RE-CUSTOMIZING CUSTOMARY INTERNATIONAL LAW

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Abstract

Customary international law remains relevant, if not increasingly relevant, as a source of international law. With the completion of the International Law Commission's work on Identifying Customary International Law, specific issues became clearer, but new problems have arisen. The traditional approach with its two-element requirement is fraught with theoretical and practical issues. There is no surprise that alternative methods have been suggested to respond to past questions and meet the demand of current realities. This paper adds to these alternative approaches by addressing the problems and meeting the needs of the times.

> "[t]he renaissance of custom requires the articulation of a coherent theory that can accommodate its classic foundations and contemporary developments."
> — Anthea Robert

I. Introduction

A. The Importance of Custom

International custom, international conventions, and general principles of law are the three formal sources of international law listed in the Statute of the International Court of Justice ("ICJ").[1] But the more common term used to refer to international custom is customary international law ("CIL").

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[1] Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945) ("international custom, as evidence of a general practice accepted as law").

CIL is important in international law as one of its cornerstones.[2] Some have argued that international law is built on the bedrock of custom[3] as CIL is the "foundation on which all international legal rules are built."[4] For instance, the principle of state sovereignty, the rule on which the international legal order is built, is a custom.[5]

Since the end of the Second World War, the growing number of states has increased international conventions or treaties. But the prevalence of treaties governing international relations does not diminish the importance of treaties. First of all, the "rules governing treaties themselves originated in customary international law."[6] Many of the provisions of the Vienna Convention on the Law of Treaties originated as customs or remained part of CIL (e.g., *pacta sunt servanda*).

Furthermore, as the International Law Commission ("ILC") has pointed out:

> Some important fields of international law are still governed essentially by customary international law, with few if any applicable treaties. Even where there is a treaty in force, the rules of customary international law continue to govern questions not regulated by the treaty and continue to apply in relations with and among non-parties to the treaty. In addition, treaties may refer to rules of customary international law.[7]

Judicial decisions further point to the importance of custom, as international and national courts continue to identify and apply rules of customary international law.[8] As for national legislation, "a number of state constitutions specifically incorporate customary international law into the national legal systems in some

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[2] REEXAMINING CUSTOMARY INTERNATIONAL LAW 1 (Brian D. Lepard ed., 2017) [hereinafter Lepard (ed.)].
[3] Michael Wood, *Foreword*, *in* Lepard (ed.), *supra* note 2, at xiii.
[4] Lepard (ed.), *supra* note 2, at 1 (citing Hans Kelsen, General Theory of Law and State (Andes Wedberg trans., Harvard University Press 1945)).
[5] *Id.* at 3.
[6] *Id.* at 1.
[7] International Law Commission, *Draft Conclusions on Identification of Customary International Law, with commentaries*, UNITED NATIONS OFFICE OF LEGAL AFFAIRS, n. 663, ¶ 66 (2018), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf [hereinafter "ILC Commentary"].
[8] Lepard (ed.), *supra* note 2, at 3.

way."[9]

Thus, CIL is not just relevant but "increasingly relevant."[10] In fact, it has been pointed out that there has been a "contemporary resurrection of custom."[11]

B. The Work of the ILC

Pursuant to its mandate to promote the progressive development of international law and its codification, the ILC has included the topic *"Identification of customary international law"*[12] in its program of work, appointing Mr. Michael Wood as Special Rapporteur for the topic.[13] After several reports, the ILC adopted a set of 16 draft conclusions on the identification of customary international law ("Conclusions"), together with Commentary ("Commentary").[14] In 2018, the United Nations ("UN") General Assembly ("GA") took note of the Conclusions[15] and the Commentary and encouraged their widest possible dissemination.[16]

The work of the ILC demonstrates the importance of rules identifying CIL. The UN GA itself noted that "the subject of identification of customary international law is of major importance in international relations."[17] The Conclusions "concern the methodology for identifying rules of customary international law" and "seek to offer practical guidance on how the existence of rules of CIL, and their content, are to be determined."[18] According to the Commentary, "[t]he draft conclusions reflect the approach adopted by states, as well as by international courts and organizations and

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[9] *Id.* at 6.
[10] *Id.* at 8.
[11] Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95(4) AM. J. INTL L. 757 (2001).
[12] Originally the topic was "Formation and evidence of customary international law" but in 2013, the ILC decided to change the title of the topic to "Identification of customary international law".
[13] International Law Commission, *Summaries of Work of the International Law Commission: Identification of Customary International Law*, UNITED NATIONS OFFICE OF LEGAL AFFAIRS (2020), http://legal.un.org/ilc/summaries/1_13.shtml.
[14] Int'l Law Comm'n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10 (2018).
[15] In this paper, the draft conclusions are treated as a single document hence "Conclusions" is singular.
[16] G.A. Res. 73/203 (Dec. 20, 2018).
[17] *Id.*
[18] ILC Commentary, *supra* note 7, ¶ 66(2).

most authors."[19] Therefore, the Conclusions of the ILC can be said to reflect the current state of CIL if not the customary rules in determining CIL.

But despite the extensive work of the ILC on this matter, the issues are far from settled. For instance, the requirements for state practice and *opinio juris* are foremost among issues. While the Conclusions and the Commentary seem to settle some concerns, they also reiterate past problems and raise new ones.

The importance of a clear and credible methodology in determining CIL is crucial. As the Commentary has stated, "a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly."[20] Blutman correctly asserts that "[t]he first and most fundamental issue in customary international law must be that of its constituent elements or the criteria of existence."[21] Without settling this issue, the validity of custom as a source of law will always be questioned because how can a rule provide guidance if there is no agreement on what the rule is.

C. Finding the Right Approach

Part II of this paper discusses the "traditional" two-element approach described by the ICJ and provided for by the ILC's Conclusions and Commentary.

Part III examines the problems inherent in the two-element model. It also discusses issues in applying the model in practice.

Part IV explains the alternative approaches to the two-element model, while Part V explains the approach forwarded by this paper.

II. The Traditional Approach

A. The Confluence of Two Elements

[19] *Id.* at ¶ 66(4).
[20] *Id.* at ¶ 66(2).
[21] Laszlo Blutman, *Conceptual Confusion and Methodogical Deficiencies: Some Ways that Theories on Customary International Law Fail*, 25(2) EUR. J. INT'L L. 530 (2014).

