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Customary international law: Formation, identification, and narrative construction

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Abstract

The International Law Commission's (ILC) Draft Conclusions on Identification of Customary International Law represent an important attempt to provide organized doctrinal guidance on customary law-making. However, a conceptual issue figures prominently: the formation and development of custom are characterized in the Conclusions as distinct from the identification of custom, and the ILC offers little explanation as to why this must be the case. In essence, this distinction assumes that the formation of custom is an objective, spontaneous, and chronological process beyond the control of individual lawyers. Although seemingly innocuous, this assumption is directly responsible for various doctrinal problems, such as the relationship between the two traditional elements of custom, the requisite duration of its formation, and the 'post-identification' interpretation of custom. Drawing primarily on insights from historiography, this article explains why the formation and identification of custom should be understood as a single process, and why conceiving of it as a matter of narrative construction provides a better solution to the above-mentioned questions.

Keywords: customary international law; formation; historiography; identification; narrative construction

1. Introduction

In its 2018 Draft Conclusions on Identification of Customary International Law[1] (hereinafter Conclusions), the International Law Commission (ILC) sets out the following caveat for its efforts to provide organized doctrinal guidance on custom identification:

> [T]he draft conclusions do not address, directly, the processes by which customary international law develops over time. Yet in practice identification cannot always be considered in isolation from formation; the identification of the existence and content of a rule of customary international law may well involve consideration of the processes by which it has

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[1]UN, Report of the International Law Commission Seventieth Session (30 April–1 June and 2 July–10 August 2018), UN Doc. A/73/10 (2018), adopted by UNGA Res. 73/203, UN Doc. A/RES/73/203 (11 January 2019). ILC Draft Conclusions on Identification of Customary International Law, 2018 YILC, Vol. II (Part Two).

> developed. The draft conclusions thus inevitably refer in places to the formation of rules of customary international law. They do not, however, deal systematically with how such rules emerge, change, or terminate.[2]

This position is intriguing in the way it distinguishes two types of questions. To begin with, custom's 'formation' and other development-related issues are considered essentially a matter of fact. They hinge on how members of the international society interact with each other and how custom gradually gains its ground in this process.[3] In contrast, the 'identification' of custom is deemed a matter of law and of how facts are to be assessed, regarding which doctrinal efforts may provide useful guidance.[4] This presents an analytical rather than descriptive approach[5] of approaching custom's nature. However, other than the somewhat evasive language of '[cannot] always be . . . in isolation', the ILC provides no further elaboration on when and how 'formation' and 'identification' may overlap or diverge or on the extent to which they inform the ILC's work.

This article seeks to clarify the relationship between the formation and identification of custom. It is structured in five sections. Section 2 introduces the analogy between custom identification and historiography and explains the rationale behind this comparison. Drawing on this analogy, Section 3 proceeds to defend the position that custom's formation and identification are an inseparable undertaking of narrative construction.[6] It also highlights that the common notion of 'custom identification', as understood by the ILC, does not carry an independent meaning. Equally importantly, Section 3 evaluates the extent to which the different criteria for good practices in law and history overlap. The central argument is that while a direct, vertical 'transplant' of such criteria across disciplines is untenable, it would be an overstatement to claim that the standards of good historical scholarship cannot inform those of legal argumentation.

Based on the idea that custom's formation and identification are conceptually inseparable, Section 4 shows the extent to which some doctrinal controversies arise from the view that custom emerges spontaneously. Three issues will be highlighted there: the logically flawed definition of custom and *opinio juris*, the controversy over the sufficient duration for custom's formation, and the possibility of interpreting 'already existing' customary norms to resolve legal disputes. As will be further explained, these issues are problematized precisely due to their close link to the idea of custom's chronological development. Section 5 concludes the main arguments made throughout the article.

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[2] Ibid., Conclusion 1 and the accompanying commentary, at 124. For the same view, see O. Pomson, 'Methodology of Identifying Customary International Law Applicable to Cyber Activities', (2023) 36 *LJIL* 1023, at 1031.

[3] See, e.g., J. d'Aspremont, 'The Custom-Making Moment in Customary International Law', in P. Merkouris, J. Kammerhofer, and N. Arajärvi (eds.), *The Theory, Practice, and Interpretation of Customary International Law* (2022), 29 at 35.

[4] For authors making a similar distinction between custom's formation and identification, see, e.g., E. Kadens and E. A. Young, 'How Customary Is Customary International Law', (2013) 54 *William and Mary Law Review* 885, at 920; R.R.B. Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates', (2010) 21 *EJIL* 173, at 203. In the terms of Hart, 'courses of conduct once thought optional become first habitual or usual, and then obligatory.' See H.L.A. Hart, *The Concept of Law* (2012), 92. This is why the literature has habitually likened the formation of custom to observable events or natural phenomena, e.g., the emergence of a route as 'an acknowledged path' in a forest. See, e.g., K. Wolfke, *Custom in Present International Law* (1993), 55.

[5] This should be distinguished from Mendelson's reference to the different 'observational standpoints'. According to him, the difference lies in how 'impartial' states and international law-judges/tribunals should be in identifying custom. See M. Mendelson, 'Formation of International Law and the Observational Standpoint', in International Law Association, *Report of the 63rd Conference* (Warsaw, 1988), 935 at 941; cited in International Law Association, Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law (2000), at 5, available at www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf.

[6] For the sake of fluency, this term will be used interchangeably with 'narrative-building' in this article.

2. Historiography: Its meaning and value as an analytical lens for custom identification

This section introduces certain basic concepts, definitional and methodological issues relevant to the arguments that follow. The starting point is a triad of key terms constantly employed in the literature to refer to historical inquiries: 'the past', 'history', and 'historiography'. The first point to note is the well-established distinction that historians draw between 'the past' and 'history'. 'The past' is a collective, umbrella concept consisting of whatever events, incidents, and human activities took place in any previous temporal moment, whereas 'history' denotes 'the 'meaning' [produced] from the past'.[7] In other words, while any historical writing is based on archives or documents recording past events,[8] it is the meanings constructed by us today – rather than those archives and documents *per se* – that constitute 'history' in the proper sense of this term. This definitional distinction reflects a commonsense view that the study of history neither seeks to, nor is capable of, exploring everything that happened in the past.[9] Rather, historians' ability to construct meaning is inherently limited by various factors, such as the availability of documents.[10]

A second point lies in the separation between 'history' and 'historiography'. According to *Oxford English Dictionary*, the term 'historiography' can be broadly conceived to mean '[t]he writing of history; written history' and '[t]he study of history-writing, [especially] as an academic discipline'.[11] While 'historiography' and 'history' may be used interchangeably for this reason,[12] throughout this article 'historiography' will be understood in the second sense, referring to scholarly discussions on the nature and assumptions of historical investigations.[13] This terminological choice is made to avoid confusion. Since, as has just been noted, history is a *meaning* one constructs from the past, historiography becomes an appropriate alternative that describes the study of meaning production (i.e., historical writing) itself. In this sense, historiography, sometimes termed 'philosophy of history'[14] or 'methodology of history',[15] concerns not only such technical issues as verifying the authenticity of archival documents, but also fundamental issues of

[7]See, e.g., G. Hálfdanarson and N. Kızılyürek, 'Two Islands of History: "History Wars" in Cyprus and Iceland', in C. Bilsel et al. (eds.), *Constructing Cultural Identity, Representing Social Power* (2010), 1 at 4; A. Munslow, *The Aesthetics of History* (2019), 1–9. For a discussion on a minority view which sees the two terms as synonymous, see A. Adjepong, 'What is History?: The Science of the Past in Perspective', (2020) 4(3) *International Journal of Trend in Scientific Research and Development* 13, at 16.

[8]For some general discussion on the idea of 'historical fact', see R. Evans, *In Defence of History* (2018), 75–102.

[9]As is put by Carr:

> The fact that you arrived in this building half an hour ago on foot, or on a bicycle, or in a car, is just as much a fact about the past as the fact that Caesar crossed the Rubicon. But it will probably be ignored by historians . . . The historian is necessarily selective.

See E. H. Carr, *What Is History?* (2002), 6. See also J. Tosh, *The Pursuit of History* (2022), 157–8.

[10]K. Jenkins, *Re-Thinking History* (2003), 62.

[11]*Oxford English Dictionary*, 'historiography n.', available at www.oed.com/dictionary/historiography_n?tab=meaning_and_use#1664114. For other discussion on its definition, see, e.g., C. Becker, 'What is Historiography?' (1938) 44 *American Historical Review*, 20; A. Tucker, 'Introduction', in A. Tucker (ed.), *A Companion to the Philosophy of History and Historiography* (2009), 1 at 2.

[12]For scholars who appear to see historiography of international law as synonymous to international legal history, see, e.g., T. Skouteris, 'The Turn to History in International Law', 2017, available at www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0154.xml; V. Vadi, 'International Law and Its Histories: Methodological Risks and Opportunities', (2017) 58 *Harvard International Law Journal* 311, at 314; I. de la Rasilla, *International Law and History: Modern Interfaces* (2021), 11–40. For a detailed discussion on the use of both terms in the literature of international law/legal history, see J. d'Aspremont, 'Turntablism in the History of International Law', (2020) 22 *Journal of the History of International Law* 472. For the literature of historical theory that sees the two terms as identical, see, e.g., Jenkins, *supra* note 10, at 7.

[13]See, e.g., G. Cunningham, *History and Historiography* (2018), 34.

[14]See, e.g., R. Aron, *Introduction to the Philosophy of History* (1948); W.B. Gallie, *Philosophy and the Historical Understanding* (1964).

[15]See, e.g., J. Topolski, *Methodology of History* (translated by O. Wojtasiewicz) (1976), 33.

how research questions are formulated; how evidence is gathered, selected, and presented; and conceptual problems of historical objectivity, and so on.[16]

As will be further elaborated in the following sections, an analogy between custom identification and historiography here is far more than another rhetorical device which serves only aesthetic purposes. Rather, since both undertakings aim at making sense of the past from today's perspective,[17] insights from historiography can help unravel some deep-rooted puzzles surrounding customary international law that, albeit seemingly unrelated, are conceptually linked.

