
RESPONSE

Custom, Codification, and the Verdict of History

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In response to Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995 (2012).

INTRODUCTION

Over one hundred years ago, Lassa Oppenheim asked, “[I]s the Law of Nations ripe for codification?” and answered with a qualified yes.¹ Oppenheim recognized disadvantages that would come with codification: “[i]nterfere[nce] with the so-called organic growth of the law through usage into custom,” subsequent interpretation that focused more on the letter than the spirit of the law, and the risk that the codifiers would make “clumsy” choices and do “more harm than good.”² But for him, the likely improvements in clarity, substance, and uniformity that codification offered outweighed these costs. Oppenheim went on to urge a project whereby a “generation of able jurists” could “prepare draft codes for those parts of International Law which may be considered ripe for codification.”³ He expressed the hope that some “noble-minded monarch of far-reaching influence” would initiate the project.⁴

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¹ 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 42 (1905).

² *Id.* at 39-40.

³ *Id.* at 43.

⁴ *Id.*

In a terrific new article, Professor Timothy Meyer challenges this exalted view of codification, which numerous scholars since Oppenheim have echoed.⁵ Meyer argues in *Codifying Custom* that codification is a self-interested project undertaken by rational and perhaps even cunning states seeking to write the rules in their own favor.⁶ He does not dismiss the possibility that codification projects clarify or progressively develop international law, but he views this possibility, which he terms the Clarification Thesis, as overstated.⁷ He argues that another common motive for codification is what he calls the Capture Thesis: “states often use codification to capture customary international legal rules to benefit themselves at the expense of the general welfare”⁸

Codifying Custom provides an important reminder that codification is not divorced from the individual and often competing interests of the states involved. More specifically, Professor Meyer makes a valuable and original contribution in arguing that these competing interests may influence decisions concerning both whether to codify and in what forum to do so. Few would doubt that particularized state interests matter enormously once a codification of customary international law is underway—a skim through the *travaux préparatoires* of any codifying treaty demonstrates this point—but the role these interests play in shaping decisions whether to codify has been undertheorized. Most powerfully, Professor Meyer suggests that competing state interests can lead to what might be called competitive codifications: situations in which different groups of states engage in separate, contrasting codifications rather than approving a single, shared approach.⁹

In this Response, I consider the strength of Professor Meyer’s Capture Thesis and discuss some implications of his findings. Professor Meyer makes a persuasive case that states might pursue codification to advance understandings of customary international law that will advantage them at the expense of other states.¹⁰ But I have difficulty with

⁵ See Timothy L. Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1000 n.15 (2012) (citing various sources).

⁶ *Id.* at 998.

⁷ *Id.* at 1000.

⁸ *Id.* at 998; see also *id.* at 1001. Professor Meyer also notes that states may seek codification in order to improve compliance, as where a treaty both codifies customary international law and includes monitoring or enforcement provisions (the “Compliance Thesis”). *Id.* at 1016-17. For the purposes of this brief Response, I will focus only on what Professor Meyer terms the Clarification Thesis and the Capture Thesis.

⁹ *Id.* at 1054.

¹⁰ *Id.* at 1001.

his further claim that such capture is in fact a common motive for codification. My objections stem from two main sources. First, Professor Meyer relies on a model that overstates the likely power of capture. Second, the landscape of codification today aligns more with the Clarification Thesis than with the Capture Thesis. Thus, I think the Capture Thesis is much less powerful than Professor Meyer suggests. Since I accept that capture could sometimes drive codification, however, I close this Response by considering how international law might respond to the risk of capture. I argue that international law already responds to these risks by codifying international law through mechanisms that partially bypass the traditional principle of state consent.

I. DOUBTS ABOUT THE REACH OF THE CAPTURE THESIS

A. *The Model*

Professor Meyer supports the Capture Thesis largely by reasoning deductively from a model that treats states as unitary, self-interested, rational actors and that views these states as the relevant international actors in the codification process. The simplifying features of this model are ones that are likely to magnify the importance of capture and downplay that of clarification.

Perhaps most obviously, this model ignores nonstate actors. In his descriptive account of codification, Professor Meyer acknowledges the role played in codification by nonstate actors such as the International Law Commission (ILC),¹¹ but he does not factor the influence of these actors into his model. In actuality, their presence strengthens the Clarification Thesis and weakens the Capture Thesis in multiple respects. By downplaying the Clarification Thesis, for example, Professor Meyer emphasizes the transaction costs of negotiations;¹² however, nonstate actors like the ILC reduce some of these costs and transform others into fixed costs associated with codification in general. States fund much of the ILC's costs through their contributions to the United Nations budget,¹³ but they do not make individual choices about

¹¹ *Id.* at 1005-06.

¹² *Id.* at 1037.

