

Introductory Note: Beyond the Identification of International Customary Rules

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This special issue of the *International Community Law Review* hosts selected papers from a conference on international customary law that I co-organised in July 2015 as a member (at the time) of the McCoubrey Centre for International Law. Custom is a “mysterious” source of international law.¹ Every generation of lawyers has painstakingly strived to demystify it, by explaining its formation and by endeavouring (in vain?) to encapsulate it in such a way so that it fits into the tidy “boxes” and “channels” through which law is formally constructed by society, its subjects and their institutions. Yet, the inherent spontaneity² of a construct that emerges from the society (through conduct of its members that, somehow, transforms itself into a legal rule) is in sharp contrast with the very premises and physiognomy of posited law that promises certainty (as to its validity and content) through formalism. Perhaps customary law and legal positivism make odd bedfellows. Or it may simply be that lawyers (even the greatest among them) do not possess the tools (i.e. methodological equipment) that would allow them to “tame” customary law.

* I wish to thank the *ICLR* for hosting the papers on international customary law published in this issue, its Editor-in-Chief, Professor Malgosia Fitzmaurice, its Managing Editor, Dr Sarah Singer, the authors contributing to the issue, the ILC Special Rapporteur, Sir Michael Wood, Mr Omri Sender, the anonymous reviewers and, last but not least, the McCoubrey Centre for International Law.

- 1 Prosper Weil, “Le droit international en quête de son identité”, 237 *Recueil des cours de l’Académie de droit international de La Haye* (1996) p. 161 and Georges Abi-Saab, “Cours général de droit international public”, 207 *Recueil des cours de l’Académie de droit international de La Haye* (1996) pp. 174–175.
- 2 Among others, Roberto Ago, “Science juridique et droit international”, 90 *Recueil des cours de l’Académie de droit international de La Haye* (1957) pp. 851 and following and especially pp. 932 and following.

I am mindful of the fact that one may react to this rather pessimistic (albeit realistic) introduction by questioning the overall value and usefulness of this issue. However, the tone of the opening paragraph to this brief introductory note is not one that should discourage the reader. Quite the opposite, it should be perceived as an open invitation to everyone interested in international customary law to read the studies contained in this special issue with a critical eye and an open mind to the varied and divergent (methodological) approaches that underpin them. It is also meant as an explanation of why the papers selected for publication in this issue, whilst topical – insofar as each of them engages with the works of the International Law Commission (ILC) on the identification of international customary law – all move (in one way or another) beyond the confines of legal formalism and question the definition and innate foundations of international custom. Their value is not (only) in the arguments they make or in the answers they offer, but in the questions they are raising regarding international customary law and its formation and validity as law. What is it after all that changes social conduct into a norm (i.e. a legal rule)? And what is the bedrock of its normativity and binding force?

The first paper in this issue, by Noora Arajärvi, offers a very topical *tour d'horizon* of the works of the ILC on customary law and navigates us through the views expressed by all involved actors, including the Special Rapporteur and states participating in the discussions taking place within the United Nations General Assembly (UNGA). Arajärvi engages critically with the ILC documents and links the issues they raise with principal arguments in legal theory on the formation of international customary law. Her analysis spans a wide variety of aspects of customary law, from the role played by UNGA resolutions to the persistent objection doctrine. A topic occupying a central place in her analysis is the two-element test, which is at the heart of the debate on “traditional” and “modern” customary law, with the latter approach prioritising (a certain perception of) *opinio juris* to the detriment of state practice. This approach is seen by its proponents as a more appropriate method for the formation of custom, especially in certain areas of international law, such as human rights, that aim at protecting the general interest (i.e. interests of the international community as a whole). Arajärvi concurs in that respect with the ILC and rejects modern custom, favouring legal certainty and the unity of international law across its various regimes.

In contrast with Arajärvi's all-encompassing analysis, Khagani Guliyev's study focuses on particular custom. The author contributes to scholarship by arguing against the common perception that – unlike general international custom – particular customary law owes its normativity to the consent of the states that it binds. Both these types of law, i.e. general and particular custom,

are binding because of practice believed/accepted to be law. However, the tacit agreement theory might not be totally irrelevant to the extent that particular customary law contains certain features that bring it closer to contracted law (reflecting the will of states) in case of state succession. To support his novel argument, Guliyev proceeds with a thorough comparison between particular custom and treaty law in the context of state succession.

