***Sender, Omri* and *Wood, Michael*: Identification of Customary International Law.** Oxford: Oxford University Press 2024. ISBN 978-0-19-884822-6. xxix, 389 p. £145.-

'There is no doubt room for a whole treatise on the harm caused to the business of legal investigation by theory.'[1] Omri Sender's and Sir Michael Wood's excellent new book, *Identification of Customary International Law*, published by Oxford University Press in December 2024, is not that treatise. However, the spirit of Professor Brownlie's famous pronouncement runs through the work, which at points demonstrates some impatience with the 'theoretical speculations that sometimes accompany customary international law in the books' (p. 75).

This book, with a length of 432 pages, is a very welcome and useful addition to the extensive existing literature on customary international law. As stated in the introductory chapter, the book's aim is 'to complement the ILC's authoritative work [on identification of customary international law] by offering more information and analysis for those – practitioners and scholars alike – with the time or need to dig deeper' (p. 3). In this, the work generally succeeds. The twelve substantive chapters address the key topics within the identification of customary international law in a level of detail not found outside the International Law Commission's (ILC) own products.[2] In addition to drawing on the ILC conclusions and commentaries, the analysis in the book is derived from the reports prepared by Sir Michael, with the assistance of Mr Sender, in his role as Special Rapporteur for the topic 'Identification of customary international law'. Like those reports the book is characterised by very detailed and extensive reference to the practice of states and international tribunals, as well as both recent and classic literature. The book differs from these reports primarily in being more succinct and focused, as well as developing the analysis of some issues in greater detail, and including new discussion of topics not addressed in the Commission's work.

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1 Ian Brownlie, 'Recognition in Theory and Practice' in: Ronald St. John Macdonald and Douglas M. Johnston (eds), *The Structure and Process of International Law* (Brill 1983), 627-642 (627). For criticism see Iain Scobbie, 'Voyaging Towards Ithaca: Thinking About International Legal Theory' in: Malcolm Evans (ed.), *International Law* (6th edn, Oxford University Press 2024), 53-92 (54-58).

2 Existing book-length general studies of customary international law are now rather old: Anthony D'Amato, *The Concept of Custom in International Law* (Cornell 1971); Maurice Mendelson, 'The Formation of Customary International Law', RdC 272 (1998), 155-410 (188). Some more recent monographs analyse the identification of customary international law within a particular sub-field of international law, see, for example, Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press 1991); Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press 2016).

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Chapter two provides a concise history of customary international law as a source of international law and the ILC's work to date on 'access to evidence of customary international law', as well as a robust defence of custom's continuing importance to the international legal system (pp. 17-22). Filling a gap in the ILC's work on identification of custom, there is a brief but useful discussion of the distinction and relationship between customary international law and general principles of law (pp. 23-27). Chapter three then describes the history of the ILC's project on identification of customary international law, from its inception to the adoption of the conclusions by the Commission in August 2018, including relatively detailed accounts of the comments received and debates within the Commission and Sixth Committee at first and second reading. The most contentious issues remained the role of the practice and *opinio juris* of international organisations; the weight, if any, to be given to inaction as state practice; and the persistent objector rule. The concise summary of the process is convenient, although there is little to surprise readers who closely followed the ILC's work on the topic.

The final part of chapter three provides an assessment of the ILC's work on identification of custom (pp. 47-52). This assessment is unsurprisingly positive but provides some insightful reflections on the impact of the ILC project and its place within the broader international legal landscape. Addressing the charge of conservatism, the authors respond that:

'the aim was to be neither conservative nor progressive, but to reflect accurately the current position as regards the determination of customary international law. To the extent that the Conclusions restate widely-held positions, they are none the worse for that.' (p. 49)

The authors rightly emphasise the reception of the conclusions by states in the Sixth Committee, noting that reactions were mostly positive and '[a]s on previous occasions, no speaker questioned the basic two-element approach' (p. 44). Indeed, the conclusions have already been widely referred to, before the International Court of Justice (ICJ), International Criminal Court (ICC), and arbitral tribunals, by individual ICJ judges and domestic courts, and in scholarly writings (p. 47-48). Although it is probably overly optimistic to hope that 'The Commission's output should help to overcome some of the theoretical controversies that have bedevilled writings on customary international law' (p. 49).

