ESIL Reflections
Editorial Board: Federico Casolari, Patrycja Grzebyk (editor-in-chief), Ellen Hey, Guy Sinclair, and Ramses Wessel

29 September 2022 Volume 11, Issue 3

‘Customary Law Interpretation as a Tool’ Series

Custom as Rewritten Law
The Text and Paratext of Restatement Reports

Wouter G. Werner[1]
Vrije Universiteit Amsterdam, University of Curaçao


Photo by Gregoire Jeanneau (cc)

Introduction: The Transformation of Customary Law

Customary international law is often described as a form of ‘unwritten law.’ While written treaties have clear textual markers, customary law is supposed to evolve out of the practices and beliefs of the international legal community. What is more, written treaty law is able to present its own date and place of birth. The Vienna Convention on the Law of Treaties, for example, informs the reader that it

[1] Wouter Werner is professor of international law at Vrije Universiteit Amsterdam as well as at the University of Curaçao. His most recent publication is *Repetition and International Law* (CUP 2022). This contribution is based on a discussion during the workshop *The Role of Interpretation in the Practice of Customary International Law*, organized by the TRICI-Law project. This project has received funding from the European Research Council (ERC) under the European Union’s Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

is ‘Done at Vienna on 23 May 1969’ and that it ‘Entered into force on 27 January 1980.’ In other words, written treaty law actually ‘begins’ at some point in time: it is possible to identify when treaty provisions still lacked and when they actually obtained validity under international law.[2] Written treaty law thus creates a break in time, and it does so intentionally. It is the product of a creative act of will.

Customary law, by contrast, is unable to articulate its own beginning. According to the now predominant understanding, it is grounded in a practice, accompanied by an *opinio iuris*: the expressed belief that a rule of law exists. It is therefore impossible to identify the origin of a first rule of customary law, as this requires the identification of a belief that the rule was already in existence.[3] If this belief is correct, it cannot identify the origin of the rule itself, as the belief holds that the rule was already valid before. If the belief is incorrect, the rule simply does not exist. Rules of customary law, therefore, exist by virtue of a seemingly never-ending chain of restatements: expressed beliefs that the rule was valid all along. Some restatements of customary law, however, do more than just express the belief in the existence of a rule once more. Some seek to transform the nature of customary law at a deeper level, i.e., from a set of spontaneous practices into a written and systematized product. They change, in other words, the form and materiality of customary law.

This, I argue, happens when legal expert committees restate rules of customary law in ‘studies’, ‘manuals’, ‘articles, ‘principles’, ‘guides’ or ‘conclusions.’ Such reports should not be discussed only in terms of their propositional content. The question whether individual restatements ‘actually’ reflect rules of customary law may be highly relevant, of course. However, there is more to restatement reports. Restatement reports bring about a fundamental transformation in the way customary law appears to states, academics, or judicial bodies. They make customary law appear in a different form, and thereby open up new possibilities to read, interpret, and develop it. The traditional conception of customary law as grounded in state practice and *opinio iuris* is unable to do justice to this transformation. It treats restatements mainly as a collection of propositions that do or do not reflect customary law ‘as it is.’ However, restatement reports necessarily go beyond a neutral reproduction of pre-existing rules. They ‘re-present’ them: they present them again in a new form, text and paratext.

[2] This is not unlike the function of beginnings ascribed to novels by Said: ‘when we point to the beginning of a novel, for example, we mean that from *that* beginning in principle follows *this* novel.*’* Edward W. Said, *Beginnings: Intention and Method* (Columbia University Press 2012) 5.

[3] Watson has summarized the paradox as follows: for a new customary rule to develop it ‘should arise first through custom, but at the time of the first behavior the law was, of course, not in existence. But the first relevant behavior should be accompanied by the *opinio necessitatis*. Consequently the first behavior rested on an error and should not be counted for the creation of the customary law. But this also applies to the second act of behavior, which now becomes the first, and so on through all subsequent acts.’ Alan Watson, *The Evolution of Western Private Law* (Expanded edn, The Johns Hopkins University Press 2001) 94-5.

