

**CUSTOMARY INTERNATIONAL LAW
NOT MERELY FICTION OR MYTH**

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I. INTRODUCTION

The concept and application of customary international law in modern international law are often controversial. Much debate exists on the definition of this law and its consistent application. Many questions arise such as what do we ask of international law? What does it need to be? What constitutes 'good' international law or does it even exist? Should there be just one source of international law or are several sources better? How does one determine whether international law has failed or that it is a myth or fiction instead?¹

This article will argue that the definition debate is poorly defined. For example, it misses the point on the true value of customary international law by assuming that a clear definition is advantageous and therefore needed. In some of the debates on its consistent application this has focused mainly on a limited number of cases and fails to convert into a serious question. The article will argue that it is wrong to assume that inconsistency in the approach to the substance of customary international law is an issue. Instead, the issue concerns the person making the assumption more than the assumption itself. Finally, it will be shown that customary international law influences and regulates state behaviour, a fact that gives this law its legitimacy. As a result, customary international law is far from being a fiction or myth. On the other hand, it is a valuable source of international law due particularly to its flexible nature.

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¹ This raises another debate on the nature of international law. Franck states: "The surprising thing about international law is that nations never obey its strictures or carry out its mandates". However, he adds: "Why should rules, unsupported by an effective structure of coercion comparable to a national police force, nevertheless elicit so much compliance, even against perceived self-interest, on the part of sovereign states?": Franck, "Legitimacy in the international system" (1998) 82 *American Journal of International Law* 705, 707.

II. APPROACHES

One widely adopted view on the approach to international law is to frame it firmly in the global environment created by the concept of sovereign equality.² This is stated clearly in Article 2(1) of the United Nations Charter.³ However, Trimble articulates a slightly different approach stating that “[i]n the popular view international law is a charade – governments obey it if convenient to do so and disregard it whenever contrary interest appears.”⁴ This view is couched in the realist concept of the lack of a higher authority or world government resulting in no ‘world law’. It is essentially derived from the Waltzian notion of international relations that exists in the realm of anarchy, a realm where state survival is the key motivation for behaviour.⁵

A liberal or postmodernist view of international relations, and hence international law, would look different again. This view concerns state behaviour or interaction that has a greater or lesser degree of ability to buck the ‘logic of anarchy’.⁶ Charlesworth, Chinkin and Wright seek yet another approach:⁷

² The term ‘sovereignty’ is also not without contention. Reisman states: “Since Aristotle, the term ‘sovereignty’ has had a long and varied history during which it has been given different meaning, hues and tones, depending on the context and objectives of those using the word. Bodin and Hobbes shaped the term to serve their perception of an urgent need for internal order. Their conception influenced centuries of international politics and law”. Moreover, “[a]lthough the venerable term ‘sovereignty’ continues to be used in international legal practice, its referent in modern international law is quite different. International law still protects sovereignty, but – not surprisingly – it is the people’s sovereignty rather than the sovereign’s sovereignty”: Reisman, “Sovereignty and human rights in contemporary international law” (1990) 84:4 *American Journal of International Law* 866, 870.

³ Article 2(1) provides: “The organisation is based on the principle of the sovereign equality of all of its Members”.

⁴ Trimble, “A revisionist view of customary international law” (1986) 33 *UCLA Law Review* 665.

⁵ Guzzini states: “Waltz is very careful in stating that the primary goal is not to maximise power, but to achieve or maximise security”: Guzzini S, *Realism in International Relations and International Political Economy* (1988, Routledge, London) 135. See also Waltz KN, *Theory of International Politics* (1979, McGraw Hill, New York).

⁶ Refer Hobson J, *The State and International Relations* (2000, Cambridge University Press, Cambridge).

⁷ Charlesworth and others, “Feminist approaches to international law” (1991) 85:4 *American Journal of International Law* 613, 615.

A feminist account of international law suggests that we inhabit a world in which men of all nations have used the statist system to establish economic and nationalist priorities to serve male elites, while basic human, social and economic needs are not met.

