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Negotiated International Customs: Dynamics, Transformation and Codification

Dr. Shakeel Ahmad

Postdoctoral Research Fellow, Institute of Air and Space Law, McGill University, Canada

Abstract

The making of international law has passed through the various dynamic stages of international relations. International Customs as the foremost source of international law and sometime regarded as meta-laws, have been under consistent debate. Some legal scholars are stringent not to disturb customary international law (CIL) as possessing the status of meta-laws which ultimately leads to the very logic of static nature of CIL. However, in the process of codification, negotiation for international treaties has become an overwhelming phenomenon and some scholars have argued not to rely much on CIL. Therefore, an argument can be established that international customs are in phase of constant negotiation and readjustment which is contrary to classical nature of international law and these CIL can be termed as "negotiated customary international law."

Key Words: Customary International Law, Meta-Laws, *Opinio Juris*, Soft law, Instant Customs, Codification

Introduction

The idea of negotiating international customs is as old as the international legal system itself. International law from its emergence has passed through various stages of formation and is thus regarded as dynamic law. Customs are the foremost source of international law and sometime regarded as *meta-law* (Kammerhofer, 2004). Classical legal scholars muse over not to disturb the International Customary Law (CIL) therefore the very logic of static customary law prevail in the writing of various legal scholars. In this equation the question rises "Does the idea of negotiating international customs make sense?" International rules are articulated by CIL and international conventions; today the major sources of these rules are draft conventions of the International Law Commission (ILC), the resolutions of international organisations and the states' practice. A successful experiment of consensus negation of 1982 United Nations Convention on Law of the Sea (UNCLOS III) has set a precedent to negotiate and reform CIL. However, states as principal actors in international relations may develop a novel way of creating CIL. Similarly, states opt out from customs by adopting persistent objection doctrine. Creating new customs or opting out from existing customs is also a way of negotiating customs by actions. Thus, in practice customs have always been negotiated and amended according to the situation in various circumstances; It can also be termed as international legal consciousness. As the gap between actual practice and text of various statues is widening therefore it should be realised by international community to reform international legal system in order to minimise the level of uncertainties.

CIL is considered pivotal to the understanding of international law, as well as being source of various uncertainties (Kammerhofer, 2004)in the international legal system. International custom as one of the primary sources of international law, defined under Article 38 of the Statute of the International Court of Justice (ICJ), as evidence of a general practice accepted as law based on a general and consistent practice with sense of legal binding (Guzman, 2005) CIL, then, is normally said to have a state practice 'objective' element and a *pinio juris* (Guzman, 2005).

The literature review of CIL provides simultaneously divergent views on both subjective and objective elements. Some scholars have described the old notion of objective and subjective elements as very misleading. The precise scholarly consensus of *opinio juris and state practice* is somewhat uncertain (Lepard, B. 2016). Thus, there isno settled answer to many questions aboutCIL. However, the contemporary majority view is as of Akhurt's "state practice as any act or statement by state from which views about customary law can be inferred; it includes physical acts, claims, declarations in abstracto (such as General Assembly Resolutions), national laws, national judgements and commission". CIL can also be created by the practice of international organisations and by the practice of individuals (Akehurst, 1976).The above definition is sufficiently broad to include resolutions and declarations by the United Nations General Assembly (UNGA), United Nations Security Council (UNSC), international and regional organisations and even the unilateral acts.

Further, state practice must be accepted as legal obligation and *opinio juris* must be accompanied by practice. The official statements are not challenged by other states (Akehurst, 1976). The states may withdraw from emerging CIL by comity an act of violation or by adopting persistent objector doctrine "repeatedly and prominently object to the rule on the international stage" (Villiger, M. E. 1985). This means that, "instead of engaging in quiet diplomacy, the nation must self-consciously generate a substantial amount of friction with the nations that are seeking to solidify the custom, and this friction is likely to be costly in terms of possible retaliation and loss of opportunities for cooperation" (Villiger, M. E. 1985). In this way states can make international law unilaterally.

Post treaty based customs, the unwritten characteristic CIL makes its identification easy, but simultaneously it has been always a mammoth task for sitting international judges as well as scholars to find out the evidence of consistent, prolonged, widespread state practice as and the *opinio juris* too (Goldsmith& Posner1999).For example, in the *North Sea Continental Shelf Cases* the ICJ for its judgement tried to find evidence of widespread and consistent state practice along with *opinio juris*(Guzman, 2005).A custom to be binding as international law must amount to a settled practice and must be rendered obligatory by a rule of law requiring it.

