

# THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN SHAPING CUSTOMARY INTERNATIONAL LAW

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**Abstract:** Customary international law (CIL) stands as a cornerstone of the international legal order. Historically rooted in state practices, CIL has evolved from organic norm development to a dynamic force shaped by multilateral frameworks, reflecting the international community's evolving consensus. This paper examines CIL's primacy, aiming to elucidate its theoretical underpinnings, historical precedence, and transformative influence through the International Court of Justice (ICJ). Employing doctrinal and historical analysis of judicial decisions, state practices, and legal frameworks, it traces CIL's trajectory from early state consent to modern collective commitments, highlighting the ICJ's pivotal role in norm crystallisation. The study explores how CIL's dual-track approach, balancing rapid norm formation with practice-based stability, addresses global challenges like decolonisation and cyber warfare. By affirming universal standards while exercising strategic restraint, the ICJ ensures CIL's adaptability and coherence. Structured across four thematic sections, this analysis illuminates the ICJ's nuanced engagement with CIL, offering insights into its enduring contribution to a responsive international legal system, while advocating for clearer judicial standards to sustain its relevance.

**Key words:** Customary International Law; International Court of Justice; Dual-Track Approach; State Practice; *Opinio Juris*

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## 1. INTRODUCTION

Customary international law (CIL) occupies a position of equal, if not superior, significance to treaties within the architecture of the international legal order.<sup>1</sup> Legal historians have long debated its relative stature, with some asserting that custom historically preceded treaties as the dominant source of the *jus gentium* (Nussbaum, 1954, p. 201). This perspective finds robust support in the works of foundational theorists. Hugo Grotius, in his seminal *De Jure Belli ac Pacis* (1625), conceptualised the law of nations as emerging from the collective will of states, manifested through sustained customs and consistent state practice, which supplemented the universal precepts of natural law (Grotius, 1964, p. 44). Similarly, Francisco Suárez, in *De Legibus ac Deo Legislatore* (1612), argued that customary rules, established through the habitual conduct of nations, filled lacunae left by natural reason, paralleling the role of custom in municipal legal systems (Nussbaum, 1954, pp. 87-88). These early natural law approaches emphasised the organic development of legal norms through state behaviour, a process distinct from the deliberate codification of treaties.

In contrast, the positivist shift of the eighteenth and nineteenth centuries, epitomised by Richard Zouche's *Juris et Judicii Feialis* (1650), reframed international law

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<sup>1</sup> Article 38 (1) b, Statute of the International Court of Justice (1945).

(*jus inter gentes*) as a product of rational customs and explicit agreements, sidelining natural law in favour of state consent (Nussbaum, 1954, p.167). This doctrinal evolution entrenched the principle that only norms expressly or implicitly accepted by states, whether through treaties or customary practice, possess binding force. The positivist paradigm, which dominates modern legal thought, underscores the consensual basis of international obligations, a principle that Article 38(1)(b)<sup>2</sup> implicitly reflects in its requirement of "acceptance as law." While Article 38(1)(b) is, *stricto sensu*, binding only in proceedings before the ICJ, its widespread recognition as a codification of pre-existing legal principles has elevated it to the status of customary international law itself. This dual character, as both a procedural directive and a substantive norm, renders it a critical point of departure for legal analysis.

Nevertheless, as Sir Robert Jennings astutely observed, the formulation in Article 38(1)(b), rooted in a 1920 draft by the League of Nations' Committee of Jurists, serves merely as a foundational reference rather than an exhaustive exposition of customary international law (Rubin, 1993, p. 226-230). Its brevity and historical context may limit its capacity to address the complexities of contemporary international legal practice, necessitating a broader exploration of the concept.

The unwritten nature of CIL, however, poses challenges to its clarity and certainty. The drafters of the Statute of the International Court of Justice (ICJ) admitted to an unclear understanding of what constitutes international custom, highlighting its definitional ambiguity.<sup>3</sup> Some scholars note that the absence of an authoritative text means that there is no inherent "thereness" to be extracted, rendering CIL's content inherently insecure (Kammerhofer, 2004, p. 524). As a result, international law relies heavily on the ICJ's interpretation of Article 38(1)(b), which defines custom as "evidence of a general practice accepted as law." Given the "rudimentary" nature of international law, and the absence of a centralised law-making body or compulsory judicial authority, the ICJ's role in clarifying customary norms is critical but raises questions about its legitimacy (Cassese, 2005, pp. 194-195). This approach, where custom and treaties coexist, ensures that international law remains dynamic, balancing the organic evolution of state practice with the deliberate codification of treaties.

The enduring primacy of customary international law is further illuminated by Hans Kelsen's pure theory of law, which posits custom as the *Grundnorm* (basic norm) of the international legal system. Kelsen argued that all legal rules, including the binding nature of treaties encapsulated in the customary maxim *pacta sunt servanda* ("agreements must be kept"), derive their validity from this foundational norm (Kelsen, 1945, p. 369). This theoretical framework aligns with the practice of the ICJ, which has consistently recognised treaty-related rules,<sup>4</sup> such as those governing formation, interpretation, and termination, as having crystallised into customary international law. For instance, in the *North Sea Continental Shelf Cases*,<sup>5</sup> the ICJ emphasised that customary norms emerge from a general and consistent state practice accompanied by

<sup>2</sup> United Nations. (1946). Statute of the International Court of Justice.

<sup>3</sup> International Law Commission (1950). Yearbook of the International Law Commission, volume I, p. 6, para. 45. Available at: [https://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1950\\_v1.pdf](https://legal.un.org/ilc/publications/yearbooks/english/ilc_1950_v1.pdf) (accessed on 18.04.2025).