However, Onuf states that “[i]nternational law exists, most theorists agree, but efforts to explain how it works fail the test of credibility.”⁸ In this context, any notion of law is transient by definition.⁹

III. IMPLICATIONS

The different approaches indicate that modern international law and relations are not uniform or constant.¹⁰ What does this mean for customary international law?

First, since the environment in which customary international law operates changes constantly, this law needs to be flexible to be of use.¹¹ Secondly, it has to be closely aligned with the internal workings of sovereign state relations for it to endure in this environment. In other words, customary international law needs to sit comfortably with state consent. Finally, it should influence and help regulate state behaviour because failure to do so would change it from fact into fiction or myth.

Customary international law seems to have a ‘situational’ as well as a ‘mechanical’ element to its content. For example, Schachter states that “customary law, new and old, are products of political aims and

⁸ Onuf, “International legal order as an idea” (1979) 73:2 *American Journal of International Law* 244.

⁹ Citing Tammes, Thirlway states: “International law often puts its subjects before a conflict of interests without providing the key to the solution”: Thirlway HWA, *International Customary Law and Codification* (1972, AW Sijthoff, Leiden) 53.

¹⁰ Koskenniemi uses this to argue for a flexible view of the nature of law. He states that “international law is not rules... Firstly, rules are too conservative. They are only ‘accumulated past decisions’. If international law were only such decisions, it would be too static to contribute to a changing world”. Koskenniemi, “International law in a post-realist era” (1995) 16 *Australian Year Book of International Law* 1, 5.

¹¹ This consideration is even more important if Koskenniemi’s view of international law is accepted, namely, that international law is ‘internalised’. He states: “If we accept treaties and custom as sources of the law, this is precisely because they represent, as it were, the external face of international social facts”: *ibid* 3.

conditions” while Visscher states that “[e]very international custom is the work of power”.¹² In addition, Byers states:¹³

[A]lthough States are equally entitled to participate in the customary process, in general, it may be easier for more ‘powerful’ States to behave in ways which will significantly influence the development, and maintenance or change of customary rules.

Although the above commentators provide examples to support their argument,¹⁴ they fail to discredit the merits of international customary law. Thus, while it may be shown that power and customary law are intertwined, this does not mean that customary international law is somehow less viable as a source of law. Nor does it mean that it is somehow less credible in its own right as a source of law.¹⁵ Although a powerful state may divert substantial resources to customary international law and its existence, this may also be true in relation to other aspects of international law and relations. In this sense, the ‘power’ debate is not restricted to international customary law alone and is inconsequential therefore. Further, the underlying flexibility surrounding customary international law leans towards the argument that customary international law in some instances is more robust than treaty law within the context of power in international relations.¹⁶

¹² Schachter, “New custom: power, opinio juris and contrary practice” in Makarczyk J (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996, Kluwer Law International, Boston) 536.

¹³ Byers M, *Custom, Power and the Power of Rules* (1999, Cambridge University Press, Cambridge) 37.

¹⁴ For example, Byers argues that more powerful states have larger and more resourced diplomatic corps to influence and monitor developments in international customary law: *ibid.*

¹⁵ This consideration is even stronger if Koskenniemi’s notion of law is accepted. He argues that “the distinction between the relevant and the irrelevant, and between law and power, can be achieved by introducing a psychological element into law... laws are effective because they have been internalised, and so are obeyed as a matter of course, not because of some external constraint”: Donaghue, “Normative habits, genuine beliefs and evolving law: Nicaragua and the theory of customary international law” (1995) 16 *Australian Year Book of International Law* 327, 328.

