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Global Cooperation Research Papers 22

Wouter Werner

Godot was Always There

Repetition and the Formation of Customary International Law



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Schifferstr. 44
47059 Duisburg
Germany
Tel: +49(0)203 379-5230
Fax: +49(0)203-379-5276
E-Mail: info@gcr21.uni-due.de
Internet: www.gcr21.org

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Please cite the work as follows: Wouter Werner 2019. *Godot was Always There. Repetition and the Formation of Customary International Law* (Global Cooperation Research Papers 22). Duisburg: Käte Hamburger Kolleg / Centre for Global Cooperation Research (KHK/GCR21).

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Printed by UDZ, Duisburg

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ISSN: 2198-1949 (Print)

ISSN: 2198-0411 (Online)

DOI: 10.14282/2198-0411-GCRP-22

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Wouter Werner

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Editors Preface

We are happy to announce that the research paper series is back with Research Paper No. 22. The reprise of the series comes with new inputs from the Centre's fellows and staff, who present insights from ongoing research at the KHK/GCR21. As the new visual appearance signals, the Centre has entered its second phase and is shifting the agenda to the core issues of first, Pathways and Mechanisms of Global Cooperation, and Global Cooperation and Polycentric Governance from 2018 to 2020, and second, Critique, Justification and Legitimacy as well as Competing Visions of World Order from 2021 to 2024. This research paper by Wouter Werner is titled 'Godot Was Always There – Repetition and the Formation of Customary Law' and marks the beginning of our second research period (2018–2024). The paper explores the role of customary law as one of the major sources of international law, which in turn regulates global cooperation in various fields. Referring to Samuel Beckett's play 'Waiting for Godot' as an intellectual inspiration, Wouter analyses a report by the International Law Commission (ILC) among other sources, and develops ideas on how rules for customary law are created and maintained within polycentric environments through collaborative processes and restatements. In doing so, he claims that repetitions are one of the major reasons why international customary laws exist in the first place. This interesting and somewhat surprising finding highlights why it is fruitful to focus on the formation of such counter-intuitive pathways of global cooperation.

Frank Gadinger

Godot Was Always There

Repetition and the Formation of Customary International Law

1 Introduction

In Samuel Beckett's play, 'Waiting for Godot', the two main characters do exactly that: they wait for a man named Godot to arrive. By now, the play has obtained iconic status and the audience knows the outcome: Godot will never come. The play shows endless anticipation, an indefinite transitory period in which Vladimir and Estragon are killing time (and time hits back at them). The big event, the arrival of Godot, whatever that may entail, is always yet to come. In the meantime, Vladimir and Estragon repeat over and over again:

Estragon: He should be here.

Vladimir: He didn't say for sure he'd come.

Estragon : And if he doesn't come?

Vladimir: We'll come back tomorrow.

Estragon: And then the day after tomorrow.

Vladimir: Possibly.

Estragon: And so on.

Fast forward to 2016. The International Law Commission (ILC) presents its report on the identification of customary international law.¹ As may be recalled, customary law is still one of the most important sources of the international legal order. Rules of customary law regulate (global) cooperation in a variety of fields, including the responsibility of states for wrongful acts,²

¹ International Law Commission, *Identification of Customary Law*, A/71/10, 2016.

² A recent example is the 2017 ruling of the Hague Court of Appeal, which held that the Netherlands was partly liable for the losses suffered by the relatives of some 350 Muslim men. In 1995, these men were made to leave the compound of the UN peacekeeping force 'Dutchbat', and subsequently killed. The Court of Appeal decision is currently under review at the High Court in the Netherlands. One of the core questions in this case is whether the acts of the UN force Dutchbat can be attributed to the State of the Netherlands. In order to answer this question, the Court turned to customary international law. *Gerechtshof Den Haag*, 27 June 2017, C/09/295247 / HA ZA 07-2973.

cyberspace,³ international humanitarian law,⁴ environmental law,⁵ investment law⁶ or state immunities.⁷ Rules of customary law have been pivotal in deciding cases on controversial issues such as the responsibility of states for actions of UN peacekeeping forces,⁸ the legality of court proceedings against states for crimes committed in the Second World War,⁹ or the obligation of states to intensify their policies to combat climate change.¹⁰ However, rules of customary law have to be applied in what has been called a context of ‘polycentric governance’. This context is characterized by the fact that ‘sites for the governance of a global problem are today generally spread across geographical scales (local, national, regional and planetary) as well as across social sectors (public, private, and public-private combinations). Moreover, the many agencies which are involved with governing a given global issue frequently have overlapping institutional mandates, so that multiple regulators address the same problems in the same places’.¹¹ For customary international law, the dispersed nature of global governance poses challenges at different levels. It is not only that its rules can be interpreted and applied in diverging ways (thus raising questions regarding the unity and coherence of international law),¹² but also that different agents use different methods to *find* rules of customary law in the first place. After all, it is way more difficult to define and identify rules of customary law than rules of treaty law. Where treaty law is laid down in written, formally adopted documents, rules of customary law emerge out

³ *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence, Cambridge: Cambridge University Press, 2017.

⁴ See in particular the restatements of customary law by the International Committee of the Red Cross: Jean Marie Henckaerts & Louise Dowwald-Beck, *Customary International Law*, Vol. I: Rules. The rules are also available via the website of the ICRC, at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

⁵ For a recent overview see: Pierre-Marie Dupuy, Ginevra Le Moli and Jorge E. Viñuales, *Customary International Law and the Environment*, CEENRG, University of Cambridge, 2018, at: https://www.ceenrg.landecon.cam.ac.uk/working-paper-files/CEENRG_WP_19_CustomaryInternationalLawandtheEnvironment.pdf.

⁶ Jeswald W. Salacuse, *The Law of Investment Treaties* (2nd Edition), Oxford University Press, 2015.

⁷ See for example the ruling of the International Court of Justice in the case between Germany and Italy, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), *Judgment*, *I.C.J. Reports* 2012, 99.

⁸ *supra* note 2.

⁹ *supra* note 7.

