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Distinguishing the Legal Bindingness and Normative Content of Customary International Law

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In international legal discourses about international treaties, it is commonly advocated that a distinction should be drawn between the *legal bindingness* of a norm and the *content* of such norm.[1] The former concept confers the legal nature to the norm while the latter concept refers to the norm without prejudice to its nature. In practice, this distinction, when applied to the identification of international law, has been instrumental in the dominant understanding according to which the identification of legal bindingness of an instrument is not conditioned on the content of norms. The consequence thereof being that it is accepted that treaties can formally qualify as treaties despite being deprived of normative content and failing to prescribe any substantive obligation.[2]

Interestingly, the distinction between legal bindingness and normative content has never been considered relevant to the other main source of international law, namely customary international law. In contrast to treaties, normative content is generally presumed in the

[1] Jan Klabbers, 'Law-Making and Constitutionalism' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (2009); Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 European Journal of International Law 1075 (distinction between *negotium* and *instrumentum*); Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson and John Tasioulas (eds), *The philosophy of international law* (Oxford University Press 2010) .

[2] See, however, Jan Klabbers, *The Concept of Treaty in International Law | Brill* (Brill | Nijhoff 1996). Klabbers defines the concept of treaty as "(e)very agreement concluded between states that is of *a normative nature*, and is not made subject to another system of law (e.g. domestic law), is a treaty." In advancing this concept, he suggests the nature of agreement being treaty hence being binding could be identified by the standard external to the intention of states.

identification of customary international law[3] and the distinction between legal bindingness and normative content is accordingly deemed irrelevant for customary international law.[4]

This Reflection argues that the distinction between legal bindingness and normative content can also be of great relevance with respect to the identification and functioning of customary international law. Drawing on a new approach to customary international law, it is specifically submitted here that *opinio juris* confers legal bindingness to custom while *state practice* provides normative content thereto. According to this understanding, the two constitutive elements of custom come to be seen as a reflection of the abovementioned distinction between legal bindingness and normative content that is commonly reserved to treaties. It is argued that such an account of customary law has the potential to provide a new understanding of the way in which the two constitutive elements of customary international law are theorized while simultaneously showing the irrelevance of whole debate on the so-called "chronological paradox" of customary international law. In making such an argument, this Reflection intends to contribute to the work conducted by the International Law Commission (hereafter the ILC) on the identification of customary international law. It will be shown that the ILC has recognized the relevance of the distinction between legal bindingness and normative content but fell short of developing it fully. An important caveat is necessary. This attempt to apply the distinction between bindingness and normative content to customary international law does not presuppose any analogy between treaties and customary international law. The distinction could play out differently with respect to each of these two sources.

The first part of this Reflection elaborates on the claim that opinio juris confers legal bindingness upon custom while state practice provides normative content to the customary rule (1). The implications of such claim are then discussed in relation to the so-called "chronological paradox"

[3] North Sea Continental Shelf case, Judgement, International Court of Justice, (1969), para.72 "It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character…".

[4] Some scholars, while recognizing the use of the distinction in relation to international treaties, have even explicitly dismissed the possibility of distinguishing between legal bindingness and norm-creation in the case of custom. See e.g. Olivier. Corten, *Méthodologie du droit international public* (Editions de l'Université Libre de Bruxelles, 2009), at 213-215; Although the distinction between law-ascertainment and content-determination cannot be conflated with the distinction between legal bindingness and normative content, Jean d'Aspremont makes a similar distinction. See J. d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished' in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (OUP, 2015) 111-129; Also, Kirgis, in his sliding-scale approach, seems to premise that there must be a norm creative power to be a customary international law. See Frederic L Kirgis, 'Custom on a Sliding Scale' (1987) 81 American Journal of International Law 146.

(2). This Reflection then turns to the work of ILC on the identification of customary international law where this distinction, albeit acknowledged by the ILC, has not been fully exploited (3).

1. The Distinction between Legal Bindingness and Normative Content Applied to Custom-identification

As is well-known, the two-element variant of the doctrine of customary law was established by the Permanent Court of International Justice (hereafter, the PCIJ) in the *Lotus* case in 1927. Here the court held that in identifying international custom, there is not only the practice of States (abstention) but the practice must also be "based on their being conscious of having a duty to abstain".[5] This two-element approach has been endorsed by the ILC in its work on the "identification of customary international law" under the rapporteurship of Sir Michael Wood since 2012.[6] It is argued here that this traditional two-element doctrine of custom mirrors the distinction between legal bindingness and norm-content. Indeed, it is contended here that in custom-identification, the search for opinio juris boils down to a search for legal bindingness while the quest for practice amounts to a quest for normative content. The following paragraphs discuss the distinct role of practice and opinio juris in the light of the distinction between legal bindingness and norm-content sketched out in the previous section.