¹⁶ In *North Sea Continental Shelf Cases*, the International Court of Justice states clearly that “[w]ith respect to other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable time, a very widespread and representative participation in the convention might suffice itself,

Article 38 of the Statute of the International Court of Justice provides the classic starting point for discussing the mechanical aspects.¹⁷ Article 38(1)(b) provides that the Court shall apply “international custom, as evidence of a general practice accepted as law.”¹⁸ This starting point is itself a source of controversy at times,¹⁹ because international custom is not defined. Questions such as the following therefore arise: What is custom? What constitutes a general practice? Who decides the underlying concepts? At what point does law come into existence? What are the relevant circumstances, contexts, timeframes and political climates, if any?

This imprecision led critics such as Dunbar to state that “the concept of customary international law [is] merely fiction or myth.”²⁰ If so, does this mean that the concept of customary international law has no relevance or role in modern international law? Or does the concept, with shortcomings and imperfections, add value to the regulation of state behaviour in international relations as another source of law? Given that the wider notion of international law is often criticised for lacking teeth, it stands to reason that customary international law as one branch of international law may find itself under constant attack.

provided it included that of States whose interests were specially affected”: [1969] International Court of Justice Reports 3, 73. Thus, whilst one could argue that more powerful states may be more likely to be specially affected since they tend to participate more regularly in different theatres of international law and relations. However, this cannot counter the ‘process’ by which customary law pays particular attention to interests of ‘specially affected’ states irrespective of their power.

¹⁷ Villiger ME, *Customary International Law and Treaties* (1997, Kluwer Law International, The Hague) 15.

¹⁸ Wolfke points out that the International Law Commission later took “accepted as law” to mean “an expression of the consent of states, hence their will, and not of any feeling, conscience or conviction”: Wolfke K, *Custom in Present International Law* (1993, 2nd ed, Martinus Nijhoff, Dordrecht) 7. This supports further the notion of state consent in international law and the role of interested states in its application.

¹⁹ Charlesworth, “Customary international law and the Nicaragua case” (1991) 11 *Australian Year Book of International Law* 1, 2. Charlesworth notes that this is normally accepted to mean “international practice as evidence of a general custom accepted as law”. Villiger states that the 1920 Preparatory Committee that drafted the Statute of the Permanent Court of International Justice seemed to understand the shortcomings of the formulation, as the Court could only apply customary law, not custom: Villiger ME, *Customary International Law and Treaties* (1997, Kluwer Law International, The Hague) 15.

²⁰ Dunbar, “The myth of customary international law” (1983) 8 *Australian Year Book of International Law* 1, 2.

Dunbar's view on customary international law is essentially limited to his view on *Trendtex Trading Corporation v Central Bank of Nigeria*.²¹ However, one judgment hardly provides a reason to conclude that the entire concept of customary international law is fiction. His remedy for the fiction is to have a notion of particular or regional state practice or custom,²² but it is not explained how this simple remedy is not already subsumed by current customary international law or how an application of the concept could enhance international law generally.

When Judge Hudson attempted to articulate his formula to clarify international customary law, he provided it with five elements:²³

1. the concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;
2. the continuation or repetition of the practice over a considerable period of time;
3. the conception that the practice is required by, or consistent with, prevailing international law;
4. the general acquiescence in the practice of other states; and
5. the establishment of each element by a competent international authority.

There remains some conjecture that customary international law can only come about if it is seen as a legal obligation consistent with prevailing international law. However, how can such a law arise if it has to be part of an existing law? Or as D'Amato states:²⁴

If custom creates law, how can a component of custom require that the creative acts be in accordance with some prior right or obligation in international law? If the law prior exists, would not custom be...superfluous as a creative element?

²¹ [1978] Queen's Bench 529. Dunbar's argument revolves largely around Lord Denning's judgment and he holds the view that there is no consensus of states regarding the doctrine of sovereign immunity: see Dunbar, "The Myth of Customary International Law" (1983) 8 *Australian Year Book of International Law* 1.

²² *Ibid* 19.

²³ D'Amato A, *The Concept of Custom in International Law* (1971, Cornell University Press, New York) 7.

²⁴ *Ibid* 53.

