

ORIGINAL SCIENTIFIC ARTICLE

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## NATURE OF CUSTOMARY INTERNATIONAL LAW: ALL WE NEED IS PRACTICE

**Abstract:** *The main objective of this paper is to critically assess the dominant additive theory of the formation of Customary International Law by using the concept of discursive normative practice and the work of Gerald Postema. My central conclusion is that the use of this concept provides an explanation of the process of formation of Customary International Law that is superior to the additive theory which consists of two elements – practice and opinio juris. On the other hand, Postema’s theory also has its own weaknesses, and this paper explores ways to improve it.*

**Key words:** International Law, Customary International Law, International Court of Justice, sources of international law, discursive normative practice.

### 1. INTRODUCTION

The paper is aligned with the still dominant paradigm in the theory of international law that sees both the practice and *opinio juris* as constituent components of the process of formation of Customary International Law (CIL).<sup>1</sup> The aspect it seeks to critically assess is the way practice, usually understood as one of the two elements that are fundamental to the formation of CIL, is being explained and dealt with by international law scholars and the International Court of Justice (ICJ). The main argument of the paper is that jurisprudence of the ICJ and most of the international law doctrine fail to provide an appropriate explanation of the process of formation of CIL.

In accordance with the work of Gerald Postema, I will argue in this paper that practice of international law-makers is the only element in the

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1 I will use the term ‘additive theory’ for this dominant paradigm throughout the article.

formation of CIL.<sup>2</sup> However, this practice is very specific form of practice – discursive normative practice (DNP). In short, this means that actors are involved in the process of formation of CIL by offering normatively relevant claims and counterclaims on their deeds in global relations.<sup>3</sup> However, contrary to Postema's argumentation, I will argue that the process of formation of CIL must be seen as a deliberate process during which international lawmakers decide which behaviour will be legal in global relations.

The paper is drafted based on the following structure: the second section is devoted to the formal sources of international law and CIL. The third deals with the structure of CIL and the critical assessment of the dominant view of the practice as an element of CIL, including the relevant jurisprudence of the ICJ. In the fourth section of the paper, I will elaborate on Postema's use of the concept of DNP and its relevance for the nature and formation of CIL. Concluding remarks are provided at the end of the paper.

## 2. CUSTOMARY INTERNATIONAL LAW AS A FORMAL SOURCE OF INTERNATIONAL LAW

The stance on the nature of CIL is determined by the author's position on the nature of international law. More specifically, and in line with the main goal of this paper, in order to analyse the nature of CIL it is necessary to provide basic information on the process of creation of international law. Even though the source thesis is controversial<sup>4</sup> and has many fierce opponents among the international law scholars,<sup>5</sup> it is still commonly used to describe the process of international law-making.<sup>6</sup> The difference between the so-called material and formal sources of international law is sometimes

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2 Postema, G. J., Custom in International Law: A Normative Practice Account, in: Perreau-Sassine, A., Murphy, J. B. (eds.), 2007, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, Cambridge, Cambridge University Press, pp. 279–306; Postema, G. J., 2012, Custom, Normative Practice, and the Law, *Duke Law Journal*, Vol. 62, No. 3, pp. 707–738. More on the meaning of this notion and its importance for the process of creation of CIL see in Section 4.

3 For more details on this concept and its relevance for the formation of CIL see Section 4.

4 Besson, S., D'Aspremont, J. (eds.), 2018, *The Oxford Handbook of the Sources of International Law*, Oxford, Oxford University Press, pp. 3–8.

5 See e.g. Kelsen, H., 2003, *Principles of International Law*, The Lawbook Exchange; Ross, A., 2008, *A Textbook of International Law: General Part*, The Lawbook Exchange.

6 D'Aspremont, J., 2011, *Formalism and the Sources of International Law – A Theory of the Ascertainment of Legal Rules*, Oxford, Oxford University Press.

used to explain in greater detail the process of creating law from non-law. Namely, even though there are some authors who describe material sources of international law as concrete acts in which formal sources of law could be found,<sup>7</sup> the concept of material sources of law is used in this paper as the factor of influence of the international community on the process of formation and substance of international law norms.<sup>8</sup> Kolb, for example, defines material sources “as a sociological fact explaining why, and in relation to what needs, the legislator has adopted a particular piece of legislation (in international law, a particular treaty or a customary rule)”.<sup>9</sup> It is not easy to provide clear answers to the question what those factors of influence of international community or motives of the legislators in concrete circumstances are. Usually, however, the power of the actors, their interests and interdependence, ethics and other factors are mentioned as key in this regard.

Be that as it may, material sources of law are still not sufficient for the creation of law from non-law. In order for this to happen, some additional criteria need to be fulfilled. Miodrag Jovanović argues that “a social practice is typically judged as falling within the category of ‘law’ if it consists of rules purporting to coordinate the behaviour of actors and to settle their disputes; if it possesses at least institutions in charge of judging whether those rules were violated; if the rules in question are guaranteed, normally through some form of a coercive mechanism; and if the rules are, overall, apt for inspection and appraisal in light of justice”.<sup>10</sup> Other authors support the argument that a competent institution needs to adopt the rule in an already accepted form and through a defined procedure.<sup>11</sup>

Therefore, material sources of law could become the law, but legislators need to use complex legal techniques to give them legal form. This complex and agreed process through which norms of international law are

7 Brownlie, I., 1998, *Principles of International Law* (5<sup>th</sup> edition), Oxford, Oxford University Press; Thirlway, H., 2014, *The Sources of International Law*, Oxford, Oxford University Press.

8 Hrnjaz, M., 2016, *Nastanak i utvrđivanje postojanja međunarodne običajne norme: praksa Međunarodnog suda pravde*, doktorska teza, Univerzitet u Beogradu – Fakultet političkih nauka, str. 25.

9 Kolb, R., *Legal History as a Source of International Law: From Classical to Modern International Law*, in: Besson, S., D’Aspremont, J. (eds.), 2018, *The Oxford Handbook of the Sources of International Law*, Oxford, Oxford University Press, pp. 279–80.