In order to elucidate how opinio juris can be considered as conferring legal bindingness, it is necessary to recall, in broad brush strokes, the different understandings of opinio juris found in international legal scholarship, for each of them leads to distinct theoretical and practical consequences to the question on the legal identification of customary international law. This will help to show how much opinio juris and the determination of legal bindingness are linked.

First, and most commonly, opinio juris is construed as "belief". Based on this account, opinio juris is the recognition by States that the legal obligation *had already existed* at the time of state

[5] S.S. "Lotus" case, 1927 Permanent Court of International Justice (ser. A) No. 10, p. 28. On the argument that it is the PCIJ, rather than Article 38 of its Statute, which established the two-element doctrine of customary international law, see Christian Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making', *The Law & Practice of International Courts and Tribunals* (Brill | Nijhoff 2015); Jean d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' [2015] Global Community: Yearbook of International Law and Jurisprudence.

[6] 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*)'

practice. As is well-known, this position was advanced by the International Court of Justice (hereafter the ICJ) in the *North Sea Continental Shelf* case.[7] Second, opinio juris is, albeit more marginally, understood as the expression of a consent of sorts. Indeed, some scholars construe opinio juris as implicit agreement, which transforms a rule of conduct into a legally binding norm of customary international law.[8] Lastly, opinio juris is sometimes equated to a community value to maintain orderly co-existence.[9] In this respect, some scholars argue, by referring to the idea of *opinio juris sive necessitatis*, that opinio juris includes cases where practice is rendered necessary by the common popular sentiment.[10] For the sake of the argument made here, it is worth noting that the first two abovementioned approaches have one common denominator. Indeed, the function bestowed upon opinio juris under the first and the second approach pertains to the conferral of legal bindingness to custom in a way that is content-independent. But even the third understanding of opinio juris, despite being more content-dependent, makes opinio juris determinative of legal bindingness. Despite divergent understandings in international legal scholarship, opinio juris is commonly thought about in relation to the conferral of legal bindingness.

While opinio juris confers the legal bindingness of custom, practice, it is argued, can be understood as what provides custom with normative content. In this respect, it should be recalled that the very meaning of practice for the sake of custom-identification remains controversial. For instance, there has been a long-standing debate about whether state practice is limited to physical acts or whether it also includes verbal acts.[11] For example, some authors, such as D'Amato[12] and d'Aspremont,[13] dismiss the possibility that verbal acts constitute state practice except for standards pertaining to verbal conduct. D'Amato specifically claims that

[7] North Sea Continental Shelf case, Judgement, International Court of Justice (1969).
[8] Gennady M Danilenko, 'The Theory of International Customary Law' (1988) 31 German Yearbook of International Law 9, p. 11.
[9] P Allott, 'The Concept of International Law' (1999) 10 European Journal of International Law 31, especially p. 39; Anthony D'Amato, *Concept of Custom in International Law* (Cornell University Press 1971), pp. 71-72 (referring scholars such as Raman and Cheng).
[10] D'Amato (n 9), pp. 47-48 (referring scholars such as Puchata and Savigny), pp. 71-72 (referring to Sorenson and Kopelmanas).
[11] Those who accept verbal acts as a part of state practice, e.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/).
[12] D'Amato (n 9), p. 88
[13] Jean d'Aspremont, Customary International Law as a Dance Floor (n 11)

verbal acts "may articulate a legal norm", however it "cannot constitute the material component of custom".[14] Other authors like Akehurst contend it is artificial to distinguish between what states do and what states claim,[15] a position which has been followed by the ILC.

Behind this controversy lies fundamental contestation over the nature of state conduct as a material fact or a norm which inevitably requires a subjective element as its component. The claim that state practice should only include the physical act corresponds to the common understanding of state practice as the material element of customary international law. Based on this understanding, the inclusion of verbal acts is contested because verbal acts should constitute the subjective element of customary international law - opinio juris.[16] Mendelson supplemented the understanding of state practice as "material" by pointing out the inclusion of verbal acts to state practice could cause the issue of "double-counting", which section 3 will address. This factual understanding seems to be deeply rooted in the thinking and practice of customary international law. Indeed, determining state practice is often described as an "inductive" process. The ICJ in the *Maritime Delimitation* case stated that customary international law "can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas."[17]

However, in determining the "sufficiently extensive and convincing practice" to be taken into account, there must be the deductive process to lay down the pre-existing standard to identify such practice.[18] By interference of this deductive process, a meaningful regularity of state conduct is distinguished from coincidental repetition. In other words, for the Court to distinguish the two, it must identify the pre-existing norm that creates the meaningful regularity for the sake of the identification of customary international law. This norm, together with opinio juris, is the constituent element of customary international law.

