AGORA: THE END OF TREATIES

CUSTOM AND TREATIES AS INTERCHANGEABLE INSTRUMENTS OF NATIONAL POLICY

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As treaties decline, customary international law can be an important mechanism of international cooperation over the medium term. There are increasingly fewer treaties ratified by the United States, with a record-low number of five[1] in 2009–2012, and fewer multilateral treaties adopted worldwide.[2] Yet, the demand for global rules and standards has not abated. Thus, for many international questions where treaties are not available as a source of new rules, customary international law may serve as an interchangeable instrument of national policy.[3]

Continuing Relevance of Custom

Customary international law has long been a mechanism of international relations across different distributions of global power and varying jurisprudential philosophies. It is generally a more prominent feature of decision-making in non-hierarchical communities, which overcome the lack of a central lawmaker by treating past practice as potentially relevant to future decisions.[4] And it should continue to be an important mechanism of global governance in the twenty-first century. Yet, the form of customary international law will be different to reflect changes in the international system.

Custom has accommodated different distributions of power within the international community. For instance, in ancient Rome with its high concentration of global power, the concept of jus gentium emerged to govern relations between Roman citizens and foreigners and was enforced by Roman institutions.[5] But in the contemporary world with growing diffusion[6] of power to numerous state and non-state actors, dilution of power from hard to soft mechanisms, and especially in a potential "G-zero"[7] environment with no global

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[1] *Search Treaties through THOMAS*, THE LIBRARY OF CONGRESS.

[2] *Treaties in Force*, U.S. DEP'T OF STATE.

[3] Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II*, 54 YALE L.J. 534 (1945).

[4] *Lecture on the Causes of Uncertainty and Volatility in International Law*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2014).

[5] DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW (2010).

[6] NAT'L INTELLIGENCE COUNCIL, GLOBAL TRENDS 2030: ALTERNATIVE WORLDS (2012).

[7] IAN BREMMER, EVERY NATION FOR ITSELF: WHAT HAPPENS WHEN NO ONE LEADS THE WORLD (2012).

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leadership,[8] international custom will increasingly rely on the power of persuasion across international and national actors.

Both of these factors—composition and distribution of global power—mean that international custom has become increasingly complex.[9] At the time of the Permanent Court of International Justice (PCIJ) when the modern definition of custom was developed, there were fewer than 60 states, such that a concept of "general practice accepted as law" was perhaps easier to envision as a source of adjudicative rules. With the rise of multilateral treaties and hopes for international legislation during the twentieth century, the use of custom may have temporarily waned. And in the twenty-first century—with nearly 200 states and many non-state actors—international custom may seem antiquated and unrealistic.

However, modern technology and means of instant communication help resolve some of these challenges. International actors "increasingly . . . now develop international law more and more through diplomatic law talk—dialogue within epistemic communities of international lawyers working for diverse governments and nongovernmental institutions," which "creates a record of state practice and builds a process of generating *opinio juris*."[10] Notwithstanding its limitations, this mechanism of international lawmaking should not be dismissed as it still offers an attractive vision for the international community.

Custom, which reflects practice by definition, directly relates to all composition of power. It can arise based on acts of violence (e.g., sovereignty over air space declared at the outbreak of World War I or self-defense against non-state armed groups in the aftermath of 9/11), economic coercion (e.g., financial sanctions against terrorist networks), economic inducement (e.g., exclusive economic zone over the continental shelf two hundred nautical miles past the territorial waters), and reason (e.g., no sovereignty in outer space or agreements must be kept). Ultimately, however, custom is accepted by other international actors based on persuasion. A customary norm's persuasiveness will be a function of its reasonableness or utility, which in turn reflects the perceived common interest of international actors in a given norm.

Given its relationship to practice and power, it is sometimes difficult to disentangle custom's legal influence on decision-making from the back-and-forth struggle of politics that reaffirms or revises custom. As in other customary contexts, "law and politics[11] [are] overlapping and interactive rather than . . . mutually distinct considerations." This interrelation "does not by itself negate the importance of law,"[12] but makes any claims as to its strength tentative and subject to case-by-case analysis. The assumption that custom has some precedential effect is minimal and plausible, given its use by political and judicial actors. If there were no effect, then why would any actor bother relying on custom in argumentation? After all, it could be used to undermine one's credibility during a subsequent decision if one's later policy preference was contrary to the previously articulated customary norm; it's better to keep your options open, one might say. Given that much of individual actors' power rests on their credibility, use of any arguments that might affect it is not done lightly. One might be able to get away with the occasional fig leaf, but one cannot construct a whole tapestry of decision-making over time in this manner. And so, to the extent international custom is utilized by political and judicial branches, it has to be assumed to have some legal effect in the form of prohibition or permission. In addition, to the extent power is defined as the ability to accomplish a certain objective,[13] past custom

[8] CHARLES A. KUPCHAN, NO ONE'S WORLD: THE WEST, THE RISING REST, AND THE COMING GLOBAL TURN (2012).

