SAVING THE FLUIDITY OF CUSTOMARY INTERNATIONAL LAW THROUGH THE ROLE OF INTERNATIONAL JUDGES IN CUSTOM-MAKING

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Abstract

Although Article 38 (1) (b) of the Statute of the International Court of Justice (ICJ) provides for customary international law as a source of international law and defines it as 'evidence of a general practice accepted as law', the clarity of the text and the entire statute have remained questionable. Attempts have been made to box international custom into state practice and *opinio juris*, yet it is argued that ascertainment of these elements is paradoxical. There is no clear idea on what constitutes customary international law, no authoritative text, and its unwritten nature renders it insecure, elusive, scattered, unstable, unsystematic as well as hegemonic. These obstacles are no excuses for international judges to fail in their adjudicative duties when questions of customary international law are before them. In response to these challenges by the international courts, this paper investigates whether international judges go beyond its primary interpretative role to custom-making. Following the examination of cases before the ICJ and ad hoc tribunals, this paper argues that through judicial creativity, international judges are contributing to the making and development of customary international law. Therefore, making international custom a continually relevant primary source of international law despite its challenges.

Key Words: Customary, International, Law, Fluidity, Court, Tribunals

I. Introduction

Custom is one of the primary sources of international law. The statute of the International Court of Justice provides that in the application of the court's decision, custom may be employed as one of its sources. Article 38(1) (b) Statute of the International Court of Justice refers to 'international custom as evidence of a general practice as law'.[1] Huge court decisions and literature abound in the interpretation and definition of customary international law.[2] For instance, 'International customary law is that law which has evolved from the practice or customs of states. It is the foundation of the modern law of nations.'[3] There are similarities and prominent elements in diverse definitions of custom[4] and these are state practice (consistence of

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[1] Article 38 of the Statute of International court of Justice.

[2] *North Sea Continental Shelf* ICJ Reports (1969) p. 3, *Military and Parliamentary Activities in and Against Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 97(para. 183,110 (para. 211); *Asylum case*, ICJ Reports (1950) pp. 226, 276-277; *Right of Passage over India Territory*, ICJ Reports (1960) pp.6, 40; *Legality of the Threat or Use of Force*, ICJ Reports (1966) pp. 226, 253-255 (paras 65-73); Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971); Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999).

[3] Martin Dixon, *Textbook on International Law* (sixth edition, Oxford University Press, 2007).

[4] Ian Brownlie (1993) *Principles of Public International Law* (sixth edition, Oxford, Oxford University Press, 1993) 6; P Malanczuk, *Akehurst's Modern Introduction to International Law* (seventh edition,

such practice;[5] generality of such practice;[6] duration of such practice) and *opinio juris et necessitates.*[7] While state practice is regarded as the objective element, *opinio juris* is regarded as the subjective (psychological) element of customary international law.

In spite of the common factors in the above definitions, custom has remained a controversial source of international law.[8] Determination of evidence of practice is far from self-evident as contested.[9] The difficulty in ascertaining the above two elements as constituting custom if deduced from article 38 (1) (b) of the ICJ is doubted as authoritative.[10] Again the insistence on state practice and *opinio juris* as the sole determinant has been viewed as hegemonic based on the argument that there is a huge concentration of Western state practice and *opinio juris* which renders such international custom Western biased.[11] Therefore rendering Africa disadvantaged in the making and application of customary international law and unattractive to the world public.[12]

In view of the above, the president of the ICJ addressed the court's approach to customary international law by stating that: '*authors are correct in drawing attention to the prevalent use of general statements of rules in the Court's modern practice, although they take the point too far by insisting on theorizing this development'*.[13] The president also highlighted that, in practice, the court does not take into consideration such inquiry in every case and that it would be sufficient to also consider the views of

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Routledge. 1997); R Shabtai, *The Hague Academy of International Law, The Perplexities of Modern International Law* (Martinus Nijhoff Publishers, 2004); J Duggard, *International Law, A South African Perspective* (Juta & Co ltd, 1994); Patrick Dumberry, 'The Last Citadel! Can a State Claim the status of persistent objector to prevent the Application of customary international law in investor-state Arbitration? [2010] (23) (2) *Leiden Journal of International Law* 381; Michael Byers, *Custom, Power and Power of Rules, International Relations and Customary International Law* (Cambridge University Press, 1999).

