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University of Catania School of Law
CRIO Centre of Research on International Organizations
Villa Cerami
I – 95124 Catania Italy

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Adriana Di Stefano
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Giuseppe Matarazzo

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PATHS TOWARDS A FRESH RE-THEORIZATION OF INTERNATIONAL CUSTOMARY NORMS. HOW RELEVANT IS THE PRACTICE ELEMENT?*

Rosario Sapienza

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I. Introduction.

In a very interesting and thought provoking essay published in 2003 in the Netherlands International Law Review, Robert Kolb has a very striking incipit.

"As with everything which cannot be seen or grasped, customary law remains something of a smiling sphinx in the realm of lega1 theory. Over the centuries, it has tended to generate puzzling questions of understanding and of construction, some linked to the concept of custom itself, others linked to the conception of custom within the context of a specific society with its special structure. In societies where custom continues to play a paramount role, that is, in societies deprived of a centralised legislator, the predominance of custom imports into the law and lawmaking the many uncertainties invariably linked with it. This is particularly true of international law".

And another distinguished jurist, Charles De Visscher, has, some fifty years ago, given a highly eloquent description of the uncertainties inherent in the complex process of construction entrusted to the interpreter:

«Les incertitudes qui subsistent au sujet de la formation coutumière concernent surtout le processus mental par lequel l'esprit humain associe la normativité (idée de l'obligation) à certaines régularités sociales. Le lien qui, après coup, s 'établit ici ne peut Etre précisé en termes généraux. C'est que l'idée d'ordre qui, sur ce point, guide la pensée juridique, procède elle-meme d'une représentation de valeurs ... Ni les données de fait à utiliser (nombre, spécificité), ni la direction dans laquelle ces données s 'enchaineront pour prendre un jour forme e figure de "précédents" constitutifs de la coutume ne sauraient etre l'objet de généralisations dans une théorie de la coutume».

Now, these two quotations, in my opinion, well explain how unsatisfactory the traditional legalistic account concerning customary law is and how deceptive its in-depth rationale has revealed to be through the years. Several scholars, both international lawyers

and international relations political scientists, have tried to go into these matters in order to offer new theories and new explanations.

It would be unrealistic to try even a brief exposé of all the problems and questions and uncertainties which bedevil the traditional account concerning customary law.

Moreover, when one plans, as we do, to study the whole issue from the point of view of our "contextual" theory, which aims at studying the problems of international law in the "context" of the global society.

Therefore, in tackling this problems we shall start by one the most generally accepted tenets of the traditional theory, viz. the so called two elements doctrine' to test its reliability in the global society context.

II. The so called two elements theory of customary norms and its critics.

Everybody knows, in fact, that according to a widespread point of view, custom stems out of the interrelation of two distinct elements, namely the *repetitio facti* and the *opinio iuris.'*

In other words the international customary norm appears when States adopt uniform behaviours, a common and consistent practice, and this practice is accompanied by the internal conviction that this behaviour is consistent with what is required by law.

According to the ICJ, in the often-quoted passage of the *North Sea* cases:

"Not only must the acts concerned amount to a settled practice, but they must also be such, or be 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. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty"

But this two-elements theory has not been generally accepted by scholars, rather it has often been subject to some criticism. Several scholars, in particular, have emphasized the idea of the paramount relevance of the practice element.

According to Hans Kelsen, just to name a distinguished European jurist of the past century, custom emerges through the consolidation of the practice element, and you do not need to look for what is generally named “opinio iuris” . According to other scholars, *opinio iuris* is in some way implicit in practice, or rather practice is the mean through which you can proof the existence of the *opinio iuris*.

III. A closer look at International Custom. Customary norms without a practice element?

Now, in my opinion, all these approaches, the mainstream and the critical, though equally authoritative, share a point of view that should instead be challenged: the idea that custom is a unitary, monolithic concept.

Which is no more true at all nowadays. We still use the unitary concept of custom and customary law to point at very different situations, having only in common the quality of being unwritten norms. But this does not necessarily imply that custom, or rather the process of its creation, should be described always in the same manner.

There are some instances of what is still called customary law which are in no way related (or not related in a direct way) to the practice element. Customary norms which surely exist, but without being connected to a relevant practice.

This happens, for instance, in the case of norms which are normally seen as customary, but may reveal, at a closer look, not based on a consistent State practice, but more on the fact that they are so deeply related to the idea of an international community made of equally sovereign States that they appear as logical postulates of legal arguments about international law.

