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Between Pragmatism and Disenchantment

The Theory of Customary International Law after the ILC Project

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1 Introduction

There is a fundamental, eternal and unresolvable conundrum at the heart of customary international law (CIL) – the 'source', if the pun may be excused, of the enigma that is customary law. It is that we do not know on what we can – or are allowed to – base our arguments for or against one or another concept. Authors frequently note the lack of discipline in our debates on the foundations of this source of international law, even as they fail to show any themselves. Plenty of old wine is poured into new bottles as we seem to periodically rediscover arguments which generations upon generations before us have made – sometimes all the way back to Roman law.

Debates on the theory of CIL continue unabated, inter alia because there is a continuing, strong, urgent and foundational belief that we *need* CIL in order to keep international law working. Instead of being able to see customary law as a primitive method of norm-creation which is severely limited in its utility and dismissing it – as their domestic colleagues are wont to do – as entirely unsuitable for modern legal orders which tend to be complex and technocratic, an important sub-group of international lawyers wish to see and/or create international law as such a complex legal order. To this group belong practitioners and international legal scholars with a stake in the actual functioning of the law. They imagine customary law to be capable of performing the complex functions analogous to legislation in domestic law.[1] They do so not out of a sense of pride or ego, but because

[1] M Wood, 'The Present Position within the ILC on the Topic "Identification of Customary International Law": In Partial Response to Sienho Yee, Report on the ILC Project on "Identification of Customary International Law"' (2016) 15 Chin J Int Law 3, 5:

they genuinely believe that we cannot rely on treaties alone, that we *must* have CIL[2] (and therefore do) in order to achieve the political goals international society or politics needs to progress (or those which they imagine do). But the question is whether that is reason enough to consciously or subconsciously change the mechanics of customary law to suit these perceived needs and whether CIL has the flexibility to react to these perceived needs.

Two events have prompted my writing of this chapter. The first is that the International Law Commission (ILC) concluded its project on the Identification of Customary International Law in 2018.[3] Ably directed by Michael Wood, it has from the very beginning been suffused with the spirit of pragmatism. The project primarily wanted to provide guidance to decision makers, particularly those not professionally trained in international law. Engaging in depth with the theory of CIL was consciously avoided as far as possible. Yet, for all its self-avowed pragmatism, the ILC could not avoid taking a stance on the theoretical aspects of this source, even if only in a roundabout, subconscious manner. On the other side of the equation we find foundational critiques of CIL, with Jean d'Aspremont's 2018 *International Law as a Belief System* as well as recent articles on CIL[4] as excellent recent contributions to this *genre*. In these writings, CIL is downgraded to a set of doctrines within the canon of folk tales international lawyers tell themselves – our 'bed-time stories', so to speak.

Both methods have virtues, but both have very dangerous vices and both, in a sense, contain the seeds of their own destruction. One aim of this contribution will therefore be an effort to show the relative merits and

'Customary international law continues to play a significant role . . . In uncodified fields, it has proven itself able to adapt to the ways of modern international life.'

[2] DH Joyner, 'Why I Stopped Believing in Customary International Law' (2019) 9 Asian JIL 31, 38–41, gives a range of examples from humanitarian law. I have also previously written on this phenomenon: J Kammerhofer, 'Orthodox Generalists and Political Activists in International Legal Scholarship' in M Happold (ed), *International Law in a Multipolar World* (Routledge 2011) 138.

[3] Documents cited in this chapter: ILC, 'Report of the International Law Commission on the Work of its 70th Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10; ILC, 'First Report on Formation and Evidence of Customary International Law by Michael Wood, Special Rapporteur' (17 May 2013) UN Doc A/CN.4/663; ILC, 'Second Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (22 May 2014) UN Doc A/CN.4/672; ILC, 'Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (27 March 2015) UN Doc A/CN.4/682.