[5] *Lotus case* (1927) PCIJ Series A, No. 10, p. 18.

[6] *North Sea Continental Shelf case*, (1969) ICJ Reports 43.

[7] *Fisheries case* (1951) ICJ Reports 116.

[8] Robert Kolb, 'Selected Problems in the Theory of Customary International Law' [2003] (50) (2) *Netherlands International Law Review*119.

[9] Andrea Pellet, 'Article 38' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006) 750.

[10] Ibid.

Jörg Kammerhofer, 'Uncertainties in the Formal Sources of International Law: Customary International Law and some of its Problems' [2004] (15) (3) *EJIL* 523.

[11] Joycelin Chinwe Okubuiro, 'Application of Hegemony to Customary International Law: An African Perspective' [2018] (7) (2) *Global Journal of Comparative Law* 232.

[12] Isabelle R Gunning, 'Expanding the International Definition of Refugee: A Multicultural view' [1989-90] (13) *Fordham International Law Journal* 156 at 158.

[13] Michael Wood, Special Rapporteur, First report on formation and evidence of customary international law, International Law Commission Sixty-fifth session Geneva, 6 May-7 June and 8 July-9 August 2013, <http://legal.un.org/docs/?symbol=A/CN.4/663> accessed on 23 June 2016.

bodies such as the International Law Commission.

This paper explores the role of international judges in custom-making as a necessary in the development and continual relevance of custom as primary source of international law. Such 'extension of duty' has been seen as undue influence of the ICJ in the identification of custom.[14] Although caution is solicited while carrying out such judicial creativity, the ability of international judges to do so takes away 'stagnancy of the law' and contributes to the development of customary international law. Arguably, it is a step in the fulfilment of its subsidiary role for the determination of international law in Article 38 (1)(d) of the ICJ Statute.

In carrying out the task of this paper, it first explores the necessity of customary international law in the international system. Thereafter, it examines the competence of international judges in custom-making. It considers the attitude of the international judges in custom-making and the legal effect of such custom-making is examined. The final part considers if there could be a custom without a judge.

II. Is It Necessary To Make Custom?

Despite the weaknesses of customary international law as enumerated above, it is regarded as an important source of international law that binds states unless a state has established persistent objector as argued by some scholars.[15] The importance of custom may be considered indispensable as it affects different spheres of states interactions. For instance, it provides the foundation for the whole of international law and it is at stake in every fundamental question of international law.[16] Custom also play relevant roles in the development of treaties and they complement each other, although some times, there are conflicts between them.[17] Custom plays an important role in the international system as it has no legislative or compulsory judicial system.[18] Consequently, custom provides a source of international legal regulation.
On humanitarian international law, the wide application of custom over treaties has been pointed out.[19]

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[14] Loretta Chan, 'The Dominance of the International Court of Justice in the Creation of Customary International Law' [2016] (6) *Southampton Student Law Review* 44.
[15] Patrick Dumberry, (n 4).
[16] Herman Meijers 'On International Customary Law in the Netherland' in Ige F Dekker and Harry HG Post (eds), *On the Foundations and Sources of International Law* (The Hague, T.M.C.Asser Press, 2003).
[17] M Dixon, (n 3).
[18] J Duggard, n 4.
[19] J Henckaerts, 'Study on customary international humanitarian law, A Contribution to Understanding and respect for the Rule of law' *in* L Maybee and B Chakka (eds), *Armed Conflicts in Custom as a*

It is contended that treaties apply only to states that have ratified them, but customary international law applies to all parties to a conflict irrespective of whether or not they have ratified the treaties containing the same or similar rules.[20] In this regard, treaties are of a limited usage. It cannot be a source for resolution of conflicts between parties who are not parties to the said treaties, but custom can serve as a source for resolution.

