and non-signatories alike.

All of this is not to say that custom is seen as the source of the principles and norms of the UN Charter which are binding upon the Soviet Union. On the contrary, "the same norm of general international law could be conventional [in origin] for some states and customary for others."<sup>74</sup> For the Soviets, the principles and norms of the Charter are binding upon the USSR by virtue of its being a signatory to the treaty. Those same principles and norms are held to be binding upon non-signatories as a matter of custom.

Such an analysis is indicative of the Soviet view of the hierarchical importance of the sources of international law. If custom, in the Soviet conception, had ranked higher than treaty as a source of law, then Soviet writers would have concluded that for all states (including the Soviet Union) the principles and norms of the Charter derived their legal force from custom. Instead, Soviet scholars consider the Charter's norms and principles as treaty law for the Soviet Union, in accordance with the higher Soviet valuation of treaty over custom.

Such a viewpoint ought not be construed as implying that custom is of no consequence to the Soviet government so long as a principle is codified in the Charter. On the contrary, custom serves to fill gaps and explain how nonsignatories to a treaty

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<sup>72</sup> Koretskii, U.N. Y.B. INT'L L. COMM'N, U.N. Doc. A/CN. 4/SR32/13 (1949) at 232 (emphasis added).

<sup>73</sup> Tunkin, U.N. Y.B. INT'L L. COMM'N, U.N. Doc. A/CN. 4/SR621/46 (1961) at 258.

<sup>74</sup> Tunkin, U.N. Y.B. INT'L L. COMM'N, U.N. Doc. A/C.N. 4/SR794/47 (1965) at 134.

can be bound. This is not an inconsequential function. Moreover, treaties themselves have frequently been instrumental in producing future customs. As Pavel I. Lunkin has noted, "many international customary norms have resulted from international treaties."<sup>75</sup> Treaties constitute a precedent, an element of practice, an expression of "coordinated wills." The daily acts of international organizations and of member-states may contribute to the creation of customary norms. Tunkin has pointed out, "[i]t is obvious that change in the Charter of an international organization by custom, *i.e.*, by practice gaining recognition as a legal norm, is possible only with the general agreement of member-states of the international organization."<sup>76</sup>

Prior to 1945, the Soviet Union had accepted many of the principles and norms presently contained in the UN Charter as binding custom. Among these principles were sovereign equality of states, non-intervention, and self-determination. The subsequent codification of these customary norms into the Charters does not preclude the future evolution of new customs through the accumulated practices of states.<sup>77</sup> The process is a continuous one. Furthermore, it is important to recognize that from 1917 to 1945, custom was the source of many of the international legal principles accepted by the USSR. That period was a crucial one in that nation's relations with the international community, and custom played a prominent role in it.

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<sup>75</sup> LUNKIN, *supra* note 11, at 87.

<sup>76</sup> Tunkin, *supra* note 37, at 9.

<sup>77</sup> It has been the opinion of western writers that treaties and international conventions may become the basis of a rule of customary law. In 1844, Reddie, whose treatment of the subject was astute, explained that a treaty stipulation may "by subsequent imitation and adoption, without special stipulation . . . have become a rule of common and consuetudinary international law." R. REDDIE, 1 RESEARCHES IN MARITIME INTERNATIONAL LAW 8 (Edinburgh 1844). In 1913, Alvarez wrote of rules expressed in treaties that were later acknowledged by third states as having "changed their nature, one can no longer consider them as conventional but as customary." A. ALVAREZ, LA CODIFICATION DU DROIT INTERNATIONAL [The Codification of International Law] 148 (Paris 1913). In the same year, Oppenheim wrote of looking forward to the time when the Panama Canal shall have been in use for such a length of time "as to call into existence — under the influence and working of the Hay-Pauncefote Treaty — a customary rule of international law according to which the Canal is permanently neutralized and open to vessels of all nations." L. OPPENHEIM, PANAMA CANAL CONFLICT 46 (2d ed. 1913). In 1917, Roxburgh noted, "In practice, this process of extension of a conventional into a customary rule is not only possible but of very constant occurrence." R. ROXBURGH, INTERNATIONAL CONVENTIONS AND THIRD STATES 75 (1917). In 1925, Kosters likewise noted, "Already in the conception of past centuries, the conclusion of a treaty is an act which . . . can contribute to the formation of customary international law." KOSTERS, *Les Fondements du Droit des Gens* [Foundations of International law] 4 BIBLIOTHECA VISSERIANA 221 (1925). In 1932, Derryng wrote, "Every treaty to

