

DEMOCRATIC CUSTOM V INTERNATIONAL CUSTOMARY LAW

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This article responds to the criticism that customary international law is undemocratic, by arguing that the criticism takes too narrow a view of conceptions of democracy and custom. The author suggests that democracy can be conceived as a process of participation rather than representation, and presents a conception of "compound custom" which combines the elements of custom as a source of law, as a mode of rights, and as a foundation of interaction. With this conception of compound custom in mind, customary international law has a greater democratic potential.

I INTRODUCTION

There are many senses in which rule by custom appears, on its face, to fall short of contemporary ideals of democracy. It does not seem democratic, for example, to rely on a social system in which ingrained community practices and beliefs, or those which the elites of those systems sustain, are relied upon unquestioningly or without public accountability. It does not seem democratic to leave the development and change of the content of custom to the "powers that be" and the gradual evolution of dominant social values they purport to reflect, rather than putting such values to the public for formal approval. Custom appears to be an undemocratic mode of order because it lacks the very formalism and rational approach to decision-making which most democracies consider vital for solving problems of disagreement. At the international level these problems – the rule of power, the dominance of particular projected values, and widespread disagreement – are amplified both between and within States, rendering custom a seemingly unhelpful and unattractive basis for a legal system.

It is therefore unsurprising that amidst the contemporary concern in international legal theory to explain international law's legitimacy, "customary international law" has come in for significant criticism.¹ The prevailing account of customary international law imports the most obvious

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1 For summaries see J Patrick Kelly "The Twilight of Customary International Law" (2002) 40 *Vir J Int'l Law* 449; Robert Kolb "Selected Problems in the Theory of Customary International Law" (2003) *Neth Int'l L*

characteristic of customary order – that it is practice-based – to refer to law made informally by States, and it consequently imports the same democratic concerns which might at face value be applied to custom generally. Specifically, where concern centres upon the legitimacy of international law's implications for domestic law, there are common concerns that customary international law may be an insidious threat to national democracy – particularly in those systems in which it is a part of rather than merely an influence upon domestic law.² Similarly, where the assessment focuses upon the international level itself, customary international law is criticised both for its non-compliance with the "rule of law",³ and its apologism for State power,⁴ resulting in a failure to provide equal participation opportunities to substantively unequal States.

This article argues, however, that closer and more conceptual attention needs to be given to the nature of both custom itself and the theory of democracy it is measured against. With such attention emerges a more basic and largely neglected sense in which custom does accord with democratic social regulation and constitution. It is the sense in which democracy is not primarily about majority decision-making and the election of representatives, but rather a concept of direct participation with less formal mechanisms for accountability and authorisation; and whereby custom is not merely a source of formal-rational law, but is an interactive process through which the foundations of the legal system are constituted and upon which rules are built. This author has argued elsewhere that the orthodox conception of custom upon which customary international law doctrine relies is just one of several possible conceptions.⁵ This article aims to take the more broadly conceived notion of custom which that work suggests, and to consider its democratic credentials. It argues that the two concepts – custom and democracy – may sit more naturally

Rev 119; Ben Chigara *Legitimacy Deficit in Custom: A Deconstructionist Critique* (Dartmouth, Aldershot, 2001).