The next three studies in this issue concern the impact of actors other-than-states on international customary law. The first such paper is written by Nicolás Carrillo-Santarelli and discusses non-state actors. Mindful of state-centrism in international law making, the author is cautious not to challenge the positivist orthodoxy in international customary law. However, his analysis invites us to go beyond formalism and acknowledge the influence of non-state actors in the making of customary law, in the course of their wide-ranging interactions with it, when, for instance, they use or interpret it. Constrained as it may be by state-centrism, the conduct of non-state actors (“filtered” through and presented as state conduct) is essential for both practice and *opinio juris*. Among other reasons, this is due to the expertise and the power of (some) non-state actors. Empirically speaking, their role and impact might be proven to be significantly more effective than the lens of formalism allows us to perceive. Finally, moving beyond empirical analysis, Carrillo-Santarelli engages in a normative (i.e. deontological) discussion about the desirable engagement (and the formal effects that ought to be given to it) of non-state actors in the making of customary law. The conclusion reached is that states should occasionally endorse/recognise the law making power of non-state actors, when this is justified against criteria such as the interests at stake and the expertise of non-state actors.

Sufyan Droubi’s analysis may be seen as complementary with that of Carrillo-Santarelli. The focus in his study is on international organisations and, in particular, on the UN. Unlike Carrillo-Santarelli, Droubi avoids normative (*de lege ferenda*) arguments and focuses on empirical observation through the lens of sociological constructivism. The criterion of the attribution of customary practice to member states or to the organisation itself is given lesser weight, as the paper invites us to observe (beyond the constraints of formalism, which may be accused of disregarding the reasons behind social conduct) that institutions such as the UN are not merely agents of states. They do influence states (by applying also pressure against those states that oppose a rule), while acting as norm-entrepreneurs that articulate norms binding the international community. This type of law making process involves a number of stages that are discussed in the study at a theoretical level, but also in the context of customary law, both in abstract and through a case study.

The last main paper in this issue is written by Panos Merkouris who discusses the role of international judges in the interpretation of the (customary rules) on interpretation. Armed with the strict rules of logic, Merkouris masterfully demonstrates that such rules are susceptible to judicial interpretation and, most importantly, that this is an intellectual exercise that should not be confused with the identification of custom by judges. For Merkouris, induction is the course of reasoning to be followed for the identification of a customary rule (i.e. to establish its existence as a valid legal rule), as opposed to deduction that is apposite for interpretation pertaining to the content of a rule, once it has been identified as a rule.

The role of judicial interpretation in the making of international customary law is a question to which I will return. But before that, the overview of the contents of this issue will not be complete without highlighting that it has the privilege to include a concluding note written by Sir Michael Wood, who is the ILC Special Rapporteur on the topic of the identification of international customary law. The note comments on the five aforementioned studies from the perspective of the ILC draft conclusions on the identification of customary law and demonstrates that, in spite of any points of divergence that may exist between the scholarly work published in this issue and the works of the ILC, the framework established by the latter is wide enough to encompass (most of) the arguments put forth by the authors in this issue. The enduring archetypal definition of customary law to which the ILC subscribes is flexible and wide enough, in the sense that state-centrism only regards the formal requirements for the identification of custom, without necessarily rejecting (or being *per se* incompatible with) the social drivers and forces behind state practice and *opinio juris*. The fact that (for the sake of formalism – to the extent that formalism is possible in the case of customary law) the social forces (by actors) surrounding, inspiring and shaping state practice and *opinio juris* are not to be formally taken into account neither means that they do not exist, nor nullifies their (indirect) impression on customary law.