Article 38.1 (b) of the ICJ Statute lists "international custom, as evidence of a general practice accepted as law" as one of the sources of law.

In addition, Conclusion 2 provides that "[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (opinio juris)."[22]

In the *North Sea* case, the ICJ stated that "[n]ot 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."[23]

According to the Commentary, "determining a rule of customary international law requires establishing the existence of two constituent elements: a general practice, and acceptance of that practice as law (*opinio juris*)."[24] It explains that this "two-element approach" serves to ensure that the exercise of identifying rules of CIL results in determining only such rules that actually exist.[25] It further adds that such determination "requires a careful analysis of the evidence for each element."[26]

It further states that:

> the identification of a rule of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice, and whether such general practice is accepted as law (that is, accompanied by *opinio juris*). In other words, one must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way.[27]

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[22] International Law Commission, *Draft conclusions on identification of customary international law*, UNITED NATIONS OFFICE OF LEGAL AFFAIRS, Conclusion 2 (2018) https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf [hereinafter "ILC Draft Conclusions"].
[23] North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, 44, ¶ 77 (Feb. 20) [hereinafter *North Sea*].
[24] ILC Commentary, *supra* note 7, at 124.
[25] *Id.* at 125.
[26] *Id.* at 124.
[27] *Id.* at 125.

Therefore, the identification of CIL requires essentially a two-step process. First, there must be an inquiry into whether there is a general practice. Second, if a general practice is established, it must then be determined if such practice is accepted as law. The two elements together are essential conditions.[28] Thus, both must be established. The existence of one cannot be implied or inferred from the presence of the other.

In the *North Sea* case, the ICJ stressed that these *two conditions* must be fulfilled.[29] In the *Jurisdictional Immunities* case, the ICJ said the existence of a rule of CIL requires that there be "a settled practice" *together* with *opinio juris*.[30] Thus:

> Practice without acceptance as law (opinio juris), even if widespread and consistent, can be no more than a non-binding usage, while a belief that something is (or ought to be) the law unsupported by practice is mere aspiration; it is the two together that establish the existence of a rule of customary international law.[31]

Conclusion 3 paragraph 2 states that "[e]ach of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element."[32]

But according to the Commentary, this "does not exclude that the same material may be used to ascertain practice and acceptance as law."[33] It explains further:

> A decision by a national court, for example, could be relevant practice as well as indicate that its outcome is required under customary international law. Similarly, an official report issued by a state may serve as practice (or contain information as to that state's practice) as well as attest to the legal views underlying it. The important point remains, however, that the material must be

[28] *Id.*
[29] *North Sea*, 1969 I.C.J. 3, at 44, ¶ 77.
[30] Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Judgment, 2012 I.C.J. 99, 122–123, ¶ 55 (Feb. 3).
[31] ILC Commentary, *supra* note 7, at 126.
[32] ILC Draft Conclusions, *supra* note 22, Conclusion 3.2.
[33] ILC Commentary, *supra* note 7, at 129.

> examined as part of two distinct inquiries, to ascertain practice and to ascertain acceptance as law.[34]

Thus, while the evaluation of whether there is state practice is separately determined from whether there is *opinio juris*, the same evidence can be used to establish both.

Interestingly, the Commentary also provides that the determination of *opinio juris* can come before the establishment of general practice. It says:

> While in the identification of a rule of customary international law, the existence of a general practice is often the initial factor to be considered, and only then is an inquiry made into whether such general practice is accepted as law, this order of examination is **not mandatory**. Thus, the identification of a rule of customary international law may also begin with appraising a written text allegedly expressing a widespread legal conviction and then seeking to verify whether there is a general practice corresponding to it.[35] (emphasis supplied)

This rule seems to be an expansion of the definition of *opinio juris*. The original idea for *opinio juris* is that it is a belief of a state concerning a particular practice it is engaging in and not a belief in the existence of a rule in general. A state believing that its current practice is required by law is different from a state thinking that a rule (regardless of whether that state is practicing it or not) is required by law. The former is a belief that their practice is required by law, while the second is a belief that a rule is or should be law.

The Commentary, however, reiterates that:

> To establish that a claim concerning the existence or the content of a rule of customary international law is well-founded thus entails a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or

[34] *Id.*
[35] *Id.*

> obligation (namely, that it is required, permitted or prohibited as a matter of law). The test must always be: is there a general practice that is accepted as law?[36]

1. The Requirement for General Practice

Conclusion 8 provides that the relevant practice must be general, which means that it must be sufficiently widespread, representative, and consistent.[37]

In the *North Sea* case, portions of its paragraph 74 are often quoted to provide the standard that practice must be "both extensive and virtually uniform." Paragraph 74 states in part:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been **both extensive and virtually uniform** in the sense of the provision invoked;- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. (emphasis supplied)

Taken into context, the ICJ referred to the standard (i.e., extensive & virtually uniform) in connection with the question as to whether custom could form within a short time period. It is therefore arguable that the said standard need not apply in all cases.

This notwithstanding, the requirement for widespread and representative practice for all situations seems to have achieved general acceptance.

a. **Widespread and Representative**

Concerning the requirement that practice is sufficiently widespread and

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[36] ILC Commentary, *supra* note 7, at 125.

[37] ILC Draft Conclusions, *supra* note 22, Conclusion 8, ¶ 1.

representative, the ILC admits in the Commentary that this "does not lend itself to exact formulations."[38] It further explains that the word *sufficiently* "implies that the necessary number and distribution of States taking part in the relevant practice (like the number of instances of practice) cannot be identified in the abstract."[39]

Universal participation is not required, but "the participating States should include those that had an opportunity or possibility of applying the alleged rule."[40] According to the Commentary:

> Thus, in assessing generality, an indispensable factor to be taken into account is the extent to which those States that are **particularly involved in the relevant activity** or are **most likely to be concerned with the alleged rule** ("specially affected States") have participated in the practice.[41] (emphasis supplied)

However, the requirement that practice must be widespread implies a way to determine the required amount of practice. Lepard asks:

> Do all 196-odd states in the international system have to engage in a practice for it to give rise to a customary norm? Do at least a super-majority of all states have to do so? Or is a simple majority sufficient… should we give special weight… to the practice of certain states?[42]

This issue is still a question that remains unanswered by the Conclusions and the Commentary.

b. **Consistent**

According to the Commentary, consistent practice means that no relevant acts are divergent to the extent that no pattern of behavior can be discerned.[43]

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[38] ILC Commentary, *supra* note 7, at 136.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Lepard (ed.), *supra* note 2, at 20.
[43] ILC Commentary, *supra* note 7, at 137.