10 Jovanović, M., 2019, *The Nature of International Law*, Cambridge, Cambridge University Press, p. 76.

11 Hart, H. L. A., 1961, *The Concept of Law*, Oxford, Clarendon Press; Lukić, R., 2012, *Sistem filozofije prava*, Pravni fakultet Univerziteta u Beogradu.

created, modified or annulled is usually called formal sources of international law.<sup>12</sup> Sometimes, however, the problem could be the determination of the exact moment when material sources of law become formal sources. This is especially relevant for non-written sources of law such as CIL. In addition, there are numerous other controversies regarding the issue of formal sources of law in international law. For example, the international community does not have a constitution in which formal sources of international law could be stipulated. One of the consequences of this fact is the fierce disagreement in the doctrine of international law on the issue of the exact list of its formal sources. The (in)famous Article 38 of the ICJ Statute mentions international treaties, customary law and general principles of law; while some authors tend to see this as a closed list of formal sources of international law,<sup>13</sup> others argue that the list is in fact much broader.<sup>14</sup> There are, of course, many authors who believe that the intention of the creators of PCIJ (and later ICJ) Statute was not to produce a list of formal sources of international law, but only to help the Court by defining the applicable law to the Court.<sup>15</sup> This last statement is perfectly correct; however, it does not mean that the list mentioned in Article 38 has not become the list of formal sources of international law in the meantime, thanks to the will of law-makers.

Be that as it may, the main objective of this paper is to provide more details on the issue of CIL and it seems that there is a consensus that CIL is the formal source of international law.<sup>16</sup> However, it also seems that the consensus ends there, since everything but the fact that CIL exists is the subject of a hot debate among international law scholars.<sup>17</sup> The above Article 38 of the ICJ Statute provides the following definition of international custom – “evidence of general practice accepted as law”.<sup>18</sup> This definition was heavily criticised in the doctrine of international law. Rosalyn Higgins, for example, explained that it should be the other

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12 Besson, S., *Theorizing Sources of International Law*, in: Besson, S., Tasioulas, J. (eds.), 2010, *The Philosophy of International Law*, Oxford University Press, p. 169.

13 Thirlway, H., 1972, *International Customary Law and Codification*, Leiden, Sijthoff & Noordhoff, Leiden.

14 Pellet, A., *Article 38*, in: Zimmermann, A., Oellers, K. F., Tomushat, C., Tams, C. J. (eds.), 2012, *A Statute of International Court of Justice, A Commentary*, Oxford, Oxford University Press.

15 See, e.g. D'Aspremont, J., 2011, *Formalism and the Sources of International Law, A Theory of Ascertainment of Legal Rules*, Oxford, Oxford University Press.

16 At least to those who do not refuse the concept of formal sources of international law.

17 More on this issue see: Hrnjaz, M., 2016, pp. 52–155.

18 Statute of the International Court of Justice (Statute of the Court | International Court of Justice (icj-cij.org) 9. 10. 2021).

way around – an international custom is not evidence of general practice accepted as law, general practice accepted as law is rather evidence of the existence of a custom.<sup>19</sup>

Besides the issue of definition, the name of this formal source has been disputed as well – is it correct to call it international custom?<sup>20</sup> It is crucial to stress that there is a distinction between a custom and a law as two different normative systems. CIL is interesting *inter alia* because it creates a bridge between the two, since it is a law derived from a custom. Hence, it is necessary to shed some light on this type of process of international law-making. Customary rules are usually placed between the rules of nature as a direct consequence of human nature, and valid legal rules made by rational human activity and through proper legal procedure.<sup>21</sup> James Bernard Murphy explains that both a habit and a convention are at the foundation of the custom:

*[...] customary habits are compared to natural instincts because they operate spontaneously, automatically, and tacitly. Custom here means a kind of second nature: our customary habits operate as unobtrusively as our breathing. In this sense, custom is like natural instinct except that it is learned in a particular social context. Yet custom is also described as a set of informal conventions, a set of practices of social coordination that arise from informal agreements without being imposed by enacted law.*<sup>22</sup>

However, one should bear in mind that a custom understood as an informal convention still lacks the quality of a valid law. Of course, some customs do become law, but not all. Some laws are actually enacted to cancel, change or sanction particular customs. Murphy further states that “law arises because of the profound shortcomings of customary social order: groups with incompatible customs come into conflict, interpretations of shared customs come into conflict, and rapid social change creates urgent demands for new customs. Law is not the foundation of social order but a remedy for the deficiencies of custom.”<sup>23</sup> At the same time, he is asking the key question: “But how can we clearly distinguish the stipulated order of law from the spontaneous order of

19 Higgins, R., 1995, *Problems and Process: International Law and How We Use It*, Oxford, Oxford University Press, p. 18.

20 Petersen, N., 2007, Customary Law Without Custom? Rules, Principles and the Role of State Practice in International Norm Creation, *American University International Law Review*, Vol. 23, Issue 2, pp. 275–310.

21 Hrnjaz, M., 2016, str. 52.

22 Murphy, J. B., Habit and Convention at the Heart of Custom, in: Perreau-Sassine, A., Murphy, J. B. (eds.), 2007, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, Cambridge, Cambridge University Press, p. 54.

23 *Ibid.*, p. 76.

custom if some law is customary?”<sup>24</sup> The answer he provides is worth of a longer quote:

*No society can undertake to provide legal enforcement of all customs, so every society must decide which customs will be doubly enforced, both by customary sanctions and by legal sanctions. Customary law therefore refers to that subset of customs deliberately chosen for special enforcement. In this sense, customary law reflects not just the habitual and spontaneous order of custom but also the deliberately stipulated order of law. Moreover [...] only someone in a position of authority can stipulate what kind of customs will be treated as lawful.*<sup>25</sup>

Therefore, one should not forget that a custom and customary law are not the same thing. In the case of international law, this seems self-evident since the definition of international custom from Article 38 mentions practice accepted as law. The fact that for the creation of CIL custom needs to be deliberately stipulated as law arguably led the great majority of international law scholars and international judicial institutions to accept the theory of two elements of customary international norms – practice and *opinio juris*.<sup>26</sup> Almost all international law handbooks embrace this mainstream theory of formation of CIL.<sup>27</sup> Furthermore, in 2018 the International Law Commission adopted the Report on the topic of Identification of Customary International Law with Conclusion 2 (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*)”.<sup>28</sup> In Conclusion 3, the Commission further stated: “Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element”.<sup>29</sup> In the Fifth report on the identification of customary international law, Special Rapporteur Sir Michael Wood noticed that “Conclusion 2 received wide support from States, thus once more confirming their approval of the two-element approach underpinning the conclusions and its applicability in all fields of international law”.<sup>30</sup>

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24 *Ibid.*

25 *Ibid.*

26 I am using *opinio juris* and subjective element of CIL as synonyms in this text.

27 See, for example: Dixon, M., 2013, *Textbook on International Law* (7<sup>th</sup> edition), Oxford, Oxford University Press; Shaw, M., N., 2017, *International Law* (8<sup>th</sup> edition), Cambridge, Cambridge University Press; Klabbbers, J., 2017, *International Law* (2<sup>nd</sup> edition), Cambridge, Cambridge University Press.