<sup>4</sup> ICJ, Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) in Judgment of 10 October 2002, 2002 ICJ Rep. 303, 429–430, paras. 263– 264; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, in Advisory Opinion, I.C.J. Reports 2004, 94; ICJ, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), in Judgment, I.C.J. Reports 1997, 46.

<sup>5</sup> ICJ, North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands), Judgment, I.C.J. Reports 1969.

*opinio juris* (the belief that such practice is legally obligatory), a standard that treaty rules often meet over time.

This judicial practice underscores a critical insight: treaties, while authoritative expressions of state consent, derive their legitimacy from pre-existing customary norms. The customary principle of *pacta sunt servanda*, for example, predates and enables the enforceability of treaty obligations, positioning custom as the bedrock of the international legal hierarchy.<sup>6</sup> The ICJ's affirmation of this interplay in cases such as *Nicaragua v. United States* reinforces the notion that customary international law not only complements but also sustains the treaty-based system.<sup>7</sup>

The British historian Niall Ferguson once remarked, "Sometimes the most important historical events are the non-events: the things that did not occur" (Ferguson, 2009, p. 165) This evocative insight finds a compelling echo in the jurisprudence of the ICJ, where the significance of customary international law often lies as much in what the Court declines to affirm as in the norms it explicitly upholds. The ICJ's jurisprudence reveals a dual role: it actively shapes custom through affirmative rulings while preserving its evolution through strategic restraint. The Court's significance lies not only in the norms it upholds, such as state sovereignty,<sup>8</sup> resource rights,<sup>9</sup> or sovereign immunity,<sup>10</sup> but also in its silences. This dual role underscores the Court's profound influence, where its silences echo with the same authority as its declarations, mirroring Ferguson's insight into the potency of the unspoken. By affirming customary norms, the ICJ enhances legal certainty, providing states with predictable standards.<sup>11</sup> By exercising restraint, it avoids pre-empting the organic development of custom through state practice, a balance critical in emerging fields like environmental obligations or cyber warfare.

Historically, CIL preceded treaties as the primary source of international legal norms, rooted in the collective will of states to establish binding rules through habitual conduct. Early legal thought viewed these customs as complementing universal principles, filling gaps with norms derived from state practice. This organic process, distinct from the deliberate drafting of treaties, underscored CIL's adaptability and resilience. A doctrinal shift in later centuries reframed international law as a product of rational customs and explicit agreements, emphasising state consent as the cornerstone of legal obligations. This modern paradigm recognises CIL as a consensual framework, requiring both consistent state actions and a belief in their legal necessity, a principle codified in foundational international legal texts. This dual requirement positions CIL as a vital norm-creating mechanism, capable of evolving with the international community's needs while maintaining stability through time-tested practices.

This study explores the ICJ's nuanced engagement with CIL, examining how its judicial authority transforms state conduct into binding norms while navigating the tension between innovation and tradition. It aims to assess the ICJ's contribution to CIL's coherence and responsiveness, advocating for refined judicial standards to address

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<sup>6</sup> "Pacta Sunt Servanda" in United Nations. (1969). Vienna Convention on the Law of Treaties, 331.

<sup>7</sup> ICJ, Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), in Judgment, I.C.J. Reports 1986, 14, paras. 188–192.

<sup>8</sup> Permanent Court of International Justice, Case of the S.S. 'Lotus' (*France v. Turkey*), in Judgment of 7 September 1927, PCIJ Series A, No. 10, 18.

<sup>9</sup> ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), in Judgment of 19 December 2005, ICJ Rep. 168, 251–252. para. 244.

<sup>10</sup> ICJ, Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), in Judgment of 3 February 2012, 2012 ICJ Rep. 99, 123. para. 56.

<sup>11</sup> ICJ, United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*), in Judgment of 24 May 1980, 1980 ICJ Rep. 3, 30–31.

challenges in norm application. The research objectives include analysing CIL's historical precedence over treaties, evaluating its theoretical role as the foundational norm of the international legal system, and tracing its evolution through the ICJ's methodological shifts. By employing a doctrinal analysis of ICJ rulings and legal principles, alongside a historical examination of state practices and evolving legal frameworks, the study provides a comprehensive lens into CIL's enduring significance. Structured across three thematic sections, the analysis explores the development of CIL within the ICJ jurisprudence, the influence of technological and institutional advancements, and contemporary applications alongside the persistence of traditional customs through a dual-track approach. The first track focuses on the swift formation of customary norms via international resolutions, which demonstrate *opinio juris* and embody collective state intent. The second track, grounded in traditional customary law formation, depends on the gradual buildup of consistent state practice over time, supported by *opinio juris*. This paper illuminates the ICJ's crucial role in sustaining a coherent and adaptable international legal order, offering insights into how CIL continues to shape global governance in an ever-changing world.

## 2. THE EVOLUTION OF CIL IN THE JURISPRUDENCE OF THE ICJ

The lack of certainty in the formation of CIL has amplified the ICJ's influence in shaping its development, prompting scrutiny of the Court's role and legitimacy. Article 38(1)(d) of the ICJ Statute designates judicial decisions as a "subsidiary means for the determination of rules of law," implying a restricted role in law creation.<sup>12</sup> Yet, the ICJ's jurisprudence suggests it often exceeds this mandate, engaging in the creation of customary norms by asserting their existence without thoroughly evidencing consistent state practice and *opinio juris*.<sup>13</sup> This tendency, as critics observe, risks undermining the legitimacy of CIL, which depends on the consensual practices of states. Absent a robust foundation in state practice, the credibility and compliance of customary norms are compromised, threatening their role within the international legal order (Chan, 2016, pp. 44-71).