[9] JOSEPH S. NYE, JR., PRESIDENTIAL LEADERSHIP AND THE CREATION OF THE AMERICAN ERA (2013).

[10] Harold Hongju Koh, *Address: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. ONLINE 1 (2012).

[11] Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013).

[12] *Id.*

[13] Bart. M.J. Szewczyk, *Variable Multipolarity and UN Security Council Reform*, 53 HARV. INT'L L.J. (2012).

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may be as good a predictor of actual power in the present as non-legal factors. Thus, international and domestic actors would be unwise to disregard custom and, indeed, tend not to do so.

Distinction Between Political and Judicial Actors

Notwithstanding international custom's historical pedigree and continuing relevance, "after nearly half a millennia of debate, [scholars and practitioners are] no closer to conclusive answers as to what makes a binding custom among nations . . . and the process by which customary international law changes or dies."[14] Indeed, Manley Hudson pointed out[15] that the framers of the modern formulation as general practice accepted as law "had no very clear idea as to what constituted international custom."

Even before international custom became a source of rules adjudicated by an independent court—the PCIJ drafting committee president Édouard Descamps noted[16]—"[c]ustom has always played an important part" in international law. International custom, he observed,[17] is "a very natural and extremely reliable method of development [of international law] since it results entirely from the constant expression of the legal convictions and of the needs of the nations in their mutual intercourse."

Drawing on this tradition, scholars and practitioners for nearly a century have sought to make international custom also a source of judicially applicable law as opposed to rules enforced by political actors. These modern efforts have resulted in significant uncertainty and limited consensus on custom as to its elements, sources of evidence, and burdens of proof. But conventional critiques against the application of international custom by courts[18] do not apply to its use by political branches and should not narrow the future scope of this modality of international lawmaking. Indeed, even classical realists in the aftermath of the devastation of World War II, who otherwise denied the relevance of court-enforced international law to international politics, recognized the conceptual value of "political norms"[19] as an explanatory variable of foreign affairs. Once distinctions are drawn between types of decision-makers, one can develop appropriate guidelines for the use of international custom by the political and judicial actors in the twenty-first century.

Many of the arguments raised during the PCIJ debates[20] were in the context of establishing "clearly defined" rules instead of "more or less vague principles" for the Court to apply, particularly if states were to submit to its compulsory jurisdiction. Some of the delegates feared that custom's potential indeterminacy would give the PCIJ unacceptable law-making power. For instance, Elihu Root argued, based on his experience with the Senate's failure to ratify the treaty establishing an International Prize Court, that "America would never give its adherence to a treaty for compulsory jurisdiction outside the limits of recognized rules." He also pointed out that the Great Britain had similar objections. The same concerns regarding the loss of democratic control and impermissible judicial lawmaking can apply to the use of international custom by domestic courts. But the critique is not necessarily directly transferable to the use of international custom by political branches.

By its contemporary definition, custom exists because states engage in practices that are generally accepted as law. Custom's dynamism can be its disadvantage as a source of adjudicative law as it may grant judges too

[14] *See* BEDERMAN, *supra* note 5.

[15] *Summary Records of the Second Session June 5-June 29 1950*, Y.B. INT'L L. COMM'N 1, UN Doc. A/CN.4/SER.A/1950.

[16] *Id.*

[17] *Id.*

[18] Bart. M.J. Szewczyk, *Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions*, 82 GEO. WASH. L. REV. 1118 (2014).

[19] HANS JOACHIM MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (5th ed. 1988).

[20] *See Summary Records of the Second Session June5-June 29 1950*, *supra* note 15.

much discretion. However, its adaptability to change also makes it a uniquely advantageous mechanism of international lawmaking for political actors.