In this case we should speak of "deductive" international norms, rather than norms stemming out of an "inductive" process from State practice. We shall call them "inherent rules"

Or let us think of those situations when the international community feels that a norm or a legal principle is morally necessary as a foundation of the legal edifice of international law. In the field of human rights and humanitarian law, more often than not a custom is ascertained more according to an *opinio iuris* than to effective practice, which may on the contrary reveal dismaying.

In many other fields of international law, especially those newly emerged such as space law or environmental law or international criminal law, it may be difficult and painstaking to wait for the emergence of customary norms through the traditional consolidation of practice. And it is therefore generally accepted that in these fields customary norms can be held to exist from the very moment they are enunciated in relevant international documents. Again we are speaking here of a deductive process, and not of an induction from practice observation.

IV. The so called "deductive International Law" and our Public International Law in Context Theory.

Let us now focus on this so called "deductive International Law". As we said above, in certain cases, the rules of customary law, when designated as fundamental or inherent rules whose normative status derives from the structural necessity of international legal system, are identified without much enquiry into the supportive State practice and opinio juris. This also applies for those norms which are seen as morally compulsive or simply necessary to the establishment of a normative framework.

Whether such fundamental or inherent rules can be seen as customary in the mainstream sense of this term may amount to a highly debatable issue.

This idea is definitely no news in international law theorizing, not even in most traditional positions. As Fitzmaurice emphasizes in a more organic presentation, though clearly inspired from a consensual point of view concerning the process of creation of international norms,

"If a rule is necessary, or if the existence of a system of rules is a necessary condition of a certain state of affairs, the rule or system must also necessarily be binding, or it would not fulfil, or be able to fulfil its function. ... It is something that arises logically and inevitably out of the requirements of international intercourse, relations and transactions. It is an inherent necessity of the case, and no theory of consent need to be postulated in order to account for it."

Bleckmann also develops the rationale behind the inherency of rules, speaking of consequential rules (Folgesatze). There are fields in which the existence of certain legal rules is objectively necessary and independent of practice, such as the fields of territorial sea, nationality or outer space. There can also be areas which relate to the structure of international law and the consequent allocation of territorial competence, or liability of the State organs for its action. There are further areas in which these consequential rules can be derived from fundamental legal principles. They may possibly be confirmed through practice as well, but this is not deemed to be necessary.

But I would rather emphasize that a fundamental element is missing in these theories: the idea that all these principles stem out of an informal agreement of the leading forces in the international community.

These forces may be (and more often than not still are) leading States, but also majorities at vote in international organizations, international media networks, civil society organizations, i.e. all those organizations capable of moulding ideas and ways of thinking and thus acting as a global leading compact.

V. A tentative conclusion and a plan for further research.

We have in this paper tried to show that in current international legal discourse the words “custom” or “customary norms” are used to point at norms of different nature and reach. Therefore it is no more advisable to stick to the traditional legalistic account of a custom always stemming out of the two elements of practice and opinion iuris.

We have in particular gone into a category of international norms containing principles of law which are accepted as such and where no inquiry into the existence of a consistent practice is required.

In this area, the reasoning is therefore deductive. But deductive from what? We have put forward the idea that this process of deduction is made from an informal agreement between the leading forces of the international community (leading States, majorities in intergovernmental organizations, international media networks, civil society organizations and so on)

The idea of the informal role played in contemporary international law by these leading forces is one of the main features of our Public International Law in Context Theory, explaining through which ways traditional international law can survive and be enforced in a global environment.

Further reflections and elaboration of such categories, including the precise legal requirements governing them, would be of course interesting and rewarding.

But for the moment being these were, ladies and gentlemen, the few considerations which I’m glad to have had the chance to share with you and I thank you all for your kind attention.

Bibliographical Notes and References.

The opening quotation in para. 1 is picked up from KOLB, *Selected problems in the theory of Customary International Law,* in *Netherlands International Law Review,* 2003, p. 119 ff., while the extract from De Visscher is drawn from DE VISSCHER, *Théorie et réalités*

en droit international public, 2 e. éd., Paris, 1955, p. 190 ff. Useful hints for a constructive rethinking of custom and of its role in international law can be found in ROUGHAN, *Conceptions of Custom in International Law* (2007), available at SSRN: http://ssrn.com/abstract=1072965 and in BRADLEY, GULATI, *Withdrawing from International Custom*, (2009) in *Yale Law Journal*, (120) available at SSRN: http://ssrn.com/abstract=1523906. The quote from the International Court of Justice judgment is taken from The North Sea Continental Shelf Cases, 1969 at p. 44, para. 77.

