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CUSTOMARY INTERNATIONAL LAW AND NON-STATE ACTORS: BETWEEN ANTHROPOMORPHISM AND ARTIFICIAL UNITY

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Customary International Law and Non-State Actors: Between Anthropomorphism and Artificial Unity

Maiko Meguro*

Introduction

This chapter seeks to shed light on the role of non-state actors in custom-making processes. It does so by repudiating the dominant understanding of *opinio juris* and practice as they are found in the two-element variant of the doctrine of customary law that has informed practice and scholarship since the 1920s. It shows that dominant approaches to opinio juris and practice are indifferent to the role of non-state actors by virtue of constructions that are highly questionable.

Section 1 sketches out the dominant understanding of two elements of customary international law (1). Section 2 discusses the limitations of the dominant understanding of opinio juris by showing the extent to which the anthropomorphic concept of *opinio juris* fails to perform the functions assigned to it and denies any role to non-state actors (2). In section 3, the attention turns to practice which is the object of a much greater variety of approaches. This section particularly emphasizes the role of *domestic* non-state actors in the creation of international norms that shapes State practice (3). This chapter ends with a few concluding remarks about the general implications of the approach promoted here for the doctrine of customary law as a whole (4).

Before proceeding with the arguments above, a caveat must be made. The purpose of this chapter is neither to solve all the problems commonly associated with identification of customary international law nor to repudiate the doctrine customary international law. Instead, this chapter, by shedding light to the role of domestic actors

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in making of international customary law and its consequences, extends an invitation for the readers to recognize the malfunctioning of the dominant approach of custom as a "source" of international law, and suggests avenues to refresh international lawyers' reflections on customary international law.

1. *Opinio juris* and State practice in the dominant approach to customary international law

Despite the widespread scholarly inclination to extract the two-element variant of the doctrine of customary law from Article 38 of the Statute of the Permanent Court of International Justice (hereafter the PCIJ) and the International Court of Justice (hereafter, the ICJ), it can be defended that the two elements of custom, namely, practice and *opinio juris* are not a product of Article 38 but creation of the PCIJ.[1] Article 38(2) of the Statute of the PCIJ list custom merely as law applicable by the PCIJ under the terms of "International custom, as evidence of a general practice accepted as law". While the wording of "a general practice accepted as law" allows an interpretation that "a general practice" and "acceptance as law" exist as separate elements, [2] the drafting process of article 38 does not suggest there was discussion about what was meant by "custom" nor was there any attempt to distinguish between the two elements under the monolithic understanding of that time.[3] Instead, it was the PCIJ that first established the necessity of the two separate elements of custom when finding "evidence of a general practice accepted as law".[4] In particular, the PCIJ in the *Lotus* case of 1927 held that, in

[1] Jean d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' [2015] Global Community: Yearbook of International Law and Jurisprudence,, pp 8-10; James Crawford, 'THE IDENTIFICATION AND DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW (Keynote Speech at the ILA British Branch Annual meeting)' (2014), p. 3.

[2] See for example, Omri Sender and Michael Wood, 'The emergence of customary international law: Between theory and practice', *Research Handbook on the Theory and Practice of International Lawmaking* (Elgar, 2016).

[3] Christian Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making', *The Law & Practice of International Courts and Tribunals* (Brill | Nijhoff 2015). Also see d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' (n 1) , p. 9.

[4] S.S. "Lotus" case, 1927 PCIJ (ser. A) No. 10, p.18, 29; S.S. Wimbledon, 1923 PCIJ (ser. A) No. 1, p. 25.

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identifying international custom, there must not only the practice of States('abstention') but also the practice must be "based on their being conscious of having a duty to abstain".[5] It is well known that the ICJ perpetuated this two-element approach.[6] According to this approach, and notwithstanding divergent scholarly positions on what is exactly meant by each element, there seems to be general agreement that State practice refers to the regularity of conduct by States with uniformity and generality,[7] while *opinio juris* – the subjective element – is the recognition on the side of the State that its conduct is in accordance with a sense of legal obligation. The two elements approach has also been upheld by the International Law Commission (hereafter, the ILC) in its work on "identification of customary international law" under the guidance of Sir Michael Wood since 2012.[8] A few remarks on each of these two elements are warranted.

As far as the objective element ("State practice") is concerned, it must first be acknowledged that there is ambiguity in usage of the term "State practice". There has been a long-standing debate whether state practice is limited to physical acts or whether also includes verbal acts as well.[9] Behind this traditional dichotomy between State practice as physical acts and State practice as verbal acts, there are different understandings which all simultaneously refer to both the fact of the repeated state conducts and the norm that shapes the

[5] S.S."Lotus", p. 28.

[6] North Sea Continental Shelf case, 1969 ICJ Judgement, para. 77.

[7] For example, North Sea Continental case, and S.S. "Lotus" case. Also Crawford (n 1), pp. 5-6.

[8] ILC 'Identification of Customary International Law: text of the Draft conclusions. A/CN.4/L.872' (UN, 2016). Draft conclusions: 2(3). 'Two constituent elements. To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

[9] Those who accept verbal acts as a part of state practice, i.g. Maurice Mendelson, 'The Formation of Customary International Law' (1998) 272 Collected Courses of the Hague Academy of International Law; Michael Akehurst, 'Custom as a Source of International Law' (1976) 47 British Yearbook of International Law 1; also the ILC (see the next section) On the contrary, the scholars contend only physical act constitutes state practice, e.g.D'Amato (n 8). See also, J. d'Aspremont, The Decay of Modern Custom and J. d'Aspremont, Customary International Law as a Dance Floor - Part II, EJIL TALK! (https://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/).

