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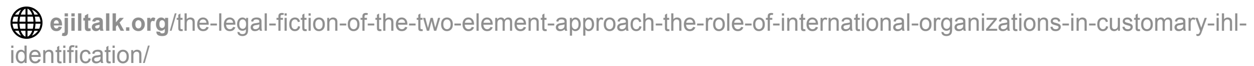
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By Magda Pacholska August 30, 2023

The following post is part of a symposium based on a conference panel that discussed issues of customary law of armed conflict, at the 4th Israel Defense Forces (IDF) Military Advocate General (MAG) Conference on the Law of Armed Conflict, held in Herzliya, Israel, during May 8-10, 2023. The post is based on the author's presentation in the panel.

Introduction

Be it for the built-in limitations of the applicability of the conventional rules, the ongoing amalgamation of IAC and NIAC frameworks, or the divergent treaty obligations among the coalition partners, few need to be convinced of the practical relevance of customary International Humanitarian Law (IHL). In fact, the determination of the existence, scope and content of customary LOAC rules is the bread and butter of both practitioners and academics alike. These two camps might disagree on much, but asked how customary IHL is identified, would likely answer instinctively: 'by assessing State practice and opinio juris.' Is it, however, only *State* practice and *opinio juris* that contribute toward the crystallization of customary international law (CIL) in general and customary IHL in particular? After providing a brief conceptual backdrop of CIL methodology, this post questions the validity of the oft-repeated 'State practice and opinio juris' maxim with respect to customary IHL in two ways. Firstly, by taking a closer look at the 2018 International Law Commission's Conclusions on Identification of Customary International Law (2018 Conclusions on CIL) and Commission's position on custom-making powers of actors other than States. Secondly, by fleshing out the towering disconnect between the theory and practice of customary IHL identification, and the frequently overlooked role international organizations (IOs), chiefly international criminal courts and tribunals, play in this regard.

A brief conceptual backdrop

Despite the public international law methodology being notoriously underdeveloped, doctrinal debates on CIL crystallization resurrect frequently, with the 1960s disputation between Georg Schwarzenberger and Wilfred Jenks about the inductive and deductive method in CIL ascertainment being perhaps the most consequential one. Ever since, a widespread, albeit purely theoretical as will be discussed below, consensus holds over the primacy of induction

(i.e., 'inference of a general rule from a pattern of empirically observable individual instances of state practice and opinio juris') over deduction (understood as 'inference, by way of legal reasoning, of a specific rule from an existing and generally accepted (but not necessarily hierarchically superior) rule or principle') (*see* Talmon, p. 420).

The inductive method of custom identification, often referred to as the 'two-element approach' has been subject to considerable conceptual reflection over recent decades. Apt scholarship exists on the two constituent elements of custom – practice and opinio juris – and the relationship between them; the plurality of existing theories is often roughly divided into the so-called traditional (emphasizing the crucial role of practice) and modern (attaching more importance to *opinio juris*) approaches (for an overview and clarification over some terminological confusion see Blutman, pp. 529 and 545). Usually, it is the latter element, *opinio juris sive necessitatis*, that is recognized to be more problematic due to its 'psychological' or 'subjective' nature, with the first 'objective/material' one – State practice – assumed to be relatively straightforward. Yet, it is often forgotten that 'State practice and opinio juris' is a commonly adopted shorthand to what the ICJ Statute, Article 38(1) refers to as "international custom, as evidence of a general practice accepted as law." Put simply, nothing in the provision at hand explicitly restricts the CIL-making power to States, and a variety of arguments have been put forward both in favor of and against recognizing that non-State actors may also contribute to the formation of CIL (here, here and here).

Whose practice and opinio juris? The ambiguity of the ILC's Conclusions on CIL

The 2018 Conclusions on CIL unequivocally reiterate that "in all fields of international law" custom is to be identified through induction, that is the empirical assessment of the two elements (2018 Conclusions on CIL, Commentary to Conclusion 2, paras. 5-6). Yet, the question of whose practice and opinio juris is to be taken into account turned out to be one of the most controversial issues the ILC grappled with during its work on the item. Even though the exclusion of non-governmental actors, such as organized armed groups or NGOs, from custom creation proved relatively uncontroversial (Fifth Wood Report on identification of CIL, para. 40), the capacity of IOs to contribute to CIL-making divided both the ILC members and States active in the process. Conclusion 4, adopted to accommodate disparate views on the issue, provides that while it is "primarily" the practice of States that contributes to the formation of custom, "in certain cases, the practice of IOs also contributes" to this end. The official commentary, an integral part of all ILC's outputs, identifies two such cases; first, when States "have transferred exclusive competences to the IOs", and second, when States "have conferred competences upon the [IOs] that are functionally equivalent to powers exercises by States." (2018 Conclusions on CIL, Commentary to Conclusion 4, para. 6)