While this may make it difficult to define international custom, does it extend to its application also? Since parties have to show the existence of international custom before it can be relied on, it is arguable that the process and hence the definition have latitude and are dependant on 'persuasive argument'. For example, it has been said:²⁵

International consensus...is manifested objectively as a result of strategic calculations of the states that are the creator-subjects of international law. It is misleading to look for 'subjectivities' or national 'intentions' apart from what the state manifests in its international relations.

A redeeming feature may exist in the application of the 'developing' nature of customary law²⁶ that reinforces the sovereign consent by states.²⁷ This retains some flexibility for international law especially the potential for judgments on discerning points of law. One may argue that the International Court of Justice in some of its decisions manifests a type of 'reverse engineering' in order to facilitate a decision so that the law fits the facts.²⁸ Charlesworth supports this position²⁹ stating that the Court in *Case Concerning Military and Paramilitary Activities in and against Nicaragua*³⁰ may be criticised for the obscurity in its

²⁵ Ibid 40.

²⁶ "A customary rule does not arise and exist once and for all. Rather it has to be confirmed repeatedly by instances of State practice meeting certain qualifications accompanied by opinio juris...If the substance of State practice changes, so will the content of the customary rule": Villiger ME, *Customary International Law and Treaties* (1997, Kluwer Law International, The Hague) 61.

²⁷ "The decentralised process of customary law formation undoubtedly leads nation-state officials to view international law not as much as an encroachment on their sovereign freedom of action as the manifestation of their national identity": D'Amato A, *The Concept of Custom in International Law* (1971, Cornell University Press, New York) 29.

²⁸ Charlesworth states that "the Court clings to the orthodox language of custom and tries to squeeze the facts before it into inappropriate categories": Charlesworth, "Customary international law and the Nicaragua case" (1991) 11 *Australian Year Book of International Law* 1, 29.

²⁹ Ibid 27. D'Amato also supports this view: "Students of the Court's jurisprudence have long been aware that the Court has been better at applying customary law than defining it. Yet until *Nicaragua v United States* little harm was done": D'Amato, "Trashing customary international law" (1987) 81:1 *American Journal of International Law* 101.

³⁰ [1986] *International Court of Justice Reports* 14.

judgment, which is at odds with *North Sea Continental Shelf Cases*.³¹ However, although some judgments may be criticised, this is not necessarily a negative reflection of customary international law. The Court would not be the first court to be criticised and neither have all its judgments on customary international law been criticised. Further, while Charlesworth is critical of *Nicaragua*, she does not go as far as to claim that international customary law is fiction or myth.³²

Nicaragua revolves around a United States argument first raised in the jurisdictional phase of the proceedings.³³ In another appraisal of this case, it is seen that D'Amato does not take issue with how the Court dealt with customary international law. It may be said that, at worst, he has only one criticism of the Court's decision and that is when he concludes that only decisions grounded in sound scholarly thoroughness are likely to have any real impact.³⁴ He acknowledges that the Court prior to *Nicaragua* did not have such difficulty, even adding that the argument over the definition of custom had afforded him a career.³⁵

³¹ [1969] International Court of Justice Reports 3. It is noted that Charlesworth fails to make the point that *Nicaragua* and *North Sea Continental Shelf Cases* turned on different points of custom. *Nicaragua* concerned the question of whether a customary rule applied between states that were also parties to a treaty governing the same ground. *North Sea Continental Shelf Cases*, on the other hand, dealt with whether a treaty rule was binding as custom upon a non-party to the treaty.

³² Charlesworth concludes: "The *Nicaragua* case attempts...to stretch the traditional tests of customary law, based on the consent of states, to fit normative aspirations which bear little direct relation to practice...A rethinking of the classic doctrine, however, may allow customary international law to survive into the next century": Charlesworth, "Customary international law and the *Nicaragua* case" (1991) 11 *Australian Year Book of International Law* 1, 31. This is insufficient ground for holding that customary international law is fiction. Although she contends that there is a tension between 'new' and 'old' orders in international law, she fails to show that this is fact. Even if her view on *Nicaragua* is accepted, she does not show that customary international law is not robust enough to accommodate changes in international relations given its broad application and flexible nature.

