

The Concept of Customary International Law. Redefining The Formation Requirements of Customary International Law Based on The Rules-And-Principles-Model of Robert Alexy

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Abstract : The emergence of customary international law has always been controversial. Even with the two fundamental elements of origin, *longa consuetudo* and *opinio iuris* the process of origin is highly unclear. It is uncertain how much time must pass, how many subjects must act, how many actions must be taken and how strong the *opinio iuris* must be in order for customary international law to emerge. The most appropriate solutions are based on sliding scales. Every aspect of the emergence of customary international law is up for debate, depending on the specific circumstances. The given approach is to rationalise this process by constructing an internal line of justification for all the arguments developed in the literature and used in the external justification process. This requires defining the elements of the justification process as formal principles. Such an approach is a milestone considering the fact that formal principles are highly questioned nowadays and - if they are accepted at all - are mostly used in relation to competences. Furthermore, the application of formal principles needs to be scrutinised and extended. In the national context (eg fundamental rights), principles have so far only been able to collide. However, their optimisation character also allows for other applications, for example cooperation instead of collision. Taking these aspects into account, a rational origination scheme is to be developed that is based on Robert Alexy's weight formula. First, one has to examine the individual components of the two fundamental elements of emergence and establish whether these are all-or-nothing requirements (rules) or partially fulfillable parameters (principles) and to what extent the gradually fulfillable parameters are definitely of necessity in every case. Second, one has to look at the previous research on formal principles, which is based in particular on Matthias Klatt's theory stating that formal principles are equivalent to competences and occur only in this context. However, the outcome of the paper will not merely show that this identity theory is too narrowly conceived, but that the application of principles to date only represents a partial area of their possible applications. The context of fundamental rights review has suggested to representatives such as Robert Alexy that it is purely the nature of principles to collide with each other and that the task of the practitioner is purely to resolve this collision by means of a proportionality test. However, the application of the development process of customary international law shows that a complementary application of principles is equally possible. The highly praised optimisation requirement is merely attributable to the specific circumstances and is rather based on a general optimisation possibility. The result is twofold. On one side, it is an internal justification scheme that rationalises the development process of customary international law in the sense of an internal justification, whereby a cooperation behaviour between the sub-parameters within the development elements is to be depicted. On the other side, it is a fully developed test to identify the emergence of customary international law in practice.

Keywords : balancing, consuetudo, customary international law, formal principles, *opinio iuris*, proportionality, weight formula

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