Spontaneously grown rules are presented again as if they are a legal code, with internal coherence and clear textual markers.

Of course, restatement reports in and of themselves do not make law. They need to be confirmed and reconfirmed in order to make a difference. However, they are a crucial part of the political and social process where customary law is presented anew, re-imagined and recreated. Below, I will discuss (in brief) this often-neglected transformation of customary law. First, I will zoom in on the dialectical nature of restatements of customary law. Such restatements, I argue, have to present rules of customary law as insufficiently clear and present—and yet as pre-existent. Secondly, I will take a—sometimes quite literal—*look* at the texts that claim to restate customary law. How do they present rules of customary law? How do they make rules of customary law present in the world of law?

Customary Law and the Learned Jurist

The transformation of customary law by legal experts is not a new phenomenon.[4] Frederick von Savigny already assigned a similar task to the 'learned jurists' of his time. While he held that law grows out of the conscience of a legal community, he also believed national legal orders could develop such a level of complexity that their meaning escapes the average person. It is the vocation of the increasingly professionalized jurist to step in, to rearticulate and develop rules of a community in more precise and systematized form: 'With the progress of civilization, national tendencies become more and more distinct, and what would otherwise remained common, becomes appropriated to particular classes; the jurists now become more and more a distinct class of the kind; law perfects its language, takes a scientific direction, and, as formerly existed in the consciousness of the community, it now devolves upon the jurists, who thus, in this department, represent the community'.[5]

Probably not many international lawyers today will subscribe to von Savigny's idea of law as emanating from the conscience of the legal community. Not many will believe that they represent this conscience either. Yet, von Savigny's account of learned jurists transforming communal rules foreshadowed a trend in contemporary international law: the rise of legal expert bodies tasked with the codification and restatement of (customary) international law. By now, several such bodies exist, varying from broad, permanent and institutionally embedded commissions such as the International

[4] See also the analysis by Emily Kadens, who points at the role of formalist lawyers in the 12th century in the reconstruction of customary law. Kadens argues that Medieval lawyers started to treat customary law as a formal source, thereby transforming it from 'a relatively flexible and malleable set of social norms' into a system of formal rules, developed by a specific class: lawyers. Emily Kadens, 'Customs Past' in Curtis Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 15.

[5] Friedrich Charles von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence,* (Abraham Hayward tr, The Lawbook Exchange Ltd 1831) 28.

Law Commission (ILC) to *ad hoc* and theme-specific groups such as the Group of Experts who drafted the Tallinn Manuals on cyber-operations.[6] The expert bodies vary greatly in composition, mandate, and institutional position. Their products also come under a variety of names, such as 'Conclusions', 'Articles', 'Manuals' or 'Studies'. However, they also share an important common element: they all claim to restate rules of customary international law. Sure, they may do more than that. They may also restate rules emanating from other sources of international law, and they may also admit that part of their work is about 'progressively developing' international law.[7] However, at least a significant part of their ambition is to restate rules of customary law as they 'actually exist'.[8]

However, when expert bodies claim to restate customary law 'as it is', they almost promise to square a circle. After all, the reason to invest time, money, and effort in a restatement report is the need for more clarity and coherence. Experts are called in, precisely because there is a lack of clarity about the existence and applicability of existing rules. If it were otherwise, if (customary) law was sufficiently clear, what would be the point of restating it? This is perhaps most obvious in the field of cyberwarfare, the topic of the first *Tallinn Manual*. The Manual was written because there was no specific treaty on cyber operations, states were reluctant to express their *opinio iuris*, and state practice was scarce (and often concealed). However, if specific and clear law is absent, what is there to restate? The Tallinn Manual, therefore, should not be considered as an echo chamber of already existing rules of international law. It reworks the law, reimagines it in the form of a systematized written product applicable to current and future behavior. The same applies to other restatement reports: they do not 'mirror' existing rules of customary law. They remodel past practices and beliefs in the image of legal

[6] For an overview of legal expert bodies tasked to restate international law, see Anton Orlinov Petrov, *Experts Laws of War: Restating and Making Law in Expert Processes* (Edward Elgar 2020), 31-81.

