The Evergreen Examination Question

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As ChatGPT-4 and other artificial intelligence machines are all but extinguishing the essay-writing practice, it is high time that we receive the right answer to the ever-green topic of international law's essay questions: customary international law. Generations of students and scholars have labored over the objective and subjective elements of customary law, the main rule and its exceptions, the persistence of objectors, the exact characterizations of the limits of the consistency, duration, and the ambit of the generality of the state practice to reach the elusive definition. All these issues are rehearsed in sophisticated and detailed ways in the compilation discussed here.

Mystery with A 'Mount Everest' of Background

The reason why essayistically examining eminences of international law have favored customary law as a question, is exactly its inherent, even insolvable, foundational mystery. Ostensibly, only a Sherlock Holmes or a god might get 100% on a customary law essay question. Much of this mystery and sherlockian ambition oozes from the present collection and its accompanying symposia; to conquer the truth about something that eludes enquiry. It is a quest akin to a climb on Mount Everest given the background materials to be considered. In this sense, the collection, while not lacking theoretical sophistication and variety, may seem rather heavy on the positivist doctrinal conquest-style and traditionalistic in its purpose in general, with a hefty bibliography, yet missing certain critical gems.

The book is conventional in many ways: the topic, the spawning site (Europe, Groningen, The Netherlands), with an International Law Council Report, a European Research Council Grant and a European Society of International Law discussion group behind it. This setup is Eurocentric and the affiliations point towards mainstream major institutions. The book is co-edited by two males and one female, and, considering the mention that over 100 abstract proposals were received (preface xvi), it is a question mark that only seven women (29 % of authors) made it to the final cut. The project clearly comes with top-tier academic researchers and resources up to the magnificence of the mystery.

Abstraction Versus Situating Custom in International Law

Although highly pertinent to the structure of the mystery of customary international law, David Kennedy's treatise-length article, The Sources of International Law (1987), has not found its way to the bibliography. Kennedy's study analyzes the structural interdependence, the co-construction of the rhetorical strategies, and the overall contextuality of the sources, including custom, in international law. It reviews a staggering amount of canonical literature on the theory and practice of customary law. Based on Kennedy's findings, it seems that one needs to keep re-analyzing interpretations (of international legal sources) in widening circles of practical and

theoretical contexts – thus situating the mystery – rather than attempting a conquest. It is not about asking only general versus particular questions, or preferring policy or linguistics to doctrinal fine-dissection, it is a question of multiple perspectives and their fluidity. Thus, a critical scholar might suggest hopping between academic perspectives as the mystery slips to its various iterations elusive, yet perhaps manageable. There are examples in the book: Indicatively, Anna Irene Baka's chapter (chapter 4) on an open-systems approach refers to a structurally-aware analysis; Diego Mejia-Lemos (chapter 7) puts customary international law in the context of the sources doctrine as a whole.

As Kennedy remarks the sources doctrine and customary law as its main component must serve both normative autonomy and normative authority. Therefore, there emerges "a rhetorical strategy of inclusion" to solve "the problem of sources discourse *as a whole*". Kennedy explains the oscillation between and co-existence of the 'hard' and the 'soft' so that "sovereigns will be able to remain autonomous within a binding normative order". For him, rather than legal logic there is a continuously moving practice that creates "a feeling of resolution" (p. 23). He states: "This combination of differentiation and hierarchically organized recharacterization through proliferation suits doctrines about treaty and custom to rhetorical strategies which will sustain the hard and soft images of international law as a *whole*."(p. 45) (emphases added).

Conquering the Elusive Peak

Although of great interest throughout, the compilation offers a pride of place to a clash of titans in the vein of pragmatism versus disenchantment, as characterised by Kammerhofer (chapter 1, p. 10). It is a somewhat curious start for the compilation in that the opening chapters seem a reaction and a rejoinder (or vice versa) in a debate between Kammerhofer and D'Aspremont. This opening makes the reader feel like having walked into a class discussion hot on unresolved issues from the lockdown year thinking "I must have missed something quite crucial…". Whether the order choice is warranted by seniority or else, it impregnates the rest of the reading experience.

In the first chapter, Kammerhofer takes issue with D'Aspremont's concept of law as a belief system that to the former seems too easy and risky a solution to the mystery of customary international law. However, D'Aspremont's thesis is only to be laid down in the following chapter, which kind of makes the rejoinder precede the claim. Essentially, if one simplifies to an extreme, Kammerhofer's argument amounts a tour de force of doctrinal construction as a counter-move against the destructive (to an essentialist concept of law) if elegant 'suspension of law' solution by D'Aspremont. With illustrative figures and belabored concepts including such rarities as 'meta-meta law', Kammerhofer arrives at what he calls an AppPEN (Approximately Plausible Empowerment Norm, p. 23), the syllogistic exercises of which first render the abstract possibility of foundational customary law (p. 27) and manage then to ground pragmatic law interpretation. What this tool loses in elegance, it gains in the arduous labor-intensiveness of its doctrinalist logic.

In contrast, D'Aspremont opens chapter 2 with unambiguity and crystal clarity about how the birth-moment of a norm is never traced or established, yet always pre-supposed – as a feature of a particular social reality such as that of international law (p. 31). And, therefore, the pre-supposition does the necessary work as 'the foundation' of customary rule interpretation. In other words, the clash is about whether and what is 'the something' down there on the legal ontology level – at the bottom – or whether it is enough that we suppose there to be something and thus do not need to go down and excavate it. One can perhaps understand this debate to be about dealing with the foundational violence of law. In contrast to its purpose of peace through order, liberal law, nevertheless, is founded by the setup of order – a setup that is backed by power.

Even if the reader feels like a late interloper, the two chapters hold their spell. These would be the perfect answers to the exam question on customary international law or even the nature of international law. They leave the too-busy bureaucrats of the International Law Commission with their pragmatist reports in the dust. Unfortunately, the following chapters are overshadowed by the editorial choice to open with such a specific debate.

One expects the opening chapters' arguments to be contributed on through a variety of different voices but the rest of the compilation is not directly related to them. Instead, there are many classically doctrinal and positivist chapters that rehearse the International Court of Justice's Statute and the International Law Council's Report in very similar terms – some only to conclude that their chosen empirical materials or actors do not make much of the in-depth dissection of customary law interpretations, which is disappointing to say the least. It is not surprising that customary law's mystery is forgotten or put on a shelf when the busy life of professional expertise takes over and ready-to-hand solutions are needed on the double.

Although nicely packaged, professionally edited and compiled, including shiny pearls and exciting clashes of titans among its chapters, it is never pleasing to find lapses of spell-check. Even when we trust the machines, some things would need to be done with human eye and hand, such as the 'i.e.'s and 'e.g.'s to name but some recurring errors.

To conclude, I rehash Kennedy's observations:

> "At the level of doctrinal structure, custom and treaty law differentiate themselves from one another by reversing the arrangement of their internal components (…) Indeed, custom seems in many ways the rhetorical mirror image of treaty law." (pp. 70, 72).

Together, complemented with ius cogens, general principles, and secondary sources, they afford the situated interpretative potentials and limitations that we know as international law.