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repetition of State conducts. In this regard, the ILC Draft Conclusion describes State practice as "conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions",[10] and includes "both physical and verbal acts".[11] The same line of argument is also found in the International Law Association (ILA) report on the formation of customary international law.[12] However, neither organization clearly defines what it means by "State practice".[13]

Another remark about State practice is in order. If identification of custom is a normative evaluation, what constitutes State practice as a component of custom should not be the repetition of conducts itself but the subjective reasoning that underlie the repetition. As will be discussed in *section 3*, the standard of identification could vary depending on which understanding courts and tribunals take with regards to State practice. This chapter sheds light on the power of courts and tribunals to create the subjective reasoning which is inevitably required for identifying the degree of the required "unity" of state practice. Section 3 will show that the identification of unity by courts and tribunals is often of an artificial nature.

As far as the subjective element ("*opinio juris*") is concerned, it should preliminarily be stressed that there are multiple understandings of the subjective element that leads to different theoretical and practical consequences to the question. First of all, the subjective element which the ICJ, in *North Sea Continental Shelf* case, construed as "a belief" (or "sense of legal duty") by States that "this practice is rendered obligatory by the existence of a rule of law requiring it".[14] Under this narrative, States are considered to have recognized that the legal obligation "had already existed" at the certain time in the

[10] The ILC (n 8) Draft conclusion 5.
[11] The ILC (n 8) Draft conclusion 6.
[12] International Law Association, Committee on the Formation of Rules of Customary International Law, Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law (2000), pp. 14-15.
[13] The latest proposed amendment to draft conclusion 4 ("Requirement of Practice") seems to put forward the practice as "the norm". See the Forth Report (2016), Annex, A/CN.4/695.
[14] North Sea Continental Shelf case, para. 77.

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past before the conduct at issue took place.[15] Whereas this understanding of "pre-existing law" has been criticized by the scholars such Hans Kelsen,[16] and Anthony D'Amato,[17] the narrative remained as dominant. Under this narrative, the question "how the customary legal obligation came into being" remains unsolved. Secondly, the subjective element is sometimes, albeit more marginally, understood as consent. Indeed, some scholars construe the subjective element as implicit agreement which transforms a rule of conduct into a legally binding norm of customary international law.[18] In the second understanding, contrary to the first understanding, the subjective element is construed as equivalent to legal identification of the customary norms. However, this position has been criticized for its artificiality in inferring consent from silent States since it fails to reconcile with the fact that the majority of States neither protect nor support the emergence of customary legal norms clearly. For instance, Mendelson rejects the "consent" narrative as "(t)o say that all States gave their consent, in any normal sense of the word 'consent', is simply untrue."[19] While construction of *opinio juris* as consent is theoretically designed to provide a way to address the issue of legal identification, the reliance on the construction of tacit consent – in other words, "acquiescence"[20] reinforces the narrative whereby "States had come to accept" and thus the idea of *opinio juris* as a belief. Equating non-participation to giving a consent implicitly "reduces general acceptance to an obvious fiction, since the

[15] Hans Kelsen, in Charles Leben and Doctrine Juridique (eds), *Hans Kelsen : Ecrits français de droit international* (Presses Universitaires de France - PUF 2001).p. 72; Raphael M Walden, 'The Subjective Element in the Formation of Customary International Law' (1977) 12 Israel Law Review 344,pp. 357-359; Anthony D'Amato, *Concept of Custom in International Law* (Cornell University Press 1971),pp. 47-48; Michael Akehurst, 'Custom as a Source of International Law' (1976) 47 British Yearbook of International Law 1, p. 32; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1998), p. 131.

[16] Kelsen (n 14), especially pp. 72-73.

[17] D'Amato (n 14). D'Amato rejoins Kelsen while he recognizes rejecting the approach is "difficulty of imagining all states", see p. 263.

[18] Gennady M Danilenko, 'The Theory of International Customary Law' (1988) 31 German Yearbook of International Law 9,p. 11; Walden (n 14).

[19] Maurice Mendelson, 'The Subjective Element in Customary International Law' (1996) 66 British Yearbook of International Law 177, p. 185.

[20] IC MacGibbon, 'Customary International Law and Acquiescence' (1957) 33 British Year Book of International Law 115.

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conclusion is presumed rather than proven".[21] Lastly, the subjective element is sometimes equated to a community value to maintain orderly co-existence.[22] In this respect, some scholars argue that the reference to "*sive necessitatis*" indicates that *opinio juris* includes the cases where practice is rendered necessary by the common popular sentiment.[23]

It is noteworthy that the ILC did not clearly take any clear position and fell short of embracing any of the abovementioned understandings of *opinio juris*. Instead, the ILC rephrased the old formula of "the general practice be accepted as law (*opinio juris*)" in the context of two element approach.[24] Being aware of the theoretical ambiguity and constrains in every position, the Special Rapporteur seems to have chosen a more pragmatic (and supposedly prudent) approach rather than attempting to join the theoretical controversy. He did so by establishing an inclusive understanding of the subjective element as "(b)elief, acquiescence, tacit recognition, consent have one thing in common – they all express subjective attitude of States either to their own behavior or to the behavior of other states in the light of international law".[25] In referring to the inclusive understanding of subjective element, Special Rapporteur Wood stated that "(w)hile the term *opinio juris* has undoubtedly become established in referring to this element, it is suggested that 'accepted as law maybe the better term.'"[26]

According to the author of this chapter, the ILC's abovementioned pragmatic approach to *opinio juris* is perplexing, particularly in the light of the purpose of the current work of the ILC "identification of customary international law". Indeed, the ILC's use of wording of Article 38 is not self-explanatory at all in this regard. For example,

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[21] J Patrick Kelly, 'The Twilight of Customary International Law' (2000) 40 Virginia Journal of International Law, p. 473.