While such a conceptualization of IO custom-making powers seems to adequately reflect States' views on the theory of custom creation, it has been aptly characterized as obvious yet ambiguous (Summary record of the ILC 3181th meeting, para. 8). It is unclear how much weight should be given to the practice of an IO, in particular in cases where it diverges from the practice of some of its Member States. Take for example the NATO AI Strategy and its Principles of Responsible Use, explicitly "based on existing and widely accepted ethical, legal, and policy commitments under which NATO has historically operated and will continue to operate under." Under the Principles, "all AI applications" considered for deployment by NATO must be subject to the mandatory risk & impact assessment, "including international humanitarian law and human rights law, as applicable." As there is no unanimity among the NATO allies on the purported customary status and scope of Article 36 of Additional Protocol I, the question remains as to how to assess the activities of the recently established NATO Data and Artificial Intelligence Review Board should it be tasked to review, e.g., the capabilities to be procured to replace the AWACS fleet. Simply said, should the NATO practice be taken into account in the prospective analyses of the nature and scope of the pre-deployment obligation of legal review, and if so, how much weight should it carry?

The disconnect between the theory and practice of customary IHL identification

Future legal assessments notwithstanding, it is more troublesome that the 2018 Conclusions on CIL, supposedly reflecting how custom is identified in all fields of international law, has little to no resemblance to how many rules of customary IHL have been determined. The growing influence of broadly conceived non-State actors, especially groups of experts engaged in manual drafting, in IHL development has garnered much attention in recent years. Similarly, the individualization and expansion of (customary) IHL by the international criminal courts and tribunals, sometimes referred to as 'customary midwives' (Mettraux, p. 15) due to their propensity to ascertain custom through questionable methods, have been subject to apposite academic scrutiny (here and here). A bird's eye view of some of the more controversial instances of a given IHL provision (or its interpretation) being elevated to customary status suggests that it can either be done independently by a court or tribunal (repetition in subsequent case law) or through a joint enterprise between a court and the ICRC (with the latter favorably restating a particular judicial pronouncement in the generally seen as a highly authoritative instrument ICRC Customary IHL Study).

Admittedly, some instances of 'judicial activism' on the international plane – e.g., the recognition of Common Article 3 of the Geneva Conventions giving rise to individual criminal responsibility under customary law in a line of case law originating in the *Tadic* interlocutory appeal at the ICTY – have been well-received by States and as such are not of much concern. Others – like the finding in *Martić* Trial Judgment of the same tribunal, declaring the prohibition against belligerent reprisals in times of NIACs to be "an integral part of customary law" (para. 16), and restated in the *Kupreškić* Trial Judgment (recognizing that the customary rule emerged "due to the pressure by the requirements of humanity and the dictates of public conscience" at para. 531) – are more problematic. Beyond attracting significant criticism in

academic circles, the interpretation offered in *Kupreškić* was explicitly rejected by the UK as "unconvincing" and "fly[ing] in the face of most of the state practice that exists" (The Joint Service Manual of the Law of Armed Conflict, p. 423, fn. 62).

In some cases, it is the favorable restatement of a judicial pronouncement in the ICRC Customary IHL Study that is taken as proof that a given interpretation crystalized as CIL, even when such restatements are merely mentioned in the commentary to a given customary rule. For instance, the ICRC CIHL Study mentions in its commentary to Rule 156 that "[i]nternational case-law has indicated that war crimes are violations that are committed wilfully, i.e., either intentionally (dolus directus) or recklessly (dolus eventualis)." (fn 32) Not only does the sole reference cited – the ICTY *Delalić* Trial Judgment – does not support the broad recklessness assertion made in the Study, but the ICTY methodology in the decision at hand (limited to the survey of the jurisprudence of France, Italy and Germany) also does not meet the required density and generality of practice. Despite the methodological flaws of the ICTY's conclusions on recklessness, it has been accepted by some commentators and put forward in official correspondence with the governments as a seemingly firmly-established standard (HRW letter on MSF Kunduz hospital attack, p. 2).

Conclusions

Despite a general agreement that CIL should be identified by induction, i.e., the examination of practice and opinio juris of States (and in some cases IOs), much of customary IHL appears to have been either deduced or simply asserted by international courts and tribunals. Even if we assume that international courts and tribunals fit into the elusive "certain cases" category as set forth by the ILC, as it could be argued that they have been conferred competences functionally equivalent to powers exercised by States, there is no way out of assessing State practice and opinio juris. Irrespective of how respected an international court or tribunal is, even consistent case law repeating an unsubstantiated custom assertion does not elevate it to CIL; judicial decisions are merely a "subsidiary means" for the determination of CIL rules. Given how often it is forgotten even in professional circles, States might want to follow the UK example and use their manuals and explicitly push back on the custom assertions offered by international judicial institutions they disagree with. Failing to do so could be seen as amounting to an acceptance that, at least with regard to customary IHL, a special category of IOs – international criminal courts and tribunals – may engage in 'judicial legislation in disguise' (Schwarzenberger, p. 126).