Indeed, it might be argued that two fundamental differences remain between legal and historical practices, rendering the analogy made in this article inappropriate. To begin with, history is generally descriptive, concerned with the 'is' rather than the 'ought',[18] while the study of law focuses on the opposite.[19] However, from a technical and formalist perspective, this criticism is somewhat misplaced. As clarified above, 'history' is defined here as the 'meaning' established from the past, and 'historiography' as the study of meaning-making. In this article, the analogy is drawn between custom identification and the latter, not the former.

Next, even setting aside this potential misunderstanding for the sake of argument, the distinction between 'is' and 'ought' is not a sufficient reason to preclude analogies between law and history. Although a detailed engagement with the relevant literature goes beyond the scope of this article, it is important to note that the distinction should not be taken as absolute; and accordingly, a reference to what 'is' can still inform our understanding of what 'ought' to be.[20] For example, as MacIntyre remarks in a famous essay:

> To say that we ought to do something is to affirm that there is a commonly accepted rule; and the existence of such a rule presupposes a consensus of opinion as to where our common interests lie. An obligation is constituted in part by such a consensus and the concept of 'ought' is logically dependent on the concept of a common interest and can only be explained in terms of it.[21]

For him, it is the 'common interest' or 'consensus' – as a fact – that forms part of the basis for what 'ought' to be. Importantly, this seems precisely what international custom, defined as 'a general practice accepted as law' in Article 38(1)(b) of the Statute of the International Court of Justice (ICJ), is meant to achieve. Following MacIntyre's argument, the provision essentially seeks to transform an 'is' – namely, the presence of a patterned practice – into an 'ought' (i.e., a binding custom), by way of another fact: the presence of a sense of a legal obligation.[22] Hence, as is put by Tomuschat, 'to recognize custom . . . is an imaginative device to establish congruence between the

[16]See below in the following sections.

[17]M. Clark, 'Ambivalence, Anxieties/Adaptations, Advances: Conceptual History and International Law', (2018) 31 *LJIL* 747, at 769.

[18]For the origin of this distinction, see D. Hume, *A Treatise of Human Nature* (2019), 518.

[19]For some discussion, see S.E. Hamill, 'Review of Legal History', (2019) 28 *Social & Legal Studies* 538, at 550. In truth, this concern is constantly raised and discussed when history is used as a reference point for interdisciplinary studies. See, e.g., A. Bird, 'The Historical Turn in the Philosophy of Science', in S. Psillos and M. Curd (eds.), *The Routledge Companion to Philosophy of Science* (2014), 136 at 141; S. Weigert, 'Relativity and Quantum Theory: Under the Spell of Today's Paradigms', (2024) 2877 *Journal of Physics: Conference Series* 012071.

[20]For a similar view in the context of moral philosophy and the study of ethics, see, e.g., G. Spielthenner, 'The *Is-Ought* Problem in Practical Ethics', (2017) 29 *HEC Forum*, 277; P. D. Magnus and J. Mandle, 'What Kind of Is-Ought Gap Is There and What Kind Ought There Be?' (2017) 14 *Journal of Moral Philosophy* 373; J. Hage, 'Constructivist Facts as the Bridge Between Is and Ought', (2023) 36 *International Journal for the Semiotics of Law* 53.

[21]A. C. MacIntyre, 'Hume on " Is" and "Ought"', in W.D. Hudson (ed.), *The Is-Ought Question* (1969), 41.

[22]For some relevant discussion, see, e.g., Wolfke, *supra* note 4, at xx; V.P. Tzevelekos, 'Juris Dicere: Custom as a Matrix, Custom as a Norm, and the Role of Judges and (Their) Ideology in Custom Making', in N. M. Rajkovic, T. E. Aalberts, and T. Gammeltoft-Hansen (eds.), *The Power of Legality: Practices of International Law and Their Politics* (2016), 188 at 189–90.

is and the ought'.[23] It is also in this vein that Orford asserts that 'any description of past practice [is] a legal argument'[24] in itself.

Lastly, the use of history has long been a common component of the (international) legal argument. For example, historical narratives are at the core of the so-called 'originalist' interpretive approach to US constitutional law, and any claim to 'discover' the original intent of framers inevitably entails an element of meaning-making from the past.[25] The same is true for international law, where past practice of states and *travaux préparatoires* of treaties, for example, are institutionalized sources of information that can be drawn to produce doctrinal guidance on today's legal matters.[26] In other words, there is no inherent reason why historiography – the study of how history is written – should not serve as a fruitful theoretical resource for legal scholarship.[27]

The use of history in legal argument, however, leads us to a second potential challenge against the present article's analogy between custom identification and historiography. For some, history drawn in legal argumentation concerns not so much about pursuing historical objectivity; rather, it is employed selectively to advance a normative claim and win a case.[28] As such, Tushnet writes that 'Law-office history is a legal practice, not a historical one. The criteria for evaluating it, for determining what is a successful performance, must be drawn from legal practice rather than from historical practice'.[29] To ensure a smooth flow of argument, this point will be dissected below in Section 3.2.2. For the time being, it is sufficient to note that the distinction between law and history does not render historiographical insights irrelevant to the present context.

3. The inseparability of custom's formation and identification

3.1 Formation and identification as narrative-construction

By distinguishing custom's formation and identification, the ILC implies that it is one thing to say that a customary norm exists and quite another to say that the norm is, or can be, identified. In line with this understanding, identifying a customary norm is synonymous with *finding* a pre-existing custom as it is. Analogizing custom identification to a physicist's identification of gravity laws through the patterned movement of planets,[30] D'Amato asserted in his speech during the 1988 annual meeting of the American Society of International Law that 'We don't dictate what [customary] international law is; *we find it out there*'.[31] Parisi, in the same vein, wrote that 'Judicial recognition of spontaneous norms amounts to a declaratory (rather than constitutive) function that treats custom *as a legal fact*. The legal system 'finds' the law by recognizing social norms but

[23]C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law', (1999) 281 Recueil des cours de l'Académie de La Haye en ligne, 9, at 325. See also C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', (1993) 241 *Recueil des cours de l'Académie de La Haye en ligne*, 195, at 290–1.

[24]A. Orford, *International Law and the Politics of History* (2021), 243. Notably, in contrast to this article's terminology, Orford seems to use 'the past' as synonymous with 'history.' For relevant examples, see below in Section 3.1.

[25]For theoretical discussion on the connection between historical narratives and legal argument in this context, see, e.g., L. Kramer, 'When Lawyers Do History', (2003) 72 *George Washington Law Review* 387; M. Festa, 'Applying a Usable Past: The Use of History in Law', (2008) 38 *Seton Hall Law Review* 479; L. Cahillane, 'The Use of History in Law – Avoiding the Pitfalls', in L. Cahillane and J. Schweppe (eds.), *Legal Research Methods* (2016), 57; J. Balkin, *Memory and Authority* (2024). For discussions on international law and the use of history, see Orford, *supra* note 24, at 105–77.

[26]See Orford, *supra* note 24, at 178–252.

[27]See Kramer, *supra* note 25, at 396.

[28]See, e.g., Festa, *supra* note 25, at 515–27.

[29]M. Tushnet, 'Interdisciplinary Legal Scholarship: The Case of History-in-Law', (1996) 71 *Chicago-Kent Law Review* 909, at 934–5. See also Festa, *supra* note 25, at 510.

[30]A.D'Amato, 'The Theory of Customary International Law', (1988) 82 *Proceedings of the Annual Meeting (American Society of International Law)*, 242, at 243. For a similar narrative, see M.N. Shaw, *International Law* (2017), at 342, 350.

[31]See D'Amato, ibid. (emphasis added).

does not 'create' the law'.[32] More recently, Johnston has contended that as long as 'a general practice accepted as law' is present,[33] custom becomes present automatically according to Article 38(1)(b) of the Statute of the ICJ, independent of any process of law-ascertainment/identification:[34]

> Whether or not someone actually conducts an evaluation of state practice and *opinio juris* and concludes that sufficient evidence exists for a given customary international law rule to be identified has no impact on the existence of customary international law. The mere existence of that practice and *opinio juris* is necessary, but also sufficient, for custom to exist. It is in this way that the formation of customary international law is an informal process.[35]

One may nonetheless raise a conceptual question regarding this understanding: how can we even *know* the existence of 'a general practice and *opinio juris*' before someone brings it up and provides evidence to argue that case? An intuitive response may be that this question is largely epistemological, and Johnston's point is ontological, which, according to Westerman, should be clearly distinguished.[36] Nevertheless, this separation would create more problems than it would solve. For example, it seems to assume that some customary law, albeit present (i.e., ontologically existing), cannot be *identified* (i.e., epistemologically known to us) for some reasons. However, there is no way to demonstrate a norm's existence independently of our knowledge – and even if there is, the practical benefits of doing so remain unclear. After all, the law would serve no function in shaping social behavior if it is unknown.

Indeed, attempts to 'find' already-existing custom are intuitively comprehensible due to custom's essential connection to actual past events – signature of treaties, promulgation of unilateral declarations, protest, and so on. In historiographical terms, '[w]hether or not a historian has actually carried out the act of verification is irrelevant to [a fact's] factuality; it really is there entirely independently of the historian'.[37] 'A general practice', therefore, is traditionally seen as '[the] less problematic' and 'objective element'[38] of custom. And relatedly, that custom gradually

[32]F. Parisi, 'Spontaneous Emergence of Law: Customary Law', (2000) 5 *Encyclopedia of Law & Economics* 603 (emphasis added). Commenting on the general principles of law defined in Article 38(1)(c) of the Statute of the ICJ, the Soviet international lawyer Tunkin has also written that 'The Court does not *create* international law; it *applies* it.' (emphasis added) In this sense, international legal norms are similar to a natural fact, and judges are required to identify and use them impartially. See G. I. Tunkin, *Theory of International Law* (translated by W. Butler, 1974), 191. For authors describing custom's formation as a 'spontaneous' process, see J.L. Kunz, 'The Nature of Customary International Law', (1953) 47 *AJIL* 662, at 664.