The ICJ's approach to CIL has evolved in response to changes in the global legal landscape. Before 1969, the Court prioritised prolonged state practice, ensuring legal certainty but marginalising newly independent states with limited historical participation. After 1969, the ICJ embraced a more dynamic approach, recognising collective expressions of legal obligation, such as multilateral resolutions, as evidence of custom. This shift aligns with the argument that modern CIL formation integrates traditional state practice with norms emerging from globalised frameworks, promoting inclusivity. Similarly, the ICJ's strategic rulings enable rapid norm creation while preserving coherence with state-driven processes, ensuring CIL's adaptability to global challenges like human rights and environmental protection. By balancing practice-based stability with innovative norm development, the ICJ's dual-track approach enhances CIL's responsiveness and inclusivity, maintaining its foundation in state consent through affirmative rulings and calculated restraint.

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<sup>12</sup> Article 38 (1)(d), ICJ Statute.

<sup>13</sup> Second report on formation and evidence of customary international law, by Sir Michael Wood, Special Rapporteur, International Law Commission, Sixty-sixth session, A/CN.4/672, May 2014, pp. 171-172.

### 2.1 The Court's pre-1969 Methodology

The Court's pre-1969 methodology for identifying customary international law was anchored in two core principles: sustained and uniform state practice over a prolonged period, and the volitional element of state consent through *opinio juris*. This approach sought to balance historical continuity with state sovereignty, as demonstrated in pivotal cases such as *Right of Passage over Indian Territory* (1960)<sup>14</sup> and *The Lotus* (1927).<sup>15</sup>

The first principle required that state practice be consistent and endure over an extended duration to establish a customary norm. In *Right of Passage over Indian Territory*, Portugal asserted a right of passage through Indian territory to access its enclaves, Dadra and Nagar-Aveli. The ICJ determined that a "constant and uniform practice" of free passage for private persons, civil officials, and goods had persisted for over 125 years, spanning British colonial and post-independence periods. This practice, unaffected by India's independence, led the Court to recognise a bilateral customary right specific to Portugal.<sup>16</sup> The emphasis on temporal depth underscored legal stability. Some authors contend that such prolonged practice was essential in an era of limited state interaction, ensuring norms reflected a shared legal order (Dinstein, 2004, p. 197). Conversely, others criticise this focus as overly restrictive, arguing it disadvantaged emerging states, particularly those post-decolonisation, which lacked historical practice to demonstrate compliance (Cassese, 2005, pp. 26-28). This critique reveals the methodology's limitations in accommodating new states amid a changing international landscape.

The second principle mandated that states undertake a practice with the belief that it is legally binding (*opinio juris*), positioning customary law as an expression of their free will. In *The Lotus*, a collision on the high seas between a French vessel (*Lotus*) and a Turkish vessel (*Boz-Kourt*) prompted Turkey to prosecute the French officer. France contested Turkey's jurisdiction, but the PCIJ upheld Turkey's actions, stating: "The rules of law binding upon States... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law".<sup>17</sup> This consensualist perspective reinforced state sovereignty, enabling states to exempt themselves from emerging norms via dissent, thus establishing the persistent objector doctrine. Dinstein underscores *opinio juris* as critical, distinguishing legal obligation from mere habit (Dinstein, 2004, p. 197). Cassese, while not explicitly critiquing this element pre-1969, advocates for flexibility, suggesting strict *opinio juris* requirements could marginalise newer states without established legal traditions (Cassese, 2005, pp. 26-28).

The pre-1969 methodology ensured legal certainty through prolonged practice and consensual legitimacy, but its rigidity posed challenges with the rise of new states post-decolonisation. Dinstein defends the historical necessity of duration for stability, while Cassese's critique highlights the need for inclusivity, reflecting ongoing debates about adapting customary international law to a more diverse state system.

In the *Asylum Case*, the ICJ recognised the theoretical possibility of regional customs, distinct from general customary international law, which requires widespread

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<sup>14</sup> ICJ, *Right of Passage over Indian Territory* (Portugal v. India), Merits, Judgment, I.C.J. Reports 1960.

<sup>15</sup> Permanent Court of International Justice, *Case of the S.S. 'Lotus' (France v. Turkey)*, Judgment, PCIJ Series A, No. 10, 1927.

<sup>16</sup> ICJ, *Right of Passage over Indian Territory* (Portugal v. India), Merits, Judgment, I.C.J. Reports 1960, 6–73.

<sup>17</sup> Permanent Court of International Justice, *Case of the S.S. 'Lotus' (France v. Turkey)*, in Judgment of 7 September 1927, PCIJ Series A, No. 10, 4–33.

state practice and *opinio juris* as articulated in Article 38(1)(b) of the ICJ Statute.<sup>18</sup> The Court assessed whether a regional custom of diplomatic asylum existed among Latin American states, capable of binding Peru. It concluded that no such custom had been sufficiently proven, particularly in a manner enforceable against Peru. This ruling implicitly acknowledged that regional customs could exist, but emphasised the evidentiary burden of establishing their existence through consistent practice and acceptance within the region. However, the Court left a critical question unresolved: what constitutes sufficient proof of a regional custom? Must all states in the region actively participate in or acquiesce to the practice, including the state sought to be bound? Alternatively, does a state's persistent objection, akin to the persistent objector rule in general customary law, exempt it from being bound? Peru's consistent dissent, evidenced by its non-participation in the 1933 and 1939 Montevideo Conventions, suggested the latter. The ICJ noted in obiter dicta that even if a Latin American custom of diplomatic asylum existed, Peru's rejection precluded its application. This aligns with the principle that customary norms, even regional ones, do not bind states that persistently object during their formation (*North Sea Continental Shelf Cases*, 1969). Yet, the Court's failure to explicitly clarify whether universal regional consent or mere dissent sufficed weakened the doctrinal coherence of its reasoning. The *North Sea Continental Shelf Cases* offered another opportunity to refine the concept of regional custom. The suggestion arose that a custom governing continental shelf delimitation existed among North Sea riparian states. The ICJ, however, declined to recognise such a custom, emphasising instead the primacy of general equitable principles over localised practices. This decision underscored the judicial preference for universal norms unless regional customs are unequivocally established, a high threshold that reflects the Court's cautious approach to particular law. The ruling implicitly rejected the notion that geographic proximity alone could substantiate a regional custom, instead demanding rigorous evidence of practice and *opinio juris* specific to the region.