¹⁰ *Stichting Urgenda v. Staat der Nederlanden*, Hoge Raad der Nederlanden 1 Rolnr.: 19/00135 Zitting: 12 April 2019.

¹¹ Research description of the thematic field ‘Global Cooperation and Polycentric Governance’, Centre for Global Cooperation Research, University Duisburg/Essen, at: <https://www.gcr21.org/research/polycentric-governance>.

¹² See the report by the International Law Commission, finalised by Martti Koskenniemi: ‘Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law’, *A/CN.4/L.682*, 13 April 2006.

of the practices of states. The very existence of rules of customary law is thus often a matter of legal contestation.

It is against this background that the International Law Commission assumed the task to develop criteria on how to identify rules of customary law. It starts out from the fact that customary law today is identified, interpreted and applied by a multitude of agents, who do not necessarily share the same approach to international law. Therefore, the first step in the ILC report is the formulation of a definition of customary law that all agents should adopt. In this context, the ILC recalls the often-used conception of customary law as a general practice that is accepted as law by the members of a legal community.¹³ In international law, this conception is translated into state practices that are accompanied by an *opinio juris*, the expressed belief that the practices in question are allowed, prescribed or prohibited by law. In this research paper, I challenge this by now common understanding of customary law, using – among other sources - the ILC report as an illustration. The idea that rules of customary law are created bottom-up, through the practices of states and their expressed belief, does not do justice to its temporal logic as well as to the crucial role that experts often play in the emergence of customary rules of law. In order to substantiate this argument, it is necessary to go back to Beckett's 'Waiting for Godot'.

As I will argue in the second section, the concept and formation of customary law are predicated on a *rationale* that overlaps with but also opposes the logic employed in Beckett's play. Where Godot is always yet to come, customary law is always already there; where Vladimir and Estragon are locked in an eternal present through repetition, customary law grows through its restatements. Based on this conception of customary international law, I study the importance of restatements by expert bodies in more detail in section three. If, as I argue, customary law only exists in and through its restatements, it is necessary to revisit our understanding of reports such as the one published by the ILC in 2016. In terms of the research agenda of the Centre, my argument could be read as an invitation to approach the formation of customary law more as a process of (global) cooperation. It is not the practices of states as such that form the basis of customary law, but the way in which these practices are *(re)presented* in dialogues on customary law. Customary law is formed through collaborative processes, which sometimes circle around common documents.¹⁴ The ILC report itself is a good illustration of this argu-

¹³ To mention just a few examples: Jan Klabbers, *International Law*, Cambridge: Cambridge University Press, 2017, 25–35; Malcom Shaw, *International Law*, Cambridge: Cambridge University Press 2014, 51–66; Anders Henriksen, *International Law*, Oxford: Oxford University Press, 2017; Antonio Cassese, *International Law*, second edition, Oxford: Oxford University Press, 2005, 156–157.

¹⁴ For an analysis of cooperation around common practices and documents see Christian Bueger, 'Territory, authority, expertise: Global governance and the counter-piracy assemblage', *European Journal of International Relations*, 24(3), 614–637.

ment. The Commission is a subsidiary organ of the UN General Assembly, formally tasked with progressively developing and codifying international law. It consists of independent legal experts across the world, and works in close cooperation with states. The latter provide input on the Commission's work in progress, in an attempt to come up with documents that solicit enough support from member states of the UN. The ILC report, therefore, should not only be viewed in terms of its content. It is also part of a collaborative process between the Commission and the UN Member States to arrive at a common understanding and approach of international customary law.

2 Time and Repetition in ‘Waiting for Godot’

It is difficult not to see parallels between ‘Waiting for Godot’ and eschatology, the theological doctrine of the end of times. Across different religions, the end of times has been associated with ideas such as final judgment, penance, redemption, resurrection of the dead or the return of a savior.¹⁵ Although Beckett himself denied that the name ‘Godot’ should be read as ‘God’ (and in the original French version this did not make sense indeed), the play does contain several references to Christianity.¹⁶ What is more, the play itself is built around the main characters’ anticipation of a decisive break, of redemption through the arrival of Godot. This is spelled out most explicitly in a scene where Vladimir and Estragon discuss how they are tied to each other— how they feel worse off when together, but still keep bonding up:

Estragon: I can’t go on like this
Vladimir: That’s what you think
Estragon: If we parted? That might be better for us
Vladimir: We’ll hang ourselves tomorrow. Unless Godot comes
Estragon: And if he comes?
Vladimir: We’ll be saved

The idea of redemption through the arrival of a judge and savior and is predicated on a progressive reading of time: as time progresses, the moment of salvation comes closer. This is how time brings together past, present and future in, for example, Christian eschatology. As Gauthier explains: ‘This view of time as a flowing progression from past, to present, to future, is typical of the system forged by Christian tradition, in which time is seen as linear and progressive, with a beginning, ending in a fulfilment, and experienced in a tension between formerly (the creation of the world and Adam’s sin), already (the passion of Christ), and not yet (waiting for the *Parousia*). This sequence is seen as a linear and irreversible temporal process, which is caused by and must repair the original sin, and which governs all humanity’¹⁷

The progressive conception of time, however, is fatally undermined in Beckett’s ‘Waiting for Godot’. Throughout the play, Vladimir and Estragon seem

¹⁵ Jerry Walls, *The Oxford Handbook of Eschatology*, Oxford: Oxford University Press, 2007.

¹⁶ Jonathan Boulter, *Beckett: A Guide For the Perplexed*, New York: Continuum, 2008. Boulter here mentions Vladimir and Estragon’s intensive discussion of the repentance of the thief that hung next to Christ at the cross.