## SUMMARY

"There is a fairly close similarity," write the American international legal scholars Jan F. Triska and Robert M. Slusser, "between Soviet and western views on sources of order in international relations. . . ." <sup>78</sup> Treaties rank first and custom second as the only primary sources of international law. Custom is recognized by Soviet lawyers as an important source of legal norms, notwithstanding its ranking below that of treaty. The principles of international law which are custom-based are fundamental to the international system. With the exception of the emphasis which Soviet writers place on the element of agreements between states, Soviet and western views are remarkably in accord as to the legal nature of the customary norm creation process. One should recognize, of course, that there is wide disagreement among western scholars themselves over some aspects of custom.

The Soviet view of the legal nature of customary law may be summarized in the following graphic form:

SOVIET VIEW OF THE LEGAL NATURE OF  
CUSTOMARY INTERNATIONAL LAW SUMMARIZED

ELEMENT	NECESSARY	SUFFICIENT
Practices among states (both positive and negative)	*yes	no
Time	*yes	no
Repetition	*yes	no
Continuity	*yes	no
Agreements between states	yes	yes
<i>Opinio juris</i>	no	no

\* Necessary in the usual case

some extent . . . contributes to the formation and specification of rules of particular or common law." A. DERRING, *THE PRINCIPAL TRENDS OF DEVELOPMENT OF THE LAW OF NATIONS IN THE LIGHT OF DECISIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 39 (Lwow 1932). In 1957, Schwarzenberger described the "widespread process of transforming of treaty law into international customary law." G. SCHWARZENBERGER, *1 INTERNATIONAL LAW* 563 (London 1957). In 1966, Quincy Wright speaking about the U.N. Charter wrote, "The Charter is more than a treaty . . . it gives the United Nations a universal competence to maintain peace, thus going far toward making the principle of Article 2 universal international law." Wright, *Custom As a Basis for International Law in the Post War Period*, 2 *TEX. INT'L L. F.* 143, 149 (1966).

The question of the binding effect of resolutions of the United Nations General Assembly is recognized but not considered in depth in the present article.

<sup>78</sup> Triska and Slusser, *Treaties and Other Sources of Order in International Relations: The Soviet View*, 52 *AM. I. INT'L L.* 726 (1958).

Agreement between states is the essential element for the creation and termination of customary law from the Soviet point of view. First, Soviet lawyers view the element of agreement as adding a measure of certainty to traditional western notions of customary law. A nation which agrees to be bound by a customary norm has some notice of the nature and scope of its obligations. Uncertainty has always been a feature of customary law which Soviet writers have found distasteful. Second, Soviet diplomats view the element of agreement as containing political advantages for the Soviet Union. Soviet policy-makers may choose which norms will bind them and which will not.

It is fair to ask at this juncture whether the element of agreement has, in fact, contributed to the lessening of uncertainty or provided the Soviet Foreign Ministry with real political benefits. Is customary law today more certain because of the Soviet position? Do the Soviets really obtain political advantages in the world of inter-state relations through their preference for explicitly agreeing or not agreeing to a customary norm? In practice, only little impact has resulted from Soviet and western disagreement on the issue of whether agreement is the essential element for the creation or termination of a customary norm. A measure of uncertainty remains inherent in unwritten customs. Similarly, the Soviet Union has agreed to adhere to the great majority of traditional customary norms. The actual degree to which Soviets have come to accept particular principles of customary international law must be the subject of another article.<sup>79</sup>

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<sup>79</sup> For a discussion of the degree of acceptance of customary principles of international law, see ERICKSON, *supra* note 3.