Both statements and actions are scattered in international arena in centuries' intercourse of states. The statements by the governments have been paradoxical to their actions. In this situation, to find out evidence of mature custom has often resulted in various controversies. A by–product of these controversies and

uncertainties is the idea of negotiating CIL by codification, application of soft law and the majority view in highly qualified writings.

In this *basic research* the idea of negotiating CIL has been critically analysed by highlighting three main points. First, Article 13 of the UN Charter expressly gives the General Assembly of the UN the power to initiate studies and make recommendations for the purpose of 'encouraging the progressive development of international law and its codification. Second, the acknowledgement of soft law and the resolutions of international organisations as the evidence of consent that may also outdate the previous practices of states. Third, the role of instant/special custom and persistent objection doctrine. These points converge on the experiment of UNCLOS III. All three points also reflect the Anthony D'Amato's views that the major sources of formulation of rules are treaties, draft conventions of the ILC, and the UN General Assembly resolutions (D'Amato, 1971).

Codification and Progressive Development

First, the UN General Assembly established the ILC in 1946, accordance with the power vested under Article 13 of the UN Charter. Since its inception through the function of codification and the progressive development of international law it has accomplished various challenging tasks and enhanced the credibility of the international legal system. Codification means "the more precise formulation and systematisation of rules of international law in fields where there already has been extensive state practice, precedent and doctrine" (Statute of the ILC 1947, Art.15).

Most of the Commission work now focussed on "progressive development" which means "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states." (ILC, 1947).A numbers of multilateral conventions now in force are the result of the Commission's work. Generally, the Commission submits its report to the UNGA Sixth Committee. On the basis of Commission's drafts, the UN may call diplomatic conferences for example, the 1958 Geneva Convention on the Law of the Sea, the 1969 Vienna Convention on Law of Treaties, the 1998 Statute of the International Criminal Court and currently the Draft Articles on Diplomatic Protection 2006 and the Guiding Principles applicable to Unilateral Declarations of States Capable of Creating Legal Obligation 2006 which may lead to treaties (Harris, 2010, p.58).

Boyle holds the view that there is no sharp distinction between codification and progressive development, thus as inference that it can be involve in a "certain amount of creative law-making or law reform". He further highlights that the ILC does not 'make' international law but it has been acknowledged and "become a significant part of the subtle process by which general international law is identified, changes and comes into being" (Boyle,2005).This has also enabled the ICJ and other tribunals to rely on ILC conventions without overtly enquiring whether particular articles represent existing law, revision of existing law or a new development of the law. In ICJ jurisprudence the character and process of the Commission has been acknowledged as an authoritative quality as expressed in the *North Sea Continental Shelf case.*In this case, the dissent's analysis of the concept of *opinio juris* is in accord with the position taken by some legal scholars who maintain that *opinio juris* may be

presumed from uniformities of practice regarding matters viewed normally as involving legal rights and obligations. A contrary position maintains that the practice of states must be accompanied by or consist of statements that something is law before it can become law (ICJ Reports 1969, p.3).

According to the judgement (1969) "the process of the definition and consolidation of the emerging customary law took place through the work of the ILC, the reaction of governments to that work and the proceedings of the Geneva Conference"; and this emerging customary law became "crystallized in the adoption of the Continental Shelf Convention by the Conference". The numerous signatures and ratifications of the Convention and the other states practice based on the principles set out in the Convention had the effect of consolidating those principles as customary law.

Another example is the *Gabcikovo-Nagymaros case* (I.C.J. 1997), in which the ICJ decided in1997. Instead of finding evidence of widespread, consistent and prolonged state practice as it did in the *North Sea Continental Shelf case*. The Court relied on the Vienna Convention (the draft-work of the ILC) as representing customary law. The Convention was seen as a codification of existing customary law on the subject of termination of a treaty on the basis of change in circumstances. The Court also heavily relied on the work of the ILC even though the work on state responsibility was then incomplete, its articles on watercourses had only just been adopted as a treaty, and its Convention on state succession had not been widely ratified. At that time, it was considered a new development in environmental law.