28 Draft Conclusions on Identification of Customary International Law, 2018, International Law Commission, A/73/10.

29 *Ibid.*

30 International Law Commission, Fifth report on the identification of customary international law, A/CN.4/717, 14 March 2018, p. 12. Special Rapporteur explicitly men-

It is, therefore, reasonable to conclude that the two elements theory of CIL formation has a very wide support of States, international scholars and international judicial institutions. Nevertheless, numerous challenges concerning the relationship between the two elements and the assessment of evidence of their existence still remain. For example, Birgit Schlütter claims that “various writings divided the bulk of theories produced on the formation of customary international law merely according to whether theoretical approaches favour either the element of *opinio juris* or the requirement of state practice, or both or neither”.<sup>31</sup> Mendelson and Mulleson, and Byers are among the authors who underline the importance of practice in the formation of CIL.<sup>32</sup> Anthea Roberts, Bin Cheng and Michael Scharf are some of the many authors that could be labelled as representatives of those who emphasise the importance of *opinio juris*.<sup>33</sup> Then again, there are many authors who could be viewed as representatives of the so-called alternative approaches to this issue (Frederic Kirgis with his sliding scale approach<sup>34</sup> or John Tasioulas<sup>35</sup>).<sup>36</sup>

Finally, many authors claim that these disputes on the relationship between the two elements of CIL are impossible to resolve. Koskenniemi is arguably the most famous among them. He argues that “neither element can be dismissed or preferred to the other without this engendering immediately the objection that custom is either apologist (because it makes

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tioned the support of Russian Federation, the United Kingdom, Chile, Sudan, Israel, Thailand, Viet Nam, Slovakia and Belarus, but, according to the best of our knowledge, there was no country which questioned the relevance of two elements theory.

- 31 Schlütter, B., 2010, *Developments in the Customary International Theory and the Practice of International Court of Justice and the International ad hoc Tribunals for Rwanda and Yugoslavia*, Leiden, Martinus Nijhoff Publishers, p. 15.
- 32 See, for example: Mendelson, M., 1999, *The Formation of Customary International Law*, Leiden, Martinus Nijhoff Publishers; International Law Association, 2000, Committee on Formation of Customary (General) Law (Final report of the Commission), London; Byers, M., 2003, *Custom, Power and the Power of the Rules: International Relations and Customary International Law*, Cambridge, Cambridge University Press.
- 33 See, for example: Roberts, A. E., 2001, Traditional and Modern Approaches to Customary International Law: A Reconciliation, *The American Journal of International Law*, Vol. 95, pp. 757–791; Scharf, M. P., 2010, Seizing the “Grotian moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change, *Cornell Journal of International Law*, Vol. 43, pp. 439–463.
- 34 Kirgis, Jr F. L., 1987, Custom on a Sliding Scale, *American Society of International Law*, Vol. 81, pp. 146–151.
- 35 Tasioulas, J., 1996, In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case, *Oxford Journal of Legal Studies*, Vol. 16, pp. 85–128.
- 36 More on these various approaches and their critical assesment: Hrnjaz, M., 2016, str. 82–104.



no distinction between might and right) or utopian (because we cannot demonstrate its norms in a tangible fashion). Because both elements seek to delimit each other's distorting impact, the theory of custom needs to hold them independent from each other. But this it cannot do."<sup>37</sup>

While Koskenniemi commented on some of the theoretical issues that had to do with the relationship of the two CIL elements, the International Committee of the Red Cross (ICRC) commented on the separation of the two elements in practice: "It proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction."<sup>38</sup> Since the separation of the two elements still dominates the doctrine of international law and the practice of international judicial institutions, and states details on the dominant view on practice as an element of CIL will be provided in this contribution. By doing this, the weak spots of this approach will be detected as well.

### 3. THE PRACTICE AS AN ELEMENT OF CUSTOMARY INTERNATIONAL LAW

In this chapter, I will try to sketch the position of practice as an element of CIL in the dominant additive theory of formation of international customary norms. At the same time, I will underline several weak spots of this theory and set the scene for an alternative theoretical understanding of this process, dominantly relying on the work of Gerald Postema and the concept of discursive normative practice (DNP). Among these weak spots of additive theory the requirement of uniform practice and the disputed relationship between practice and *opinio juris* will be underlined.

Once again, the definition of CIL from Article 38 of the ICJ Statute states that international custom is general practice accepted as law. Hence, the definition does not say much about the criteria for the existence of the element of practice of international custom, except that practice needs to be general. Many issues remain unresolved: what counts as practice; what it means that practice needs to be general; whose practice it is; what the other requirements for practice as the element of CIL are, etc.<sup>39</sup>

It is stated in Conclusion 5 of the International Law Commission's Report on the identification of CIL that "State practice consists of conduct

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37 Koskenniemi, M., 2006, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge, Cambridge University Press, pp. 410–411.

38 Henckaerts, J., Doswald-Beck, L. (eds.), 2005, *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, p. XLVI.

39 Some of these issues will be just broadly sketched and others will be analyzed in more details.



of the State, whether in the exercise of its executive, legislative, judicial or other functions”.<sup>40</sup> One could conclude from this that the practice of a chief of state, government, minister of foreign affairs, or final judgments, count as practice of the state. State legislation also counts as state practice. Furthermore, statements from chief legal advisers, ministries of foreign affairs and state officials in international organisations, as well as written proceedings before international judicial institutions and many other acts of state officials also count as state practice. Jurisprudence of the ICJ has, *inter alia*, recognised treaties,<sup>41</sup> unilateral acts of states,<sup>42</sup> national legislation<sup>43</sup> and jurisprudence of national courts<sup>44</sup> as practice that could form CIL.<sup>45</sup>

One of the controversial issues in the Report on the formation of CIL was, however, whether exclusively a state’s practice should count towards the formation of CIL. Conclusion 4 of the Report stated as follows:

1. *The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.*
2. *In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.*
3. *Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.*<sup>46</sup>

Some states commented on this particular issue during the preparation of the Report. For instance, Austria was of the opinion that these conclusions do not “sufficiently reflect the growing participation of universal as well as regional international organisations in international relations

40 Draft Conclusions on Identification of Customary International Law, International Law Commission, A/73/10, 2018, p. 2.

