SELECTED PROBLEMS IN THE THEORY OF CUSTOMARY INTERNATIONAL LAW

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1. INTRODUCTION

As with everything which cannot be seen or grasped, customary law remains something of a smiling sphinx in the realm of legal theory. Over the centuries, it has tended to generate puzzling questions of understanding and of construction, some linked to the concept of custom itself, others linked to the conception of custom within the context of a specific society with its special structure. In societies where custom continues to play a paramount role, that is, in societies deprived of a centralised legislator, the predominance of custom imports into the law and law-making the many uncertainties invariably linked with it. This is particularly true of international law. The objective of this short contribution is to address some of these problems in the form of brief commentaries following a concise statement of the point or problem at issue.
2. THESES AND COMMENTARIES ON SOME PROBLEMS OF CUSTOMARY INTERNATIONAL LAW

2.1 The two-elements theory of customary law

Thesis

Custom emerges out of the conjunction of two interrelated elements, namely practice and opinio iuris. As has often been emphasised, the substance of this source is to be found in the practice of states. To this practice, or external element, there must be added a subjective element. Its function has been described as follows:

‘When inferring rules of customary law from the conduct of States, it is necessary to examine not only what States do, but also why they do it. In other words, there is a psychological element in the formation of customary law. State practice alone does not suffice; it must be shown that it is accompanied by the conviction that it reflects a legal obligation.’

There are thus two main modalities of law-creation in the international society. In the first, conventional, method, law is made in a conscious and wilful process akin to legislation, whereas in the second, customary, method, law grows through a process which weaves together acts of practice and belief. The first leads to negotiated and rationally exposed norms, held together by an expression of autono-