But it is "important to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen."[44] So, the requirement of consistency looks into whether the manner of practice is similar.

However, complete consistency is not required,[45] and some divergence may be allowed as long as a pattern of behavior can still be demonstrated. Thus, "[t]he relevant practice needs to be virtually or substantially uniform, meaning that **some inconsistencies and contradictions are not necessarily fatal** to a finding of 'a general practice.'"[46] (emphasis supplied)

In the *Nicaragua* case, the ICJ stated:

> It is not to be expected that in the practice of States the application of the rules in question should have been perfect... The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules...[47]

Thus, breaches are not necessarily inconsistencies that preclude general practice.[48]

The ICJ in *Nicaragua* further stated*:*

> [I]nstances of State conduct inconsistent with a given rule **should generally have been treated as breaches of that rule**, not as indications of the recognition of a new rule. **If a State** acts in a way prima facie incompatible with a recognized rule, but **defends its conduct by appealing to exceptions or justifications** contained within the rule itself, then whether or not the State's conduct is in fact

[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 98 ¶ 186 (June 27) [hereinafter *Nicaragua*].
[48] ILC Commentary, *supra* note 7, at 137.

> justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. [49] (emphasis supplied)

Conclusion 8 also provides that general practice does not require a particular duration. [50] Thus, "a relatively short period in which a general practice is followed is not, in and of itself, an obstacle to determining that a corresponding rule of customary international law exists."[51]

As previously quoted in the *North Sea* case, the ICJ said, "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law."[52]

But as "some period of time must elapse for a general practice to emerge; there is no such thing as 'instant custom.'"[53]

2. *The Source of the Practice*

Conclusion 4 states:

a. The requirement of a general practice, as a constituent element of customary international law, **refers primarily to the practice of States** that contributes to the formation, or expression, of rules of customary international law.
b. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.
c. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2. (emphasis supplied)

Thus, it is the practice of states which serves *primarily* as the building block of custom. The term primarily seemingly opens the door to other sources of practice. But Conclusion 4 only grants relevance to the practice of international organizations in *certain cases.*

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[49] *Nicaragua*,1986 I.C.J. 14, at 98, ¶ 186.
[50] ILC Draft Conclusions, *supra* note 22, Conclusion 8, ¶ 2.
[51] ILC Commentary, *supra* note 7, at 138.
[52] *North Sea*, 1969 I.C.J. 3, at 43, ¶ 74.
[53] ILC Commentary, *supra* note 7, at 138.

a. Practice of States

Conclusion 5 states that "State practice consists of conduct of the State, whether in the exercise of its **executive, legislative, judicial, or other functions**.[54] "(emphasis supplied)

i. *Government Practice*

According to this definition, what is meant by "state" practice is actually *government* practice. Only the government of a state has executive, legislative and judicial functions. What is referred to as the "state" is the organ exercising governmental powers. So while the "state" under international law consists of an entity that consists of four elements (i.e., *people, territory, sovereignty,* and *government*), this is not the "state" referred to in "state practice." It is perhaps more accurate to call it "government practice."

ii. *Intra-State?*

So, state practice consists of the acts of a government. But is it limited to the action of governments in relation to other governments? In other words, are all government actions considered state practice or only those actions done in connection with international relations? Is state practice limited to interstate action, or does it include intra-state action? Roberts argues:

> we need to broaden our understanding of state practice to include consideration of intrastate action (not just interstate interaction), obligations being observed (not just obligations being breached), and reasons for a lack of protest over breaches (other than acquiescence in the legality of those breaches). State practice should include intrastate practice rather than just interstate interaction because of the changing subject matter of international law.[55]

The Commentary clarifies that "[t]he relevant practice of States is not limited to conduct vis-à-vis other States or other subjects of international law; conduct within the State, such as a state's treatment of its own nationals, may also relate to matters

[54] ILC Commentary, *supra* note 7, at 132.
[55] Roberts, *supra* note 11, at 777.

of international law."[56] So the government practice need not be connected to international relations to be considered as state practice.

iii. *Disclosed Practice*

However, government practice must be disclosed. State practice cannot include "secret practice" because:

> In order to contribute to the formation and identification of rules of customary international law, practice must be known to other States (whether or not it is publicly available). Indeed, it is difficult to see how confidential conduct by a State could serve such a purpose unless and until it is known to other States.[57]

This rule may pose a problem considering some aspects of government practice are confidential. There are activities that governments only disclose to their counterparts in other states. Can such confidential communications become state practice, or must practice be disclosed to the public? Based on the Commentary, it must be the latter.

b. The Practice of International Organizations

Conclusion 4 provides that in "certain cases," the practice of international organizations may also contribute. The Commentary clarifies this by stating that:

> The practice of international organizations in international relations (when accompanied by opinio juris) may count as practice that gives rise or attests to rules of customary international law, but **only** those *rules* (*a*) *whose subject matter falls within the mandate of the organizations*, and/or (b) *that are addressed specifically to them* (such as those on their international responsibility or relating to treaties to which international organizations may be parties).[58] (emphasis supplied)

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[56] ILC Commentary, *supra* note 7, at 133.
[57] ILC Commentary, *supra* note 7, at 133.
[58] ILC Commentary, *supra* note 7, at 131.

So, the practice of international organizations is only relevant for certain types of rules.

The Commentary further clarifies that:

> the practice falling under paragraph 2 arises most clearly where member States have transferred exclusive competences to the international organization, so that the latter exercises some of the public powers of its member States and hence the practice of the organization may be equated with the practice of those States.[59]

Thus, the relevance of the practice of international organizations largely depends on the purpose of the international organization.