- 2 See for example Phillip R Trimble "A Revisionist View of Customary International Law" (2006) 33 UCLA L Rev 665; Curtis A Bradley and Jack L Goldsmith "Customary International Law as Federal Common Law: A Critique of the Modern Position" (1997) 110 Harv L Rev 815; Treasa Dunworth "Hidden Anxieties: Customary International Law in New Zealand" (2004) 2 NZJPIL 67; Kristen Walker and Andrew D Mitchell "A Stronger Role for Customary International Law in Domestic Law?" in Hilary Charlesworth and others (eds) *The Fluid State: International Law and National Legal Systems* (Federation Press, 2005) [*Fluid State*]; Treasa Dunworth "Lost in Translation: Customary International Law in Domestic Law" in *Fluid State*.
- 3 Chigara, above n 1, 22, arguing that customary international law ought to manifest "consistency, transparency, determinacy, predictability and coherency".
- 4 Michael Byers *Custom, Power and the Power of Rules* (Cambridge University Press, Cambridge, 1999) 37-40; see also Brigitte Stern "Custom At The Heart Of International Law" (trans Michael Byers and Anne Denise) reprinted in (2001) 11 Duke J Comp & Int'l L 89, 108: "the customary international law rule is the one which is considered to be such by the will of those states which are able to impose their point of view".
- 5 See Nicole Roughan "Conceptions of Custom in International Law" (LLM Thesis, Victoria University of Wellington, 2006).

together than international legal theory has thus far allowed, and suggests that a reconceived paradigm of custom – taking into account a broader picture of its relationship to law and authority and its participatory function and potential – might be a more useful conception of custom in thinking about an ideal of democratic international law.

The project in this way is driven by the momentum within legal scholarship of looking more closely at social law-making and governance processes, rather than the characterisation of law and authority as being top-down, formal phenomena.⁶ However, whereas much of this momentum has resulted from law and economics advocacy of the efficiency of such bottom-up regulation, or critical legal studies attempts to redistribute power in favour of greater democratic legitimacy,⁷ this account suggests that custom itself can claim normative authority, and can be democratically legitimate.

A Revisiting Democracy Theory

This article argues that, while the attempts to increase the uptake of representative democracy at the international level are important, the juncture between democracy theory and international law is not exhausted by the notions of representation and formal institutions. Here, the focus moves away from procedures of formal representation and its blinkered corollary of attention to formal institutions, to a discussion of the theory of participatory democracy and its relationship to the most informal of international legal institutions: international legal custom or "customary international law". It asks whether, as an inherently participatory institution, custom itself can be considered democratic; whether existing conceptions of custom in international law provide for such an ideal of participation; and how a participatory democratic vision of custom might relate to more formal mechanisms of representation and accountability.

A renewed attention to democratic theory is not merely a logical place to begin a study of the correlation between democracy and the informal institution of custom; it can be more generally justified by the desire to appeal to democracy as a legitimating feature of international law. In a legal system, the overwhelming appeal of democratic practices and principles is that they allow law to claim authority over subjects in a way that is more legitimate and justifiable for the involvement of those subjects in law-making. Or, from a political perspective, democracy accords subjects "a certain degree of political control over the actions of representatives who are invested with powers over their public decision-making".⁸ In both the legal and political respects, there is the sense that

6 As Orly Lobel describes it, "[t]he new governance model connotes a decentering of legal scholarship, challenging the traditional focus on formal regulation as the dominant locus of change". See "The Renew Deal: The Fall Of Regulation and the Rise of Governance in Contemporary Legal Thought" (2004) 89 *Minn L Rev* 342.

7 See Lobel, above n 6, 344.

8 Terry Macdonald and Kate Macdonald "Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry" (2006) 17 *Eur J Int'l L* 89.

ultimate authority (and the "authorship" of official action) rests with the relevant public rather than those selected to represent them. Characterised in this manner, democratic practices and principles have an obvious appeal for international lawyers looking to articulate the missing legitimating link to sustain the authority of international law over its subjects.

However, the analysis of the democratic credentials of international law cannot be considered only in relation to the standard image of modern democratic practice – one which de-emphasises participation and is primarily concerned with representation. This starting point stems from the brand of democracy theory most often articulated in political science and theory, which has largely retreated from the "classical" notion of participation by "the people" in governance to the fallback reality of individual apathy, falling voting rates, and a general absence among some populations of "democratic will".⁹ The shift turns attention from questions of how best to activate and engender a democratic will in a participatory democracy, to a more specific focus upon the institutions of representative democracy. In particular, detailed analysis is conducted of the activities of the representatives and the processes of their selection, demanding that electoral processes give voting publics an opportunity to authorise representatives to act on their behalf, and holding representatives accountable for actions non-compliant with majority will.¹⁰ Even where legal and political authorities are not themselves elected, the representative democratic ideal requires that they be held indirectly to account through a more or less formal separation of powers which connects all State branches in a centralised structure.¹¹ The image of democracy is therefore situated within a landscape of the State which has a "constitutionalised allocation and coordination of public roles and responsibilities".¹²