¹⁷ Claudine Gauthier, ‘Temps et eschatologie’, *Archives de sciences sociales des religions* 2013/2 (No 162), p. 123–141, at 128.

to have lost all sense of both place and time. The play is located in what may best be described as a non-place, a spot that could be anywhere and nowhere: 'A country road. A tree'. More importantly, Vladimir and Estragon prove incapable of securing the identity of the place:

Estragon: We came here yesterday.
Vladimir: Ah no, there you're mistaken. .
Estragon: What did we do yesterday?
Vladimir: What did we do yesterday?
Estragon: Yes.
Vladimir: Why . . . (*angrily*). Nothing is certain when you're about.
Estragon: In my opinion we were here.
Vladimir: (*looking round*). You recognize the place?
Estragon: I didn't say that.
Vladimir: Well?
Estragon: That makes no difference.
Vladimir: All the same . . . that tree . . . (*turning towards auditorium*)
that bog . . .

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As this scene illustrates, Vladimir and Estragon are unable to situate themselves temporally and spatially. Their dialogue (if that) continues with a search for the right time: was it this evening they were supposed to wait? Did Godot say Saturday? What day of the week is it to begin with? The dissolution of time is also evident in other aspects, such as the leaves on the tree. In Act one, Vladimir says that the tree 'must be dead', signaling it has no leaves. Shortly thereafter, the tree has grown four or five leaves; something that is impossible if the play would develop linearly, since less than one day has passed. In this way, the play suggests that time does not really matter: the same scene could take place in every period of the year, over and over again. The play thus combines the longing for the end of times with a conception of time that turns everything into an ever-lasting present.¹⁸ In the world of Vladimir and Estragon, time cannot progress towards the arrival of Godot: if it is impossible to tell yesterday apart from today, Saturday from Friday or Sunday, Winter from Spring, time does not 'go forward' but stops functioning. In that sense, Vladimir and Estragon *already* live at the end of time. They live in a universe without movement, as illustrated by the ending of the play:

¹⁸ It is exactly this combination which gives the experience of the absurd. If Vladimir and Estragon had no expectation of Godot's arrival, all that happened would just be 'wierd', but not absurd. As Camus has explained in 'The Myth of Sisyphus', , the absurd only arises out of the confrontation between human longing and an indifferent universe: 'Man stands face to face with the irrational. He feels within him his longing for happiness and for reason. The absurd is born of this confrontation between the human need and the unreasonable silence of the world.'

Vladimir: Well, shall we go?

Estragon: Yes, let's go.

They do not move.

The end of times is also illustrated by the role of repetition in the play. The play as a whole is repetitive, as the second act basically repeats what happens in the first. Critics have described 'Waiting for Godot' as a play 'in which nothing happens, twice'.¹⁹ The two acts of the play contain the same encounter in the opening scene,²⁰ where Vladimir greets Estragon saying 'So there you are again' (Act one) or 'You again!' (Act two), both times followed by a talk on the beating that Estragon received from unnamed strangers. The rest of both the scenes are filled with repetitive talks and (in)actions, such as the plan to commit suicide or the repeated realization that they cannot leave as they are waiting for Godot. The final words of each scene are the exact same, although the order of speakers has turned around. In Act one, it is Estragon who asks, 'well, shall we go?' and it is Vladimir who answers, 'yes let's go', whereas in act two it is Vladimir who asks 'well, shall we go?', and Estragon who answers, 'yes let's go'. In both cases, the result is the same: they don't move.

Beckett's use of repetition in 'Godot' is not only at odds with progressive readings of history. It is also radically different from traditional, cyclical readings of time, which hold that the present should be modeled after some ideal model in the past. As Eliade has shown, cultures across the globe have cherished the idea that 'reality is a function of the imitation of a celestial archetype', while no act is recognized as valuable and real if it 'has not been previously posited and lived by someone else (...) - a conscious repetition of paradigmatic gestures'.²¹ Under such readings repetition is necessary in order to turn the present into an instantiation of the past. However, in 'Waiting for Godot' repetition is not meant to model the present after anything else—it does not help to come closer to the future, nor to reinstall an idealized past. On the contrary, repetition is used to dissolve past and future into an ever-lasting present, an end-of-time, which does not come with any finality or redemption.

¹⁹ Vivien Mercier (1956), 'The Uneventful Event', *Irish Times* 18 (6).

²⁰ Another illustration is the opening song of Act two, which contains an indefinite loop: A dog came in the kitchen; and stole a crust of bread; Then cook up with a ladle; and beat him til he was dead; Then all the dogs came running; and dug the dog a tomb; and wrote upon the tombstone; for the eyes of dogs to come: 'A dog came in the kitchen....'

²¹ Mircea Eliade (1954), *Cosmos and History, The Myth of the Eternal Return*, Harper & Brothers, New York (translated from French by Willard R. Trask), 5.

3 Time and Repetition in the Formation of Customary Law

In customary law, time and repetition operate in ways that partly overlap with, but also diametrically oppose ‘Waiting for Godot’. This follows from the way in which customary law has been treated as a formal source of law since medieval times.²² Already in the 14th century, a rule of customary law was defined as ‘a certain law, instituted by repeated acts, which is acknowledged as law’.²³ Some seven centuries later, the ILC adopted a roughly similar definition of customary international law, stating that a rule of customary law exists where there is a ‘consistent and general’ practice accepted as law.²⁴ Where legislation or treaty law can be created through acts of will formally expressed at an identifiable moment in time, customary law grows out of practices of behavior that get accepted as law. This conception of customary law has been confirmed by the International Court of Justice and found its way into virtually all textbooks and introductions of international law.²⁵ As the ILC has summarized: customary law consists of two constitutive elements: (a) a general practice (b) an *opinio juris*, defined as the ‘conviction that (a practice) is legally required, permitted or prohibited by customary law’.²⁶

The element of ‘practice’ has given rise to many practical problems of identification: how widespread should a practice be before it gives rise to a rule of customary law? How long should a practice exist before it starts to count? Should the practice of states with a specific interest in the development of a rule carry more weight? (e.g. archipelagic states in relation to rules setting

²² As Kadens and Young have argued, since medieval lawyers turned the concept of customary law into a formal source of law, legal theory has been struggling to grapple with its tensions and paradoxes. Emily Kadens & Ernest A. Young, How Customary is Customary International Law?, *William & Mary Law Review* 54, 2013, 885–920.