[7] As may be recalled, the Statute of the ILC explicitly refers to the progressive development of international law as one of its core tasks. Yet, what this means in practice is not always clear. The Articles on State Responsibility offer a good example of a text where both codification and progressive development come together. In the Introduction, the ILC states: These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts." Draft Articles on Responsibility of States for Wrongful Acts, (A/56/10) 31. Another example is the Tallinn Manual, which contains many rules that restate existing international law, sometimes at a very general level or close to a tautology (e.g., rule 25: 'A countermeasure, whether cyber or not, that violates a legal obligation owed to a third State or other party is prohibited'). Yet the Manual also contains rules and commentaries that go beyond existing law. An example of the latter can be found in the commentary to rule 69, where the Manual suggests a number of factors that 'influence States making use of force assessments.' While the Manual itself downplays the legal significance of these factors, it does mention them nevertheless as either factually or practically relevant for states who need to apply rule 69. Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, Cambridge University Press 2017.

[8] The term 'actually exist' is taken from the ILC *Draft Conclusions on Identification of Customary International Law, with Commentaries*. ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 11, 82.

rationality; they present them anew, this time in the form of a systematized text. In this way, they do more than interpret existing rules in a new context. At a more fundamental level, they make customary law appear in a different way altogether: not as a flexible, bottom-up grown body of law but as a systematized code, laid down in a material, textual product.

The Paratext of Customary Law

Restatement reports have received broad attention in international legal circles. Codification reports by the ILC, for example, are discussed within and among states, receive praise and critique from scholars, and are taken up by domestic, regional, and international courts.[9] The Tallinn Manual has been discussed at Ministries of Defense and Foreign Affairs and was extensively scrutinized in blog posts and scholarly publications. The ICRC Study on Customary Law has turned into a common reference point for many who engage in the identification and application of rules in humanitarian law. Most debates regarding restatement reports focus on the question whether the experts managed to reflect existing law correctly. In this context, questions are raised regarding the methods used by the experts, the evidence they rely on, and the propositional content of a particular restatement.

This focus is understandable, because the acceptance or rejection of a restatement may have significant practical consequences. However, there is more to restatements than their validity and correctness. What is generally overlooked is the *way* in which the restatements are presented to the reader. In literary studies, this aspect is known as the 'paratext' of a written product. The concept of paratext was coined by Genette, who introduced it as follows: 'text rarely appears in its naked state, without the reinforcement and accompaniment of a certain number of productions, themselves verbal or not, like an author's name, a title, a preface or illustrations. One does not always know if one should consider that they belong to the text or not, but in any case they surround it and prolong it, precisely to *present* it, in the usual sense of the verb, but also in its strongest meaning: to *make it present*, to assure its presence in the world, its "reception"'.[10]

[9] See, for example, the reference to Article 8 of the ILC Articles on State Responsibility in the Dutch Srebrenica cases (Hoge Raad, Stichting Mothers of Srebrenica tegen de Staat der Nederlanden, Vonnis van 16 juli 2014, ECLI:NL:GHDHA:2017:1761, para. 3.2) or by the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*) (Judgment) [2007] ICJ Rep 43, para. 398.

