

# The Dominance of the International Court of Justice in the Creation of Customary International Law

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## Abstract

In this Article, I seek to challenge the rationale and justification for the ICJ's undue influence over the identification of customary law. Although the Court is prescribed a subsidiary role for the determination of law in Article 38 (1)(d) of the ICJ Statute, it is apparent that the ICJ's influence has manifested beyond its envisioned subsidiary role and instead encompassing a dominant role in creating custom. The Court, which no longer content to determine the substance of customary law, has expanded its role by entering the realms of law creation. This is problematic as the ICJ seems to create customary law without reference to state practice or state consent. Without these two fundamental elements to ground custom with legal basis, the ICJ seems to invent custom at its own convenience. In doing so, the Court is creating a legal fiction, declaring customary law where there is no custom to be found.

## Introduction

Customary international law is enshrined as a source of law under Article 38(1)(b) ICJ Statute,<sup>1</sup> where it is defined as “evidence of a general practice accepted as law.”<sup>2</sup> Yet, the clarity of this text is questionable when the drafters of the statute themselves, “had no very clear idea as to what constituted international custom.”<sup>3</sup> The issue in seeking to define customary law, as Kammerhofer states, is that there is “no ‘authoritative text’, which has an inherent ‘thereness’ and whose meaning need only be ‘extracted.’”<sup>4</sup> The unwritten nature of customary law has made its content inherently insecure.<sup>5</sup> This absence of an authoritative text has resulted in a reliance on the International Court of Justice’s (ICJ) interpretation of Article 38 of the ICJ Statute.<sup>6</sup> As Cassese asserts, “given the rudimentary character of international law... many decisions of the most authoritative courts, in particular the

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<sup>1</sup> Statute of the International Court of Justice (1945) 3 Bevens 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215

<sup>2</sup> *Ibid.*, at Article 38 (1)(b)

<sup>3</sup> International Law Commission, *Yearbook of the International Law Commission 1950*, vol. I, p. 6, at para. 45. (quoting Manley O. Hudson)

<sup>4</sup> J. Kammerhofer, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems’ (2004) 15 EJIL, p. 524.

<sup>5</sup> A. Roberts, ‘Traditional and Modern Approaches to Customary International Law’ (2001) 95 AJIL 757, p. 767.

<sup>6</sup> ICJ Statute [n1] at Article 38

International Court of Justice, are bound to have crucial importance in establishing the existence of customary rules, or in defining their scope and content.”<sup>7</sup> However, I would question whether this reliance on the ICJ is justified given that international law lacks a central law-making body. Indeed, in referring to international law as “rudimentary” in character, Cassese notes that the international legal system lacks a “central judicial institution endowed with compulsory jurisdiction.”<sup>8</sup>

Hence, this Article seeks to argue that the lack of certainty in the creation of customary law has allowed the Court an unprecedented degree of influence in creating customary international law.<sup>9</sup> The jurisprudence of the ICJ provides evidence that the Court has entered the realms of law creation, when “it is not the court’s role to develop law.”<sup>10</sup> Given that Article 38 (1)(d) of the ICJ Statute prescribes to the Court a limited scope to serve as a “subsidiary means for the determination of rules of law,” it would appear that the ICJ is acting outside its ambit.<sup>11</sup> Thus, I submit that the legitimacy of customary international law is questioned when the ICJ jurisprudence demonstrates “a marked tendency to assert the existence of a customary rule more than to prove it.”<sup>12</sup> Without grounding custom in legal foundations, issues of credibility and compliance arise, since custom is meant to develop through the practice of states, with the consent of states. As Lord Hoffman describes, international law “is based upon the common consent of nations.”<sup>13</sup> Without such consensus, custom cannot function within the broader architecture of international law.

In order to question the actions of the ICJ, the article begins with outlining the function of the Court and its influence in finding customary international law. Secondly, in needing to ground custom with legitimacy and compliance, the necessity of state practice is emphasised for custom to be found. Thirdly, given the ICJ’s detraction from the requirement of state practice, it is discussed that the Court seems no longer content to merely identify custom, but rather creates judge-driven customs. Lastly, the justifications underlying this reinvention of customary law under the ICJ’s direction is examined. This article concludes that the ICJ has moved too far away from the original conception of customary law, acting with too much leniency regardless of legal basis.

## **I. The Function and Influence of the ICJ**

### **A. Subsidiary role**

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<sup>7</sup> A. Cassese, *International Law* (OUP, 2005) p. 194-5.

<sup>8</sup> *Ibid*

<sup>9</sup> A. Alvarez-Jiménez, “Methods for the identification of Customary International Law in the International Court of Justice’s Jurisprudence: 2000–2009” (2011) 60 ICLQ, p. 685.

<sup>10</sup> M. Wood, Special Rapporteur, First Report on Identification of Customary International Law, International Law Commission, Sixty-sixth session, A/CN.4/672, May 2014, p. 21.

<sup>11</sup> ICJ Statute [n1] at Article 38 (1)(d)

<sup>12</sup> A. Pellet, “Shaping the Future of International Law: The Role of the World Court in Law Making”, in M. H. Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers, 2011), 1065, p. 1076.

<sup>13</sup> *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya; Mitchell and others v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* [2006] UKHL 26, at para. 63

As the ICJ itself described in *Bosnian Genocide*, “the Court’s function, according to Art. 38 of its Statute, is to ‘decide’, that is, to bring to an end ‘disputes as are submitted to it.’”<sup>14</sup> Hence, the Court’s function in relation to customary international law is to identify and apply customary rules on the cases before it.<sup>15</sup> Under Article 38(1)(d) of the ICJ Statute, judicial decisions of international courts are described as “subsidiary means for the determination of rules of law.”<sup>16</sup> The subsidiary nature of the ICJ’s judicial decisions is further vindicated under Article 59 of the ICJ Statute, which limits the impact of the Court’s decisions as holding that “no binding force except between the parties and in respect of that particular case.”<sup>17</sup> This serves as a reminder that the ICJ holds no general competence, since the Court’s verdicts are not meant to create formal precedents and the ICJ may only act on cases which appears before it.<sup>18</sup>

However, in practice the formulation of Article 38(1)(d) of the ICJ Statute<sup>19</sup> “underestimates the role of decisions of international courts.”<sup>20</sup> The ICJ’s influence in the creation of customary international law has grown and this is reflected in the dicta of the judgements. In *Fisheries Jurisdiction*, the Court specified that its role was to ascertain the existence of rules of customary international law, and that it was outside the Court’s ambit to create them.<sup>21</sup> The ICJ subsequently expanded its role in contributing to the formation of customary international law in *Nuclear Weapons Advisory Opinion*.<sup>22</sup> Here the Court observed: “In stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.”<sup>23</sup> Therefore, the Court has widened its function and in doing so has made itself an important actor in the creation of customary law.

The prescription of a subsidiary role to judicial decisions indicates that the sole function of the judgements and opinions of the ICJ are to act as evidence of customary rules.<sup>24</sup> However, this subsidiary role has been elevated into treatment of the ICJ judgements as primary sources of law. Thus, ICJ’s judicial decisions have gone beyond their evidential value and are treated as an “authoritative pronouncements of the current state of international law.”<sup>25</sup> To advance Kopelmanas’ opinion, the creation of new customary international law through the actions of international judges is “an incontestable positive fact.”<sup>26</sup> For instance, in 1950 the International Law Commission (ILC) listed the decisions of international

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<sup>14</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina/Serbia and Montenegro]*, Merits, ICJ Reports [2007] p. 43, at para. 116.

<sup>15</sup> M. Wood, First Report on Identification of Customary International law [n10] at para 54.

<sup>16</sup> ICJ Statute [n1] at Article 38(1)(d)

<sup>17</sup> *Ibid.*, at Article 59

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* at Article 38

<sup>20</sup> R. Bernhardt, ‘Custom and Treaty in the Law of the Sea’, 205 *Recueil des Cours* (1987) p. 270.

<sup>21</sup> *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)* I.C.J., 1973 I.C.J. 3

<sup>22</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, 18.

<sup>23</sup> *Ibid.*

<sup>24</sup> K. Wolfke, *Custom in Present International Law*, 2nd edition (Martinus Nijhoff Publishers, 1993), p.145.

<sup>25</sup> R. Higgins, *Problems and Process: International Law and How We Use it* (Clarendon Press, 2002), p. 202.

<sup>26</sup> L. Kopelmanas, ‘Custom as a Means of the Creation of International Law’, *British Yearbook of International Law*, 18 (1937), 127, p. 142.

courts as a primary source of customary law, conflicting with the wording of Article 38(1)(d) of the ICJ Statute.<sup>27</sup> As observed, “Article 24 of the Statute of the Commission [ILC] seems to depart from the classification in Article 38 of the Statute of the Court.”<sup>28</sup> To place such importance on the judgements of the ICJ expands the role of the Court beyond its intended role of applying existing law. It creates the impression that the ICJ has the capability to create new rules of customary law.

## B. Creators of Custom

Indeed, the ICJ has a prominent role in determining the creation of customary international law. Indeed, whilst interpreting Article 38(1)(b) of the ICJ Statute<sup>29</sup> in the *North Sea Continental Shelf* cases, where court was asked to decide on the delamination of the continental shelf between Germany and Denmark on the one hand, and Germany and the Netherlands on the other, the Court was responsible for creating the criteria for identifying customary law.<sup>30</sup> Here, the Court held that two conditions must be fulfilled: “not only must the acts concerned 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.”<sup>31</sup> Thus, the creation of customary law depends on two elements: a widespread and consistent practice from the States and a subjective element known as *opinio juris sive necessitates*.<sup>32</sup> The function of *opinio juris* is to determine that the relevant practice is motivated by legal obligation, rather than considerations of “courtesy, good-neighbourliness and political expediency.”<sup>33</sup> This is the “criteria which [the ICJ] has repeatedly laid down for identifying a rule of customary international law.”<sup>34</sup> These conditions must be met, “for the birth of an international custom.”<sup>35</sup> Hence, the Court is largely accountable for defining customary international law.

However, in allowing the ICJ such a pivotal role in the creation of customary law there is a danger of creating international law which is judge-made.<sup>36</sup> When the ICJ’s jurisprudence is assessed, it seems apparent that the Court has disregarded its own formula for finding customary law, despite the fact that the ICJ puts emphasis on the need for settled state practice and *opinio juris* as the “cornerstones of custom...it

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<sup>27</sup> International Law Commission, “Report of the International Law Commission to the General Assembly (Part II): Ways and Means of Making the Evidence of Customary International Law More Readily Available,” [1950] 2 Y.B. Int’l L. Comm’n 367, ILC Doc. A/1316, p. 367; ICJ Statute [n1] at Article 38(1)(d)

<sup>28</sup> *Ibid.*, at p. 368

<sup>29</sup> ICJ Statute [n1] at Article 38(1)(b)

<sup>30</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* [1969] ICJ Rep 3.

<sup>31</sup> *Ibid.*, at para 77.

<sup>32</sup> H. Thirlway, “The Sources of International Law”, in M. D. Evans (ed.), *International Law*, 3rd edition (Oxford University Press, 2010) p. 102

<sup>33</sup> *Asylum (Colombia/Peru)*, I.C.J. Reports 1950, p. 266, at paras 285-6.