²³ Bartolus’ (1313–1357), *In Primam Digesti Veteris Partem Commentaria*, Nicholus Beuiliaquam, 1574. Quoted in Emily Kadens (2016), ‘Custom’s Past’, in Curtis Bradley (ed.), *Custom’s Future: International Law in a Changing World*, Cambridge: Cambridge University Press, 11–34, at 13.

²⁴ Draft conclusion 8 of the ILC report on the identification of customary law: . International Law Commission, *Identification of Customary Law*, A/71/10, 2016.

²⁵ The term ‘general practice accepted as law’ is commonly used in international legal practice and scholarship. See for example: This approach was also adopted by the International Law Commission in its report on the identification of rules of customary international law. International Law Commission, *Identification of Customary Law*, A/71/10, 2016. The ILC report contains several references to ICJ jurisprudence where the same approach was embraced. The approach is also adopted by virtually all modern handbooks and introductions to international law. To mention just a few examples: Jan Klabbbers, *International Law*, Cambridge: Cambridge University Press, 2017, 25-35; Malcom Shaw, *International Law*, Cambridge: Cambridge University Press 2014, 51-66; Anders Henriksen, *International Law*, Oxford: Oxford University Press, 2017; Antonio Cassese, *International Law*, second edition, Oxford: Oxford University Press, 2005, 156–157.

²⁶ *ILC Report on Customary Law*, at 97.

archipelagic baselines, or technologically advanced states in relation to rules pertaining to outer space). However important these questions may be, conceptually the more foundational questions arise in relation to the other aspect of customary law, *opinio juris*. As I set out above, *opinio juris* is defined by the ILC as a conviction that there is a rule, which requires, permits or prohibits the practice in question. In other words: to express an *opinio juris* is to express the belief that a rule was already in existence. The *opinio juris* thereby turns into a restatement of something that allegedly predated the articulated belief. This helps explaining why the origin of rules of customary law tends to be obscure. This is not only caused by the fact that it is often unclear at what point in time a practice is general and consistent enough for a new rule to emerge. It is also caused by the very nature of *opinio juris* as a restatement: to express the belief that a rule exists necessarily comes with the assumption that the beginning and authorship of that rule lies somewhere in the past. All we have are restatements of an original rule that always already has begun.

As I set out at the opening of the section, there are some parallels and fundamental differences between such restatements and the repeated announcements of Godot's upcoming arrival.

First, both the conception of customary law and the main characters in Beckett's play refer to something, which is fundamentally inaccessible and unknowable. Although Vladimir and Estragon constantly talk about the arrival of Godot, they have no clue who he is and what it would mean if he ever showed up. Estragon, for example, keeps forgetting his name (Estragon: His name is Godot? Vladimir: I think so), and when another character arrives at the scene, he takes him for Godot:

Estragon: *(undertone)*. Is that him?
Vladimir: Who?
Estragon: *(trying to remember the name)*. Er . . .
Vladimir: Godot?
Estragon: Yes.
Pozzo: I present myself: Pozzo.

When Pozzo asks them who Godot is, Vladimir, in the same scene, admits: 'we don't know him very well'. It also remains unclear what would happen if Godot showed up, with Vladimir and Estragon only speculating in vague and general terms about it (e.g. 'we will be saved').

It may seem quite a stretch from the unknowable Godot to the identification of customary law. However, in both cases, that what really counts (Godot, the

customary rule) remains out of reach. In the case of customary law, this follows from the idea that *opinio juris* is understood as the belief or conviction that a practice is required or permitted by law. As I set out above, this means that the rule in question is supposed to *exist already* when it is first invoked. This, however, creates an unsolvable conceptual problem, as it makes it impossible to explain how new rules of customary law could ever emerge.²⁷ After all, under this understanding of customary law, new rules law can only emerge if the legal community accepts them as valid *prior* to their first invocation. As Watson has summarized the paradox: for a new customary rule to develop it ‘should arise first through custom, but at the time of the first behavior the law was, of course, not in existence. But the first relevant behavior should be accompanied by the *opinio (juris et) necessitatis*. Consequently the first behavior rested on an error and should not be counted for the creation of the customary law. But this also applies to the second act of behavior, which now becomes the first, and so on through all subsequent acts’.²⁸ This so-called ‘chronological paradox’ was already acknowledged as an unsolvable problem by medieval jurists,²⁹ and has haunted international legal theory up to the present day.³⁰

Thus, where Godot is always yet to come, rules of customary law are always formed already. All we have are restatements *about* those rules, which presuppose their prior existence. There is no way to test whether these restatements are ‘correct’ or ‘incorrect’, as this can only be done through an assessment based on the elements of customary law: a practice, accompanied by the expressed belief that this practice is required or permitted by law. This begs the question whether *that* expressed belief is correct, *ad infinitum*.

This links up directly to the *second* aspect, the role of repetition. In ‘Waiting for Godot’, repetition locks the main characters in an ever-lasting present. The absurdity of the play occurs out of the confrontation between Vladimir and Estragon’s anticipation of salvation to come and the impossibility of any progress in time. In customary law, by contrast, repetition *does* allow for movement. Repetition takes the form of restatements that represent an allegedly pre-existing rule. In this context, the term ‘represent’ refers to two

²⁷ Von Savigny & Heuser (1840), at 171, 174–175.

²⁸ Alan Watson, *The Evolution of Western Private Law* (expanded edition), Baltimore & London: The Johns Hopkins University Press, 2001, at 94, 95.

²⁹ Kadens (2016), 11–34.