[22] Phillip Allott, 'The Concept of International Law' (1999) 10 European Journal of International Law3; D'Amato (n 14),pp. 71-72 (referring scholars such as Raman and Cheng).

[23] ibid,pp.47-48 (referring scholars such as Puchata and Savigny), pp. 71-72 (referring to Sorenson and Kopelmanas).

[24] The ILC (n 8) Draft conclusion 9.

[25] The second report on identification of customary international law by Michael Wood, Special Rapporteur: A/CN.4/672, ICL Sixty-sixth session (2014), para. 67.

[26] The second report, para. 68.

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the ILC Special Rapporteur contends the term under Article 38 "… goes a large way towards overcoming the *opinio juris* 'paradox'".[27] This paradox is at the heart of the dominant approach whereby *opinio juris* is construed as the belief that the legal obligation "had existed" at the time of State conduct. This construction has commonly been considered problematic. For instance, Kelsen famously contended it was redundant to have the second criteria of *opinio juris* since the States had already believed in the legal obligation when the conduct was made.[28] D'Amato described this redundancy as a tautology since customary international law that is created by State practice which must be preceded by the legal obligation.[29] What is more, this chronologically paradoxical relationship between State conducts and the legal obligation may cause a real problem when the customary norm emerges in a violation of existing customary norm.[30] The "belief" approach would lead to the conclusion that customary international law cannot be modified once it is established since the new norms emerge in violation of the existing customary legal norms.[31]

It is submitted here that the abovementioned paradox builds on the assumption that customary international law is produced spontaneously at intangible point in the past. Given this uncertainty about the moment of crystallization, one cannot distinguish between the repetition of state conduct tied to emerging customary norms that should take place before the legal identification and the repetition of state conduct as implementation of customary international law. In regard to the crystallization, the ILC approach seems to be avoiding the question of legal identification of customary international law much like the dominant approach of *opinio juris*. As already stated above, the scholarly construction on subjective element as a belief - and as consent - are based on totally different understandings of identification of customary international law. Turning to the wordings of Article 38, "accepted as law" is not at all self-explanatory on the issue of legal identification. Under Article 38

[27] Ibid.
[28] Hans Kelsen, 'Théorie du droit international coutumier', in Kelsen (n 13), p. 72.
[29] D'Amato (n 14), p. 66, 73.
[30] The second report, para. 66.
[31] For example, Byers (n 14), pp. 130-133.

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approach, the legal obligation remains presupposed as "had been accepted" at the certain point of the past, thus there is no guidance on how norms of customary international law are identified. Under this approach, it is argued here that the question of legal identification of customary international law is treated as what is called here "a black box" in the sense that emergence of new legal norms is completely circumvented by the narrative that States came to recognize the legal obligation to which they accord their conducts.

This chapter is not the place to continue to revisit the traditional criticisms of each of the two constitutive elements of customary international law. Nor is it the place to repudiate the doctrine of customary international law as a whole because of all the problems mentioned in this section. Abandoning the two-element variant of the doctrine of customary international law would be unrealistic let alone desirable.[32] Indeed, notwithstanding all these problems, customary international law continues to be central tool of functioning of international law.[33]

Instead, the next section focuses on one aspect of the discussion carried out in this section, the abovementioned 'black box' approach to identification of custom by questioning its anthropomorphic foundation that informs the dominant understanding thereof. In articulating such a criticism, the next section revisits the dominant approach adopted by the ICJ and the ILC that identification of customary international law as a result of unintentional acceptance by States, which is described through the narrative of "belief" or "the general practice accepted as law". It is submitted in the next section that a "belief" or "the general practice accepted as law" is a porous fiction created by some anthropomorphism that could undermine

[32] D'Amato who is known for his extensive research on the theories on customary international law, still could not entirely refute the concept of opinio juris despite all the theoretical problems including opinio juris paradox. He states "in so far as the identification of existing customary law is concerned. Here, opinio juris is at worst a harmless tautology". See D'Amato (n 13), p. 73. Also, Special Rapporteur Wood refers to the statement by Briggs regarding the problems of the subjective element as "creates more difficulty in theory than practice" in his second report to the ILC. See The second report, para. 66.

[33] d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' (n 1), p. 22.

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the entire international legal order by giving courts and tribunals immense power to create customary international law as needed. In doing so, it draws on the idea that the law-making process constitutes a consciously coordinated process within each a State, shedding the light on the various actors behind the "statehood". It will be particularly shown that States' decisions to support the creation of certain legal norms are the result of domestic coordination among different actors at domestic level.

2. Anthropomorphism and the limitations of the dominant approach to opinio juris

This section takes issue with the content of the black box – or the very approach which creates the black box: anthropomorphism informing the dominant approach to *opinio juris*. Under the dominant approach, customary international law is construed as a product of a spontaneous form of law-ascertainment in contrast to treaty making. Whereas the wide range of scholars, including those who tried to construe the subjective element as "consent", have criticized the dominant proposition,[34] it has been found to be present in the case-law of the ICJ,[35] as well as the current work of the ILC. Under this position, the lack of formal legal identification is compensated by the concept of "belief" or "acceptance" that the conduct carried out is according to the legal obligation.[36] It is submitted here that *opinio juris* understood as the subjective element, or the psychological element,[37] manifests an anthropomorphic pattern of legal thought.