[4] J d'Aspremont, *International Law as a Belief System* (Cambridge University Press 2018); J d'Aspremont, 'The Four Lives of Customary International Law' (2019) 21 Int CL Rev 229.

demerits of these two approaches, exemplified in the ILC Report and d'Aspremont's work. I will focus on what they can tell us about the theoretical foundations of customary law as a source of international law. I am sympathetic to both: CIL is on shakier ground than mainstream writers and practitioners assume, but the point cannot be to employ a brutal reductivism. In this chapter, I will show where the quicksand lies and why our reliance on this source is problematic. To paraphrase Carl Schmitt: whoever invokes customary international law wants to deceive.[5]

The second event to spark this chapter is that at the time of writing fifteen years had passed since I first published an article in the *European Journal of International Law* on the fundamental 'uncertainties', as I called them, of customary international law-making.[6] This anniversary and the conclusion of the ILC project have prompted me to rethink the argument made then and to reconceptualise the foundation of this source whose importance for international lawyers is eclipsed only by their frustration in the face of the manifold *aporia* with which they are confronted when wishing to research and/or apply it. My work usually stops at the recognition that we cannot find the law which tells us what the rules on customary international law-making are. In this chapter, I will attempt to go a step further.

Accordingly, Section 2 will summarise what I consider to be the salient features of the two approaches, exemplified by the writings of its two champions, Wood for the pragmatists and d'Aspremont for the iconoclasts. This section is brief because these traits are better discussed using specific examples. Indeed, the example in Section 3 is the pivot point for this chapter, because it is both an illustration of the two approaches as well as an expression of the high-level problem: the 'meta-meta law' and the problem of finding what its content is. Section 4 will focus on this problem and will discuss my proposal for a new method for conceptualising this elusive level.

2 Two Approaches to Customary International Law

There are, of course, more than two possible approaches to customary (international) law and the choice of these two is arbitrary. Yet, they are

[5] Schmitt's aphorism is: *Wer Menschheit sagt, will betrügen*. 'Whoever invokes humanity wants to deceive.' C Schmitt, *Der Begriff des Politischen* (first published 1932, 7th ed, Duncker & Humblot 1991) 55.

[6] J Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 EJIL 523; later incorporated, rewritten and expanded in J Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2010) 59–86, 195–240.

well-known and well-respected archetypes for two essential directions the debates on this topic have taken in the past decade or so – both in terms of the sharp divergences that characterise them as well as the fact that they are surprisingly close on some points. Wood is typical of those scholars and practitioners who wish to construe CIL in a practicable manner from a 'generalist' perspective; d'Aspremont is the most adept communicator among the younger generation of scholars who seek to deconstruct the theoretical-philosophical foundations of the stories we tell about custom. Both approaches have merits, but both suffer from significant defects: Wood is right to focus on the positive law, but wrong to dismiss CIL's problems so easily. His generalist-pragmatic understanding leads to an indistinct view of what CIL is and how it comes about; an impish soul might call him 'the astigmatic pragmatist'. D'Aspremont is right to criticise that aspect, but the way forward in legal scholarship cannot lie in a reduction of law to collective psychology; he, in turn, could be called a 'frustrated iconoclast'. My argument is, and has been for more than fifteen years, that both methods have a point, but that we require a combination of factors in order to make headway in international legal scholarship on customary law: it should be a theory-conscious analysis of the positive law in force.

2.1 Astigmatic Pragmatists

From the beginning of the ILC's project on CIL, Michael Wood as the special rapporteur was committed to pragmatic goals, rather than to exploring theoretical (or even many doctrinal) questions. Wood's First Report is clear about the project's goal, namely 'to offer some guidance to those called upon to apply rules of CIL on how to identify such rules in concrete cases',[7] that is 'especially those who are not necessarily specialists in the general field of public international law', because it is 'important that there be a degree of clarity in the practical application of this central aspect of international law, while recognizing of course that the customary process is inherently flexible'.[8] On that *pragmatic* level, concerned with the 'usefulness of its practical consequences',[9] the project has to some extent succeeded. In this sense, the ILC's work has a stabilising function and Wood is to be commended for his contribution. If he had remained

[7] Wood, 'First Report' (n 3) [14].
[8] Wood, 'Second Report' (n 3) [12].
[9] *Oxford English Dictionary* (3rd ed, Oxford University Press 2004): pragmatism, n 4a, available at: <https://oed.com>.