³⁰ Sir Hersch Lauterpacht, *The Development of International Law by the International Court of Justice*, New York: Praeger, 1958, 379. Lauterpacht speaks of the ‘mystery of custom oscillating inconclusively between being a law-creating source of legal rules and mere evidence of pre-existing law’. For a recent account see Bradley (2016) and Brian Leppard, *Customary International Law, A New Theory with Practical Applications*, Cambridge: Cambridge University Press, 2010.

acts at the same time: restatements present the rule to an audience, which can either accept or reject the rule presented to them. At the same time, they make the rule operative *in the present*; restatements bring something which allegedly lies in the past into the here and now. In this sense, restatements are forms of ‘forward repetition’- repetition that moves the past into the present and the future.³¹ Customary law knows its absurdity too, as its rules begin by restatements of something that cannot yet exist. However, this absurdity does not preclude movement: once the restatement is accepted as correct (however absurd that may be conceptually), the restated rule obtains validity. In other words: rules of customary international law exist in and through restatements and their acceptance by states and other authorities. In this context, it is worth recalling an observation made by Crawford in relation to the question when a new customary regime on the continental shelf emerged: ‘One cannot tell what all of international law was on a given day until after that day. Custom is developed by a dialogue in time. (...) Like good coffee, international law has to be brewed’.³² Crawford here points at the impossibility of knowing the past of rules of customary law other than through their re-presentation in the present. What international law *was*, which rules of customary law already existed, is formed by how we restate that past in the present. This restatement is not just a copy-pasting of what went before, but rather a re-appropriation of that past, in light of how agents should behave in the future.

³¹ The term ‘repetition forward’ is taken from: Søren Kierkegaard, *Fear and Trembling and Repetition*, Princeton University Press 1983 (original work from 1843).

³² James Crawford and Thomas Viles ‘International Law on a Given Day’, K Ginther & ors, *Völkerrecht zwischen normativen Anspruch und politischer Realität. Festschrift für Karl Zemanek zum 65. Geburtstag* (Duncker & Humblot, Berlin, 1994) 45-68, at 68. I found out about this piece through a blog by Marko Milanovic, ‘Article 75 API and US Opinio Juris’, *EJIL Talk!*, 9 March 2011, <https://www.ejiltalk.org/article-75-ap-i-and-us-opinio-juris/>.

4 Restating Restatements

4.1 Restatements by expert committees

The previous section showed how customary law arises out of acts of doubling. Rules of customary law do not begin when there is a practice that is accepted as law, but when there is an accepted restatement of a practice as guided by law. It is only through these restatements that rules can emerge and grow. This insight echoes Descombes' analysis of the relation between an original (the 'first') and the reproduction (the 'second'): 'it must be said that the first is not the first if there is not a second to follow it. Consequently, the second is not that which merely arrives, like a latecomer, *after* the first, but that which permits the first to be the first'.³³ In the field of customary law, this chain of reproduction continues: it is only the third that allows the second to be the one that permits the first to be first, and so on. What is more, in this chain of restatements, the meaning of the rule does not remain the same. After all, as I indicated above, restating a rule is not an act of neutral copy-pasting the past into the present, but an act that *presents* a rule as valid and relevant in new circumstances. Restatements of customary law do not take place in the universe of Vladimir and Estragon, where movement in time is precluded. Repetition (restatement) in the world of customary law is a way of 'updating' the past, of bringing it into the present in order to relate to the future. Repetition thus brings both continuity and change. As the narrator and pseudonym of Kierkegaard's *Repetition* has put it: 'The dialectics of repetition is easy, for that which is repeated has been – otherwise it could not be repeated – but the fact it has been makes repetition into something new'.³⁴

The importance of restatements in the formation of customary law only grows when the role of expert committees is taken into account. Across international law, there are several committees and institutes whose task it is to 'restate' rules of customary international law. A classical example is the International Law Commission, a subsidiary organ of the General Assembly of the United Nations. Following Article 13 (1) (a) of the UN Charter and article 1 of its own Statute, the ILC is tasked to promote 'the progressive development of international law and its codification'. The ILC Statute makes a strict distinction between the two tasks: 'progressive development' stands for the preparation of draft conventions not yet (sufficiently) regulated by international law, whereas 'codification' signals the 'more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine' (Article 15). As the wording of Article 15 indicates, 'codification' stands for restate-

³³ Vincent Descombes, *Modern French Philosophy*, Cambridge University Press 1980, at 145; as quoted by Sarah Gendron, *Repetition, Difference and Knowledge in the Work of Samuel Beckett, Jacques Derrida and Gilles Deleuze*, Peter Lang, New York, 2008, 146.

³⁴ Kierkegaard (1983), 146.

ments of pre-existing rules. However, the wording of article 15 also shows that ‘restatement’ is always more than just copy-pasting: it involves ‘more precise formulation’ and ‘systematization’ of rules, and thus an act of repetition that adds new elements. Adding new layers of meaning is exactly the point of the work of the ILC: if rules would be clear enough as they are, there would be no need for a commission of experts to restate them. However, if the rules are not precise and systematic enough, if they need re-articulation in order to be understood properly, the work of the commission necessarily goes beyond the law as it stands. Another example is the International Committee of the Red Cross, which publishes a (continuously updated) ‘study’ of rules of customary international humanitarian law. This study does more than simply recollecting rules that are out there already. First and foremost, the ICRC study is an attempt to instruct states and other agents on how rules of customary law are to be applied to current phenomena.³⁵ In addition, the study presents the rules as part of a larger *system*, with its own logic and underlying principles: ‘The ICRC study also represents an excellent opportunity to view international humanitarian law in its entirety, asking what purpose it has served and how it has been applied, studying the relevance of its various provisions and determining whether some of the problems encountered today do not call for a fresh look at this or that provision’.³⁶ Other examples can be found in *ad hoc* commissions, such as the ‘Tallinn Group of Experts’, an international group of experts that was brought together on the initiative of NATO’s Cooperative Cyber Defense Centre of Excellence. The group of experts drafted the so-called *Tallinn Manual 2.0 on the Law Applicable to Cyberoperations (Tallinn 2.0)*.³⁷ Its principal aim is to explicate which rules of customary international law are applicable to a wide variety of cyber operations. The Manual was written in response to new challenges posed by the digital revolution. The world of cyber gave birth to new social relations, new forms of communication and novel possibilities of inflicting harm. What is more: the digital revolution gave rise to the idea that changes in the future may come at higher speed and thus with greater unpredictability than before. The Manual was put together to make sense of these developments and the uncertainties they carry along. *Tallinn 2.0* does so by restating what is already out there: rules of customary international law, some of which have existed

³⁵ As the study puts it: the problem is not to know whether given rules exist or not but rather how to interpret them. Jean Marie Henckaerts & Louise Dowwald-Beck, *Customary International Law*, Vol. I: Rules, at xxiii. The rules are also available via the website of the ICRC, at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

³⁶ *Idem*, at xxii.

