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Introduction

Why Does Customary International Law Need Reexamining?

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1.1 THE INCREASING RELEVANCE OF CUSTOMARY INTERNATIONAL LAW

Customary international law has long been one of the cornerstones of the international legal order, alongside treaties. The international legal historian Arthur Nussbaum declared that customary international law "has always held a position equal or superior to treaties" "in the theory of the law of nations."[1] Hans Kelsen famously argued that customary international law provides in fact the "basic norm" of the international legal order; it is the foundation on which all international legal rules are built.[2] Thus, for example, the rules governing treaties themselves originated in customary international law, and numerous decisions of the International Court of Justice ("ICJ") have identified particular rules relating to the conclusion and entry into force of treaties, their interpretation, and their termination as rules of customary international law.[3]

The great international law theorists invoked customary international law. For example, Hugo Grotius (1583–1645), in his influential treatise, *On the Law*

[1] Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: The Macmillan Co., rev. ed. 1954), 201.

[2] See Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg (Cambridge, MA: Harvard University Press, 1945), 369. See also Nussbaum, *A Concise History of the Law of Nations*, 281 (affirming that "Kelsen attributes binding force above all to international custom," from which "the binding force of treaties is derived: *pacta sunt servanda* is in itself a customary rule").

[3] See, e.g., *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002, 2002 ICJ Rep. 303, 429–30, paras. 263–64 (on the customary law character of rules on the conclusion and entry into force of treaties); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004 ICJ Rep. 136, 174, para. 94 ("*Wall Advisory Opinion*") (on the customary law status of rules of treaty interpretation); *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, 1997 ICJ Rep. 7, 38, para. 46 (on the customary law character of rules involving the termination of treaties).

of War and Peace ("*De Jure Belli Ac Pacis*"), first published in 1625, affirmed that customary law is the essence of the "law of nations," which supplements natural law. Grotius defined the "law of nations" as "the law which has received its obligatory force from the *will of all nations, or of many nations*."[4] He went on to state that the law of nations must be found from their customs. He wrote: "The proof for the law of nations is similar to that for unwritten municipal law; it is found in *unbroken custom* and the testimony of those who are skilled in it. The law of nations, in fact, as Dio Chrysostom well observes, 'is the creation of time and custom.' And for the study of it the illustrious writers of history are of the greatest value to us."[5]

The scholastic Francisco Suárez (1548–1617), in his great work *On Laws and God as Legislator*, similarly wrote that human communities

> need a law by which they are guided and rightly ordered in respect to communication and association. To a great extent this is done by natural reason but not so sufficiently and directly everywhere. Hence, certain special rules could be established by the customs of these nations [*gentes*]. For just as in one commonwealth [*civitas*] or province [*provincia*] custom establishes law, so among the human race as a whole rules of *jus gentium* could be established by usage [*moribus*]. This is true all the more because the rules pertaining to that law are few.[6]

One of the early positivists, Richard Zouche (1590–1661), professor of civil law at Oxford University, also characterized international law – *jus inter gentes* – as "a law which has been accepted by customs conforming to reason among most nations or which has been agreed upon by single nations."[7] He minimized the importance of natural law.[8] In keeping with this view, eventually the idea of natural law was weakened beginning with the rationalism of the eighteenth century and then abandoned during the tide of positivism that swept through the legal field during the nineteenth century.[9] Positivism maintained that states were bound only by treaties and customary international law because they had exercised their positive "will" in consenting to, or otherwise participating in the formation of, both forms of law.

4 Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, translated by Francis W. Kelsey (New York: Oceana; London: Wildy & Sons, 1964), book 1, chap. 1, ¶ 14, 44 (emphasis added).
5 Ibid. (emphasis added).
6 Francisco Suárez, *De legibus ac Deo legislatore* (1612), in *Selections from Three Works of Suárez*, translated by J.B. Scott (1944), vol. II., 19, § 9, quoted in Nussbaum, *A Concise History of the Law of Nations*, 87–88.
7 Quoted in Nussbaum, *A Concise History of the Law of Nations*, 167.
8 See ibid.
9 See, e.g., ibid., 135, 164–85.