³³ See [1984] International Court of Justice Reports 392. D'Amato explains that in the jurisdictional debate on the case, the United States had argued that United Nations Charter Article 2(4) "is customary and general international law": D'Amato, "Trashing customary international law" (1987) 81:1 *American Journal of International Law* 102.

³⁴ *Ibid* 105.

³⁵ D'Amato states: "[I]n the sharply contested cases prior to *Nicaragua*, the Court managed to elicit commonalities in argumentative structure that gravitated its rulings toward the customary norms implicit in state practice. The Court's lack of theoretical

In addition, Wolfke states:³⁶

In its sixty years of activity the Court has only four times explicitly quoted or at least referred to subparagraph 1(b) of Article 38 of its Statute...One even gains the impression that the Court purposely avoided the terms 'custom' and 'customary law' in its decisions and opinions. The reasons for this may be inter alia, the notoriously controversial character of international customary law in general...

Observations such as the above hardly reflect a situation where the entire nature of customary international law is deemed to be fiction or myth. Although the nature of its definition may be controversial, this does not in itself support its dismissal as fiction or myth. Further, to do otherwise would be too simplistic³⁷ especially when criticisms may be levelled at other aspects of international law as well.

In deciphering the nature of international customary law and its application, it has to be broken down into the two core elements of state practice (usage) and the acceptance of this practice by states (*opinio juris* or the psychological element). Both elements bring with them debate and conjecture.

Roberts outlines 'traditional' and 'modern' versions of international custom and highlights the two different elements. Essentially, the traditional approach is based on state practice over time. The critical issue here is why a state undertakes a particular practice, and whether this is due to a sense of legal obligation including social nicety, ceremony, convenience or other normative acceptance.³⁸ Conversely,

explicitness simply meant that a career opportunity arose for some observers like me to supply the missing theory of custom": *ibid* 101.

³⁶ Wolfke K, *Custom in Present International Law* (1993, 2nd ed, Martinus Nijhoff, Dordrecht) 8.

³⁷ Chigara explains: "The standard of sufficiency for each of the elements of customary international law remains undetermined. International tribunals vary the requirements of State practice and *opinio juris* particularly in difficult cases like the Nicaragua Case. [A]lthough custom is ridden with inconsistency, incoherency, indeterminacy, and unpredictability, factors that combine to impair the legitimacy of norms it creates, norms of customary international law continue to represent the majority of rules in international law": Chigara B, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001, Ashgate, Burlington) 48.

³⁸ Roberts, "Traditional and modern approaches to customary international law: a

the 'modern custom' concept centres around *opinio juris* but this results in a problem highlighting the difference between what a state believes in and does and what it says.³⁹

Much of the debate on customary international law concerns the two elements of practice and *opinio juris*. The traditional or state practice based approach centres on determining custom from consistent state practice derived from a sense of legal obligation. It focuses on the element of state practice and the interaction between states and it gives *opinio juris* a secondary role that in some cases is considered a non-essential ingredient for determining custom.⁴⁰

The emphasis on practice comes from a tacit distrust of the validity of *opinio juris*. For example, a state may be expressing what it views as the law instead of what it believes the law to be. Proponents of this approach also claim that state practice is both quantifiable and tangible.⁴¹ To them, it matters little whether one is able to find tangible, objective evidence of state practice that is tied to a sense of legal obligation. Further, what really matters is whether a state is able to argue coherently and convincingly that it undertakes a given practice because of a sense of legal requirement. Or conversely, that it does not believe that there is a legal imperative for its action depending on the position it is trying to establish. In any case, the modern approach plays down state practice in favour of a more 'deductive' approach to custom that begins with locating the *opinio juris* or statements of rules articulated by states and considered to be legal obligations.⁴²

At the margin of this school of thinking is Cheng's idea of 'instant' customary law. He espouses that customary law is created by states through the medium of General Assembly resolutions that articulate the

reconciliation" (2001) 95 *American Journal of International Law* 757.

