ESIL Reflections
Editorial Board: Federico Casolari, Patrycja Grzebyk (editor-in-chief), Ellen Hey, Guy Sinclair, and Ramses Wessel

17 January 2024 Volume 13, Issue 1

‘Change in International Law: Rules of Change or Changing Rules?’ Series

Rules of change and the nature of customary international law

Katie A. Johnston*
University of Liverpool

Image by Katie Johnston

A ‘source’ of international law, such as customary international law, refers to a particular process for the creation of international law rules.[1] It is the differences between these secondary rules of law creation that distinguish one source of international law from another. It would therefore be surprising if the secondary rules governing the modification of different sources of international law were identical; rather, the rules of change for a particular source of international law should reflect the particular nature of that source. In relation to treaties, it is accepted that creation, modification and interpretation are distinct processes,[2] although in practice it may be difficult to draw a sharp line between them.[3] However, we cannot assume that this is the case for customary international law,

[1] Alain Pellet, Le droit international à la lumière de la pratique: l’introuvable théorie de la réalité (2021) 414 *Recueil des cours* 9, 167.
[2] International Law Commission, ‘Draft Articles on the Law of Treaties with commentaries’ Yearbook of the International Law Commission, 1966, Vol II, 238.
[3] E.g. Ruys argues that it is better to speak in terms of an ‘interpretive continuum’, Tom Ruys, *‘Armed Attack’ and Article 51 of the UN Charter* (CUP 2010), 23.

the nature of which differs significantly from the formal, written nature of treaty law. This paper argues that the practice-based nature of customary international law means that there is no separate set of secondary rules for the modification of customary international law, distinct from the rules for its identification.

To identify a rule of customary international law 'it is necessary to ascertain whether there is a general practice that is accepted as law'. These are the two 'constituent elements' of customary international law.[4] Customary international law rules that are identified are simply characterisations given to that state practice and *opinio juris* at a particular point in time. Customary rules that are identified as regulating the same subject matter at different points in time are thus not 'modified' versions of a continuously existing customary international law rule. Whether one is identifying a customary international law for the first time; determining whether a different customary international law rule governing the same subject matter can be identified from state practice and *opinio juris* at a subsequent point in time; or determining in more detail how a previously-identified customary international law rule applies to a particular situation – what in the context of treaty law would be considered creation, modification, and interpretation of the treaty rule respectively - it is the same two-element test for the identification of custom that must be applied.

1. State practice and *opinio juris* as *constitutive* of customary international law

It is commonplace to speak of the flexibility of customary international law,[5] usually in contrast with the rigidity of treaty law. Treaty rules are frozen in an agreed text, while customary rules may exist without necessarily being expressed in written form.[6] However, customary international law differs from treaty law not just in being unwritten but in being practice-based and *informal*.[7] To create a binding treaty obligation it is not enough for two states to reach agreement: a treaty rule must also fulfil certain formal requirements – adoption, signature, in some cases ratification and entry into force

[4] ILC, 'Conclusions on identification of customary international law, with commentaries' in 'Report of the International Law Commission, 70th session' (30 April-1 June and 2 July-10 August 2018) UN Doc A/73/10, 119, Conclusions 2-3.

[5] E.g. ILC, Second report on formation and evidence of customary international law by Michael Wood, Special Rapporteur, A/CN.4/672* (22 May 2014), para 12, 37; K Wolfke, 'Some Persistent Controversies Regarding Customary International Law', [1993] 24 *Netherlands Yearbook of International Law* 1, 16.

[6] Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' 15(3) *EJIL* (2004), 524-5. Customary rules can of course be codified. However, this creates a new treaty rule in addition to the customary rule.

[7] Maurice Mendelson, 'The formation of customary international law' (1998) 272 *Receuil des Cours* 161, 172.

– before it constitutes a legally binding rule for the parties.[8] By contrast, although there are well-established requirements for the identification of customary international law – the existence of 'a settled practice […] carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'[9] – this process of identification, whether by a tribunal, a state, or a scholar, is not what creates binding customary international law.[10] Whether or not someone actually conducts an evaluation of state practice and *opinio juris* and concludes that sufficient evidence exists for a given customary international law rule to be identified has no impact on the existence of customary international law.[11] The mere existence of that practice and *opinio juris* is necessary, but also sufficient, for custom to exist.[12] It is in this way that the formation of customary international law is an informal process.