But state-centrism (and the associated question of the role of other-than-states actors in international customary law) is one only of the threads connecting the studies contained in this issue. Another common thread is the role of sovereign will in custom making. A common misconception is that international legal positivism (i.e. the idea that the law is posited, as opposed to natural law explanations of the validity of law that may see it as God-given, associated with morality or deriving from *recta ratio*) is associated with state will only and the idea that the law is binding upon sovereign states because (and only if) they consent to it. Admittedly, this lens, corresponding to the voluntarist strand of international legal positivism, is the prevailing one. However,

leaving aside the variations that exist within international legal voluntarism, the misconception discussed here ignores the diversity of strands that exists within international legal positivism. If for Anzilotti international customary law is a tacit agreement,³ for Scelle, who rejects the idea of sovereignty,⁴ the normative foundations of custom stem from the needs of the international community (encompassing non-state actors).⁵ And, if for Kelsen the binding force of customary law is hypothetical⁶ and cannot be explained⁷ as it coincides⁸ with the foundational (extra-legal) rule of the international legal order, namely *pacta sunt servanda* (which, according to this theory is customary in nature and serves as the source of normativity of treaty law, giving a higher hierarchical status to custom compared to treaties⁹), Hart associates customary law with the function of judges and courts,¹⁰ who (one may add) cover the absence of a rule of recognition in the (rather primitive and decentralised) international legal system.¹¹

Seen from that perspective, each paper contained in this study makes a contribution to the positivist foundations of customary law and to the fundamental question of whether custom owes its normativity to the will of the states it binds and whether it can be understood as a tacit agreement. It appears that all authors in this issue concur (and some of them explicitly state) that customary law is not the product of and does not acquire a binding force because of state consent. This is yet another point of convergence between the studies in this issue and the ILC. The latter is not dealing with this issue in detail, as it has chosen not to focus *per se* on the formation of customary law, but on

3 Dionisio Anzilotti, *Cours de droit international* (re-edition, 1999) pp. 73–79.

4 Georges Scelle, *Cours de droit international public* 1948, pp. 23 and 99 and following.

5 Scelle's theory is called sociological objectivism. For an introduction, Patrick Daillier and others, *Droit international public* (8th edition, 2009) pp. 91 and 116–118. On social necessity, and morality and power Georges Scelle, *Cours de droit international public, Les cours de Droit* (1947–1948) pp. 11 and following and especially pp. 36–38. Especially regarding the power of custom to be imposed against state will, Georges Scelle, *Précis de droit des gens (Principes et systématiques)* (Vol. 11, 1934) p. 298.

6 Hans Kelsen, "Théorie du droit international public", 84 *Recueil des cours de l'Académie de droit international de La Haye* (1955) p. 129.

7 Hans Kelsen, "Théorie du droit international coutumier", in C. Leben-C. (ed.), *Hans Kelsen: écrits français de droit international* (2001) p. 65.

8 *Ibid.*, p. 67.

9 Hans Kelsen, "Théorie du droit international public", n. 6, p. 129.

10 Herbert Lionel Adolphus Hart, *The Concept of Law* (2nd ed., 1994) p. 46.

11 *Ibid.*, pp. 235, 214 and, on the effects of recognition, pp. 94 and following, and especially pp. 100 and following.

its identification – although, admittedly, the latter partially overlaps with the former. Yet, the ILC explicitly rejects state consent as the basis of custom and “translates” (excluding the *sive necessitatis* part of the maxim) *opinio juris* as “acceptance as law”.¹²

The reason why the ILC focuses on the identification of customary rules, rather than opting for a broader scope, is because its aim is to offer authoritative guidelines to those who employ custom.¹³ International judges are not the only addressees, but they are among them. One could even argue that they are high on the list of addressees as international courts have the authority to identify the law. This brings me to the last point I wish to make in this brief introductory note. This point concerns the role of international judges and ties quite well with the paper by Merkouris. As I have argued elsewhere,¹⁴ international judges and their courts are vital for international custom making. My argument goes beyond Article 38 of the Statute of the International Court of Justice that recognises case law as a means for the determination of the law. In all legal systems, but (because of decentralisation, and the absence of a central legislator and rule of recognition) especially in international law, judges need to identify the law. This means that they recognise its existence and validity. While doing so, and to do so they need to interpret the definition of international customary law, which, as such, is a systemic rule, that is to say, a “proto-norm”, a “matrix” for the establishment of other norms. Custom as a source of international law corresponds to a rule of international law, which, as all rules of law, is susceptible to interpretation. Thus, while interpreting custom as a source of law (so that they can decide on the criteria they will use to identify a customary rule, i.e. the normative output of the source), international judges define what custom is. This way they (co-)shape the definition of customary law (as a source of law). Judges should/do not create customary rules. These

¹² ILC, A/71/10, Report of the International Law Commission on the work of its sixty-eighth session, 2 May–10 June and 4 July–12 August 2016, p. 82 in footnote 252.