[33]For some conceptual challenges against the reading of Article 38(1)(b) as requiring two elements, see, e.g., J. d'Aspremont, 'Non-State Actors and the Formation of International Customary Law: Unlearning Some Common Tropes', in S. Droubi and J. d'Aspremont (eds.), *International Organisations, Non-State Actors, and the Formation of Customary International Law* (2020), 166 at 172; B.D. Lepard, *Customary International Law: A New Theory with Practical Applications* (2010), 128.

[34]This somewhat 'automatic' production of legal effects by the meeting of a legal provision's elements is not unfamiliar to lawyers in general legal discourse. In many countries, for example, a person commits an offence if driving under the influence of alcohol. Whether a person is really caught and put on trial for that transgression does not seem to change the fact that, at the moment of conducting the acts described by the relevant provision(s) under the criminal law, the person is regarded as 'automatically' punishiable.

[35]K. A. Johnston, 'Rules of Change and the Nature of Customary International Law', 2024, available at esil-sedi.eu/esil-reflection-rules-of-change-and-the-nature-of-customary-international-law/#_ftnref11.

[36]P. Westerman, 'The Illusion of Gold-Digging: The Interpretation of State Practice', in M. Fortuna et al. (eds.), *Customary International Law and Its Interpretation by International Courts Theories, Methods and Interactions* (2024), 3 at 10–11. Perhaps somewhat confusingly, despite endorsing this separation, Westerman has also attacked the idea of 'theoretically neutral observation' described in the present section.

[37]See Evans, *supra* note 8, at 76. This is also the most traditional/narrow way of understanding the objectivity of historical writing. See J. Passmore, 'The Objectivity of History', (1958) 33 *Philosophy* 97, at 98. Cf. M. Rieser, 'Lukacs' Critique of German Philosophy', (1958) 55 *Journal of Philosophy* 177, at 192.

[38]See, e.g., G. Distefano, *Fundamentals of Public International Law: A Sketch of the International Legal Order* (2019), 321. For a somewhat sceptical view of this assertion, see, e.g., M.P. Beham, 'Customary International Law', in C. Binder et al. (eds.), *Elgar Encyclopedia of Human Rights* (2022), 428.

evolves through engagement among international actors can be presented and understood as a valid sociological description. Nevertheless, *contra* Parisi, it seems that any 'judicial recognition' of custom involves an *inexpungable* element of law-creation.[39] That element pervades almost every aspect of our 'finding' of facts/practice. First, on a micro-level, even the description of a single past event is not an automatic or mechanical undertaking. It is lawyers themselves that decide the way to describe 'what is going on in the world'.[40] For example, one needs to describe the fact that 'a man opens the door for a woman'[41] to formulate a proposed norm about it. Various options highlighting the different aspects of this act may be available:

> '[O]ne should always assist others who may benefit from such assistance'; 'a man should always assist women who may benefit from such assistance'; 'one should open the door for others'; 'a man should open the door for others/women' and so on and so forth.[42]

Of course, there could be more to highlight: the man and woman's ethnicity, social status, the colour and size of that door, etc. The limitless number of ways to present a fact further attests to the previous point that 'a general practice' can never be something 'out there' and automatically accessible.[43] Furthermore, even if the factuality of a door-opening act can be affirmed, this does not dictate or guarantee a singularly truthful manner in which that act can be described.[44]

Next, articulating a customary norm's existence requires more than ascertaining the factuality of isolated events. According to the ICJ's jurisprudence, acts contributing to customary norms must 'amount to a settled practice'[45] and 'be consistent with [the alleged customary] rules'.[46] But an ocean of scattered and disjointed facts does not create such patterns and consistency automatically. Rather, we need to 'make a pattern'[47] ourselves by choosing, synthesising, connecting, and interpreting various historical facts and, at the same time, assigning meaning to that set of carefully curated facts. For example, as Aral points out, three particular historical events are repetitively singled out in various scholarly works in their justification for a customary right to democratic governance – 'the 1991 military takeover in Haiti [,] 1997 military coup in Sierra Leone [, and the] intervention of the Security Council in the post-election crisis in Côte d'Ivoire'.[48]

[39]See, e.g., L. Kopelmanas, 'Custom as a Means of the Creation of International Law', (1937) 18 *BYIL* 127, at 140; C.J. Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making', (2015) 14 *Law & Practice of International Courts & Tribunals* 51; N. Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law', (2017), 28 *EJIL* 357; M. Shahabuddeen, *Precedent in the World Court* (2007), 67–96; D. Terris, C. P. R. Romano, and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007), 104; T. Ginsburg, 'Bounded Discretion in International Judicial Lawmaking', (2004) 45 *Virginia Journal of International Law* 631, at 634.

[40]O. Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End', (2020) 31 *EJIL* 235, at 244. For a similar view, see R. Kolb, 'Selected Problems in the Theory of Customary International Law', (2003) 50 *Netherlands International Law Review* 119, at 130–1.

[41]See Chasapis Tassinis, ibid., at 241.

[42]Ibid., at 242.

[43]Along this line, White has famously written that 'there is no such thing as a single correct description of anything'. See H. White, *Tropics of Discourse* (1978), 127.

[44]See, e.g., T. Førland, *Values, Objectivity, and Explanation in Historiography* (2017), 122–3.

[45]*North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 44.

[46]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 98.

[47]K. N. Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method', (1940) 49 *Yale Law Journal* 1355, at 1359. For a similar point in the context of the intellectual history of international law, see Orford, *supra* note 24, at 256.

[48]I. Aral, 'The Role of the Security Council and Its Authorisation to Use Force to Create Normative Markers in Democratic Governance Discourses', (2023) 10(1) *Journal on the Use of Force and International Law* 17, at 17–18.

Meanwhile, a similar meaning is inferred from these events: they are turning points that repeatedly reinforce the international community's commitment to democratic governance. For some academic lawyers, these events create a picture of 'a cumulative practice'[49] leading to the crystallization of customary international law. On the other hand, 'any possible setbacks from the linear advancement of democratic rule' would be 'disregarded'[50] in such scholarly accounts. To borrow the words of Carr, it is indeed up to historians (lawyers) themselves to '[decide] to which facts to give the floor, and in what order or context'.[51]

Noteworthily, in the process of 'judicial recognition' of custom, not only are the substantive, primary rules of customary international law established, but the interpretation and scope of Article 38(1)(b) of the Statute of the ICJ are also shaped and reaffirmed. For instance, Article 38(1)(b) does not dictate what behaviour/acts constitute 'a general practice' within its meaning. Thus, whether states' verbal statements and physical acts are to be counted in equal measure presents a classic difficulty in this context.[52] It is also unclear whether the behaviour/acts of international actors other than states should count, leading to intense scholarly debates over international organizations' role in building custom.[53] A 'theoretically neutral' observation of reality is non-existent.[54]

In brief, while it is tempting to be in the shoes of a third-person observer and 'describe things as they are', any articulation of the two elements' presence *per se* is already a subjective construction and intervention in reality.[55] Custom formation and identification are therefore inseparable and synonymous with narrative construction.

3.2 Narrative construction, massivity of evidence, and 'objective' law-making

Acknowledging custom's character as narrative construction is more than a matter of purely academic interest. In the present section, this article describes how narrative construction works and how this notion helps clarify some theoretical uncertainties surrounding custom identification.

3.2.1 Purpose, evidence, and the massivity of facts

First, every undertaking of narrative construction is based on a guiding normative claim.[56] A claim contains a number of elements/'qualifiers',[57] such as the identity of the right holder and duty

[49]Ibid., at 47.

[50]I. Aral, 'International Lawyers as Hope Mongers: How Did We Come to Believe That Democracy Was Here to Stay?' (2024) 26 *Journal of the History of International Law* 161, at 172.

[51]See Carr, *supra* note 9, at 5. While it might be doubted that a highly selective presentation of facts – such as the democratic-governance right mentioned above – can ever meet the threshold of custom, an important point here is that this selectivity is not confined to scholarly writings. In truth, as has long been noted (and criticized), the judicial practice of the ICJ has not always established a general practice through a detailed examination of facts. For an account for the methodological limitations of the ICJ's approach, see, e.g., M. Lando, 'Secret Custom or the Impact of Judicial Deliberations on the Identification of Customary International Law', (2022) 81 *Cambridge Law Journal* 550.

[52]See, e.g., Wolfke, *supra* note 4, at 42; J. Kammerhofer, 'Between Pragmatism and Disenchantment: The Theory of Customary International Law after the ILC Project', in P. Merkouris et al. (eds.), *supra* note 3, 3 at 15.

[53]See, e.g., N. Carrillo-Santarelli, 'The Possibilities and Legitimacy of Non-State Participation in the Formation of Customary Law', (2017) 19 *International Community Law Review* 98, at 103–7.

[54]This is so even in the field of physics and other natural sciences, to which D'Amato seeks to analogize custom identification. As is put by Einstein, 'It is the theory which decides what we can observe.' See The Information Philosopher, 'Werner Heisenberg Talk with Einstein', (1925–1926), available at www.informationphilosopher.com/solutions/scientists/heisenberg/talk_with_einstein.html.

[55]J. Beckett, 'The Deceptive Dyad: Falseness and Fantasy in International Law', (2021) 8 *Indonesian Journal of International & Comparative Law* 277, at 299.

[56]This is similar to the way historians work with a guiding research question. See Evans, *supra* note 8, at 77–8.