There is therefore an immediate question whether this image of democratic theory is an appropriate one in a global system where power is frequently decentralised, marked by conflicting constitutions, and at times exercised by private agents as much as public representatives.¹³ Further, there is a question mark over the existence of a "public" or *demos* in the international system, and, if

9 For discussion of this view in American political science literature, see Doni Gewirtzman "Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture" (2005) 93 Geo LJ 897, 913.

10 Carole Pateman "Defining Democracy" in *Participation and Democratic Theory* (Cambridge University Press, Cambridge, 1970) 8.

11 Macdonald and Macdonald, above n 8, 97-98.

12 Ibid, 98.

13 For discussion of this general observation about international law's structure, see the work of the International Law Commission on "Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law" <http://untreaty.un.org/ilc/> (accessed 2 January 2007). On the different conceptions of constitutionalism in international law, see Anne Peters "Global Constitutionalism Revisited" (ASIL Centennial Discussion on a Just World Under Law: Why Obey International Law? <http://law.ubalt.edu/asil/> (accessed 1 March 2007)).

it exists, whether it is fundamentally cosmopolitan or communitarian in nature.¹⁴ Amongst those theorists willing to consider that democratic theory has some place in international theory – and not all do¹⁵ – debate is situated around the extent to which the international system provides for democratic outcomes either through decision-making processes which look like those of national democracies, or through an indirect democratic "trickle-down" process which requires that international institutions be accountable to States, as an international "public", which is in turn accountable to national populations.¹⁶ In both cases, the emphasis is upon the procedures with which democracy is associated: majority decision-making, elections and de-selections, and other formal avenues for representation and accountability.

A theory of participatory democracy, in contrast, maintains that the existence of representative institutions "is not sufficient for democracy".¹⁷ Rather, participatory democracy requires the direct participation of individuals or groups in decision-making processes; the notion of rule "by the people" rather than their formal representatives. It stems from the classical theories of democracy associated with Rousseau and Mill, and as such is subject to the well-known criticisms that direct participation generating consensus in accordance with a "general will" is impossible in a pluralist society, impracticable in a dispersed society, or merely a rhetorical cover for the interests of elites. Modern accounts of participatory democracy, however, reframe the classical theories to emphasise the important educative function of participation rather than its determination of particular (liberal) outcomes, suggesting that participation is required within and beyond the governmental sphere to generate a "democratic character" upon which more formal democratic processes then rely.¹⁸ To this they add contemporary perspectives guided by the facts of social pluralism, and analyse the nature of participation in non-governmental spheres as well as those within State structures so as to construct a more complete picture of the practice of democracy.¹⁹ In essence, contemporary theories of participation argue that democracy is impossible without a society with the necessary skills to

14 See for example Daniel Bodansky "Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93 Am J Int'l L 596, 599.

15 See the discussion of this position in Susan Marks "Democracy and International Governance" in Jean-Marc Coicaud and Veijo Heiskanen (eds) *The Legitimacy of International Organizations* (United Nations University Press, New York, 2001) 66.

16 Compare Robert A Dahl "Can International Organizations be Democratic?" in Ian Shapiro and Casiano Hacker-Cordon (eds) *Democracy's Edges* (Cambridge University Press, Cambridge, 1999); and David Held *Democracy and the Global Order: from the Modern State to Cosmopolitan Governance* (Stanford University Press, Stanford, 1995).

17 Pateman, above n 10, 41. This is not to deny that it may still be necessary to have representative institutions on top of participatory structures.