41 ICJ, *Case concerning Right of Passage over Indian Territory* (Portugal v. India), Merits, Judgment of 12 April 1960, *ICJ Reports*, 1960, p. 6.

42 ICJ, *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, *ICJ Reports*, 1974, p. 3.

43 ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment, *ICJ Reports*, 2002, p. 3.

44 ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, *ICJ Reports*, 2012, p. 99.

45 More on the jurisprudence of the ICJ in this regard: Hrnjaz, M., 2016, str. 178–184.

46 Draft Conclusions on Identification of Customary International Law, International Law Commission, A/73/10, 2018, p. 2.

and therefore also in the formation of customary international law”.<sup>47</sup> Israel, on the other hand, made an argument that “as a rule, international law, including customary international law, is created almost exclusively by States. Therefore, generally speaking, no practice or *opinio juris* of other entities, such as international organisations, should serve as the basis for the identification of customary international law.”<sup>48</sup> USA joined this position even more firmly, making critical comments regarding the concrete role of the International Committee of the Red Cross in the domain of formation and identification of Customary International Humanitarian Law.<sup>49</sup> Since the issue of the practice of non-state actors and the formation of CIL is well beyond the purpose of this paper, it is perhaps enough to state that arguments made by most of the states were conservative to say the least, if one looks at the contemporary role of non-state actors both in the field of international relations and international law. This fact is especially obvious in certain fields of international law such as international humanitarian law.

The next important issue that needs to be resolved are the requirements that practice as an element of CIL needs to fulfil. As already discussed, all that the definition from Article 38 provides is that practice needs to be general. But what does that mean? First of all, it is certain that it means that practice does not need to be universal. In the world that consists of almost 200 states, and in the situation where an enormous amount of international law norms is constantly being developed in various new fields, this fact is crucial. The demand that all states/actors be involved in the practice in order for it to be able to qualify as the practice of CIL would make the formation of CIL practically impossible. But, the question of what it means that in concrete cases practice needs to be general, remains relatively unanswered.

In the *North Sea Continental Shelf* case, the ICJ ruled *inter alia* that “State practice should have been [...] *extensive*”.<sup>50</sup> It also used the term very widespread,<sup>51</sup> as confirmed in later cases such as the *Maritime Delimitation* case between Qatar and Bahrain.<sup>52</sup> The examples of *Fisheries* and

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47 International Law Commission, Identification of customary international law (comments and observations received from governments), 14 February 2018, A/CN.4/716, p. 13.

48 *Ibid.*, p. 15.

49 *Ibid.*, pp. 18–22.

50 ICJ, *North Sea Continental Shelf Case*, Judgement 20 February 1969, *ICJ Reports*, 1969, p. 3, p. 43, para. 74.

51 *Ibid.*, para. 134.

52 ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits 16 February 2001, *ICJ Reports*, 2001, p. 102.

*North Sea Continental Shelf* cases illustrate the fact that the demand that practice be general must be assessed on a case-by-case basis. In *Fisheries*, for example, the Court analysed only the practices of Norway, France and the UK, but it is reasonable to presume that it concluded either that the practice of especially interested states needed to be investigated, or that other states had silently agreed to the practice of Norway. In the *North Sea Continental Shelf* case, on the other hand, the Court concluded that 15 cases in which the principle of equidistance has been used as the principle of delimitation between states “represented a very small proportion of those potentially calling for delimitation in a world as a whole”.<sup>53</sup> These examples provide arguments for the standpoint that practice as an element of CIL always needs to be interpreted in a broader context. No pattern of behaviour is self-evident.

I believe that this conclusion is even more obvious if one looks at the criterion firmly based in the jurisprudence of the ICJ stating that practice as an element of formation of CIL needs to be uniform. It should be said here that any normative order exists solely because there are numerous patterns of behaviour in the practice of agents. One of the functions of the law as a normative order is to prescribe the rules that will make patterns of behaviour legal or illegal. As stated above, legal norms could be based on customs that already exist.<sup>54</sup> However, the problem is how to recognise the pattern of behaviour which has been deliberately chosen to become CIL if the practice is not uniform and many patterns of behaviour exist in parallel? And what does it actually mean that practice needs to be uniform?

In its early jurisprudence, in the case between Norway and the United Kingdom on the right of fisheries near the Norwegian coast, the ICJ concluded that “the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose”.<sup>55</sup> In the *Asylum* case, the Court stated that “The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage”.<sup>56</sup> In the case between India and Portugal, the Court further confirmed that practice needs to be “consistent and uniform”.<sup>57</sup> These conclusions have become the part of international law handbooks dealing with CIL.

53 ICJ, *North Sea Continental Shelf Case*, p. 3, p. 44, para. 75.

54 See Section 2 for more details.

55 ICJ, *Fisheries case*, (United Kingdom v. Norway), Judgment of 18 December 1951, *ICJ Reports*, 1951, p. 116, p. 138.

56 ICJ, *Asylum*, (Colombia/Peru), Judgment of 20 November 1950, *ICJ Reports*, 1950, p. 266, p. 276.

57 ICJ, *Case concerning Right of Passage over Indian Territory*, p. 40.

Nevertheless, the practice of ICJ does not provide a clear answer to the question of what it means that practice needs to be uniform. Namely, in the above mentioned *Fisheries* case, the ICJ did respond to the UK's argument that Norwegian practice of maritime delimitation was not sufficiently consistent. The Court, however, concluded: "[...] that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court."<sup>58</sup> But how can one make a distinction between "few uncertainties or contradictions" in practice and those that could prevent the formation of CIL?