[57]J. Kammerhofer, 'Orthodox Generalists and Political Activists in International Legal Scholarship', in M. Happold (ed.), *International Law in a Multipolar World,* (2013), 138 at 148–9.

bearer, the content of rights and obligations (e.g., a prohibitive or permissive norm), the conditions in which rights and obligations are triggered, and so on. In other words, international lawyers have to determine what they want to argue and possess more or less a general idea of what the customary norm in their mind looks like. Thus, in the previous door-opening example, lawyers may choose to highlight the information they consider relevant and ignore everything else according to that claim.[58] Also, since the determination of that normative claim is essentially inspired by practical purposes of solving problems and achieving a desired outcome,[59] this qualifier selection is something to which the ILC's Conclusions have little to say. Hence, there is no general legal requirement for or prohibition of the inclusion or exclusion of any element.[60]

To determine the normative claim is also to determine the boundary of *relevant evidence* of that claim. For historians, facts or 'raw material'[61] of the past do not become historical *evidence* unless used to respond to a question and for a purpose.[62] Similarly, as the ICJ notes in the case of the *Right of Passage over Indian Territory*:

> In the course of the written and oral proceedings, [a right of passage claimed by Portugal] was discussed with reference to *the different categories making up the right*, namely private persons, civil officials, goods in general, armed forces, armed police, and arms and ammunition. The Court will proceed to examine whether such a right as is claimed by Portugal is established *on the basis of the practice* that prevailed between the Parties during the British and post-British periods *in respect of each of these categories*.[63]

The starting point of the ICJ's examination, therefore, was the normative claim Portugal put forward, and this claim simultaneously determined the scope of relevant materials which need to be consulted by the Court. By focusing narrowly on the bilateral interactions and the aforementioned categories contained in the customary-right claim, the Court justified its finding of a general practice and a customary norm governing the passage of Portuguese personnel in question. Likewise, in the case of *Colombian–Peruvian Asylum*,[64] a qualifier of locality was introduced initially by Colombia, leading to the Court's limited inquiry into the diplomatic-protection practice of Latin America only.[65] Similarly, in *SS Lotus*, where the Permanent Court of

[58]On the other hand, such filtering of information also constitutes an important stage how that normative claim is formed. The formulation of claims and analysis of evidence are mutually complementary and a chronological sequence of them cannot be established. See Section 3.1, *supra*.

[59]In a similar vein, see, e.g., Chasapis Tassinis, *supra* note 40, at 237; M. Hakimi, 'Custom's Method and Process: Lessons from Humanitarian Law', in C. Bradley (ed.), *Custom's Future: International Law in a Changing World* (2016), 148; C. Bob, 'Introduction: Fighting for New Rights', in C. Bob (ed.), *The International Struggle for New Human Rights* (2009), 6 at 8–9. Lorimer also described this process in as early as 1883: 'Though customs appear to arise spontaneously, and are rarely traceable to premeditation, they must always have rested on a previous conception of *an object to be attained, and of the means of attaining it*.' See J. Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities, Volume 1* (1883), 28 (emphasis added). For a more general reference of choosing relevant qualifiers, see J. Kammerhofer, *supra* note 57, at 148–9.

[60]As a result, see Chasapis Tassinis, *supra* note 40, at 237.

[61]L. Jordanova, *History in Practice* (2019), 128.

[62]R. Ashby, 'Understanding Historical Evidence: Teaching and Learning Challenges', in I. Davies (ed.), *Debates in History Teaching* (2017), 146. See also R. G. Collingwood and J. van der Dussen (ed.), *The Idea of History* (1993), 281; see Passmore, *supra* note 37, at 105; see Jordanova, *supra* note 61, at 128.

[63]*Right of Passage over Indian Territory (Portugal v. India)*, Judgment of 12 April 1960, [1960] ICJ Rep. 6, Paras. 39–40 (emphasis added).

[64]*Asylum Case (Colombia v. Peru)*, Judgment of 20 November 1950, [1950] ICJ Rep. 266.

[65]In the same vein, Baetens notes that the idea of regional custom has been flexible, as no agreed definition of a 'region' has ever been reached. Therefore, to borrow her example, '[L]ooking at sub-Saharan Africa rather than Africa as a region . . . could already significantly [narrow] the number of states whose practice and whose opinion [need] to be established [in evaluating a claim of customary law].' See F. Baetens, 'State Consent between Regionalism and Universalism: Particular Customary International Law before the International Court of Justice', Speech at Public International Law Discussion Group, University

International Justice (PCIJ) required that 'a close analogy'[66] between past and present cases be carried out to identify binding norms, the Court substantially limited the scope of relevant state practice. Given the nature of the French–Turkish jurisdictional dispute in question, '[the PCIJ] omitted from its consideration purported precedents of practice involving crimes committed against one state's nationals in another state's actual territory [and] precedents relating to the exercise of jurisdiction concerning single-vessel incidents'.[67] Whilst the Court found no customary norm supporting the claim of France's 'exclusiv[e] flag state jurisdiction'[68] over its nationals involved in (a) maritime collision in this case, it managed to evaluate practice within a narrowly defined ambit and established the existence of a usage on this basis.

Hence, although the vast body of historical events and state practice[69] has long presented a challenge to customary law-making, acknowledging the link between claims and their evidence clarifies the scope and extent of this problem. It figures most prominently when one, as D'Amato does, looks at a random mass of state acts, tries to reveal the underlying norms 'out there', and yet possesses no normative claim or guiding question in mind. This method offers no guidance whatsoever as to which direction one should go when collecting evidence. The same problem also becomes acute when a question or a claim is ill-defined and vaguely worded. For example, a claim to a 'customary human right to life' tells us nothing about the permissibility of capital punishment, euthanasia, or the government's suppression of abortion. Conversely, states' acceptance or prohibition of these acts can neither substantiate nor disprove the existence of such a claim to customary right. Similarly, it is one thing to argue that 'prohibition against torture' is a customary norm and another to say that there exists a duty to 'prosecute' acts of torture.[70] The former is a negative right by nature and the latter positive, and they necessitate different types of evidence showing that states follow them in negative and positive ways, respectively. The bottom line is that context-specific claims are required to address context-specific issues and achieve context-specific outcomes.[71]

3.2.2 Objectivity of customary law-making

Linking customary law-making to narrative construction raises concerns about the minimal (degree of) objectivity of the former.[72] If, as stated above, customary law-making inherently hinges on lawyers' discretion and practical considerations of how to present a fact, then one could potentially construct whatever kinds of 'general practice accepted as law' by choosing different qualifiers, giving weight to different events, excluding some of them from consideration, and inferring different meanings therefrom. As we always seem able to construct different narratives

of Oxford, 3 February 2022, available at www.podcasts.ox.ac.uk/state-consent-between-regionalism-and-universalism-particular-customary-international-law.

[66] *SS Lotus* (France v. Turkey), Judgment of 7 September 1927, PCIJ Rep Series A No 10, at 21.

[67] See Pomson, *supra* note 2, at 16.

[68] This term is borrowed from A. Hertogen, 'Letting Lotus Bloom', (2015) 26 *EJIL* 901, at 905.

[69] See, e.g., M. Koskenniemi, *From Apology to Utopia* (2005), 434; D. Joyner, 'Why I Stopped Believing in Customary International Law', (2019) 9 *Asian Journal of International Law* 31, at 34.

[70] This may be termed the 'disaggregation' of rights and obligations. See M. Jackson, 'Amnesties in Strasbourg', (2018) 38 *Oxford Journal of Legal Studies* 451. See also J. Waldron, 'Rights in Conflict', (1989) 99 *Ethics* 503, at 510.

[71] On the other hand, a related issue here is whether one may still ignore such contexts at the stage of custom identification, make ambiguous claims about customary rights, and then rely on legal interpretation of these rights to resolve context-specific problems when they arise. For writers expressly endorsing this approach, see, e.g., E. Bates, 'From Assertion to Solid Methodology in Customary International Human Rights Law', (2009) 103 *Proceedings of the Annual Meeting (American Society of International Law)* 492, at 494. However, as will be further explained below in Section 4.3, this question must be answered in the negative.

[72] See, e.g., Joyner, *supra* note 69, at 38, 45; M. Hakimi, 'Making Sense of Customary International Law', (2020) 118 *Michigan Law Review* 1487, at 1501–4; P. Staubach, *The Rule of Unwritten International Law* (2018), 75–110.

based on the same set of facts,[73] customary law-making cannot provide any definite or 'irreproachable'[74] solution to a dispute on the existence and scope of a customary norm.[75]

But such challenges are indeed common to all exercises of narrative construction. Deconstructivist literary critics, for example, have attacked the objectivity of history as an intellectual discipline, dismissing historians' work as identical to that of novelists.[76] For most historians, this attack has generally been unsuccessful since the objectivity question is essentially a definitional issue, and contemporary historians[77] do not proceed on the assumption that historical writings hinge on finding a singularly truthful understanding of the past. As is well-established in historiography today,[78] objectivity is generally understood as the extent to which a historical account conforms to standards of good scholarly investigation as adopted by the professional community of historians. These include, but are not limited to,[79] the meticulous examination of authentic documents and the requirement for a narrative's coverage and coherence.[80] Coverage denotes that the wider the scope of past events a narrative incorporates, the better the narrative is.[81] Coherence requires the absence of logical contradictions in a narrative. Because the satisfaction of these requirements is inherently a matter of degree, objectivity can never be absolute and static. Moreover, in order to make a choice between competing narratives based on an identical body of events, we need to compare the extent to which these narratives conform to such criteria.[82] As such, one can only speak of a higher or lower objectivity of a narrative *vis-à-vis* that of other competing narratives. *Objectivity is relative* in this sense.