<sup>34</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, 122, at para. 55

<sup>35</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)* [n21] at p. 47 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda).

<sup>36</sup> H. Thirlway, ‘The Law and Procedure of the International Court of Justice 1960–1989’, *British Yearbook of International Law* (2005) 76 (1) p. 116.

does not observe its own precept.”<sup>37</sup> In particular, it appears that the treatment to state practice by the ICJ is incoherent. As I shall demonstrate, case law suggests that existing state practice is disregarded in case law, with a lack of justification for doing so.<sup>38</sup> To endorse the stance promoted by Thirlway, there is a “tendency of the court to follow and apply earlier decisions rather than to investigate the practice of states supposedly creative of custom.”<sup>39</sup> This posture is particularly apt in describing maritime delimitation law, where an array of cases can be seen as “judge-made law rather than customary law.”<sup>40</sup>

In the *Gulf of Maine*,<sup>41</sup> for example, the Court focused on the Third United Nations Conference on the Law of the Sea rather than investigating existing state practice. This approach was problematic, given that the treaty adopted by the conference, the United Nations Convention on the Law of the Sea (UNCLOS),<sup>42</sup> was not yet in force.<sup>43</sup> It was known at the time of the judgement that several states, including the US, would not become a party to UNCLOS.<sup>44</sup> In fact, only thirteen states were party to the Convention at the time of the judgement – a significantly lower number than the sixty ratifications required to enter it into force.<sup>45</sup> The low number of signatories at the time indicated that the treaty could not convincingly be held as reflecting the general practice of states. Therefore, it would not be an overstatement to submit that the Court’s openly proclaimed standards were “quite different from how the Court really proceeds.”<sup>46</sup>

This absence of state practice is a reoccurring feature in the ICJ judgements concerning maritime delimitation. As seen in *Continental Shelf*, the ICJ did not refer to existing state practice which was evident in the announcements of exclusive economic zones made by numerous states.<sup>47</sup> Instead, the Court relied on the Convention on the Continental Shelf<sup>48</sup> and on the drafting history of the UNCLOS to justify the finding of customary law.<sup>49</sup> As I have suggested, the Court’s reliance on the UNCLOS over existing state practice is troubling given its low level of ratification.<sup>50</sup> Yet, as seen in the maritime case between *Denmark v Norway*,<sup>51</sup> the Court has persisted in relying on the provisions of UNCLOS, despite acknowledging that the

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<sup>37</sup> R. H. Geiger, ‘Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal’, in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011), 673, p. 692.

<sup>38</sup> A. M. Weisburd, ‘The International Court of Justice and the Concept of State Practice’ (2009) UNC Legal Studies Research Paper No. 1282684. p. 295.

<sup>39</sup> H. Thirlway, *The Law and Procedure of the International Court of Justice* [n36]

<sup>40</sup> *Ibid.*

<sup>41</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246

<sup>42</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397

<sup>43</sup> *Gulf of Maine Case* [n41] at p. 294.

<sup>44</sup> U.S. Votes Against Law of the Sea Treaty (1982) 82 DEP’T ST. BULL. 71, p. 71 (quoting U.S. President Ronald Reagan)

<sup>45</sup> UNCLOS [n42] at Article 308.

<sup>46</sup> R. H. Geiger, *Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal* [n37] at p. 674

<sup>47</sup> *Continental Shelf Case (Libya v. Malta)*, 1985 I.C.J. 3

<sup>48</sup> Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311

<sup>49</sup> *Continental Shelf Case (Libya v. Malta)* [n47] at para 48.

<sup>50</sup> A. M. Weisburd, *The International Court of Justice and the Concept of State Practice* [n38] at p. 314.

<sup>51</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.)*, 1993 I.C.J. 38

treaty had yet to entered into force.<sup>52</sup> Given the various proclamations by States of exclusive economic zones at the time, it seems evident that the Court decided to ignore evidence of state practice.<sup>53</sup> Rather, the ICJ preferred to cite its own decision in *Continental Shelf* to support its finding.<sup>54</sup>

In attempting to recycle its own case law, the ICJ certainly seems to be endorsing the impression that the Court is “relying on precedent rather than repeatedly engaging in detailed analysis of the customary status [of every case].”<sup>55</sup> This lack of detailed analysis is seen in *Icelandic Fisheries*,<sup>56</sup> where the Court failed to consider examples of state practice. Therefore, I would submit that the Court, by ignoring extensive state practice, fails to support its own finding of customary law on the strongest evidence of custom. It seems unsurprising that this approach of the ICJ has been harshly criticised. To advance Boyle and Chinkin’s position, the ICJ’s “failure to act consistently with its own asserted methodology undermines the legitimacy of judicial decision-making, and the content of the espoused customary laws.”<sup>57</sup>

The legitimacy of the ICJ’s decision-making process is certainly called into question given its inconsistent approach towards the creation of customary law.<sup>58</sup> As the ICJ acknowledged in *Nicaragua*,<sup>59</sup> the Court is “bound...by Article 38 of its Statute to apply, inter alia, international custom ‘as evidence of a general practice accepted as law’, the Court may not disregard the essential role played by general practice.”<sup>60</sup> However, there is evidence to suggest that this recognition of the “essential role played by general practice” is only accepted on a superficial level.<sup>61</sup> For instance, principles of non-intervention are upheld to customary status, even when the Court itself acknowledge that occurrences of trespass in violation of these principles “are not infrequent.”<sup>62</sup> Hence, the conclusion reached in *Nicaragua* seems dubious, given the frequency of States acting in violation of these international rules.<sup>63</sup> Such evidence of contrary practice, “challenges the basic premise of customary law” which bases itself around conforming state practice.<sup>64</sup>

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<sup>52</sup> *Ibid.*, at para 59.

<sup>53</sup> R. W. Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (Martinus Nijhoff Publishers, 1986) p. 28 – 40.

<sup>54</sup> *Continental Shelf Case (Libya v. Malta)* [n47]

<sup>55</sup> T. Meron, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches* (Oxford University Press, 2011), p. 31.

<sup>56</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)* [n21] at p. 3.

<sup>57</sup> A. Boyle, & C. Chinkin, *The Making of International Law* (OUP, 2007), p. 280.

<sup>58</sup> B. Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff Publishers, 2010), p. 71-86.

<sup>59</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14

<sup>60</sup> *Nicaragua* [n59] at p. 97-98, para. 184

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, at p. 106, para. 202

<sup>63</sup> J. Wouters and C. Ryngaert, “Impact on the Process of the Formation of Customary International Law” in M. Kamminga and M. Scheinin, eds. *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009) p. 5.

<sup>64</sup> O. Schachter, ‘New Custom: Power, *Opinio Juris* and Contrary Practice’, in J. Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century, Essays in Honour of K. Skubiszewski* (The Hague/London/Boston: Kluwer Law International, 1996) 531, p. 538.

Moreover, whilst the President of the ICJ claimed that the Court is “firmly rooted in the wording of the Statute...that ‘the existence of a rule of customary international law requires that there be a ‘settled practice’ together with *opinio juris*”,<sup>65</sup> this claim seems as a mere assertion which fails to accurately reflect the practice of the ICJ. As evident in the jurisprudence, the requirement of state practice has been marginalised to a great extent. The refrainment of the ICJ from thoroughly analysing the two separate requirements, namely the roles of state practice and *opinio juris*, has blurred the Court’s treatment to customary law.<sup>66</sup> This erosion of the traditional requirements of customary law, as defined in the *North Sea Continental Shelf* cases, has resulted in a change in the creation of customary law.<sup>67</sup> As Jennings recognises, “most of what we perversely persist in calling customary international law is not only not customary law; it does not even faintly resemble a customary law.”<sup>68</sup>

### C. Judge-made Law

It seems apparent, then, that the ICJ is no longer performing its “normal function of assessing the various elements of State practice and legal opinion.”<sup>69</sup> After abandoning its methodology in the *North Sea Continental Shelf* cases,<sup>70</sup> the ICJ has begun a practice of declaring customary international law without the need for detailed analysis.<sup>71</sup> In *Gabčíkovo-Nagymaros Project*,<sup>72</sup> the Court simply quoted the ILC Report, which found succession of states do not effect treaties of territorial character, the Court made no reference to the ILC’s analysis of state practice supporting this proposition.<sup>73</sup> Rather than analysing state practice, the ICJ invoked the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.<sup>74</sup> This reliance on the Watercourses Convention lacked justification, since it had only been adopted less than four months earlier with no signatories at the time. Furthermore, the Watercourses Convention had numerous opponents, including some major powers such as China, India and France, which meant that its entry into force was unlikely to be in the near future,<sup>75</sup> and indeed, the Watercourses Convention only entered into force in 2014.<sup>76</sup> These factors weaken the belief that

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<sup>65</sup> P. Tomka, ‘Custom and the International Court of Justice’, (2013) 12 *The Law & Practice of International Courts and Tribunals*, p. 195, 197.

<sup>66</sup> O. Yasuaki, ‘Is the International Court of Justice an Emperor Without Clothes?’ (2002) 81 *International Legal Theory*, p. 16.

<sup>67</sup> *North Sea Continental Shelf cases* [n30]

<sup>68</sup> R. Y. Jennings, *The Identification of International Law*, in Bin Cheng (ed.), *International Law: Teaching and Practice* (Stevens, London, 1982), p. 3, 5.

<sup>69</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, at p. 367, para. 112 (Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Arechaga and Waldock).

<sup>70</sup> *North Sea Continental Shelf cases* [n30]

<sup>71</sup> J. Crawford, University of Cambridge, ‘The identification and development of Customary International Law’, (Keynote speech at the ILA British Branch Spring Conference, 23 May 2014) <https://www.youtube.com/watch?v=OXBcoZjMVSM> (accessed on 15 January 2015).

<sup>72</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports (1997) 7 p. 7, 38–42.

<sup>73</sup> Report of the International Law Commission to the General Assembly, U.N. Doc. A/9610/Rev. 1 (1974), reprinted in [1974] 2 Y.B. Int’l L. Comm’n 154, 184–86, U.N. Doc. A/CN.4/SER.A/1974/Add.1,

<sup>74</sup> United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted on May 21, 1997), reprinted in 36 I.L.M. 700 (1997).

<sup>75</sup> E. Benvenisti, ‘Customary International Law as a Judicial Tool for Promoting Efficiency’ in Eyal Benvenisti and Moshe Hirsch (eds) *The Impact of International Law on International Co-operation: Theoretical Perspectives* (CUP, 2004) 1.

<sup>76</sup> International Water Law Project, Status of the Watercourses Convention: [http://www.internationalwaterlaw.org/documents/intldocs/watercourse\\_status.html](http://www.internationalwaterlaw.org/documents/intldocs/watercourse_status.html) (accessed on 5 February 2015)

this treaty can be held as reliable evidence of state practice, as it certainly does not seem to meet the threshold of uniform state practice.