[10] Gérard Genette, 'Introduction to Paratext' (1991) 22 New Literary History 261. See also the example used by Genette to underscore the importance of paratext: 'To indicate what is at stake, we can ask one simple question as an example: limited to the text alone and without a guiding set of directions, how would we read Joyce's Ulysses if it were not entitled Ulysses?' (2)

The concept of paratext helps to take a fresh look at the way in which expert reports represent customary international law. As I said before, most debates focus on the question whether the propositional content of restatements actually reflects ('represents') state practices accepted as law. The focus on paratext, however, points to another way in which customary law is represented. The practices accepted as law are '*presented again*' to the reader, in a form that is radically different from the way in which they emerged in the legal community. Take, for example, the ICRC Study on Customary Law. By now, the restatements contained therein are presented to the reader in two different forms: a database and a book. Let me focus on the latter. What emerged out of practices in armed conflict is now presented again in a specific material form: a book. The book is filled with paratext: it has a cover, a title, a year of publication, authors, and the name of a renowned publisher in the field of international law attached to it.

The book starts with – or is it preceded by? – a number of prefatory texts, written by three key figures in the field. Prefaces, as Genette has argued, are important paratextual elements as they typically promote the text and instruct the reader at the same time. One of their classical functions is 'to ensure that the text is read properly'.[11] This involves two elements: that the text is read (promotion) and that it is read properly (instruction). In the ICRC Study, both elements recur in the three prefaces. The prefaces remind the reader of the progress in conventional international humanitarian law, yet they also warn that the rise in treaty law does not suffice. Rules of customary law remain crucial: not all states are party to all conventions, states may have added reservations, treaty provisions may need interpretation, and some areas are still not covered by treaty law. The reader is also instructed to take the Study not as an end but as a starting point: 'It reveals what has been accomplished but also what remains unclear and what remains to be done'.[12] In addition, the prefaces seek to convince the reader that the text is valid and reliable. The foreword by Kellenberger, for example, sets out the working methods and informs the reader that: 'The ICRC believes that the study does indeed present an accurate assessment of the current state of customary international humanitarian law'.[13] Interestingly, the third preface (by Sandoz) concludes by recalling the image of restatements as a 'reflection of what is out there': 'The study is a still photograph of reality, taken with great concern for absolute honesty'.[14] Indeed, there is no reason to doubt the skills, honesty, and integrity of the drafters of the customary law study. It is also understandable that the preface tries to convince the reader that the restatements

[11] Genette (1991), 197.
[12] Yves Sandoz, 'Foreword' in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I* (International Committee of the Red Cross and Cambridge University Press 2005) xvii.
[13] Jakob Kellenberger, 'Foreword' in ibid xi.
[14] Sandoz (n 12) xvii.

reflect the law 'as it is.' However, the image of the still photograph is also paradoxical. After all, to take a picture is to frame and focus. To include a picture in an album is to present it in a new context, to have it surrounded by other pictures and by paratextual elements. In similar fashion, to present restatements of state practices accepted as law in the form of a book is to add new layers of meaning. To mention just one example: the 'reality' of which the ICRC study supposedly takes a still photo does not come with prefaces and reassurances by ICRC presidents or ICJ judges. This reality is not mirrored or reflected but presented anew; it is made present again.

Perhaps the most radical transformation of customary law comes from its representation in the form of printed 'rules.' State practices accepted as law are turned into rules, which can be identified in terms of numbers, just like articles in codes or treaties. In this way, an attempt is made to solidify custom in the form of text. From now on, clear textual markers indicate where rules of customary law can be found and how they should be read. The rules provoke an image of clarity and brevity, which is reinforced by the fact that they are printed in bold. The ICRC Study is not unique in this respect, as all restatement reports use some form of typographical technique to (re)present their 'rules', 'articles', or 'conclusions' as separate textual units to the reader.[15]