¹³ See Proposed Programme Budget for the Biennium 2010–2011, pt. III, § 8, para. 18, U.N. Doc. A/64/6 (Mar. 19, 2009) (budgeting more than two million dollars for the ILC from 2010–2011). The ILC may also receive indirect subsidies from private entities, such as academic institutions that are home to ILC members. Another exam-

which projects their money supports and thus do not earmark their funds in ways that would further capture. The ILC's role also mitigates the holdout problem Professor Meyer identifies regarding the Clarification Thesis.¹⁴ Because the ILC's codifications do not bind states directly, but rather serve as presumptive embodiments of customary international law, the ILC does not need every state to agree in order to produce a codification.

Professor Meyer's assumption that states are unitary, rational actors similarly undervalues clarification and overvalues capture. For example, the incentives of diplomats who decide whether to pursue codification do not align perfectly with disembodied state interests. Rather than viewing treaty negotiations as transaction costs that reduce the appeal of clarification, diplomats may view these negotiations as the best and most exciting part of their jobs (and be more sympathetic to overall welfare maximization than pure state interest would suggest¹⁵). More fundamentally, there is the broader question of how much states actually resemble classical rational actors. If states are motivated by behavioral pressures such as acculturation¹⁶ beyond what a rational choice model would predict, then they will be significantly more inclined toward clarification than Professor Meyer's model suggests.

B. *The Landscape*

My sense that clarification has played a bigger role than capture in motivating codifications is reinforced by the present landscape of international law. Professor Meyer does not cite to any codifiers who acknowledge capture as a motivation—as compared to numerous ones who emphasize clarification—so we must look for indirect evidence to

ple of private funding, the influential *Harvard Research in International Law*, was financed in part by John D. Rockefeller, Jr. See John P. Grant & J. Craig Barker, 1 *THE HARVARD RESEARCH IN INTERNATIONAL LAW: ORIGINAL MATERIALS* 3 (2008).

¹⁴ See Meyer, *supra* note 5, at 1014-15.

¹⁵ U.S. negotiators who participated in the drafting of the Rome Statute, for example, were more sympathetic to the International Criminal Court than were other key U.S. actors. See, e.g., William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 *EUR. J. INT'L L.* 701, 708-09 (2004) (observing that U.S. negotiators could have "wreck[ed] the [negotiating] process" but instead showed sincere interest in furthering the treaty).

¹⁶ See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621, 626-27 (2004) (describing the impact of international law on state behavior through acculturation, the "general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture").

support the Capture Thesis.¹⁷ Yet the present landscape of international law does not bear a close resemblance to what Professor Meyer's model would lead us to expect.

Professor Meyer rests his intuition of capture most prominently on the claim that, groups of like-minded states, by codifying interpretations of custom that they themselves favor, can thereby influence other states to accept these interpretations.¹⁸ Yet in practice we do not see these kinds of consciously competing codifications of custom nearly as often as this argument might suggest. Professor Meyer points to one interesting modern example—the treatment of expropriations in international investment law¹⁹—but the international community has undertaken numerous other codifications, including codification of the law of diplomatic relations, the law of the sea, and the law of treaties, through processes open to participation by all states.

Professor Meyer suggests that treaties negotiated under the auspices of worldwide organizations experience capture due to the procedural rules that govern their negotiation.²⁰ Even if true, however, it is hard to see how this advantage would be clear enough prior to the negotiations to serve as a powerful motivating factor in favor of codification. States may not understand the ground rules before entering

¹⁷ I recognize that codifiers will often have strong incentives against publicly revealing that they undertook a codification for the purpose of strengthening their preferred version of customary international law against competing versions. It seems unlikely, however, that discretion would silence all discussion of the Capture Thesis, if indeed it is a common motive to codification.

Interestingly, hints of capture are perhaps most often found not in the treaty-making process on which Professor Meyer focuses, but rather in the context of codifications by single actors with particular substantive agendas. For example, some have suggested that the recent codification of customary international humanitarian law (IHL) by the International Committee of the Red Cross (ICRC) interprets disputed issues of customary international law in ways strongly favored by the ICRC. See, e.g., Major J. Jeremy Marsh, *Lex Lata or Lex Ferenda? Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 MIL. L. REV. 116, 117-18 (2008) (arguing that the ICRC's extensive study of humanitarian law "represents the ICRC's idealistic notion of what states should consider customary international humanitarian law"); Leah M. Nicholls, Note, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT'L L. 223, 232-33 (2006) (discussing the ICRC's methodology in codifying humanitarian law and noting that "[s]ince the purpose of the study was a progressive one, it provided another strong incentive for the ICRC to push for an expansive view of customary IHL").

¹⁸ Meyer, *supra* note 5, at 1028.

¹⁹ *Id.* at 1057-68.