Understandably, from Mendelson's perspective, it would indeed be reasonable for the ICJ to assert a well-established rule or principle of customary without delving into further analysis, given that there is no need to reanalyse existing law.<sup>77</sup> It is plausible for reasons of efficiency that the Court may not wish to analyse certain cases as rigorously, if accepted customary norms can be applied. However, this reasoning cannot be applied in *Gabčíkovo-Nagymaros Project*,<sup>78</sup> because of the lack of acceptance of the Watercourses Convention indicates that it cannot convincingly be treated as representing well-established norms of customary law. The ICJ may claim that it is "merely finding the law in a field of state practice, but they are often in fact declaring new law."<sup>79</sup>

Moreover, the ICJ's lack of analysis is problematic as the Court fails to justify its identification of customary law. The Court does not legitimise its finding of customary status of law when it "simply asserts that such-and-such is a 'well-recognized rule of international law' or employ[s] some other vague phrase, without identifying whether the rule derives from custom."<sup>80</sup> As seen in *Armed Activities*,<sup>81</sup> whilst the Court relied on certain provisions of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States,<sup>82</sup> it satisfied the finding of customary law by affirming that the provisions of the Declaration were "declaratory of customary international law."<sup>83</sup> Thus, the Court refrained from any further analysis on the formation of customary law. Without grounding its judgements in detailed analysis, the ICJ creates the impression that rules of custom are being formed largely due to the Court's discretion. To advance Vicuña's opinion, "the Court has found a customary rule whenever and wherever it has deemed it necessary or convenient to identify such a rule or to go beyond treaty rules."<sup>84</sup>

Fundamentally, the function and the influence of the ICJ in the formation of customary law is much greater than envisioned under Article 38(1)(d).<sup>85</sup> In practice, the influence of the ICJ's judicial decisions conflicts with its prescribed role as a subsidiary source, as it has become increasingly frequent practice for international courts and tribunals to rely on the ICJ jurisprudence.<sup>86</sup> Hence, the ICJ decisions

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<sup>77</sup> M. Mendelson "The International Court of Justice and the sources of international law", in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996) p. 63, 67.

<sup>78</sup> *Gabčíkovo-Nagymaros Project* [n72] at pp. 38–42.

<sup>79</sup> T. Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, (2004) 45 Va. J. Int'l L. 631, p. 639.

<sup>80</sup> M. Mendelson, *The International Court of Justice and the sources of international law* [n77] at p. 63, 64.

<sup>81</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] ICJ Rep 168, p. 226-227, para 162

<sup>82</sup> Principles of Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations, General Assembly Resolution 2615 (XXV), 24 October 1970.

<sup>83</sup> *Armed Activities on the Territory of the Congo* [n81] at p. 226-227, para 162

<sup>84</sup> F. Vicuña, "Customary International Law in a Global Community: Tailor Made?" *Estudios Internacionales*, (2005)148, p. 21, 25-6.

<sup>85</sup> ICJ Statute [n1] at Article 38

<sup>86</sup> M. Scharf & M. Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences', (2012) 13 CHI. J. OF INT'L L. 123, 128.



span across the international legal order and have an “important influence on the norm-generating process.”<sup>87</sup> For instance, the International Tribunal for Law of the Sea (ITLOS) relied on the judgment in *Gabčíkovo-Nagymaros* for the customary international law character on the defence of the ‘state of necessity.’<sup>88</sup> In finding the rule of customary law in *US – Standards for Reformulated and Conventional Gasoline*,<sup>89</sup> the WTO Appellate Body relied on the ICJ judgement in *Territorial Dispute*.<sup>90</sup> Although, the International Criminal Tribunal for Rwanda (ICTR) did not make a specific reference to an ICJ judgement in *Prosecutor v. Akayesu*,<sup>91</sup> the ICTR held that, “the Genocide Convention is undeniably considered part of customary international law as can be seen in the opinion of the International Court of Justice on the provisions of the Genocide Convention.”<sup>92</sup> Evidently, the tribunals treat the ICJ judgements as “an important part of community practice.”<sup>93</sup> In relying on the decisions of the ICJ, these tribunals recognised the ICJ’s findings without further examination of state practice and *opinio juris*.<sup>94</sup> In effect, the tribunals accepted the ICJ judgements at face value and treated the judgements as an authoritative source of law. The influence of the ICJ and its findings on customary law supports the notion that “the claim that international judges do not make international law is increasingly anachronistic.”<sup>95</sup>

Whilst, I accept Maria Shapiro’s view that, “every court makes law in a few of its cases”,<sup>96</sup> these law-making instances should only occur when pre-existing international law fail to provide a solution to the dispute before the ICJ.<sup>97</sup> In essence, the ICJ’s activism should be limited to exceptional circumstance. Yet increasingly, the Court is moving further away from its original conception of customary law, in determining *opinio juris* the Court has recycled its own declaration and formal expression rather than examining actual state practice. In the context of customary law, what should be noted is that “it is not the court’s role to develop law.”<sup>98</sup> As Lord Hoffman describes, it is not for a court to “develop international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.”<sup>99</sup> In moving forward, I shall examine the risks of allowing the ICJ such a great degree of influence in the formation of customary international law and the role of States in the creation of custom.

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<sup>87</sup> R. Bernhardt, Custom and Treaty in the Law of the Sea [n20] at p. 270.

<sup>88</sup> *Gabčíkovo-Nagymaros Project* [n72] at p. 40 and 41, paras 51 and 52.

<sup>89</sup> *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, p. 17.

<sup>90</sup> *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, (1994), I.C.J. Reports 1. para. 41, p. 21.

<sup>91</sup> *Prosecutor v. Akayesu* Case No. ICTR-96-4-T, 2 September 1998, at para 495.

<sup>92</sup> *Ibid*

<sup>93</sup> G.M. Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers, 1993), p. 84.

<sup>94</sup> J. R. Crawford, Keynote speech [n71]

<sup>95</sup> D. Terris, C. Romano, L. Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World’s Cases* (OUP, 2007) p.104.

<sup>96</sup> M. Shapiro, ‘Judges As Liars’, (1994) 17 Harv. J.L. & Pub. Pol’y 155, p. 156.

<sup>97</sup> T. Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, (2004) 45 Va. J. Int’l L. p. 631.

<sup>98</sup> M. Wood, First Report [n10]

<sup>99</sup> *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya; Mitchell and others v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* [2006] UKHL 26, at para. 63.

## **II. The Importance of State Practice**

In the drafting process of Art. 38(1)(b) of the ICJ statute,<sup>100</sup> Baron Descamps stated that customary international law is “a very natural and extremely reliable method of development [of international law] since it results entirely from the constant expression of the legal convictions and of the needs of nations in their mutual intercourse.”<sup>101</sup> Based on this reading, the traditional understanding of customary law is dependent upon the actions and consent of States – in this regard it is “very state-centric.”<sup>102</sup> As is made clear by Jennings and Watts, the formulation of Art. 38 of the ICJ statute implies that the substance of this source of law is to be found in the practice of States.<sup>103</sup> This interpretation seems accurate, as the requirement of state practice logically precedes the analysis of *opinio juris* in the framing of Article 38(1)(b) of the ICJ Statute.<sup>104</sup> This reasoning is further supported in the dicta of the ICJ, which holds that “it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.”<sup>105</sup> Hence, the ICJ’s disregard of state practice is surprising given the dicta in the judgements which were explicit on the need for “a very widespread and representative participation.”<sup>106</sup> That is, the threshold for state practice is high, with the need for “substantially or practically uniform [practice].”<sup>107</sup> Crucially, the requirement of state practice has been held by the Court as being “expressive, or creative, of customary rules.”<sup>108</sup> As the ICJ acknowledged in *Nuclear Weapons Advisory Opinion*, the existence of customary rules “have been developed by the practice of States.”<sup>109</sup> The fact that Judge Ammoun frames the discussion of state practice around unanimous practice as compared to practice by the generality of States – provides evidence that there is no contemplation of not fulfilling the requirement at all.<sup>110</sup> Hence, customary law is meant to be derived initially from state practice, where it is the behaviour of States that creates custom.

### **A. Legitimacy**

The requirement of state practice is necessary, as it provides legitimacy to customary law and represents the consent of the state. As D’aspremont has described, customary law is derived “on the basis of a bottom-up crystallization process.”<sup>111</sup> Where the substance of customary law comes from the behaviour of states, who act

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<sup>100</sup> ICJ Statute [n1]

<sup>101</sup> Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), Annex 3, p. 322, per Baron Descamps

<sup>102</sup> R. B. Baker, Customary International Law in the 21st Century: Old Challenges and New Debates, *European Journal of International Law* (2010) Vol. 21, Issue 1, pp. 173-204.

<sup>103</sup> R. Jennings and A. Watts, *Oppenheim’s International Law*, 9th edition (Oxford University Press, 2008) p.25.

<sup>104</sup> ICJ Statute [n1] at Article 38(1)(b)

<sup>105</sup> *Continental Shelf (Libyan v. Malta)* [n47] at p. 29.

<sup>106</sup> *North Sea Continental Shelf*, [n30] at para. 73.

<sup>107</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)* [n21] at p. 90 (Separate Opinion of Judge De Castro)

<sup>108</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, at p. 46, para. 43.

<sup>109</sup> *Nuclear Weapons Advisory Opinion* [n22] at p. 253, para. 64.

<sup>110</sup> *North Sea Continental Shelf* [n30] at p. 104 (Separate Opinion of Judge Ammoun)

<sup>111</sup> J. D’Aspremont, *Formalism and the Sources of International Law* (Oxford University Press, 2011), p. 162.

in a constant and concurring manner under a belief. The creation of customary law is legitimised through the participation of States. For custom represents the “coming together of the wills of states, as manifested by their behaviour, that creates the rule on the legal plane.”<sup>112</sup> If customs are not generally applied and largely ignored than the effectiveness of using state practice as determinative factor of customary law is meaningless. As Judge Lachs recognises, state practice is essential for the creation of a new rule of international law.<sup>113</sup> It is through the participation of States, that all their different political, economic and legal systems are taken into account.<sup>114</sup> Therefore, there is a need to gather significant evidence of state practice from a large number of States.<sup>115</sup> As Akehurst remarks, “the number of states taking part in a practice is a more important criterion [...] than the duration of the practice.”<sup>116</sup> As customary international law is meant to reflect the actual behaviour of the States and their interaction in the international community.<sup>117</sup> In basing customary law on state practice that has been widely accepted by the international community, international custom is grounded with “stability, reliability, and legitimacy.”<sup>118</sup>

The importance of state practice is further influenced by the treatment of the States. In assessing States’ conduct, there is evidence to suggest that States place great importance on their involvement to establishment of customary law. This is demonstrated in the US response to a study of the International Committee of the Red Cross (ICRC)<sup>119</sup> in which, in a formal response at governmental level, the US held that “customary international law develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*.”<sup>120</sup> Notably, the US emphasised that the existence of custom “must in all events relate to State practice.”<sup>121</sup> To illustrate, there are numerous other instances where States’ have placed greater emphasis on state practice over *opinio juris*. As seen in the European Union Guidelines, customary international law is defined as a source of law that “is formed by the practice of States, which they accept as binding upon them.”<sup>122</sup> In bilateral investment treaties, Rwanda, US and Uruguay have stated, “their shared understanding” that customary international law “results from a general and consistent practice of States that they follow from a sense of legal obligation.”<sup>123</sup> Hence, it seems evident that these States prioritise the need for state practice, in the formation of these statements.

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<sup>112</sup> Brigitte Stern, ‘Custom at the Heart of International Law’, 11 *Duke J. Comp. & Int’l L.* 89 (2001), p. 97.