18 Ibid, 42-43.

19 Ibid, 42-51.

participate, but they do not wholly depart from the Rousseauian premise that through participation, there is likely to be greater acceptance of collective decisions.²⁰

At the international level, two distinct levels of participation may be identified relating to different conceptions of the relevant *demos*.²¹ First, we can analyse the extent of participatory democracy among States involved in international fora, while on the second tier of participation is the concern to involve private individuals and groups in the international law-making process. The task of trying to improve international law's democratic scorecard may be undertaken on either or both levels, but with quite different implications. In the realm of custom, for example, taking account only of conduct at the official State level offers nothing to the goal of participatory democracy among citizens of those States, unless those States happen to be in the minority of countries that are both substantially democratic and sufficiently outward-looking that democratic participation can drive their international practice. To enhance international participatory legitimacy, a solution might be to prioritise the actions of democratic States in an assessment of the customary rules arising from practice,²² but this offends against democratic principles on the first tier of analysis which favours democratic processes as between States. The remaining option is then to insist upon the possibilities for participation amongst all States, but to expand the class of relevant participants in the formation of custom, to include the non-State actors who might otherwise be denied opportunities to either participate or be represented.²³

This extension needs to be done with some care. It would be overly simplistic, and likely incorrect, to equate the increasing level of participation by non-State actors with a positive democratic outcome, for such participation is only a step in the direction of democracy to the extent

20 Ibid, 27. This includes not only the well-documented accounts of participation through interest-based "civil society" organisations, but the more structural contexts of participation such as employment. For recent discussion of applied theory see Susan Rose-Ackerman *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (Cambridge University Press, Cambridge, 2005).

21 For a discussion of perspectives on the need for *demos*, and the problems with that concept in international law, see Margaret Moore "Globalization and Democratization: Institutional Design for Global Institutions" (2006) 37 *Journal of Social Philosophy* 21, 24-27.

22 This is of course the Kantian approach which favours including only republican States in the international community. For empirical discussion of how successful this strategy is as a means of global order, see generally Michael Doyle *Ways of War and Peace Realism, Liberalism, and Socialism* (WW Norton, New York, 1997).

23 This participation includes involvement in deliberative bodies and contributions to judicial proceedings. See for example William R Pace and Jennifer Schense "The Role of Non-governmental Organizations" in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press, New York, 2002) 106-107; Steve Charnovitz "The Emergence of Democratic Participation in Global Governance" (2003) *Indiana J Global Leg Stud* 45; D Shelton "The Participation of Nongovernmental Organisations in International Judicial Proceedings" (1994) 88 *Am J Int'l L* 611; Caroline E Foster "Social Science Experts and *Amicus Curiae* Briefs in International Courts and Tribunals: The WTO *Biotech* Case" (2005) 52 *NILR* 433.

that it actually increases peoples' (or groups') participation in the formation of the rules that govern them. Some sceptics have argued that the degree of participation does not reach this level – and indeed on a model of rules and rule-making which focuses solely on decisional power that criticism would seem accurate.²⁴ However, on a model of rules and rule-making which includes attention to the background meanings and expectations which generate rules, it becomes harder to diminish the role of participation by non-State actors in this way. They may not have a controlling role, but they will have a role in shaping the perceptions about behaviour which gain currency in the international community.²⁵ I argue that the reconception of custom, in which custom includes this foundational constitutive process below the level of specific rules, provides for this participatory ideal.²⁶

So conceived, there is a sense in which the international system appears an ideal theoretical example of participatory democracy. The decentralised and dispersed nature of the community seems to require the type of deliberation aimed at producing some consensus over action characteristic of the deliberative type of participatory democracy.²⁷ The practice probably fails to measure up to the deliberative ideal – it is unlikely that the enormous range of international actors' views can be properly presented, let alone considered – but the degree of attention to deep and wide participation accords well with the significant increase in international actors; both more states and more non-state actors.²⁸ An assumption that those in favour of the non-State actors' role evidently share is that participation in international practice ought to extend beyond States, even though non-State –actors are not usually representatives in the normal democratic sense. There are then derivative concerns about the accountability of non-State actors, which can be used to limit the ultimate level of authority that non-State participants are thought to deserve.²⁹ What is interesting about these accounts for this study, however, are the starting points of participatory democracy rather than representative accountability, the notion that non-state actors may even offer a democratic check on the powers of formally-elected representatives, and the extent to which non-State actors' non-authoritative role turns out to be critical in the accounts of customary law which follow.