3. Nature of the Practice

a. Verbal Acts

Under the Conclusions, state practice may take a wide range of forms, including physical and verbal acts.[60]

The inclusion of "verbal acts" can be contentious as there can be a discrepancy between what states say and what they actually do. States may publicly state support for certain principles, for example, in the field of human rights, yet through actions violate the same principles. The Commentary responds to this by stating:

> While some have argued that it is only what States "do" rather than what they "say" that may count as practice for purposes of identifying customary international law, it is now generally accepted that verbal conduct (whether written or oral) may also count as practice; indeed, practice may at times consist entirely of verbal acts, for example, diplomatic protests.

While it is true that verbal conduct can constitute practice, the explanation does not address the situation where diplomatic statements contradict conduct. This

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[59] *Id.*

[60] ILC Draft Conclusions, *supra* note 22, Conclusion 6, ¶ 1.

issue is partially addressed by Conclusion 7, paragraph 2, which state that "[w]here the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced."

According to the Commentary:

> Paragraph 2 refers explicitly to situations where there is or appears to be inconsistent practice of a particular State. As just indicated, this may be the case where different organs or branches within the State adopt different courses of conduct on the same matter or where the practice of one organ varies over time. If in such circumstances a State's practice as a whole is found to be inconsistent, that State's contribution to "a general practice" may be reduced.[61]

b. Inaction

Under certain circumstances, state practice includes inaction.[62] However, such "negative practice" covers "only deliberate abstention from acting may serve such a role: the State in question needs to be conscious of refraining from acting in a given situation, and it cannot simply be assumed that abstention from acting is deliberate."[63]

The problem with this requirement is how to prove that abstention is deliberate. This is similar to the situation with determining *opinion juris* - the determination of the intention of states.

4. Evidence of Practice

Conclusion 6 paragraph 2 states that forms of state practice include, but are not limited to:

- diplomatic acts and correspondence;
- conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference;

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[61] ILC Commentary, *supra* note 7, at 135.
[62] ILC Draft Conclusions, *supra* note 22, Conclusion 6, ¶ 1.
[63] ILC Commentary, *supra* note 7, at 133.

- conduct in connection with treaties;
- executive conduct, including operational conduct "on the ground";
- legislative and administrative acts; and
- decisions of national courts.[64]

The Conclusions state that "[t]here is no predetermined hierarchy among the various forms of practice."[65]But a hierarchy may be necessary for specific situations. Lepard gives an example: "[I]n the case of putative customary norms involving the conduct of foreign relations, an area of activity the primary responsibility for which most state constitutions assign to the executive branch, is it appropriate to treat national court decisions as having the same weight as executive policy?"[66]

5. The Requirement for Opinio Juris

a. *Sense of Legal Right or Obligation*

In the *North Sea* case,[67] the ICJ stressed:

> 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. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The **States** concerned **must** therefore **feel that they are conforming to what amounts to a legal obligation.** The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty. (emphasis supplied)

Conclusion 9 paragraph 1 provides that *opinio juris* requirement means "the practice in question must be undertaken with the sense of legal right or obligation."

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[64] ILC Draft Conclusions, *supra* note 22, Conclusion 6, ¶ 2.
[65] *Id.*, Conclusion 6, ¶3.
[66] Lepard (ed.), *supra* note 2, at 19.
[67] *North Sea*, 1969 I.C.J. 3, at 44, ¶ 77.

According to the Commentary, this means that the practice "must be accompanied by a conviction that it is permitted, required or prohibited by customary international law."[68]

Lepard notes that "one function of this requirement is to distinguish behavior motivated by perceived legal rules from behavior motivated purely by self-interest, by a sense of moral obligation, or by a desire on the part of a state to treat other states with consideration, or 'comity.'"[69]

Thus, according to the Commentary, "[a]cceptance as law (opinio juris) is to be distinguished from other, extralegal motives for action, such as comity, political expediency or convenience: if the practice in question is motivated solely by such other considerations, no rule of customary international law is to be identified."[70]

b. *Which States should Exhibit Opinio Juris?*

As to which states should exhibit *opinio juris*:

> Acceptance as law (*opinio juris*) is to be sought with respect to both the States engaging in the relevant practice and **those in a position to react to it**, who must be shown to have understood the practice as being in accordance with customary international law.[71] (emphasis supplied)

The inclusion of states in a position to react to the said practice is problematic as it does not appear that they are engaging in the said practice.

This idea is based on the *Nicaragua* case, where the ICJ stated that "[e]ither the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[72]

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[68] ILC Commentary, *supra* note 7, at 138.
[69] Lepard (ed.), *supra* note 2, at 23.
[70] ILC Commentary, *supra* note 7, at 139.
[71] *Id.*
[72] *Nicaragua*, 1986 I.C.J. 14, at 109, ¶ 207.

The fundamental question is whether states not engaged in the said practice can provide *opinio juris*. According to the rule stated, for states who do not engage in the practice, *opinio juris* is present when their abstention arises from a belief that such abstention is required by law.

c. *Forms of Evidence of Opinio Juris*

Conclusion 10 paragraph 2 provides that the forms of evidence of *opinio juris* include but are not limited to:

- public statements made on behalf of States;
- official publications;
- government legal opinions;
- diplomatic correspondence;
- decisions of national courts;
- treaty provisions; and
- conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

Even a cursory comparison would lead to the observation that some evidence for *opinio juris* also qualifies as evidence of practice. The Commentary recognizes this and says:

> There is some common ground between the forms of evidence of acceptance as law and the forms of State practice referred to in draft conclusion 6, paragraph 2 … in part, **this reflects the fact that the two elements may at times be found in the same material** (but, even then, their identification requires a separate exercise in each case). In any event, statements are more likely to embody the legal conviction of the State, and may often be more usefully regarded as expressions of acceptance as law (or otherwise) rather than instances of practice.[73] (emphasis supplied)

In addition to the forms listed above, Conclusion 10 paragraph 3 also provide that "[f]ailure to react over time to a practice may serve as evidence of acceptance as

[73] ILC Commentary, *supra* note 7, at 141.

law (opinio juris), provided that States were in a position to react and the circumstances called for some reaction."[74]

In addition to the *Nicaragua* case, the other basis for this rule appears to be the *Fisheries* case, wherein it was stated that the failure of states to react within a reasonable time "[bear] witness to the fact that they did not consider ... [a certain practice undertaken by others] to be contrary to international law."[75]

This is explained by the fact that "[t]olerance of a certain practice may indeed serve as evidence of acceptance as law (opinio juris) when it represents concurrence in that practice."[76] However, two requirements need to be complied with:

> First, it is **essential that a reaction** to the practice in question **would have been called for**: this may be the case, for example, where the practice is one that affects — usually unfavourably — the interests or rights of the State failing or refusing to act. Second, the reference to a State being "in a position to react" means that the **State concerned must have had knowledge of the practice** (which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge), **and that it must have had sufficient time and ability to act**. Where a State did not or could not have been expected to know of a certain practice, or has not yet had a reasonable time to respond, inaction cannot be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law. A State may also provide other explanations for its inaction. (citations omitted, emphasis supplied)

Therefore, it seems that *opinio juris* is not limited to the intention of states engaged in the practice but the opinion of the entire international community of states regarding the existence of a particular rule.

