PART ONE

THE ENIGMAS OF CUSTOMARY INTERNATIONAL LAW

1

The Need for a New Theory

1.1. CUSTOMARY INTERNATIONAL LAW AND ITS TRADITIONAL DEFINITION

What is customary international law? This question has intrigued scholars and jurists for centuries – and frustrated government officials charged with determining whether a contemplated course of conduct is consistent with a state's international legal obligations.

What is clear, at least, is that customary international law is one of the three main sources of international law, which also include treaties and "general principles of law recognized by civilized nations."[1] Today it is playing an increasingly prominent role in the international legal system,[2] despite some assertions of its diminishing importance.[3] The International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ), have held, or at least suggested, that a vast array of norms have now entered the realm of customary law.

For example, the customary law of human rights has burgeoned. The ICJ has affirmed in a number of its decisions that genocide is prohibited by customary international law.[4] More generally, it has also implied that "the basic rights of the human person, including protection from slavery and racial discrimination" have become part of the corpus of customary law.[5]

Similarly, many crimes under international law are defined primarily by customary law. The statutes of new international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court, make references to

[1] See I.C.J. Statute, art. 38, para. 1.
[2] See, e.g., Jiménez de Aréchaga, "International Law in the Past Third of a Century," 14.
[3] See, e.g., van Hoof, *Rethinking the Sources of International Law*, 114 (declaring that "custom is in decline" and that "the process of creation of international law through custom has become extremely cumbersome").
[4] See, e.g., *2006 Armed Activities Case (D.R.C. v. Rwanda)*, para. 64; *2007 Genocide Convention Case*, para. 161.
[5] *Barcelona Traction Case*, 1970 I.C.J. Rep. 3, 32, para. 34.

customary international law in defining the crimes over which the tribunals have jurisdiction.[6] Decisions of these tribunals have also frequently invoked customary international law.[7] The ICJ has furthermore considered certain elements of the law of diplomatic privileges and immunities[8] and diplomatic protection[9] to be customary law.

Many judgments of the ICJ have concluded that essential norms governing the use of force have attained the status of customary law. These norms include a general prohibition of the use of nondefensive force by one state against another,[10] the impermissibility of the acquisition of territory by war,[11] states' right of self-defense against armed attacks by other states,[12] the requirement that any uses of force in self-defense be necessary and proportional,[13] and a principle of resolving disputes between states peacefully.[14] Other relevant norms that the ICJ has considered customary law are the law of occupation,[15] the law of neutrality,[16] nonintervention by one state in the affairs of another,[17] and a concomitant prohibition of states assisting subversive activities aimed at the overthrow of the government of other states.[18] The ICJ has in numerous decisions upheld the customary law status of rules of international humanitarian law governing the use of force in armed conflict.[19]

