

Noora Johanna ARAJARVI

The Changing Nature of Customary International Law: The Methods of Interpreting the Concept of Custom in International Criminal Tribunals

Abstract

Article 38(1) of the Statute of the International Court of Justice lists sources of international law: treaties, customary international law, general principles, judicial decisions and the teachings of the most highly qualified publicists. Traditionally, the formation of customary international law is constituted of two elements, state practice and *opinio juris*, in other words, the action of states and the subjective belief that the action is required by law. On occasions, however, the rules labelled under customary international law are not found through the process of establishing state practice and *opinio juris*, but stem from other normative considerations, as the case-study of international criminal tribunals illustrates.

This thesis examines the nature of customary international law and the ‘modernised’ version of it; what distinguishes the traditional and novel concepts; where do they arise from – the process of their formation; and their relationship with other sources of international law. The critical analysis concentrates on this transformed process of discovering rules categorised as customary international law, and the impact of this novel process on the understanding of the nature of customary international law, as well as on the legitimacy of the resulting rules.

The thesis does not, finally, purport to renounce the expansion of the sources of international law, but rather directs the criticism on the methods of finding customary international law and the compliance to the principle of legality, and notes that criminal trials may not be the appropriate venues for the discovery of novel sources of law or the explicit extension of the scope of existing sources.