<sup>113</sup> *North Sea Continental Shelf* [n30] at p. 229 (Dissenting Opinion of Judge Lachs)

<sup>114</sup> *Ibid.*, at p. 227

<sup>115</sup> *Ibid.*, at p. 229

<sup>116</sup> M. Akehurst, ‘Custom as a Source of International Law’, *British Year Book of International Law*, (1975), 47 1, 16 pg. 18.

<sup>117</sup> C. De Visscher, *Theory and Reality in Public International Law* (P. E. Corbett, trans.) (Princeton University Press, 1957), p.155

<sup>118</sup> M. Wood, First Report [n10] at pg. 47.

<sup>119</sup> J. M. Henckaerts, Study on Customary International Humanitarian Law (2005) *International Review of the Red Cross*, Vol. 87. No. 857, p. 180.

<sup>120</sup> J. B. Bellinger and W. J. Haynes, “A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law”, *International Review of the Red Cross*, (2007) 89, p. 443, 444.

<sup>121</sup> *Ibid*

<sup>122</sup> *Updated European Union Guidelines on promoting compliance with international humanitarian law* (2009/C 303/06), section 7.

<sup>123</sup> Annex A to the *Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection*

In effect, these States regard customary law as a reflection of their actions in the international arena. The treatment of the state practice requirement in domestic courts also highlights the importance of state practice. As seen in the Supreme Court of Singapore, state practice is set at a high threshold with the need to satisfy the requirement of “extensive and virtually uniform practice by all States.”<sup>124</sup> In considering these States’ behaviour, it can be presumed that in their view customary law grows from the practice of States. Where custom is able to “reflect accurately the balance of [the States’] conflicting interests and to represent their considered intentions.”<sup>125</sup>

However, this interpretation of customary law conflicts with the ICJ’s practice of disregarding state practice in their findings of customary law. This is problematic, since the ICJ operates in an international system which is arguably state-centric. The ICJ cannot act independently in its interpretation of international law, its actions are necessarily “constrained by the preferences of states and other actors.”<sup>126</sup> To illustrate, the ICJ’s effectiveness is largely dependent on the States’ willingness to accept its judgements.<sup>127</sup> In a decentralised system, the Court’s position is precarious without compulsory jurisdiction.<sup>128</sup> Hence, the legitimacy of the ICJ’s denunciations can be inferred from States’ willingness to obey custom. In discounting the actual practice of the States, the ICJ is operating without the participation and consent of the States – this will likely result in instances of non-compliance.<sup>129</sup> International law, “must bear some relation to practice if they are to regulate conduct effectively, because laws that set unrealistic standards are likely to be disobeyed and ultimately forgotten.”<sup>130</sup>

Given the ICJ’s tendency to create judge-made custom unrelated to state practice, it is unsurprising that few States are willing to opt-in to the ICJ’s jurisdiction. Currently seventy-one states,<sup>131</sup> recognise the ICJ’s jurisdiction under Art. 36 (2) ICJ Statute.<sup>132</sup> Yet, even this small number of States do not adhere to the Court’s jurisdiction without retaining a number of reservations, which limit the ICJ’s power. These reservations are typically made in order to allow States the option of withdrawing from the ICJ’s jurisdiction.<sup>133</sup> The UK is the sole permanent member of

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*of Investment* (2008) and Annex A to the *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment* (2005)

<sup>124</sup> *Yong Vui Kong v. Public Prosecutor*, [2010] 3 S.L.R. 489 [2010] SGCA 20 (Supreme Court of Singapore – Court of Appeal, 14 May 2010), para. 96-98.

<sup>125</sup> H. Thirlway, *International Customary Law and Codification* (Martinus Nijhoff Publishers, 1972) p. 76.

<sup>126</sup> T. Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, (2004) 45 Va. J. Int’l L. 631, p. 633.

<sup>127</sup> A. M. Weisburd, *The International Court of Justice and the Concept of State Practice* [n38] at p. 362.

<sup>128</sup> UN Res No. 3232, *Review of the Role of the International Court of Justice*, 12 Nov. 1974, UN Doc. A/ RES/3232 (XXIX). Para. 1.

<sup>129</sup> J. R. Crawford, Keynote speech [n71]

<sup>130</sup> A. Roberts, *Traditional and Modern Approaches to Customary International Law* [n5] p. 762.

<sup>131</sup> International Court of Justice, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3> last accessed 5 February 2015

<sup>132</sup> ICJ statute [n1] at Article 36 (2)

<sup>133</sup> Eric A. Posner & John C. Yoo, ‘Judicial Independence in International Tribunals’, (2005) 93 CAL. L. REv. 1, p. 38-42

the Security Council that currently recognizes the compulsory jurisdiction of the ICJ, even then the UK's acceptance is moderated by reservations.<sup>134</sup> Hence, the role of the state remains fundamental to the international law structure. The Court's ability to interpret the content of international law depends on the States' willingness to bring cases forward.<sup>135</sup> As recognised by the ICJ, "the consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases."<sup>136</sup> The consent and participation of States is necessary to legitimise the ICJ's findings, similarly the legitimacy of custom relies on state practice. If the ICJ ignores state practice it effectively hinders its own legitimacy and chances of compliance.

## B. Compliance

The ICJ faces difficulties in ensuring compliance with its findings of customary law given the noticeable absence of state practice. It is a well-known fact that States consent to the ICJ's jurisdiction on a voluntary basis. Thus, States can withdraw their consent to be bound by the ICJ's jurisdiction. There are various instances to demonstrate how States, who had initially agreed to the ICJ's jurisdiction, subsequently refused to comply with an adverse decision.<sup>137</sup> Perhaps, the most prominent State to act in defiance of the ICJ's decision can be found in the United States. Following *Nicaragua*, the US withdrew from the compulsory jurisdiction of the ICJ, refused to participate in ICJ proceedings and ignored the ICJ's decision.<sup>138</sup> The US has also repeatedly conflicted with the ICJ decisions regarding the Vienna Convention on Consular Relations.<sup>139</sup> As seen in the *LaGrand* case, the US executed two German nationals in violation of the Vienna Convention and provisional measures issued by the ICJ.<sup>140</sup>

Even, smaller countries such as Iceland have refused to comply with the ICJ rulings.<sup>141</sup> In *Corfu Channel*, Albania rejected the ICJ's decision and refused to make the reparations ordered.<sup>142</sup> Further examples of noncompliance with the ICJ judgements have occurred in France, India and Iran.<sup>143</sup> This defiance against the judgements of the Court by States, questions the competence of the ICJ and the judicial role it plays.<sup>144</sup> To put forth the position held by Boyle and Chinkin, the issue is that "when courts ignore the traditional requirements for customary international law or fail to subject them to any strict scrutiny ... [In such instances] scant regard is

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<sup>134</sup> International Court of Justice, Declarations Recognizing the Jurisdiction of the Court as Compulsory (UK) <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=GB> (accessed 5 February 2015)

<sup>135</sup>A. M. Weisburd, *The International Court of Justice and the Concept of State Practice* [n38] at p. 299.

<sup>136</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, I. C. J. Reports 1950, p. 71

<sup>137</sup> E. A. Posner & J. C. Yoo, *Judicial Independence in International Tribunals* [n133] at p. 38-42

<sup>138</sup> *Nicaragua* [n59]

<sup>139</sup> Vienna Convention on Consular Relations (1963) 596 UNTS 261 / 21 UST 77 / TIAS 6820

<sup>140</sup> *LaGrand (Germany v. United States of America)*, 40 I.L.M. 1069 (2001).

<sup>141</sup> *Fisheries Jurisdiction (United Kingdom v. Ireland)* [n21]

<sup>142</sup> *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* I.C.J. Reports 1949, para. 244.

<sup>143</sup> *Ibid*

<sup>144</sup> *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Provisional Measures, 39 ILM (2000) 1100, at 1113 (Declaration of Oda J).

given to the niceties of state consent or the likelihood of compliance with such easily pronounced norms.”<sup>145</sup>

In seeking to identify customary law, the Court should consider the practice of States to legitimise its finding and increase the likelihood of compliance by States. In basing international custom on state practice, compliance can be reasonably expected from future State behaviour.<sup>146</sup> As Judge Jennings has commented, “it is ironic that the Court’s business up to the delivery of judgment is published in lavish detail, but it is not at all easy to find out what happened afterwards.”<sup>147</sup> Custom is meant to consolidate the status of existing practices as law, if custom is declared followed by multiple incidences of non-compliance the legitimacy of the custom will surely be questioned. It is ineffectual of the ICJ to make findings of customary law without considering the existing state practice. For the Court’s pronouncements to be meaningful, there should be a positive correlation between the identification of customary law and the States’ subsequent behaviour. Whilst, it may be overly simplistic to argue that State consent is central to international law, it is logical to assume that State consent would increase chances of compliance and legitimisation of custom found in the ICJ pronouncements.

### C. Structural Difficulties

Having said this, there are practical and structural issues that challenge the use of state practice. As the UK noted, “identifying a rule of customary international law is a rigorous process.”<sup>148</sup> This rigorous examination, necessary for ascertaining state practice, can be hindered by the nature of the behaviour in question. As suggested by the International Criminal Tribunal for the Former Yugoslavia (ICTY), it is extremely difficult to assess the actual behaviour of military forces in the field, for the purposes of fulfilling the requirement of state practice.<sup>149</sup> Given the confidential nature of military affairs, where information is often withheld, the tribunal’s determination of state practice is hindered. Hence the ICTY held that, “reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.”<sup>150</sup>

However, this kind of an approach has been criticised by John Bellinger and William Haynes in their response to the ICRC study, which emphasised the same points with the ICTY.<sup>151</sup> They argued that this method, “places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict.”<sup>152</sup> It would

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<sup>145</sup> A. Boyle & C. Chinkin [n57] at p. 285.

<sup>146</sup> B. Simma and P. Alston, “The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles”, *Australian Yearbook of International Law*, (1988-1989) 12, p. 88-89.

<sup>147</sup> J. Jennings, ‘Presentation’, in C. Peck and R.S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (Martinus Nijhoff, 1997), p. 78.

<sup>148</sup> Legal Adviser of the Foreign and Commonwealth Office, statement at the Meeting of National Committees on International Humanitarian Law of Commonwealth States, Nairobi, 20 July 2005: *British Year Book of International Law*, 76 (2005) pp. 694-5.

<sup>149</sup> *Prosecutor v. Tadic, Decision on the defence motion for interlocutory appeal on jurisdiction*, ICTY Appeals Chamber, Case nr. IT-94-1-AR72, 2 October 1995, para 99.

<sup>150</sup> *Ibid.*

<sup>151</sup> J. B. Bellinger and W. J. Haynes [n120], pp. 2-4.