³⁹ *Ibid.*

⁴⁰ Cheng, "United Nations resolutions on outer space: 'Instant' international customary law?" (1965) 5 *Indian Journal of International Law* 36.

⁴¹ D'Amato states clearly that "a state may say many things; it speaks with many voices, some reflecting divisions within top governmental circles, some expressing popular opinion via mass media, and some 'trail balloons' or other argumentative tactics. But a state can only act one way at one time, and its unique actions, recorded on history, speak eloquently and decisively": D'Amato A, *The Concept of Custom in International Law* (1971, Cornell University Press, New York) 51.

⁴² *Ibid.* 2.

states' sense of agreed obligation. He argues that the case of outer space is a good example and his reasoning is based essentially on the fact that the United Nations General Assembly had unanimously adopted the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.⁴³

On the other hand, one might argue that due to the lack of actual state practice, the essential elements of customary international law have not been met. Whilst there may be a case for the existence of *opinio juris*, there cannot be custom by definition until there is supporting state practice. Cheng's view is that practice is not required and that a 'single element' custom is possible in cases when such unanimous support exists.⁴⁴ This 'single element' custom also demonstrates the robust nature of customary international law and it matters little whether custom is defined objectively from a single element. The argument that this is possible gives customary international law added depth and breadth to be applied in varied situations.

Byers' view of *opinio juris* is different again. He points out that the *opinio juris* of states transfers power into obligation. This is an important consideration for the dynamics of customary international law as seen from a procedural perspective. He states:⁴⁵

[O]*pinio juris* itself represents a diffuse consensus, a general set of shared understandings among States as to the 'legal relevance' of different kinds of behaviour in different situations.

This considers that only 'legally relevant' behaviour is regarded as forming part of customary international law. It does not state how 'legally relevant' is defined or arrived at other than by what the states themselves arbitrarily define as a 'shared understanding'.⁴⁶ Byers' argument therefore fits well into the 'persuasive argument' framework and it becomes inconsequential how 'legally relevant' behaviour is defined. It is far more important that there is a shared understanding

⁴³ Cheng, "United Nations resolutions on outer space: 'Instant' international customary law?" (1965) 5 *Indian Journal of International Law* 23.

⁴⁴ *Ibid* 45.

⁴⁵ Byers M, *Custom, Power and the Power of Rules* (1999, Cambridge University Press, Cambridge) 19.

⁴⁶ *Ibid*.

between the specially affected states, allowing them to argue their case more effectively on how they understand the law is to be applied or otherwise as the case may be.⁴⁷

Alternatively, D'Amato posits that state practice can only become international custom if accompanied by an articulation of the legality of the practice.⁴⁸ In other words, the state must make a statement to the effect that it considers its practice on a given issue as resulting from a sense of legal obligation. Akehurst points out that this is another way of explaining *opinio juris*, albeit with a distinction made between beliefs and statements.⁴⁹ He adds that a statement on the content of customary law ought to be taken as *opinio juris* even if the state does not believe the statement to be true. Whilst it would be conceivable that a state could prove that it did not believe the statement to be true it would nonetheless be regarded as though it did.⁵⁰ He offers the following example of the 1945 Truman Proclamation claiming continental shelf rights for coastal states:⁵¹

It makes no difference whether the United States genuinely believed that international law gave such rights or to the coastal state or not; the important thing is that the United States said that international law gave such rights to the coastal State and other States concurred.

Would it be the same if other states did not concur? If this were to happen, these states would not be 'accepting' the practice as law.

⁴⁷ D'Amato states: "What makes international custom authoritative is that it consists of the resultants of divergent state vectors (acts, restraints) and this brings out what the legal system considers a resolution of the underlying state interests. Although the acts of states on the real-world stage often clash, the resultant accommodations have an enduring and authoritative quality because they manifest the latent stability of the system": D'Amato, "Trashing customary international law" (1987) 81:1 *American Journal of International Law* 102.

