Changing custom: identification of state practice and *opinio juris* in the context of existing customary international law

Katie A. Johnston

There is no separate process or set of secondary rules for the modification of customary international law (CIL or custom): it is the same two-element test for the identification of customary international law that must be applied. However, the kind of state practice and evidence of *opinio juris* required to satisfy this test may differ, depending on the type of change to customary international law that is alleged to have occurred. For example, whether the alleged change is the expansion of a previously identified customary international law norm, or the creation of a new exception to it.

The informality of customary international law

The creation of a treaty norm is primarily a formal process.[1] Without having regard to the content of the treaty norm being created,[2] one can determine whether the criteria for the conclusion of a treaty have been fulfilled by the instrument in whose text the purported treaty norm is expressed.[3] From the moment that those criteria – adoption, entry into force and so on – are fulfilled, a valid treaty norm exists, and it is the very fulfilment of those criteria that gives it its validity.

By contrast, customary international law norms may be identified, but it is not the process of identification – whether by a tribunal, a state, or a scholar – that creates customary international law. Custom is not just unwritten but *informal*.[4] The two elements of state practice and *opinio juris* are constitutive of custom.[5] 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' is necessary, but also sufficient, for custom to exist.[6]

Custom is thus the sum of all the practice and *opinio juris* of states at a particular moment, and it is constantly in flux. Whether or not someone conducts an evaluation of state practice and *opinio juris* and concludes that sufficient evidence exists for a given customary international law norm to be identified has no impact – other than as a piece of *opinio juris* in itself – on its existence. By extension, the identification of a custom norm which can be said to be supported by that state practice and *opinio juris* at a particular time does not freeze custom, which will continue developing without interruption.[7] Mendelson describes the ongoing nature of the process through the metaphor of building 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

[1] Jean D'Aspremont, 'Formalism and Flexibility' in Tams et al (eds), *Research Handbook on the Law of Treaties* (Elgar 2016) 257, 270.
[2] With the notable exception of purported treaty norms whose content conflicts with *jus cogens*, VCLT, Article 53.
[3] For written treaties, these criteria are set out in Part II of the VCLT, and in the CIL norms it codifies.
[4] Maurice Mendelson, 'The formation of customary international law' (1998) 272 Receuil des Cours 161, 172.
[5] See *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.
[6] *North Sea Continental Shelf* (Judgment) [1969] ICJ Reports (1969) 3, para 77.
[7] K Wolfke, 'Some Persistent Controversies Regarding Customary International Law', (1993) 24(1) *NILR* 7; Michael Wood, 'Concluding Observations', 2017 19(1) *International Community Law Review* 156, 159.

> 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.[8]

When customary international law is understood in this way, there is no separate process or set of secondary rules for the modification of a CIL norm.[9] Whether one is seeking to evaluate if a particular CIL norm exists or continues to exist, or to determine its content at a given time, it is the same test for the identification of custom that must be applied. That is, the existence of a sufficiently widespread and representative state practice, accompanied by *opinio juris*. To speak of change to a CIL norm simply means that the CIL norm identified following the evaluation of existing state practice and *opinio juris* by a particular actor differs from the CIL norm identified as regulating that same subject matter at an earlier point in time.

Factors impacting the test for identification of customary international law

Even if there is no separate process for the modification of custom, the question of how custom can change nevertheless raises distinct issues. Where one is assessing whether an alleged change has occurred, the test for identification of custom is being applied in a context where CIL regulating the particular subject matter is already in existence. Moreover, 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 alleged to have occurred. The new CIL norm being identified may be prohibitive, permissive or prescriptive, which will impact the kind of state practice necessary to identify the norm. In addition, the new CIL norm identified could be characterised as an expansion or a restriction of a previously identified CIL norm.[10] Thus, the requirements for change in custom to occur may vary depending on the kind of change being contemplated. To build on Mendelson's house metaphor, what we look for to determine whether an alteration to the house has been completed will depend on whether one is building a new house from scratch, adding a new extension, or demolishing the house to replace it with an apartment block.

1. Expansion of a customary international law prohibition

The expansion of a customary international law prohibition would be the identification of a CIL norm which includes within its prohibitive scope new kinds of conduct, in addition to the conduct regulated by a CIL norm identified as prohibiting that same subject matter at an earlier point in time. Imagine a scenario where custom 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 custom to change, so that acts of 'indirect force' are now considered under custom to be prohibited uses of force, what is needed is sufficient state practice and *opinio juris* to identify a new CIL prohibition on indirect uses of force. The state practice that would support the existence of such a customary norm would therefore be a widespread and representative practice of states abstaining from engaging in acts of indirect force, accompanied by *opinio juris*.