Many multilateral treaties are a mixture of codification or the result of progressive development of that law. States that are not parties to a treaty cannot said to be bound by its non-parties are bound only by those obligation which have in fact attained the status of customary law (Camino, & Molitor, 1985). In this way the work of the ILC can be equated with “most highly qualified publicists” (Art. 38(1) of Statute of the ICJ, 1946).

Treaty Based CIL

Before entry into force, unlike traditional CIL, treaties are always negotiated. Similarly, CIL comes under rigorous discussion during codification and progressive development. The draft convention is presented in diplomatic conferences; this is the first stage where custom based provision comes under negotiations.

Once such a multilateral treaty is ratified, it reflects the state practice and shows the acceptance of new customary rules. Sometimes a treaty or its *travaux preparatoires* contain a claim that the treaty is declaratory of pre-existing customary law. Thus, the requirement of state practice and *opinio juris* may be inferred from these treaties. In the 1969 *North Sea Continental Shelf* cases, the ICJ delivered that treaty provisions can generate an international custom, treaty was recognised as a method to create CIL.As Akehurst(1976) mentions that there can be evidence of *opinio juris* in the text of the treaty itself or in the *travaux preparatoires*.

D’Amato, on the same direction as of Akehurts, accepts the treaties as evidence of state practice as he induces “rules in treaties reach beyond the parties

because a treaty itself constitutes state practice" (D'Amato, 1971). In this sense CIL is not a static body of law. States enter into new treaties, based on their national interests, and they express state practice by adopting new rules by implementing in domestic laws. For example, acceptance of the Universal Declaration of Human Rights is a result of the realisation by states in their international practice "the way other states treat their own citizens." Thus it can be inferred that a treaty or some of its provisions are sufficient record of evidence as a binding international commitment that constitutes the practice of states as much as "a record of customary behaviour"(Guzman , 2005).According to Akehurst (1976), statements and actions subsequent to the treaty can also satisfy this requirement of *opinio juris*.

Treaty as an Evidence of State Practice

Article 38 of the Vienna Convention on Law of Treaties (VCLT) (1969) becomes the authority by stating "Nothing ….precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such". While codifying the existing CIL a new rule may emerge and be accepted as customary law. For example, in the 1982 UNCLOS III, the width of territorial sea is agreed as 12 nautical miles which has modified the old CIL, for example the claim termed as *canon shot rule*. If the treaty is intended to develop the new law, the non-parties may come under similar obligations to those found in the treaty if the intention of the treaty and the effect of state practice are to give rise to new customary law.

Mendelson holds the opinion that a custom based treaty must give "the indication on its face" to be accepted as CIL (Guzman, 2005).Thus, a treaty that is declaratory of customary law but has not yet entered into force, carries weight as evidence of the state practice as "state of law" (Baxter 1965).

According to Guzman (2005), if the treaty on its face purports to be declaratory of CIL or if it can be established that such was the intent of its draftsman, the treaty may be accepted as valid evidence of the state of CIL. If a treaty was at the time of its adoption constitutive of new law, then the person or entity relying on the treaty as evidence of customary law has the burden of establishing that treaty has subsequently been accepted into custom, either by express reference to this process by the States and other authorities or by the proof that rule of treaty is identical with international customs. Thus, the four elements of the Montevideo Convention on rights and duties of states (1933) have become standard expression of the definition of State.

Uncertainties and Application of Soft Law

Second, when compared with domestic law, the international legal system is considered the imperfect and immature. Weil comments that CIL is "surrounded by mystery" (Vicuña, 2005).Similarly, Kammerhofer (2004) states that uncertainty is the perpetual feature of international law and the foremost uncertainty is associated because states are sovereign. He further comments when two norms conflict with each other through different interpretation then its ontological uncertainty and how we perceive the law is epistemological uncertainty. The crux of Kammerhofer study is that uncertainty abounds in international law and CIL is no exception and "the

discovery of uncertainty of international law leads to understand the applicability of norms and its failures."

In this situation soft laws can play an important role. Soft laws are non-binding instruments, including the UN General Assembly resolutions, conferences declarations, codes of conduct, etc. They play a role of normative instruments; the texts adopted in resolution reflect a kind of passive consent. Thus, soft law is said to be a by–product of these deficiencies. Soft law may govern the conduct of certain situations without legal obligation, though it can lead to legal obligations as Boyle inferred soft law carries normative quality (Boyle 2005) Soft law may be treated as general principles as Article 31 (3)(c) of the Vienna Convention , and include general principles, such as an aid to treaty interpretation.