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[14] D'Amato (n 8), p. 88. See also Anthony D'Amato, *International Law Anthology* (1994 edition, LexisNexis 2003), pp. 73-74 ("... that's our customary-law problem: to figure out what laws account for these regularities. And so we start looking at what states do and what they claim. The laws could be anything. We don't dictate what international law is; we look for it and find it out there in the real world").

[15] Akehurst (n 11), p. 3

[16] Mendelson (n 11), p. 206. Also see the next section.

[17] Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, 1984 I.C.J. 246, 111 (Jan. 20). A caveat here is the understanding of "can" allows the margin of interpretation.

[18] William Thomas Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' (2014) 45 Georgetown Journal of International Law 2; Stephen Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 European Journal of International Law; Robert Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 Netherlands International Law Review 119, p. 130.

It must be acknowledged that this association between state practice and the normative content of custom that is advocated in this Reflection can find some support in the case-law of the ICJ. As is well-known, the ICJ in the *North Sea Continental Shelf* case referred to the requirement of pre-existing norm-creating content for a treaty provision to possibly crystalize into customary law.[19] As argued in the previous paragraphs, evaluating whether practice supports the crystallisation of a treaty provision as a customary norm presupposes that the treaty provision concerned prescribed a norm on the basis of which practice can be tested. Contrary to the prevailing understanding of state practice as being material, thus a fact, the identification of state practice requires reference to underlying customary norms.[20]

2. The Chronological Paradox and the Distinction between Legal Bindingness and Normative Content

The claim that opinio juris can be seen as what allows the conferral of legal bindingness upon it while state practice as providing normative content of custom bears upon a very old charge against the doctrine of customary law, and in particular the dominant understanding of opinio juris. Indeed, the abovementioned understanding of opinio juris as belief has been widely criticized for the so-called "chronological paradox". According to this charge, opinio juris as belief presupposes that the legal obligation *had already existed* at the time of state practice. It is in this respect that Kelsen contends that it is redundant to have the element of opinio juris since the State already had some belief in the bindingness of the legal obligation when the conduct was adopted and pursued.[21] D'Amato similarly describes this redundancy as tautological and

[19] North Sea Continental Shelf case, para. 72 "It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character" See also J. d'Aspremont, Softness in International Law (n 1), pp. 1085 – 1086.

[20] In the similar vein, Müllerson distinguishes the claim and the exercise of the claim in state practice. According to him, state practice inevitably includes both objective and subjective elements, and this subjective element does not necessarily equal opinio juris. See Rein Müllerson, 'The Interplay of Objective and Subjective Elements in Customary International Law' in Eric Suy and Karel Wellens (eds), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (Nijhoff, 1998). Especially pp. 161-164. His argument is summarized in Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 European Journal of International Law, p. 527.

[21] Hans Kelsen, *Hans Kelsen : Ecrits français de droit international* (Charles Leben and Doctrine Juridique eds, Presses Universitaires de France - PUF 2001), p. 72.

insists that customary international law is created by state practice only, state practice being necessarily preceded by the recognition of a legal obligation.[22]

By virtue of the specific claim made in the previous section according to which state practice constitutive of custom can be construed as what provides normative content to the customary rule, the chronological paradox becomes artificial, or even fallacious. It has been claimed that there is a paradox in the logic of the two-variant doctrine of customary international law: state practice cannot become customary international law unless states regard it as law (opinio juris) while opinio juris is understood as the belief of states that the legal obligation "had already existed" at the regularity of state conduct. This construction is said to be the source of paradox as Olufemi Elias states "(n)othing can be a source of new customary international law if opinio juris requires that any action must be in accordance with the existing law."[23] This paradox even leads to the conclusion, which Samantha Besson summarizes that "creating a new norm always paradoxically implies breaking the previous one."[24] It is in this sense that this paradox has been also called "opinio juris paradox"; hence, the proposals for a solution have been shaped around the concept of "opinio juris".[25] However, unlike the common understanding of the paradox being caused by the specific understanding of opinio juris, it is the uncertainty of the nature of state practice (see the previous section) that caused the paradox. Repeated conduct precedes opinion juris is not "accorded to the law" but a customary norm that creates the meaningful repetition. This entails repetition of state conduct before conferral of legal bindingness (opinio juris), which provides the emergence of customary norms, and repetition of state conduct after the ascertainment of law, namely, implementation of the customary international law. When new practice emerges as non-legal norms, the relationship between state practice and opinio juris is no longer a paradox. This is the abovementioned duplicative usage of state practice between the normative content of customary international law and the evidence of customary international law that creates the uncertainty in the relationship between state practice and opinio juris in chronological order.