24 See for example Moore, above n 21, 33-34.

25 On the example of activist networks playing this type of shaping or framing role, see Margaret Keck and Kathryn Sikkink *Activists Beyond Borders: Activist Networks in International Politics* (Cornell University Press, New York, 1998).

26 See Roughan, above n 5, 129-141.

27 On this ideal of democratic practice, see Jurgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans William Rehg, MIT Press, Boston, 1996).

28 Keck and Sikkink, above n 25, ch 1.

29 Duncan B Hollis "Why State Consent Still Matters: Non-State Actors, Treaties and the Changing Sources of International Law" (2003) 23 Berkeley J Int'l L 1, 1-4.

The participatory model of democracy, therefore, through its focus on the level of participation rather than representation, draws attention to the constitutive process which engenders different opinions and interests of actors at both the domestic and international levels. Democracy in this light is a matter of participation and interaction among all groups – including those who are ultimately overruled by countervailing interests, and those whose interests are ultimately satisfied. For international law, this notion that participation is foundational and crucial to any overlaid structure of representation implies that law-making processes may start at a more basic and societal level than orthodox theories have explained.

B Revisiting Conceptions of International Custom

The realm of customary international law presents the most potential for this type of participatory activity and analysis. Indeed custom might be understood at its core to be a matter of social participation, ripe for the type of democratic input which participation engenders. Currently, however, where consideration is given to custom in international law against a model of democratic legitimacy, it is conceived of as an institution which must stack up against the modern ideals of democratic legitimacy understood to require direct accountability and authorised representation.³⁰ This article challenges that assumption by considering the democratic credentials not of the orthodox notion of custom, but of a reconceived notion which better accounts for the role of custom in international law. It therefore sets up the idea of orthodox customary international law – as a doctrine which can be applied in legal argument where facts satisfy the criteria of state practice and *opinio juris* – against the idea that custom is actually something more basic, more social, and less formulaic than that. Rather than repeating the concern that customary international law doctrine is undemocratic because of the way it is applied and recognised, this paper argues that the doctrine is "undemocratic" because of the particular conception of custom upon which it rests. With a reconceived notion of custom reemphasising its social character, a more consistent picture can be presented of custom alongside participatory democracy.

I have argued elsewhere that in international legal theory and in the relatively dispersed philosophy of custom from which it draws ideas, the orthodox "source" conception of custom – the notion that custom is itself non-law (or pre-law) but can be a source of law when it is formalised and rationalised – is just one of three core paradigms of custom which can be identified.³¹ The second, the "mode of rights" conception, posits custom as a separate system of norms and obligations which is itself authoritative and need not be connected to or rationalised within a formalised legal system. Third, some treatments of custom move away from any direct association with authoritative rules, and treat custom as a foundation or framework of interaction through which basic principles of

30 See generally Chigara, above n 1, which, although concerned with aspects of custom other than just democratic principles, appeals to the same notions of equality and transparency which democracy itself supports.