on this pragmatic level, it would not have made for a good example for this chapter; however, there are indications that there is more to this mindset. For example, in a 2016 article, Wood (writing in his private capacity), argues: 'Work on the topic has also shown that *several longstanding theoretical controversies related to customary international law have by now been put to rest*. It is no longer contested, for example, that verbal acts, and not just physical conduct, may count as "practice."'[10] One can take issue with statements such as this on several levels. For one, it is less than certain that 'theoretical controversies', including the verbal practice problem, have been 'put to rest' (which itself can mean a number of things). On another level, however, I submit that this type of statement is indirectly expressive of a particular view popular with practitioners and practice-leaning scholars, mistakenly believing that practice solves theoretical problems. While neither Wood nor the ILC texts openly declare it, one could argue that there is a subconscious belief that the eternal problems of customary law can be solved by the Commission declaring one side the winner – or that it should try. It is trivial to say that the ILC is not a lawmaker which could modify the law on customary international lawmaking. It is perhaps not so trivial to say that the role of the ILC as epistemic 'authority' – as an institution whose pronouncements can be presumed to accurately represent the state of international law – is equally problematic, particularly given the narrow range of sources and arguments on which it, like most orthodox international lawyers, relies.

Partially, this can be explained by the peculiar, if widespread use of the word 'theory' in English legal language. Whereas for example in German, *Theorie* or *Rechtstheorie* refers to legal theory, in English it tends also to be used for doctrinal statements about the material content of the positive law. The 'theory of customary international law' of which Wood writes tends to be concerned with questions like the relative value of domestic court judgments as state practice or the requisite number of instances of *opinio juris*.[11] Those are not the core research areas of legal theorists, but of international legal scholars – *Rechtsdogmatik* in German. If those topics are 'theory', then it is not surprising that legal theory properly so called finds no place in the ILC project and that a pragmatic project assumes that it has made changes to the 'theory' of customary law.

[10] Wood (n 1) 8 (emphasis added).
[11] O Sender & M Wood, 'The Emergence of Customary International Law: Between Theory and Practice' in C Brölmann & Y Radi (eds), *Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 133, 137–45.

Largely, however, it is the *culture of orthodoxy*[12] which moulds this mindset. Orthodoxy is understood here as respect for conventional authority (acceptance by peers). International lawyers with their largely (but not consistently) 'positivist' outlook tend to exhibit three elements as part of the culture of orthodoxy: (1) submission: international lawyers submit to an apology of international tribunals (foremost the ICJ) as almost unquestioned authorities; (2) realist pragmatism: the pragmatic impetus unites with a belief in being 'realistic' and accommodating the 'realities' of international life, particularly practice – we know that practice is relevant because practice tells us that practice is relevant; (3) problem-solving: their pragmatic bent leads naturally to a tendency to try to solve problems, rather than analyse the law, even when they are not authorised to 'solve' the problems themselves.

On this basis, Wood's reports combine a certain (small-c) conservatism on substantial issues, for example on international legal subjectivity,[13] with a pragmatic *modus operandi*. As mentioned above, the problem arises when there is even the tacit assumption that this is the right way to cognise or change the law – the result is an unclear cognition, an astigmatism.

2.2 *Frustrated Iconoclasts*

Like myself, Jean d'Aspremont has critiqued the *naïveté* inherent in the ILC project, which cannot escape the theoretical problems of what he calls the 'monolithic understanding of customary law'.[14] This is obvious in manifold ways, including the central problem of verbal practice which we have both criticised in similar terms. His is a theoretical approach to (customary) international law; it is heterodox in the sense that theoretical coherence is more important to him than his arguments being in line with what is generally accepted. However, even the briefest look at his current theory, summarised in the 2018 book *International Law as a Belief System*, shows that its radical reductivism borders on non-cognitivism and threatens to destroy more than false assumptions. In this book, d'Aspremont argues with some justification that much of the (orthodox) discourse about what CIL is and how it functions – 'the articulation of international legal

[12] I have tried to outline this in a recent publication as part of international legal scholarship's 'default positivism': J Kammerhofer, 'International Legal Positivist Research Methods' in R Deplano & N Tsagourias (eds), *Research Methods in International Law: A Handbook* (Edward Elgar 2021), 95, 97–103.
[13] Wood, 'Third Report' (n 3) [70].
[14] D'Aspremont, 'The Four Lives of Customary International Law' (n 4) 231.

discourses around fundamental doctrines', as he puts it – has the hallmarks 'of a belief system'.[15] That, in turn, is characterised in the following manner:

> [A] belief system is a set of mutually reinforcing beliefs prevalent in a community or society that is not necessarily formalised. A belief system thus refers to dominant interrelated attitudes of the members of a community or society as to what they regard as true or acceptable or as to make sense of the world. In a belief system, truth or meaning is acquired neither by reason (rationalism) nor by experience (empiricism) but by the deployment of certain transcendental validators that are unjudged and unproved rationally or empirically.[16]

The 'fundamental doctrines', such as (our talking about) CIL are 'organised clusters of modes of legal reasoning that are constantly deployed by international lawyers when they formulate international legal claims about the existence and extent of the rights and duties of actors',[17] which sounds reasonable as a *sociological description* of the *language use* by international law professionals. And indeed, on first blush, d'Aspremont seems to carefully guide us through the problems of this deconstructive enterprise. This new view of customary law doctrine as part of a belief system and as a cluster of reasoning is supposedly a 'heuristic undertaking' 'with a view to raising awareness about under-explored dimensions of international legal discourse'. By this method, he posits the possibility of 'a temporary suspension of the belief system' and 'a falsification of the transcendental character of the fundamental doctrines to which international lawyers turn to generate truth, meaning or sense in international legal discourse'.[18] In more conventional terms, by realising that the (dominant) way in which we *talk* about international law and the widespread acceptance of certain doctrines does not equal 'truth', the authority of orthodox assumptions can be questioned. So far so good: questioning the unspoken assumptions of legal scholars is the main task of all legal theory and I would happily count myself among those who participate in this form of 'radical' critique in the word's original sense: pertaining to the *radix*, the root or foundation, of our knowledge.

Yet at this point the critique turns to iconoclasm, despite d'Aspremont's avowed aim of avoiding 'apostasy', which 'is neither possible nor desirable'.[19] Let us look at what d'Aspremont does *not* (wish to) talk about: international law itself and the relationship of the doctrines/belief system to the body of

[15] D'Aspremont, *International Law as a Belief System* (n 4) 1.
[16] ibid 4–5.
[17] ibid 8.
[18] ibid 17–18.
[19] ibid 20.

rules/norms that is the law. The open question is as to the reason for this reluctance, which he shares with many other postmodernist international legal theorists. My interpretation of this peculiar state of affairs – peculiar from my theoretical vantage point – is that for d'Aspremont, two foundational beliefs strongly discourage talking about the law itself in any meaningful way: (1) a general noncognitivism; (2) a specific aversion to the 'ruleness of sources'.

(1) For d'Aspremont, the title of his book is enough to show the radical reductivism of this strain of thought: it is *international law* that is a belief system. Despite considerable vacillation between the possibility of rules/norms and their denial, in the end, international law is identified with and reduced to 'law-talk' – the way we talk about the law is the law. The 'existence' in any sense of the word of international law as body of rules (as legal order) is half-negated. It seems – although it is difficult to pinpoint in the text – that, on the one hand, substantive rules are rules properly speaking, but on the other hand, sometimes certain parts of the law and the law in general is doctrine. Law is doctrine, law is a socio-psycho-linguistic phenomenon, law is reducible to (a special kind of) facts and apprehensible only by social-scientific methods. Even when d'Aspremont's approach was still closer to Hartian legal positivism, it tended to favour reductivist, legal realist and anti-metaphysical readings of Hart.[20] With this book, this trend is strengthened and he is now closer to the postmodernist orthodoxy in international legal theory.
(2) Denying the idea that the law regulates its own creation (i.e. sources *sensu stricto*), and that sources are not themselves law unites certain post-Hartian and postmodernist theoretical approaches with a long tradition of state-centred thought in international legal doctrine. Whereas the former would rather, as d'Aspremont does, reduce sources to a doctrine – to teachings and to methods of law ascertainment[21] – the latter see the source of law immediately founded in facts.[22]

[20] J Kammerhofer, 'International Legal Positivism' in F Hoffmann & A Orford (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 407, 414–25.
[21] D'Aspremont, *International Law as a Belief System* (n 4) 55–63; see already J d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011).
[22] I have analysed this aspect in J Kammerhofer, 'Sources in Legal Positivist Theories: The Pure Theory's Structural Analysis of the Law' in S Besson & J d'Aspremont (eds), *The*