Positivism still holds sway today. And because it endorses customary international law, customary law lives on in the twenty-first century, as vital as ever. Customary international law has been recognized in the Statute of the ICJ as one of the three primary sources of international law to be applied by the Court, alongside treaties and general principles of law.[10]

In keeping with this foundational status, many judicial decisions at both the international and national levels have identified and applied rules of customary international law. These rules have ranged across a vast legal terrain, addressing subjects as diverse as states' right to sovereignty, sovereign immunity and diplomatic relations among states, states' responsibility for international law violations, their rights to natural resources, the law of the sea, international environmental law, the law of international armed conflict, international criminal law, and human rights.

For example, the ICJ and its predecessor, the Permanent Court of International Justice ("PCIJ"), have held that states have a fundamental right to sovereignty under customary international law; indeed, state sovereignty has long been acknowledged as a foundational customary principle of the current global legal order.[11] In keeping with this principle, the ICJ has ruled that states have sovereignty over their natural resources.[12] Moreover, the Court has recognized the customary law right of states to immunity from lawsuits by other states.[13] It has, furthermore, identified many rules involving diplomatic privileges and immunities[14] and diplomatic protection[15] as customary law. At the same time, it has recognized the customary law status of norms relating to the responsibility of states for their wrongful acts.[16]

[10] See Statute of the International Court of Justice ("ICJ Statute"), art. 38(1).

[11] See, e.g., *Case of the S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, PCIJ Series A, No. 10, 18 (stating that the "rules of law binding upon States … emanate from their own free will"). See also James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 8th ed. 2012), 5.

[12] See, e.g., *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, 2005 ICJ Rep. 168, 251–52, para. 244 ("*2005 Armed Activities Case (Congo v. Uganda)*").

[13] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, 2012 ICJ Rep. 99, 123, para. 56.

[14] See, e.g., *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, 1980 ICJ Rep. 3, 30–31, para. 62; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, 2002 ICJ Rep. 3, 20–22, paras. 51–55 (affirming that the provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations regarding diplomatic immunity reflect customary international law).

[15] See, e.g., *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, 2007 ICJ Rep. 582, 599, para. 39.

[16] See, e.g., *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, 1999 ICJ Rep. 62, 87, para. 62;

The law of the sea originated as customary law, and international tribunals have issued many decisions identifying particular rules of the law of the sea as customary in nature. These include the freedom of all states to navigate on the high seas as well as a right of ships flying the flag of one state to pass innocently through the territorial waters of another.[17] They also include rules on delimiting maritime boundaries and fishery zones, and rules establishing rights to use the waters and the seabed adjoining the coast of a state.[18] Courts are more frequently recognizing norms of environmental law as customary rules.[19]

The ICJ has identified many norms of the law of armed conflict as having customary law status, including the rule that one state may not use armed force in the territory of another except in self-defense or as authorized by the United Nations Security Council,[20] and the rule that a state may not lawfully acquire territory by war.[21] The ICJ has affirmed a broader customary rule that one state

2005 *Armed Activities Case (Congo v. Uganda)*, 242, paras. 213–14; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, 2007 ICJ Rep. 43, 202, para. 385, 207–08, para. 398, 216–17, paras. 419–20 ("*2007 Genocide Convention Case*").

17 See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, 1984 ICJ 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 and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment of 16 March 2001, 2001 ICJ Rep. 40, 110, para. 223 (customary international law accords to ships "the right of innocent passage") ("*Maritime Delimitation Case (Qatar v. Bahrain)*").

18 See, e.g., *Continental Shelf Case (Tunisia v. Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, 1982 ICJ Rep. 18, 74, para. 100 ("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 (Libyan Arab Jamahiriya v. Malta)*, Judgment of 3 June 1985, 1985 ICJ Rep. 13, 33, para. 34 (holding that the exclusive economic zone "is shown by the practice of States to have become a part of customary law"); *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment of 14 June 1993, 1993 ICJ Rep. 38, 58, para. 46; *Maritime Delimitation Case (Qatar v. Bahrain)*, 2001 ICJ Rep. 40, 91, para. 167, 93, para. 174, 97, paras. 183, 185, 100, para. 201; *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, 2007 ICJ Rep. 659, 696, para. 113, 703, para. 141, 739–40, para. 265 (quoting from earlier cases discussing customary rules of maritime boundary delimitation).

19 See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 226, 241–42, para. 29 ("*Nuclear Weapons Advisory Opinion*") (affirming 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").

20 See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14, 98–101, paras. 187–90 ("*Nicaragua Case*"); *Wall Advisory Opinion*, 171, para. 87.