Investment, trade and business in international sphere have also emphasised the significance of custom stating that:

> Custom is the residual applicable legal regime between a foreign investor and the host State in the absence of any BIT [Bilateral Investment Treaties]. Thus, numerous BITs may be, but they certainly do not cover the whole spectrum of possible bilateral treaty relationships between States. It has been argued that, BITs in fact, cover only some thirteen percent of the total bilateral relationship between states in the world. Since a BIT is only binding on parties to the treaty and not on third parties, the limited worldwide geographical scope of BITs necessarily results in the legal protection of foreign investments. Customary rules of international investment law are important as a supplement to an existing BIT.[21]

Again, any foreign investor can invoke rules of customary international law notwithstanding whether its state of origin has entered into a BIT with the country of investments to claim his or her rights.[22]

Furthermore, custom has been termed very useful in the filling of lacuna in treaties to ascertain the meaning of undefined terms in the text or to help the interpretation and implementation of its provision.[23] Custom most often serves as the last resort of international legal protection against unlawful conduct by States.[24] Based on such huge significant roles of custom in international law, arguably, its making is imperative for the progression of the international system. As such, limitations towards such achievements requires the active participation of the international judges to see to the continuous significance of international custom

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source of International Humanitarian law (New Delhi, ICRC, 2006).

[20] Ibid.

[21] Patrick Dumberry, n 4 at 379.

[22] Ibid.

[23] Ibid.

[24] Ibid; See also, *Iran-US Claims Tribunal in Amoco Int'l Fin. Corp. v. Government of the Islamic Republic of Iran,* 15 Iran-USCTR189, 14 July, 83 ILR 500(1990).

III. Does An International Judge Have The Competence To Make Custom?

It is trite that the function/competence of the court is the settlement of disputes by the interpretation of laws. The ICJ, the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for former Yugoslavia (ICTY) are examples of international court and tribunals created for settlement of disputes and maintenance of international peace and security. It has been stated that:

> it is clear that the court cannot legislate…Rather its task is to engage in its judicial function of ascertaining the existence or otherwise of legal principles and rules…The contention that the giving of an answer to the question posed would require the court to legislate is based on a supposition that the rules in the present corpus juris is devoid of relevant rules in this matter. The court could not accede to this argument; it states the existing law and does not legislate. This is even so if, in stating and applying the law, the court necessarily has to specify its scope and sometimes note its general trend.[25]

Despite the obvious function of the international judge to interpret laws, he/she is said to play important role in custom-making to resolve the peculiar challenges associated with the nature of custom which is uncertain and unwritten. Though the judge is sometimes criticised to manipulate the meaning of what custom is. The court in ascertaining what is custom has always adopted three different procedures:

1. Pronouncing or declaring the existing law;
2. Crystallising a rule of customary international law by articulating an evolving rule and transforming it into an existing law; and
3. Generating or constituting a rule whereby the court's pronouncement becomes states practice that forms into a rule of customary international law.[26]

Looking at the above proposition, the ability of an international judge to employ any of these propositions would definitely have to pull the judge out of the positivist theory of conservatism of seeing law as what it is. It takes away the burden and possible negative effects of restriction on the judge as just a *mere interpreter of existing rules, even when there is none to guide.* However, for the judge to perform his/her role effectively bold step must be taken or better still a cloak of judicial

[25]Alan Boyle and Christine Chinkin, *The Making of International Law; Foundations of Public International Law* (New York, Oxford University Press, 2007) 268; Ige F Dekker and Wouter G Werner, 'The Completeness of International law and Hamlet's Dilemma: Non liquet, the Nuclear Weapons case and legal theory' in Ige F Dekker and Harry HG Post (eds), *On the Foundations and Sources of International law* (Netherlands: T.M.C. Asser Press, 2003)12.