[34] For example, Danilenko pointed out deficiency of Article 38 in the light of ascertainment under customary international law is "largely caused by natural law theories" see Danilenko (n 17), p. 10.

[35] Meldelson argues that the PCIJ and the ICJ has not been clear about the nature of opinion juris – namely, consent or belief. See Mendelson (n 18), p.180.

[36] The argument of acquiescence also adopts the narrative "States had come to accept" although it is understood as a variation of "consent". See *section 1*.

[37] Mendelson (n 18), p. 177; Stephen Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 European Journal of International Law, p. 433.

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Debates on anthropomorphism in international legal thought are not new.[38] While some scholarly debate exists about the scope and function of anthropomorphism in international law, there is general agreement that anthropomorphism is necessary in the practice of international law since the concepts such as "will" of States constitute the very core of the dominant positivist theory of law making. In this sense, a State is treated as a unitary personality - a normative being in the light of international law making.[39] That being said, criticisms of anthropomorphism in customary law are not unheard of. For instance, D'Amato[40] and Akehurst[41] advocate the position that States do not have mind of their own like natural persons since States are institutions that consist of various organs and actors. However, these criticisms overlook the role of fiction in international legal practice. This section takes issue with the anthropomorphism of the doctrine of customary international law, and more specifically the fiction this anthropomorphic pattern is built on. This is the fiction according to which States may have positions which can be described as "thoughts" or "intention". In doing so, this section will show how such legal fiction impacts the recognition of the role of non-State actors in customary law making.

In taking an issue with the usage of fiction of anthropomorphism in customary international law, the notion of fiction must be explained first. Fiction in general is a legal device whose use is unavoidable in legal system since the legal system cannot be perfect – there is always a possibility of a situation that existing legal rules do not cover. Fiction adjusts the application of law by attributing certain legal effects to certain facts which otherwise would fall outside the scope

[38] Jean d'Aspremont, 'The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law' (2015) 4 Cambridge Journal of International and Comparative Law, p. 516.

[39] For example, Kelsen claims the concept of State as purely normative one, stating "the state is not a visible or tangible body", Hans Kelsen, 'General Theory of Law and the State', translated by Anders Wedberg, (Harvard University Press, 1949), p. 191. In this comment, Kelsen had Jellineck's sociological concept of statehood in his mind. For Jellineck, this sociological concept co-exist with the legal concept "a State as a legal person(Körperschaft)" in 'Allgemeine Staatslehre', Berlin (1900), p. 173 and p. 183.

[40] D'Amato (n 14), pp. 35-39.

[41] Akehurst (n 14), pp. 36-37.

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of the law. An example of legal fiction,[42] under international law, is diplomatic protection where injury suffered by individual is treated "as if" injury to the individual's national State.[43] While there is some debate on possible scope and function of fiction, it is widely accepted that fiction provides harmless simplification or transformation of the facts to fit into the existing legal system rather than announcing vacuum of law.[44] In the context of international law making, whilst the respective decision by the constituents of a State does not fit in the State-centred international legal framework, if these decisions are treated collectively, the device of fiction can make it possible to be treated as if it is a decision by a unitary personality of State - a subject of international law. While the usage of fiction is widely accepted among legal practice and scholarship, an important thing to note here is that fiction cannot posit a fact with legal effect unless it is based on some corresponding reality. In the abovementioned example of diplomatic protection, for a State to exercise the right of diplomatic protection, the corresponding fact that their national was injured must be established. In the same vein, for a State to be perceived as having a "will" through the fiction of anthropomorphism, there must be a corresponding outcome of decision-making participated by the state organs and entities. In other words, the state will cannot exist where the "corresponding" decision making among the state organs and entities does not take place.

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[42] In the context of domestic law, inheritance by an unborn child is often referred to as an example. While legal capacity is only given to the child at the moment of birth, an unborn child is treated as if the child has already been born with regard to inheritance in many legal systems. Without legal fiction, the child who is not born at the time of inheritance cannot be an inheritor since he or she lacks legal capacity to do so.

[43] Annemarieke Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection'' (2007) 18 European Journal of International Law 37.

[44] In general, see Jean Salmon, 'The Device of Fiction in Public International Law' (1974) 4 Georgia Journal of International and Comparative Law; LL Fuller, 'Legal Fictions' (1930) 25 Illinois Law Review 363. The issue of legal personality bears a controversy between "a fiction" or "a conceptual fact" – however, for the sake of this chapter, the term "fiction" is understood in the wider sense to the issue of legal personality. As to this controversy, Fuller states that it is as a matter of terminology, pp. 372-373. Also see Bryant Smith, 'Legal Personality' (1928) 37 The Yale Law Journal 283, pp. 292-293.

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According to the argument made here, the mainstream understanding of *opinio juris* can be considered to be similarly based on a fiction. In constructing *opinio juris* as "belief" or "unintentional recognition", courts and tribunals, for instance, has presupposed that the belief by States amounts to "a position" on the international scene, possibly originating in a domestic political process. In other words, the very fiction at work behind the subjective element pertains to the question of the formation of *opinio juris*, that whether a State can form a position "unintentionally". By virtue of the idea that a State has come to recognize a legal obligation without formal acceptance, the fiction boils down to the idea that State position to accept a legal obligation is possibly formed spontaneously. The fictitious character of this construction is confirmed by the fact that not much scholastic attention has been paid to formation of such "subjective element" – or put in differently, a position of State to support and discard existence of legal obligation. It is argued here that paying more attention to the formation of *opinio juris* allows one to show that the fiction of *opinio juris*, as it is commonly understood, lacks the very premise required for the fiction of anthropomorphism.