[8] Mendelson (n 4), 174, 192.
[9] Similarly, for CIL, every interpretation is an 'existential interpretation': one which serves to establish or confirm the norm's existence, Duncan B Hollis, 'The Existential Function of Interpretation in International Law', in Bianchi, Peat and Windsor (eds), *Interpretation in International Law* (OUP 2015) 78, 85.
[10] See Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008), 127.

In cases of expansion of a CIL prohibition, the underlying context of international law in which the test for identification of custom is being applied will always be one where custom does not otherwise prohibit that conduct. As a result, it will be difficult to establish that this inaction by states actually constitutes legally relevant conduct for the purpose of identifying custom. States, by omitting to perform acts of indirect force are acting – or rather, not acting - in a manner that is perfectly consistent with previously identified CIL norm; in a situation where custom contains only a prohibition on direct force, it is clearly lawful also to abstain from using indirect force. States may omit to act for many reasons, or no reason,[11] and there is no possibility to infer from their omission that this reflects a conscious choice, much less an *opinio juris* for a new CIL prohibition.

What is needed, if their inaction is to be considered as state practice in support of a CIL prohibition on indirect force is evidence that their abstention is 'based on their being conscious of having a duty to abstain'.[12] Thus the difficulty in establishing new CIL prohibitions: the necessity for evidence of *opinio juris*, not just as one half of the two element test for identification of custom, but also to establish that there is even a supportive state practice at all.[13]

Assuming there is sufficient state practice and *opinio juris* for a CIL prohibition on indirect force to be identified, should this be categorised as a change to CIL? That is, do we end up in a situation where we now have a CIL prohibition on direct uses of force coexisting with a more recently identified prohibition on indirect uses of force, or is it more accurate to say that in this case the prohibition on force has been changed – its scope has been expanded?

Ultimately, how a change to custom is characterised will come down to an evaluation of the *opinio juris* of states. It may be that states demonstrate an acceptance that indirect uses of force are prohibited by custom in their own right; in this case, the correct analysis would be that a new prohibition on indirect force has been identified. Yet states may treat the state practice in support of the new CIL norm as being in application of an existing CIL norm. In this case, the situation may be analysed not as the creation of a new CIL prohibition (on indirect force), but as the expansion of the existing CIL prohibition on force. For example, the General Assembly resolution on a Definition of Aggression,[14] adopted without a vote, may be considered as evidence of the *opinio juris* of those states adopting it.[15] The text of the resolution makes clear that acts of aggression – including indirect attacks – are uses of force for the purposes of both the Charter and CIL prohibitions on force. This seems to have been treated by states adopting

[11] Gionata Piero Buzzini, 'Les comportements passifs des états et leur incidence sur la réglementation de l'emploi de la force en droit international general' in Cannizzarro and Palchetti (eds) *Customary International Law on the Use of Force: a methodological approach* (Nijhoff 2005) 79, 82.

[12] *Case of the SS Lotus*, [1927] PCIJ Series A No 10, 28; International Law Commission, 'Conclusions on identification of customary international law, with commentaries' UN Doc A/73/10, 119, Conclusion 3, commentary para 4.

[13] For more detailed argument see Katie A Johnston, 'The nature and context of rules and the identification of customary international law' (2021) 32(4) *EJIL* 1167.

[14] A/RES/3314(XXIX), Annex.

[15] As stated by the ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Reports 14, para 188, *opinio juris* 'may, with all due caution' be deduced from state participation in general Assembly resolutions, depending on their text. As with the Friendly Relations Declaration, the use of the term 'State' throughout the Resolution 3314, regardless of 'whether a State is a member of the United Nations', makes clear that the definition 'cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter'.

the resolution as an expansion of the existing CIL prohibition on the use of force, not as the creation of new and separate CIL prohibition on indirect force.[16]

In most cases, whether this kind of change to custom is characterised as the identification of a new CIL norm or change to a previously identified norm will not make a difference – what matters is that custom now prohibits both direct and indirect uses of force. As argued at the outset, it is state practice and *opinio juris* that constitutes custom and to speak of norms is merely to describe how different actors have characterised the content of that law. However, the potential issues raised by different characterisations become clear if one considers that the prohibition on direct force was likely, even at the time of the adoption of the Definition of Aggression in 1974, to have enjoyed *jus cogens* status. Modification of the *jus cogens* prohibition on force would require the test for identification of a new *jus cogens* norm to be met – acceptance and recognition by the international community of states as a whole. Identification of a new CIL prohibition on indirect force would require merely the fulfilment of the regular two-element test for custom.