III. Problems with the Traditional Approach

[74] *Id.* at 140.
[75] *Id.* at 141 (citing Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, at 139).
[76] *Id.* at 141-142.

The traditional approach has been heavily criticized for a number of reasons. Roberts writes:

> Traditional custom lacks procedural normativity. The process of custom formation is inherently uncertain, with no clear guide to the amount, duration, frequency, and continuity of state practice required to form a custom. The unwritten nature of traditional custom makes its content inherently insecure, while requiring repeated practice is "too clumsy and slow" to accommodate the fast-paced evolution of law. Traditional custom is meant to be based on general and consistent state practice, but selective analysis inheres in this approach because of the impossibility of thoroughly analyzing the practice of almost two hundred states. This selectivity results in a "democratic deficit" because most customs are found to exist on the basis of practice by fewer than a dozen states. [77]

Some of these problems are fleshed out further in the following section.

A. *The Problem with the Two Elements in General*

1. How to Distinguish the Two Elements

One problem with the two elements is the difficulty "to determine what states believe as opposed to what they say."[78] Roberts gives as an example the controversy as to whether treaties constitute state practice or *opinio juris*.[79] To resolve this, she adopts the "distinction between action (state practice) and statements (*opinio juris*)."[80] Under this view, "[*o*]*pinio juris* concerns statements of belief rather than actual beliefs."[81] However, the implication is that "actions can form custom only if accompanied by an articulation of the legality of the action."[82] But under the Conclusions, verbal acts also constitute practice. So, how can one differentiate

[77] Roberts, *supra* note 11, at 767.
[78] *Id.* at 757.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 758.
[82] *Id.* at 757.

whether the articulation is evidence of *opinio juris* or constitutes practice?

2. Historically Not Applied

The traditional two-element approach presumes that customs have been established based on the two elements of state practice and *opinion juris*. However, Kelly argues that from a "the wider political and economic context… state practice and general acceptance of states played only a limited role in norm development."[83]

In his view, "if one looks at how norms were actually articulated and justified during the sixteenth century through much of the twentieth century, state practice and general acceptance played a minor, even inconsequential role in the formation of customary international law norms."[84] Thus, historical support for the two-element requirement prior to the *North Sea* case seems to be lacking. The irony is that there seems to be no state practice or *opinio juris* to support the two-element requirement as the means for establishing custom.

Lepard further points out that:

> [T]he apparent consensus on the "technical" definition of customary law and its elements is superficial. It frays as soon as we attempt to probe such questions as whether state practice is always required, or *opinio juris* is always required, or how to prove the existence of a sufficient "quantum" of either.[85]

B. *The Problem with Practice*

1. Theoretical Basis

For a proper evaluation of practice, it is essential to understand why a regularity of practice gives rise to a legal obligation.[86] Why does the repetition of

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[83] J. Patrick Kelly, *Customary International Law in Historical Context: The Exercise of Power Without General Acceptance*, *in* Lepard (ed.), *supra* note 3, at 50.
[84] *Id.* at 49.
[85] Lepard (ed.), *supra* note 2, at 18.
[86] *Id.* at 16-17.

conduct by states give rise to binding rules? In other words, why should practice determine law? Shouldn't law determine practice? So as Lepard puts it, "some meta-theory is required to explain this transmutation of consistent behavior into a legal rule."[87]

Based on one view, each state that engages in a practice because it believes it is a rule is consenting to be bound by the rule.[88] This view considers "custom as a form of tacit agreement: States behave to each other in given circumstances in certain ways, which are found acceptable, and thus tacitly assented to."[89] So each practice is considered a vote in favor or against the rule.[90]

Yet another view is that practice becomes a rule because "legal expectations from legitimate expectations [are] created in others by conduct."[91] Furthermore, "[r]eliance on state practice provides continuity with past actions and reliable predictions of future actions."[92]

The problem with both views "is that if agreement makes customary law, absence of agreement justifies exemption from customary law."[93] Worse, the absence of practice exempts some states from the application of the law. Furthermore, states formed subsequent to the crystallization of custom would never be bound by unless it engages in the said practice.

In addition, repeated practice serving as the basis for a binding rule does not seem to be legitimate in all cases. Supposing a majority of the states of the world choose to violate human rights norms, should such practice generate CIL? In other words, should ethics be considered or simply pervasiveness of conduct?

The traditional approach has been criticized because it looks at practice clinically and does not distinguish ethical conduct from non-ethical conduct. Lepard points out that "[t]raditional customary international law doctrine… adopts the

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[87] *Id.* at 17.
[88] *Id.*
[89] Hugh Thirlway, *The Sources of International Law*, *in* INTERNATIONAL LAW 121 (Malcolm D. Evans ed. 2003).
[90] Lepard (ed.), *supra* note 2, at 17.
[91] Thirlway, *supra* note 89, at 121.
[92] Roberts, *supra* note 11, at 762.
[93] Thirlway, *supra* note 89, at 122.

pretense of being ethically neutral; it purports not to care whether a rule formed through the marriage of consistent state practice and *opinio juris* is ethically desirable or not."[94]

2. What is the "State"

Earlier it was said that what is referred to as "state practice" is actually "government practice" based on the text of the Conclusions. If the element would actually consider "state" and simply "government" practice, what should be considered is the practice of the entire citizenry. If the government decisions are supported by at least a majority of the citizens then it is state practice. However, if the government actions are unsupported by the citizenry, then they should not be considered. But this is not how state practice is evaluated. It is assuming that the acts of the government represent the will of the entire state and not just the ruling elite. This is reasonable in democratic countries where the popular vote determines the leadership and policy of a nation. But this would not be the case in authoritarian regimes where the government imposes its will on the citizenry.

