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A Deconstructionist Critique

To the memory of one who showed me the way: my mother.

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Legitimacy Deficit in Custom: A Deconstructionist Critique

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Introduction

There is a strong current of opinion that customary international law (CIL) is a mysterious phenomenonⁱ that: "... has lost its utility in international law and should be abandoned. Short of that, it should be radically reformed".ⁱⁱ A former judge of the International Court of Justice (ICJ) perceived it to be: "... both delicate and difficult".ⁱⁱⁱ However, the majority of rules of international law are customary in nature.^{iv} Therefore, the transparency, consistency and determinacy of custom – the process by which rules of customary law are created - is central to the legitimacy of rules of CIL.

The process of custom itself comprises several attributes, including the creation, modification, and replacement of rules of customary international law. It is the creation of rules of customary international law that appears to have generated the most controversy^v and it is this aspect of custom that this monograph is concerned with. Chapter One deals with issues of textual clarity and interpretative dilemmas induced into the theory of custom through article 38(1)(b) of the Statute of the International Court of Justice^{vi} – the formal source of custom. Because customs are common in every language and culture, the process that transforms so common a phenomenon into legal custom for application in the international legal system is what this writer calls the juridification of custom. This process separates legal custom from common custom. The legitimacy of rules of customary international law depends on the success of that process. Article 38(1)(b) of the Statute of the International Court of Justice sets out this process, which the international community must abide by.

Chapter One challenges also the superficial appeal of condensing so complex a process as custom into a user-friendly slogan that does little to cater for the uncertainties that shroud any attempt to determine the creation of a new norm of customary international law. The view that State practice (SP) accompanied by a belief of obligation (OJ) results in the emergence of a new norm of customary international law, (SP + OJ = CIL) implies that rules of CIL result from a careful calculation of their instigators, a view shared by the majority on the International Law Association Committee on Formation of General International Law.^{vii} However, interrogation of international tribunals' jurisprudence on this matter appears to favour Wolfke's minority view that: "... calculated custom-making, if not excluded, is rare and difficult to prove".^{viii}

By examining the assumptions on which article 38(1)(b) premises the theory of custom, Chapter Two examines the potential effect on the doctrine of custom of the ever-shifting concept of State sovereignty. Chapter Three analyses the perceptual and ideological constructs that underpin the legitimacy deficiencies observed in custom. Chapter Four introduces deconstructionism to the search for a transparent, consistent, coherent and determinate doctrine of custom.

In the next three chapters an attempt is made to deconstruct some of the leading decisions of international tribunals on the creation of customary international law. Chapter Five examines the ICJ's determination of the creation of norms of customary international law in the Corfu Channel Case (CCC).^{ix} After several years of inactivity, this was the first case to come before the new court that had in 1945 succeeded the Permanent Court of International Justice (PCIJ). This case presented the ICJ with the opportunity to push forward understanding of the process by which common usage among the community of sovereign independent nations translates into legal custom, and to quash speculations on the matter that its predecessor the (PCIJ) had raised. Chapter Six examines international tribunals' pronouncements on the process of custom. In particular, regard is had of the ICJ's pronouncements on the function of persistent objector status in custom in the Anglo Norwegian Fisheries Case,^x where two years after deciding the CCC it had further opportunity to clarify and consolidate its opinions on custom. In Chapter Seven the ICJ's determination of

customary international law in North Sea Continental Shelf Cases^{xi} is analysed. Critical in these cases is discussion of the relationship between custom and treaty in the process of custom. These cases represent what is arguably the most comprehensive consideration of the formation of norms of customary international law. Chapter Eight is an appraisal of the theory of customary international law. The writer identifies at least two factors that appear to weaken the legitimacy of norms of customary international law. The first is reliance by international tribunals on norm-creating violence (NCV) in their determination of the question whether or not a new norm of customary international law has formed, and following on from that, norm-enforcing violence (NEV), norms of customary international law inaugurated without regard to the requirements set in the formal source of custom are applied to resolve disputes. The second is what appears to be strict adherence by international tribunals to uncritical foundationalist philosophy where rejection and acceptance of views competing to regulate the same sphere (*otherness*) occurs without justification, and the privileged view is enthroned both as the rule and as customary international law almost effortlessly. These factors, it is submitted, weigh heavily against the creation of a consistent, transparent, coherent and determinate doctrine of custom. Therefore, to address custom's legitimacy deficit sufficiently these difficulties ought to take first priority. The writer proposes a customary process based on critical foundationalism as opposed to the current one based on uncritical foundationalism.

