Introductory Note: Beyond the Identification of International Customary Rules

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This special issue of the International Community Law Review hosts selected papers from a conference on international customary law that I co-organised in July 2015 as a member (at the time) of the McCoubrey Centre for International Law. Custom is a “mysterious” source of international law. Every generation of lawyers has painstakingly strived to demystify it, by explaining its formation and by endeavouring (in vain?) to encapsulate it in such a way so that it fits into the tidy “boxes” and “channels” through which law is formally constructed by society, its subjects and their institutions. Yet, the inherent spontaneity of a construct that emerges from the society (through conduct of its members that, somehow, transforms itself into a legal rule) is in sharp contrast with the very premises and physiognomy of posited law that promises certainty (as to its validity and content) through formalism. Perhaps customary law and legal positivism make odd bedfellows. Or it may simply be that lawyers (even the greatest among them) do not possess the tools (i.e. methodological equipment) that would allow them to “tame” customary law.

* I wish to thank the ICLR for hosting the papers on international customary law published in this issue, its Editor-in-Chief, Professor Malgosia Fitzmaurice, its Managing Editor, Dr Sarah Singer, the authors contributing to the issue, the ILC Special Rapporteur, Sir Michael Wood, Mr Omri Sender, the anonymous reviewers and, last but not least, the McCoubrey Centre for International Law.


2 Among others, Roberto Ago, “Science juridique et droit international”, 90 Recueil des cours de l’Académie de droit international de La Haye (1957) pp. 851 and following and especially pp. 932 and following.
I am mindful of the fact that one may react to this rather pessimistic (albeit realistic) introduction by questioning the overall value and usefulness of this issue. However, the tone of the opening paragraph to this brief introductory note is not one that should discourage the reader. Quite the opposite, it should be perceived as an open invitation to everyone interested in international customary law to read the studies contained in this special issue with a critical eye and an open mind to the varied and divergent (methodological) approaches that underpin them. It is also meant as an explanation of why the papers selected for publication in this issue, whilst topical – insofar as each of them engages with the works of the International Law Commission (ILC) on the identification of international customary law – all move (in one way or another) beyond the confines of legal formalism and question the definition and innate foundations of international custom. Their value is not (only) in the arguments they make or in the answers they offer, but in the questions they raise regarding international customary law and its formation and validity as law. What is it after all that changes social conduct into a norm (i.e. a legal rule)? And what is the bedrock of its normativity and binding force?

The first paper in this issue, by Noora Arajärvi, offers a very topical *tour d’horizon* of the works of the ILC on customary law and navigates us through the views expressed by all involved actors, including the Special Rapporteur and states participating in the discussions taking place within the United Nations General Assembly (UNGA). Arajärvi engages critically with the ILC documents and links the issues they raise with principal arguments in legal theory on the formation of international customary law. Her analysis spans a wide variety of aspects of customary law, from the role played by UNGA resolutions to the persistent objection doctrine. A topic occupying a central place in her analysis is the two-element test, which is at the heart of the debate on “traditional” and “modern” customary law, with the latter approach prioritising (a certain perception of) *opinio juris* to the detriment of state practice. This approach is seen by its proponents as a more appropriate method for the formation of custom, especially in certain areas of international law, such as human rights, that aim at protecting the general interest (i.e. interests of the international community as a whole). Arajärvi concurs in that respect with the ILC and rejects modern custom, favouring legal certainty and the unity of international law across its various regimes.

In contrast with Arajärvi’s all-encompassing analysis, Khagani Guliyev’s study focuses on particular custom. The author contributes to scholarship by arguing against the common perception that – unlike general international custom – particular customary law owes its normativity to the consent of the states that it binds. Both these types of law, i.e. general and particular custom,