In the *Frontier Dispute*, a Chamber of the ICJ addressed the principle of *uti possidetis juris*, the doctrine that colonial boundaries remain intact post-independence.<sup>19</sup> Rather than confining it to a regional norm of Spanish American or African law, the Chamber characterised *uti possidetis* as a principle of general international law. This expansive interpretation diverged from a strict regional custom framework, suggesting that practices rooted in specific regions could transcend their origins to acquire a broader normative force. The Chamber's reasoning rested on the principle's widespread acceptance in decolonisation contexts globally, supported by state practice and resolutions like the 1964 Cairo Declaration of the Organisation of African Unity.<sup>20</sup> This approach, however, obscured the potential for *uti possidetis* to operate as a regional custom with distinct applications, diluting its particularity. Contrastingly, in the *Land, Island and Maritime Frontier Dispute*,<sup>21</sup> a differently constituted Chamber treated *uti possidetis* as a norm specific to former Spanish American colonies, accepted by the parties without probing its wider applicability. This narrower construction avoided the universalising tendency of the *Frontier Dispute* ruling, grounding the principle in the historical and legal context of the disputants' shared colonial heritage. The Chamber's reluctance to extrapolate beyond the case's regional scope reinforced the idea that

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<sup>18</sup> ICJ, Asylum (Colombia/Peru), Judgment, I.C.J. Reports 1950, 277-278.

<sup>19</sup> ICJ, Frontier Dispute (Burkina Faso v. Mali), in Judgment, 1986 I.C.J. Reports 554.

<sup>20</sup> Organisation of African Unity, Cairo Declaration on Border Disputes Among African States, in Cairo Declaration on Border Disputes Among African States, AHG/Res. 16(I).

<sup>21</sup> ICJ, Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening), in Judgment, 1992 I.C.J. Reports 351.

regional customs derive legitimacy from the consent or practice of the affected states, consistent with the voluntary nature of international legal obligations.

## 2.2 The Court's post-1969 Methodology

The *North Sea Continental Shelf* judgment marked a turning point, as the Court began to prioritise evidence of general acceptance over strict historical practice, a shift lauded by Shaw for its adaptability (Shaw, 2021, p. 85). This evolution reflects a broader scholarly debate on reconciling custom's traditional roots with contemporary realities. The following analysis will explore this transition, situating the Court's interpretative shift within the broader context of international law's development.

The ICJ's traditional approach to customary international law was deeply rooted in the realities of the nineteenth-century international society, a period marked by nascent multilateralism, the absence of recognised legal personality for international organisations, and significant barriers to accessing evidence of state practice due to geographical and technological constraints. This context shaped a methodology that prioritised prolonged and consistent state practice as the bedrock of customary norms. However, the global landscape had transformed dramatically by the time the ICJ delivered its seminal 1969 judgment in the *North Sea Continental Shelf* cases. This decision emerged two decades after the Court's recognition of the international legal personality of organisations in the *Reparation for Injuries* advisory opinion,<sup>22</sup> and roughly a decade following the wave of decolonisation that brought newly independent African and Asian states into the international community. The post-World War II era, catalysed by the 1945 *United Nations Charter*, also witnessed the proliferation of multilateral treaties, reflecting a surge in multilateralism. These developments, legal personality for organisations, a broadened state membership, and treaty-based codification, fundamentally altered the Court's approach to identifying customary norms, culminating in the innovative framework articulated in *North Sea Continental Shelf*, which has proven enduring.

In the *North Sea Continental Shelf* cases, the ICJ was tasked with resolving disputes concerning the delimitation of the continental shelf between the Federal Republic of Germany and Denmark, and between Germany and the Netherlands. These cases provided a pivotal opportunity for the ICJ to articulate the criteria for identifying customary international law, a foundational concept in international legal practice. The Court established that customary law emerges from the convergence of two essential elements: a widespread and consistent state practice and a subjective belief, known as *opinio juris sive necessitatis*, that such practice is legally obligatory.<sup>23</sup> Specifically, the Court held that "*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.*" This formulation underscores that state practice must be both consistent and motivated by a sense of legal obligation, rather than driven by considerations of courtesy, neighbourliness, or political expediency.

The ICJ's delineation of these two elements, settled state practice and *opinio juris*, has been repeatedly affirmed as the cornerstone of customary international law. For

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<sup>22</sup> ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, 184-185.

<sup>23</sup> ICJ, *North Sea Continental Shelf* (Germany v. Denmark; Germany v. Netherlands), in Judgment, I.C.J. Reports 1969, para. 77.

instance, in the *Asylum* case<sup>24</sup> and the *Jurisdictional Immunities of the State* case,<sup>25</sup> the Court emphasised the necessity of both components for the formation of an international custom. This formulation marked a significant departure from the Court's earlier methodology, distinguishable in three key respects, which reflect both practical adaptations and theoretical advancements in international law.