Throughout this examination particular values are examined for their potential effect on the legitimacy of the process of custom. These include the temporal principles that guided in 1920 the Committee of Jurists' tasked with formulating the Statute of the Permanent Court of International Justice (PCIJ), the collegiate and individual responsibility of judges of international tribunals, the ferment of positivist legal philosophy on the subject and perception of language and how that affects its application in legal discourse on custom. From this examination are revealed secondary tendencies that impair custom's transparency, determinacy and predictability. For instance, the commonly held view that a norm of customary international law is formed when States exhibit practice (SP) which they regard as being obligatory (OJ) that has led to the slogan $SP + OJ = CIL$ does not say anything about the level and quality of SP and OJ that suffices to create a new norm of CIL. Practice shows that sometimes international tribunals declare a new norm of customary international law without the slightest regard to whether or not there is evidence of SP or OJ on the matter - what one might call customary international law by prescription. Practice also shows that sometimes evidence of only one of the two elements of customary international law will suffice, a kind of baby produced from an unfertilised ovum. Sometimes a little SP will suffice where OJ is overwhelming vice versa. Consequently, international tribunals are able at random to vary their requirements of custom whenever they are called upon to determine whether a new norm of customary international law has been formed. This makes it difficult to talk about an ascertainable empirical threshold at which the elements of custom crystallise to form a new norm of customary international law. International tribunals' continuing practice of varying at will the requirements of custom negates the textual determinacy, substantive coherence, and general transparency of the process of custom which are integral to the legitimacy of norms of law. This writer argues that in order to achieve legitimacy enhancing transparency in the process of custom, it must be acknowledged first that the power applied by international tribunals when they inaugurate new norms of customary international law always creates categories of *dominance* and *subservience*, *inclusion* and *exclusion*. Such an acknowledgement would foster a situation where both the power applied by tribunals and the manner in which it is applied, can legally be scrutinised for excesses that limit first the transparency of the process of custom, and second the legitimacy of norms of customary international law. It would also bring into the discourse on custom's transparency those socio-political values that influence tribunals' determinations on the question whether or not a new norm of customary international law has formed. This, it is submitted would be a crucial first step in the effort to demystify the process by which rules of customary international law are created.

Notes

- ¹ Allot, P. (1977) "The People as Law Makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England", *Journal of African Law*, vol. 21, p.1.
- ² Dunbar, N.C.H. (1983) "The Myth of Customary International Law", *Australian Yearbook of International Law*, vol. 8, p.1.
- ³ See Judge Tanaka's dissenting opinion in the North Sea Continental Shelf Cases, International Court of Justice Reports, 1969, p.175.
- ⁴ Dixon, M. (3rd edn. 1996) *International Law*, Blackstone Press Ltd., London, p.27.
- ⁵ See Villiger, M.E. (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice of the Interrelation of States*, Kluwer Law, The Hague, p.53.
- ⁶ Statute of International Court of Justice, 26 June 1945, San Francisco, UKTS 67 (1946) Cmnd. 7015; UNTS 993, 59 Stat. 1031.
- ⁷ This committee's work is still in progress. See International Law Association (1996) Report of the Sixty-seventh Conference, Helsinki, p. 624.
- ⁸ Ibid. See for example, Corfu Channel Case (discussed in Chapter Five) where the ICJ inaugurated a new norm of CIL which it then relied on to establish the case's operative cause. Although the ICJ heralded the norm as a well - established principle, the United Kingdom, one of the maritime powers of the world, did not appear to know about the norm.
- ⁹ Corfu Channel Case (United Kingdom v. Albania) International Court of Justice Reports (1949) p.41.
- ¹⁰ Anglo-Norwegian Fisheries Case (UK v. Norway) International Court of Justice Reports (1951) p.116.
- ¹¹ North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) International Court of Justice Reports (1969) p. 3.