[6] See, e.g., Rome Statute, art. 8(2)(b), (e).
[7] See, e.g., Cassese, *International Criminal Law*, 17–20; Meron, "Revival of Customary Humanitarian Law," 821–22. On international humanitarian law as customary law, see, e.g., ICRC, *Customary International Humanitarian Law*; Provost, *International Human Rights and Humanitarian Law*.
[8] See, e.g., *Arrest Warrant Case*, 2002 I.C.J. Rep. 3, 21, para. 52 (affirming that the provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations regarding diplomatic privileges and immunities reflect customary international law).
[9] See, e.g., *2007 Diallo Case*, para. 39.
[10] See, e.g., *Nicaragua Case*, 1986 I.C.J. Rep. 14, 98–101, para. 187–90; *Wall Advisory Opinion*, 2004 I.C.J. Rep. 136, 171, para. 87.
[11] See *Wall Advisory Opinion*, 2004 I.C.J. Rep. 136, 182, para. 117.
[12] See *Nicaragua Case*, 1986 I.C.J. Rep. 14, 94, para. 176 (holding that the "right of self-defence" is "of a customary nature" and concluding that Article 51 of the U.N. Charter, which refers to states' "inherent right" to self-defense, constitutes a recognition of this preexisting customary norm). See also *Oil Platforms Case*, 2003 I.C.J. Rep. 161, 186–87, para. 51 (reiterating the requirement of an "armed attack" to justify self-defense under customary international law).
[13] See, e.g., *Nicaragua Case*, 1986 I.C.J. Rep. 14, 94, para. 176 (stating that the rule that a right of self-defense warrants only measures that "are proportional to the armed attack and necessary to respond to it" is "a rule well established in customary international law"); *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. Rep. 226, 245, para. 41 (affirming that the "submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law"); *Oil Platforms Case*, 2003 I.C.J. Rep. 161, 187, para. 51 (similar).
[14] See *Nicaragua Case*, 1986 I.C.J. Rep. 14, 145, para. 290 (affirming that the "principle that the parties to any dispute . . . should seek a solution by peaceful means" has "the status of customary law").
[15] See, e.g., *Wall Advisory Opinion*, 2004 I.C.J. Rep. 136, 167, para. 78.
[16] See *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. Rep. 226, 260–61, para. 88–89.
[17] See, e.g., *Nicaragua Case*, 1986 I.C.J. Rep. 14, 126, para. 246 ("the principle of non-intervention derives from customary international law").
[18] See, e.g., ibid., 108, para. 206; *2005 Armed Activities Case (D.R.C. v. Uganda)*, para. 162.
[19] See, e.g., *Nicaragua Case*, 1986 I.C.J. Rep. 14, 113–14, para. 218 (implicitly considering the rules in common Article 3 of the Geneva Conventions, as well as other "fundamental general principles

Customary law is playing an increasing role in protection of the environment. This is again reflected in the jurisprudence of the ICJ, which has affirmed not only that norms requiring protection of the environment have passed into customary law,[20] but also that states have a customary right to sovereignty over their natural resources.[21]

The ICJ has held that many rules involving freedom of the seas and rights to the world's water resources have entered the realm of customary law. These encompass, for example, freedom of navigation and a right of ships to innocent passage[22] and norms dealing with the delimitation of maritime boundaries, fishery zones, and other rights relating to waters and the seabed off the coast of a state.[23]

The Court has furthermore identified a variety of norms relating to treaties as customary law, including norms pertaining to the conclusion and entry into force of treaties,[24] their interpretation,[25] and their termination.[26] It has also identified as customary law certain rules relating to the responsibility of states for

of humanitarian law" expressed in the Geneva Conventions, as part of customary international law); *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. Rep. 226, 256–60, para. 74–87; *Wall Advisory Opinion*, 2004 I.C.J. Rep. 136, 172, para. 89 (affirming that the "Court considers that the provisions of the Hague Regulations [annexed to the Fourth Hague Convention of 1907] have become part of customary law"); *2005 Armed Activities Case (D.R.C. v. Uganda)*, para. 217, 219 (similar).

[20] See, e.g., *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. Rep. 226, 241–42, para. 29 (stating that the "existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment").

[21] See, e.g., *2005 Armed Activities Case (D.R.C. v. Uganda)*, para. 244.

[22] See, e.g., *Nicaragua Case*, Jurisdiction and Admissibility, 1984 I.C.J. Rep. 392, 424, para. 73 (asserting that the principle of "freedom of navigation" continues "to be binding as part of customary international law"); *Maritime Delimitation Case (Qatar v. Bahrain)*, 2001 I.C.J. Rep. 40, 110, para. 223 (stating that customary international law accords to ships "a right of innocent passage" in territorial seas).

[23] See, e.g., *Continental Shelf Case (Tunisia v. Libya)*, 1982 I.C.J. Rep. 18, 74, para. 100 (affirming that "the notion of historic rights or waters and that of the continental shelf are governed by distinct legal régimes in customary international law"); *Continental Shelf Case (Libya v. Malta)*, 1985 I.C.J. Rep. 13, 33, para. 34 (holding that the institution of the exclusive economic zone "is shown by the practice of States to have become a part of customary law"); *Greenland Maritime Delimitation Case*, 1993 I.C.J. Rep. 38, 58, para. 46; *Maritime Delimitation Case (Qatar v. Bahrain)*, 2001 I.C.J. Rep. 40, 91, para. 93, 167, para. 97, 174, para. 100, 185, para. 201; *2007 Territorial and Maritime Dispute Between Nicaragua and Honduras*, para. 113, 141, 265 (quoting from earlier cases discussing customary rules of maritime boundary delimitation).