First, the *North Sea Continental Shelf* judgment marked a transformative shift in the ICJ approach to customary international law, departing from its historical reliance on prolonged state practice as the primary indicator of custom.<sup>26</sup> Instead, the Court emphasised *opinio juris*, the belief that a practice is legally obligatory, asserting that "*the frequency, or even habitual character of the acts, is not in itself enough*" to establish a norm absent this conviction.<sup>27</sup> Routine acts, such as ceremonial gestures, may reflect courtesy rather than duty, the ICJ noted, underscoring that practice and *opinio juris* are interdependent. A single act, if imbued with legal intent, might suffice to evidence both elements, suggesting that *opinio juris* can, at times, drive the emergence of practice, a significant break from the traditional temporal focus.

This evolution resonates with scholarly analyses of customary law's adaptation to a post-colonial, multilateral era where some states are more powerful than the others. (Shaw, 2021, p. 79). The ICJ's focus on *opinio juris* addresses the exclusionary nature of prolonged practice, which, some authors argue, disadvantaged newly independent states lacking historical records (Cassese, 2005, p. 158). This shift aligns with the accelerated norm-formation enabled by treaties and international organisations, reflecting a more inclusive legal order. Theoretically, it bridges the positivist and naturalist perspectives. While early ICJ jurisprudence, rooted in positivism, viewed custom as an empirical accumulation of acts over time, the *North Sea* approach introduces a normative lens, where *opinio juris* shapes custom proactively, a stance akin to naturalist emphasis on shared legal consciousness.

The second notable shift in the ICJ approach in the *North Sea Continental Shelf* judgment concerns the composition of state practice, expanding its scope beyond traditional usages to encompass *consuetudo scripta*, customary norms crystallised in multilateral conventions. Departing from its earlier stance in the *Asylum* case, where consent to a treaty was conflated with a customary obligation, the Court delineated a clear distinction between consent to a treaty norm and *opinio juris*, the subjective belief in a practice's legal necessity. The ICJ emphasised that while states may opt out of treaty obligations through reservations, customary international law norms, by their universal nature, bind all members of the international community without unilateral exclusion. As the Court articulated, such rules "*must have equal force for all*" and cannot be subject to a state's discretionary opt-out.<sup>28</sup> This distinction underscores a pivotal recognition: treaties can serve as evidence of custom without requiring universal ratification, broadening the sources from which customary norms may be derived.

This finding reflects a profound transformation in international relations over the twentieth century: the proliferation of multilateral conventions. In fields such as human rights, the law of the sea, treaty law, international humanitarian law, and diplomatic relations, these instruments have codified and modernised international law,

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<sup>24</sup> ICJ, *Asylum* (Colombia/Peru), I.C.J. Reports 1950, p. 266, at paras. 285-286.

<sup>25</sup> ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, 122, at para. 55.

<sup>26</sup> ICJ, *North Sea Continental Shelf* (Germany v. Denmark; Germany v. Netherlands), in Judgment, I.C.J. Reports 1969, para 77.

<sup>27</sup> *Ibid.*, para 77.

<sup>28</sup> *Ibid.*, 38-39, para. 63.



accommodating the diverse membership, interests, and legal traditions of an expanded global community. Concepts like *jus cogens*, the common heritage of mankind, and the exclusive economic zone, introduced through treaties, exemplify this dual role as both conventional and customary norms. The ICJ affirmed this duality in the *Military and Paramilitary Activities* case, recognising that treaty provisions can parallel customary rules.<sup>29</sup> This approach highlights the Court's willingness to leverage treaties as a dynamic source of custom, responsive to contemporary state practice.

Finally, the *North Sea* judgment diminished the traditional emphasis on time as a determinant of customary law. The Court held that "*even without the passage of any considerable period of time,*" widespread and representative participation in a multilateral convention could suffice to establish a customary rule, provided it includes states with specially affected interests.<sup>30</sup> This temporal flexibility marks a significant departure from earlier jurisprudence, which often required prolonged practice, as seen in cases like *Right of Passage*. By prioritising the quality and representativeness of participation over duration, the ICJ adapted custom formation to the accelerated pace of modern international law-making.

Theoretically, this evolution mediates formalism and dynamism. The traditional formalism, rooted in positivism, emphasised observable practice over time. The *North Sea* ruling, however, adopts a dynamic view, treating treaties as both evidence and drivers of custom. This raises a legitimate concern: rapid norm formation via treaties may reflect only treaty-drafting states' consent, not the broader international community's. Nevertheless, by balancing adaptability with inclusivity, the *North Sea* judgment underscores the ICJ's pivotal role in shaping a responsive and coherent customary legal order, a contribution enriched by scholarly and theoretical discourse.

Hence, the ICJ influences customary international law through two primary mechanisms. First, it declares treaty provisions as reflective of customary norms, extending their reach to non-party states. In *Military and Paramilitary Activities in and against Nicaragua*, the ICJ, unable to rely on the UN Charter due to a U.S. reservation, ruled that common Articles 1 and 3 of the Geneva Conventions embodied customary law, prompting even non-parties to accept these obligations.<sup>31</sup> Meron highlights how such declarations solidify customary status, enhancing norm universality (Meron, 2000, p. 361-389). Second, other international courts rely on ICJ rulings to affirm customary rules without independent analysis. For example, the European Court of Justice in *Opel Austria GmbH v Council* and the International Tribunal for the Law of the Sea in *M/V Saiga (No. 2)* drew on ICJ decisions to uphold principles like good faith and necessity.<sup>32</sup> The *Gabcíkovo-Nagymaros Project* ruling confirmed the customary status of necessity, sparking debate in investment arbitration over necessity clauses, illustrating the ICJ's cross-domain impact.<sup>33</sup>

However, the ICJ's influence has limits. Its jurisdiction, dependent on state consent, leaves many customary law areas untouched, and states, as primary creators of custom, may diverge from ICJ positions. D'Amato argues that customary rules persist

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<sup>29</sup> ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, in Judgment, I.C.J. Reports 1986, p. 95, para. 177.