[26]Alan Boyle and Christine Chinkin, (n 25) 268.

activism must be worn to make some pronouncements which could later develop into custom. Yet, it takes a bold judge to certify that the former pronouncement had given birth to custom which could be invoked in subsequent decisions of international courts and tribunals.

Following this trend of argument, judges in international criminal courts and tribunals could be said to play some significant roles in custom-making and these are examined below.

Article 21 of the Rome statute provides for the sources of law applicable to the International Criminal Court (ICC), but did not mention customary international law. However, in section 1 (b) of this article, there has been inference of custom in the following words: 'the principles and rules of international law, including the international law of armed conflict,' Although the rulings of the ICC attach little or no importance to customary international law,[27] numerous references to customary law have been made in ICTY, ICTR and SCLR (Special Court for Sierra Leone) by the judges.[28]

In the *Tadic Interlocutory Appeal Decision*[29] of ICTY which has been described as ground breaking decision approached custom-making from a different angle. The court stressed that not every piece of evidence reflects state practice and *opinio juris*. That military practice, for instance, poses more of operational tactics than the considerations which supported the establishment of legal rule. Arguably, this contributed to emergence of a new rule. Looking at this decision, it showed that there were fundamental rules that were applicable to international and internal armed conflicts. This position was also supported by some findings of the International Committee of Red Cross.[30] The Chamber boldly declared the customary nature of individual criminal responsibility flowing from a violation of these rights through the following words:

We have no doubt that they entail individual criminal responsibility,

[27]Ibid

[28]W Schabas, 'customary law or "judge-made" law: Judicial creativity at the UN Criminal Tribunals' in J Doria, H Gasser and MC Bassiouni (eds.), *The Legal Regime of the International criminal court, Essays in Honour of Professor Igor Blishchenkor* (ed.) (Martinus Nijhoff, 2009).

[29]*Tadic, Decision* on Defence motion for interlocutory Appeal, 02. 10. 1995, B. Schulutter, Constitutionalisation at its best or at its worst? Lessons from the development of customary International Criminal Law < http://esil-sedi.eu/wp-content/uploads/2018/04/Schleutter.pdf> accessed 9 September 2019

[30]Ibid. See also Titus K. Githiora 'Implications for General Military Operations in custom as a source of international humanitarian law' in L Maybee and CB Benarji (eds.), *Custom as a Source of International Humanitarian Law* (ICRC, 2005) 117.

> regardless of whether they are committed in internal or international conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognised as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, or the interest of the international community in their prohibition.[31]

Again, the international judge played significant role in the ascertainment of custom in the case of *Prosecutor v. Tadic*.[32] Here, the court gave an innovative and explicit meaning to terms that are not defined by a given statute. In this case, the issue of what constitutes 'serious violation' in terms of customary international law was raised. Neither did the statute provide for explicit authority as to the meaning of the term nor did the tribunals provide for explicit authority for general application of customary international law. However, an exception in article 3 of the statute of ICTY to the 'laws or customs of war' was employed. The interpretation incorporated within the tribunal's jurisdiction viewed all crimes recognised as 'serious violations of international humanitarian law' to the extent that they are part of customary international law. Though corresponding article 3 of the Geneva Conventions of 12 August 1949 for the protection of war victims and its Additional Protocol 11 stipulates the issue of 2 'serious violation' without any guidance as to what constitutes serious violation. Despite the silence, tribunals have acted as if there is a provision inviting them to apply, as residual law, the recognised sources of public international law, especially customary international law.[33]

International judges have further expanded what constitutes crime, hence showing their competence necessity to make custom. In this regard, the statutes of the international tribunals were quite limiting as to the definition of certain crimes such as what constitutes rape, genocide and other crimes against humanity. In the definition against humanity, though there was a division on whether a state or organisational plan or policy was an element of crimes against humanity, the ICTY Appeals chamber in *Kunarac's case* held that the policy component was not an element of crimes against humanity at all 'at the time of the alleged acts'.[34] There was the controversy on the requirements of customary international law and the text of the Rome Statute