3. Effect of Silence

As mentioned in Part II, according to the Conclusions, state practice includes inaction under certain circumstances.

But as *Crawford* points out, "often the real problem is to distinguish mere abstention from protest by a number of states in the face of a practice followed by others. Silence may denote either tacit agreement or simple lack of interest in the issue."[95]

Roberts says that "[b]reaches of intrastate obligations are also likely to result in inaction by other states because states do not usually protest violations unless they affect their rights or the rights of their nationals."[96]

Roberts also says:

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[94] Lepard, *supra* note 2, 14.
[95] James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 23 (2019).
[96] Roberts, *supra* note 11, 777.

> Many plausible explanations can be made for a failure to protest intrastate breaches other than belief in the legality of the action, including lack of knowledge, political and economic self-interest, and realization of the futility of action. The lack of protest over intrastate breaches should not necessarily imply acquiescence in the legality of those breaches.[97]

Lepard adds that "[e]very day every state-affiliated entity undertakes actions — but also refrains from undertaking countless other actions. Which is the relevant practice for purposes of determining customary international law?"[98]

4. Effect of Non-Conforming Practice or Inaction

There is a problem with the state practice requirement in International Human Rights Law. Lepard argues that "an honest application of the two-element test… must result in a conclusion that human rights norms cannot satisfy the test because there is simply insufficient consistent state practice in favor of human rights."[99] He adds "the reality is that very often there appears to be consistent state practice of violating many rights not respecting them."[100] This seems to be inevitable considering the nature of human rights:

> human rights norms are based on ethical principles, not merely the self-interest of states… it will often be in states' perceived short term interest to violate these ethics-based on norms…This means there is a permanent tension between states' self-interest and the demands of human rights norms… this tension can lead to widespread human rights abuses in practice.[101]

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[97] *Id.* at 778.
[98] Lepard, *supra* note 2, at 19.
[99] Brian D. Lepard, *Toward a New Theory of Customary International Human Rights Law*, *in* Lepard (ed.), *supra* note 2, at 240.
[100] *Id.* at 249
[101] *Id.* at 251

Roberts adds:

> The observance of many human rights is also difficult to measure because they are negative rights, which means that they place limitations on state action rather than impose a positive duty on states to act. Observance by inaction, in the form of not violating rights, is inherently ambiguous because it may result from an obligation (prohibitive norm) or discretion (permissive norm); or from domestic or treaty obligations rather than custom.[102]

Perhaps the same argument can be made for International Humanitarian Law, International Environmental Law, and International Criminal Law.

C. *The Problem with Opinio Juris*

1. Paradoxical Implications

The existence of *opinio juris* requires that states act with the belief that the relevant practice is law.

Thirlway points out that this requirement:

> is paradoxical in its implications: for how can a practice ever develop into a customary rule if states have to believe the rule already exists before their acts of practice can be significant for the creation of the rule? Or is it sufficient if initially states act in the mistaken belief that a rule already exists, a case of *communis error facit jus* (a shared mistake produces law)?[103]

Lepard puts it this way:

> the traditional formulation of the *opinio juris* requirement tests results in a chronological paradox… it requires that before the customary norm comes into existence, states must believe that they are already bound by the (nonexistent) norm. This implies that states must

[102] Roberts, *supra* note 11, 777.
[103] Thirlway, *supra* note 89, at 122.

> mistakenly believe that a norm already exists as a precondition for it coming into existence.[104]

The implication of this is that CIL becomes a product of the collective mistake of states.

2. Impossibility to Determine the State of Mind

Lepard asks, "states are not people, so how can they 'believe' and 'think' anything"?

According to Thirlway, "[s]ince the *opinio juris* is a state of mind, there is evident difficulty in attributing it to an entity like a State; and in any event it has to be deduced from the State's pronouncements and actions, particularly the actions alleged to constitute the 'practice' element of the custom."[105]

Even if *opinio juris* is determinable using statements of states, the task is no less daunting. This is because, as *Roberts* points out, "*opinio juris* is inherently ambiguous in nature because statements can represent *lex lata* (what the law is, a descriptive characteristic) or *lex ferenda* (what the law should be, a normative characteristic)."[106]

IV. Suggestions for Re-Customization

Worster points out that "[m]any scholars have identified a shift in customary international legal analysis from the 'traditional' to the 'modern' approach."[107]

The traditional approach has been accused of being an anachronism because of "the increasing number and diversity of states, as well as the emergence of global problems that are addressed in international fora,"[108] whereas the modern approach has been praised as "a progressive source of law that can respond to moral issues and global challenges."[109]

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[104] Lepard, *supra* note 2, at 25.
[105] Thirlway, *supra* note 89, at 123.
[106] Roberts, *supra* note 11, at 763.
[107] William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45(2) GEO. J. INT'L L.. 445, 449 (2014).
[108] Roberts, *supra* note 11, 759.
[109] *Id.*

Of course, what constitutes the traditional approach as opposed to a modern approach is up for debate. The traditional approach can be viewed as the strict implementation of the two-element requirement, while the modern approach allows for leniency on of the two elements depending on the circumstances. Roberts would describe the traditional approach as "evolutionary and… identified through an inductive process in which a general custom is derived from specific instances of state practice."[110] On the other hand, the modern approach is "derived by a deductive process that begins with general statements of rules rather than particular instances of practice [and therefore] emphasizes *opinio juris* rather than state practice because it relies primarily on statements rather than actions."[111] While this distinction is interesting, some "modern" approaches (e.g., Kirgis' sliding scale) do not necessarily focus on *opinio juris* alone.

For purposes of this paper, the traditional approach is understood to refer to the strict implementation of the two-element approach, while the modern approach would be anything other than that. Perhaps the term "alternative approach" would be more accurate in that sense.

The ILC recognizes that "[w]hile writers have from time to time sought to devise alternative approaches to the identification of customary international law, emphasizing one constituent element over the other or even excluding one element altogether, such theories have not been adopted by States or in the case law."[112] Thus, the ILC would seem to uphold the traditional approach.

The following part of the paper discusses the various alternative approaches and the ILC's responses to them.

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[110] *Id.* at 758.