<sup>30</sup> ICJ, *North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands)*, in Judgment, I.C.J. Reports 1969, p. 42, para. 73.

<sup>31</sup> ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, in Merits, Judgment, I.C.J. Reports 1986, 14–150.

<sup>32</sup> International Tribunal for the Law of the Sea, *M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, in Judgment, ITLOS Reports 1999, 10–78.

<sup>33</sup> ICJ, *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, in Judgment, I.C.J. Reports 1997, 7–84.

only when they align with states' mutual self-interest, a dynamic the ICJ cannot override (D'Amato, 1987, pp. 34-67). For instance, U.S. non-compliance in *Nicaragua* underscores state resistance. Despite these constraints, the ICJ's authoritative voice profoundly shapes customary international law when it engages, making its methods for identifying norms critical to their recognition and evolution.

### 3. THE IMPACT OF TECHNOLOGICAL AND INSTITUTIONAL DEVELOPMENTS

The formation of CIL has historically been constrained by its reliance on consistent state practice and *opinio juris*, the subjective belief in a legal obligation, as outlined in Article 38(1)(b) of the ICJ Statute. Traditional custom struggles to adapt to the demands of a progressive legal order, particularly in addressing issues like sustainable development. Despite the proliferation of international instruments articulating environmental protection principles, these norms often fail to meet the orthodox requirements of consistent state practice, rendering them unable to crystallise into customary law (Hunter et al., 2007, p. 316). This rigidity has led scholars to describe traditional custom as stagnant, incapable of reflecting the growing international consensus on norm-creating principles (Reisman, 1987, p. 133; Kolb, 2003, p. 128). In contrast, deriving custom from treaties and declarations offers a more democratic approach, engaging a broader range of states and capturing collective intent more effectively (Roberts, 2001, p. 768).

The limitations of traditional custom are particularly pronounced in its inability to keep pace with the rapid evolution of international relations, a process historically slowed by logistical barriers, geographic isolation, and limited diplomatic interactions (De Visscher, 1956, p. 471). Cases like *Right of Passage* demonstrate the traditional requirement of prolonged practice, often spanning decades or centuries. However, technological advancements in transportation and telecommunications have compressed time and space, enabling states to engage more frequently and transparently. The United Nations General Assembly has further accelerated this process by providing a forum for states to articulate their positions and gauge immediate reactions, fostering a dynamic interplay between state practice and *opinio juris*.<sup>34</sup>

This transformation is reflected in the ICJ evolving approach to custom formation, particularly in the *North Sea Continental Shelf* judgment. The Court emphasised that customary norms could emerge rapidly through widespread and representative participation, prioritising the quality of state engagement over its duration. This opened the door for General Assembly resolutions to serve as a source of customary international law, despite their non-binding nature under Article 10 of the UN Charter.<sup>35</sup> The 1970 Declaration on Principles of International Law Concerning Friendly Relations exemplifies this shift.<sup>36</sup> Adopted by near-unanimous consensus, it codified principles such as the prohibition of the use of force and non-intervention, which the ICJ later recognised as customary in *Nicaragua v. United States*.<sup>37</sup> The Court's reliance on the *Declaration*, alongside state practice and *opinio juris*, demonstrated that a single,

<sup>34</sup> ICJ, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, I.C.J. Reports 1966, 248, paras. 291–293.

<sup>35</sup> United Nations. (1945). Charter of the United Nations, XVI.

<sup>36</sup> United Nations General Assembly. (1970). Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV).

<sup>37</sup> ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, in Judgment, I.C.J. Reports 1986, 14.

representative act could crystallise custom, bypassing the need for decades of consistent practice.

The *North Sea* framework reshaped custom formation in three critical ways. First, it recognised that a single act, such as a resolution, could embody both state practice and *opinio juris* if accompanied by a sense of legal duty.<sup>38</sup> In this context, the “sense of legal duty” bridges the *North Sea* judgment to the *Declaration* by enabling a single, representative act to crystallise custom, accelerating the process beyond traditional timelines. It reflects the ICJ’s adaptation to a post-decolonial, interconnected world, where legal norms emerge from collective expressions rather than prolonged bilateral acts. Traditionally, custom required repeated practice over time, e.g., the 125-year practice in *Right of Passage*, with *opinio juris* inferred from its consistency. The *North Sea* Court, however, emphasised quality over quantity, stating that “*the frequency, or even habitual character of the acts, is not in itself enough*” without legal conviction. This opened a pathway for General Assembly resolutions, like the Declaration on Friendly Relations, to serve as a “single act.” Adopted by consensus in 1970, the Declaration reflects state conduct (voting or acquiescence) and *opinio juris* (its normative language, e.g., “*States shall refrain... from the threat or use of force*”), potentially evidencing custom in one stroke. Legally, this hinges on the resolution’s representativeness, near-universal support from 108 states at the time, aligning with *North Sea*’s focus on “*widespread and representative participation*.” However, the original text’s assertion lacks specificity on how voting translates to practice, a gap in legal reasoning.

Second, by dispensing with the requirement of long-term practice, it enabled a single resolution, or a series adopted over a short period, to contribute to custom formation, provided they reflected widespread consensus. Specifically, in paragraph 73, the Court assessed whether the 1958 Geneva Convention on the Continental Shelf had crystallised into custom, focusing on the quality and breadth of state engagement rather than its duration. While the Court ultimately found insufficient evidence in that instance (due to limited ratifications and practice), it established a principle: time is not an absolute requirement if the practice is sufficiently robust and representative. This shifted the focus from longitudinal repetition to a snapshot of collective state action, provided it demonstrated both practice and *opinio juris*.