[31]B Schleutter, (n 29).
[32] Tadic, (n 29).
[33]W Schabas, (n 28).
[34] *Kunarac et al.* (IT-96-23 & 23/1)

which the ad hoc tribunals have sometimes regarded as an authoritative codification of customary international law.[35] However, in the same *Kunrac's case*, it has been noted that the traditional concept of slavery was expanded as defined in the slavery convention and referred to as 'chattel slavery; has developed into various contemporary forms of slavery which are based on the exercise of any or all of the powers attaching to the right of ownership'[36].

In *Prosecutor v. Naletilic*,[37] the international judge exhibited the ability of expanding definitions through the determination of intents. The court stated that persecution refers to 'a discriminatory act or omission' that 'denies or infringes upon a fundamental right laid down in international customary law or treaty and that it penetrated with intent to discriminate on racial, religious or political grounds'.[38]

The *judgement of Kupreskic* displays more roles of the international judge in custom-making as it buttresses the 'elementary considerations of humanity' contained in the Martens clause for the interpretation of rules of international humanitarian law. The tribunal examined the customary nature of article 51(2) and 52 (6) of the Additional Protocol 1 to the Geneva Convention (API). Although some states such as India and United States have ratified the Protocol, the Chamber held that the demands of humanity or dictates of public conscience could foster the emergence of a new rule of customary international law.[39] The tribunal went further to hold that this constituted a 'new approach to customary international law which resulted from a general transformation of humanitarian law, that is, from the humanisation of armed conflict', a trend which had been confirmed by the International Law Commission (ILC) work on state responsibility.[40]

In the face of the limitation of state practice which is a traditional element of custom as held by the ICJ, the tribunal in the *Hadzihasanovic Interlocutory Appeal Decision*,[41] boldly examined the applicability of command responsibility in international and internal armed conflicts. The tribunal made a deduction from customary application to the internal armed conflicts from the principle of responsible command in article 3 of the Geneva Conventions and in article 3 of its statute without

[35]W Schabas, (n 28).
[36] Ibid at 78.
[37] *Prosecutor v. Naletilic et al* (case no. IT-98-34-T) Judgement, 31 march 2003.
[38] Ibid. See also, W Schabas, (n 28) 99.
[39]B Schleutter, 29.
[40] Ibid.
[41] Ibid.

reference to article 38(1) (b) ICJ statute.[42] All the above functions exhibit the contributions of the international judge in custom-making.

IV. Attitude of International Judges in Custom-Making.

It is a general knowledge that the evidence of customary law is scattered, elusive and unsystematic.[43] This uncertain nature of custom has led to different theoretical postulations,[44] which are also with deficiencies. International judges in the face of all these odds is expected to perform his/her judicial functions. Following these, some questions have arisen to determine the attitude of international judges in the role of custom-making. These are:

1. How did the judges act in performing this role?
2. Did they respect the already made laws?
3. Did they go beyond the plain interpretation?
4. Did they exhibit judicial activism?
5. Did they follow a consistent procedure in their role of custom-making?

From the above cases discussed under the section of the competence of judges to make custom in the international tribunals, the mere fact that the judges did not shy away from their judicial responsibilities proved a point of enthusiasm and courage to dispense justice and fill some gaps where and when necessary with the aid of custom, unlike in the *Nuclear Weapons Advisory opinion*[45] where the ICJ eschewed any law-making function. In the absence of any relevant treaty or rule of customary international law, the ICJ declined to conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in the extreme circumstance of self-defence in which the survival of a state would be at stake. The court's failure to reach a definite conclusion was greatly regretted by Judge Higgins in her dissenting opinion.[46]