³⁷ *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence, Cambridge: Cambridge University Press, 2017.

for more than a century.³⁸ However, *Tallinn 2.0* does more than simply restate what is out there; it also instructs states how to apply existing law to new phenomena, in light of the system of international law as a whole. In the case of *Tallinn 2.0*, the aim is even to *instruct* states on how they should apply existing customary law to events in cyber that have not taken place yet, and may as well never occur at all.³⁹

Restatements of the law by expert committees thus necessarily go beyond copy-pasting a pre-existing rule. Instead, they provide instructions on how existing law is to be applied to new phenomena, thereby adding new layers of meaning to the restated rules. In addition, they not only restate rules, but also present them as part of a larger legal regime with underlying principles and coherence, thereby restating and presenting this regime as well. Of course, the fact that expert committees restate certain rules does not as such turn them into rules of international law. Somehow, the restated rules need to be validated by other authorities, in particular by states or international judicial bodies. This explains why the International Law Commission is engaged in a constant dialogue with states when drafting reports, and why it seeks formal adoption of its conclusions by the General Assembly. Other expert bodies cannot rely on pre-existing formal procedures to involve states in the drafting of restatements. However, they too seek support from states through different channels. The ICRC, for example, involved academic and governmental experts in the drafting process of its customary law study, while receiving – and responding to – formal governmental responses to its end products.⁴⁰ In an even less formalized way, Michael Schmitt, the chair of the Tallinn 2.0 group of experts, solicited support for *Tallinn 2.0*, e.g. in some seminars organized in cooperation with states. In this way, the findings of the Manual could be explained to its main target group, legal advisors. In addition, the restated rules could be further strengthened through the support by states.

The interaction between expert committees and states once more illustrates how customary law evolves through restatements. The committees claim to

³⁸ The Tallinn Manual fits in a longer tradition in international humanitarian law. Since the late 19th century, international groups of experts have produced manuals in specific fields such as naval warfare, non-international armed conflicts or air and missile warfare: the 1913 *Oxford Manual on the Laws of Naval War Governing the Relations Between Belligerents*; the 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, the 2006 *San Remo Manual on the Law of Non-International Armed Conflict*, the 2009 *Harvard Manual on International Law Applicable to Air and Missile Warfare*, and the 2013 *Tallinn Manual on the International Law Applicable to Cyber Warfare*.

³⁹ For an analysis see Lianne Boer & Wouter Werner, 'It Could Prabal Just as Well Be Otherwise: Imageries of Cyberwar', in Monika Ambrus, Rosemary Rayfuse & Wouter Werner, *Risk and the Regulation of Uncertainty in International Law*, Oxford: Oxford University Press, 2017, chapter three.

⁴⁰ See for example Jean-Marie Henckaerts 'Customary International Humanitarian Law: a response to US comments', *International Review of the Red Cross*, 89 (866), 2007, 473-488 V89 (866), 2007.

restate rules that already emerged from the practice and *opinio juris* of States. However, the fact that it is necessary to restate (and update and systematize) these rules shows that states themselves apparently did not have sufficient insight into the customary law they had created. Therefore, the reports, studies or manuals produced by expert bodies present these rules anew to states. If States treat these re-presentations as correct, the rules they express are validated as pre-existing. Whether these rules *in fact* existed before they were restated is often beside the point. Not only can the acceptance by states itself be regarded as the expressed belief that a rule exists. More fundamentally, the very nature of customary law makes such an assessment often difficult to carry out. As I set out in section 1, customary law only exists by virtue of its restatements and their acceptance by the legal community. Just like Godot remains unknowable for Vladimir and Estragon, the origin of a rule of customary law remains out of reach. If a rule of customary law is to remain valid, it has move forward through restatements.

4.2 The 2016 ILC Report

The 2016 report by the International Law Commission takes the role of restatements to yet another level. The report was written in response to the growth of international law and the proliferation of different forms of transnational cooperation. As a result, the ILC holds, more and more non-specialists are confronted with questions regarding the formation and identification of customary international law. These non-specialists include ‘those working in domestic courts of many countries, those in government ministries other than Ministries of Foreign Affairs, and those working for non-governmental organizations’.⁴¹ The aim of the ILC report is to facilitate a common understanding of how customary law is to be found and applied. The focus of the report thus is on so-called ‘second-order’ rules of customary law: the rules that determine how substantive rules of customary law can be identified. This raises the question of where these second order rules come from. The report does not come up with an explicit answer to this question. However, the report does indicate indirectly where these rules can be found. According to the ILC, its ‘draft conclusions reflect the approach adopted by States, as well as by international courts and tribunals and within international organizations’.⁴² The ILC report here echoes approaches that have treated the rules that determine how customary law is made (and can be found) are *themselves* customary law. Meijers, for example, has treated these rules as ‘secondary rules’ in the Hartian sense, rules that determine how other rules can be made

⁴¹ ILC report (2013), 5. The same argument is made in the ILC report of 2016, at 79 (supra note xx).

⁴² ILC report (2016), 80.

and recognized.⁴³ However, this only begs the question: whose practices count as relevant for identifying the (secondary) rules of recognition? How do we know that we have identified the right practices to find rules of customary law?

According to the ILC, what counts are the practices of courts, states and international organizations. Restating their practices help to ensure that one only identifies those rules of customary law that ‘actually exist’.⁴⁴ The ILC report itself thereby becomes a restatement of these past practices, which seeks to guide behavior of those who are called to apply customary law in the future. This implies that the report is unavoidably more than just a description of what states, courts and international organizations have done so far. The report confirms, and thereby strengthens, the power of these agents by singling out their practices as the ones that matter. One may wonder, for example, why the methods used by informal bodies, non-governmental organizations or academics do not count. The report cannot answer this question, other than through circular reasoning: these are not (necessarily) the methods used by states, courts and international organizations. What is more, the report also indirectly critiques certain practices, e.g. the method for the identification of rules of customary law by the ICTY in the *Kupreskic* case.⁴⁵ The ILC report, therefore, is more than a restatement of what is out there. It wavers between restating how states, courts and international organizations identify rules of customary law and how they *ought* to do so. The ILC report thereby becomes yet another presentation of restatements—a presentation that obtains validity for those members of the international community it deems most relevant if they accept it as correct.