It is certainly true, as briefly mentioned in Section 2, that legal practice and historical research pursue distinct aims. And for this reason, the criteria for good historical writing and lawyering may differ. Nevertheless, it would be an overstatement to assert, according to this view, that historiographical debates on historical objectivity and 'good history' offer no insight into the process of customary law-making. To start with, it is precisely the question of objectivity that has been raised by some academic lawyers mentioned above, including Joyner, Hakimi, and Staubach. Indeed, these authors have refrained from stating positively what they mean by objectivity, and whether their understanding is akin to that of most historians. However, it is sensible to see the

[73]See, e.g., Koskenniemi, *supra* note 69, at 471–2; J. Beckett, 'The Divisible College: A Day in the Lives of Public International Law', (2022) 23 *German Law Journal* 1159, at 1168.

[74]For example, Meron has written in his monograph on customary human rights/humanitarian law that he sets out to provide 'irreproachable legal methods [of custom identification]'. See T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), 81.

[75]For the same observation, see M. Ramsey, 'The Empirical Dilemma of International Law', (2004) 41 *San Diego Law Review* 1243, at 1247.

[76]See, e.g., H. White, *Tropics of Discourse: Essays in Cultural Criticism* (1985); P. Zagorin, 'History, the Referent, and Narrative: Reflections on Postmodernism Now', (1999) 38 *History and Theory* 1, at 14.

[77]For example, to justify history's objective and 'scientific' character, mainstream, nineteenth-century authors embraced exactly the same view that historical narratives should be a catalogue of as many objective facts as possible. See Evans, *supra* note 8, at 16–17 and 147; see Carr, *supra* note 9, at 10–11.

[78]See, e.g., K. Anbalakan, 'Objectivity in History: An Analysis', (2016) 23 Kemansiaan, 21; A. Assis, 'Objectivity and the First Law of History Writing', (2019) 13 *Journal of the Philosophy of History* 107, at 108.

[79]For a discussion on these criteria, see, e.g., J. Appleby et al., *Telling the Truth about History* (1995), 241–270. Similar criteria have also been put forward and addressed by other legal authors in the context of making a persuasive case in judicial practice. See, e.g., N. Pennington, 'Explaining the Evidence: Tests of the Story Model for Juror Decision Making', (1992), 62 *Journal of Personality & Social Psychology* 189; B. Jackson, *Law, Fact and Narrative Coherence* (1988); F. Bex and B. Verheij, 'Legal Stories and the Process of Proof', (2013) 21 *Artificial Intelligence and Law* 253, at 266; S. Krieger and J. Krieger, 'Storytelling and Relevancy', (2020) 99 *Oregon Law Review* 163, at 179.

[80]Historians have employed different terms to describe similar ideas. The terms 'coverage' and 'coherence' are used by the present article for the sake of convenience.

[81]For a similar idea, see Førland, *supra* note 44, at 138.

[82]On the point of comparison, see M. Bevir, *The Logic of the History of Ideas* (2009), 100. See also J. Gorman, 'Objectivity and Truth in History', (1974) 17 *Inquiry* 373; S. Gaukroger, *Objectivity: A Very Short Introduction* (2018) 1, 6 (referencing the view of Popper).

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classic doctrinal requirement for a general practice in customary law-making as presuming certain substantive criteria for historical objectivity. For a claim to custom to be persuasive, the ILC insists, the practice 'must be sufficiently widespread and representative, as well as consistent'.[83] In other words, the more instances which can be explained by the presence of an alleged customary norm, the better a claim to custom is. Ideally, a persuasive claim should also not include potential inconsistencies in the general practice. Whenever inconsistencies arise, international lawyers have to explain why it does not undermine the overall picture of consistent practice – just as writers advocating a customary right to democratic governance do.

The relative nature of historical objectivity also explains why setting a fixed and precise threshold for the generality, consistency,[84] or exhaustiveness[85] of custom-forming practice always fails. They are criteria for claims to custom to satisfy to the greatest extent possible, rather than black-and-white requirements which are either met or unmet. This leads us to an even broader conceptual point about (customary) international law. Higgins, for example, characterizes international law as a 'process' of making authoritative decisions by citing, among other things, Lauterpacht's view that the international law judges are choosing 'between claims which have varying degrees of legal merit'.[86] Collins has also observed that in international legal decision-making, '[a]ll participants share the same burden of presenting the best evidence in favour of one rule or another, whilst the system itself forecloses the possibility that any of those determinations can have absolute finality'.[87] The puzzle of custom's alleged lack of objectivity is thus resolved: first, under this view, the 'legal merit' (in Lauterpacht's words) of each argument – in the present context, the extent to which claims to custom conform to the criteria for 'objectivity' – becomes a matter of gradation. Second, there is nothing worthy of lament about the parallel existence of different, competing narratives about custom. In contrast, this is the premise of any international legal decision-making, as there needs to be different narratives as options to be chosen.

4. Some practical implications of narrative construction

The separation between the formation/development of custom and its identification not only assumes the former to be 'natural' and immune to lawyers' subjective will/control, but it also presumes that the element of time plays a central role in custom's establishment. This is at the core of much confusion about custom identification. In the following sections, this point will be illustrated via practical examples.

4.1 The alleged circularities of custom's definition

The ILC defined *opinio juris* in its 1950 handbook as a 'conception that the practice is required by, or consistent with, *prevailing international law*'.[88] In highly similar wording, the ICJ declares in *North Sea Continental Shelf* that this concept denotes 'a *belief* that this practice is rendered

[83]See ILC, *supra* note 1, Conclusion 8 and the accompanying commentary, at 135.

[84]See, e.g., H. E. Chodosh, 'An Interpretive Theory of International Law: The Distinction between Treaty and Customary Law', (1995) 28 *Vanderbilt Journal of Transnational Law* 973, at 1054–5; L. Kirchmair, 'What Came First: The Obligation or the Belief—A Renaissance of Consensus Theory to Make the Normative Foundations of Customary International Law More Tangible', (2016) 59 *German Yearbook of International Law* 289, at 317.

[85]For a view which sees exhaustive analysis of 'a general practice' as a requirement for custom identification, see Joyner, *supra* note 69, at 38.

[86]H. Lauterpacht, *The Development of International Law by the International Court* (1958), 399, cited in R. Higgins, *Problems and Process: International Law and How We Use It* (1995), 3.

[87]R. Collins, 'How to Defend International Legal Method?' in R. Deplano and N. Tsagourias (eds.), *Research Methods in International Law: A Handbook* (2017), 9 at 25.

[88]International Law Commission, Yearbook of the International Law Commission 1950/II, UN Doc. A/CN. 4/SER.A/1950/ Add. 1 (1950), available at www.legal.un.org/ilc/publications/yearbooks/english/ilc_1950_v2.pdf (emphasis added).

obligatory by the existence of a rule of law requiring it'.[89] Whilst the mainstream literature today has not had difficulties embracing this construction, what is simultaneously (and paradoxically) acknowledged is that this understanding is riddled with conceptual problems. As is famously pointed out by Kelsen[90] and widely recognized by later generations of international lawyers, in order for states to believe they are acting according to a law, the relevant law must *preexist*.[91] Even more fundamentally, as Koskenniemi argues, the relationship between custom's two elements is 'hopelessly circular'[92] because the two-element definition relies on *opinio juris* to distinguish custom-forming practice from non-custom-forming 'usage', and, at the same time, it presumes that (state) practice is the basis from which *opinio juris* can be inferred.

Once again, these interconnected doubts can be demystified by discarding the idea of custom as spontaneous law. Two points need to be reiterated. First, observation and identification of custom are never purposeless – we need to decide what to argue in order to achieve the desired outcome; it is such a decision that guides our observation. Second, to 'identify' what states have considered legally obligatory is a process of assigning meaning to facts. It involves building a narrative of 'this/that is what states have willed to be law'. Consequently, one does not 'find' *opinio juris* which is already there; rather, the content of *opinio juris* is in fact a manifestation of the desired conclusion one aims to reach, or the guiding question one possesses. For example, in the *North Sea Continental Shelf* case, when contending that Nordic states' delimitation of continental shelf boundaries reflected an *opinio juris* accepting the 'equidistance principle' as law, Denmark was arguing, simultaneously, for the 'equidistance principle' itself as law. Similarly, In *Right of Passage*, by arguing that India's non-protest against Portugal's passage for a long time reflected an *opinio juris* acknowledging Portugal's legal right of passage, Portugal was also defending its right of passage *per se* as part of custom. The chicken-and-egg relationship between custom's two elements[93] is thus clarified: we indeed should 'know' *opinio juris* in the first place, i.e., determine what to argue. One might still insist, for example, that this idea does little to address the most fundamental element of circularity. That is, we rely on a pre-determined hypothesis to determine the scope of relevant evidence on the one hand but revise that same hypothesis when evidence does not support it on the other.[94] Indeed, all narrative construction and theory building (including those in natural sciences)[95] concern a 'continuous interaction between hypothesis and evidence',[96] thereby showing a degree of 'circularity' in this sense. But it is unclear why this should be considered a devastating criticism. It has not prevented us from making sense of the reality we observe or creating some guidance on evidence collection and analysis.

[89]See *North Sea Continental Shelf*, *supra* note 45, at 44, Para 77 (emphasis added).

[90]C. Dahlman, 'The Function of Opinio Juris in Customary International Law', (2012) 81 *Nordic Journal of International Law* 327, at 332.

[91]See, e.g., T. Gihl, 'The Legal Character and Sources of International Law', (1957) 1 *Scandinavian Studies in Law* 51, at 83. Tunkin also comments: 'Such a line of reasoning inevitably leads to the conclusion that the customary norm, according to this concept, is by no means a customary norm stemming from the international practice of states, but is a norm preceding such practice.' G. I. Tunkin, 'Remarks on the Juridical Nature of Customary Norms of International Law', (1961) 49 *California Law Review* 419, at 424.

[92]See Koskenniemi, *supra* note 69, at 434.

[93]Some writers have directly termed this definitional problem of *opinio juris* a 'chronological paradox'. See, e.g., M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (2004), 130; D. Lefkowitz, '(Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach', (2008) 21 *Canadian Journal of Law & Jurisprudence* 129, at 131.