21 See *Wall Advisory Opinion*, 166, para. 74, 171, para. 87, 182, para. 117.

may not intervene in the affairs of another[22] and may not lend aid to subversive activities whose purpose is to topple the government of another state.[23]

At the same time, the ICJ has identified as customary law the right of states to use armed force in self-defense against armed attacks by other states,[24] and rules mandating that any such defensive measures be both necessary and proportional to the scope of the attack.[25] Similarly, the ICJ has recognized particular norms developed to govern hostilities as customary norms, such as the law of occupation[26] and the law of neutrality.[27] The ICJ has also recognized as a customary norm the principle that states should settle their disputes peacefully and without recourse to war.[28]

Furthermore, the ICJ has determined that many rules of international humanitarian law aimed at reducing the loss of life or harm to noncombatants in both international and noninternational armed conflicts have attained the status of customary international law.[29] In this connection, the International Committee of the Red Cross ("ICRC") has undertaken a massive study of customary rules of international humanitarian law[30] – a study analyzed in

[22] See, e.g., *Nicaragua Case*, 126, para. 246 ("the principle of non-intervention derives from customary international law").

[23] See, e.g., ibid., 108, para. 206; *2005 Armed Activities Case (Congo v. Uganda)*, 226–27, para. 162.

[24] See *Nicaragua Case*, 94, para. 176 (holding that the "right of self-defence" is "of a customary nature" and asserting that Article 51 of the UN Charter, which refers to states' "inherent right" to self-defense, constitutes a recognition of this preexisting customary norm). See also *Oil Platforms Case (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, 2003 ICJ Rep. 161, 186–87, para. 51 (reiterating the requirement of an "armed attack" to justify the exercise of self-defense under customary international law).

[25] See, e.g., *Nicaragua Case*, 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*, 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*, 187, para. 51 (similar).

[26] See, e.g., *Wall Advisory Opinion*, 167, para. 78.

[27] See *Nuclear Weapons Advisory Opinion*, 256, para. 74, 260–61, paras. 88–89.

[28] See *Nicaragua Case*, 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").

[29] See, e.g., ibid., 113–14, para. 218 (treating the rules in common Article 3 of the Geneva Conventions, as well as other "fundamental general principles of humanitarian law" appearing in the Geneva Conventions, as part of customary international law); *Nuclear Weapons Advisory Opinion*, 256–60, paras. 74–87; *Wall Advisory Opinion*, 172, para. 89 (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 (Congo v. Uganda)*, 243–44, paras. 217–19 (similar).

[30] See *Customary International Humanitarian Law*, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2 vols., Vol. I: Rules, Vol. II: Practice (2 Parts) (Cambridge: Cambridge University Press and ICRC, 2005).

detail by two of the contributors to this volume. The ICJ, and many other courts, have upheld the customary law character of the prohibition of genocide, reflected in such treaties as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[31]

Many courts have recognized that serious war crimes are prohibited by customary law and that customary law now permits and sometimes requires their prosecution by states. In this connection, the statutes of international criminal tribunals, including those of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the International Criminal Court ("ICC"), refer to customary international law in their definitions of the crimes over which the tribunals have jurisdiction.[32] And, as discussed by some of the contributors to this volume, decisions of these tribunals often refer to customary international law.[33]

Moreover, the ICJ and other tribunals are increasingly recognizing a wide range of human rights as protected by norms of customary law and not only human rights treaties. For example, the ICJ has suggested that "the basic rights of the human person, including protection from slavery and racial discrimination" have risen to the level of customary international law.[34]

Alongside the recognition by international tribunals and organizations of this sweeping array of norms as having attained the status of customary law, national legal systems are now giving greater prominence to customary international law. Many national judicial decisions are applying it and affirming that particular norms are customary in character and binding internally.

For example, a number of state constitutions specifically incorporate customary international law into the national legal system in some way. Thus, the Constitution of South Africa provides in Section 232 that "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."[35]

[31] See, e.g., *Armed Activities on the Territory of the Congo (New Application: 2012) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, 2006 ICJ Rep. 6, 31–32, para. 64; *2007 Genocide Convention Case*, 110–11, para. 161; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Judgment of 3 February 2015, para. 87.

[32] See, e.g., Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, art. 8(2)(b).

[33] See, for example, the decisions discussed in Noora Arajärvi, "From the 'Demands of Humanity': The Formulation of *Opinio Juris* in Decisions of International Criminal Tribunals and the Need for a Renewed Emphasis on State Practice," in this volume.