⁴⁸ Charlesworth, "Customary international law and the Nicaragua case" (1991) 11 *Australian Year Book of International Law* 1, 8.

⁴⁹ Akehurst, "Custom as source of international law" (1974-1975) 47 *British Year Book of International Law* 1, 36.

⁵⁰ *Ibid* 37.

⁵¹ Akehurst also points out that it is important that *opinio juris* be found in assertions of law instead of a statement on what might be law or ought to be law, or that it is required by some other motive or social construct: *ibid*.

Hence, by definition, this would fall short of becoming custom. On the other hand, if they concurred but failed to maintain a consistent practice or ‘virtually uniform’ practice, once again custom would fail to exist.⁵² Further, if an insufficient number of states concurred, then notwithstanding a possible case for regional or ‘special custom’, the definition of custom would be strained once more.⁵³

Conversely, unlike treaty law, customary international law can bind states even if they do not consent formally to the rules. MacGibbon argues.⁵⁴

Consent may be express; it may be implied from the conduct of States, as when they *prima facie* recognise the legality of a practice by participating in it (although in these circumstances acquiescence may also be required when those States in turn submit to the exercise of practice); or it may take the form of acquiescence.

The sanctity of the principles of state consent and sovereign equality is therefore maintained through the principle of the ‘persistent objector’.⁵⁵ If a state continually rejects a given state practice as law, namely, as a persistent objector, then the *opinio juris* cannot exist. In other words, if it is assumed that the state does not believe that its claim is fact, this means that *opinio juris* is non-existent.⁵⁶ If the state refrains

⁵² Byers states: “The International Court has never provided detailed guidance on [the] issue but has referred simply to ‘general acceptance’ or extensive state practice as necessary...In the *Asylum* case a regional customary law allowing a host state to qualify political offences for the purposes of diplomatic asylum was not found established because of the inconsistencies in practice”: Byers M, *Custom, Power and the Power of Rules* (1999, Cambridge University Press, Cambridge) 7.

⁵³ D’Amato states: “General customary law applies to all states, while special customs concern relations between a smaller set of states”: D’Amato A, *The Concept of Custom in International Law* (1971, Cornell University Press, New York) 234.

⁵⁴ MacGibbon, “Customary international law and acquiescence” (1975) *British Year Book of International Law* 115 note 132.

⁵⁵ See Charlesworth, “Customary international law and the *Nicaragua* case” (1991) 11 *Australian Year Book of International Law* 1, 3.

⁵⁶ Assuming the broader view of Akehurst and D’Amato in particular, which argue for ‘statements’ to be given the same, if not more, credibility than state action, is accepted, it is certainly arguable that it is more reliable than trying to locate an *opinio juris*: see Charlesworth, “Customary international law and the *Nicaragua* case” (1991) 11 *Australian Year Book of International Law* 1, 6. Charlesworth also points out that “[a] constant theme in the *Nicaragua* treatment of state practice is that words are often

persistently from participating in a given state practice then the rule of custom cannot be said to exist as well. However, in this discussion there is one exception in the name of *jus cogens*, which refers to a rule of international law that no state is allowed to derogate from.⁵⁷

Therefore, would it not be easier to simply codify custom in a treaty to eliminate the potential for confusion regarding the existence of customary international law? This may sound like a good idea but it immediately comes up against the issues surrounding the treaty making process, including the enormous amount of time it takes to finalise and ratify treaties even if they are based on existing customary law.⁵⁸ Most importantly, this process disallows the law to change and evolve, as is usually the case with the creation of international customary law.

It has been seen that the formation and application of international law are subjects of debate. This is largely a reflection of the role of power in the ever changing and evolving nature and landscape of international relations. It is therefore unsurprising that in this context international customary law as a part or source of international law is at times called into question.