The ICJ has interpreted custom as consisting of two elements: "widespread and consistent state practice"[21] and *opinio juris*, defined as[22] "a general recognition that a rule of law or legal obligation is involved." But significant uncertainty remains regarding more detailed criteria for these elements and how they are demonstrated. Questions regarding identification of custom have eluded clear answers and continue to pose problems for scholars and judges. Resolving them unequivocally for all international actors over time alike might be a quixotic and Sisyphean task, which this essay does not undertake. However, customary principles of legal decision-making for our time are within reach for specific categories of actors, such as domestic courts or domestic political branches. The competing theoretical and methodological approaches to international custom—and the resulting uncertainty—have been "sometimes seen as a weakness[23] in international law generally," particularly for courts. On the other hand, the unwritten nature of custom may make it "a source of signal strength"[24] for international law, at least for the political branches. International custom enables the international community to "informally develop rules of behavior without the necessity of resorting to more formal and difficult means of law-making (like treaties)."[25] Whereas treaties require agreement on a range of issues, international custom can arise based on agreement on a specific question or problem.[26] Indeed, no one in the PCIJ drafting committee questioned custom's established status as a source of international lawmaking for the political branches; as one constitutional law scholar observed[27] in a different context, the "point is elementary and elemental. It goes without saying." Instead, the disagreement over the PCIJ statute focused on the appropriate scope of judicial discretion in applying and developing custom. Thus, the range of theories of international custom that has since developed is potentially problematic for judicial actors, but can be beneficial for political actors.

This crucial distinction between international custom as a source of judicial decision-making and a source of political decision-making—well-recognized by the PCIJ drafting committee—has become obscured over time, as scholars have focused primarily on courts. And whereas clear guidelines and simple heuristics for judicial use of international custom can and should be established to minimize impermissible discretion, its use by the political branches can be more flexible, require lower burdens of proof, and can utilize the full range of theories of customary international law.

From the perspective of political actors, the mechanism of customary international law should require minimal criteria: some form of practice through executive or legislative acts; and some relation to an issue of international law. There should be no amount of prior state practice required before applying or creating customary international law. As one scholar suggested,[28] even "one instance of an act or restraint that followed the articulation of a rule" might be sufficient to create custom. Similarly, the requirement that *opinio juris* "must be of international, not domestic, law"[29] or that the state practice relate to "international rela-

[21] Sovereignty Over Pedra Brance/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.), Judgment, 2008 ICJ REP 12 (May 23).

[22] North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), Judgment,.1969 ICJ Rep. 3 (Feb. 20).

[23] Report of the International Law Commission to the General Assembly, UN GAOR Supp. No. 10, UN Doc. A/67/10 (2012).

[24] *See* BEDERMAN, *supra* note 5.

[25] *Id.*

[26] KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW (2d ed. 1993).

[27] AKHIL REED AMAR, AMERICAN'S UNWRITTEN CONSTITUTION (2012).

[28] ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

[29] *Id.*

tions"[30] should be limited when the distinction between international and domestic law is becoming increasingly faint and the field of customary international law is likely to encompass a wider range of norms. Finally, there should be no requirement that a political actor is aware of these elements as frequently "custom is unconscious and unintentional lawmaking."[31] The validity of a given customary-claim assertion will depend on a given practice's acceptance by other international actors or its link to other accepted practices. Similar to the doctrine of precedent in case law, custom is not determined unilaterally by its authors but rather bilaterally with its audience—what could be termed a type of inter-decision.

Conclusion

Custom's full potential is not yet realized and its mechanisms may be increasingly relied upon as treaties are difficult to ratify. Indeed, custom may be more appropriate for issue areas involving frequent technological or policy change, even if a treaty is politically feasible. It is more adaptable to change in the international system compared with formal agreements. Due to the bounded rationality of state actors in assessing consequences of such change, greater flexibility in the agreed-upon rules may be desirable. Moreover, unwritten agreements allow for greater dynamic learning. On the other hand, there are costs to implicit agreements, such as higher uncertainty of the underlying rule and greater risk of instability. The threshold choice between the use of unwritten custom and written treaties as a source of international law should take these factors into account, rather than assuming a preference for treaties.

The primary intellectual challenge is to fully understand the scope of international custom and harness its possibilities. Indeed, the conceptual straightjacket of applying the same standards of international lawmaking across governmental branches—judicial and political—may have even warped the existing practice of the political branches, whose actors might misperceive that customary international law requires the heightened criteria of proof expected of courts. Part of the solution is distinguishing between political actors and judicial actors in developing and applying customary international law, and applying appropriate guidelines of decision-making to each.

[30] *See Summary Records of the Second Session June5-June 29 1950, supra* note 15.

[31] HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW, (Robert W. Tucker ed. 2d ed. 1966).