<sup>152</sup> *Ibid.*

be difficult to treat such military manuals as strong evidence of state practice, when they often act as guidance on policy reasons. Frankly, there is a great distinction to be made between military publications used for training purposes and official government statements.<sup>153</sup> Whilst, I am sympathetic to the difficulties of the international courts had been through while assessing state practice in such sensitive areas, the reliance on such materials fails to reach the prescribed standard of widespread state practice. The US protest demonstrates discontent in using “insufficiently dense” state practice to demonstrate the existence of custom.<sup>154</sup>

#### **D. Democratic Deficit**

Another point is that, when a low-threshold is set in terms of the fulfilment the requirement of state practice, this led to accusations of creating a democratic deficit.<sup>155</sup> Indeed, the difficulty in assessment of the practices where there nearly 200 states, has resulted in a highly selective survey of customary international law, where only a handful of states are taken into account.<sup>156</sup> This has resulted in a situation where a “great body of customary international law is made by remarkably few States.”<sup>157</sup> This is problematic, for the emphasis of the role of the state in the creation of custom has meant that it is difficult to disregard the disparities of wealth and power between the States.<sup>158</sup> The inequality between States, has allowed powerful states a disproportionate influence on the content and determination of custom.<sup>159</sup>

Current international law purposely ignores the issue of uneven development in favour of prescribing uniform legal regimes.<sup>160</sup> However, the development of the legal order is dynamic and reactive to the actions of States, particularly dominant States. Hence, the need of the international community is defined by the interests of dominant States, who “have unprecedented influence in shaping global policies and law.”<sup>161</sup> In effect, the claim that States hold equal status acts as a legal fiction which masks the reality of power politics in the international system.<sup>162</sup> For instance, the ability of the US to influence the development of custom is much greater than Malta, even though they are formally accorded equal status under international law.<sup>163</sup> Thus, it would be “unrealistic” to close one’s eyes to the States with the largest influence and power.<sup>164</sup> Yet, this is the exercise that the Court attempts to practice, as

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<sup>153</sup> *Ibid*

<sup>154</sup> *Ibid*

<sup>155</sup> A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 767.

<sup>156</sup> N. Petersen, ‘Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation’ *American University International Law Review* 23, no.2 (2007) p. 277.

<sup>157</sup> O. Schachter, ‘New Custom: Power, Opinio Juris and Contrary Practice’, in J. Makarczyk (ed.) *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International, 1996), p. 536.

<sup>158</sup> M. Byers, Introduction Power, Obligation, and Customary International Law, 11 *Duke Journal of Comparative & International Law* (2001) 81-88 p. 84.

<sup>159</sup> M. Bedjaoui, *Towards a New International Economic Order*, (Holmes & Meier, 1979) p. 51-52.

<sup>160</sup> B. S. Chimni, ‘The Past, Present and Future of International Law: A Critical Third World Approach’ (2007) 8 *Melb. J. Int’l L.* 499 p. 5.

<sup>161</sup> *Ibid.*, at p. 7.

<sup>162</sup> J. Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case’, (1996) 16 *Oxford. Legal Stud.* 85 p. 123.

<sup>163</sup> M. Byers, Introduction Power, Obligation, and Customary International Law [n158] at p. 84.

<sup>164</sup> *Nuclear Tests (Australia v. France)* [n69] at p. 306 (Separate Opinion of Judge Petró)

Judge Shi states “any undue emphasis [on dominant States] would make it more difficult to give an accurate proper view of the existence of a customary rule.”<sup>165</sup>

Nonetheless, customary international law is not formed from a democratically accountable political system.<sup>166</sup> Although, Judge Weeramantry may claim that the practice and polices of five States out of nearly 200 are an insufficient basis to assert the creation of custom.<sup>167</sup> The permanent members of the Security Council do, “represent the bulk of the world’s military and economic and financial and technological power and a very large proportion of its population.”<sup>168</sup> Whilst it is acknowledged that the powers of the permanent members have changed over time with the development of States such as China and India, it is nonetheless clear that previously dominant Western states was and are still in the primary focus in terms of state practice in the ICJ proceedings.<sup>169</sup> For Roberts, this lack of democratic accountability is troubling as international custom is capable of binding all States.<sup>170</sup> In relying on state practice, the influence of dominant States has legitimised political and economic *status quos* in their favour.<sup>171</sup> Whereby new states are bound by existing customs, despite a lack of participation in their formation.<sup>172</sup> However, I would argue that it is impossible to escape the reality of power politics in the international system.<sup>173</sup>

As the US Ambassador to the UN, Jeanne Kirkpatrick once described, the ICJ acts as “a semi-legal, semi-judicial, semi-political body.”<sup>174</sup> The interaction of politics and law is intertwined in the international community. Arguably, political and economic *status quos* can be implicitly found in the composition of the ICJ, since the seats of the ICJ are held by judges holding the nationalities of each of the five permanent member States of the Security Council.<sup>175</sup> This arrangement of the Court, has been evident since the ICJ’s founding and has remained in its tradition – although this conduct has not been prescribed by any statute.<sup>176</sup> In seeking to find evidence of “general practice accepted as law” it is necessary to accept the realities of the international order.<sup>177</sup> As de Visscher eloquently describes, inherently some States will “mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.”<sup>178</sup> In the following section, I shall consider the

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<sup>165</sup> *Nicaragua* [n59] at p. 278 (Declaration of Judge Shi)

<sup>166</sup> W. S. Dodge, ‘Customary International Law and the Question of Legitimacy’, *Harvard Law Review Forum*, (2007) 120, 19, 26.

<sup>167</sup> *Nicaragua* [n59] at p. 533 (Dissenting Opinion of Judge Weeramantry)

<sup>168</sup> *Ibid.*, at p. 312, 319 (Dissenting Opinion of Judge Schwebel)

<sup>169</sup> J. P. Kelly, “The Twilight of Customary International Law” (2000) 40 VA. J. INT’L L. 449, p. 469.

<sup>170</sup> A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p.768.

<sup>171</sup> *Ibid*

<sup>172</sup> *Ibid*

<sup>173</sup> A. A. D’Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971) p. 191-93.

<sup>174</sup> E. A. Posner and M. de Figueiredo, ‘Is the International Court of Justice Biased?’ (2005) *Journal of Legal Studies*, vol. 34(2) p. 600. (quoting Jeane Kirkpatrick)

<sup>175</sup> D. R. Robinson, ‘The Role of Politics in the Election and the Work of Judges of the International Court of Justice’, (2003) 97 AM. Soc’y INT’L L. PROC. 277, p. 278.

<sup>176</sup> S. Rosenne, *The World Court: What it is and how it Works*, 5th ed. (Martinus Nijhoff Publishers, 1995) pp. 155-58.

<sup>177</sup> *Ibid*; ICJ Statute [n1] at Article 38 (1)(b)

<sup>178</sup> Charles de Visscher, *Theory and Reality in Public International Law*, (Princeton: Princeton University Press, 1957) p. 147.



justifications for the ICJ's shift away from state practice and the implications of this shift.

### **III. Movement away from State Practice**

The ICJ has significantly changed its interpretation of Article 38(1)(b) of the ICJ statute.<sup>179</sup> According to Abi-Saab, it seems that:

‘we are calling different things custom, we are keeping the name but expanding the phenomenon ... In fact we have a new wine, but we are trying to put it in the old bottle of custom. At some point...we will have to recognize that we are no longer speaking of the same source, but that we are in the presence of a very new type of law-making.’<sup>180</sup>

#### **A. Redefining Custom: Emphasis on *Opinio Juris***

To reiterate, the traditional understanding of customary law was formed by the ICJ in the *North Sea Continental Shelf Cases*.<sup>181</sup> Here, the Court articulated the requirements of customary law as follows: “not only must the acts concerned 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.”<sup>182</sup> This statement frames the requirement of *opinio juris* as subsidiary to state practice. However, the ICJ reformulated its criteria in *Nicaragua* where, “the Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.”<sup>183</sup> In doing so, the requirement of *opinio juris* is emphasised over state practice.<sup>184</sup> The primary focus on “state practice from which customary law is derived” is no longer evident.<sup>185</sup> Whilst, the ICJ dicta continues to refer to the elements of state practice and *opinio juris* in forming customary law, there is a fundamental change in the ICJ's treatment of the two elements. The ICJ is less concerned in basing custom on “actual state practice in the real world,” rather it seems content to rely “heavily on resolutions of the United Nations.”<sup>186</sup>

This is apparent in *Nicaragua*, where the ICJ held that “the attitude of States towards certain General Assembly resolutions” enabled it to conclude “that the attitude referred to expresses an *opinio juris* respecting such rule.”<sup>187</sup> Hence, there is an intrinsic change in the creation of customary law under the ICJ's direction. The traditional understanding of custom is abandoned by the ICJ, in preference of *Nicaragua* approach, which “prefers to look for statements of belief by States [to form custom.]”<sup>188</sup> In *Nicaragua*, the Court held that GA Resolution 3314 (XXIX)

<sup>179</sup> ICJ Statute [n1] at Article 38(1)(b)

<sup>180</sup> A. Cassese and J. H. H. Weiler (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988), 10. (quoting G. Abi-Saab)

<sup>181</sup> *North Sea Continental Shelf Cases* [n30] at para 77.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Nicaragua* [n59] at para 184.

<sup>184</sup> Brian D. Lepar, *Customary International Law: A New Theory with Practical Applications* (CUP, 2010) 132.

<sup>185</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* Judgment, I.C.J. Reports 2012, p. 99. para. 101.

<sup>186</sup> J. I. Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’, (1985) BYIL 56, p. 171.

<sup>187</sup> *Nicaragua case* [n59] at p. 14

<sup>188</sup> *Ibid*; M. Akehurst, Custom as a Source of International Law [n116] at p. 36.

“may be taken to reflect customary international law.”<sup>189</sup> In confirming that the text of the resolution cannot be taken as “reiteration or elucidation” of the treaty obligations under the UN Charter.<sup>190</sup> The ICJ treated the acceptance of the resolution and the declarations within it, as capable of having a direct effect on *opinio juris*.<sup>191</sup>

However, I would express doubts that the acceptance of resolutions can be seen as conclusive evidence of “*opinio juris* possessing all the force of a rule of customary international law.”<sup>192</sup> Since the General Assembly acts as a political organ, which does not make it an ideal forum for establishing law.<sup>193</sup> Given that the States are acting in a political arena, they will have various motivations for voting favourably on a resolution. Thus, the act of voting is often an indication of “political desideratum and not a statement of belief that the law actually requires [for *opinio juris*].”<sup>194</sup> It is importance to contextualise the voting of resolutions, for a State may vote having regard to their function as an organ of the United Nations (UN).<sup>195</sup> For instance, the US initially opposed the draft GA Resolution XVII which prescribed the standard of ‘appropriate compensation’ following an expropriation.<sup>196</sup> The US preferred the standard of ‘prompt, adequate, and effective’ compensation, yet the US voted in favour of the resolution “in a spirit of compromise.”<sup>197</sup> This spirit of cooperation within the international community is emphasised in the functioning of the UN. However, this greater consideration of the international community cannot be taken as evincing a State’s meaningful support for the resolution. Rather, this conciliatory manner of voting by States has been referred to by Judge Schwebel as indicative of “fake consensus.”<sup>198</sup>

## B. Use of Consensus

The use of consensus as a guiding notion to consider whether a resolution establishes *opinio juris* is contentious. As found in *Nuclear Weapons Advisory Opinion*, “substantial numbers of negative votes and abstentions” by States, would indicate that such resolutions would “fall short of establishing the existence of an *opinio juris*.”<sup>199</sup> To infer, the threshold of *opinio juris* is reached if a resolution is adopted unanimously or by a representative majority.<sup>200</sup> This use of consensus is praised by

<sup>189</sup> *Nicaragua* [n59] at 103, para. 195; Definition of Aggression, General Assembly Resolution 3314 (XXIX) 14 December 1974

<sup>190</sup> *Ibid.*, at p. 99–100, para. 188; United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

<sup>191</sup> *Nicaragua* [n59]

<sup>192</sup> *Ibid.*, at p. 182 (Separate Opinion of Judge Ago)

<sup>193</sup> K. Skubiszewski, ‘Resolutions of the U.N. General Assembly and Evidence of Custom’, in *Le droit international a l’heure de sa codification – etudes en l’honneur de Roberto Ago* (Vol. I) (1987) 503, p. 506–507.