It is arguably even more difficult to resolve the issue of uniform practice in the case of prohibitive rules and restraint of behaviour. In such situations, what does it mean that states generally speaking ought to refrain from doing something? And if they do so, how do we know that their restraint is part of the practice as an element of CIL formation? Even more importantly, in the case of prohibitive rules of international law it is sometimes difficult to determine what the (customary) rule is, and what the violation of that rule would be. Rosalyn Higgins noted that there are customary (even *ius cogens*) norms, such as prohibition of torture, that are systematically violated by states on a regular basis.<sup>59</sup> What is the general practice then – torture or restraint from torture? Since it was not easy to answer this question, Higgins posed another one: Does that mean that "there is in fact no prohibition of torture under customary international law?"<sup>60</sup> She tried to resolve the issue by making the following argument:

*New norms require both practice and opinio juris before they can be said to represent customary international law. And so it is with the gradual death of existing norms and their replacement by others. The reason that the prohibition of torture continues to be a requirement of customary international law is [...] because opinio juris as to its normative status continues to exist[...] A new norm cannot emerge without both practice and opinio juris; and an existing norm does not die without the great majority of states engaging in both a contrary practice and withdrawing their opinio juris.*<sup>61</sup>

Even after this quote, many questions remained unanswered. First of all, it is not at all clear why practice and *opinio juris* are both needed for

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58 ICJ, *Fisheries case*, Judgment, 1951, p. 138.

59 Higgins, R., 1995, *Problems and Proces: International Law and How We Use It*, p. 20.

60 *Ibid.*

61 *Ibid.*, p. 22.

the formation and disappearance of CIL. Someone could instead argue that if both elements are needed for the formation of CIL, then the loss of either must be enough for its disappearance. But, even more importantly, if one goes back to the example of torture, is it possible to argue that, during the formation of the customary norm on the prohibition of torture, both elements – general practice and *opinio juris* – existed? It is not easy to make the argument that states did not systematically torture people before the formation of this customary norm, and that they started to do exactly that after the customary norm of prohibition of torture was created. It seems that a better explanation could be that states both tortured and refrained from torture in various situations, and that they deliberately chose the prohibition of torture to become, at one moment, the customary norm of international law.<sup>62</sup>

It is, therefore, not by accident that the ICJ has had so many problems with the issue of restraint of behaviour, the criterion stating that practice needs to be uniform, and the formation of CIL. In arguably the most famous *Nicaragua* case (which was also mentioned by Judge Higgins), the Court was confronted with the issue of customary nature of the prohibition of the use of force in international relations. The Court was faced with the issue of whether it was possible to have the customary rule on the prohibition of the use of force despite numerous international armed conflicts in the world. Therefore, the Court famously stated as follows (its statement is worth of a longer quote):

*It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force [...] The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.*<sup>63</sup>

62 Perhaps this argumentation sounds counterintuitive, but more details on this issue will be provided in Section 4.

63 ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America). Judgment of 27 June 1986, *ICJ Reports*, 1986, p. 14, para. 186.

It is difficult to overstate the importance of this quote for understanding the process of formation and change of CIL. The first thing that ought to be noted is that the Court stated that practice should not be expected to be perfect, in the sense of complete consistency with the rule. Similar to the norm of the prohibition of torture, judges were of course painfully aware of numerous violations of the rule on the prohibition of threat or use of force in international relations. They concluded that, for the establishment of a customary norm, practice does not need to be in absolute, rigorous conformity with the rule, but rather consistent with the rule in general. The Court, therefore, started with the argument that “few uncertainties and contradictions” were not an obstacle to the formation of CIL (*Fisheries*), stating also that practice needed to be in conformity with the rule in general. However, it never offered additional arguments or criteria by which to measure whether practice in general is in conformity with the rule. It did, however, state something else: the customary rule continues to exist if (numerous) violations of the rule are treated as violations and not as new rules. Many authors claimed that these conclusions should be understood as an emphasis on the subjective element of CIL.<sup>64</sup> Maybe uniform practice is not so crucial if there is a strong *opinio juris* behind the rule? But even if one denies the correctness of this conclusion, it seems that after the *Nicaragua* case it is not possible to argue that practice and *opinio juris* could be ascertained independently. Other authors questioned the so called inductive and deductive methodology of the CIL ascertainment and called for a new interpretation of the Court’s methodology in this field – assertion.<sup>65</sup>

Stefan Talmon defines the deductive approach in the identification of CIL 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”.<sup>66</sup> He claims that there are at least four situations in which it is not possible to use the inductive methodology for the identification of CIL (Talmon uses this term for the identification of CIL “as inference of a general rule from a pattern of empirically observable individual instances of State practice and *opinio juris*”<sup>67</sup>):

- 1) State practice is non-existent because the question is too new;
- 2) State practice is conflicting or too disparate, and thus inconclusive;

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64 For more details, see Section 2.

65 Talmon, S., 2015, Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion, *European Journal of International Law*, Vol. 26, No. 2, pp. 417–433.

66 *Ibid.*, p. 420.

67 *Ibid.*

- 3) The *opinio juris* of states cannot be established;
- 4) There is a discrepancy between state practice and *opinio juris*.<sup>68</sup>

However, this argumentation is not persuasive. In these four situations, there is no specific customary international rule which would regulate a particular situation. Hence, the ICJ may indeed use deductive legal reasoning to apply broader customary international rule to a particular situation. But that broader rule must be based on the inductive method.

More importantly for the goal of this paper, the passage once again illustrates the fact that it is virtually impossible to make conclusions on the practice itself without analysing the way states-actors interpreted that practice. There is a practical and theoretical inseparability of two elements. Despite the conclusion of the ILC Special Rapporteur that evidence of the two elements of CIL must be sought independently, it is impossible to conclude that the practice was general, constant or uniform without the analysis of the way the actors have interpreted it.

This conclusion was confirmed also in the *Nuclear Advisory Opinion*.<sup>69</sup> In his dissenting opinion in this case, Judge Weeramantry argued that between 180 and 185 states support the prohibition of the use of nuclear weapons.<sup>70</sup> Even though this claim seems exaggerated, there is no doubt that the (great) majority of states did believe that the use of nuclear weapons is prohibited by international law. However, in the Advisory Opinion, the ICJ decided that there was no customary rule on the prohibition of the use of nuclear weapons in 1996. It is worth noting in this regard that the Court first stated that some states argued that the prohibition of the use of nuclear weapons could be based on the “*consistent practice* of non-utilisation of nuclear weapons by States since 1945 and they would see in that practice the expression of an *opinio juris* on the part of those who possess such weapons”.<sup>71</sup> It, then, stated that, in the view of states that claimed that the use of nuclear weapons could be legal, the lack of use of this weapon in armed conflicts since 1945 “is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen”.<sup>72</sup> The Court went on to conclude that these arguments are proof of the lack of *opinio juris* with regard to the prohibition of the use of nuclear weapons. Does this mean

68 *Ibid.*, pp. 422–423.