To articulate the claim that opinio juris is a fiction built on a wrong premise, it is necessary to recall the variables that can possibly shape the formation of state positions in international relations Scholars of international relations (hereafter, IR) and political science have put forward two main models to explain the behaviors of states: (i) the traditional normative *statehood* model and (ii) the *social actor* model.

The normative model of the state construes a state as an independent, unitary personality constitute the basis of the mainstream IR studies such as realism or institutionalism. In the light of international law making, a state as a normative being was presumed in the understanding of the state consent as creating bindingness of international law.[45] This model views "international

[45] For example, Kelsen claims the concept of State as purely normative one, stating "the state is not a visible or tangible body", Hans Kelsen, 'General Theory of Law and the State', translated by Anders Wedberg, (Harvard University Press, 1949), p. 191. In this comment, Kelsen had Jellineck's sociological concept of statehood in his mind. For Jellineck, this sociological concept co-exist with the legal concept "a State as a legal person(Körperschaft)" in 'Allgemeine Staatslehre', Berlin (1900), p. 173 and p. 183.

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or external forces" (i.e. balance of powers, international reputation, membership to the community etc) as the key variables to explain the positions of states . However, as has been widely pointed out, this model is heavily reliant on the fiction of anthropomorphism because states are institutions that consist of various organs and actors.[46] While some scholarly debate exists about the scope and function of anthropomorphism in international law, there is general agreement that anthropomorphism is necessary in the practice of international law since the concepts such as the "will" of States constitute the very core of the dominant positivist theory of law making. [47] This anthropomorphism is sustained by a fiction - according to which states have positions which can be described as if "thoughts" or "intention" by states in international legal practice.

In contrast to this position, the social actor model primarily focuses on individuals and private groups behind the "veil of the state" created by the fiction of anthropomorphism. For the social actor model, the preferences and interests of these actors is the crucial variable while international/external forces are subordinated.[48] This model is the core framework of liberal IR theory as the primacy of demands by domestic actors for formation of a State position is the basic premise in explaining international relations. This liberal theory rests on the view that the demands of individuals and societal groups at domestic level have more significance in the decision making by States than corresponding forces in the international environment. This argument will even be pushed further by virtue of

[46] From this perspective, D'Amato and Akehurst criticized the personalization of statehood that states do not have mind of their own like natural persons. Anthony D'Amato, *Concept of Custom in International Law* (Cornell University Press 1971), pp. 35-39, Michael Akehurst, 'Custom as a Source of International Law' (1976) 47 British Yearbook of International Law 1, pp. 36-37.

[47] Jean d'Aspremont, 'The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law' (2015) 4 Cambridge Journal of International and Comparative Law, p. 516.

[48] For liberalism thinking, see e,g, Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 International Organization 549; Florian Hoffman, Florian Hoffman and Anne Oxford, 'International Legalism and International Politics', *The Oxford Handbook of the Theory of International Law* (2016).; John Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 International Organization 379.

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the concept of "audience cost"[49] – the punishment by the domestic public in case where the political leaders fail to meet their demands (i.e. likelihood of facing electoral consequences,[50] losing the winning collation to stay in power,[51] etc) in a wide range of political regimes[52] is indicated by various political studies. The threat of audience costs suggests various domestic actors come to influence the determination of international legal 'bindingness' regardless of the formal authority of decision making under the domestic law. The abovementioned social actor model is crucial in understanding of the collective characteristic of the consent by States in international law making. This perspective posits that the creation of legal bindingness is possibly conducted in such ways that could be explained by the social network of organs and actors connected by interest. This assumption is not totally alien to the international legal scholarship. In tandem with the development of argument on expanding subjects of international law,[53] international legal scholarship came to focus

[49] The concept of "audience cost" is originally developed by Fearon in the context of threat. See James D Fearon, 'Domestic Political Audiences and the Escalation of International Disputes' (1994) 88 The American Political Science Review 577. For the empirical studies from the institutional perspectives, see George Tsebelis, 'Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism' (1995) 25 British Journal of Political Science 289; Bruce Bueno de Mesquita and others, *The Logic of Political Survival* (The MIT Press 2004).

[50] Earlier in 1980s, the rational choice theory was also built upon the nature of legislators to avoid conflicts with the potential voters under the desire to be re-elected. See James Buchanan, 'Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications' in James Buchanan and Robert Tollison (eds), *The Theory of Public Choice - II* (University of Michigan Press 1984), pp. 11-13; Robert D Tollison, 'Public Choice and Legislation' (1988) 74 Virginia Law Review 33, pp. 341-344; also in general, Daniel Farber, 'A Public Choice Theory and Legal Institutions' (Social Science Research Network 2014) UC Berkeley Public Law Research Paper No 2396056 <http://ssrn.com/abstract=2396056>.

[51] George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton Univ Press 2002), also Tsebelis (n 49). These arguments were also tested against the authoritarian regime where the political authority is dominated by the state leader see Jessica L Weeks, 'Autocratic Audience Costs: Regime Type and Signaling Resolve' (2008) 62 International Organization 35.; Olga Chyzh, 'Can You Trust a Dictator: A Strategic Model of Authoritarian Regimes' Signing and Compliance with International Treaties' (2014) 31 Conflict Management and Peace Science 3.

[52] For example, Weeks (n 51); Chyzh (n 51).