Arguably, where states continue to recognise the CIL prohibition on force as non-derogable it may be assumed that their acceptance and recognition also extends to a new, broader iteration of that norm that includes the new practice, without states needing to demonstrate specifically that no derogation is permitted from the prohibition on indirect uses of force that it now encompasses.[17] Thus, where the *opinio juris* of states identifies new state practice as being regulated by an existing *jus cogens* norm, the broader CIL norm will have *jus cogens* status in its entirety. This may appear to allow for modification of a *jus cogens* norm through fulfilment of the test for identification of a regular customary international law norm only. However, all depends on how the *jus cogens* norm is defined by the acceptance and recognition of the international community of states as a whole. If states accept and recognise that a norm that prohibits 'force' is non-derogable, and the customary definition of prohibited 'force' evolves to include indirect uses of force, there is no change to what states are accepting and recognising as non-derogable. In effect, identifying practice as being prohibited by an existing *jus cogens* norm is simply another way for states to evidence their acceptance and recognition that the prohibition on that practice is non-derogable.

2. Restriction of a customary international law prohibition

A restriction of a CIL prohibition would be the identification of a CIL norm which, by comparison with a CIL norm identified as regulating that subject matter at an earlier point in time, excludes certain conduct from its scope. The most obvious example would be a change characterised as the creation of an exception to a previously identified CIL norm. Arguments that such a change has occurred are common in practice, if rarely successful: in both the *Jurisdictional Immunities of the State* case and the *Arrest Warrant* case, one party argued unsuccessfully for the existence of a permissive CIL exception to an established CIL norm that

[16] A/RES/3314(XXIX), Annex, Articles 1 and 3.

[17] That indirect uses of force were considered to fall within the scope of the existing *jus cogens* prohibition can be seen from Article 5(1) of the resolution. Some states did explicitly recognise the *jus cogens* nature of the prohibition on force, as newly defined in Resolution 3314. See statement of Colombia, UN Doc A/9619, 28. Although Article 6 provides that 'Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful' this is best understood, given the ongoing debate about a possible new exception to the prohibition that would permit the use of force to support self-determination struggles, as clarifying that the resolution does not provide any new reason to use force. This also emerges from the statements of delegates prior to the definition's adoption, see e.g. statement of the USA, UN Doc A/9619, 24.

prohibited the exercise of jurisdiction.[18] Arguments as to the existence of new exceptions also persist in the *jus ad bellum*: the United Kingdom continues to invoke a novel right of 'humanitarian intervention', most recently as a purported justification for its unlawful use of force against Syria in 2018.[19] Such a right would create a new exception to the customary prohibition on force, as well as derogating from the *jus cogens* norm in the *jus ad bellum*.

At first glance it is not immediately obvious why demonstrating the existence of a new customary exception should be so difficult. Where a party is arguing for the existence of a new CIL exception to a prohibition, in effect what is required is to demonstrate sufficient state practice and *opinio juris* to identify a new permissive CIL norm that partly replaces the previously identified CIL prohibition. As a permissive CIL norm, the supportive state practice that would need to be shown would be a practice of states performing the conduct that is now alleged to be permitted by the CIL exception. That is, for example, states exercising jurisdiction even where a party claims they would qualify for immunity under the previously identified CIL prohibition. Those incidents of supportive state practice will therefore be inconsistent with the previously identified CIL prohibition.

This of course means that the states performing the first incidents of state practice supporting a new exception are at risk of their conduct being viewed as an internationally wrongful act. However, from the perspective of change in the law, rather than state responsibility, the significance of this inconsistency concerns the inferences one can draw about the *opinio juris* of states performing or reacting to that practice as a result. Unlike the situation of expansion of a prohibition discussed above, it seems that in this scenario there is neither the difficulty of identifying a state practice that consists of omissions, nor of finding evidence of *opinio juris* where practice could support either existing custom or the alleged new CIL norm. To the contrary: in circumstances where a state is consistently acting contrary to existing CIL, it seems reasonable to interpret this as implying an acceptance by that state that their conduct is permitted by custom (*opinio juris*).[20] Otherwise the state is simply repeatedly acting in violation of international law.[21] Similarly, turning to the reactions of other states, presumably a state acting contrary to international law raises at least some expectation of a negative response by other states. This expectation will be strengthened if the silent state is itself the victim of the apparent internationally wrongful act. A failure by another state to react negatively to conduct inconsistent with previously identified custom may therefore imply that state's acceptance that the conduct is now permitted by custom.