To overcome formal obstacles for the amendment of multilateral treaties, the consensus endorsement by states of an agreed interpretation or a general principle in soft law form is an entirely sensible alternative. Soft law's principal advantage is simply that it avoids the need to go through the process in treaty form. Once adopted, no ratification is necessary, and the resolution takes immediate effect for all parties. Boyle (2005) takes, "the subtle evolutionary changes in the existing treaties may come about through the process of interpretation under the influence of soft law. In any system of law, the ability to make such changes on a systemic basis is important. For this purpose, it is neither necessary nor useful to attempt to turn the precautionary principle into a rule of CIL, or to enshrine it into binding treaty"

Soft Law as an Evidence of State Practice

The resolutions of international organisations act as the evidence of state practice which may outdate the previous practices of states or it may acknowledge the emerging rule by expressing the consent for a specific resolution. By definition these resolution of international organisation have no legal binding on states but in practice the judges in the ICJ have been using them to infer the decisions and also the practice of states is evident for implying the resolutions in their domestic laws. Today, major developments in international law often get their start or substantial support from proposals, reports, resolutions, treaties or protocols debated in such forums. Multilateral forums often play a central role in the creation and shaping of contemporary international law. In this way the indirect application of soft law is very much prominent. For example, the Universal Declaration of Human Rights (UDHR) adopted through the resolution of UNGA, has been incorporated by in the constitutions of states. Moreover, UDHR became source of international human rights law as later conventions related to human rights all incorporated provisions of this Declaration.

The concept of state sovereignty has been enacted in international law; therefore "state consent" becomes vital to both primary sources of international law. For the purpose of definition, soft laws are not binding but they reflect the states' passive consent. In both treaty law and customary law consent is touchstone. States express consent in treaty law through signature and mostly through ratification. But in case of CIL, consent is shown to not oppose the emerging practice then, *opinio juris*

may be acquired as general acceptance in the international community. An acceptance by the affected state may further be assured by the statements and declarations it makes regarding the specific consent to a resolution. Thus, the consent is central to both treaty law and as well as CIL. This point will further be elaborated while discussing the UNCLOS III experiment.

Similarly, in Wolfke's view, statements in the form of voting in international organisations do not "constitute acts of conduct, nor, even multiplied, any conclusive evidence of any State practice." He further observes that "repeated verbal acts are also acts of conduct in their broad meaning and can give rise to international customs, but only to customs of making such declarations, etc., and not to customs of conduct described in the content of the verbal acts." (Wolfke, 1993). Thus, statements made by governments and their representatives are of a political nature, often made strategically, and should not be considered reality of practice. The best example is denunciation of act of torture by governments, yet its use by states is common. Thus, for some scholars evidence of state practice is state' actions while others include anything officially said by governments through various ministries.

Instant Custom and Persistent Objector Doctrine

Third, ideas of "instant custom" and "persistent objector doctrine" are an indirect way to negotiating CIL. There is also disagreement about how much state practice and for how long time is required for a usage to be considered as custom. Scholarly writings and decisions of international judges are at variance on this issue. The traditional CIL requirement of a "general practice" was based on some minimum period of time over which there must be a practice before one can speak of a rule of CIL. Contrary to this view, Bin Cheng(Cheng, B. 1997) says that CIL can be formulated quickly he termed it as "instant custom" As Cheng considers that international legal system is a horizontal and states make the law and they are themselves subjects to it, "legal obligation can arise or change instantaneously."

On the same direction, The Bush Doctrine became a new CIL in the immediate aftermath of the terrorist attacks of September 11, 2001 (Langille, B. 2003).President George W. Bush announced that the US has right to attack to any country who is harbouring the terrorists. Bush's statement set the practical example of formation of "instant custom." It was considered as a novel approach in international relations that established the new CIL almost immediately thus rejecting the requirement of consistent practice (Langille, 2003).