Traditional "legalistic" points of view concerning customary international can be perused through this short bibliography AKEHURST, *Custom as a Source of International Law*, in *British Yearbook of International Law,* 1974-1975, p. 1 ff.; ARANGIO-RUIZ, *Consuetudine internazionale*, in *Enciclopedia Giuridica Treccani,* vol. VIII (1988), *ad vocem*; BARILE (G.), *La rilevazione e l'integrazione del diritto internazionale non scritto e la libertà di apprezzamento del giudice*, in *Comunicazioni e Studi dell'Istituto di Diritto Internazionale e Straniero dell'Università di Milano,* vol. V, p. 150 ff.; CONDORELLI, *Consuetudine internazionale*, in *Digesto delle Discipline Pubblicistiche*, vol. III (1989), *ad vocem*; D'AMATO, *The Concept of Custom in International Law*, New York, 1971; DUPUY (R.-J.), *Coutume sage et coutume sauvage*, in *Mélanges Rousseau*, Paris, 1974, p. 75 ff.; FERRARI BRAVO, *Méthodes de recherche de la coutume internationale dans la pratique des Etats*, in *Recueil des Cours de l'Académie de Droit International de La Haye*, 1985, vol. III, p. 233 ff.; FRANCIONI, *La consuetudine locale nel diritto internazionale*, in *Rivista di Diritto Internazionale*, 1971, p. 396 ff.; PENTASSUGLIA, *La rilevanza dell'obiezione persistente nel diritto internazionale*, Bari, 1996; RONZITTI, *La Corte internazionale di giustizia e la questione della liceità della minaccia o dell'uso delle armi nucleari*, in *Rivista di diritto internazionale*, 1996, p. 861 ff.; WOLFKE, *Custom in Present International Law,* Dordrecht, 1993; ZICCARDI, *La consuetudine internazionale nella teoria delle fonti giuridiche*, in *Comunicazioni e Studi dell'Istituto di Diritto Internazionale e Straniero dell'Università di Milano,* vol. X, p. 187 ff.

Our theory about Public International Law in Context is roughly sketched, for the moment being, in *The Never-ending Transition. From the Ius Publicum Europaeum to a Law for the Global Society*, CRIO Paper no. 11 at http://www.lex.unict.it/crio/criopapers

The quotes in para. 2 are taken from KELSEN, *Théorie du droit international coutumier*, in *Revue internationale de la théorie du droit, nouvelle série, 1939,* pp. 264 ff. and BARILE (G.), *Lezioni di diritto internazionale*, Padova 1983 (2 ed.), p. 73 ff. According to other authors this mechanism is something open to sociological enquiries, because the custom originates from a process of claims and counterclaims which can be seen as a fact [see, e.g., the New Haven school, MCDOUGAL, *International Law, Power and Policy: A Contemporary Conception*, in *Recueil des Cours de l'Académie de Droit International de La Haye*, 1953-I, pp. 137 ff.; REISMAN, *International Law-Making: A Process of Communication*, *ASIL Proceedings* (1981) pp. 101 ff.

The quote in para. 3 is taken from TOMUSCHAT, *Obligations Arising for States Without or Against their Will*, in *Recueil des Cours de l'Académie de Droit International de La Haye*, 241

The first quote in para. 4 is taken from FITZMAURICE, *The General Principles of International Law Considered from the Standpoint of the Rule of Law,* in *Recueil des Cours de l'Académie de Droit International de La Haye*, (1957-II), pp. 39-40. The second one from BLECKMANN, *Volkergewohnheitsrecht trotz widerspruchlicher Praxis?* in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1976, p. 374 ff. at 389

At this juncture, it is maybe not useless to say a word on whether this approach to customary rules, that is the reliance on the inherency of rules, could be described as implying a revival of the natural law argument.

Classical writers and 19th century writers refer in several places to State practice while at the same time accepting the natural law argument, just seeing practice as a mean to prove the existence of positive international norms.

Now, I must admit how fascinated I am by the possibility of a natural law revival in the theory of international law, particularly in this era of a Never ending Transition from the Westphalia and Ius Publicum Europaeum model of international law towards the United Nations model of a Global Society, a Maxima Civitas Humana, but for the moment being I

feel that it is somewhat too early to accept these ideas as definitely and generally accepted tenets.

My reluctance is based on the consideration that though still advocated, Natural Law arguments are normally useful in a highly cohesive social milieu, which is not the case with our international community at present. But this will offer matter for further elaboration. On the idea of the natural law origin of customary norms see Orakhelashvili, *Natural Law and Customary Law,* in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* 2008, p. 69 ff.