The judges in international criminal tribunals respected already made laws. This is proven from the fact that they tried to recognise custom as a source of law to base their decisions. However, where the statute did not expressly provide for custom,

[42] Ibid.
[43] R Shabtai, (n 4).
[44]Michael Byers, (n 4); A Carty, *The Decay of International Law? A Reappraisal of the limits of legal imagination in international affairs* (Manchester, Manchester University Press, 1986).
[45] *Legality of the Use of by a State of nuclear weapons in armed conflict, Advisory Opinion*, (1996) ICJ Reports 66.
[46] The expression of Judge Higgins, *Legality of the Threat or use of Nuclear Weapons* (1996) ICJ Reports (Adv. Op) diss op Judge Higgins; Alan Boyle and Christine Chinkin, (n 25) at 289.

there were incidents the courts went on voyage of discoveries as shown in the United Nations international criminal tribunals such as ICTY, ICTR and SCSL. There were no explicit provisions in these statutes for the application of customary international law. Though there was the exception of reference in article 3 of ICTY to the 'laws or customs of war', these tribunals applied customary international law[47] without fear or favour in the cases stated earlier. However, could these be viewed that the judges went beyond their jurisdiction? Of course not, as the implied or inherent powers of the court gave them the authorisation to do so.[48]

Whether the judges went beyond plain interpretation of the statute is another important attitude to consider. It was discovered that when the judges were faced with limited definitions, they went beyond the plain meaning of a given provision. In fact, the court expanded the meaning of the provisions to arrive at their decisions. These might be termed a revolution against the traditional conservatism to judicial creativity and activism. For instance, on the question of what constitutes 'serious violations,[49] there was an expansion as illustrated above. Again, showed dissatisfaction on the lack of provisions and limitations on what constitutes the crime of rape and genocide. Furthermore, the court went ahead in the *Kunrac case* earlier mentioned to ignore the limitation before it and gave a definition of slavery by interpreting that slavery has developed into various contemporary forms of slavery which are based on the exercise of any or all of the powers attaching to the right of ownership.[50]

The *Tadic's case* received a loud ovation from legal minds for the tribunal's judicial activism and some writers called it a ground breaking decision.[51] The tribunal scrutinised and affirmed that article 3 of its statute penalised violations common to article 3 to the Geneva Conventions to internal as well as to international conflicts. The court held that this resulted from the development of customary international law in this field. The court further employed that there existed principles and rules of humanitarian law reflecting 'elementary considerations of humanity requiring minimum conduct, and that no one can doubt the gravity of the acts at issue or the interest of the international community in their prohibition'.[52]

On the question of procedural attitude of the judges in the determination of

[47] W Schabas, (n 28).
[48] Jan Klabbers, *An Introduction to International Law* (second edition, Cambridge University Press, 2009).
[49]W Schabas, (n 28).
[50] *Kunrac, Trial chamber judgement*, 22.06.2002, case No. IT-96-23-T
[51] B Schleutter, (n 29).
[52]Ibid.

custom, it could be said that there were some levels of flexibility and inconsistency, though in some cases the court tried to adopt a consistent approach. The court invoked 'elementary considerations of humanity' to evidence the customary character of certain norms of international criminal law which were adopted in several subsequent judgements of the court. For example, *the Celebici Appeals chamber judgement* as well as the recent *Halilovic Trial chamber decision* re-emphasised these findings.[53]

The international criminal tribunal manifested a sign of inconsistence in *Hadzihasanovic's case*. Here, the court examined and deduced the principle of responsible command reflected in common article 3 of the Geneva conventions and in article 3 of its statute without reference to traditional approach of custom as stated in article 38(1) (b) ICJ Statute viewed as evidence of state practice and opinio juris. Yet in answering the question of internal conflicts, it applied traditional elements of article 38(1) (b) ICJ Statute.[54]