Chapter four marks the beginning of the substantive heart of the book: it is the first of five chapters which address in detail the components and practicalities of the test for identification of custom: the two-element approach itself (chapter four); assessment of evidence for the two constituent elements (chapter five); practice (chapter six); generality (chapter seven); and acceptance as law (chapter eight). Chapter four begins by providing a per-

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suasive argument in support of the two-element approach to the identification of custom, relying primarily on an extensive array of state practice, and the jurisprudence of the International Court of Justice (pp. 54-63). Short but insightful subsections are devoted to two topics not addressed by the Commission. First, in relation to how customary international law changes, it is argued that 'there is in principle no difference between the emergence of a new rule of customary international law and the change of an existing rule; indeed, it does not seem useful to seek to make any such distinction', and that change in custom also requires satisfaction of the two-element approach (pp. 68-71). On the more controversial question of the 'interpretation' of customary international law, the authors are rightly sceptical, observing that 'identification of a rule of customary international law involves the determination of its scope and content, and once that determination has been made, what remains is the application of the rule to a given situation'. While state practice and *opinio juris* will need to be interpreted in the sense that their relevance and significance will need to be assessed, and this may involve interpretation of written materials, this does not amount to interpretation 'of the customary rule as such' (pp. 77-78).

Being based on the work of the ILC on this topic, the book naturally shares the strengths and shortcomings of the Commission's approach to the identification of customary international law. Chapter five opens by highlighting the tension between the stated need for 'rigour in appreciating, in each case, whether a general practice accepted as law may indeed be said to exist' and the reality that 'the application of the two-element approach involves an evaluation that is more an art than a science' (p. 80). This emphasis on the 'flexibility' of the two-element approach (pp.66-68), like the relatively abstract and high-level guidance provided in the ILC conclusions themselves, leaves the work open to criticism that it does not truly grapple with, nor provide helpful guidance for, the messy practical difficulties of determining whether the test is met in concrete cases. For example, chapter seven on 'generality' does a good job of explaining the various factors that affect how much and how consistent a practice is required to identify a customary international law rule, but arguably this highly contextual approach, with considerable work done by the word 'sufficiently' in the expression 'sufficiently widespread and representative', is of limited utility for practitioners seeking to apply the two-element test.

However, such criticism seems uncharitable: it is impossible for general guidelines to address all possible situations in which a customary rule may need to be identified. The practical guidance and examples prevent the discussion from becoming too abstract (pp. 139-144), and there is also an intellectual honesty in recognising the complexity of the task and avoiding the temptation to create neat, but overly simplified, rules of thumb. The great

contribution of the book, like the ILC conclusions, is to provide a structured and systematic way to approach the identification of custom, even if inevitably much will come down to the judgment made by the identifier in the particular case. This is in addition to the clarification of key, but under-analysed aspects of the application of the two-element test, such as the overall context of the inquiry, the nature of the rule, the circumstances in which the evidence is found, and the order of ascertainment of the two elements and whether they must be assessed separately (pp. 81-85; 89-93). Chapter seven also contains an illuminating discussion of the development of the conclusion on specially affected states and the divisions within the Commission (pp. 144-150).

Chapter eight on acceptance as law makes a valuable contribution to demystifying the concept of *opinio juris*, and will be of great assistance to those trying to apply the test in practice. There are detailed analyses of key questions such as whose acceptance as law matters (pp. 174-178), distinguishing *opinio juris* from other motives (pp. 171-173), and an excellent subsection on when failure to react can evidence *opinio juris* (pp. 187-192). There is also a brief analysis of each of the commonly used forms of evidence of acceptance as law – public statements by states, diplomatic correspondence, national court decisions, and so on (pp. 178-187). As is common in writing about custom, heavy reliance is placed on dicta of the ICJ, but this is supported by reference to a variety of domestic and other international court decisions, as well as other practice.