[24] See, e.g., *Land and Maritime Boundary Between Cameroon and Nigeria Case*, 2002 I.C.J. Rep. 303, 429–30, para. 263–64.

[25] See, e.g., *Wall Advisory Opinion*, 2004 I.C.J. Rep. 136, 174, para. 94 ("The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.").

[26] See, e.g., *Gabčíkovo-Nagymaros Project Case*, 1997 I.C.J. Rep. 7, 38, para. 46 (affirming that "in many respects . . . the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62," codified existing customary law).

internationally wrongful acts,[27] including a rule of necessity.[28] Likewise, it has upheld the customary law rank of various procedural rules, including a rule requiring the exhaustion of local remedies before the institution of international proceedings[29] and norms dealing with forms of reparation for violations of international law.[30]

This ascending relevance of customary international law has spawned a redoubtable and growing academic literature.[31] It is also shining an unflattering light on the weaknesses and enigmas of its traditional doctrine. That doctrine is based on Article 38(1)(b) of the Statute of the International Court of Justice, which refers tersely to customary international law as "international custom, as evidence of a general practice accepted as law."[32]

In keeping with the Statute's language – or perhaps despite it – commentators generally agree on this basic definition: A customary practice among states can evolve into a customary legal norm binding on all states if 1) the practice is consistent among states and endures over some period of time, and 2) states believe that the practice is legally mandated (a belief referred to as *opinio juris sive necessitatis* or more simply as *opinio juris*).[33] In the 1985 *Continental Shelf Case (Libya v. Malta)*, the ICJ reaffirmed these elements by stating that the substance of customary international law must be "looked for primarily in the actual practice and *opinio juris* of States."[34]

The traditional definition of customary international law as consisting of the dual elements of state practice and *opinio juris* has a long pedigree. It reflects

[27] See, e.g., *Immunity of Special Rapporteur Advisory Opinion*, 1999 I.C.J. Rep. 62, 87, para. 62; *2005 Armed Activities Case (D.R.C. v. Uganda)*, para. 213–14; *2007 Genocide Convention Case*, para. 385, 398, 419–20.

[28] See *Gabčíkovo-Nagymaros Project Case*, 1997 I.C.J. Rep. 7, 40, para. 51.

[29] See, e.g., *Interhandel Case*, 1959 I.C.J. Rep. 6, 27; *Elettronica Sicula Case*, 1989 I.C.J. Rep. 15, 42, para. 50; *2007 Diallo Case*, para. 41–48.

[30] See, e.g., *Chorzów Factory Case*, 1928 P.C.I.J., 47 (referring to a principle "established by international practice and in particular by the decisions of arbitral tribunals . . . that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed"); *Wall Advisory Opinion*, 2004 I.C.J. Rep. 136, 198, para. 152 (referring to the principles set forth in the *Chorzów Factory Case*); *2005 Armed Activities Case (D.R.C. v. Uganda)*, para. 259 (similar); *2007 Genocide Convention Case*, para. 460 (similar).

[31] Representative works include Byers, *Custom, Power and the Power of Rules*; D'Amato, *The Concept of Custom in International Law*; Thirlway, *International Customary Law and Codification*; and Wolfke, *Custom in Present International Law*.

[32] I.C.J. Statute, art. 38, para. 1(b).

[33] See generally Brierly, *The Law of Nations*, 59–62. See also *Restatement (Third)*, vol. 1, sect. 102(2) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."); Higgins, *The Development of International Law*, 1–2 ("The emergence of a customary rule of law occurs where there has grown up a clear and continuous habit of performing certain actions in the conviction that they are obligatory under international law.").