The problems which this approach engenders are, at least potentially, destructive not just of false orthodox narratives, but of the very idea of law. It does not really matter that d'Aspremont asks us only for 'a temporary suspension'[23] of the belief system. The very possibility that we can simply suspend belief destroys the underlying concept and is probably self-contradictory – as if we could temporarily suspend belief that half, but not all, of the audience members are in an auditorium. Reductivism of this sort must face up to the enormous problem that it cannot distinguish between the belief system of doctrines about the law and the possibility that the law itself is no more than a belief system. This idea is indeed more than a heuristic tool to critique baseless orthodox taboos and fetishes, it is more than 'apostasy'; it negates the very possibility of law as something separate from what actually happens in the physical world, its counterfactual nature. 'The argument that in the end . . . the "existence" of law "is a matter of fact" is a negation of the very possibility of Ought. Ideals cannot be deduced from reality alone.'[24] It does not really matter that perhaps the reductivism which d'Aspremont wishes to promote is not anti-norm-ontic, merely epistemic. As long as the mediatisation of law by way of beliefs and discourse is watertight, law is still reduced to facts. If we adopt such reductivism, we are throwing the baby (the notion that 'you ought not to kill' makes sense as a claim to regulate behaviour) out with the bathwater (the true observation that many of our most cherished doctrines have little to do with the content of the positive law). But there is some 'hope' that orthodoxy's serene pragmatism will domesticate and ultimately frustrate this iconoclasm – as it tends to do with all theoretical arguments, whether they are right or wrong.

3 Verbal Practice as Example

How do the two approaches deal with an issue which is not always acknowledged as problem, but which (from a theoretical vantage point) is far from problem-free? From a range of potential topics I have chosen verbal practice, because it allows me to demonstrate the strengths and weaknesses of both approaches introduced in Section 2 – but also because it is an ideal candidate to show the fundamental problem of all CIL theory (Section 4).

Oxford Handbook of the Sources of International Law (Oxford University Press 2017) 343, 349–51.

[23] D'Aspremont, *International Law as a Belief System* (n 4) 17.

[24] Kammerhofer, *Uncertainty in International Law* (n 6) 226.

Verbal acts have become incredibly important for international law and we have increasingly turned to texts to support our claims to the emergence, change and destruction of customary law. That is because our world has become more complex whereas customary law as ancient law-creation mechanism originally based on raw actions has not. The classical controversy about the role of verbal utterances as practice has abated and it is virtually universally admitted that statements can be state practice.[25] In customary international humanitarian law, for example, reliance on verbal practice has far eclipsed 'battlefield practice' – take the ICRC study's almost exclusive use of verbal emanations such as manuals as example for this trend. For example, the 'Practice' section for the principle of distinction contains a vast amount of material. As far as I can tell, all of these are statements and not a single instance of battlefield practice is mentioned;[26] for example under 'Other National Practice', the study quotes the following '"[i]t is the *opinio juris* of the United States that . . . a distinction must be made"' – *opinio juris* is thus made practice. The entire project seems to be aimed at reporting statements, rather than acts.

The pragmatic temperament of colleagues has meant that they are unwilling to exclude any factor that might possibly be useful. Accordingly, verbal acts are now universally recognised, including by Wood. He is dismissive of those who problematise the use of statements; those 'views . . . are too restrictive. Accepting such views could also be seen as encouraging confrontation and, in some cases, even the use of force.'[27] That is a strongly emotive argument – you better accept verbal practice or we may end up at war – but in terms of a dispassionate legal argument it cannot convince. Yet orthodoxy's pragmatic impetus pushes Wood and the ILC to focus on the fact of widespread acceptance by peers:[28] "it is now *generally accepted* that verbal conduct . . . may also count as practice."[29] The only substantive argument is negative; Wood quotes Mark Villiger's 1997 monograph, which contains the following argument: 'the term "practice" . . . is general enough . . . to cover any act or behaviour . . . it is not made entirely

[25] N Petersen, 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' (2007) 32 AmUInt'l LRev 275, 278.
[26] ICRC, 'Practice Relating to Rule 1 The Principle of Distinction between Civilians and Combatants' (*ICRC Customary IHL Database*, 2005) sect A <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule1> accessed 1 March 2021.
[27] Wood, 'Second Report' (n 3) [37].
[28] Which, in turn, is the decisive element of the 'culture of orthodoxy' that characterises orthodox (positivist) international legal scholarship (and practice): Kammerhofer (n 12) 97–101.
[29] ILC Report (n 3) Conclusion 6, Commentary 2 [66].