Having analysed in detail the component elements of the test for identification of custom, chapters nine to thirteen address some of the more vexed issues that arise in practice and scholarship: resolutions of international organisations as evidence of customary international law (chapter ten); subsidiary means for the determination of customary international law (especially relevant in light of the ILC's ongoing work on this topic) (chapter eleven); particular customary international law (chapter thirteen); and, of course, the persistent objector rule (chapter twelve). Perhaps the most interesting is chapter nine, on 'The Significance of Treaties for the Identification of Customary International Law'. The approach is appropriately cautious, noting that '[t]he relationship between the two principal sources of international law is a dynamic one, and their separate validity and applicability must be acknowledged' (p. 200). The rigorous and detailed analysis is a valuable addition to classic texts on the subject,[3] updating the familiar tripartite

[3] Richard Baxter, 'Treaties and Customs', RdC 129 (1970), 27-105; Rudolf Bernhardt, 'Custom and Treaty in the Law of the Sea', RdC 205 (1987), 247-330; Mark Villiger, *Customary International law and Treaties: a Manual on the Theory and Practice of the Interrelation of Sources* (Kluwer 1997); Yoram Dinstein, 'The Interaction Between Customary International Law and Treaties', RdC 250 (2007), 243-427 (322).

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framework of 'codifying, crystallising, and generating' with the most recent practice. In addition to the more abstract discussion of the relationship between the two sources, the chapter also includes useful practical guidance on factors to consider when determining whether a treaty rule has codified, crystallised, or generated a rule of custom: the extent of participation in the treaty; the position of non-parties; and possibly the faculty of making reservations to the treaty rule in question and the existence or not of a denunciation clause (pp. 220-229).

Returning, then, to the question of theory; the book does engage to some extent with the theoretical debates that underlie the identification of customary international law. Indeed, the discussion at the beginning of chapter eight, on 'Acceptance as Law', which skilfully summarises and analyses the theoretical debate about the nature of *opinio juris*, demonstrates the utility of understanding the 'theory' which stands behind well-accepted legal concepts, at least as context for the doctrinal debates. In chapter four, there is also a discussion of 'novel theories on the identification of customary international law, sometimes referred to as "modern approaches"' (pp. 72-76). However, the word 'theory' seems to be used, not as one might expect to refer to the various 'full-blooded' theoretical approaches to (customary) (international) law – natural law, feminism, Marxism, critical approaches, Third World Approaches to International Law (TWAIL), and so on – but to encompass any unorthodox approach or scholarly account of customary international law that departs from the two-element test. Frederick Kirgis's 'sliding scale' approach to custom,[4] and the International Law Association's 'single-element' approach,[5] while novel in their reconceptualisations of the test for custom, are hardly best described as theoretical.

Elsewhere, at times theoretical debates are dismissed in favour of a conclusion based on an analysis of the practice of states or, more dubiously, 'common-sense' (p. 104). This is certainly useful advice for a practitioner or domestic judge who encounters customary international law in the course of their work,[6] and indeed, as already noted, the purpose of the ILC's conclusions was to 'offer practical guidance' on how the existence and content of customary international law rules are to be determined. The consensus-based working methods of the Commission, and the input of the United Nations General Assembly (UNGA) Sixth Committee into its work, also inevitably mean that controversial theoretical issues are skated over or compromise

4 Frederic Kirgis, 'Custom on a Sliding Scale', AJIL 81 (1987), 146-151.

5 International Law Association, Statement of Principles Applicable to the Formation of Customary International Law, 2000, 741.

6 In this respect, the book has some similarities with the pragmatic approach taken in Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press 2013).

language must be found. However, in a scholarly work one is left hungry for deeper engagement with the conceptual and, yes, theoretical issues that lurk behind these practical puzzles. For example, in rejecting single-element approaches to the identification of custom, it is argued that '[i]n the absence of practice, customary international law would be a misnomer […] Nor can there be customary international law without acceptance as law: "[i]t is the element of conviction that lends customary law its authority; and if the conviction be missing, so pro tanto is the authority"' (p. 74).

The final quotation from Jennings seems to take the place of any analysis, or even discussion of possible accounts; of *why* it is the *opinio juris* of states that distinguishes mere usage from custom.