[34] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970, 1970 ICJ Rep. 3, 32, para. 34 ("*Barcelona Traction Case*").

[35] Constitution of South Africa, sec. 232, available at http://www.gov.za/documents/constitution-republic-south-africa-1996-chapter-14-general-provisions#232. See also *Kaunda v. President of*

Even in the absence of an explicit constitutional provision, many national courts have ruled or implied that customary international law plays some role in their domestic legal systems. For example, the High Court of Australia has implied that customary international law may influence the development of the common law of Australia.[36] The Supreme Court of Canada has affirmed that "following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation."[37] The Supreme Court of India has declared that "it is almost [an] accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law."[38] The Supreme Court of Israel has repeatedly affirmed that customary international law is part of Israeli law. Thus, it has stated that the provisions of Geneva Convention IV, which relates to the protection of civilians in armed conflict, that have entered customary international law "constitute a part of the law of the State of Israel" and asserted that Israeli armed forces must comply with them.[39] The former UK House of Lords has generally endorsed the proposition that customary international law is part of the law of England and Wales.[40]

U.S. courts have made similar pronouncements. In the famous 1900 case of *The Paquete Habana*, the U.S. Supreme Court affirmed that "[customary] international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[41] And the United States has a federal statute, on the books since 1789 and known as the "Alien Tort Claims Act" ("ATCA"), that establishes original district court jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[42] U.S. courts have interpreted the phrase "law of nations" as a synonym for "customary international law." Many cases have been decided under this statute involving claims

the Republic of South Africa, Case CCT 23/04 (4 August 2004), para. 23 (Constitutional Court of South Africa quoted this provision).

[36] See, e.g., *Mabo v. Queensland (No. 2)*, [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992), para. 42.

[37] *R v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26 (7 June 2007), para. 39. See also ibid., para. 53.

[38] *People's Union for Civil Liberties (PUCL) v. The Union of India*, [1997] 1 SCC 301 (18 December 1996).

[39] *Physicians for Human Rights v. Prime Minister of Israel*, HCJ 201/09, [2009] IsrLR 1 (19 January 2009), para. 15. See also *Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 (13 December 2006), para. 19 (similar).

[40] See *R. v. Jones*, [2006] UKHL 16 (29 March 2006), paras. 11–23.

[41] 175 U.S. 677 (1900), 700.

[42] 28 U.S.C. § 1350.

by non-U.S. citizens that their rights protected by customary international have been violated. U.S. courts have delved into the question of whether particular norms have attained the status of customary international law and thus whether their violation is a "tort" committed in violation of customary international law.[43]

Various national courts have also held that domestic statutes should be interpreted, if possible, to be consistent with customary international law. For example, the High Court of Australia has asserted that Australian courts should favor an interpretation of a statute that is in keeping with international law, including customary international law.[44] The Israeli Supreme Court has similarly affirmed that "an Israeli act of legislation should be interpreted in a manner that is consistent, in so far as possible, with the norms of international law to which the State of Israel is committed."[45] The Supreme Court of New Zealand has declared that statutory rights and powers "are to be exercised, if the wording will permit, so as to be in accordance with international law, both customary and treaty based."[46] The Competition Appeal Court of South Africa has said that in light of sections 232 and 233 of the South Africa Constitution, courts are required to prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[47] And the U.S. Supreme Court has affirmed that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[48]

1.2 THE TRADITIONAL DOCTRINE OF CUSTOMARY INTERNATIONAL LAW

This brief review of judicial decisions clearly demonstrates that customary international law is increasingly relevant in the global legal order. But just what

[43] See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980) (holding torture to be prohibited by customary international law); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (establishing standards that a norm of customary international law must meet for a case to be actionable under the ATCA); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___, 133 S.Ct. 1659 (2013), 1669 (holding that the ATCA has no extraterritorial application, and thus that it should not grant jurisdiction for lawsuits for torts committed outside the U.S that did not "touch and concern" the territory of the U.S.).

[44] *Behrooz v. Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*, [2004] HCA 36 (6 August 2004), para. 127.

[45] *A v. State of Israel* (11 June 2008), para. 9.

[46] *Attorney-General v. Zaoui*, [2005] NZSC 38 (21 June 2005), para, 90.