²⁰ *Id.* at 1033.

negotiations, and thus they may not know whether they can have more or less influence than they do in the context of creating custom in the first place. Further, if states knew the ground rules in advance, then the system would incentivize those states with lessened influence to resist codification or bargain for more equal ground rules, which can give rise to countervailing processes. At the Third United Nations Convention on the Law of the Sea (UNCLOS III), for example, many states accepted exclusion from powerful working groups, but because consensus was the primary means of decisionmaking, they retained an important check on the work of these groups.²¹

II. IMPLICATIONS OF THE CAPTURE THESIS

While I doubt that the Capture Thesis has the power Professor Meyer attributes to it, I think he has persuasively argued that it could play an occasional role in motivating codification. What then does this mean for our understanding of codification? Professor Meyer identifies two potentially troubling prospects: first, that codification can entrench suboptimal rules, and second, that it can lead to the fragmentation of international law through competing codifications.²² His analysis is primarily descriptive, and although he does not offer solutions to these prospects, he does hint at two resulting implications.

A. *Back to Bare Custom?*

First, Professor Meyer observes that “[i]n some instances, bare customary law may be superior in delivering on the promises of a universal and decentralized legal system.”²³ He does not affirmatively argue for a return to custom, however, and with good reason. Even if bare customary law might be superior to codification, we cannot go back to it. As Oppenheim observed long ago, “the fact must be recognised

²¹ See *id.* at 1034-37 (discussing separately each of these two procedural tools).

²² The first of these prospects can arise under the Clarification Thesis as well, see *supra* text accompanying note 2, but is even more likely under the Capture Thesis. The second is specific to the Capture Thesis. For example, Professor Meyer suggests that the absence of an international consensus on the rule for compensating expropriation of foreign investment may be the result of competing codifications. Meyer, *supra* note 5, at 1057-59. However, it is hard to decipher the causal relationships—the same deep underlying disagreements that led to competing codifications might also have prevented an international consensus even absent these codifications.

²³ *Id.* at 1069.

that history has given its verdict in favour of codification.”²⁴ He reasoned primarily from the impulses toward clarification, but Professor Meyer’s arguments about capture make this point even more compelling. If individual states can gain distributional advantages through codifications, then under Professor Meyer’s model they will seek these advantages regardless of whether codification promotes the general welfare.

B. *Away from State Consent?*

Second, Professor Meyer suggests that “perhaps the [requirement of state consent to international legal obligations] should be jettisoned in favor of a rule that more appropriately balances the competing objectives of international lawmakers.”²⁵ This change would reduce the powers of holdout or vetoing states and thus promote overall welfare. Professor Meyer does not explore how this might be done in practice, but in the context of codifications, there are already important options available.

One example is the use of international courts to resolve questions of customary international law. For example, faced with competing state interpretations of the law governing treaty reservations in the years following World War II, the General Assembly requested and received an advisory opinion from the International Court of Justice (ICJ) on the issue.²⁶ Although the decisions of international courts are not codifications per se and do not have binding effect beyond the parties in a contentious case,²⁷ they can nonetheless resolve disputes about customary international law in ways that become generally accepted. The ICJ’s decision on treaty reservations framed the issue going forward and was ultimately incorporated into the Vienna Convention on the Law of Treaties.²⁸ A second way to avoid the consent requirement is to use soft-law codifications that are not binding

²⁴ OPPENHEIM, *supra* note 1, at 40.

²⁵ Meyer, *supra* note 5, at 1069.

²⁶ Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

²⁷ See Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055.

²⁸ Vienna Convention on the Law of Treaties art. 19(c), May 23, 1969, 1155 U.N.T.S. 331; see also Edward T. Swaine, *Reserving*, 31 YALE J. INT’L L. 307, 312-14 (2006) (describing how the ICJ’s approach to treaty reservations shaped the method used in the Vienna Convention).

treaties but that nonetheless command worldwide respect. The ILC's development of the Draft Articles on State Responsibility is a fairly recent example of this kind of codification.²⁹

While these kinds of delegations do not eliminate the possibility of suboptimal rules, they do reduce holdout problems, promote uniformity, make use of expertise, and leave open at least some possibility for subsequent revision. They thus amount to already-existing and reasonable, though not perfect, real-world solutions to the problem of capture.

CONCLUSION

The codification of custom is likely to be with us for as long as any custom remains. *Codifying Custom* offers a novel and interesting twist on why such codifications occur. While Professor Meyer's emphasis on capture may be overstated, he has provided a valuable counterpoint to traditional understandings of the purposes behind codification.

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²⁹ Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 43-58, U.N. Doc. A/56/10, GAOR, 56th Sess., Supp. No. 10 (2001); *see also* Draft Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, at 1-2, U.N. Doc. A/Res/56/83 (Jan. 28, 2002) (welcoming the conclusion of the Draft Articles and commending them to states' attention).