It must be acknowledged that although the paradox is solved, the difficulty of identification in practice remains frustrated by the *spontaneous* construction of opinio juris. As discussed above,

[22] D'Amato (n 9), pp. 72-73.
[23] Olufemi Elias, 'The Nature of the Subjective Element in Customary International Law' (1995) 44 The International and Comparative Law Quarterly 501, p. 504.
[24] Besson (n 1), p. 178.
[25] See *section 3* as to the ILC's approach. For the scholastic attempts, see e.g. Besson (n 1), p. 179.

it is widely understood that states spontaneously or even unintentionally come to recognize the legal nature of a custom at an unspecified point in the past.[26] For the approach of opinio juris as belief and opinio juris as community value, it is impossible to identify the moment of crystallization of legality since acceptance of the legal nature is construed as a gradual process.

3. What Is There To Learn from the International Law Commission?

In the previous sections, this Reflection illustrated the extent to which the distinction between opinio juris and state practice reflects the conferral of legal bindingness and normative content of customary international law. This account explains the distinct role given to each element with respect to the distinction of bindingness and normative content and therefore, provides the theoretical foundations for a more systematic and intelligible separation of the identification of the two elements. It is noteworthy that the ILC, in addressing the question regarding the identification of customary international law, came to recognize a distinction between legal bindingness and norm-creation. Indeed, the Special Rapporteur, in its second report and the draft conclusion recognized the distinction.[27] Despite this recognition, the ILC does not apply it in a convincing manner.

In particular, the ILC has proposed a revised account of opinio juris as "the general practice be accepted as law".[28] In discussing identification, the Special Rapporteur argued the wording of Article 38 "… goes a large way towards overcoming the opinio juris 'paradox'" that is caused by the "belief" approach.[29] However, this statement is somewhat perplexing since the wording of Article 38 is not self-explanatory why it provides a better solution for the opinion juris, or the *chronological,* paradox than the existing approaches. As already explained in the previous section, the paradox largely hinges on the construction of state practice.

[26] As to the problem arising from this fictious nature of opinio juris, see Maiko Meguro, 'Customary international law and non-state actors: between anthropomorphism and artificial unity', forthcoming in Iain Scobbie and Sufyan Droubi (eds), *Perspectives on Non-State Actors and Formation of Customary International Law* (Manchester University Press) available at SSRN: https://ssrn.com/abstract=3071305.
[27] See draft conclusion 1 proposed in Second report on identification of customary international law by Michael Wood, Special Rapporteur, International Law Commission, A/CN.4/672, para. 15 (existence and content).
[28] Draft conclusion 9, Text of the draft conclusions provisionally adopted by the Drafting Committee, International Law Commission, A/CN.4/L.872.
[29] Second report (n 27), para. 68.

In terms of state practice, the ILC Draft Conclusion defines state practice "consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions"[30], and includes "both physical and verbal acts".[31] If read in conjunction with the ILC's understanding of opinio juris as "general practice as accepted as law", the inclusion of verbal acts in state practice can prove extremely ambiguous from the perspective defended here. In the Draft Conclusion on *Requirement of acceptance as law (opinio juris)*, the ILC defines "a general practice that is accepted as law (opinio juris) is to be distinguished from mere usage or habit." However, under the construction of state practice as norm, state practice must be *also* distinguished from mere usage or habit.