More important than its informality, however, is the practice-based nature of customary international law. A treaty rule is constituted by the particular set of words in which it is expressed. Once created, treaty rules are capable of modification through amendment[13] or, where certain conditions are met, their interpretation may be impacted by the subsequent practice and agreement of the parties.[14] These processes for the modification of treaty rules allow for even large amounts of practice to be ignored until they meet the criteria for effecting a modification of the rule: statements or even actions contrary to a treaty rule have no effect on its content or binding nature until the parties' practice fulfils the procedural requirements for amendment or is sufficient to establish agreement among the parties as to a subsequent interpretation.[15] Only in extreme cases would contrary practice cause the treaty to fall into desuetude.

However, customary international law is different: all state practice and *opinio juris* is relevant to the determination of customary international law at a given moment because those two elements are

[8] For written agreements, these criteria are found in Parts II and V of the VCLT, and in the customary international law rules it codifies.
[9] *North Sea Continental Shelf* (Judgment) [1969] ICJ Reports (1969) 3, para 77.
[10] See Orfeas Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31(1) *EJIL* 235, 261-2.
[11] Other than as a piece of *opinio juris* in itself where that conclusion is reached by a state.
[12] *North Sea* (n 11), para 77.
[13] Vienna Convention on the Law of Treaties (1969), 1166 UNTS 331, Article 39.
[14] *ibid*, Article 31(3)(a) and (b).
[15] Subsequent practice which does not establish such agreement *may* be used in interpreting the treaty, but need not be, and is limited in the extent to which it can reinterpret the treaty, VCLT, Article 32; ILC, 'Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' in 'Report of the International Law Commission, 70th session' (30 April-1 June and 2 July-10 August 2018) UN Doc A/73/10, 11, Conclusion 2(4).

constitutive of customary international law.[16] For example, the customary international law on self-defence is constituted by all past and ongoing practice of states in relation to self-defence, including uses of force by states, (non-)reactions to the use of force by other states, and statements about the legality of particular uses of force. While the weight of each individual piece of practice will vary, customary international law is no more nor less than the sum of all the practice and *opinio juris* of states at a particular moment. This is not affected by the evidential difficulties that arise in identifying that practice and any *opinio juris* that accompanies it, nor by the challenges of determining whether practice and *opinio juris* are sufficiently widespread and representative to allow the identification of a particular rule.

This body of practice and *opinio juris* will change from time to time as new incidents of practice – whether supportive of or contrary to existing practice – occur. This does not mean that the rule that can be identified from that practice will also necessarily differ from moment to moment. That will only be the case if the new practice is significant enough to change the conclusion reached on application of the two-element test. Practice may simply reinforce the previously identified rule; for example, where a state invokes the right of self-defence in circumstances widely accepted as lawful under customary international law. A single incident of contrary practice may have virtually no impact on the conclusion one may reach as to the customary international law rule that can be identified from the practice as a whole. For example, one incident of a state using force purportedly in self-defence in the absence of an armed attack, or in a disproportionate manner, is by itself unlikely to require a reconsideration of the conclusion that the previously identified customary international law rule is still supported by a widespread and representative state practice, accompanied by *opinio juris*.[17] However, unlike practice that falls short of the formal requirements for modification of a treaty, that contrary state practice cannot be excluded from the evaluation of the existence and content of customary international law: it is still part of the body of practice that constitutes the customary international law on self-defence.

Identification of a customary international law rule from the existing body of state practice and *opinio juris* at a given moment will thus not freeze customary international law, which will continue developing

[16] The 2018 ILC Conclusions on Identification of Customary International Law refer to state practice and *opinio juris* as 'constituent' elements, Conclusions 2-3. UNGA Res 73/203 welcoming and taking note of the ILC's conclusions on identification of customary international law was adopted by consensus. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections) [1996] ICJ Reports 595, Dissenting Opinion Judge ad hoc Kreca, 776, citing Schwarzenberger.

[17] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Reports 14, para 186.

without interruption as new practice occurs.[18] Mendelson describes the ongoing nature of the process through the metaphor of the building of a house:

> The process of customary law is a continuing one which does not stop when the rule has emerged, any more than the life of a house stops after the builders have left the site and the keys handed over to the new owner: the house will continue to be altered and repaired, and these repairs will strengthen it or at least prolong its life, just as neglect or damage to the fabric will hasten its collapse and destruction.[19]

Given that the body of practice and *opinio juris* is constantly changing from moment to moment, to speak of a customary rule is merely to speak of the conclusion an observer – such as a judge, a scholar, or a government legal advisor – can reach on the basis of that practice as to what conduct is permitted, prohibited or required by customary international law at a particular moment in time.[20] That conclusion will be based on whether or not the practice and *opinio juris* meets the test for the identification of a rule of customary international law, and the contours of the rule that is supported by such a sufficient practice and *opinio juris*. However, this conclusion - the snapshot of the rule that can be identified from the practice - should not be mistaken for customary international law itself.