<sup>194</sup> S. Rosenne, *Practice and Methods of International Law* (Oceana Publications, 1984) p. 112.

<sup>195</sup> H. Meijers, ‘On International Customary Law in The Netherlands’, in I.F. Dekker, H.H.G. Post (eds.), *On the Foundations and Sources of International Law* (T.M.C. Asser Press, 2003), p. 77, 84

<sup>196</sup> Permanent Sovereignty over Natural Resources, G.A. Res.1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (Dec. 14, 1962); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, p. 890 (2d Cir. 1981).

<sup>197</sup> *Banco Nacional de Cuba* [n196] at p. 890

<sup>198</sup> S. M. Schwebel, ‘The Effect of Resolutions of the U.N. General Assembly on Customary International Law’, (1979) 73 AM. SOC’Y. OF INT’L. L. PROC. 301, p. 308.

<sup>199</sup> *Nuclear Weapons Advisory Opinion* [n22] at para. 71.

<sup>200</sup> B. Conforti & B. Labella, *An Introduction to International Law* (Martinus Nijhoff Publishers, 2012), p. 42.43.

Barboza who suggests that resolutions “obtained by unanimity, or by consensus...represent the international opinion better than multilateral treaties, having a relatively restricted membership.”<sup>201</sup> In disagreeing with this view, I would submit that the use of consensus is a “particularly misleading notion.”<sup>202</sup>

The action of voting is considered an affirmative stance of the State without considering the States’ motivations for acting in this manner. The negotiations of the States, in forming the resolution, are a more accurate reflection of the States’ opinions than the resolutions themselves.<sup>203</sup> In assessing the legal value of resolutions, there is greater relevance to be found in the States’ treatment of the resolution, than the resolution itself,<sup>204</sup> as the final text of a resolution fails to reflect the decision-making process undergone by the States.<sup>205</sup> To advance Rosenne’s opinion, the use of consensus “conceal[s] the many reservation buried away in the records, and it often only means agreement on the words to be used and on their place in the sentence, and absence of agreement, or even disagreement, on their meaning and on the intent of the document as a whole.”<sup>206</sup>

Moreover, the use of consensus as a standard seems futile, when the intent to be legally bound by a resolution is absent from States’ actions in voting. States often vote without contemplating that these general, recommendatory resolutions may transform into norms of binding customary law.<sup>207</sup> In the view of a Russian representative, States vote “having precisely in mind that, according to the Charter, [these resolutions] do not create any legal norm and do not imply the recognition of any rules as such, but are only of recommendatory nature.”<sup>208</sup> The recommendatory nature of resolutions undermines their ability to present *opinio juris*. General Assembly resolutions are not legally binding instruments, “even if a resolution employs legal terminology and speaks of all States’ obligations.”<sup>209</sup> It would be foolish to consider a State’s vote as decisive evidence of *opinio juris*.

Therefore, any deductions of *opinio juris* made on this basis should be treated “with all due caution.”<sup>210</sup> Since the nature of *opinio juris* is difficult to prove, the fact that it is often described as “the philosophers’ stone” demonstrates its intangible quality.<sup>211</sup> A significant amount of evidence is needed to verify the certainty of *opinio juris* and I would argue that this evidence seems lacking in the affirmation of resolutions. This

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<sup>201</sup> J. Barboza, ‘The Customary Rule: From Chrysalis to Butterfly’, in C.A. Armas Barea et al. (eds.), *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (Kluwer Law International, 2000) p. 5.

<sup>202</sup> S. Rosenne, *Practice and Methods of International Law* [n194] at p. 112.

<sup>203</sup> H. Thirlway, *International Customary Law and Codification* [n125], at p. 65.

<sup>204</sup> A. Pellet, ‘Article 38’, in A. Zimmermann et al., *The Statute of the International Court of Justice: A Commentary*, 2nd edition (Oxford University Press, 2012), p. 817, 825.

<sup>205</sup> J. Wouters & P. De Man, ‘International Organizations as Law-Makers’, in J. Klabbbers, A. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing, 2011), 190, p. 208.

<sup>206</sup> S. Rosenne, *Practice and Methods of International Law* [n194] at p. 112.

<sup>207</sup> J. P. Kelly, *The Twilight of Customary International Law* [n169] at p. 520.

<sup>208</sup> Legality of the Use by a State of Nuclear Weapons in Armed Conflict and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (Nov. 10, 1995), <http://www.icj-cij.org/docket/files/93/5964.pdf> (accessed on 5 January 2015) (quoting Mr. Khodakov, Director of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation) p. 48.

<sup>209</sup> L. Hannikainen, ‘The Collective Factor as a Promoter of Customary International Law’, *Baltic Yearbook of International Law*, 6 (2006) p. 138.

<sup>210</sup> *Nicaragua* [n59] at p. 188.

<sup>211</sup> H. Thirlway, *International Customary Law and Codification* [n125] at p. 47

view is supported by Judge Barwick who notes that resolutions “however frequent, numerous and emphatic, are insufficient to warrant the view that customary international law now embraces [a certain rule].”<sup>212</sup> Hence, it is questionable for the ICJ to conclude that the action of voting for a resolution, is conclusive evidence of *opinio juris*.<sup>213</sup>

### C. Restrictive approach

In recognising these concerns, the ICJ seems to have reconsidered its *Nicaragua* approach, which indicates that resolutions are capable of directly effecting *opinio juris*.<sup>214</sup> A retraction of this stance is apparent in *Nuclear Weapons Advisory Opinion*, where the Court acknowledged that declarations of the General Assembly “may not themselves make law.”<sup>215</sup> Rather, the normative value of resolutions is found in their ability to “provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.”<sup>216</sup> This finding, establishes a clear withdrawal from the position held in *Nicaragua*,<sup>217</sup> which suggests that a resolution is not capable of directly establishing *opinio juris*. The ICJ’s attempt to distance itself from *Nicaragua* is apparent, given the conspicuous lack of referencing to the seminal case of *Nicaragua* in the *Nuclear Weapons Advisory Opinion*.<sup>218</sup>

I find the treatment of resolutions, in their restricted role of evidential sources, more appropriate.<sup>219</sup> This restricted approach has been supported by the *Institut de Droit International* where, “a Resolution may constitute evidence of customary law or of one of its ingredients.”<sup>220</sup> Further, the dictum of the Iran-United States Claims Tribunal in *Sedco* demonstrates the marginalised role of resolutions: “resolutions are not directly binding upon States and generally are not evidence of customary law. Nevertheless, it is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary international law.”<sup>221</sup>

Since one cannot deny that the United Nations has established itself as an appropriate body to look for indications of developments in international law, General Assembly resolutions “have helped shape public international law... [They] are an important material source of customary international law in this regard.”<sup>222</sup> The relevance of international organisations has grown, in line with developments in international relations. The diplomatic actions of States in international

<sup>212</sup> *Nuclear Tests (Australia v. France)* [n69] at p. 435- 436 (Dissenting Opinion of Judge Barwick)

<sup>213</sup> O. Schachter, ‘Entangled Treaty and Custom’, in Y. Dinstein, M. Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989) p.730.

<sup>214</sup> M. D. Öberg, ‘The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ’ *EJIL* (2005), Vol. 16 No. 5, p. 897.

<sup>215</sup> *Nuclear Weapons Advisory Opinion* [n22] at p. 532 (Dissenting Opinion of Judge Weeramantry)

<sup>216</sup> *Ibid.*, at paras. 71–73.

<sup>217</sup> *Nicaragua* [n59]

<sup>218</sup> *Ibid*; *Nuclear Weapons Advisory Opinion* [n22]

<sup>219</sup> *Nuclear Weapons Advisory Opinion* [n22]

<sup>220</sup> *Institut de Droit International* on ‘The Elaboration of General Multilateral Conventions and of Non-contractual Instruments Having a Normative Function or Objective’ with regard to Resolutions of the United Nations General Assembly (1987) available at [http://www.idi-iil.org/idiE/resolutionsE/1987\\_caire\\_02\\_en.PDF](http://www.idi-iil.org/idiE/resolutionsE/1987_caire_02_en.PDF), (accessed on 24 January 2015).

<sup>221</sup> *Sedco, Inc. v. National Iranian Oil Co. and Iran* Case No. 129, 25 ILM 629, (1986), 633-634

<sup>222</sup> *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, at p. 188 (Dissenting Opinion of Judge Weeramantry)

organisations have legal significance, as evidence of customary law.<sup>223</sup> The General Assembly broadly represents its member States in acting as an international forum.<sup>224</sup> The practice of one state, one vote represents an attempt to even the playing field between developed and developing countries.<sup>225</sup>

Hence, resolutions may indicate dominant trends of international opinion and imply a legal view on certain matters.<sup>226</sup> As Judge Weeramantry observed, “a stream of resolutions” holding similar content can “provide importance reinforcement” on what a customary law is.<sup>227</sup> It is understandably tempting for the ICJ to rely on resolutions to impute a legal perspective, given the participation of States in a public exchange of views.<sup>228</sup> The United Nations, “provides a very clear, very concentrated, focal point for state practice.”<sup>229</sup> In engaging with resolutions, the ICJ is able to overcome the difficulties of analysing the collective practice of States in a particular area.

However, I regard the various forms of State conduct in the General Assembly as reflecting a peripheral kind of state practice.<sup>230</sup> There is a difference between what States claim to do and their actions in practice. To illustrate, many States claim to uphold humanitarian goals yet the inconsistency of States’ human rights practice, suggests an inability or unwillingness to implement these goals in practice.<sup>231</sup> In ascertaining customary law, it is necessary to determine the right “mix of what States say and do, want and believe, but also in being aware of the ambiguities with which many elements of practice are fraught.”<sup>232</sup> State conduct within the General Assembly, may be influenced by political pressure to conform and avoid exclusion from the international community. Hence, consensus is reached in an artificial context.<sup>233</sup>

In suggesting that the ICJ is reconsidering its *Nicaragua* approach, there is still ample reason to suggest that the ICJ is seeking to rely on resolutions to grant itself greater power to create customary law.<sup>234</sup> As custom, under the *Nicaragua* approach, is no longer derived from a bottom-up model dependent on state practice. Rather, a new customary law model is proposed from the top down, where custom is formed

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<sup>223</sup> R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford University Press, 1963), p. 2.

<sup>224</sup> J. Charney, ‘International Lawmaking – Art. 38 of the ICJ Statute Reconsidered’, in J. Delbruck (ed.), *New Trends in International Lawmaking – International ‘Legislation’ in the Public Interest* (1996), pp. 180–183.