[53] For example, Jose Alvarez, 'International Organizations as Law- makers' (Oxford University Press, 2005), Kal Raustiala, 'States, NGOs, and International Environmental Institutions' (1997) 41 International Studies Quarterly 719.

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on the liberal state-society relationship where social actors bargain, negotiate, and fight in making, applying and verifying of particular international legal rules.[54]

Yet, there is a strong limitation to the social actor model. The existing studies on the social actor model builds their argument on the dichotomy between "the state" and "the society", which creates the black box effect on the concept of "the state".[55] On the other hand, the "state" also consists of various actors with different interests such as the political parties or the ministries. These governmental actors are largely influenced by the elements such as balance of powers, international reputation, membership to the community apparent in the *normative* statehood model.

The perspective given by the above models suggests that formation of a State position should be construed as a consciously coordinated process among relevant domestic actors rather than belief ("spontaneously come to be bound"). The social actor model enables to shift the focus to the process behind the veil of state – the process in which the interest of domestic actors in motivating the state to accept or reject the legal bindingness of international norms. Meanwhile, it must be acknowledged that the state is not only motivated by the domestic interests as the social actor model suggests. The state entities are also influenced by the various factors in international relations such as diplomatic reputations or external pressures as has been informed by the normative model of the state based on other branches of IR studies such as realism. The decision to create legal bindingness must be construed as interaction between the international and domestic levels as well a process which involves different motivating factors for said state entities. What appears to be the position of a state is a direct result of internal negotiations among the governmental and non goverrntmental actors over their different interests.

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[54] See for example, Myres S McDougal, 'Law as a Process of Decision: A Policy Oriented Approach to Legal Study' [1956] Faculty Scholarship Series. Paper 2464; McDougal and Lasswell (n 50).
Also, the recent attempt to illustrate the non-state actors between "law-maker" and "law-taker", see Noortmann and Ryngaert (n 4).

[55] See general i.e. Moravcsik (n 48).

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According to the above understanding, in coordinating different interests, the domestic actors in the process are at least conscious with respect to what interest they may gain or lose as a result of creating new international legal obligations. Acceptance of legal obligation through *opinio juris* should instead be construed as the result of careful political coordination among domestic actors. A State cannot come to accept a legal obligation in such a way that it cannot be specified when and how a State come to accept a legal obligation in the light of interests of domestic actors. In other words, a State cannot spontaneously come to be bound by a legal obligation without pre-coordination among the different interests, otherwise such legal obligation cannot be implemented or the political leaders are punished by domestic actors (the audience cost).

A useful illustration of the foregoing can be provided here. Domestic control over the decisions of the State in international law-making is expanding as the substance of international law has come to cover the issues which directly influence the interests of domestic actors such as the environment, trade and investment, control of chemical substances, as well as food safety. In terms of treaty making, when the pre-existing efforts to obtain domestic coordination do not reach a compromise, it is very difficult to conclude a treaty because of procedural difficulty (i.e. Parliamentary approval) and substantial domestic punishment (i.e. audience cost). For example, the Clinton administration faced bipartisan opposition to the ratification of the Kyoto Protocol when President Clinton signed the Protocol at COP3. Before COP3 started, it was clear that the Senate opposed a Treaty since it would put competitive burden on the U.S. economy while excluding developing countries from binding target.[56] Whilst the Clinton Administration and the environmental NGOs seem to have believed they could use the outcome of international negotiation to persuade Congress to ratify the Protocol in future,[57] this estimate proved to be wrong. The George W. Bush administration formally withdrew from the Protocol in 2001 because the condition to achieve

[56] See, Byrd-Hagel Resolution, Senate Resolution. 98, 105th Congress. (1997) (Passing the resolution 95–0).

[57] David Hunter, 'International Climate Negotiations: Opportunities and Challenges for the Obama Administration' (2009) 19 Duke Environmental Law & Policy Forum, p. 255.

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domestic compromise in order to ratify a treaty is participation by developing countries, which could not be achieved under the Kyoto Protocol.[58]

According to the argument developed in this section, the common narrative of "unintentional" or "spontaneous" acceptance of legal obligation by States - which has been recalled in section 1 - should thus give way to a new understanding, namely the *consciously coordinated* process among relevant domestic actors. While the anthropomorphism is a necessary fiction in international law, the function of this fiction is to only treat something that fits ill with the existing legal framework as if it were "something" that fits well in the existing legal framework. It cannot generate "something" out of nothing. In the specific case of custom making process at stake here, a State cannot "accept" creation of legal norms without the actors at domestic level recognizing such norms at all. Thus, the fiction of *opinio juris* as a belief – or as an unintentional, unconscious or even inferred acceptance – rests on the wrong premise.

3. Artificial unity and the limitations of the dominant approach to practice

As was argued in the previous section, the formation of a State position in the international law making processes should be construed as the outcome of a *consciously coordinated* process among relevant domestic actors. It was submitted in the previous section that the dominant approach to construe the emergence of customary international law is based on an unconscious and spontaneous form of law identification that is a failed fiction that lacks the premises required for the fiction of anthropomorphism. This section turns to the other element of customary international law, namely State practice. It is argued in this section that the emergence of international organizations and instruments strengthen the role of domestic actors in creating international norms because they come to shape State practice. In doing so, this section plays down the

[58] Press Release by White House, President Bush Discusses Global Climate Change (11 June 2001) available at https://georgewbush-whitehouse.archives.gov/news/releases/2001/06/20010611-2.html (Accessed 28th of May 2017).