Though it looks as if the certainty or the presumption of what the court will make out of a matter before it cannot be one hundred per cent (100%) predicted, the attitude of the international criminal judges in filling a lacuna, expansion of definitions, judicial creativity and judicial activism portrays the intangible and uncertain nature of custom that the court tries to preserve or create. This judicial behaviour in giving decision might be criticized to bring in some manipulations by some judges. However, it gives room for the development of custom and other aspects of international law as well as save the statute from absurdity, limitations, vagueness, and ambiguities that plain meaning might give should a question of law arise in such statute. However, the caution and moderations are prescribed while making these decisions.[55]

V. The Legal Effects of Judge-Made Customs

It has been stated that the 'Making of orders and delivering of opinions in legal matters is the proper function and judicial responsibility of the court and when the court properly discharges its obligations in this regard, the court's determination will naturally have its repercussions in many spheres including the political…Again, the process by which the court achieves this resolution makes it clear that judicial

[53]Ibid.
[54]Ibid
[55] R Shabtai, (n 4).

decision-making is a deliberative process giving rise to collegiate responsibility for the outcome".[56] Based on the foregoing, the legal effects of the roles international judges play in custom-making create responsibilities as well as repercussions and so on. The legal effects are most times advantageous as discussed below, though; there could be possible negative effects.

The identification and ascertainment of what actually constitutes custom by the international judge especially in customary international human rights is binding. This is because customary international human rights are *erga omnes* in that they are applicable against the entire would.[57] It is also the responsibility of the court to actually make the pronouncements/interpretations on what constitutes customary international law. Even if there are some statutes to this effect, the court still has to interpret and these pronouncements or interpretations are binding especially as it concerns customary international human rights.

Though, the doctrine of precedence is not recognised in international law, the general principle is that a decision only binds the parties to a dispute.[58] However, the effect of such decisions sometimes assumes the role of authoritative interpretation and substantive international law. In fact, as observed by Shabtai Rosenne, 'there is a general desire for consistency and stability in the court's case law when the court is dealing with the legal issues which have been before it in previous cases'.[59] Therefore, previous judgments can aid the later case in getting to a decision.

Custom-making or creation by the international judges arguably leads to the fulfilment or actualisation of the intention and provisions of statutes. Firstly, as shown above, where there is a limitation as to the meaning of some provisions of the statute, the court has tried to employ some extra device to expand such meaning to give their ruling, thereby saving the statute from non-intended limitations. Secondly, it satisfies the provision that judicial decisions form part of the sources of law in the international law. For instance, article 38(1) (d) of the ICJ provides that judicial decisions form part of the sources of law. If this was the case, then, it means that there is anticipation for judicial decisions which could arise in the form of law-making. When the judge makes a decision, example, custom-making, then it can be deduced that the

[56]Alan Boyle and Christine Chinkin, (n 25) 268-269

[57] Tzevelekos P Vassilis, 'In Search of Alternative Resolutions: Can the state of origin be held International Responsible for Investors' Human Rights Abuses which are not Attributable to it?" [2010] (35) *Brooklyn JILaw,* 155

[58] Statute of the ICJ

[59]Alan Boyle and Christine Chinkin, (n 25) 298

anticipation of the statute or the intention of the draftsman has been fulfilled as such decision form part of sources of law.

Custom-making could also have the legal effect of gap filling especially where the statutes/treaties did not make express provisions on some legal issues. Though, in filling this gap, some writers have argued that sometimes, the judge makes a change and the authority of this change has been sometimes questioned. For, it has been put forward "…that state practice which contributes to the development, maintenance and change of customary rules is usually engaged in only after consideration of the customary international law.[60] However, the problem with this view is that who or what institution have the power to consider the effect or the process of customary international law before there is a change. Also, from whose eyes are the effects seen from? This could suggest a question of what is right and wrong which could be controversial in determination.