[34] *Continental Shelf Case (Libya v. Malta)*, 1985 I.C.J. Rep. 13, 29–30, para. 27. See also *Nicaragua Case*, 1986 I.C.J. Rep. 14, 97, para. 183 (affirming that the Court had to "direct its attention to the practice and *opinio juris* of States").

a more general pattern of acceptance of customary law even in national legal systems.[35] A number of civil codes refer to custom as a subsidiary source of law,[36] and some of them appear to adopt a formulation similar to that in the Statute of the Court. For example, the Louisiana Civil Code states in Article 3 that "custom results from practice repeated for a long time and generally accepted as having acquired the force of law."[37]

According to the traditional definition of customary international law, there are many sources of evidence of uniform and consistent practice as well as of *opinio juris*, including diplomatic statements and correspondence, executive practices, domestic legislation, and judicial decisions.[38] The doctrine maintains that the general recognition by at least most states of a practice's obligatory character is sufficient to bind all states, even those that have not explicitly consented to the practice, including new states, unless they qualify as "persistent objectors" to the practice.[39]

Customary norms from which no deviations are allowed are considered peremptory norms, also referred to as norms of *jus cogens*.[40] These constitute a small subset of customary norms and require a high degree of consensus for their recognition. The 1969 Vienna Convention on the Law of Treaties declares that treaties that conflict with these norms are void.[41] Generally accepted examples of peremptory norms include prohibitions of the nondefensive use of force by one state against another, genocide, crimes against humanity, slavery and the slave trade, racial discrimination, torture, and piracy. They may also include affirmative rights of states to sovereignty over their natural resources and of states and peoples to self-determination.[42]

[35] See, e.g., Hart, "Commands and Authoritative Legal Reasons," 107.

[36] See, e.g., the provisions quoted in Mattei et al., *Schlesinger's Comparative Law*, 482–84. See also Mendelson, "The Subjective Element," 178–79 (mentioning the historical importance of customary law in the legal systems of Europe and other regions).

[37] Louisiana Civil Code, art. 3, Acts 1987, No. 124, sect. 1. The 1987 Revision Comments on this article state: "According to civilian theory, the two elements of custom are a long practice (*longa consuetudo*) and the conviction that the practice has the force of law (*opinio necessitatis* or *opinio juris*). The definition of custom in Article 3 reflects these two elements." See *West's Louisiana Statutes Annotated*, 12.

[38] See generally Brierly, *The Law of Nations*, 59–62; Brownlie, *Principles of Public International Law*, 6–7.

[39] On the persistent objector doctrine, see Chapter 16. On the doctrine that new states are bound by existing norms of customary international law, see, e.g., Akehurst, "Custom as a Source of International Law," 27–28.

[40] On *jus cogens* norms, see generally, among other sources cited later, Hannikainen, *Peremptory Norms;* International Law Commission, "Fragmentation of International Law," 181–92, para. 361–79; Janis, *An Introduction to International Law*, 62–67; Orakhelashvili, *Peremptory Norms; Restatement (Third)*, vol. 1, sect. 102, comment k; Sinclair, *The Vienna Convention on the Law of Treaties*, 203–41; Sztucki, *Jus Cogens*.

[41] See Vienna Convention, art. 53, 64, 71.

[42] See generally Brownlie, *Principles of Public International Law*, 510–11. The International Law Commission has indicated, "Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against

Despite the apparent clarity of the traditional definition, many legal scholars have commented on the enigmatic character of customary international law. For example, Anthony D'Amato has lamented the "tremendous amount of disagreement among scholars and publicists over the rules of customary international law" and the lack of a "consistent theory of custom."[43] Martti Koskenniemi has asserted, "[M]odern legal argument lacks a determinate, coherent concept of custom. Anything can be argued so as to be included within it as well as so as to be excluded from it."[44] Karol Wolfke has noted that even the ICJ may have tended to avoid reference to "custom" or "customary law" in its decisions and opinions because of "the notoriously controversial character of international customary law in general and the resulting division of opinions on it in the Court itself."[45] One scholar, emphasizing the pervasive subjectivity involved in determining customary international law and this plethora of competing theories, has provocatively declared that customary law no longer has any authority or legitimacy and ought to be "eliminated" as a source of international law in deference to treaties.[46]

One reason the legitimacy of the traditional doctrine has been challenged is that it raises many conceptual and practical questions. The purpose of this book is to develop a comprehensive and consistent theory of customary international law that proposes resolutions to these enigmas. In so doing, it suggests a new answer to the question, what is customary international law?