Third, the Court’s elevation of *opinio juris* allowed resolutions to express a legal conviction pre-emptively, potentially catalysing practice rather than merely reflecting it. To express a legal conviction pre-emptively means, a resolution could serve as an initial declaration of *opinio juris*, potentially sparking state practice to align with it, rather than waiting for practice to mature first. The 1970 Declaration on Friendly Relations exemplifies this. Adopted by consensus, it articulated principles like the prohibition of the use of force with normative language (“*States shall refrain*”), signalling a collective belief in their legal obligation.<sup>6</sup> Under *North Sea*’s logic, this pre-emptive expression of *opinio juris*, if sufficiently representative, could contribute to custom by encouraging states to conform their conduct to these norms post-adoption, rather than merely codifying pre-existing practice.

This catalytic role is evident in *Nicaragua v. United States*, where the ICJ relied on the *Declaration* to affirm customary prohibitions on force and non-intervention. The Court noted that the *Declaration*’s principles, supported by state acquiescence and subsequent behaviour (e.g., diplomatic protests against violations), reflected *opinio juris* that shaped practice after 1970, not just mirrored it.<sup>8</sup> For instance, states invoking the Declaration in

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<sup>38</sup> ICJ, *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), in Judgment, I.C.J. Reports 1969, 3, paras. 73, 77.

UN debates or bilateral disputes post-1970 reinforced its norms, suggesting that the resolution's legal conviction drove compliance, aligning with North Sea's forward-looking approach. Unlike *Right of Passage*, where practice preceded belief, here *opinio juris*, expressed in 1970, pre-emptively guided practice within a decade. The ICJ first applied this understanding in the *Namibia* advisory opinion, where it identified General Assembly Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples, as "an important stage" in the development of the customary principle of self-determination. The Court linked this resolution to the United Nations Charter, asserting its applicability to all non-self-governing territories.<sup>39</sup> Subsequently, in the *Nicaragua* case, the Court elaborated that *opinio juris* could be inferred, with caution, from states' attitudes toward certain resolutions, interpreting consent to their text as acceptance of the declared rules.<sup>40</sup> This reasoning was refined in the *Nuclear Weapons* opinion, where the Court clarified that while resolutions lack formal binding force, they may evidence an existing rule or emerging *opinio juris*, contingent on their content, adoption conditions, and perceived normative character.<sup>41</sup>

#### 4. CONTEMPORARY APPLICATIONS AND THE PERSISTENCE OF TRADITIONAL CUSTOM: THE DUAL-TRACK APPROACH

Recent scholarship and jurisprudence highlight a dual-track approach to the formation of CIL: rapid norm creation through international resolutions, particularly those of the United Nations General Assembly (UNGA), and gradual norm development through sustained state practice. This duality, exemplified in cases such as the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*<sup>42</sup> and *Dispute Regarding Navigational and Related Rights*,<sup>43</sup> has sparked significant debate among scholars. While some praise its flexibility in addressing contemporary global challenges, others caution against potential inconsistencies arising from subjective judicial criteria. This brief analysis explores the dual-track approach through key cases, scholarly perspectives, and theoretical implications, arguing that it balances progressive innovation with conservative stability in customary law formation.

The first track involves the rapid establishment of customary norms through international resolutions, which serve as evidence of *opinio juris* and reflect collective state intent. Resolutions of the General Assembly of the United Nations (hereinafter as "UNGA"), though not legally binding, can consolidate customary norms by articulating principles widely accepted by states. This approach is particularly effective in addressing urgent or emerging issues, such as decolonisation or human rights, where prolonged state practice may be impractical. A high volume of UN resolutions can operate as political acts that impose new obligations (Deplano, 2017, p. 249). In 2019, the ICJ issued an advisory opinion on the separation of the Chagos Archipelago from Mauritius by the United Kingdom in 1965, prior to Mauritius' independence. The Court ruled that the detachment violated Mauritius' right to self-determination, a norm crystallised through

<sup>39</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, in *Advisory Opinion*, I.C.J. Reports 1971, 31, para. 52.

<sup>40</sup> ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, in *Merits*, Judgment, I.C.J. Reports 1986, 100, para. 188.

<sup>41</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, in *Advisory Opinion*, I.C.J. Reports 1996, 254–255., para. 70.

<sup>42</sup> ICJ, *Legal Consequences of the Separation of the Chagos Archipelago*, in *Advisory Opinion*, I.C.J. Reports 2019 (International Court of Justice, 2019), 37.

<sup>43</sup> ICJ, *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, in *Judgment*, I.C.J. Reports 2009.

UNGA resolutions, notably Resolution 1514 (XV) of 1960.<sup>44</sup> The ICJ emphasised that these resolutions evidenced CIL, requiring minimal state practice to establish the norm's universal applicability.<sup>45</sup> This reliance on resolutions underscores the rapid norm formation track, enabling the Court to address historical injustices swiftly. Hence, resolutions contribute to CIL by evidencing or developing the two elements through normative content, state involvement, and systemic influence, as per the ILC framework, but they cannot create it instantly.