31 See Roughan, above n 5, 6-25.

community life are generated. These three conceptions – the source conception, the mode of rights conception, and the foundation conception – are not mutually exclusive. I have argued that although they suggest different ideas about the role custom can and should play in the community in which it resides, in the international system they may be understood together in a type of "compound conception of custom".³²

II THE THREE CONCEPTIONS AND DEMOCRATIC THEORY

A Source of Custom Conception

At the international level, the source conception of custom considers that the practices of States can constitute a source of law, however controversial and contested the actual process for determining the content of that law.³³ Although source accounts of custom disagree over the relevant weight of material or normative elements, the processes they suggest for the delineation between custom and law do not involve a formal process of States expressing approval. Rather, the source conception considers legal rules to be derivable from either actual practice or ideal practice (whether deductively or inductively), without any formal process of putting those practices or ideals to a vote of approval in the manner of representative democracy. The resulting theories of customary international law are therefore open to the criticisms that the law-formation process lacks legitimacy due to a violation of "the basic notion of democratic governance among states",³⁴ relying on the assumption that law's authority should be derived from its credentials as being rational, objectifiable, and based on the expressed consent of a majority of lawmakers.

These criticisms are powerful. If the only way of attributing State consent to rules – or the rule-identifying process³⁵ – is by trying to find that consent embedded in practice, then any democratic legitimacy of the process must somehow also be sourced in that practice. This is far from compliant with domestic representative democratic practice, but it is an open question whether such practice might actually suggest the operation of direct participation in the law-making process. With States considered the paradigmatic law-makers in the system, their law-making practices, through custom, could be regarded as authoritative conduct, with the weight of practice by the majority being accorded status as law. However the making of that law is conceived as a largely private (to each State) and non-deliberative exercise, unlike the type of public interaction which drives the

32 Ibid, 171-193.

33 For comprehensive accounts of the competing suggestions, see Anthea Elizabeth Roberts "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95 Am J Int'l L 757; International Law Association (ILA) Committee on Formation of Customary (General) International Law *Final Report: Statement of Principles Applicable to the Formation of General Customary International Law* (ILA, London, 2000).

34 Kelly, above n 1, 453.

35 Michael Akehurst "Custom as a Source of International Law" (1974-75) 47 Brit YB Int'l L 1.

democratic domestic law-making process. The source conception's legitimacy is also threatened by the well-known difficulties of selecting which practices are to count, a process which cannot be easily analogised to any sort of majority decision-making process.

The source conception's approach undeniably offers a tool for dealing with disputes over what customs are to count and how they are to be applied, and in so doing provides potential for external adjudication and ascertainment of rules. However, the desirability of the source conception is contingent on the extent to which its claims of legitimacy accord with the methods and assumptions it employs – and it cannot claim democratic legitimacy in the manner that it has in domestic law. Whereas the domestic source conception is able to rely upon the ballot box as an ultimate arbiter to settle unsettled custom – where majority interests indirectly provide formal, mediatory solutions to problems of disagreement – the source conception of custom in international law can rely upon no such intermediary representative process. The domestic source conception's assumption of a pluralist society in which formal law serves to mediate between interests is inappropriate for the international system, where formal posited law is perhaps not the obvious or dominant point of concession, compromise, and dialogue to deal with value pluralism. The degree of division over the appropriate legal institutions, the lack of democratic procedures in many formal institutions, and the even more ingrained unequal abilities to utilise what procedures there are mean that relying upon custom as a source of law precludes calling on the same democratic institutional protections that offer a means of fairly selecting and interpreting from the array of relevant practice.

B The Mode of Rights Conception

The mode of rights conception of custom can perhaps appear more consistent with democratic ideals through the removal of two blinkers which hinder the source conception. The source conception's democratic credentials are blinkered not only by the idea that custom has legal influence only where it can be formalised and rationalised into customary international law, but more importantly by the notion that this rationalisation is undemocratic because it is an unrepresentative, unaccountable practice. The mode of rights conception, by contrast, regards custom as law (or its equivalent) in its own right, and so removes the need to apply some selective rationalization test in order to determine whether custom is to "count" as law.³⁶ This less formalistic paradigm of custom triggers some of the more participatory features of custom as a social practice.³⁷ Although a customary mode of rights conception lacks a formal mechanism for separating out desirable legal behaviours from other social or moral requirements, it is possible to locate a normative evaluation of each practice as being built in to the customary mode itself. Continued participation reflects an evaluation of the customary order, and the deeper or more