[94]See, e.g., Carr, *supra* note 9, at 53. Carr cites the view of Cohen and Nagel, which describes the process of scientific theory building as 'essentially circular'. See M. R. Cohen and E. Nagel, *Introduction to Logic and Scientific Method* (1934), 396. Noteworthily, however, in the original context of their writing, this point was made descriptively and contained no value judgement or criticism.

[95]See, e.g., S. Darian, *Understanding the Language of Science* (2003), 3; P. O'Raghallaigh et al., 'The Design of Effective Theory', (2011) 5 *Systems, Signs & Actions* 1, at 11.

[96]This phrase is borrowed from Evans' description of how Carr sees the process of his historical narrative building. See Evans, 'Introduction', in Carr, *supra* note 9, ix at xxv.

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A related issue can also be illuminated in this connection. For the classic discussion on the ascertainment of *opinio juris*, the issue of dispositive importance resides in the extent to which an act – such as acts of international organizations and the voting behavior of states at the UN General Assembly – can be said as *opinio juris-reflective*.[97] An underlying assumption here is that there exists a one-to-one correspondence[98] between 'a general practice' and *opinio juris*. However, the assignment of meaning to facts does not operate on that assumption. Take, for example, a hypothetical criminal case where a male killed a female. During the trial, the court examined the following facts and convicted him of premeditated murder:[99] he went to a shop and purchased a knife, stalked the victim for a while and knew her daily routine, and eventually committed the crime with that knife one day on the victim's way home. Except for the killing itself, these facts, if observed and described in isolation, tell the lawyers nothing about the criminal's *mens rea* of the ultimate crime. Buying a knife is not prohibited by criminal law; it may even be for totally legitimate purposes like cooking.[100] Being a stalker, albeit likely illegal, does not automatically reveal an intent to kill, either. Nevertheless, these facts, when taken together, are capable of constructing a coherent narrative that the defendant in question engaged in a *premeditated* killing. Two points are clear in this example. First, for the purpose of dispute settlement, a legal meaning (*mens rea*) is *retrospectively assigned* to facts by lawyers.[101] It could well be that the defendant actually committed that killing on the spur of the moment or that he actually had no intention to do so when purchasing that knife. Nevertheless, these possibilities, in the end, become completely immaterial as long as no narratives are formulated to defend them.[102] The truth about the defendant's psychological reality, if any, remains inherently agnostic to lawyers and judges.[103]

Next, a legal meaning is not only retrospectively assigned, but it is assigned to a narrative *as a whole*.[104] Namely, in a narrative, '[t]he meaning of the whole is always a product of the parts yet,

97For some relevant discussion, see, e.g., D.H.N. Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations', (1955–1956) 32 *BYIL* 97; A. Castles, 'Legal Status of U.N. Resolutions', (1967) 3 *Adelaide Law Review* 68; M.D. Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ', (2006) 16 *EJIL* 879.

98It might be argued that the ILC, for example, has expressly rejected this one-to-one correspondence by declaring 'that the existence of one element may not be deduced merely from the existence of the other, and that a separate inquiry needs to be carried out for each.' Immediately following this sentence, however, the ILC opines that it 'does not exclude that the same material may be used to ascertain practice and acceptance as law (*opinio juris*).' Given this somewhat self-contradictory position, a one-to-one correspondence nevertheless persists. See ILC, *supra* note 1, Conclusion 3 and the accompanying commentary, at 129.

99See, e.g., *People v. Anderson*, 447 P.2d at 942 (Cal. 1968), where the Court noted that facts prior to the killing, prior relationships between the criminal and victim, the manner of the crime, etc. are the factual bases for a judgment of a premeditated crime.

100For a similar example and account, see O. Lagodny, 'The Case of Substantive Criminal Law before the Bars of Constitutional Law – An Overview from the Perspective of the German Legal Order', (1999) 7 *European Journal of Crime, Criminal Law and Criminal Justice* 277, at 282; L. Popoviciu, 'The Criminal Legal Regime of the Preparatory Acts', (2021) 1 *International Journal of Legal and Social Order* 652, at 657.

101For criminal lawyers who argue along this same line, see, e.g., J. Hall, 'Law as a Social Discipline', (1932) 7 *Temple Law Quarterly* 63, at 68; A. Taslitz, 'The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background', (2011) 2 *Alabama Civil Rights & Civil Liberties Law Review* 79, at 111. Recognition of *mens rea* as a construction explains why discussion on certain criminal-law topics, such as '*mens rea* presumption', is conceptually possible. See, e.g., E. Luna, 'Mezzanine Law: The Case of a Mens Rea Presumption', (2021) *Arizona State Law Journal* 565.

102For a relevant discussion, see J. D. Jackson, 'Two Methods of Proof in Criminal Procedure', (1988) 51 *Modern Law Review* 549, at 560–1.

103J. Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', (2004) 15 *EJIL* 523, at 538. See also B. Cheng, 'Custom: The Future of General State Practice in a Divided World', in R. St. J. Macdonald and D. M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1983), 513 at 530.

104L. Blutman, 'Law in Mind: Towards an Explanatory Framework for Customary International Law', (2014) 2014 *Hungarian Yearbook of International Law & European Law* 157, at 180–1.

simultaneously, the parts derive their meaning from the whole'.[105] It is thus unnecessary – and practically difficult – to speak of the *opinio juris*-reflecting character of an individual act, an instance of omission or abstention, and so on. Even scholarly views which attempt to, or claim to have succeeded in, pinpointing the *opinio juris*-reflecting nature of some practice are conditioned by factual contexts. For instance, if taken in isolation, inaction and silence of a state may simply reflect its indifference or unawareness of the proposed norm in question, and therefore, no 'acceptance'/*opinio juris* can be straightforwardly inferred therefrom. However, when observed *together with* facts that the state has been 'in a position to react and the circumstances called for some reaction',[106] an inference of *opinio juris* becomes justifiable. In a somewhat different context, in the case of *Nuclear Tests*,[107] the ICJ has also emphasized that the French statement conceding its own wrongs must be 'considered within the general framework of the security of international intercourse'[108] to establish France's subjective intent to be bound.[109] In any case, attempts to conceptualize an unmistakable expression of *opinio juris* are essentially beside the point.

4.2 The temporal requirement for custom

As Oppenheim pointed out, when we understand custom as emerging from a natural chronology,[110] a question that naturally arises would be how long the duration must be for a customary norm to gain ground. In the classic literature, a wide variety of views have been put forward on this matter. These have ranged, for example, from the requirement that custom needs to emerge from 'a continuous practice from time immemorial[111] to the idea that 'instant custom' is conceptually possible. In the *North Sea Continental Shelf* case, the ICJ has declared that 'the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law'.[112] For this reason, contemporary lawyers may be less troubled by this 'duration' problem than their intellectual predecessors. But, in any case, the notion of custom's slow emergence remains central to the traditional understanding of custom in the literature. This is part of the reason why theoretical devices which promise to 'accelerate' the customary law-making process[113] have not ceased to attract academic attention.

Sender and Wood have recently examined these questions in further detail. Based on a survey of the existing doctrinal approaches to custom's temporality, they present two basic observations on 'how far the passage of time is necessary for the creation of rules of customary international law'.[114] First, there is no requirement for any 'particular duration' to be present in customary law-making.[115] Importantly, however,

[105]P. Meyer, *Storytelling for Lawyers* (2014), 11.

[106]See ILC, *supra* note 1, Conclusion 10 and the accompanying commentary.

[107]*Nuclear Tests (Australia v. France)*, Judgment, 20 December 1974, [1974] ICJ Rep. 253.

[108]Ibid., at 269, Para. 51.

[109]This is sometimes described as a technique of objectifying the standard of establishing intent. See C. Goodman, 'Acta Sunt Servanda? A Regime for Regulating the Unilateral Acts of States at International Law', (2006) 25 *Australian Year Book of International Law* 43, at 56.

[110]L. Oppenheim and H. Lauterpacht (ed.), *Oppenheim's International Law: Vol. I. Peace* (1948), 26.

[111]O. Sender and M. Wood, 'Between "Time Immemorial" and "Instant Custom": The Time Element in Customary International Law', (2021) 42 *Grotiana* 229, at 231 (quoting *Jurisdiction of the European Commission of the Danube Between Galatz and Braila (France and Others v. Romania)*, Advisory Opinion of 8 December 1927, PCIJ Series B No 14. (Judge Negulesco, Dissenting Opinion), at 105, 114).

[112]See *North Sea Continental Shelf*, *supra* note 45, at 43.

[113]See, e.g., M. Scharf, 'Accelerated Formation of Customary International Law', (2014) 20 ILSA *Journal of International & Comparative Law* 305.

[114]See Sender and Wood, *supra* note 111, at 229.

[115]Ibid., at 230.

> [S]ufficient time must elapse so as to allow for the emergence of a general practice and an assurance of its acceptance as law (where the matter is otherwise equivocal). Thus the 'time element' has a role in the formation as well as the evaluation of the two constituent elements of customary international law.[116]

Second, it indeed would be difficult to pinpoint the exact moment of custom's formation, primarily due to the fact that custom emerges from engagements between international actors[117] But for practical reasons, they write, 'it seems there must be a "custom-making" moment: at one point there is no rule, and then there is'.[118] In this connection, they cite the ICJ's *Chagos* Advisory Opinion[119] for example: in that case, the Court had to consider 'whether the right to self-determination was a rule of customary international law in the period from 1965 to 1968 (and if so what its content then was)'.[120]

These heavily qualified observations reveal the doctrinal puzzle scholars encounter when attempting to make sense of custom's formation, identification, and the relations between the two. For example, asserting that 'sufficient time' is necessary for custom identification adds little to the existing debate. The 'how far' question they set for themselves remains largely unanswered. Moreover, if one concedes that the exact moment of custom's emergence is not *always* discernable, to what extent is it meaningful to insist on the continued relevance of the temporal element? After all, 'how much time is sufficient' is an unanswerable question from a logical perspective unless we can discern the point at which a norm emerges. The two authors offer no further elaboration on such issues.