[47] *American Soda Ash Corp. v. Competition Commission of South Africa*, Competition Appeal Court of South Africa, Case No. 12/CAC/DEC01, [2003] ZACAC 6 (30 October 2003), para. 15.

[48] *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804), 118.

is customary international law? The traditional doctrine seems to provide a straightforward definition: Customary international law results from the confluence of two elements: (1) a practice among states that is relatively consistent (and thus a "custom"), and (2) a belief by the states engaging in the practice that it is legally required or permitted. The first element is often referred to as the "consistent state practice" requirement, and the second element as the requirement of "*opinio juris sive necessitatis*," or more briefly, "*opinio juris*."

The ICJ has, in a number of decisions, identified these two requirements of consistent state practice and *opinio juris*. Thus, in the 1985 *Continental Shelf Case (Libyan Arab Jamahiriya v. Malta)*, the ICJ announced that the substance of customary international law must be "looked for primarily in the actual practice and *opinio juris* of States."[49] In the 1969 *North Sea Continental Shelf Cases*, the ICJ affirmed:

> Not only must the acts concerned [constituting state practice] amount to a *settled* practice, but they must also be such, or be carried out in such a way, as to be *evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it*. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must *therefore feel that they are conforming to what amounts to a legal obligation*.[50]

In its 2012 *Jurisdictional Immunities of the State* judgment, the ICJ reiterated that "the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*."[51] These statements of the Court at least enjoy significant persuasive authority regarding the foundational elements of customary international law.[52]

Many scholars and practitioners of international law have confirmed the "two element" test for customary international law.[53] For example, Michael Wood,

[49] *Continental Shelf Case (Libyan Arab Jamahiriya v. Malta)*, 29, para. 27.

[50] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment of 20 February 1969, 1969 ICJ Rep. 3, 44, para. 77 (emphasis added).

[51] *Jurisdictional Immunities of the State (Germany v. Italy)*, 122, para. 55.

[52] The 2016 draft conclusions of the ILC similarly suggest that pronouncements of the ICJ relating to customary international law deserve to be given significant weight. The draft conclusions indicate in particular that decisions of international courts and tribunals, and particularly of the ICJ, "concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules." "Report of the International Law Commission," Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016), UN Doc. A/71/10 (2016), 76–79, Draft Conclusion 13, para. 1.

[53] In addition to the authorities discussed in the text, see, e.g., Restatement (Third) of the Foreign Relations Law of the United States, § 102(2) ("Customary international law results from a

in his second report presented in 2014 to the International Law Commission ("ILC") as Special Rapporteur on the topic "Identification of customary international law," reaffirmed the merits of the two-element test.[54] The draft conclusions adopted in 2016 by the Commission furthermore endorse this two-element requirement. Draft Conclusion 2 states: "To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)."[55] Draft Conclusion 3 goes on to affirm that both elements are necessary to prove and should not be amalgamated, affirming: "Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element."[56] Yet it also recognizes a certain flexibility in the process of evaluating evidence of both elements, stating: "In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found."[57]

Furthermore, customary law is generally accepted as binding all states, with or without their explicit consent. However, traditional doctrine maintains that those states that persistently object to an emerging customary norm, beginning with the time of its initial articulation, are not bound by it. This exception has become known as the "persistent objector" doctrine.[58] The 2016 draft conclusions of the ILC reaffirm this doctrine, declaring: "Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection."[59] The draft conclusions reiterate the

general and consistent practice of states followed by them from a sense of legal obligation"); Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (London: Oxford University Press, 1963), 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.").

54 See Michael Wood, Special Rapporteur, "Second Report on Identification of Customary International Law," 65, Draft Conclusion 3; ibid., paras. 21–31.

55 "Report of the International Law Commission," Sixty-Eighth Session, Draft Conclusion 2.

56 Ibid., Draft Conclusion 3, para. 2.

57 Ibid., para. 1.

58 On the persistent objector doctrine, see, e.g., Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (New York: Cambridge University Press, 2010), 229–42; Jonathon I. Charney, "The Persistent Objector Rule and the Development of Customary International Law," 56 *British Yearbook of International Law* 1 (1985); Restatement (Third), § 102, comment b ("A principle of customary law is not binding on a state that declares its dissent from the principle during its development."); ibid., comment d (elaborating on the persistent objector exception).

59 "Report of the International Law Commission," Sixty-Eighth Session, Draft Conclusion 15, para. 1.