[111] *Id.*

[112] ILC Commentary, *supra* note 7, at 126.

A. *Subject Matter Customization*

Some scholars have argued that revising the requirements for CIL depending on the subject matter. Lepard asserts that:

> [E]xperience demonstrates that courts in practice have adopted quite different approaches to finding customary law in different areas… for example, they have exhibited a tendency to focus on *opinio juris* rather than state practice in assessing the existence of customary human rights norms, or customary norms of international humanitarian law.

However, the ILC believes that the two-element approach applies to all fields:

> The two-element approach applies to the identification of the existence and content of rules of customary international law in all fields of international law. This is confirmed in the practice of States and in the case law, and is consistent with the unity and coherence of international law, which is a single legal system and is not divided into separate branches with their own approach to sources.[113]

Nevertheless, Conclusion 3 paragraph 1 of the ILC states:

> In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (opinio juris), *regard must be had to* the **overall context**, the **nature of the rule** and the **particular circumstances** in which the evidence in question is to be found.[114] (emphasis supplied)

The language suggests the possibility of a varying standard of determination of the elements depending on the context, nature of the rule, and circumstances. According to the Commentary the said paragraph:

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[113] *Id.*

[114] ILC Draft Conclusions, *supra* note 22, Conclusion 3 (Assessment of evidence for the two constituent elements).

> sets out an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and **contextual.** Whether a general practice that is accepted as law (accompanied by opinio juris) exists must be carefully investigated in each case, **in the light of the relevant circumstances.** Such analysis not only promotes the credibility of any particular decision, but also allows the two-element approach to be applied, with the **necessary flexibility**, in all fields of international law.[115] (emphasis supplied)

This may be interpreted to mean that the standards may vary depending on context and circumstances and that the two-element approach is contemplated to be flexible. Thus, "the type of evidence consulted (and consideration of its availability or otherwise) depends on the circumstances, and certain forms of practice and certain forms of evidence of acceptance as law (opinio juris) may be of particular significance, according to the context."[116]

As to the nature of the rule, the Commentary further adds that:

> The nature of the rule in question may also be of significance when assessing evidence for the purpose of ascertaining whether there is a general practice that is accepted as law (accompanied by opinio juris). In particular, where prohibitive rules are concerned, it may sometimes be difficult to find much affirmative State practice (as opposed to inaction); cases involving such rules are more likely to turn on evaluating whether the inaction is accepted as law.[117]

B. *One Element Approaches*

Some approaches question the necessity of having strong evidence of both state practice and *opinio juris*. The argument is that in certain instances, strong evidence of one would offset weakness in the other.

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[115] ILC Draft Conclusions, *supra* note 22, Conclusion 3 (Assessment of evidence for the two constituent elements).

[116] *Id.*

[117] *Id.* at 128.

For instance, Kirgis' sliding scale approach allows strong evidence of *opinio juris* to offset weak evidence of state practice and vice versa.[118] However, Roberts rejects this sliding scale approach because "it does not accurately describe the process of finding custom and would create customs that are apologies for power or utopian and unachievable."[119]

On the other hand, Sharf's "Grotian moments" approach allows for CIL creation based on new *opinio juris* and with less state practice. Grotian moments are said to "reflect the reality that in periods of fundamental change… rapidly developing customary international law may be necessary to keep up with the pace of developments."[120]

C. *Re-imagining Opinio Juris*

Some alternative approaches revise the traditional approach by re-imagining what *opinio juris* is.

1. Belief that It Should be Law

Lepard posits that "a rule or principle ought to be considered customary if states generally believe that it is desirable, now or in the near future, to make the rule or principle legally authoritative for all members of the global community of states."[121] While his theory emphasizes *opinio juris* over state practice, it redefines *opinio juris* as a belief by states that a norm *should be* law, rather than a belief by states that it is *already* law.[122] This approach resolves the paradoxical implications of the *opinio juris* requirement.

2. Ethical Belief

Aside from that, Lepard suggests that "fundamental ethical principles… form a background value system that can inform… interpretation and assessment of the beliefs of states about whether a norm ought to be a legal norm."[123] Thus, not all

[118] Lepard, *supra* note 2, at 30.
[119] Roberts, *supra* note 11, at 760.
[120] Lepard, *supra* note 2, at 30.
[121] Lepard, *supra* note 99, at 252.
[122] *Id.* at 253.
[123] *Id.* at 254.

"beliefs" can become *opinio juris*, only "ethical beliefs." This argument addresses the issue as to whether the widespread practice of human rights violations could ever become customary. Even assuming there is sufficient state practice, the absence of *opinio juris* would prevent the transformation of the practice into custom.

D. *State Practice as Evidence of Opinio Juris Only*

Lepard asserts that while state practice is essential evidence of the belief that a norm should be universally binding, it is not by itself an essential independent requirement for recognition of a norm as customary law.[124] Under his approach, state practice is merely evidence of the belief that a norm should be law.[125]

The implication of this is that since practice is only *a type* of evidence for *opinio juris*, it may be dispensed with in cases where there is other evidence.

However, the Commentary does not support this argument that practice is only evidence of *opinio juris*:

> Although customary international law manifests itself in instances of conduct that are accompanied by *opinio juris*, acts forming the relevant practice are not as such evidence of acceptance as law… No simple inference of acceptance as law may thus be made from the practice in question; in the words of the International Court of Justice, "acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature."[126]

Blutman would also ask, "how can state practice be one constituent element and at the same evidence of the other element?"[127] The proposed approach would therefore reduce state practice into mere evidence and not a constitutive element.

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[124] *Id.* at 252-253.

[125] *Id.*

[126] ILC Commentary, *supra* note 7, at 129.

[127] Blutman, *supra* note 21, at 531.

V. Re-Customization as a Way Forward

It seems unlikely that the ICJ, the ILC, and states are ready to officially give up the traditional two-element approach. But the status quo is also untenable, as demonstrated by the issues discussed earlier.

This paper argues that the way forward may simply be to re-customize the requirements. First of all, to say re-customize means it was previously customized. To customize something is to build or modify something based on specifications or needs. The ICJ in cases like the *North Sea* case customized the requirements of custom to fit the particular needs of those times. The proliferation of scholarly work arguing the review or revision of the two-element proves that it is time to customize it again to meet specific needs.