In abbreviated form, this is the novel definition advocated here: A customary international law norm arises when states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct. This belief constitutes *opinio juris*, and it is sufficient to create a customary law norm. It is not necessary in every case to satisfy a separate "consistent state practice" requirement. Rather, state practice can serve as one source of evidence that states believe that a particular authoritative legal principle or rule is desirable now or in the near future.

Moreover, in ascertaining state beliefs, it is essential to take into account certain "fundamental ethical principles" recognized in contemporary international law, defined as those principles that are endorsed in international law and are rationally related to a preeminent ethical principle of "unity in diversity." According to the principle of unity in diversity, all states and individuals form part of global communities of states and human beings that ethically should be united at the same time that they take pride in their fundamental autonomy and diversity of culture, ethnic origin, religion, and belief.

humanity and torture, and the right to self-determination." International Law Commission, *Commentaries*, 208. See also ibid., 283–84.

[43] D'Amato, *The Concept of Custom in International Law*, 5.

[44] Koskenniemi, *From Apology to Utopia*, 361–62.

[45] Wolfke, *Custom in Present International Law*, 9.

[46] Kelly, "The Twilight of Customary International Law," 540. See generally ibid., 535–43.

Subsequent chapters will flesh out this new definition, which in many ways, as we will see, constitutes a significant modification of longstanding doctrine reflected in judicial decisions and the vast scholarly literature on customary international law. In the meantime, it is helpful to sketch some of the conceptual and practical enigmas of customary international law that this definition can assist in unraveling.

1.2. CONCEPTUAL AND PRACTICAL ENIGMAS OF CUSTOMARY INTERNATIONAL LAW

As noted previously, there are many conceptual enigmas of customary international law. For example, first, is customary international law really law? Many skeptics, particularly political scientists, doubt that customary norms in fact are binding law. Moreover, what is the basis of obligation of customary international law: consent; a democratic process of lawmaking among states, in which a majority of states can bind all of them; social obligations arising from participation in a "community" of states; or ethics? How important is the existence of sanctions in establishing the obligatory character of customary international law?

Other conceptual enigmas surround the proper criteria for determining the existence of *opinio juris*. In particular, does it require a belief by states that a norm is *already* legally binding or rather that it *ought to be* legally binding? Furthermore, how can the apparent paradox of *opinio juris* be resolved? This paradox arises from the fact that under the traditional definition of *opinio juris* for a new customary rule to be recognized states must already believe that they are legally bound to observe a rule that is not yet legally binding. Thus, the definition requires, in some sense, that their belief in its legally binding character is erroneous.

Controversy also swirls around the function of the state practice requirement. Is consistent state practice truly a separate and independent requirement for the formation of a customary legal norm, or is state practice best regarded as one source of evidence of *opinio juris*? What is the effect of widespread violations of a potential norm?

Another conceptual problem is the relationship between customary international law and ethics. For example, what is the role of ethical principles in determining whether or not a norm has achieved the status of customary international law? How do we determine which ethical standards should be applied in this evaluation?

Moreover, to what extent is the process of formation of customary international law "democratic," whether measured by participation of states, nongovernmental organizations, citizens within states, or all individuals on the planet? To what extent *should* it be democratic? Finally, how does customary international law relate to general principles of law? What distinguishes each category of norms?