At face value, the 'rules' do not read like restatements at all. They are formulated as if they are normative propositions in their own right. Rule 1 of the ICRC Study, for example, tells parties to an armed conflict that they *must* distinguish between civilians and combatants. However, unlike provisions in written treaties, the rules are not presented as the product of acts of will. Treaties inform the reader what the parties have *agreed* and are often preceded by a preamble setting out why it was necessary or desirable to create something new. Restatement reports, by contrast, are preceded by prefaces and introductions, which spell out why it was deemed necessary to restate existing law. Rather than setting out what parties agreed to, prefaces and introductions set out which methods were used to find the law as it is. The 'rules' are followed by an explanation, a discussion of the sources and methods used by the experts, and maybe even a discussion of the controversial or uncertain aspects of a rule. The rules in restatement reports, in other words, claim relevance because they repeat what was already out there. Yet, this very same claim is denied by the fact that they present what is out there anew, in the form of rules preceded by prefatory text and followed by commentaries. What is more, the rules appear in the form of a single text, which suggests coherence and unity. They are published in 'books', 'manuals', 'reports', and the like. In other words: the rules should not be read as individual restatements only, but as part of a larger system. The very fact that the rules appear

[15] Some manuals in the field of international humanitarian law refer to their restatements as 'blackletter rules.' Typographically speaking this is correct, as the rules are indeed printed in bold. Of course, the term also invokes imageries of 'blackletter law', thus suggesting that the formulated rules are certain and well-established.

under a common title already hints at their interrelationship. This is further reinforced by paratextual elements such as the table of contents, sub-titles, and chapters.

Of course, it makes sense for legal expert committees to represent customary law in this way. After all, they assumed the task of providing clarity and coherence. Yet, this does mean that it is incorrect to treat customary law as a form of unwritten law only. By now, customary law is often identified and interpreted through references to written restatements, which are (re)presented as part of a larger system. These restatements, as I argued before, transform the nature of customary law. Written restatements, to use Kadens' phrasing, 'no longer offer the option of forgetfulness'.[16] They are out there in the world of law, to be accepted, ignored, or critiqued. Either way, they are part of the way in which customary law develops, through the identification, interpretation, and assessment of text.

Conclusion

In diplomatic, academic, and judicial practice, customary international law is often identified and interpreted through text. This can take many forms, varying from military manuals to case law, treaty provisions, or UN Resolutions. In this contribution, I have focused on a specific genre of customary law writing: restatement reports by international legal expert committees. In recent decades, traditional forms of international lawmaking have slowed down. The number of newly created multilateral treaties stagnated and in areas such as cyber states have been reluctant to contribute to the development of customary international law. One of the responses has been the production of 'restatements of international law', applicable to a particular field of law or a specific socio-political problem. The restatements often aim to update the law, to bring existing law up to speed with technological or socio-political developments.

Restatement reports routinely come with a disclaimer: they do not make law, nor do they have any intention to do so. The authors of restatement reports, in other words, are different from the authors of treaties. While the latter possess the authority to create new law, the writers of restatements lack such powers. They are more like chroniclers who write about practices not created by themselves. However, just as chronicles never just record what is out there, restatements *do* something in the field of international law. In this contribution, I have argued that the very fact of publishing restatement reports brings about a transformation in the reception and reading of customary law. Customary law now appears as a set of clearly demarcated rules, identifiable by specific numbers. The numbered

[16] Kadens (n 4) 20. Kadens made this remark in relation to the transformation of customary law in the hands of 12th-century lawyers. These lawyers, she argues, viewed 'the law as an authoritative body of written rules. (…) The technical terms and techniques of interpretation required to use it meant that the law no longer belonged to the community at large.'

rules are also represented as a system through the use of paratextual elements such as titles, chapter headings, and tables of contents. Other paratextual elements such as prefaces and introductions indicate how the system of rules serves underlying purposes and functions. Restatement reports, in other words, are not only about the propositional content of their rules. They transform customary law in a more fundamental way, through the very form in which it is made available to the reader.

Cite as: Wouter G. Werner, 'Custom as Rewritten Law: The Text and Paratext of Restatement Reports', ESIL Reflections 11:3 (2022).

© 2022. *This work is licensed under a **CC BY-NC-ND 4.0 licence**.*