The laws that govern subjects such as *jus cogens*, diplomatic immunity, outer space and treaties are leading examples that show that as a concept international custom has a role in international law and as part of it. Many examples support the position that international custom has a role in international law. The law of the sea and the laws governing *jus cogens*, diplomatic immunity and outer space law are leading examples. Consequently, although issues may surround the definition of customary international law, it is hard to sustain the 'debate' that this law is merely a fiction or myth based on those examples. A reason

more significant than physical actions": *ibid* 18.

⁵⁷ It has been stated that "a peremptory norm of international law (*jus cogens*), from which states may not derogate, and that gives rise to obligations *erga omnes*": Burmester and anor, "The place of customary international law in Australian law: Unfinished business" (2001) 21 *Australian Year Book of International Law* 39, 42.

⁵⁸ Thirlway points out that even in the case of the Genocide Convention, which could be regarded as codifying customary law, it was adopted unanimously by fifty six states and yet took ten years to obtain fifty nine (there had been considerable growth in states during that period) ratifications many of which included reservations: see Thirlway HWA, *International Customary Law and Codification* (1972, AW Sijthoff, Leiden) 10.

may be the confusion generated by the different schools of thought on how to construct and define customary international law.⁵⁹ As a source of law, customary international law aids the process that influences and adjudicates the regulation of state behaviour. It is a concept that is couched in state consent irrespective of whether it is based on the traditional or modern school.⁶⁰

D'Amato's approach to theory formation augurs well for this argument. He supports a 'claim orientated' approach to theory, stating:⁶¹

[W]e must view international law as a psychological bargaining mechanism involving conflicting claims among national decision-makers and their legal counsel. If we attempt to study international law as it is viewed by participants in the international arena, we will be inclined to replace absolutistic theories with the more accurate description of a process by which the better of two conflicting claims prevails. In other words, two competing claimants may each have a case that falls short of fulfilling the requirements for a given absolutistic theory, yet the fact that one claimant has prevailed or will prevail over the other necessitates an abandonment of that 'theory' and its replacement by one which takes account of the relative superiority of persuasiveness.

There are also clear examples of the International Court of Justice using international customary law as another measure to bring about results it believes to be right, fair and just in the circumstances.⁶²

⁵⁹ Byers makes this point clearly when he states that "the process of international customary law may be complex, and its operation may in many cases be ambiguous, but the legal rules which result from its operation are nevertheless very real, very tangible results": Byers M, *Custom, Power and the Power of Rules* (1999, Cambridge Press, Cambridge) 211.

⁶⁰ D'Amato states: "The decentralised process of customary law formation undoubtedly leads nation-state officials to view international law not as much as an encroachment on their sovereign freedom of action as the manifestation of their national stability": D'Amato A, *The Concept of Custom in International Law* (1971, Cornell University Press, New York) 29.

⁶¹ *Ibid* 18.

⁶² Akehurst states that "the judge has unfettered discretion to insist on, or dispense with, the requirement of *opinio juris*. But such an approach is useless as a means of predicting how the judge will decide a case": Akehurst, "Custom as source of international law" (1974-1975) 47 *British Year Book of International Law* 1, 33.

IV. CONCLUSION

Therefore, is anything lost or at stake by having the option of international customary law as a source of law? Moreover, what other alternatives exist that do not themselves suffer to a degree from the same limitations that beset customary international law?

In light of the complexity of international relations, flexible sources of law are needed to accommodate the intricacies of state practice. Hence, the arguments over the lack of definition and surety of customary international law are in many ways precisely the reasons why this law is applicable and relevant. Byers articulates this well when he claims:⁶³

The customary process, by seeking to identify common interests, will necessarily deal with an extremely wide range of State interactions, some of which are relatively more 'subjective' and relatively less 'practical', or objectively determinable than others. By adopting different methods of determining common interests, the customary process is responding to social complexity, rather than being arbitrary, subjective or overly political.

⁶³ Byers M, *Custom, Power and the Power of Rules* (1999, Cambridge University Press, Cambridge) 211.