In truth, these issues cease to present challenges once we approach custom's formation and identification through the lens of narrative construction. Here, the well-established conceptual distinction between 'the past' and 'history' provides explanatory aid. As briefly introduced in Section 3.1, past events are what we can single out and arrange in a framework of natural time/chronology.[121] But just because past events belong to a bygone age does not entail that history itself – as a *meaning* constructed on the basis of such events – belongs to a bygone age as well. Meanings and narratives are constructed in response to today's challenges and from today's perspectives.[122]

Along the same line, one arrives at the conclusion that the only 'moment' meaningful to customary law-making is the moment when international lawyers put forward a narrative about 'a general practice accepted as law'.[123] The fact that practical considerations call on determining a norm's customary status on a given point, e.g., the *Chagos* case, does not transform custom identification from an '*ex post facto* construct'[124] into the excavation of already existing yet hidden norms. This point is partially, but clearly, illustrated by the presence of much scholarly

[116] Ibid., at 251.

[117] Ibid., at 245. See also J.I. Charney, 'Universal International Law', (1993) 87 *AJIL* 529, at 538; P. Kelly, 'The Twilight of Customary International Law', (2000) 40 *Vanderbilt Journal of International Law* 449, at 453; H. Lau, 'Rethinking the Persistent Objector Doctrine in International Human Rights Law', (2005) 6 *Chinese Journal of International Law* 495, at 499.

[118] See Sender and Wood, *supra* note 111, at 246.

[119] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, [2019] ICJ Rep. 95.

[120] See Sender and Wood, *supra* note 111, at 246.

[121] For some discussion on this particular issue in historiography, see, e.g., R. Berkhofer, *Beyond the Great Story: History As Text and Discourse* (1997), 106–37; R. Koselleck, *Futures Past: On the Semantics of Historical Time* (2004), 105–15.

[122] See, e.g., A. Tzanakopoulos, 'The Master's Tools and the Master's House: Marxist Insights for International Law', in A. van Aaken et al. (eds.), *The Oxford Handbook of International Law in Europe* (2024), 351 at 363.

[123] See, e.g., d'Aspremont, *supra* note 3, at 31; M. P. Beham, 'Schrödinger's Custom: Implications of Identification on the Interpretation of Customary International Law', in Merkouris et al. (eds.) *supra* note 3, 87 at 91.

[124] J. Crawford and T. Viles, 'International Law on a Given Day', in J. Crawford (ed.), *International Law as an Open System: Selected Essays* (2002), 69 at 93; P. Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (2016), 21–2.

disagreement on the customary status of self-determination before the ICJ 'declared' it as such in 2019.[125]

Equally importantly, even the *Chagos* case offers little doctrinal guidance on custom's allegedly temporal requirement in the sense of Sender and Wood. In that case, as the two authors correctly observed, the Court was answering whether a customary norm of self-determination *could be said as present* between 1965 and 1968. Whilst the Court speculated that such a norm might have started to evolve 'since the adoption of the Charter of the United Nations and of resolution 1514 (XV) of 14 December 1960', it never asserted either (i) that the day 14 December 1960 or that (ii) a given day between 1965 and 1968 could be seen as the exact moment of the norm's formation. In this sense, the *Chagos* Advisory Opinion is not special or different as a reference point from numerous other case-law concerning custom identification, regardless of the Court's eventual finding. For instance, in all the previously mentioned precedents, e.g. *SS Lotus*, *Right of Passage*, *North Sea Continental Shelf*, etc., the only question the international tribunals had to resolve was the alleged presence of a customary norm regulating the disputing parties' interactions *when the disputes in question arose*. No clear determination of the precise, custom-forming moment was ever necessary/possible. And to recall, since the question of 'exact moment' and 'sufficient time' are logically connected, the inability to answer the former renders the latter equally unresolvable.

4.3 The 'post-identification' interpretability of custom

According to a dictionary definition, to 'interpret' something means '[t]o expound the meaning of (something abstruse or mysterious); to render (words, writings, an author, etc.) clear or explicit; to elucidate; to explain'.[126] Transposed in the legal context, it can be broadly understood as an act of 'determining the meaning of a rule'.[127] If this definition is adopted, then essentially every step of custom's identification may be said to count as interpretation. For instance, selecting qualifiers and drawing an analogy between cases are, by their nature, steps in clarifying the content of custom at the same time.[128]

Many contemporary writers advocating custom's interpretability, however, have taken a very different view on what is meant by *interpreting* a customary norm. For them, the foregoing process of choosing qualifiers is to be labelled as custom 'identification', and on the other hand, there is a separate stage of post-identification 'interpretation', through which the meaning of a 'previously identified'[129] custom can be further pinpointed in the same way as interpreting a written treaty provision,[130] without regard to custom's two constitutive elements. Writing in a recent symposium article, Merkouris and Mileva have made this stance explicitly:

> It is important to acknowledge that at the stage of [custom] identification, a variation of interpretive reasoning also takes place, insofar as the evaluation of evidence of state practice and *opinio juris* is concerned. However, this is not legal interpretation *stricto sensu*. [For

[125] See, e.g., M. Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right', (2011) 11 *Human Rights Law Review* 609; S. Allen, 'Self-Determination, the Chagos Advisory Opinion and the Chagossians', (2020) 69 *ICLQ* 203, at 208.

[126] 'Interpret', in Oxford English Dictionary, available at www.oed.com/dictionary/interpret_v?tab=meaning_and_use#103396.

[127] *Factory at Chorzów (Germany v. Poland)*, Claim for Indemnity, Merits, Judgment No. 13 of 13 September 1928, PCIJ Series A No 17 (Judge Ehrlich, Dissenting Opinion), 35 at 39.

[128] See Chasapis Tassinis, *supra* note 40.

[129] K.A. Johnston, 'Changing Custom: Identification of State Practice and *Opinio Juris* in the Context of Existing Customary International Law', 2022, available at www.livrepository.liverpool.ac.uk/3165069/1/KJohnston%20Changing%20Custom%2023.9.22.pdf.

[130] P. Merkouris, 'Interpreting the Customary Rules on Interpretation', (2017) 19 *International Community Law Review* 126, at 127. See also A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008), 496; W.A. Schabas, *The Customary International Law of Human Rights* (2021), 103.

> example, regarding treaty interpretation,] [i]n applying Art. 2(1)(a) [of the Vienna Convention on the Law of Treaties (VCLT)], courts also examine the text and the language employed in order to determine whether the states involved intended to create binding obligations. This process has some interpretative features and undeniably leads to some rudimentary content determination, but no court has ever argued that this is legal interpretation in the strict sense. When they seek to interpret, they apply Arts. 31–33 VCLT, not Art. 2(1)(a).[131]

And also:

> The reasoning employed at the stage of *identification* is concerned with questions about the relevance and weight to be given to evidence of state practice and *opinio juris*, and the outcome of this reasoning is a binary one – a [customary] rule is determined to either exist or not. The reasoning employed at the stage of *interpretation* is concerned with the determination of the content of the [customary international law] rule and how this rule applies to the case at hand.[132]

As further support for this construction, Merkouris insists that we cannot afford not to recognize this post-identification interpretability for practical reasons. He writes: '[A] rule of customary international law, once identified by an international court or tribunal, does not cease to exist'.[133] Without recognizing this, customary norms 'would have to be identified *each and every time* it is applied'.[134] As Milanovic has similarly insisted:

> [T]here is simply no doubt that the content of some rules – whether based in treaty or custom – is of a general character and cannot be reduced to an enumerated list of specific applications. For example, if the human rights to privacy or freedom of expression exist in custom (as they do), applying them to *novel contexts*, such as cyberspace, does not require a new inquiry into state practice and *opinio juris*. Similarly, we can apply the customary principles of distinction or proportionality of the law of armed conflict to novel weapons, and do not need a weapon-specific inquiry into custom whenever a new weapon is developed.[135]

A few scholars have pointed out the potential problems underlying custom's post-identification interpretation. Lando, for example, emphasizes the infeasibility of applying the VCLT rules of treaty interpretation (i.e., Articles 31 and 32) in custom's post-identification interpretation. To elaborate, Article 31 expressly limits its own applicability to treaty interpretation only.[136] And even if the provision can be said as constituting custom, this fact does not expand Article 31's applicability to the post-identification interpretation of other customary norms.[137] Another issue which can be raised here concerns the legitimacy of interpreting a 'previously identified' custom –

[131] P. Merkouris and N. Mileva, 'Introduction to the Series: Customary Law Interpretation as a Tool', (2022) 11 *ESIL Reflections* 1, at 5.

[132] Ibid. (emphasis added).

[133] P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (2015), 242–3.

[134] Ibid., at 241 (emphasis in original).

[135] M. Milanovic, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law', (2023) 117 *AJIL* 601, at 614 (emphasis added). For a similar view, see D. Akande et al., 'Drawing the Cyber Baseline: The Applicability of Existing International Law to the Governance of Information and Communication Technologies', (2022) 99 *International Law Studies* 4, at 16.

[136] M. Lando, 'Identification as the Process to Determine the Content of Customary International Law', (2022) 42 *Oxford Journal of Legal Studies* 1040, at 1055.