36 Martti Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Pub Co Helsinki, 1989) 385-387 [*Apology to Utopia*].

37 See Roughan, above n 5, 84-108.

widespread the participation, the more reliable are its evaluative outcomes. In this regard the de facto order created through custom as a mode of rights can be seen as legitimate for its involvement of participants in substantive outcomes.³⁸

It may be, however, that the prioritisation of this de facto social practice as law, or equivalent to law, is deeply unattractive despite its reflection of direct participation. The general absence of clear procedures (let alone *democratic* procedures) to protect formal equality in the development of customary rules would see a customary mode of rights fall short of much "rule of law" theory and rhetoric. If the rules which emerge from custom as a mode of rights happen to be deeply objectionable to some members, or are in violation of the rule of law requirements which act as an additional constraint on domestic representative law-makers, then regardless of the participatory credentials of custom in this light it will still attract the type of criticisms usually leveled at the source conception. That is, it will still seem to prioritise the conduct of the powerful at the expense of the weak, and to fail to constrain the behaviour of those most powerful States.

Although it may be consistent with participatory democratic practice to encourage the conception that what States do matters precisely because it is the conduct of participants in the system, this model fails to level the playing field to allow for genuinely democratic participation in a way that would give it normative significance.³⁹ Instead, in an international community without a basic set of values to provide an authoritative backdrop or even an interpretative framework, a customary mode of rights approach is open to criticism that it is simply a manifestation of power hierarchies without any substantial normative evaluation of content.⁴⁰ It is direct participation, but ultimately only a few get to participate and still fewer get to participate with any hope of influencing the outcomes.

C Foundation Conception

The foundation conception of custom presents a still more participatory picture by according weight to mass social interaction – by States and non-state actors – as constitutive of social meaning and normative beliefs, but importantly it does not link that interaction to any particular authoritative structures or rules.⁴¹ It therefore has the advantage of looking beyond a formal or traditional

38 Jutta Brunee and Stephen J Toope "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum J Transnat'l Law 19, 53-54.

39 It is one of Dahl's requirements of democratic practice that "all members have equal and effective opportunities to influence collective decision-making": *On Democracy* (Yale University Press, New Haven, 1998) 38.

40 Stern, above n 4, 108: "the customary international law rule is the one which is considered to be such by the will of those states which are able to impose their point of view." See generally *Apology to Utopia*, above n 36.

41 See Roughan, above n 5, 66-68.

authoritative structure from which law can be derived, in favour of attributing value to social interaction and mass participation as the generator of a base structure of social order. Such a broad conception of participation and interaction also suits the international system's increasingly diverse membership and may ameliorate the inequality it embodies. That is, it allows the actual practices making up social custom to include not only the relatively formal interaction involved in treaty-making or institutional debate, but also the responses or feedback to those interactions and the experiences of those outside of the dominant, "green-room" sphere. This means that rather than requiring concrete State practice or even the formal expression of State opinions – neither of which are options equally open to all States and certainly not to all peoples – practice can include informal responses from any actor which may take root and sustain particular meanings. Where a State might lack the power to contribute to custom in the manner the source conception requires, its concerns may be highlighted, spoken for and represented by other advocates in the system, whose voices in such matters may ultimately contribute to the establishment of shared meanings or expectations. That is, they form part of the "interpretive community" from which rules and expectations emerge.

However, given the non-authoritative nature of the interaction itself, which can only support and not determine the operation of rules and normative institutions, the significance of the participatory model is essentially limited. If custom were conceived of only as a foundation of social interaction, able to generate any type of rule structure to which that community participation gave rise, there would be no way to alleviate the risk that the rule structure might itself fall short of other democratic ideals.

III CONCLUSION: A RECONCEPTION OF DEMOCRATIC CUSTOM FOR INTERNATIONAL LAW?