As a result, some highly interesting points are raised but addressed only rather superficially. On the question of the nature of the secondary rules of international law, and whether the conclusions themselves reflect or codify customary international law, it is noted that 'the Commission did not take a position on what seemed to be an essentially theoretical matter, without practical consequences' (p. 51). Fair enough; however, I suspect like many readers, I would have been very curious to read the analysis of two leading scholars of customary international law on this question, freed from the constraints that apply to a Special Rapporteur. As it is, the reader is left only with the sensible but terse statement that '[t]hese "rules of recognition" for the identification of customary international law are rules of law, and are best viewed as themselves forming part of customary international law' (p. 52). This view – that the secondary rules of law identification and change in international law are themselves rules of customary international law – likely explains the methodological approach of the book: questions that could be analysed conceptually, or using theoretical accounts of international law, are instead answered with a reference to practice or, sometimes, an ICJ judgment. However, if this is the premise that underlies the methodological approach of the book, a more detailed argument in support of the view that international law's secondary rules are themselves creatures of customary international law, and some discussion of the further, difficult questions this entails about how such customary rules are formed and identified, would have been desirable, as well as interesting.

Chapter six, entitled 'A General Practice: Whose Practice? What Practice?', elaborates on one of the more controversial issues in the ILC's work: whether and in what circumstances the practice of international organisations can contribute to the formation of customary international law. The authors take the view, based on an account of practice, that practice of international organisations 'as such' (p. 108) can be creative or expressive of customary international law, at least in their relations among themselves and with their

members, or where member states have transferred powers to the organisation. They remark that '[t]he debate seems, however, to have been largely theoretical, as it turned for the most part on whether the practice in question was regarded as that of the international organization itself or of the member States acting through the organization' (p. 110). The book thus seems to dismiss the importance of a key question on which the practical matter of whether International Organisation (IO) practice can contribute to the formation of custom turns. Yet, in choosing between alternative analyses, while it may not be necessary to have a fully worked-out theoretical account of custom, one must at least have some underlying view on what (customary) international law is, why it binds, and the reason why (state) practice and *opinio juris* can create binding law.

For example, the ILC commentary is quoted with approval: 'the more directly a practice of an international organization is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law' (p. 109). Yet it is unclear *why* the authors believe both that practice that constitutes customary international law need not be practice of a state itself, *and* that practice on behalf of or endorsed by a state nevertheless has greater weight. If greater state involvement gives more weight to a practice, is this because it evidences the consent of states to the customary rule in question? Yet if this is the case, why is it acceptable – as it seems the authors and, in the end, the ILC conclusions accept – for an IO's own practice to be creative of customary international law even where the organisation is not acting directly on behalf of members or using transferred powers, and thus the link to state consent (at least through the practice element) is absent? Similarly, in chapter eight on *opinio juris*, the authors remark that '[t]he separate legal personality of international organizations makes them capable in principle of expressing a "juridical will" of their own, including acceptance as law', and simply note that '[e]stablishing such *opinio juris* on their part, notwithstanding the differences between them and States, does not seem to raise special difficulties' (p. 196). As others have observed, the risk is that, by failing to engage explicitly with the (legal) philosophical assumptions that underlie one's analysis, they cannot be subject to critical examination.[7]

To conclude, the book succeeds in providing a clear, focused account of a highly technical area of international law, effectively synthesising an impressive volume of practice and scholarship, while adding more detailed analysis of issues not covered by, or only touched on in, the ILC's work. The authors'

7 Scobbie (n. 1), 55, citing Rosalyn Higgins and Hersch Lauterpacht.

own assessment of the ILC conclusions and commentary could be applied equally well to the book: 'While dealing with issues of considerable complexity and nuance, [it is] concise and user-friendly' (p. 49). As discussed above, this clarity may come at the expense of detailed engagement with more 'theoretical' questions, which are nonetheless discussed at least briefly and represented in the footnotes. However, overall, the authors have succeeded in producing that rare thing: an accomplished academic work that is sufficiently clear and accessible to be read by students studying the sources of international law for the first time and which will be a useful text for practitioners, but which also includes analysis of more complex debates within the subject, and detailed references to practice and literature, such as to make it a valuable research resource for scholars.

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