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Summary

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Starting points

1. The identification of customary international law presents challenges. Many regular problems of identifying the content of legal rules arise acutely (such as: some rules are inherently vague; large numbers of actors have to apply them; structured processes for reaching agreement on their content often do not exist, etc.). Moreover, the legal regime governing the identification of customary international law (the 'identification regime') itself is in dispute. This second challenge, which is specific to custom, is currently being addressed by the UN International Law Commission, and it forms the subject of the present inquiry.

The identification regime as judge-made law

2. The identification regime (which forms itself part of customary international law) has so far never been spelled out systematically. For nearly a century, much of the analysis has proceeded from Article 38(1)(b) of the Statute of the ICJ and its predecessor norm, Article 38(2) of the PCIJ Statute; yet the text of these provisions provides fairly little guidance: as observed by Rudolf Bernhardt, 'with respect to real questions of interest and import, the Statute of the World Court largely fails us'. The international legal community seems generally to assume that customary rules 'across the board' should be subject to a unitary regime (a matter that requires much further debate). However, it has so far refrained from setting out, in accessible form, the content of this regime. There is, e.g., no 'Vienna Convention on Customary International Law' (or a similar treaty), and neither has the subject been addressed in declaratory resolutions of the UN General Assembly.

3. Other actors have sought to fill this normative vacuum. Private restatements (notably the ILA's *London Principles*) and academic writings are of significance; they have exercised greater influence on the law in this area than in other fields. Yet their influence pales in comparison to that of another actor, viz. the International Court of Justice. Through decades of jurisprudence, the ICJ and its predecessor, the PCIJ, have shaped our understanding of the regime governing the identification of custom. Due to the limited reach of their jurisdiction, PCIJ and ICJ have not that frequently been able to pronounce on particular rules of customary international law. Yet the identification regime, for all intents and purposes, is 'judge-made'; and it reflects the typical features of casuistic law-making (incompleteness, complexity, flexibility, volatility, etc.).

The evolving nature of the identification regime

4. Shaped by international jurisprudence, the identification regime has evolved significantly over the past decades. Trends summarised in the following are premised on a pragmatic understanding of customary international law; three of them stand out:

5. (i) Operationalising customary international law: The identification of customary norms follows the 'two-element approach', which has become dominant since 1945, and

which requires a separate assessment of practice and *opinio juris*. As regards the density, consistency and duration of practice and *opinio,* there is relatively broad agreement on abstract threshold requirements ('generality'/'widespread character', as opposed to 'universality'; a 'certain', but 'no particular duration', etc.). While the status of particular norms of custom remains a matter of controversy, there is a large measure of agreement on the parameters of debate.

6. (ii) Opening up: A highly diverse range of materials can be used as evidence of a customary rules. There have been many attempts to privilege particular forms of evidence ('real acts versus mere verbal acts') or to exclude others (conduct relating to treaties; conduct within international organisations; domestic court decisions, etc.), but none of them has met with real success. In principle, all forms of attributable State conduct can be used as evidence of custom; as a consequence, the real question concerns the weight to be given to it.

7. (iii) Towards derivative custom: Increasingly, custom is not established by reference to practice and *opinio,* but 'derived' from other processes of legal clarification: the acceptance of such forms of 'derivative custom' is the most significant change in the identification regime. Derivative custom draws on views of other qualified actors about the state of the law, among them the ILC, UN organs (General Assembly, Security Council) or diplomatic conferences. Of course, the views of these actors need not reflect custom; yet reliance on them can considerably simplify the identification of custom. In the ICJ's jurisprudence, 'derivative custom' now assumes huge practical relevance. Few commentators today categorically rule out that other processes of legal clarification (within the UN, within the ILC, etc.) can assist in the identification of custom. However, mere 'assertions' of custom meet with criticism.

8. The three trends described in the preceding paragraphs affect the character of customary international law. Rules of custom are increasingly based on declarations and other forms of 'filtered' State conduct; by contrast, the 'beloved real acts' (Zemanek) are of lesser relevance. Organised processes of legal clarification (notably within the UN) increasingly yield tangible, written evidence that helps focus debates about custom, and can serve as the basis of derivative custom. Where customary rules emerge from such organised processes, custom becomes difficult to distinguish from other sources of international law; it is the product of a general discourse about the law. The fora of this discourse – notably international organisations – indirectly influence the identification of custom.

Open questions

9. Important aspects of the identification regime remain disputed; in part, this is due to the trends just described. Notably, the move towards a more 'open' regime renders customary international law less predictable. As the range of materials that can be relied on is so wide, and as the threshold requirements are so vague ('widespread practice', a 'certain duration', etc.), nearly everything depends on how the available evidence is assessed and evaluated. The identification regime is highly permissive, and highly dependent on the approach taken by the law-applier. Outside structured processes (court proceedings, ILC studies, UN debates), agreement on the content of a customary rule is difficult to reach.

10. Debates about the role of non-State actors in the process of identifying custom raise more fundamental questions. While the relevant practice remains primarily that of States, international organisations have a considerable indirect influence as fora of the debates and sites of Member State conduct. Where States have conferred powers upon international organisations that act on their behalf, the conduct of these organisations should be of direct relevance for debates about custom.

11. Other non-State actors, as a general matter, have no direct impact on the development of customary international law. However, they too can influence customary international law indirectly. Especially where non-State actors engage in processes of legal clarification or development, their considered views can become points of reference, and the basis of rules of derivative custom. While this influence is not automatic, recent experience with non-State initiatives such as the *Tallinn Manual* or the ICRC study illustrates its potential strength.

Consequences for the ILC's work

12. So far, the ILC in the main seeks to consolidate the existing identification regime as developed largely through the ICJ's jurisprudence. This relatively modest approach is likely to yield modest, but certain, results: the experience of other projects suggests that ILC and ICJ working 'in tandem' can effectively shape the development of general international law. An ILC 'Guide to Practice' synthesising decades of ICJ jurisprudence on custom into accessible propositions could provide useful guidance for law appliers around the globe and further harmonise debates about the identification of custom.

13. Yet it may be hoped that the ILC seeks more than just to consolidate the existing identification regime, which could do with a degree of progressive development. Continuing the general line of the ICJ's jurisprudence, the ILC might e.g. contemplate some (modest) opening up towards international organisations. Beyond that, the ILC could increase the practical value of its Guide if it did not merely highlight the breadth of the available evidence, but offered concrete guidance on the relative weight of particular types of evidence, or even indicated whether under certain circumstances (e.g. in the presence of declaratory resolutions of international organisations), the existence of a rule of custom could be presumed. Such guidance would reduce the much-cherished flexibility of the identification regime. And perhaps one should not expect too much detail and specificity from a unitary regime that is meant to apply to rules of custom across the board. However, law-appliers not used to hearing arguments about the fine details of international law (including many domestic courts or governmental departments) might find it easier to apply custom if the identification regime were a little less permissive.

14. While the ILC's current work is exciting and important, it addresses only one, and perhaps the lesser, difficulty of identifying customary international law. Even if the ILC succeeds in clarifying (or even progressively developing) the regime governing the invocation of custom, different actors will continue to disagree on the content of particular customary rules – simply because the content of many rules is open to argument. In fact, if experience with treaty law – where unanimous agreement on principles of treaty interpretation has not meaningfully reduced disputes about the content of particular treaty provisions – is any guide, one should not expect the ILC's current work to have too much of a practical impact: the identification of custom will never become an exact

science. This suggests that if the international legal community seeks to identify the content of particular customary rules with precision, it should, as in past decades, codify the substance of the law in a binding agreement, or spell out the current state of the law in a non-binding, but written, text.