In this context it is interesting to take a closer look at the way in which the ILC develops its restatements. The report claims that the restatements reflect what states, courts and international organizations do when they identify a rule of customary law.⁴⁶ This may be correct, but the report does not offer much evidence of the concrete practices of states and international organizations to back up this claim. State practice and the practices of international organizations are mentioned, but only as *elements* of customary law. The report does not restate how states and international organizations *concretely determine* the existence of rules of customary law; which criteria they use to

⁴³ Herman Meijers (1979), ‘How is International Law Made?’, *Netherlands Yearbook of International Law* 3–26, 3.

⁴⁴ *ILC report* (2016), 82.

⁴⁵ ICTY, *The Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic*, IT 95-16, *Trial Chamber, Judgement*, 14 January 2000. In this case, the Tribunal held that, when it comes to belligerent reprisals, ‘principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent’.

⁴⁶ *ILC report* (2016), 80.

identify rules of customary law. By contrast, the report heavily relies on the way in which the International Court of Justice has identified rules of customary law. All the main findings of the report are backed up by examples from the jurisprudence of the International Court of Justice. The very definition of customary law as consisting of state practice and *opinio juris*, for example, is justified by reference to Article 38 as well as to the *Nicaragua* case, the *North Sea Continental Shelf* case, the 2012 *Jurisdictional Immunities* case, the 1985 *Continental Shelf* case, the *Colombian-Peruvian asylum* case, the *Rights of Passage* case, *Nuclear Weapons* Advisory Opinion, the *Pulp Mills* case and *Nicaragua v. Colombia Territorial and Maritime Dispute* case.⁴⁷ The only other source mentioned in this context is the *Norman* case before the Special Court for Sierra Leone.⁴⁸ A similar trend is visible when it comes to conclusions such as those pertaining to the assessment of evidence for customary law,⁴⁹ the forms of state practice that matter for the identification of customary law,⁵⁰ the assessment of state practice,⁵¹ the general nature of state practice,⁵² *opinio juris* and evidence thereof⁵³ or the status of resolutions of international organizations.⁵⁴

This approach is even more interesting when we take a closer look at how the International Court of Justice actually identifies rules of customary law. The ILC rightly points out that the International Court of Justice routinely states that rules of customary law can only be identified if there is a general state practice accepted as law.⁵⁵ And indeed, sometimes the Court identifies rules of customary law (or the absence thereof) on the basis of a direct analysis of the two elements. In the *Colombian-Peruvian asylum* case, for example, the Court critically examined a large number of cases regarding diplomatic asylum referred to by the Colombian government.⁵⁶ In the *Arrest Warrant* case, the ICJ ‘carefully examined state practice, including national legislation and those decisions of national higher courts (...).’⁵⁷ I have selected these two examples on purpose, as they both ended in a negative conclusion: based on an analysis of state practice and *opinio juris*, the Court concluded that no rule

⁴⁷ ILC report (2016), 82–84.

⁴⁸ ILC report (2016), 84.

⁴⁹ ILC report (2016), 84–87.

⁵⁰ ILC report (2016), 91–92.

⁵¹ ILC report (2016), 92–93.

⁵² ILC report (2016), 93–96.

⁵³ ILC report (2016), 96–101.

⁵⁴ ILC report (2016), 106–109.

⁵⁵ ILC report (2016), 82.

⁵⁶ Colombian-Peruvian asylum case, Judgment of November 20th 1950: *I.C.J. Reports* 1950.

⁵⁷ International Court of Justice, Case Concerning the Arrest Warrant of 11 April 2000, (Democratic Republic of the Congo v. Belgium), *Judgment of 14 February 2002*, para 58.

of customary law could be detected. This confirms the observation by Mendelson that ‘The Court’s tendency, indeed, is to invoke formal requirements mainly when it wants to say that an alleged customary rule is not one’.⁵⁸ This trend has continued in the 21st century. In several cases, the ICJ did engage in a more detailed analysis of state practice, to conclude in the end that there was insufficient proof of a rule of customary law.⁵⁹ Where the Court came to a positive finding, this was generally based on alternative sources such as treaty provisions⁶⁰ or previous case law.⁶¹

Generally speaking, the ICJ has relied more on alternative sources than on an independent analysis of state practice and *opinio juris*. In other words: the Court has frequently invoked restatements of customary law to back up its own conclusions. This can be derived from one of the few quantitative studies on the determination of customary law by international courts.⁶² The study is based on an analysis of all the judgments of the Permanent Court of International Justice and the International Court of Justice, supplemented by all non-World Court decisions mentioned in the 2013 ILC customary law report.⁶³ The authors found that references to ‘classical’ evidence of state practice, and *opinio juris*, governmental statements and behavior of states, were respectively cited in only 8% and 7.4% of the cases where courts identified a rule of customary law (or the absence thereof). Domestic statutes and domestic jurisprudence were cited in 10.3 and 11.4% of the cases respectively.⁶⁴ In practice, it turns out that restatements of customary law by scholars (18.3%), UN Reports (24%), reports written by international committees (25.7%) or case law of international courts and tribunals (38.9%) are invoked much more frequently. In this context, it is interesting to note that the International Court of Justice also makes use of reports by the International Law Commission, generally without further enquiring whether the findings of the ILC actually reflect state practice and *opinio juris*. As Talmon puts it, ‘Reference to the International Law Commission is a favourite shortcut in establishing rules of customary international law. (...) In all cases, the ILC has served as

⁵⁸ Mendelson (1996), 180.