Another very important legal effect of custom made by international judges is that it could serve as a binding source of municipal law.[61] However, this has to be incorporated first into national legislations. It has been argued that irrespective of the existence of a contrary rule to national law, the relevance of the judgments of international courts has always propelled its application in Netherlands, for instance.[62] In *R. v. Hape*,[63] it was considered by the Canadian Supreme Court that customary international law may be incorporated in her domestic law where there is no conflict.[64] National courts may also employ the methodology of the international courts when determining the existence and content of a rule of customary international law.[65]

VI. Can There Be A Custom Without The Judge?

It is difficult to specifically say yes or no to this question. The question on what constitutes custom is a very difficult one looking at the unwritten and uncertain nature of custom. There is also a contention that states most times do a different thing and say a different thing which makes it difficult sometime to ascertain what is a state

[60] Michael Byers, (n 4) 139.
[61] MJ Cedric Ryngaert and Duco W. Hora Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' [2018] (65) (1) *Netherlands International Law Review*, 1.
[62] Herman Meijers, (n 16) 111.
[63] (2007) SCC 26
[64] J Currie, 'Hape Tangles Rules Governing the Domestic Reception of International Law' 12 October 2009 < http://www.thecourt.ca/hape-tangles-rules/> accessed on 9 September 2019.
[65] Alan Boyle and Christine Chinkin (n 25).

practice. Diverse international lawyers and the ICJ have acknowledged state practice but what constitutes state practice and many more questions can only be determined by the court especially in contentious matters. The court in some of its decisions has also held that not all repetition can amount to custom. Therefore, what is custom? Can there be a custom without the judge? Well, it could be argued that where there is a conflict, when other means of peaceful resolutions such as negotiation, mediation and so on have failed, it is only the judge that can determine its existence or creation. Though, a state that is pleading custom may have to prove its existence.

VII. Conclusion

The major goal of the international community is peaceful co-existence in order to carry out their economic, social, political, and religious activities.[66] However, in the course of these activities, some legal questions sometimes arise and the need for resolutions become eminent. The role of the international judge in custom-making should be encouraged by whatever form for the clarity of what the law is. This helps in the development of the law. In this regard, the courts may refuse to make its interpretation of decision on just textually plain meaning where this could lead to absurdities, ambiguities and so on.

It is observed that there were some inconsistence and deviation from the customs which were identified or made by the judges. Though it is trite law that in the international community, the decisions only bind the said parties but it would be more beneficial and less controversial (not forgetting the unwritten and uncertain nature of custom) if same methodologies are followed in the determination of custom. This will help safe the time of the court. It is also important that judges in their decision expose why and how they arrive at every decision. Though these are generally done, but in some occasions, these features were lacking.[67]

There is the temptation to conclude that the International legal environment is likely to be unthinkable without custom. The modern international society has continued to develop and expand in the areas such as industries, science, technology, international relations and other institutions[68]. When all the statutes, norms and other written laws have been exhausted in the face of a conflict, history of court decisions

[66]Ige F Dekkar and Wouter G. Werner, (n 25) 12.
[67] B Schleutter, (n 29).
[68] O Schachter, *International Law in Theory and Practice* (volume 13, Martinus Nijhoff Publishers, 1991).

have shown that custom comes in to rescue the situation by filling the gap. The ability of the international judge to make customs to meet the requirement or needs of the changing international community becomes compelling.

In conclusion, despite the imprecise nature of custom, international judges have always resort to it as a basic source of international law. The international courts have been portrayed to be a significant vehicle for the integration of international law into international affairs. It is observed that the international judge while making custom have some things in mind, and this is to preserve peace, humanity and adhere to public policies. These are important roles for the safety and peace of the international society.

Finally, there is no doubt that though the primary function of the judge is the interpretation of law. However, this paper has exhibited the competence and the role of the international judge in custom-making. The judges in the face of limitations expanded the meaning of terms given to them by the statutes. The judges went beyond plain meaning of words to avoid absurdity, vagueness, ambiguity and hardships the definitions of some words might to their decisions. This boldness is applauded and the acts of these judges are for the benefit of the international society and the development of law.