69 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports*, 1996, p. 226, para. 65.

70 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, Dissenting Opinion of Judge Weeramantry, *ICJ Reports*, 1996, p. 226, p. 304.

71 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, para. 65.

72 *Ibid.*, para 66.



that it is the *opinio juris*, and not the practice, that needs to be uniform? It seems that it is definitely impossible to ascertain the substance of practice as an element of CIL without its interpretation – especially, but not only, when agents are refraining from some form of practice.

#### 4. THE CONCEPT OF DISCURSIVE NORMATIVE PRACTICE AND THE FORMATION OF CIL

##### 4.1. POSTEMA'S CONCEPT OF DISCURSIVE NORMATIVE PRACTICE AND CIL

As previously mentioned, despite the fact that the theory of the two elements of CIL has various weak points, it remains dominant among the international law scholars, states and international judicial institutions.<sup>73</sup> Gerald Postema believes that one of the reasons for this has been the absence of any other plausible alternative.<sup>74</sup> Therefore, he offered that kind of alternative on several occasions.<sup>75</sup> Considering the so-called material element of CIL, Postema first noted that “there is no such thing as the custom’s rule—the regularity of behaviour—viewed on its own. It is a commonplace view of contemporary philosophy that the problem is not that no rule or pattern can be constructed from a collection of bits of behaviour, but rather that an indefinite number of such patterns are logically projectable from the same collection.”<sup>76</sup> Postema, therefore answers the dilemma surrounding the criterion that practice needs to be uniform in order to be an element of CIL – there is no such thing as uniform practice.

However, if that is correct, how is one to know what the rule of customary law is; if there is no single pattern of behaviour, there is no rule, right? Postema explains this by using the complex concept of normative practice. He claims that “custom following is never a matter of rote repetition of one’s past behaviour, disengaged imitation of observed behaviour of others, or simple application of a preconceived representation or rule. Rather, it involves the agent grasping the significance of some pattern and recognising its application in the given circumstances of the conduct,

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73 For more details, see Section 2.

74 Postema, G., J., 2012, Custom, Normative Practice, and the Law, *Duke Law Journal*, Vol. 62, No. 3, p. 708.

75 Postema, G., J., Custom in International Law: A Normative Practice Account, in: 2007, *The Nature of Customary Law*; Postema, G., J., 2012, Custom, Normative Practice, and the Law, *Duke Law Journal*, Vol. 62, No. 3.

76 Postema, G., J., 2012, Custom, Normative Practice, and the Law, *Duke Law Journal*, Vol. 62, No. 3, p. 715.

against the background of intermeshing anticipations and understandings of others.”<sup>77</sup> Hence, Postema claims that there is no custom if agents in the process do not understand the pattern and provide it with some meaning. He, however, adds that there are many different fields in which normative practice exists: a jazz music ensemble, the rules of international diplomacy, etc.<sup>78</sup> Since the rules of CIL represent the discursive normative practice, they are somewhat different:

*parties who engage in the in discursive normative practices are not only in the business of using and articulating concepts, but also they offer, explore, and assess reasons and arguments. The moves and countermoves they make are moves in argument—offering claims, counterclaims, challenges, and responses, offers of warrants for action and rejections of them [...] Identifying and fixing the requirements of norms of a discursive practice involves exploring the reasons and arguments for and against them and the conclusions that they support and those they do not support.*<sup>79</sup>

Therefore, Postema continues, in order to be certain whether a specific practice is legally significant (binding), just a matter of comity, or a mere convergence of interests, one needs to “look at the way the conduct is ‘read’ in the transnational public domain. In particular, it is determined by how the agents tend to characterise their actions, the terms in which they seek to vindicate them, how these attempts are taken up by other participants in the practice, how the actions are affirmed, resisted, criticised, and the like.”<sup>80</sup> Put differently, the issue of whether the action of agents is legally relevant does not depend on the mental state of the agents (their belief or acceptance) but on their proper articulation and defence based on the proprieties of the background normative practice.

By doing this, Postema refutes the additive theory on the formation of CIL. He claims that there is no material and subjective element of (international) customary norm. The use of concept of DNP enables him to make a systemic integration of deeds and words – “words and deeds are equally important elements of practice”<sup>81</sup> – and avoid the complex issue of the relationship between the two elements of customary norm. He adds that this does not mean that CIL could be understood as a mere process of argumentation, as believed by some scholars who insist on the importance of *opinio juris* in the process of formation of CIL, because arguments in the DNP are always arguments about, and drawn from, deeds.<sup>82</sup>

77 *Ibid.*, p. 726.

78 *Ibid.*, p. 729.

79 *Ibid.*

80 *Ibid.*, pp. 735–736.

81 *Ibid.*, p. 731.

82 *Ibid.*

#### 4.1.1. Critical assessment of Postema's conception of discursive normative practice and the formation of CIL

Postema's use of DNP in the explanation of the process of formation of CIL provides a more solid theoretical ground than additive theory. First of all, Postema rightly warns that there is an indefinite number of patterns in the same expressed behaviour. Therefore, one needs to refute the thesis that practice as an element of customary norm is self-evident, and that all one needs to do is to see whether the ascertained practice is general, uniform and constant. It is actually not possible to determine the substance and scope of the practice itself. Representatives of additive conception use *opinio juris* to differentiate between "ordinary" and legally relevant patterns of behaviour. Sometimes they describe this subjective element as belief, and sometimes as acceptance by the actors that a certain pattern of behaviour is legally relevant. However, both of these explanations have weaknesses.<sup>83</sup>

Postema rightly concludes that legal relevance of a pattern of behaviour depends on how the agents characterise their actions; however, this characterisation is not their belief or acceptance, but their (counter)claim on the substance and legal relevance of the practice. Of course, in some situations, their claim could be the acceptance of some other actor's claim that a particular behaviour is legally relevant.