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common criticisms - referred to in *section 1* - as to the artificial unity built around unconnected State conducts by virtue of deductive reasoning.[59]

Contemporary channels of norm-making at the international level helps illustrate the point that the criticisms pertaining to artificial unity may be overblown. In particular, international organizations and other institutional instruments - which are now active with respect to most issues of international relations - play a crucial role in the making of the norms that can potentially shape State practice,[60] especially by collecting information and offering a common ground for State acts which used to exist in disparity, through the decision making-process of resolutions, issuance of guidelines and other policies to promote convergence of State acts. In many international organizations, decision making bodies such as committees under the United Nations or Conferences of Parties (COP) under multilateral environmental treaties (hereafter MEAs) are core instruments in accelerating the emergence of new international norms. In this process, these instruments act as focal points of various actors including member States, experts and if needed, representatives of the civil society in exchanging information, enhancing mutual understanding and standard-setting in the fields. These arenas of cooperation transformed international norm creation from zero-sum collision of different practices to an institutionalized and continuous process that enables to forming and modification of norms flexibly and responsive to the fast-developing international situations and constant feedback from the participating actors.

The consequences of the argument made above for custom-making are dramatic. Under these instruments and institutional arrangements, international norms that shape State practice are continuously nourished by formal instruments such as resolutions, decisions, or guidelines. This formalization of norm creation by

[59] For example, Robert Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 Netherlands International Law Review 119. See also the chapter of Jean d'Aspremont in this volume.

[60] The formalization and institutionalization of international norm making by IO is also discussed by Sufyan Droubi in 'The Role of the United Nations in the Formation of Customary International Law in the Field of Human Rights' (2017) International Community Law Review 19, p. 70.

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international instruments, despite the growing visibility of non-State actors at international level, enabled member States to keep control of the shaping and accepting of international norms through their formal decision-making power at the relevant organization and their instruments. This also arguably contributed to reinforcing the influence of the domestic actors operating behind the veil of the state. It is in this sense that it can be contended that the extent of possible artificial unity in identification of State practice (international norms) by courts and tribunals is increasingly diminished in contemporary identification of customary international law. Hence, the common criticisms about artificial unity come to look exaggerated.

An illustration of the contribution of such institutions and instruments to the creation of norms that shape State practice must now be provided. This contribution is especially salient in the field of the environment. As has been discussed elsewhere, the increasing participation of international NGOs contributes to enriching the content of norms by providing technical information, assisting the process of negotiations, or improving State compliance by surveillance under environmental legal regime. [61] Also, the emergence of international norms often starts with introduction of established domestic practice. For example, the principle of "precautionary action" which was originally administrative law concept in countries like Germany, was not known at the international level until it was introduced by the German representatives as "requirement for a successful environmental policy for the North Sea ecosystem" [62] during the North Sea

[61] Raustiala (n 50), Also Raustiala, 'States, NGOs, and International Environmental Institutions' (1997) 41 International Studies Quarterly 719; Wendy Schoener, 'Non-Governmental Organizations and Global Activism: Legal and Informal Approaches' (1997) 4 Indiana Journal of Global Legal Studies 537; Elin Enge and Runar Malkenes, 'Non-Governmental Organizations at UNCED: Another Successful Failure'(1993) 25 Green globe yearbook of international co-operation on environment and development; 'Nonstate Actors in the Global Climate Regime' in Luterbacher & Sprinz (eds), *International Relations and Global Climate Change* (MIT Press. 2001); Philippe J Sands, 'Environment, Community and International Law, The' (1989) 30 Harvard International Law Journal 393.

[62] Lothar Gundling, 'The Status in International Law of the Principle of Precautionary Action The North Sea: Perspective on Regional Environmental Co-

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Conference. It is reconfirmed under the United Nations Environment Program (UNEP) with regard to marine pollution,[63] and even in the wider context i.e. air pollution by the preamble of Montreal Protocol in 1987 and United Nation Convention on Climate Change in 1992 as a general principle. While the uncertainty remains as to the status of the precautionary approach under the international law,[64] the emergence of the above process accelerated international recognition of the precautionary approach as norm of international environmental cooperation.

The foregoing bears another important consequence. Emphasizing the role of domestic actors through the central role of States in international norm making matters a great deal because the informality of identification strengthens the discretion of courts and tribunals in finding the elements of customary international law as discussed in *section 2*. Whereas there is general agreement that international norm creation has undergone pluralization in terms of its actors and arenas, non-State actors have not yet fully obtained direct control over formal norm creation as NGOs are often only observers without voting right to the formal decision making regarding the instruments of international organizations.[65] The

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Operation: Part 1: The International North Sea Conferences in Perspective' (1990) 5 International Journal of Estuarine and Coastal Law 23, pp. 23-24.

[63] As to the negotiation process under the UNEP and North Sea Conference, see James Cameron and Juli Abouchar, 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment' (1991) 14 Boston College International and Comparative Law Review 1;Gundling (n 62);

[64] There are authors who see the approach as customary international law or general principle of law while others define them as international principles of environmental policies. For the former position, see: Owen McIntyre and Thomas Mosedale, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 Journal of Environmental Law 221; the latter view is Cameron and Abouchar (n 63).