⁵⁹ For an analysis of ICJ case law on customary law since 2000 see Aleberto Alvarez-Jimenez (2011), ‘Methods for the Identification of Customary International Law in the International Court of Justice’s Jurisprudence: 2000-2009’, *International and Comparative Law Quarterly*, vol. 60, 681–712.

⁶⁰ Case Concerning Certain Questions of mutual Assistance in Criminal Matters (Djibouti v. France), *Judgment of 4 June 2008*, para 174.

⁶¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *Advisory Opinion of 9 July 2004*, para. 88.

⁶² Stephen Choi & Mitu Gulati, ‘Customary International Law- How do Courts do It?’, in: Bradley (2016), 117–147.

⁶³ Choi & Gulati (2016), 126.

⁶⁴ Choi & Gulati (2016), 135. All the percentages mentioned in this paragraph are taken from figure 5.2 presented by Choi & Gulati at 135.

a kind of pseudo-witness for a rule having acquired the status of customary law'.⁶⁵ This implies that there is an interesting cross-referencing going on. The International Law Commission argues that the proper method to find rules of customary international law is the one developed by the International Court of Justice. The Court, in its turn, argues that outcomes of ILC reports can be used as evidence of customary law, even without further enquiry into the underlying materials.

By far the mostly cited evidence of a rule of customary law by international courts is international treaties (62.9%). Of course, it is possible that courts cite treaties because they argue that the treaty rule in question codifies pre-existing customary law. However, as Choi and Gulati argue, 'this does happen. But it happens rarely. (...) We found such indications in fewer than 20% of the determinations'.⁶⁶ In other words, international courts, including the World Court, most often restate treaty rules as valid restatements of customary law, without direct analysis of the possible underlying state practice and *opinio juris*.

⁶⁵ Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', *The European Journal of International Law* (2015) Vol. 26 no. 2, 417–443, at 437.

⁶⁶ Choi & Gulati (2016), 133.

5 Conclusion: One Day...

In this paper I have argued that customary law essentially consists of a dialogue (or contestations) about restatements of law. Rather than being a matter of practices that get accepted as law, customary law is a process of collective sense making of restatements by a variety of actors, including states, courts and legal experts. This argument not only follows from the way in which rules of customary law develop *de facto*. It also follows from the very concept of customary law as a set of rules that is based on two elements: a general practice and an *opinio juris*. The second element expresses the belief that a rule of customary law already exists. As a result, rules of customary law are always presented as pre-existing the first *opinio juris* that was supposed to call them into existence. This paradox lies at the heart of customary law and helps explaining why rules of customary law arise and persist only through cooperative processes.

In order to explicate the cooperative nature of customary law, I have contrasted its assumptions and logic with Samuel Beckett's 'Waiting for Godot'. In the second Act, Pozzo summarizes the workings of time and repetition in the play. When asked when his slave Lucky (who gave a long speech in the first Act) turned dumb, he replies in anger: 'Have you not done tormenting me with your accursed time! It's abominable! When! When! One day, is that not enough for you, one day he went dumb, one day I went blind, one day we'll go deaf, one day we were born, one day we shall die, the same day, the same second, is that not enough for you?' Lawyers are supposed to be more calm and distanced. Yet, they too could answer to the question of when exactly a rule of customary law emerged: one day it emerged, one day it was solidified, one day it became common knowledge- is that not enough for you? However, lawyers cannot give this answer without allowing for movement in time. Where Pozzo illustrates how time and repetition create an everlasting present for the characters in the play, customary law moves forward through acts of repetition. Where 'Waiting for Godot' is predicated on the ever-receding arrival of Godot, customary law is predicated on the assumption that its rules were always already there. This is expressed in the *opinio juris*, the belief that a practice is allowed, permitted or prohibited by law. As I have argued in this paper, *opinio juris* must be understood as a restatement of something that remains principally inaccessible. Restatements, however, necessarily breed difference: even if the text remains the same, the context changes. As meaning depends on context, restatements add new layers of meaning to rules that they present as pre-existing. This is not only done by states, but also (and increasingly) by expert committees such as the International Law Commission, the Tallinn Group of Experts or the legal experts of the ICRC who are tasked with restating rules of customary humanitarian law. These committees present restatements to states, whose acceptance validates the restated rules as pre-existent. Recently, this has even been done in relation to the secondary

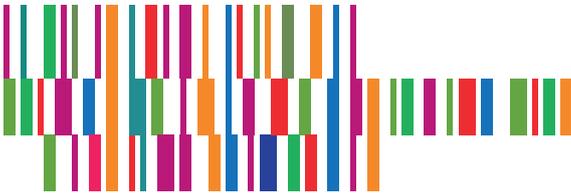
rules of customary law. In 2016 the International Law Commission presented a report on how rules of customary law are to be identified. The ILC presented the report as a restatement of the way in which states, international organizations and courts identify such rules. As it turns out, the report was based on a concept of customary law that does not entirely fit the practices it restates. However, the ‘original sin’ of the report can be redeemed through movement in time: if states, courts and international organizations accept the findings of the report as valid, the restated practices will be treated as pre-existent. Where Vladimir and Estragon remain locked in the present, customary law is only possible on the assumption that Godot was always there already.

Abstract

Rules of customary law figure prominently in today's law and policy. Across policy fields, courts and policy-makers are called to interpret and apply customary law. However, it is still a bit of a mystery how rules of customary law emerge and how they can be identified in the first place. In this paper, I set out why the mystery of customary law is bound to remain unresolved. Customary law cannot be treated as a body of rules 'out there', ready for application by domestic, regional or global authorities. Instead, it is part of a process of global cooperation where rules of customary law emerge and grow because they are restated. Rules of customary law only exist if they are successfully presented as already there.

Keywords repetition, customary law, expert committee, International Law Commission, pathways, polycentric governance

Wouter Werner is a professor of international law at the Centre for the Politics of Transnational Law, Vrije Universiteit Amsterdam. He is currently working on a project on practices of repetition in international law, with a focus on restatements, moot courts and cinematic representations of international law. In 2018 Wouter Werner was a fellow at the Käte Hamburger Kolleg, University of Duisburg-Essen.



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