Foreword

Michael Wood

Customary international law remains the bedrock of international law. Its merits and demerits as compared with that other great source of the law, treaties, have often been discussed. It used to be thought in some quarters that customary law would cease to be important as treaties multiplied. But that was never a realistic view. Even when whole areas of international law are codified in widely accepted international conventions, customary international law continues to play a vital role, as can be seen from the recent case law of international and national courts and tribunals. A good example is the law of the sea. As of August 2016, there are 168 parties to the 1982 United Nations Convention on the Law of the Sea, yet much scope remains for the customary international law of the sea. This is so not only in relation to those states (including important coastal states) and international organizations that remain outside the Convention, but also in order to complete the law in areas not covered by the Convention and to interpret and apply the Convention in areas that are in principle covered by it. Customary law is also relevant where the law is to be applied to events that took place prior to the entry into force of the Convention for the parties concerned. And it may continue to exist, and be applicable, separately from a treaty, even where the two have the same content and even among parties to the treaty.[1]

That customary international law may benefit from examination (or reexamination, as the title of this book suggests) is uncontested. The nature of customary law has led international lawyers over the decades to discuss the

[1] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14, 93-96, paras. 174–79; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Judgment of 3 February 2015, para. 88.

"complexities – indeed mysteries" of its operation,[2] a classical subject that is still debated in academic circles, even if not so much in practice.

Particularly interesting aspects, which Professor Lepard highlights in his introduction to the book, include the history of customary international law; the relationship between customary international law and politics, as well as ethics; why customary international law is law; what counts as relevant state practice; and how acceptance as law (*opinio juris*) is to be proved. These all raise a large number of questions, many by now relatively straightforward, some more difficult. They are also, for the most part, currently being addressed by the UN International Law Commission under the topic "Identification of customary international law."[3] The aim of that topic is "to offer practical guidance to those, in whatever capacity, called upon to identify rules of customary international law, in particular those who are not necessarily specialists in the general field of public international law."[4]

The debates in the International Law Commission (and in the Sixth Committee of the UN General Assembly) on the topic have evidenced a strong attachment to the "two-element" approach to the formation and identification of rules of customary international law. There is a general acceptance among members of the Commission – and among states – that customary international law requires, in the words of Article 38(1)(b) of the Statute of the International Court of Justice ("ICJ"), "a general practice accepted as law," that is, both a sufficiently widespread and consistent practice and *opinio juris* accompanying it. That is the starting position for the Commission's effort to clarify what these elements encompass and how they may be evidenced.

The present volume contains a range of essays that seek to describe the workings of customary international law from various perspectives and in various fields. It is striking that, however original and however innovative these essays are, for the most part the authors, too, adopt the two-element

[2] Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge: Stevens and Sons Ltd., 1958, reprinted by Cambridge University Press, 1996), 390.

[3] At its sixty-eighth session (2016), the Commission adopted, on first reading, a set of sixteen draft conclusions (with commentaries) on the identification of customary international law. See the International Law Commission's 2016 report to the UN General Assembly, "Report of the International Law Commission," Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016), UN Doc. A/71/10 (2016), chapter V. See also the Special Rapporteur's first, second, third, and fourth reports (UN Doc. A/CN.4/663 (2013), UN Doc. A/CN.4/672 (2014), UN Doc. A/CN.4/682 (2015), and UN Doc. A/CN.4/695 and Add.1 (2016)).

[4] Michael Wood, Special Rapporteur, "Second Report on Identification of Customary International Law," UN Doc. A/CN.4/672 (2014), para. 12.

approach, at least as their basis. This is particularly noteworthy given moves in some legal scholarship (including within this book) toward different approaches to the formation and identification of customary international law, in particular those seeking to rely predominantly on one or the other element.

For those authors who adhere to the two-element approach, as for the Commission, reexamining customary international law provides an opportunity to highlight the virtues (and address the challenges) of the approach widely seen as encapsulated in the Statute of the International Court and clearly endorsed in practice, and in doing so to contribute to the predictability and legitimacy of this important source of law. Restating the standard position may indeed be valuable in itself: as the Jordanian member of the Commission said, "The Commission should … clarify the process according to which customary international law was formed, its constituent elements and the kind of evidence required to establish its existence, all of which would serve to promote legal certainty."[5]

A key question to bear in mind when reading this book is whether the approach toward identifying rules of customary international law varies according to subject matter, or whether the same approach applies across the board, even if the available evidence, and its weight, may vary from field to field (or, perhaps more accurately, from rule to rule). Overall the chapters of this book tend to support a common approach (even if exact details may differ). The debates in Geneva and New York also assumed a common approach across the whole of international law. As Judge Greenwood has remarked, "International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law."[6]

Another fundamental question for anyone currently confronting the so-called "mysteries" of customary international law is where to look for enlightenment on the appropriate methodology for identifying its rules. Do we find guidance in writings, in the practice and pronouncements of states and other subjects of international law, or in decisions of international and domestic courts? The answer, of course, is "all of the above." At the same time, it may be thought that the most authoritative instruction is to be found in the pronouncements of the ICJ, which "relies on customary international law constantly and

[5] Provisional summary record of the 3183rd meeting of the Commission, 19 July 2013, UN Doc. A/CN.4/SR.3183 (2013), 6 (Hmoud).

[6] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation Owed by the Democratic Republic of the Congo to the Republic of Guinea, Judgment of 19 June 2012, 2012 ICJ Rep. 324, 394, para. 8 (Declaration of Judge Greenwood).

as a matter of course."[7] Such pronouncements have been and remain a central element in the current work of the International Law Commission, whose draft conclusions on the topic "Identification of customary international law" may now hopefully provide clear and accessible guidance as well.

There is agreement that the final outcome of the Commission's work should be a set of "conclusions" with commentaries, and that – given the inherent flexibility of the customary process – they should not be overly prescriptive. All this may sound far removed from the elaborate theories propounded in some of the writings on the subject. But that is not to say that such writings, and academic debate more widely, are unhelpful. Far from it, as the present fascinating volume illustrates. As a colleague and I have recently written with respect to customary international law, "academic disputes are bound to continue. That is not to be regretted; those engaged in the practice of law may benefit much from theoretical debate – and vice versa."[8] It is certainly to be expected that the current work of the International Law Commission will do so.

[7] Lauterpacht, *The Development of International Law by the International Court*, 392.

[8] Omri Sender and Michael Wood, "The Emergence of Customary International Law: Between Theory and Practice," in *Research Handbook on the Theory and Practice of International Lawmaking*, edited by Catherine Brölmann and Yannick Radi 133 (Cheltenham, UK and Northampton, MA: Edward Elgar, 2016), 159.