This practice-based nature of customary international law entails more significant consequences than just a difference in the processes whereby customary international law and treaty law are created. Customary rules and treaty rules are not identical creatures that arise by different means: customary international law, although equally binding, is by nature more flexible and less determinate. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, the parties had both agreed, with slight variation, that the 'fundamental norm' was that the maritime boundary delimitation should be determined according to the applicable law, in conformity with equitable principles, having regard to all relevant circumstances, in order to achieve an equitable result.[21] However, from that starting point both parties proposed the existence of different, more specific rules of customary international

[18] Wolfke (n 7), 7; Wood (n 7), 159; Mark E Villiger, *Customary International Law and Treaties* (2nd edn, Brill 1997), 61.
[19] Mendelson (n 4), 174, 192; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Reports 95, para. 142.
[20] *Fisheries Jurisdiction* (United Kingdom v Iceland), Merits, 25 July 1974, ICJ Reports (1974) 3, para 40; Philipp Allott, 'Interpretation – an Exact Art', in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 374, 386; James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019), 21.
[21] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, 12 October 1984, ICJ Reports (1984) 246, paras 99-100.

law that should apply to the delimitation. The Chamber, having already noted that practice was too sparse for specific rules of custom to have emerged,[22] rejected the idea that there were specific rules of custom governing such a situation that could be discovered and instead decided to 'seek a better formulation of the fundamental norm'.[23] The new formulation by the Court was that delimitation, 'whether effected by direct agreement or by the decision of a third Party, must be based on the application of equitable criteria and the use of practical methods capable of ensuring an equitable result'.[24] Unrestrained by a particular text that needed to be interpreted or modified, the Court was able to characterize the state of custom in a manner more suited to the dispute at hand in a way that would not be possible, or at least not so easy, for a treaty rule, which is constituted and limited by the particular text that expresses it.

To summarise: customary international law arises informally through the practice and *opinio juris* of states. When a customary international law rule is identified on the basis of that practice, using the two-element test, this is just a snapshot of the state of customary international law – of state practice and *opinio juris* - at a particular point in time. In seeking to identify rules of change for customary international law, the differences in the natures of the different sources of international law must be taken into account. The rules for the modification treaties reflect the formal, written nature of that source of international law. If one is to give an account of the modification of customary international law, one cannot simply apply these rules that were developed in relation to a different source of international law, but must analyse what 'modification' means in the context of an informal, practice-based source of law.

2. **Modification of customary international law**

While written treaty rules have a continuing, fixed meaning and existence until modified or abrogated, a customary rule can only be identified in response to the question 'what does customary international law permit/require at this time?'. A customary international law rule is merely a snapshot of the state of practice at a particular time and does not have an existence independent of that practice.[25] It is therefore difficult to see how there could exist a separate set of secondary rules for the modification

[22] *ibid*, para 81.
[23] *ibid*, para 111.
[24] *ibid*, para 113.
[25] See Massimo Lando, 'Identification as the Process to Determine the Content of Customary International Law' (2022) 42(4) *OJLS* 1040. Cf. e.g. Başak Etkin, 'The Changing Rivers of Customary International Law – The Interpretive Process as Flux' (2022) 11(5) *ESIL Reflections, 4.*

of customary international law *rules*, distinct from their identification, as there is nothing to modify.[26] To speak of 'modification' of a customary international law rule means rather that, as a result of the addition of new practice, the rule identified following an evaluation of existing state practice and *opinio juris* by a particular actor at a particular time differs from the customary international law rule that could be identified as regulating that same subject matter at an earlier point in time. The only secondary rule governing change to customary international law is the same two-element test that is applied to identify rules of customary international law – a widespread and representative state practice accompanied by *opinio juris*[27] – which is fulfilled with respect to a *different* customary international law rule at a *later* point in time.

For example, consider a scenario where sufficient state practice and *opinio juris* exists to identify a customary international law rule that prohibits direct uses of force by one state's military against another state, but does not prohibit indirect uses of force; that is, the sending of armed bands to conduct attacks on another state's territory. For customary international law to change, so that acts of 'indirect force' are now also considered under custom to be prohibited uses of force, what is needed is the occurrence of sufficient new state practice and *opinio juris* to allow the identification of a customary international law prohibition on indirect uses of force: a widespread and representative practice of states abstaining from engaging in acts of indirect force, accompanied by *opinio juris* that states accept such conduct as prohibited uses of force. The rule identified at the earlier point in time has not been modified; rather, the content of the body of state practice and *opinio juris* that constitute customary international law has changed, allowing the identification of a customary international law rule whose content differs from that identified previously. 'Modification' of the customary international law rule is at best a useful conclusion or label for such situations, rather than a distinct legal process.