[137] Ibid., at 1054.

without repetitively affirming the existence of 'a general practice accepted as law', customary law-ascertainment can risk losing an adequate basis of state consent.[138]

These challenges are generally valid: it would seem extraordinarily difficult to expect the interpretation of an unwritten legal norm to resolve doctrinal disputes and produce tenable guidance on state behaviour. But it is Merkouris and Mileva's conceptual starting point – the separation between pre- and post-identification of custom – that presents the most obvious difficulties. As explained in the preceding framework of 'formation as construction', custom's content is not to be intelligible and 'identifiable' until one puts forward a claim to custom and presents relevant evidence to substantiate it. Hence, any gap-filling through 'interpretation' can also be characterized as identifying a new customary legal norm[139] with higher precision.[140] By the same token, no custom is 'previously identified' and 'out there' for international lawyers to access when a legal dispute arises. Evidence of state practice and *opinio juris* is constantly revisited, with different meanings being constructed therefrom to solve different problems[141] – just like history always can, and needs to be, rewritten.[142]

The next point to be addressed is the extent to which custom 'continues to exist' after initial identification. As the foregoing discussion reveals, a definitive answer to this question is absent. It all depends on whether, at a given point where the identification of custom is called for, we will be able to construct a claim to it and provide evidence to corroborate our position.[143] By acknowledging the 'ever-changing',[144] 'ever-developing',[145] and 'dynamic'[146] character of custom, we embrace the possibility that the existence and content of a customary norm *may vary*. Meanwhile, we accept that custom's development arises from acts and *opinio juris* which are *prima facie* incompatible with what we previously believed to be customary norms.[147]

Of course, it seems intuitively appealing to think of legal norms as always existing – like treaty provisions whose binding force does not diminish or disappear simply due to the passage of time.[148] For instance, by claiming that provisions of widely ratified human rights treaties can be considered part of custom,[149] one seems able to 'entrench' certain fundamental values in international law and prevent it from being influenced by subsequent, non-conforming state acts.[150]

[138]Ibid., at 1061–5.

[139]D. Hollis, 'The Existential Function of Interpretation in International Law', in A. Bianchi, D. Peat, and M. Windsor (eds.), *Interpretation in International Law* (2015), 78 at 85.

[140]See Pomson, *supra* note 2, at 9.

[141]Ibid., at 10.

[142]C. L. Riley, 'Why History Should Always be Rewritten', in H. Carr and S. Lipscomb (eds.), *What is History Now? How the Past and the Present Speak to Each Other* (2021), 280 at 281. Bevir has also commented that '[w]e cannot evaluate interpretations [i.e., historical accounts] either definitively or instantly.' See M. Bevir, 'Objectivity in History', (1994) 33 *History and Theory* 328, at 336.

[143]See Wolfke, *supra* note 4, at 54–55. See also Beham, *supra* note 123, at 93.

[144]G. Novak, *Global Lawmaking and Social Change: The Varieties of Customary International Law* (2024), 6.

[145]M. Lando, 'Baseline Preservation as a Response to Sea-Level Rise', (2025) 56 *Ocean Development & International Law* 100, at 117.

[146]O.S. Kerr and S.D. Murphy, 'Government Hacking to Light the Dark Web: What Risks to International Relations and International Law?' (2017) 70 *Stanford Law Review Online* 58, at 67.

[147]A. Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts', (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 133, at 159.

[148]M. Kohen, 'Desuetude and Obsolescence of Treaties', in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), 350 at 355.

[149]See, e.g., M. Scheinin, 'International Human Rights Law', in D. Patterson and A. Södersten (eds.), *A Companion to European Union Law and International Law* (2016), 441 at 444; see Schabas, *supra* note 130, at 84.

[150]In the terms of D'Amato, 'Whether or not [states] subsequently act in conformity with the treaty, the fact remains that they have so committed to act. The commitment itself … is the "state practice" component of custom.' See A.D'Amato, 'Custom and Treaty: A Response to Professor Weisburd', (1988) 21 *Vanderbilt Journal of Transnational Law* 459, at 462. Citing this view, Graves suggests that 'State practice [formulating custom] can be wholly evinced by [the] commitment [to be bound by a treaty].' See also M. Graves, 'Customary Ivory Law: Inefficient Problem Solving with Customary International Law', (2017) 26 *Washington International Law Journal* 325, at 333.

Nonetheless, this 'stable existence' is achieved only by foreclosing the development of custom towards 'undesirable' directions and by denying the flexible character of custom in response to evolving global affairs. This poses obvious doctrinal challenges. For example, even concerning treaty interpretation, the VCLT explicitly requires that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'[151] be taken into account. As such, it would be bizarre to contend that the content of a treaty provision may be influenced by states' subsequent practice while claiming that the customary norm arising from that provision would always remain intact.

In truth, even if a customary norm is not regarded as 'always existing' after initial identification, its practical usefulness would not be adversely affected. As illustrated in the previous ICJ jurisprudence, for problem-solving, we may indeed have to construct a narrative about the status of custom at a bygone moment. The narrative is juxtaposed and compared against other competing narratives, and their objectivity may be assessed according to the criteria for objectivity. This has two implications. First, the crux of the matter lies in whether we can establish the (non-)existence of a customary norm at a past moment relevant to problem-solving. We do not need to assume that a customary norm will always 'stay with us' to achieve this purpose. Second, as Beham has commented, 'a full assessment [of a norm's status as custom] is only necessary once a specific argument is put forward'.[152] Before that full assessment, the *current status* of customary norms is unknowable.[153]

Finally, a few words may be added to the relationship between 'identifying' a norm, 'interpreting' a norm, and 'applying' a norm to a given situation, which Milanovic does not seem to clarify. Indeed, Milanovic is right to point out the practical impossibility of exhaustively examining all the information that can potentially be extracted from state practice and *opinio juris*. The conclusion that privacy and free speech rights may be extended to cyberspace also seems supportable. However, what is missing is an account of *why* this must be the case. Except for the implied regulatory necessity, Milanovic offers no explanation as to why cyberspace, despite a new 'context', has no impact whatsoever on the automatic application of privacy and free speech rights. Hence, one does not know when and how far an 'abstract frame' can be expanded to *new* situations. For example, although the (customary) right to life seems broad and general enough and may be extended to various contexts and situations, as practice shows, its applicability has been contested where norms of *lex specialis* character exist, such as *jus in bello*.[154] Regardless of the reasoning and outcome of this debate, its very presence shows that the extension of an 'abstract frame' is far from an automatic or intuitive undertaking. To take another example, '[t]he rule that local remedies must be exhausted before international proceedings may be instituted', recognized as 'a well-established rule of customary international law'[155] by the ICJ in the case of *Interhandel*,[156] is perhaps 'of a general character' as well. In human rights treaties, it forms a basic prerequisite for anyone seeking remedies before international courts and treaty bodies.[157] By

[151] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 31(3)(b).

[152] See Beham, *supra* note 123, at 91.

[153] See Crawford and Viles, *supra* note 124, at 70.

[154] See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, Para. 25. Noteworthily, in its General Comment No. 36, the Human Rights Committee does not employ the term *lex specialis* to describe the relationship between international humanitarian law and human rights law. Instead, according to it, '[B]oth spheres of law are complementary, not mutually exclusive.' See Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN Doc. CCPR/C/GC/36 (30 October 2018), Para. 64.

[155] *Interhandel (Switzerland v. United States of America)*, Preliminary Objections, Judgment of 21 March 1959, [1959] ICJ Rep. 6, at 27.

[156] Ibid.

[157] See, e.g., 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, Art. 35(1).

contrast, in the *context* of investment treaties, this rule garners scant international support,[158] and in most situations, 'an investor may directly commence arbitral proceedings against a state for breaches of their rights by a public authority of that state'.[159] To what extent a context is (ir)relevant to an 'already-existing' norm can only be answered on a case-by-case basis, with a reference to practice. Hence, a better approach to justify Milanovic's conclusions that privacy and free speech rights are applicable in cyberspace seems to be the fact that states, in practice, have not treated these rights differently in real life and in cyberspace.

Relatedly and more fundamentally, 'applying' customary norms requires us to draw an analogy between events which previously gave rise to a customary norm and the new event in question. And by acknowledging the 'applicability' of a norm to an event, we also acknowledge the relevance of factual information contained in that event as custom-forming when we are to 'apply' that norm again in the future. In other words, what hides behind the seemingly automatic law application remains an act of law-creation.[160]

5. Conclusion

The ILC presents an ambivalent position on the formation and identification of customary international law in its Draft Conclusions. On the one hand, by indicating the separability of custom's formation and identification, it attempts to adopt the viewpoint of an objective and third-person observer. However, while the Draft Conclusions provide useful guidance for international lawyers on how to pinpoint the two elements of custom, they also implicitly concede that custom identification lies in narrative construction. As a result, even the requirement for customary law's temporality – the most typical and distinguishing feature of a norm that emerges over a long time – is conveniently obscured by the ILC in Draft Conclusions through a reference to ICJ's equivocal claim that 'the passage of only a short period of time is . . . a bar to the formation of a new rule of customary international law'.[161]

The relationship between the formation and identification of custom is that they are the same. Although it could be argued that custom's formation and existence – independent of identification – may be 'presumed',[162] there is no reason why we must do so. As explained above, this presumption provides little, if any, clarification of how customary law-making can be understood and carried out. The crucial matter in terms of customary law-making lies in how international lawyers exercise their discretion and tell their own stories about custom.[163]

[158] A. Mills, 'Rethinking Jurisdiction in International Law', (2014) 84 *BYIL* 187, at 217.

[159] Ibid.

[160] See, e.g., F. Schauer, 'Book Review: Is the Common Law Law?' (1989) 77 *California Law Review* 455; C. Varga, 'Law-Application and Its Theoretical Conception', (1981) 67 *Archiv für Rechts und Sozialphilosophie* 462, at 467.

[161] See *North Sea Continental Shelf*, *supra* note 45, at 43.

[162] In a relevant but slightly different context, see J. d'Aspremont, *The Discourse on Customary International Law* (2021), 50.

[163] Acknowledging this point justifies the heavy scholarly focus on how international courts and tribunals' methodology of custom identification. For some discussion on judicial customary law-making, see, e.g., C.J. Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making', (2015) 14 *Law & Practice of International Courts & Tribunals* 51; N. Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law', (2017) 28 *EJIL* 357.

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