In the *North Sea Continental Shelf* cases, the Court dismissed the requirement of an extended period of practice. The report on CIL by the ILC to the UN General Assembly clearly mentions no specific time requirement for CIL formation. ILA report concludes on "practice of sufficient density."The Court's jurisprudence is consistent with view of majority scholars, that is minimum time requirement to generate CIL.

Thus, Cheng's notion of "instant customs" is tenable 'CIL arises or changes "instantly" if *opinio juris* changes instantly'. Some academic commentary has strongly criticised instant custom. Van Hoof rejects the idea of special or instant customs by declaring it opposite customary law. However Gross and D'Amato (1984)

by reviewing Hoof's book reject the whole prototype by declaring it "fails to see the interaction between *opinio juris* and usage."

Convergence of Arguments

The practical application of points one (codification of CIL), two (application of soft law) and three (instant custom) is very much prominent in negotiating is the 1982 UNCLOS III, considered a milestone in international law-making. It is the major success of the codification of CIL of the sea, for example the provision related to the freedom of the high Seas. Even for states not the party to the Convention, the principal provisions of the Convention hold the status of customary law for example the USA. The resolution was adopted by the General Assembly and the Agreement was open for signature on 28 July 1994.

Negotiation became possible by adopting majority voting criteria. ILC prefers majority voting criteria over the simple majority voting Article 9 (2) of Vienna Convention on the Law of Treaties, 23 May 1969, adopts the majority voting criteria in order to protect the interest of large group instead of unwilling minorities. Many ILC treaties have been adopted on this basis, including the 1958 Geneva Convention on the Law of sea and Vienna Convention on law of Treaties itself.

The various problems were expected that may become cause of deadlock; therefore, to overcome this situation method of consensus negotiation and package deal were adopted. Article 161 of 1982 UNCLOS defines "consensus" as "means the absence of any formal objection" (UNCLOS, 1982).Camino, & Molitor, (1985) mentions that since the Convention is an overall 'package deal' reflecting different priorities of different States, "to permit reservations would inevitably permit one State to eliminate the 'quid' of another State's 'quo'."

According to Boyle (2005) consensus negotiation assures that decision making at a multilateral negotiation of a convention and the fear of the numerical superiority of any group of nations can be minimised. Similarly, Buzan pointed out that majority voting increasingly useless for law-making decisions because of the danger of powerful alienated minorities. In UNCLOS negotiation, voting is retained as a last solution to avoid any deadlock, and importance was given to consensus called the Gentleman's Agreement(Camino, & Molitor, 1985).The UNCLOS III procedure was in some respects a reversion to the older ways of negotiating treaties.It was agreed that "the Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted" (*ibid*). Stake holders, other than states, IGOs and NGOs and greater level of diplomacy made this law-making possible.

However, the success is very much dependent on the circumstances under which the consensus is being achieved. It worked well in UNCLOS negotiations. New customary law may come into being very quickly by this method. In this broader sense a consensus process becomes not merely a more effective way of negotiating universally acceptable treaties, decisions or soft law instruments. Behind its success story is unprecedented negotiation methods and procedures employed at UNCLOS

III. Those elements have in turn become a model for subsequent law-making conferences.

Conclusions

- Customary International Law remains a puzzle. It lacks a centralized lawmaker, as source of enforcement, as similarly international law is no centralized decision making.

- Customs are negotiated while articulating the rules of multilateral treaties as we observed in UNCLOS III.

- The work of ILC, in form of draft conventions which contains the provisions based on CIL, is outcome rigorous negotiations.

- Acknowledgement of states' practice and consent as the application the resolutions of international organisations especially the UN General Assembly resolutions paves the way for the rapid formulation of a new CIL.

- Similarly, the opting out from a newly emerging custom by adopting persistent objection doctrine is form of negotiating international customs.

- Old notion of custom has created various ambiguities. As the international community has witnessed immediate formulation of CIL in case of post 9/11 Bush Doctrine. This is time to rethink about the international law as a whole and particularly about CIL.

Finally, it can be emphasised that there is need to negotiate and reformulate the concept customary international law. The contemporary scholars of international law can contribute to overcome these uncertainties. In legal scholarly writings process of reforms has already been sufficiently highlighted, however, there is a need to gradually redefine and limit International Customary Law. Through codification the emphasis as a foremost source international law is already being shifted on international conventions. Therefore, international customs getting new shape and such kind of CIL can be termed as "negotiated international customs."

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