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# Legitimacy Deficit in Custom

A deconstructionist critique

BEN CHIGARA

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**Ashgate**

**DARTMOUTH**

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LEGITIMACY DEFICIT IN CUSTOM

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# List of Abbreviations

ANFC	Anglo Norwegian Fisheries Case
CCC	Corfu Channel Case
CFSP	Common Foreign and Security Policy
CHE	Committee of Hydrographical Experts
CIL	Customary International Law
CSA	Continental shelf area
EC	European Community
ESCR	Equidistance special-circumstances rule
FG	French Government
FRG	Federal Republic of Germany
GA	General Assembly
GAR	General Assembly Resolution
ICCPR	International Covenant for Civil and Political Rights
ICESCR	International Covenant for Economic, Social and Cultural Rights
ICJ	International Court of Justice
IL	International Law
ILA	International Law Association
ILC	International Law Commission
ILS	International Legal System
IOS	International Organisations
IRNT	International relations normative theory
IT	Information Technology
KD	Kingdom of Denmark
KN	Kingdom of The Netherlands
LFV	Law-founding violence
LPV	Law-preserving violence
MIL	Modern International Law
NCV	Norm-creating violence
NEP	Norm-endangering practice
NEV	Norm-enforcing violence

NG	Norwegian Government
NPP	Norm-preserving practice
NPT	Non-Proliferation Treaty
NPV	Norm-preserving violence
NSCSC	North Sea Continental Shelf Cases
NSGT	Non-Self-governing Territory
NSV	Norm-sustaining violence
NT	Normative theory
OC	Opinio Communis
OJ	Opinio juris sive necessitatis
ONUC	United Nations Peace Operations in the Congo
PAEC	Prompt adequate effective compensation
PCIJ	Permanent Court of International Justice
PR	Primary rule
RND	Norwegian Royal Decree
RR	Rule(s) of recognition
SC	Security Council
SP	State practice
SRR	Secondary rule(s) of recognition
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKG	United Kingdom Government
UN	United Nations
UNCLOS	United Nations Conference on the Law of the Sea
UNEF	United Nations Peace Operations in the Middle East
UNGA	United Nations General Assembly
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties

# Introduction

There is a strong current of opinion that customary international law (CIL) is a mysterious phenomenon<sup>1</sup> that: "... has lost its utility in international law and should be abandoned. Short of that, it should be radically reformed".<sup>2</sup> A former judge of the International Court of Justice (ICJ) perceived it to be: "... both delicate and difficult".<sup>3</sup> However, the majority of rules of international law are customary in nature.<sup>4</sup> Therefore, the transparency, consistency and determinacy of custom – the process by which rules of customary law are created - is central to the legitimacy of rules of CIL.

The process of custom itself comprises several attributes, including the creation, modification, and replacement of rules of customary international law. It is the creation of rules of customary international law that appears to have generated the most controversy<sup>5</sup> and it is this aspect of custom that this monograph is concerned with. Chapter One deals with issues of textual clarity and interpretative dilemmas induced into the theory of custom through article 38(1)(b) of the Statute of the International Court of Justice<sup>6</sup> – the formal source of custom. Because customs are common in every language and culture, the process that transforms so common a phenomenon into legal custom for application in the international legal system is what this writer calls the juridification of custom. This process separates legal custom from common custom. The legitimacy of rules of customary international law depends on the success of that process. Article 38(1)(b) of the Statute of the International Court of Justice sets out this process, which the international community must abide by.

Chapter One challenges also the superficial appeal of condensing so complex a process as custom into a user-friendly slogan that does little to cater for the uncertainties that shroud any attempt to determine the creation of a new norm of customary international law. The view that State practice (SP) accompanied by a belief of obligation (OJ) results in the emergence of a new norm of customary international law, (SP + OJ = CIL) implies that rules of CIL result from a careful calculation of their instigators, a view shared by the majority on the International Law Association Committee on Formation of General International Law.<sup>7</sup>



However, interrogation of international tribunals' jurisprudence on this matter appears to favour Wolfke's minority view that: "... calculated custom-making, if not excluded, is rare and difficult to prove".<sup>8</sup>

By examining the assumptions on which article 38(1)(b) premises the theory of custom, Chapter Two examines the potential effect on the doctrine of custom of the ever-shifting concept of State sovereignty. Chapter Three analyses the perceptual and ideological constructs that underpin the legitimacy deficiencies observed in custom. Chapter Four introduces deconstructionism to the search for a transparent, consistent, coherent and determinate doctrine of custom.

In the next three chapters an attempt is made to deconstruct some of the leading decisions of international tribunals on the creation of customary international law. Chapter Five examines the ICJ's determination of the creation of norms of customary international law in the *Corfu Channel Case (CCC)*.<sup>9</sup> After several years of inactivity, this was the first case to come before the new court that had in 1945 succeeded the Permanent Court of International Justice (PCIJ). This case presented the ICJ with the opportunity to push forward understanding of the process by which common usage among the community of sovereign independent nations translates into legal custom, and to quash speculations on the matter that its predecessor the (PCIJ) had raised. Chapter Six examines international tribunals' pronouncements on the process of custom. In particular, regard is had of the ICJ's pronouncements on the function of persistent objector status in custom in the *Anglo Norwegian Fisheries Case*,<sup>10</sup> where two years after deciding the CCC it had further opportunity to clarify and consolidate its opinions on custom. In Chapter Seven the ICJ's determination of customary international law in *North Sea Continental Shelf Cases*<sup>11</sup> is analysed. Critical in these cases is discussion of the relationship between custom and treaty in the process of custom. These cases represent what is arguably the most comprehensive consideration of the formation of norms of customary international law. Chapter Eight is an appraisal of the theory of customary international law. The writer identifies at least two factors that appear to weaken the legitimacy of norms of customary international law. The first is reliance by international tribunals on norm-creating violence (NCV) in their determination of the question whether or not a new norm of customary international law has formed, and following on from that, norm-enforcing violence (NEV), norms of customary international law inaugurated without regard to the requirements set in the formal source of custom are applied to