By introducing the concept of DNP, Postema also resolves the issue of whether or not words constitute practice that is relevant for the formation of CIL. Put differently, he resolves the issue that concerns the relationship between words and deeds. As previously stated, the process of making claims and counterclaims is the crucial part of the process of formation of CIL. On the other hand, the formation of CIL should not be understood as a mere process of making claims and counterclaims in a vacuum, since these claims are always claims about the deeds of actors.

Now, it would be interesting to implement this theory of Postema on the normative discursive practice and formation of CIL on the already mentioned issue of the customary rule on the prohibition of torture. First of all, it is obvious that there is no single pattern of behaviour of states when it comes to the question of torture. It is possible to find both – torture and restraint from torture – in the practice of states. One solution to this situation is to state that there is no customary rule on the prohibition of torture since there is no uniform practice. Still, this conclusion seems counterintuitive, having in mind the general consensus that prohibition of torture is not only a customary rule, but also a *ius cogens* norm of international

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83 See more on this issue: Hrnjaz, M., 2016.

law. Therefore, as already mentioned, the ICJ tried to find the solution in stating that, in such situations, practice as an element of CIL need not be perfectly, but generally consistent. However, it is not easy to grasp what it means that practice needs to be generally consistent in the case of the rule prohibiting torture. Even more importantly, the ICJ also concluded that, in such situations, it is important how actors interpret their behaviour. By doing this, the ICJ actually moved just one or two steps away from the concept of DNP. Namely, it did not formally deviate from the additive theory and the criterion according to which practice needs to be consistent (or at least generally consistent), but it did recognise the crucial role of the interpretation of that practice (regardless of the fact that it was mistakenly identified as *opinio juris*). A more solid explanation would be that even though there are many patterns of behaviour concerning the issue of torture or the use of force in international relations, actors' exchange of argumentation on these patterns (which is also part of the practice relevant for the formation of CIL) clearly shows that CIL exists regarding these issues.

To conclude, even though it is possible to identify more than one pattern of behaviour concerning prohibition of torture, the crucial thing is that actors (predominantly states) are offering the argument that using torture is, and should be, prohibited by the norms of international law. They mainly criticise other state actors that use torture. Similar to the conclusions of the ICJ regarding the prohibition on the use of force, when confronted with assessments that they are violating the rule on the prohibition of torture, actors do not deny the existence of the rule. It is possible to ascertain the basic contours of the substance of that rule through the analysis of the actors' argumentation.

This does not mean that Postema's theory on the normative discursive practice and the formation of CIL properly resolves all the contested issues that exist in the field. I will start with some of the problems, or weak spots of the theory. First of all, I have already mentioned that all theories of CIL are determined by their authors' position on the nature of international law. It is important to stress in this regard that I agree with the authors who claim that international law, including CIL, is not the product of a spontaneous process, but is stipulated through deliberate and agreed process and authorised by agents.<sup>84</sup> Therefore, the will of these actors is still crucial in the process of international law-making, even though the will of the actors should not be understood as their explicit acceptance of every single norm of international law. Postema's position on the will of law-makers and the formation of CIL is a complex one. He first notes that "although unwritten, custom has the nature and force of law. Its existence,

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84 See Section 2 for arguments in this regard.

like that of all law, is a contingent matter, being a product of invention. However, custom is made not by individual human hands and wills, but *by life and time*.<sup>85</sup> He then criticises Francisco Suarez's conception on the formation of custom as the exercise of the will and intention, and connects this conception with the additive theory.

It seems that, by denying the will and the subjective attitude of actors in the process of formation of customary law, Postema insists above all on the individual will of actors. He underlines the inter-subjective character of discursive normative practice – commitments of actors made in this process “establish or presuppose a normative relation among participants in the practice, a kind of reciprocally recognized standings”.<sup>86</sup> I agree with Postema's conclusion that CIL is not made based on the will of one actor, but through the process of interdependent social interaction and the exchange of arguments, claims and counterclaims. I can also agree with his argument that the answer to the question whether some pattern of behaviour is obligatory or not is determined by how the agents tend to characterise their own actions.

However, I am not convinced that the will of the actors has nothing to do with the characterisation of their actions in the process of formation of CIL. There are, of course, various ways to create a concrete customary rule. But, if one was to look, for example, at the formation of the customary norm on the right of coastal states to use the continental shelf, they will arguably conclude that the decisive moment for the formation of this customary norm was the so-called Truman's Proclamation on the continental shelf from 1945.<sup>87</sup> It was by this Proclamation that the United States extended their jurisdiction to the submerged lands and subsoil of the outer continental shelf. Of course, the Proclamation, in and of itself, did not create the customary norm of the right of coastal states to extend their rights in this area, but there was a will of the United States to create this right. This customary norm was created by the (mostly positive) reactions (claims and counterclaims) of other states to the Proclamation, and by their will for this to become the norm of international law. There will be situations in which the first move of a state will be in violation of some already existing customary norm, but if, and only if, the reaction of other actors support that acclaimed legal right, one can make a convincing argument that a new norm of customary law has been created. Without said support, the described behaviour would continue to be treated as a violation of CIL.

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85 Postema, G., J., 2012, p. 710.

86 *Ibid.*, p. 724.

87 Sharf, M. P., 2013, *Customary International Law in Times of Fundamental Change*, Cambridge, Cambridge University Press.

Therefore, the will of actors perceived through their argumentation on the behaviour is important for ascertaining which pattern of behaviour will become a part of CIL. It would be possible to conclude that a new CIL norm has been created by the collective will of law-making actors ascertained through their legal characterisation of concrete actions.<sup>88</sup>

Closely connected to this issue is Postema's claim that the substance of a concrete customary rule is always reinterpreted and in a constant flux: "Unlike legal systems with formally defined institutions for making and changing legal norms, customary regimes cannot admit a sharp distinction between the formation and the application of their norms... change typically comes through the same kind of actions that might as easily be seen by some participants as violations: *ex iniuria ius oritur*."<sup>89</sup> As stated above, I believe that it is completely possible for a violation to create a new rule, through later claims of the violator and the acceptance of those claims by other actors; however, strictly formally speaking, this violation would be the material source of that rule, which became a part of CIL through the above mentioned exchange of the actors' claims and counterclaims.<sup>90</sup>

The problem with Postema's position on the constant reinterpretation of the substance of the rule is that rules that are in constant flux cannot fulfil some of the main functions of legal rules. He is actually accepting the thesis that one of the main functions of (customary) legal rules is to enable cooperation and coordination of actors, since it could produce legitimate expectations. But, one might ask the following question: how is this possible if rules are in the process of constant reinterpretation? How could actors legitimately expect anything in the above described chaos? One way to try to avoid this problem would be to accept a pragmatic way of thinking: there are, of course, constant disputes on the substance of the rule, but in most situations actors will agree on its core. The other way would be to claim that the substance of the rule remains relatively stable (this is the question of degree) until the actors decide to change it. This, however, would go against Postema's main conclusions on the nature of CIL.