Alongside these broad, conceptual enigmas of customary international law, the traditional doctrine of customary law has engendered more practical enigmas. Some of these relate to the *opinio juris* test. For example, in general, what are the proper sources of evidence of *opinio juris*? In particular, what is the role of treaties in determining the existence of *opinio juris*? Should multilateral treaties and bilateral treaties be treated differently in this regard? Likewise, what is the role of United Nations (U.N.) resolutions in ascertaining *opinio juris*?

Other practical questions revolve around the state practice requirement. Thus, what state actions count as "practice"? More specifically, what role should treaties play in determining the existence of consistent state practice? Does ratification of a treaty count as state practice? What if a state is party to a treaty but ignores its obligations? In considering state practice, what weight should be given to U.N. resolutions such as the Universal Declaration of Human Rights? How long must a particular practice exist before it can ripen into a norm of customary international law?

Another category of more practical problems relates to both elements of customary international law. For example, how should the "persistent objector" exception be interpreted and applied? Does it merit being retained? What is a norm of *jus cogens* and which norms should qualify as *jus cogens* norms? What exactly is an *erga omnes* norm – traditionally understood as a norm that establishes obligations owed to all other states – and how should we determine which norms qualify as belonging in this category? How should conflicts between treaties and customary international law be resolved? How are new customary law norms created and old ones terminated? What is the role of international organizations in creating customary international law? Finally, do customary international legal norms bind international organizations?

1.3. CRITERIA FOR A NEW THEORY OF CUSTOMARY INTERNATIONAL LAW

Traditional approaches and doctrines have not provided satisfactory resolutions of these conceptual and practical problems, as I will demonstrate in the following chapters. A new theory is required. A successful theory must satisfy a variety of criteria.

First, customary international law cannot be identified or interpreted without a *normative* background framework. As many social scientists have emphasized, all interpretation involves normative assumptions in some way. The interpreter, whether consciously or unconsciously, interjects a particular normative worldview into the interpretive process.[47] For this reason, a theory of customary international law must specify as clearly as possible its normative premises. This is necessary

[47] See, e.g., Brown, *International Relations Theory*, 3 (much of so-called nonnormative international relations theory "is steeped in normative assumptions").

for the theory effectively to guide decision making about which norms qualify as customary international law and how they should be interpreted.

Second, this normative framework must provide an account of why certain norms should be treated as "authoritative" and "law." I will argue in Chapter 4 and in later chapters that unique characteristics of customary norms are that they are authoritative and that they are properly classified as law. Chapter 4 therefore explores at some length the meaning of the concept of authority, drawing on the work of various philosophers and specialists in legal philosophy.

Third, many customary norms, such as those relating to human rights and humanitarian law, are primarily ethical in character. Even those that do not appear at first blush to be ethical in nature, such as norms on economic relations, may have important ethical ramifications. A useful theory must offer an account of how ethical principles should inform the identification and interpretation of customary international law, and more importantly, specify which ethical principles should play such a role.

Fourth, a new theory should draw insights from multiple disciplines. Existing customary international law theories have been grounded primarily in traditional international law doctrine. Many other disciplines, however, including political science, sociology, philosophy, ethics, and legal theory, can shed light on how the traditional doctrine can be reformed to resolve some of the conceptual and practical enigmas that plague it.

Fifth, at the same time, a new theory of customary international law, even though ultimately normative and multidisciplinary, must take into account current legal doctrines regarding the formation and transformation of customary international law. It must give them some degree of weight and explain how they should be interpreted and reconciled. There may be good reasons for revising these existing doctrines. A theory that discards them, however, cannot be a theory of customary international law, which as a social institution is defined by them.

The theory must therefore exemplify what Ronald Dworkin has called "law as integrity." Dworkin would instruct judges to determine what the law "is" by constructing a theory that best explains, justifies, and interprets existing legal norms in a coherent and integrated fashion.[48] A new theory of customary international law must serve this kind of unifying function.

1.4. THE ORGANIZATION OF THE BOOK

The next two chapters investigate some of the conceptual and practical enigmas of customary international law in more detail and the failure of existing theories to resolve these enigmas. Parts Two, Three, and Four of the book then develop

[48] See, e.g., Dworkin, *Law's Empire*, 225–75.