This does not mean that we should stop referring to customary international law 'rules' altogether. Employing these terms is clearly useful to the extent that they capture how international law actors invoke customary international law in practice. A state cannot know what it is permitted to do or prohibited from doing under customary international law unless rules of conduct are identified from existing state practice and formulated in words. For the body of state practice and *opinio juris* that constitutes the customary international law on self-defence to guide state behaviour, it is necessary to identify rules as to the circumstances in which force in self-defence is permitted or prohibited, even

[26] The term 'secondary rules' refers here to rules of law creation or modification, see HLA Hart, *The Concept of Law* (3rd edn, Clarendon 2012), 94–5.
[27] *North Sea* (n 11), paras 73-4; ILC Custom (n 5), Conclusions 2, 8, 9.

though it is not that formulation of the rule that itself constitutes the binding customary international law. The identification of customary rules also appears necessary for the existence of *jus cogens* norms: for a customary rule to be 'accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted' it must, first of all, be identified. Moreover, the legal effects of that status – the inability to derogate from the *jus cogens* norm, and the requirement that it can only be modified by another norm of the same character – seem to assume that the *jus cogens* norm has, or is at least deemed to have, some sort of continuing existence.[28]

Nor does an absence of a separate set of rules governing the modification of customary international law rules mean that we should give up trying to analyse how change to *customary international law* can occur.[29] Analysing situations where the content of customary international law has changed as a distinct category of custom identification is useful as it highlights the particular legal issues that arise in this context. In particular, the kind of state practice and evidence of *opinio juris* required to satisfy the test for identification of custom will differ, depending on the type of change in customary international law alleged to have occurred. The customary international law rule being identified at the later point in time may be prohibitive, permissive or prescriptive, which will impact the kind of state practice necessary to fulfil the two-element test. To build on Mendelson's house metaphor, what one looks for to determine whether a given alteration to a house has been completed will depend on whether that alteration involves building a new house from scratch, adding an extension to an existing house, or demolishing the house to replace it with an apartment block.

Most significantly, in situations of change to customary international law, the test for identification of custom is necessarily being applied in a context where there is already customary international law regulating the same subject matter, which will determine the inferences that can be made about the *opinio juris* of states.[30] Thus, even if it is always the same two-element test that is applied, and there is no separate set of secondary rules of change for customary international law, what the application of that test involves in practice will vary depending on whether a customary international law rule regulating a particular subject is being identified from practice for the first time, or whether sufficient

[28] See the contribution by Kleinlein in this symposium.

[29] On this question, see James Crawford, 'Chance, Order, Change: The Course Of International Law' (2013) 365 *Receuil des Cours* 17, 61ff.

[30] See Katie A Johnston, 'The nature and context of rules and the identification of customary international law' (2021) 32(4) *EJIL* 1167. In the context of change, this analysis is further complicated as the rule identified at a later point in time may be characterised as an expansion or a restriction of a previously identified customary rule, see Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008), 127.

state practice and *opinio juris* existed to allow a customary international law regulating the same subject matter to have been identified previously.

Put another way, there is no need to reinvent the wheel and search for specific secondary rules for the 'modification' of customary international law rules which depart from the well-established test for their identification. Even if there is no separate set of rules of change, the application of the test for identification of custom in this context nevertheless raises distinct questions about how state practice and *opinio juris* are identified, as well as how this process interacts with the test for the identification and modification of *jus cogens* norms.[31]

3. Conclusion

It has been argued above that customary international law rules are simply the characterisation one gives to the existing body of state practice and *opinio juris* at a given moment in time; customary rules do not have any independent or continuing existence separate from that practice, and so it does not make sense to speak of their 'modification'. This point is of more than theoretical interest. If customary international law rules were modified through the application of a specific set of secondary rules that governs their modification, then presumably these rules would be different from the two-element test for the identification of customary international law. The argument made here, by contrast, is that due to the practice-based nature of customary international law, 'modification' of a customary international law rule simply means that the rule identified following an evaluation of existing state practice and *opinio juris* at a particular time differs from the customary international law rule that could be identified as regulating that same subject matter at an earlier point in time. The only applicable secondary rule is the two-element test for the identification of customary international law. This reflects the practice-based nature of customary international law and also, more broadly, reflects that the sources of international law are distinguished by more than the different processes by which they are created. The nature of the law produced by those processes differs, and this will have further consequences for the other secondary rules that govern their operation.

Cite as: Katie A. Johnston, 'Rules of change and the nature of customary international law', ESIL Reflections 13:1 (2024).

[31] See the contribution by Kleinlein in this symposium.