To conclude, even though Postema's argument on the formation of CIL in accordance with the notion of DNP is convincing, it still leaves us with the haunting question of the practical value of these conclusions if they were to be taken to the extreme. Namely, how could CIL, which is

88 Postema would arguably refused to accept this argumentation.

89 Postema, G. J., 2007, p. 291.

90 Of course, this actor will argue that change already happened since it does not want to admit the responsibility for the violation of the existing rule. Fortunately for this violator, systems of sanctions of international law is underdeveloped, so if the other actors accept its claim, the violator will usually avoid the sanctions.

undergoing constant change and whose substance cannot be ascertained “from the outside”, provide legal certainty? Put differently, is it possible to use the concept of DNP to explain the process of formation of CIL without the mentioned flaws?

I believe that this is possible even though it would mean more pragmatic than theoretically rigorous approach. As previously stated, this would mean that the process of formation of CIL would be understood as the process of exchange of arguments of authorized agents through which they collectively decide which customs will become the part of CIL.<sup>91</sup>

Nevertheless, some of the weaknesses of this formal source of law remain. Namely, in most of the situations it isn't possible to conclude with certainty the exact moment when the rule of CIL has been created. In addition, it is sometimes difficult to ascertain the precise substance of the rule. Usually, described situation provides the agents with huge discretion regarding their behaviour in global relations. Notwithstanding these weaknesses seen from the perspective of binding function of international law, the process of normative argumentation exchange and formation of CIL play very important functions of law in international legal order such as the functions of legitimating various interests of actors and communicating between them.<sup>92</sup>

In the end, one could possibly argue that the mentioned process of exchange of arguments of authorized agents through which they create CIL could be understood as part of *opinio juris*. Nevertheless, this argumentation is not persuasive. Most of the representatives of additive theory claim that there is a clear separation of two elements of CIL and that they must be ascertained separately. This has been confirmed in the work of International Law Commission. But, I have already demonstrated that this separation is not maintainable since it is not possible to understand the meaning of practice without its interpretation by authorized agents. This is especially obvious in the cases of application of criteria that practice needs to be uniform or/and in the case of prohibitive rules. Hence, it is not possible to determine whether general, constant and uniform practice exists and afterwards to conclude whether that practice is followed by the sense of legal obligation through the exchange of arguments of agents. The direct consequence of this conclusion is that exchange of argumentation, claims and counterclaims, is not addition to the practice of authorized agents –

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91 Of course, this decision-making process is very different than the one of adopting international treaties for example.

92 Onuma, Y., 2003, International Law in and with International Politics: The Functions of International Law in International Community, *European Journal of International Law*, Vol. 14, Issue 1, February, pp. 105–139.



it is actually part of the special kind of practice, discursive normative practice in the process of formation of CIL. On the other hand, if one makes the argument that the existence of two elements could be determined simultaneously and that we use the same indicators for their existence then it would be impossible to make the difference between them.

## 5. CONCLUSION

Despite weak spots, the additive theory on the formation of CIL remains dominant among international law scholars, jurisprudence of ICJ and states. It seems that there is something very attractive in this theory – whether it is its alleged simplicity, reliance on the principle of voluntarism in international law, or something else.

Gerald Postema has argued that one of the possible explanations for the popularity of additive theory is the lack of plausible alternative so he offered one – the concept of DNP. There are convincing arguments that the concept of DNP provides more solid theoretical basis for the explanation of the formation of CIL than additive theory.

Nevertheless, the chances that the very complex and subtle concept of DNP with its own weaknesses will replace deeply rooted additive theory in the explanation of the formation of CIL look very slim. However, some of the conclusions made in this paper could still improve the contemporary understanding of the process of formation of CIL. Firstly, there are persuasive arguments that there is no such a thing as the uniform practice as an element of CIL – among many existing patterns of behavior actors choose the one to become the norm of CIL. This argument is in accordance with above mentioned Murphy's claim that customary law reflects deliberately stipulated order of law. Secondly, this deliberately stipulated order of international law is happening through the complex exchange of normatively relevant argumentation about the practice of authorized agents.

In the end, critics of CIL could still rightly warn that some of the weaknesses of this formal source of international law remain even after suggested modifications to the theoretical explanation of the process of its formation. The first one is that even with these modifications it is not easy to ascertain the precise substance of customary norms in international law. The second one is that it is hard to identify the exact moment of the norm formation having in mind constant attempts of norms reinterpretation by the authorized agents. These flaws taken together are seriously endangering the legal certainty in international legal order.

But, interestingly, states as primary agents do not highlight these deficiencies very often. One of the reasons could perhaps be that CIL still plays important role in some of the other functions of international law and not only the binding one – functions of legitimating and communicating between the actors in international community.

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## FILOZOFIJA MEĐUNARODNOG OBIČAJNOG PRAVA: DOVOLJNA JE PRAKSA

Miloš Hrnjaz

APSTRAKT

Osnovni cilj ovog rada je da kritički preispita dominantnu „dodavajuću” teoriju o nastanku međunarodnog običajnog prava koristeći koncept diskurzivne normativne prakse i rad Džeralda Posteme. Moj osnovni zaključak je da upotreba ovog koncepta pruža bolje objašnjenje procesa nastanka međunarodnog običajnog prava od „dodavajuće” teorije koja se sastoji od dva elementa – prakse i *opinio juris*-a. S druge strane, i Postemina teorija ima određene slabosti na koje u ovom radu pokušavam da ukažem i čiji značaj pokušavam da umanjim.

**Ključne reči:** međunarodno pravo, međunarodno običajno pravo, Međunarodni sud pravde, izvori međunarodnog prava, diskurzivna normativna praksa.

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