This would appear to suggest that the identification of new customary exceptions is in fact more easily accomplished than the expansion of customary norms, discussed above. However,

[18] *Jurisdictional Immunities of the State (Germany v Italy)* (Merits) [2012] ICJ Reports 99, para 61; *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v Belgium)* (Merits) [2002] ICJ Reports 3, paras 49, 56. See also the Court's rejection of the existence of a customary exception in *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [2007] ICJ Reports 582, paras 87–9.

[19] United Kingdom, 'Syria Action – UK Government Legal Position' (14 April 2018) www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position Although rather vague as to what is meant by the 'legal basis' of humanitarian intervention, this seems most likely to be a reference to customary international law, see United Kingdom, House of Commons Foreign Affairs Committee, Statement of Mr. Aust, Legal Counsellor, UK Foreign and Commonwealth Office (2 December 1992), in Marston (ed), 'UK Materials on International Law 1992' 63(1) *British Yearbook of International Law* (1992) 615, 827–8.

[20] Michael Akehurst, 'Custom as a Source of International Law', 47(1) *British Yearbook of International Law* (1975) 1, 37-8.

[21] See Johnston (n 13), 1187.

there are at least three reasons why demonstrating a change in custom by identifying a new exception will be challenging.

First, the circumstances in which such an inference of *opinio juris* will be possible are limited, since in many cases the broader context will negate any such inference. In particular, the 'utmost caution' must be exercised when inferring *opinio juris* from the silence of states in the *jus ad bellum*.[22] Where states have previously expressed their opposition to the existence of an alleged CIL norm this must prevent any inference of *opinio juris* from their silence. Evidence of their new, more recent *opinio juris* as to the lawfulness of that conduct under custom will be required for a change in the law. For example, it may be that states have explicitly rejected the specific exception being claimed to exist. When in 2018 the UK, France and USA conducted air strikes against Syria, some states reacted by explicitly condemning the strikes as illegal,[23] although many more remained silent.[24] Yet even though the conduct of the UK, US and France was a flagrant breach of the CIL prohibition on force, it does not seem correct to infer from this lack of negative reaction that those other states accepted such uses of force as now being permitted by a new CIL exception, as claimed by the UK.[25] The broader context, in which a substantial group of states had already clearly rejected this view was an important factor in assessing the meaning to be drawn from their later lack of reaction.[26]

Second, Akehurst argues that 'the amount of practice needed to establish a new rule which conflicts with the previously accepted rule is much greater than the amount of practice needed to establish a new rule *in vacuo*'.[27] Yet how is this possible if the test for identification of custom remains the existence of a 'widespread and representative' state practice? Given that the alleged CIL exception is being identified in the context of a previously identified CIL prohibition, there will be an existing body of state practice in support of that prohibitive CIL norm. To meet the 'widespread and representative' standard the quantity of state practice in support of the new exception will therefore need to be sufficient to outweigh the existing incidents of state practice supporting the prohibition on the conduct in question.[28] Thus, a

[22] Olivier Corten, *The Law Against War* (Hart 2010), 21; Dustin Lewis, Naz Modirzadeh, and Gabriella Blum, *Quantum of Silence: Inaction and Jus ad Bellum* (Harvard 2019).

[23] E.g. People's Republic of China, Statement of 16 April 2018 by the spokesperson of the Foreign Ministry of China, available at: https://www.justsecurity.org/wp-content/uploads/2018/04/China-Syria-strikes-2018.pdf (accessed 22 September 2022).

[24] See Alonso Gurmendi Dunkelberg, Rebecca Ingber, Priya Pillai and Elvina Pothelet, 'Mapping States' Reactions to the U.S. Strikes Against Syria of April 2018–A Comprehensive Guide' *Just Security* (7 May 2018) https://www.justsecurity.org/55835/mapping-states-reactions-syria-strikes-april-2018-a-comprehensive-guide/ (accessed 22 September 2022).

[25] See n 19. The US and France provided no legal justification for their actions.

[26] Group of 77, Declaration of the South Summit, April 2000 https://www.g77.org/summit/Declaration_G77Summit.htm, para 54 (accessed 22 September 2022).