A. *Re-define Opinio Juris as Statements of What the Law is or Should Be*

The *North Sea* definition of that *opinio juris* as "a belief that this practice is rendered obligatory by the existence of a rule of Iaw requiring it" has long been criticized on theoretical and practical grounds.

At the theoretical level, how can the creation of a rule depend on a belief that a rule already exists? It must be remembered that the determination of the existence of *opinio juris* is relevant when trying to determine whether a rule exists. It makes no sense to say that the determination of the presence of a rule depends on whether the state believes that the rule already exists. In other words, for a customary rule to exist, there must be a sufficient number of states who mistakenly believe that the rule already exists.

Furthermore, what would be the reason for states to believe that a rule already exists? The most logical reason would be because the state observes other states engaging in the said practice, which convinces it that it must be obligatory. This implies that the earliest state practice cannot be considered for establishing custom because they would have no basis for having the belief required. Such early practicing states must have had another reason for engaging in that practice.

At the practical level, the problem is how courts can determine the belief of states. How can courts determine the beliefs of juridical entities? At the domestic level, it is like asking what corporations were thinking when they acted the way they did. In such a scenario, that court may take a look at minutes of meetings of the Board of Directors. Therefore, it may be argued that "minutes" of the decision-making, legislative, or adjudication process may be considered. But not everything which a state does would be properly documented. This is particularly true of highly controversial or sensitive matters.

The other problem is that as a matter of practice, and under the Conclusions, the same documents can be used as evidence of state practice and *opinio juris*. So, the evidence for the action is also evidence for the belief?

Because of these issues, it may be better to simply define *opinio juris* as "statements of what the law should be."

This addresses the theoretical problem because it does not matter whether the rule already exists or not at the time of the practice. States no longer have to be mistaken that the rule already exists. Furthermore, it would not be necessary for a state to observe other states before it can generate its own *opinio juris*.

This definition also addresses the practical problem because it would be easier to identify statements than beliefs. Statements may be given orally or in writing.

Furthermore, this view is consistent with the Commentary's discussion on the possibility of *opinio juris* being established first, with verifying practice being established later. If *opinio juris* were a belief, there would be no way for this reversed order to work.

Finally, according to the Commentary, "statements are most likely to embody the legal conviction of a state and may often be more usefully regarded as expressions of acceptance as law… rather than instances of practice."[128]

[128] ILC Commentary, *supra* note 7, at 141.

B. *Limit State Practice to Actual Practice and not Stated Practice*

One issue identified earlier is the inconsistency between what states say and what states actually do. For instance, in the case of International Humanitarian Law, governments may establish extensive military manuals on engaging the enemy. But their actual practice in the field may be different from their manuals. In such a situation, should the courts consider verbal state policy or actual state policy?

Clearly, what states actually do would be more reflective of state practice than what states say. One possible exception is when actual practice inconsistent with stated practice is condemned by the government as contrary to its practice. Absent such condemnation when there is a conflict between stated practice and actual practice, the latter should be considered to establish the custom.

A related question is when the same instrument is examined as evidence of both state practice and *opinio juris*. As earlier discussed, the Commentary allows this. However, it is preferable that the instrument, as a statement, be considered as *opinio juris,* and the state actions concerning the instrument are considered practice. For example, if the alleged customary rule is stated as a provision of a treaty. Then such provision is better regarded as *opinio juris* rather than State practice. Otherwise, the court would use the same provision as evidence of both state practice and *opinio juris*.

C. *Re-customize Depending on the Nature of the Obligation*

There is merit in the argument that requiring widespread state practice in specific areas like human rights or humanitarian law is unreasonable. Allowing widespread human rights or humanitarian law violations to create custom is unacceptable. But not requiring state practice at all to establish custom may blur the distinction between custom and soft law.

Perhaps the focus on state practice or *opinio juris* should depend on whether the custom is facilitative or moral. Facilitative rules "promote co-existence and cooperation" while moral rules are those which "deal with substantive moral issues"[129] Roberts explains:

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[129] Roberts, *supra* note 11, at 764.

> Facilitative customs are more descriptive than normative because they turn a description of actual practice into a prescriptive requirement for future action. Moral customs are more normative than descriptive because they prescribe future action based on normative evaluations of ideal practice.[130]

In certain types of customs, state practice cannot be expected to be widespread or consistent, or at least proof of which cannot be expected to be readily available (e.g., use of torture). Roberts argues, "[s]tate practice is less important in forming modern customs because these customs prescribe ideal standards of conduct rather than describe existing practice."[131] Schachter argues: "[I]nternational rules are not all equal. Some are more important than others because they express deeply-held and widely shared convictions as to the unacceptability of the prohibited conduct… Contrary and inconsistent practice would not and should not defeat their claims as customary law."[132]

As Roberts points out, "a lower standard of practice may be tolerated for customs with a strong moral content because violations of ideal standards are expected."[133]

Thus, customs that deal with ethical considerations should not require as much state practice as descriptive or facilitative customs in nature. Hence, what is necessary to be pervasive—state practice or *opinio juris*—depends on the nature of the obligation. This proposal is different from the sliding scale approach because the acceptability of having one element compensate for the weakness of the other is based on the nature of the rule and not the deficiency of the other element.

For instance, it was earlier discussed how it would often be the case that it would be in the states' interest to violate human rights norms. Thus, the threshold for general practice for customary human rights rules may be lower, as any practice would usually be contrary to state interests.

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[130] *Id.*
[131] *Id.*
[132] Roberts, *supra* note 11, at 783 (quoting Oscar Schachter, *Recent Trends in International Law Making*, 1988–89 AUSTL. Y.B. INT'L L. 1, at 11).
[133] *Id.* at 790.

VI. Conclusion

The renewed enthusiasm for CIL necessitates reviewing traditional notions about the concept. But the traditional approach was stitched together at a time when the family of nations was vastly different from the community of states and international organizations today.

Furthermore, the traditional approach is unworkable, as shown by the absence of practice applying strictly in international courts and tribunals. While the two-element approach appears to be sacrosanct, in actuality, it is impossible to apply without doing violence to logic.

Finally, because the two-element requirement in the traditional approach has not been practiced by courts consistently, it has never ripened into custom. Thus, it is only proper to re-customize the criteria for establishing custom.