It is submitted here that, in the course of the current work of the ILC, the need to distinguish between legal bindingness and normative content came to the fore in the debate about the necessity to avoid double-counting, since it is understood the distinction collapses in such approaches that allow double-counting of evidence.[32]

The issue of double-counting has been widely pointed out in the light of the practice of the PCIJ and ICJ. Despite the widespread recognition of the two-element doctrine, the distinction between opinio juris and state practice has not always been rigorously observed. It has been documented widely that the PCIJ and the ICJ often identify State practice and opinio juris simultaneously, based on the same evidence.[33] Given this simultaneity of identification for both elements, some scholars contend that state practice should be construed as the evidence of opinio juris.[34] If it happens that both state practice and opinio juris are identified in such an intertwined way, then it may be sufficient, in proving the existence of customary international law, to show the existence of opinio juris.[35] In critically analysing the practice of the ICJ, it is often argued that the double-counting of evidence must be avoided to maintain the two-element

[30] Draft conclusion 5.
[31] Draft conclusion 6.
[32] Third report on identification of customary international law by Michael Wood, Special Rapporteur, International Law Commission, A/CN.4/682, para. 15.
[33] The classical understanding concerning evidence of customary international law is by Manley Hudson, Article 24 of the Statute of the International Law Commission, in: Yearbook of the International Law Commission, 1950, vol. 2, New York (1957), p. 24. Hudson makes no distinction between the use of evidence to prove State practice and to opinio juris. Also, Mendelson states "where there is a well-established practice, the Court and other international tribunals, not to mention States themselves, tend to conclude that there is a customary rule without looking for proof of *opinio juris*", see Mendelson (n 11), p. 206.
[34] Anthony D'Amato, *Concept of Custom in International Law* (Cornell University Press 1971), pp. 53-55.
[35] Hans Kelsen, *Principles of International Law* (1951), pp. 311-312; Also in general, Paul Guggenheim, 'Les deux éléments de la coutume en droit international public', Mélanges G. Scelle, vol. I (Paris, 1950).

approach. Especially, involving “verbal acts” (i.e. statements) in state practice was considered to possibly obscure the border between State practice and opinio juris.[36] As already mentioned in the previous section, Mendelson pushed his position that adopting subjective element to the identification of State practice would collapse the distinction between the two elements since it cannot avoid the “double-counting” of evidence.[37]

The approach of the ILC is rather to focus on the issue of evidence in seeking to determine the mode to identify the two elements separately, which seems to be a natural extension of the existing legal arguments to avoid the conflation of evidence in maintaining the independence of each element. However, this type of argument is not theoretically sound from the outset. The third report ILC by the Special Rapporteur, in the same paragraph where it endorses the necessity to “consider and verify the existence of each element separately”,[38]emphasizes that identification of each element must be based on an assessment of different evidence for each element “generally”.[39] As this “generally” implies, the ILC, while it recognizes the necessity to distinguish identification of State practice and opinio juris, left slight ambiguity as “it was recognized that the two elements may sometimes be closely entangled”.[40]

As the Special Rapporteur formally recognized in the fourth report, there is always the possibility of a piece of evidence being used for both state practice and opinio juris.[41] However, the double-counting of evidence does not necessarily collapse the distinction between identification of opinio juris and state practice where each respectively confers legal bindingness and norm content. In our general understanding of the treatment of evidence, the fact that evidence is shared between two elements in the disputed case does not follow the identification of both elements are substantially and theoretically conflated.[42] From this aspect, the traditional focus on separation of evidence in attempt to distinguish the two constituent elements of customary international law does not provide the theoretical foundations. In maintaining the distinction between the legal bindingness and normative content, rather than the issue of evidence, the ILC

[36] Müllerson (n 20); Mendelson (n 11).
[37] Mendelson (n 11), pp. 206-207.
[38] Third report (n 32), para. 14.
[39] ibid.
[40] Second report (n 27), para. 3.
[41] Fourth report on identification of customary international law by Michael Wood, Special Rapporteur, International Law Commission, A/CN.4/695, para. 34.
[42] I would like to express my gratitude to Shimpei Ishido (Nishimura & Asahi, Tokyo), for insightful exchange on rules of evidence in comparative law perspective.

should work on the theoretical foundations with regards to the role of state practice and opinio juris to confer normative content and legal bindingness to customary international law.

In this regard, the proposed amendment to the draft conclusion 4 intended to clarify the role of state practice is to be welcomed. While the original text simply described "a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law", the new proposed amendment reads "general practice refers to the practice of States as expressive or creative, of rules of customary international law".[43] By this amendment, the characteristic of state practice as norm emerges in an intelligible form.

As already discussed in the previous section, the formation and the identification of customary international law make sense when one presumes that the new customary norm emerges irrespective of opinio juris. In other words, the identification of a customary norm that underlies the regularity of state conduct (state practice) must exist separately from the identification of the legal bindingness by states (opinio juris).

[43] Annex, Fourth report (n 41). The draft conclusion 4 originally stated "a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law."