[27] Akehurst (n 20), 13; see also Alain Pellet, 'Le droit international à la lumière de la pratique: l'introuvable théorie de la réalité' (2021) 414 *Recueil des cours* 9, 349.

[28] It is sometimes argued that in situations of an unsuccessful attempt to change CIL, where significant practice contrary to a previously identified CIL norm may be present and yet insufficient to establish new CIL, a 'gap' may emerge during the time that the old norm is too weak to be maintained but the new norm is not yet strong enough to be established, see Robert Kolb, 'Selected problems in the theory of customary international law' (2003) 50(2) *NILR* 119, 140; René-Jean Dupuy, 'Coutume Sage et Coutume Sauvage', in R-J Dupuy (ed), *Mélanges offerts à Charles Rousseau: La Communauté Internationale* (Pedone 1974) 75, 81; Christian Tomuschat, 'International law: ensuring the survival of mankind on the eve of a new century: general course on public international law' (1999) 281 *Receuil des Cours* 19, 211–3. However, where the new CIL norm is an exception to an existing norm, often states arguing for the new exception thereby reinforce their acceptance of the continued existence of the prohibition, clearly falling within the Court's dictum in *Nicaragua* (para 186); see e.g. statement by the representative of Syria during discussions leading to the adoption of the Definition of Aggression: 'the only

greater amount of state practice will be required to identify a CIL exception than – for example – to identify an expanded iteration of an existing CIL prohibition where there is no existing CIL regulating that conduct. Again, while the test for identification of custom remains the same, its application in practice is impacted by the type of change to custom being evaluated.

Finally, the previously identified prohibitive CIL norm may have certain characteristics that protect it from being subject to new exceptions. The prohibition on the use of force is a *jus cogens* norm from which no derogation is permitted.[29] As recognised by the ILC, '[a] rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*)'.[30] Thus even if there were widespread and representative state practice, accompanied by *opinio juris*, to identify a new CIL exception to the prohibition on force, it could not constitute a valid norm of customary international law. The purported new customary exception would constitute a derogation from the *jus cogens* prohibition and is therefore invalid. Unless the more demanding requirements for modification of a *jus cogens* norm were met, at the moment the CIL exception crystallised, it would be invalidated by the conflicting *jus cogens* norm.

Jus cogens status also impacts the inferences that may be drawn from the non-reaction of other states to practice in support of a new CIL exception to that norm. Arguably, the expectation of a negative reaction to state practice that constitutes a breach or claimed derogation from a *jus cogens* norm is so strong that an absence of reaction from other states should more readily be taken as acceptance of its lawfulness. Yet such a view would produce the perverse result that *jus cogens* norms are easier to change than non-*jus cogens* norms, where the expectation of reaction to their breach or reinterpretation would not be so strong.[31] The better view must be that, unless there is already a substantial practice and/or number of statements in support of the new exception, silent states should not be assumed to accept that such a derogation from that norm is now possible, nor that such conduct is lawful under CIL. It seems odd to presume from a state's silence their acceptance that a new derogation exists to a norm that is currently accepted and recognised as non-derogable. Surely the presumption should be that, since there can be no legally valid reason to depart from a *jus cogens* norm, the practice is simply a breach of the existing *jus cogens* CIL norm.

To conclude, this paper has argued that, although there is no separate set of rules for the modification of customary international law, the question of how change to custom can occur raises distinct questions about how the test for identification of custom is applied in this context. The type of change alleged to have occurred – the identification of a permissive or prohibitive norm; the expansion or restriction of a previously identified norm – will impact the evaluation of the two elements of state practice and *opinio juris*. This more fine-grained approach to determining whether new custom can be identified will allow for a more rigorous evaluation of claims that change to customary international law has occurred.

---

intentions justifying the use of force which his delegation could accept were those permitted by the Charter and United Nations practice. They were self-defence against an armed attack, enforcement action under the control of the United Nations and the liberation of an oppressed people in pursuit of the right of self-determination' UN Doc A/AC.134/SR/67-78, 42.

[29] For one argument, see Katie A Johnston, 'Identifying the *Jus Cogens* Norm in the *Jus Ad Bellum*' (2021) 70 *ICLQ* 29.

[30] ILC, 'Text of the draft conclusions on peremptory norms of general international law (jus cogens), adopted by the Commission on first reading' UN Doc A/74/10, 142, draft conclusion 14.

[31] Buzzini (n 11), 96.