The second track, rooted in traditional customary law formation, relies on the gradual accumulation of consistent state practice over time, accompanied by *opinio juris*. This approach ensures that norms are grounded in observable state practice, providing legal stability and predictability. It is particularly relevant in disputes involving localised or technical issues, where historical practice is well-documented. The 2009 ICJ case concerning Costa Rica's navigational rights on the San Juan River illustrates this slow accretion track. The Court examined historical state practice, including Costa Rica's navigation for commerce and subsistence fishing, to affirm customary rights under an 1858 treaty.<sup>46</sup> By prioritising long-term behaviour over resolutions, the ICJ ensured that the customary norm was firmly rooted in empirical evidence, highlighting the conservative nature of this approach. Similarly, the 1969 *North Sea Continental Shelf* cases further illustrate the emphasis on state practice. The ICJ rejected the equidistance principle as a mandatory customary norm for continental shelf delimitation, requiring both widespread state practice and *opinio juris*.<sup>47</sup> The Court acknowledged that resolutions and treaties could contribute to custom but only if supported by consistent practice, as noted in paragraphs 73 and 77. This case bridges the dual tracks, recognising resolutions' potential while prioritising traditional practice.

The dual-track approach has elicited diverse scholarly commentary reflecting differing views on the balance between resolutions and state practice. Shaw praises the ICJ's use of resolutions in the *Chagos* opinion, arguing that they effectively consolidate customary norms. He views this approach as responsive to the legal legacy of decolonisation, enabling swift recognition of principles like self-determination (Shaw, 2021, p. 92). Similarly, Crawford commends the Court's reliance on UNGA Resolution 2625 (XXV) of 1970, which articulates fundamental principles of international law. Crawford sees resolutions as a bridge between treaty-like declarations and universal custom, facilitating rapid norm formation in contexts with broad state consensus (Crawford, 2019, p. 30). In contrast, Cassese expresses scepticism about over-reliance on resolutions. He argues that cases like *Navigational Rights* underscore the necessity of practice-based custom to maintain legal rigor and predictability (Cassese, 2005, p. 164). Cassese contends that resolutions alone may lack the empirical grounding required for robust customary norms, advocating for the traditional track to ensure legal stability.

Some scholars reconcile these perspectives, positing that the ICJ's flexibility allows it to toggle between instant custom via resolutions and classical custom via state practice based on context (Roberts, 2001, p. 761). Higgins aligns with the resolution-based approach through her process-oriented theory, where law evolves through

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<sup>44</sup> ICJ, Legal Consequences of the Separation of the Chagos Archipelago, in Advisory Opinion, I.C.J. Reports 2019, 37., para. 155.

<sup>45</sup> *Ibid.*

<sup>46</sup> ICJ, Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), in Judgment, I.C.J. Reports 2009, 265–266.

<sup>47</sup> ICJ, North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands), Judgment, I.C.J. Reports 1969.

collective deliberation. Higgins views resolutions as reflective of a progressive, communitarian ethos, as seen in the *North Sea* cases' acknowledgment of treaty contributions (Higgins, 1994, p. 26). However, Higgins also recognises the value of practice in grounding norms, bridging the two tracks. Thirlway, however, cautions that the dual-track approach risks inconsistency due to subjective judicial criteria for determining instant versus classical custom. Thirlway argues that the lack of clear guidelines may undermine the predictability of customary law, particularly when courts oscillate between tracks without explicit justification (Thirlway, 2019, p. 103). Thirlway's critique highlights the need for a more coherent framework to govern the application of the dual-track approach.

The dual-track approach engages a fundamental tension between progressive and conservative impulses in customary international law. The use of resolutions enables rapid norm formation, addressing emerging global issues such as decolonisation, human rights, or environmental protection. This aligns with Higgins' process-oriented theory, where law evolves through collective state deliberation, reflecting a communitarian ethos. The *Chagos* opinion exemplifies this, using resolutions to affirm self-determination as a universal norm, addressing historical inequities promptly. Conversely, the reliance on state practice ensures that norms are grounded in observable, historical behaviour, providing stability and legitimacy. Cassese's emphasis on practice, as seen in *Navigational Rights*, adheres to a positivist framework, prioritising empirical evidence to maintain legal predictability. This coexistence is often viewed as a strength, allowing customary law to balance innovation with tradition. Resolutions facilitate the swift adoption of global norms, while state practice accommodates localised practices, ensuring flexibility across contexts. However, critics warn that the absence of clear criteria for selecting between tracks may lead to judicial subjectivity, potentially eroding the coherence of customary law (Thirlway, 2019, p. 103).

## 5. CONCLUSION

The ICJ is central to the development of CIL, serving as a cornerstone of the international legal order by balancing traditional and progressive approaches to norm creation. However, when the Court derives custom without adequately considering state practice, it risks crafting a legal fiction. Successful legal interpretation must fit and justify the practice it addresses, ensuring descriptive accuracy and legitimacy. The evolution of CIL reflects a dynamic dual-track approach. The traditional track, rooted in the gradual accumulation of state practice, ensures stability and empirical rigor, while the modern track, accelerated by collective legal commitments such as international resolutions, enables rapid norm formation to address contemporary challenges, from decolonisation to cyber warfare. This duality equips CIL to remain adaptable and inclusive across diverse states, harmonising regional practices while fostering global norms. The ICJ's strategic restraint and interpretive role are crucial in crystallising these norms, yet its overly flexible application of modern custom risks undermining the coherence of CIL, rendering it a "nebulous fiction" if not tethered to state practice. To maintain CIL's relevance and authority in modern public international law, the Court must consistently refer to state practice and *opinio juris*, ensuring interpretations are justifiable and reflective of legal history. Moral considerations may inform state practice, but they should not supplant it. As law is inherently dynamic, the status of customary norms must be regularly reassessed in light of evolving state practice and *opinio juris*. By refining judicial standards to balance innovative norm creation with empirical grounding, the ICJ can strengthen CIL's framework, ensuring its enduring vitality and coherence in a rapidly

evolving global legal landscape. To ensure coherence, the ICJ must establish clearer criteria for applying each track, safeguarding CIL's legitimacy and adaptability in a dynamic global legal landscape.

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