[65] For example, the UNFCCC limits the right to vote is only for State parties. Observers do not have the right to vote unless at least one third of the Parties present at the session object. (See The draft rules of procedure (FCCC/CP/1996/2), Rule 7.). Scholars also pointed out the retained States' grip on international law making – *see* Duncan Hollis, 'Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law' (2005) 23 Berkeley Journal of International Law 137; Jean d'Aspremont, 'Non-State Actors in International Law: Oscillating between Concepts and Dynamics', and Gaëlle Breton-le Goff, 'NGO's perspective on non-state actors' in Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple perpsectives on non-state*

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general tendency of excessive expectation regarding the role of NGOs at international level that flows from the moving away sentiment from the state-centricism bears the risk of obscuring the locus of power in identifying international norm creation. That being said, informality in norm identification has provided a flexibility that has been instrumental in the success of the customary international law in the international legal order. However, this flexibility, in the end, functions to delegate the norm creating power to courts and tribunals by creating "artificial unity" among unlinked State activities. [66] In this regard, the emergence of international organizations is transforming identification of norms to formal and conscious processes that often consist of interaction between the decision making at international level and domestic level. Consequently, various actors at different governance level may retain the grip over decision-making processes, including the formation of State practice for the sake of customary international law. In these processes, these actors continuously interact, bargain, coordinate, and negotiate in shaping and verifying the norms at the heart of State practice through resolutions, decisions, guidelines and various political recommendations.

A final caveat is necessary before concluding this discussion. This section dwells on the formalization of international norm making provided by international organizations. This norm making process should not be mixed with the issue of legal bindingness,[67] which has been discussed in *section 2*. This institutionalization of norm making process and increasing voice of non-state actors at domestic level is distinct from the direct participation of non-State actors in the poly-centric conglomerate network among the traditional inter-state organization and other transnational organizations (e.g. subnational-organization or private associations endowed with various functions such as implementation mechanisms or financial mechanisms). This

actors in international law (Routledge, 2011). See also the reports of the ILA Committee on Non-State Actors (2005-2016), http://www.ila-hq.org/index.php/committees.

[66] *See* the chapter of Jean d'Aspremont in this volume.

[67] d'Aspremont, 'Non-State Actors in International Law' (n 65), p. 468

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is certainly the case in international environmental law (often referred as "regime complex"[68]).

4. Concluding remarks

The previous sections have challenged the dominant approaches to *opinio juris* and State practice, and the constructions by virtue of which the role of non-State actors in custom-making is obfuscated. At this final stage, it is submitted that the criticisms voiced here also bear more wide-ranging consequences for the doctrine of customary international law as a whole. Three general implications of the arguments developed in this paper should be mentioned. It is hoped that the realization of the following implications will help refresh international lawyers' reflections on customary international law.

First of all, the discussion above has helped elucidate the deception that accompanies the notion of *opinio juris*, and the underlying assumption of unintentional acceptance of legal obligation by States. The concept of *opinio juris* is at the core of identification of customary international law. Contrary to treaty law, which is only binding among contracting States, customary international law is to be applied wider number of States without formal announcement of intention to be bound. This informal form of customary law identification was necessary, especially at the beginning of formation of international legal order, to provide overarching structure among partial contractual agreements among small number of States. As mentioned in the previous sections, the ILC maintained the traditional informality of identification despite acknowledging the theoretical leakiness. However, such construction of the subjective element as "a belief" or "acceptance as law" that the legal obligation "existed" at the time of State conducts is rather unconvincing. The "unconscious" "spontaneous" construction is contradicted by strong empirical arguments regarding the formation of a State position. Clarification of the deception in the dominant narrative of *opinio juris*

[68] Robert O Keohane and David G Victor, 'The Regime Complex for Climate Change' (2011) 9 Perspectives on Politics 7; Kenneth W Abbott, 'The Transnational Regime Complex for Climate Change' (2012) 30 Environment and Planning C: Government and Policy 571; Liliana B Andonova, Michele M Betsill and Harriet Bulkeley, 'Transnational Climate Governance' (2009) 9 Global Environmental Politics 52.

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invites the lawyers and legal practitioners to rethink the design of identification of customary international law. For customary international law to perform the functions assigned to it and to remain a central tool of functioning international legal order, it is necessary to move beyond the current usage of legal fiction that accompanies *opinio juris*.

Second, the perspective adopted here bears important consequences in relation to the central role of courts and tribunals in customary international law making. The *opinio juris* construction, by deploying a fiction built on wrong premises, enabled court and tribunals to claim the existence of the legal norms where there is no sense of obligatory is formed around international norms at the side of States. As already indicated, unconscious acceptance of legal obligation as presupposed by the traditional *opinio juris* narrative cannot be established. This vacuum provides court and tribunals unverifiable power to create law through the narrative that courts and tribunals identify customary international law which States recognized without knowing themselves. The ILC and its Special Rapporteur, by reconfirming this "unconscious acceptance" approach, reinforce the suspicion of "judicial legislation" through customary international law.

Last but not least, the discussion conducted here has shown that "custom" may even not constitute a source of international law properly so called. "Custom" can exist at the level of source of international norms, however, it lacks a convincing system of law-ascertainment. With regard to identification of customary norms, the discretion of courts and tribunals is arguably shrinking by increasing coverage of international organizations which accelerate creation of norms and convergence of State practice thereof by providing the arena where the actors corporate to establish the standards. However, there is little indications that such international norms are necessarily recognized for their obligatory nature. These norms still need to be ascertained as law. Yet, as has already argued in the previous sections, such system of law-ascertainment prove frail in the case of customary international law. While there seems to be a consensus about increasing convergence of State conducts in various areas of international law, this idea of convergence of conducts provides only a scaffold but ultimately falls short of elevating

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international norms (around which State practice is articulated) into a proper source of international law. In order to make sense of "custom" as a source of international law, a system of law-identification must be designed as to recognize the essential role of domestic actors in the formation of a State position in custom-making.

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