¹³ ILC, A/67/10, Report of the International Law Commission on the work of its sixty-fourth session, 7 May to 1 June and 2 July to 3 August 2012, p. 114, para. 199 (referring to the views of the Special Rapporteur). See also A/CN.4/653, International Law Commission, sixty-fourth session, “Formation and evidence of customary international law. Note by Michael Wood, Special Rapporteur”, p. 6, para. 24.

¹⁴ Vassilis P. Tzevelekos, “*Juris Dicere*: Custom as a Matrix, Custom as a Norm, and the Role of Judges and (their) Ideology in Custom Making”, in N. Rajkovic and others, *Power of Legality: Practices of International Law and their Politics* (2016) pp. 188–208 and Vassilis P. Tzevelekos, Kanstantsin Dzehtsiarou, “International Custom Making and the ECtHR’s European Consensus Method of Interpretation” 16 *European Yearbook of Human Rights* (2016) pp. 313–344.

are the product of the society. But they have the authority to and enjoy discretion in interpreting/defining custom as a source/matrix for the creation of customary rules. This way they may also influence customary rules.

As already explained, the task of the ILC is to provide authoritative guidance on the identification of customary law.¹⁵ However, irrespective of the project's "label" (i.e. identification of customary law), the work of the ILC may limit judicial discretion in the definition of custom. This is so because the identification of customary law involves defining custom as a source of law. Arguably, this is what prompted the ILC to explain (albeit *en passant*) that customary law is not dependent on state consent, but on the acceptance of the normative force of customary law, i.e. the belief that social conduct (practice) has been transformed into a legal obligation.¹⁶

But, if this is true and the ILC is indeed (to some degree) defining custom as a source of law, restricting thereby (to the extent that it can restrict) the discretion of international courts to define that source, then the question to ask is how tight the "straightjacket" it creates should really be. How far should the ILC go with its definition of custom? For instance, how many states should participate in custom making? How many states should believe that social conduct has acquired a normative force? And how thorough should a court's comparative analysis be before it is in a position to identify sufficient customary practice?¹⁷ These are questions pertaining not only to the methodology for the identification of customary law, but to its definition as a source of law as well. These are also questions that are, to some extent, left unanswered by the ILC, presumably because it does not wish to compromise the inherently flexible nature of customary law.¹⁸ This is a choice that one may agree or disagree with. But, to make an informed decision, one needs to understand that the more inflexible custom is, the more concretely it is defined, the less discretion (i.e. power to co-construct it) judges will enjoy – and vice versa. Or, put differently, the balance maintained between flexibility and inflexibility in

15 See n. 13.

16 See n. 12.

17 A comparison could be made with the European consensus method of interpretation of the European Court of Human Rights when it examines in a comparative way the practice of the states under its jurisdiction with a view to identify evolution in the standards of human rights protection that they apply. European consensus is not a method for the establishment of custom. Nevertheless, to the extent that it relies on state practice, it raises similar questions to the ones applying in the context of the identification of customary rules by courts. See Tzevelekos and Dzehtsiarou, n. 14.

18 ILC, A/67/10, Report of the International Law Commission on the work of its sixty-fourth session, 7 May to 1 June and 2 July to 3 August 2012, p. 110, para. 171.

customary law translates into a balance of power between states (that create a rule) and judges (who identify it, co-shaping thereby the definition of custom as a source of law).

That being argued, the questions to leave you with are the following. How ~~much~~ detailed should ILC's definition of custom be? Isn't it enough that ~~it re-~~inforces the two-element theory – or, ~~maybe~~, we need a more comprehensive “roadmap” on customary law? But also – if I am allowed to become a bit more provocative –, how much are we ready (especially in times of rising extremism and nationalism, even in western countries with a long democratic tradition) to leave to states and how much to judges – particularly in areas of law aiming to safeguard community values? Which translates into a slightly different question: how much of the existing customary law would we really be willing to “sacrifice” for the purposes of legal certainty, achieved through a more inflexible (thus rare to identify) custom that would require an in-depth, exhaustive comparative examination of state practice and *opinio juris*?