The three paradigms presented above do not, on their own, satisfy the impulse to enhance international law's democratic legitimacy. Even taken against a model of participatory democracy, they do not individually present a very convincing picture. The challenge now is to consider how the insights from the closer attention to both democracy theory and the concept of custom may contribute to a reconception of custom in international law so as to embody a more participatory democratic ideal. This section proposes that a "compound" view of custom – which combines aspects of these three paradigms – might present a more democratic picture.⁴² In the compound conception, the foundation conception provides the core element of participation, which can reveal whether there are agreed understandings about behaviour and rights and provide the social meaning for the particular behaviour of a broad range of international actors. The mode of rights conception in turn explains the observation by participants and commentators of actual customary rules and principles that have surfaced as de facto regulators of behaviour. Finally, the source conception offers the means of checking and assessing those de facto norms within a legal process, when their

⁴² For a full discussion of "compound custom", see *ibid*, 171-191.

content, legitimacy, or appropriateness is contested. Such a compound view of custom positions the normative authority of custom as being dependent upon (1) the socially-constructed understanding of a particular type of behaviour, (2) the extent to which that behaviour is reflectively practised as a *de facto* rule and (3) the assessment of any conflicting or ambiguous elements of the practice within a formal legal process where what is at stake is not customary law, but a legal settlement of a dispute which may have customary roots but which cannot be resolved through custom alone.

The advantage of the compound conception from a participatory democracy standpoint is that it accords weight to the social action of participants in the international system – both State and non-State – to the extent that that interactive practice produces a stable normative outcome. It regards social practice as capable of containing embedded normativity. Whether that outcome appears simply by establishing that some behaviour is considered acceptable or social and some is not, or by the reiterated and interactive practice of that behaviour among participants, it prioritises the fact of participation itself as a direct legitimating force for the authority of custom. However, just as in the domestic sphere where participatory democracy can only go so far in enabling legitimate governmental authority, so too is it necessary to remain committed to regarding custom as one source of law within a more formal disagreement-resolving institution. If there is no stable customary rule, with a clear customary meaning emerging from practice, then the need for representative institutions to authoritatively determine one rule over another seems unavoidable. Custom, although reflecting participatory democratic ideals in its social form, runs out just in case it turns out that participation engenders disagreement.

Disagreement is not wholly inconsistent with custom, just as change and development are not to be excluded from the concept of custom. Disagreement and instability do, however, reduce the normative authority which any purported customary rule can claim *qua* custom. In the international sphere, in particular, the risk in allowing areas of deep disagreement to be incorrectly regarded as customary rules is that illegitimate measures may be utilised to force through one particular view. Importantly, such measures cannot, on this conception, be deemed to be the enforcement of custom; they are merely acts of power rather than exercises of the normative authority that custom itself can have. The advantage of the compound conception is that it then builds custom into the solution of dealing with the problems which relying upon custom can generate.

It does so by allowing custom to still operate as a source of law within a decision-making institution, but where there is recognition that a choice is being made by a legal process between claimed customs, not recognising that there is one dominant custom. This model therefore at this stage shifts the democratic legitimacy focus back towards the decision-making institutions, so that the challenge for international law, quite apart from any reflection on custom, is to consider how to make these institutions – whether judicial or law-making – more democratic on the standard representative theories.

However, although custom alone – even on a compound conception – cannot do all the work in enhancing international law's democratic credentials, it can do some of this work. Custom is in

many respects an extremely important type of law, generated directly through the interactive conduct of participants and producing stable rules. Just as in domestic law where the customs of particular groups – united by shared interests or identities – can be settled enough to be considered authoritative by those participants, so too might custom govern in pockets of close interaction in international law. Given that it is considered legitimate for its direct generation by participants, it makes little sense to criticise customary law for being less than democratic because those participants are not elected. That criticism confuses one tool of democratic practice – electoral representation – with its desired outcome: the participation of subjects in the processes which govern them.