<sup>225</sup> A. Roberts, *Traditional and Modern Approaches to Customary International Law* [n5] at p. 768.

<sup>226</sup> *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, Arbitral Award (1977), 62 ILR, 140, p. 189.

<sup>227</sup> *Nuclear Weapons, Advisory Opinion* [n22] at p. 532 (Dissenting Opinion of Judge Weeramantry)

<sup>228</sup> R. Higgins, *Problems and Process: International Law and How We Use It* [n25] at p. 23, 24.

<sup>229</sup> R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* [n223] at p. 2.

<sup>230</sup> I. MacGibbon, ‘General Assembly Resolutions: Custom, Practice and Mistaken Identity’, in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens & Sons, 1982), 10, p. 19

<sup>231</sup> J. Wouters and C. Ryngaert, *Impact on the Process of the Formation of Customary International Law* [n63] at p. 12.

<sup>232</sup> T. Treves, ‘Customary International Law’, in *Max Planck Encyclopedia of Public International Law* (2012) at para 28.

<sup>233</sup> I. MacGibbon, *General Assembly Resolutions: Custom, Practice and Mistaken Identity* [n230] at pg. 10, 19.

<sup>234</sup> *Ibid.*, at p. 21.

“not by deduction from domestic law but by proclamation in international fora.”<sup>235</sup> In doing so, the actions of the ICJ can be seen as using the shield of *opinio juris* to create custom. I shall assess the justifications for this approach in the final section.

#### **IV. Justifications for the Nicaragua Approach**

International law must address the demands of a complex and varied society.<sup>236</sup> The diversity among States and the growing emergence of global issues means that traditional custom has become regarded as an inappropriate means for developing law.<sup>237</sup> In an era where international law is concerned with “maximiz[ing] the welfare of people,” traditional custom is criticised for its design in being “created by nations, rather than by people.”<sup>238</sup>

The *Nicaragua* approach is characterised by an “emphasis on community consensus over individual state consent.”<sup>239</sup> This shift in focus away from the States and priority of States’ values to a welfare system concerned with human values reflects the development of the international community.<sup>240</sup> Increasingly, States act collectively in international bodies in pursuit of universal humanitarian goals. Hence the *Nicaragua* approach evinces the desire of the ICJ to use customary laws to bind all States to desired community aims.<sup>241</sup> As Judge Lauterpacht, has described the “primary purpose of the International Court ... lies in its function as one of the instruments for securing peace in so far as this aim can be achieved through law.”<sup>242</sup>

##### **A. Pursuing Humanitarian Ideals**

This motivation for securing peace is evident behind the *Nicaragua* approach, which demonstrates a far greater ability to engage with matters of human rights and international humanitarian law, than demonstrated in traditional custom.<sup>243</sup> Under the *Nicaragua* approach, a ‘modern custom’ is created which relaxes the criteria of customary law, in doing so the development of custom is given greater flexibility.<sup>244</sup> The ICJ finding in *Nicaragua* would have been substantially different under traditional custom.<sup>245</sup> The context of the Cold War meant that the international law on the use of force faced a “yawning gap between what states practice and what they

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<sup>235</sup> B. Simma and A. L. Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’, (1999) 93 AJIL 302, p. 307.

<sup>236</sup> G.J.H. van Hoof, *Rethinking the Sources of International Law* (Kluwer Law and Taxation Publishers, 1983), p. 115.

<sup>237</sup> J. I. Charney, ‘Universal International Law’, (1993) 87 AJIL 529, p. 544-45.

<sup>238</sup> J. O. McGinnis, ‘The Comparative Disadvantage of Customary International Law’, *Harvard Journal of Law and Public Policy*, 30 (2006), 7, p. 11-12.

<sup>239</sup> A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986) p. 31, 110.

<sup>240</sup> L. Henkin, ‘Human Rights and State "Sovereignty" (1995-96) 25 GA.J. INT'L L. 37.

<sup>241</sup> A. Cassese, *International Law in a Divided World* [n239] at p. 31, p110.

<sup>242</sup> H. Lauterpacht, *The Development of International Law by the International Court* (CUP, 1958) p. 3.

<sup>243</sup> J. Kammerhofer, ‘Orthodox Generalists and Political Activists in International Legal Scholarship’, in M. Happold (ed.), *International Law in a Multipolar World* (Routledge, 2012), p.138, 147.

<sup>244</sup> E. Jiménez de Aréchaga, ‘Custom’, in A. Cassese and J. H. H. Weiler (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988), p. 2,3.

<sup>245</sup> *Nicaragau* [n57]

preach.”<sup>246</sup> This gap, in line with traditional customary law, would have prevented a customary rule from crystallising.<sup>247</sup>

Modern custom, in reframing the formula for customary law, only requires state practice as an “evidentiary touchstone.”<sup>248</sup> This is particularly relevant for human rights law, which is characterised by inconsistent state practice even when the laws are upheld by international conventions.<sup>249</sup> Under the traditional reading of customary law, evidence of contrary practice, would bar the creation of custom. For instance, the Supreme Court of Singapore ruled in *Yong Vui Kong v. Public Prosecutor* that “there is a lack of extensive and virtually uniform state practice to support ... [the] contention that customary law prohibits the mandatory death penalty as an inhuman punishment.”<sup>250</sup> In conducting an extensive survey on the status of the death penalty worldwide, the Supreme Court observed that the practice of a majority of states is not equivalent to “extensive and virtually uniform practice by all States.”<sup>251</sup> Hence, traditional custom is unable to engage with matters of human rights effectively. As the focus on contrary practice, meant that traditional custom does not properly address the moral concerns raised. As Klabbers observed, traditional custom lacks credibility with “respect to prescriptions of moral relevance.”<sup>252</sup>

## **B. Responsiveness to Modern Developments**

Moreover, traditional custom seems unresponsive to the developments in a progressive legal order,<sup>253</sup> since it fails to acknowledge the greater relevance placed on issues such as sustainable development. Deriving custom from treaties and declarations is potentially more democratic than using state practice, for it involves a large number of States.<sup>254</sup> For example, the number of international instruments covering principles of environmental protection indicate the growing concern of the international community. Yet, these prescriptive norms on environmental protection are unable to form customary law, when subjected to the orthodox tests of consistent state practice and *opinio juris*.<sup>255</sup> Hence traditional customary law does not account for indications of a growing international consensus and approval for norm-creating principles. In this manner, traditional custom may be described as stagnant and “simply not forthcoming” in line with progressive developments.<sup>256</sup>

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<sup>246</sup> J. Wouters and C. Ryngaert, Impact on the Process of the Formation of Customary International Law [n63] at p. 5.

<sup>247</sup> *Ibid*

<sup>248</sup> A. T. Guzman, ‘Saving Customary International Law’, *Michigan Journal of International Law*, 27 (2005), 115, p. 153.

<sup>249</sup> *Nicaragua* [n57]; J. Wouters and C. Ryngaert, Impact on the Process of the Formation of Customary International Law [n63] at p. 5.

<sup>250</sup> [2010] 3 S.L.R. 489 [2010] SGCA 20 (Supreme Court of Singapore - Court of Appeal, 14 May 2010), paras. 95-98

<sup>251</sup> *Ibid*

<sup>252</sup> J. Klabbers, ‘The Curious Condition of Custom’, *International Legal Theory*, 8 (2002), 29, p.34.

<sup>253</sup> W. M. Reisman, ‘The Cult of Custom in the Late 20th Century’, *California Western International Law Journal*, 17 (1987), p. 133, 134, 142-3

<sup>254</sup> A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p.768.

<sup>255</sup> D. Hunter, J. Salzman and D. Zaelke, *International Environmental Law and Policy*, 2nd edition (Foundation Press, 2002), p. 312,313

<sup>256</sup> R. Kolb, ‘Selected Problems in the Theory of Customary International Law’, *Netherlands International Law Review*, 50 (2003), 119, p. 124, 125.

It seems unsurprising that traditional custom has been criticised for being “ill-suited to the present pace of international relations.”<sup>257</sup> The *Nicaragua* approach, on the other hand, was able to address fundamental issues in line with developments on the international system. In a modern era in which we are facing evolving risks such as terrorism, there is a need for instant custom<sup>258</sup> and new customary law can be created much more rapidly without the traditional burden of decades of consistent practice.<sup>259</sup> The General Assembly is able to accelerate the formation of customary law, by serving as a forum in which a state “has the opportunity, through the medium of the organization, to declare its position to all members of the organization and to know immediately their reaction on the same matter.”<sup>260</sup>

This creation of instant custom, demonstrates the ICJ’s ability to use custom as an efficient mechanism for creating international law. For instance, the Exclusive Economic Zone suddenly emerged as custom under declaration of the US.<sup>261</sup> In marginalising the role of state practice, the ICJ is able to seemingly invent customary international law when “these leaps produce more efficient norms.”<sup>262</sup> As modern custom needs not to ground itself in existing practice, “it is called upon to launch one.”<sup>263</sup> While deriving custom from abstract statements of *opinio juris*, the ICJ is working from theory to practice.<sup>264</sup> Essentially, modern custom can be taken as attaching greater weight on what law ought to be compared to what the law currently is in practice.<sup>265</sup> Hence, the ICJ is using modern custom to “take the leap and declare new law”<sup>266</sup> and undertakes this exercise in order to address issues that the prevailing practice of States fail to prioritise, such as the inconsistent practice of human rights in the international order.<sup>267</sup> Accordingly, the requirement of state practice and the interests of the States can hinder the development of custom. As Judge Ngcobo stated:

“one of the greatest ironies of customary international law is that its recognition is dependent upon the practice of states evincing it. Yet at times states refuse to recognise the existence of a rule of customary international law on the basis that state practice is insufficient...In so doing, the states deny the practice from ripening into a rule of customary international law.”<sup>268</sup>

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<sup>257</sup> C. De Visscher, “Reflections on the Present Prospects of International Adjudication”, *American Journal of International Law*, 50 (1956), 467, p. 472.

<sup>258</sup> B. Langille, ‘It’s “Instant Custom”: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001’, 26 *B.C. Int’l & Comp. L. Rev.* 145 (2003) p. 145.

<sup>259</sup> *Ibid*

<sup>260</sup> *South West Africa Cases (Eth. v. S. Afr.)*, 1966 I.C.J. Rep. 248, para 291–93, (quoting Judge Tanaka)

<sup>261</sup> M. Scharf, Accelerated Formation of Customary International Law (2014) 20 *ILSA Journal of International & Comparative Law* 305, Case Legal Studies Research Paper No. 2014-22, p. 313.

<sup>262</sup> E. Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency [n75] at p. 86.

<sup>263</sup> I. I. Lukashuk, ‘Customary Norms in Contemporary International Law’, in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International, 1996), p. 488, 493.

<sup>264</sup> A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 763.

<sup>265</sup> I. I. Lukashuk, [n255] at p. 488, 493.

<sup>266</sup> E. Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency [n75] at p. 8.

<sup>267</sup> *Ibid*

<sup>268</sup> *Kaunda and Others v. President of the Republic of South Africa and Others* (2004) Case CCT 34/04 (4 August 2004) para. 148,149.



In minimalizing the role of state practice in modern custom, the ICJ is able to attain its desired community goals in an easier fashion.<sup>269</sup> Where the ICJ's treatment of "state practice is selectively used," for modern custom does not need to describe existing state practice.<sup>270</sup> Rather, modern customs prescribes standards of conduct to be achieved.<sup>271</sup> Hence, inconsistent state practice may be overlooked and higher regard placed on *opinio juris* if the common interests of all States are engaged.<sup>272</sup> In adopting the *Nicaragua* approach, the ICJ has arguably re-interpreted the concept of customary law in such a way to ensure that the 'right' answer is provided.<sup>273</sup> As Simma and Alston discern, "there is a strong temptation to turn to customary law as the formal source which provides...the desired answers."<sup>274</sup>

### C. Inventing Legal Fiction

However, the ICJ in using customary law to provide desired answers is creating a legal fiction by "inventing custom."<sup>275</sup> The creation of modern custom treats the traditional requirements of customary law as if they are "not only inadequate but even irrelevant for the identification of much new law today."<sup>276</sup> In doing so, the ICJ is opportunistically invoking new customary law without justifying its findings in legal reasoning.<sup>277</sup> For instance, the ICJ has been accredited for giving "a new and lasting direction to the law of the sea in general."<sup>278</sup> Yet, as I sought to demonstrate in Chapter 1, the ICJ's findings on maritime delimitation are questionable. For the ICJ choose to ignore existing state practice, relied on weak examples of *opinio juris* and recycled its own judicial decisions, to identify customary law. Hence, the ICJ can be accused of creating law rather than applying it.<sup>279</sup> Similarly, the ICJ judgement in *Gabcikovo-Nagymaros Project*, demonstrates an attempt to invent custom in order to address environmental concerns.<sup>280</sup>

In seeking to advance the development of law, the ICJ is creating new customs "in the pretext of 'finding' the customary international norms."<sup>281</sup> Yet, this creation of

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<sup>269</sup> F. Vicuña, Customary International Law in a Global Community: Tailor Made? [n84] at p. 38.

<sup>270</sup> J. Wouters and C. Ryngaert, Impact on the Process of the Formation of Customary International Law [n63] at p. 111, 129, 130

<sup>271</sup> G. Schwarzenberger, 'The Inductive Approach to International Law', (1947) 60 HARV. L. REV. 539, pp. 566-70.

<sup>272</sup> J. Wouters & C. Ryngaert, Impact on the Process of the Formation of Customary International Law [n63] at p. 112.

<sup>273</sup> B. Simma and P. Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles [n146] at p. 83.

<sup>274</sup> *Ibid*

<sup>275</sup> E. Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency [n75] p. 85.

<sup>276</sup> R. Y. Jennings, "What Is International Law and How Do We Tell It When We See It?", in *Annuaire suisse de droit international*, (1981), Vol. 37, p. 67.

<sup>277</sup> J. L. Goldsmith and E.A. Posner, "Understanding the Resemblance Between Modern and Traditional Customary International Law", *Virginia Journal of International Law*, 40 (2000), 639, p. 667.

<sup>278</sup> R. Y. Jennings, 'The International Court of Justice after Fifty Years' (1995) 89 AJIL 493, p.493.

<sup>279</sup> P. Dupuy, 'Formation of Customary International Law and General Principles', in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP, 2007) p. 460.

<sup>280</sup> *Gabcikovo-Nagymaros Project* [n70]

<sup>281</sup> E. Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency [n75] at p. 85.

law is far outside the ambit of the function prescribed to the ICJ in Article 38(1)(d) of the ICJ Statute.<sup>282</sup> Although an element of dynamic interpretation may be useful for the progression of international law,<sup>283</sup> I would regard the activism of the ICJ as an attempt to use its unique role in the international system as authority to invent custom.<sup>284</sup> In doing so, the overly flexible manner in which the ICJ creates custom has disregarded the traditional requirements, which constitute custom.<sup>285</sup> Thus, the reasoning of the ICJ is no longer based on legal grounds but on ideals of *ex aequo et bono*, according to what is right and good.<sup>286</sup>

This is troubling as it suggests that modern customs are based on ideals and aspirational goals rather than realistic expectations of practice.<sup>287</sup> In marginalising the need for state practice, modern customs are unable to reflect actual and arguably achievable, standards of conduct.<sup>288</sup> A divide occurs, between the asserted custom and existing state practice. For instance, customary international law prohibits torture, yet torture is a practice that still remains today.<sup>289</sup> A similar criticism is made of the emptiness of *jus cogens* norms, which are often flouted in practice.<sup>290</sup> Without reference to state practice, modern customs lack relevance. States must internalise the custom within their own legal orders, for the custom to regulate standards of behaviour.<sup>291</sup> Hence, modern custom lacks legitimacy of state consent since it is formed with little or no reference to state practice.<sup>292</sup> Traditional custom may suffer from a lack of democratic legitimacy; however, it is able to derive legitimacy through state consent and practice. I would suggest that these elements of legitimacy are absent from modern custom altogether, for the ICJ plays the dominant role in the creation of custom.<sup>293</sup>

Moreover, the function of modern custom is questionable, since “law should not consist of abstract, utopian norms, but rather be affiliated with social reality.”<sup>294</sup> The reliance on *opinio juris*, allows the ICJ to disguise claims of what the law should be, as pronouncements of what the law is.<sup>295</sup> The text of General Assembly resolutions

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<sup>282</sup> ICJ Statute [n1] at Art. 38 (1)(d)

<sup>283</sup> A. Seibert-Fohr, ‘Modern Concepts of Customary International Law as a Manifestation of a Value-Based International Order’ in Andreas Zimmermann and Rainer Hofmann, (eds) *Unity and Diversity in International Law* (Berlin: Duncker & Humblot, 2006) 257, p. 281.

<sup>284</sup> E. Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency [n75] at p. 86.

<sup>285</sup> N. Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (Routledge, 2014) p. 56.

<sup>286</sup> W. Friedmann, ‘The North Sea Continental Shelf Cases – A critique,’ 64 *American Journal of International Law* (1970) 229, p. 236.

<sup>287</sup> A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 769.

<sup>288</sup> D. Bodansky, ‘Custom and (and Not So Customary) International Environmental Law,’ *Indiana Journal of Global Legal Studies*: (1995) Vol. 3: Iss. 1, Article 7, pp. 116-19, 110-11.

<sup>289</sup> D. P. Fidler, ‘Challenging the Classical Concept of Custom,’ 39 *GERMAN Y.B. INT’L L.* 198, p. 227.

<sup>290</sup> A. A. Weisburd, ‘The Emptiness of the Concept of Jus Cogens, as illustrated by the War in Bosnia-Herzegovina,’ (1995) 17 *MICH.J. INT’L L.* p.49.

<sup>291</sup> H. L. A. Hart, *The Concept of Law* (Clarendon Law Series, 1997) 2<sup>nd</sup> Ed. p. 86-91.

<sup>292</sup> A. A. Weisburd, ‘Customary International Law: The Problem of Treaties,’ (1988) 21 *VAND.J. TRANSNAT’L L.* p.1.

<sup>293</sup> A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 770.

<sup>294</sup> N. Peterson, Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation, 23 *AM. U. INT’L L. REV.* 275, 301 (2008) 148.

<sup>295</sup> M. P. Scharf, ‘Seizing the ‘Grotian Moment’: Accelerated Formation of Customary International Law in times of Fundamental Change’, *Cornell International Law Journal*, (2010) 43, 439, p. 450, 467,468.

often fail to differentiate between *lex lata*, what the law is and *lex ferenda*, what the law should be.<sup>296</sup> As Roberts observes, resolutions “often reflect a deliberate ambiguity between actual and desired practice, designed to develop the law and to stretch the consensus on the text as far as possible.”<sup>297</sup> The ICJ in basing new customary law on desired practice is seeking to create “utopian laws that cannot regulate reality.”<sup>298</sup>

A rule that is purely based on *opinio juris* is unlikely to achieve extensive compliance in practice. Though many States may claim to have an interest in achieving humanitarian goals, until action is taken to evidence this belief, it remains a hollow ideal.<sup>299</sup> Hence, the content of modern custom is vague, based on abstract notions. One cannot rely on modern custom to act as an accurate prediction of how States will act in the future. Modern custom seemingly establishes itself from promises of acts, rather than existing evidence of such conduct already occurring, to be continued.<sup>300</sup> Without regard to the constituent element of state practice, I remain sceptical of modern customs’ ability to regulate state conduct in its attempt to advance preferred normative objectives. I would regard traditional custom as more capable of producing practical and achievable standards for customary law, since it is based on state practice. Traditional custom in working from practice to theory is able to create expectations of compliance in the future.<sup>301</sup> To advance Berderman’s stance:

The key defect of modern custom is that in lauding ideal standards of state conduct, it has become detached from actual state practice. If legitimacy and transparency matter as metrics for customary international law ... then the traditional view of CIL - even as imperfectly captured in Article 38 (1)(b)’s formulation - should continue to be embraced<sup>302</sup>

## Conclusion

The ICJ in attempting to ground its creation of custom, without considerations of state practice, have become inventors of a legal fiction. As Dworkin described, a “successful interpretation must not only fit but also justify the practice it interprets.”<sup>303</sup> In seeking to find customary law, the ICJ must consider existing practice in order to have descriptive accuracy. The substance of custom should not be derived from abstract moral considerations but on legal expressions of *opinio juris*, “formulated by a majority of states rather than judges.”<sup>304</sup> The Court must attempt to “formulate eligible interpretations” of customary law which can be justified, based on the analysis of state practice and *opinio juris*.<sup>305</sup> This is not to say that moral considerations cannot be accounted for in the creation of custom as moral considerations may influence state practice. Customs will develop and evolve in time, for law is dynamic. The status of customary law should be regularly assessed in light

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<sup>296</sup> A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 763.

<sup>297</sup> *Ibid*

<sup>298</sup> *Ibid.*, at p. 773.

<sup>299</sup> A. A. D’Amato, *The Concept of Custom in International Law* [n173] at p. 268.

<sup>300</sup> K. Wolfke, *Custom in Present International Law* [n24] at p. 42.

<sup>301</sup> A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 763.

<sup>302</sup> D. J. Bederman, *Custom as a Source of Law* (Cambridge University Press, 2010), p. 145.

<sup>303</sup> R. Dworkin, *Law’s Empire* (Harvard University Press, 1986) p. 285.

<sup>304</sup> A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 779.

<sup>305</sup> *Ibid.*, at p. 772.

of new developments in state practice and *opinio juris*.<sup>306</sup> Nonetheless, a “judge’s duty is to interpret the legal history he finds, not to invent a better history.”<sup>307</sup> The ICJ’s interpretation under modern custom is overtly flexible, to such a degree that it has weakened the creation of custom into a “nebulous fiction.”<sup>308</sup> Ultimately, in order for customary law to retain its status and relevance in modern public international law, the Court must refer to state practice.

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<sup>306</sup> J. Rawls, *A Theory of Justice* (Harvard University Press, 1972) p. 20.

<sup>307</sup> R. Dworkin, *A Matter of Principle* (Harvard University Press, 1986) p.160.

<sup>308</sup> I. Detter de Lupis, *The Concept of International Law* (Norstedts, 1987), p.13, 116.