1. Historical background

Since the establishment of the international community, two were the mainly sources of law: treaties between States and custom. Scholars often sustain that international law emerged in Europe, specifically after the Peace of Westphalia in 1648. It is possible to identify a development of relations between different political actors already in the ancient times and, at that time, we can note the presence of the custom in this relations. In fact:

“[t]o assume that international law has developed only during the last four or five centuries and only in Europe, or that Christian civilization has enjoyed a monopoly in regard to prescription of rules is to govern inter-state conduct. As Majid Khadduri points out: “in each civilization the population tended to develop within itself a community of political entities—a family of nations—whose interrelationships were regulated by a single authority and a single system of law. Several families of nations existed and coexisted in areas such as the ancient Near East, Greece and Rome, China, Islam and Western Christendom, where at least one distinct civilization had developed in each of them. Within each civilization a body of principles and rules developed for regulating the conduct of states with one another in peace and war” (Anad in Malanczuk 1997, 9).

At that age, both sources had the same hierarchy as a rule, being equally treated in the law practice. Furthermore, it is important to state that both had one particular characteristic: they did not bind States to rules that they did not commit to obey; in other words, there was no interference of an outside legislator in the rules of States. At first sight, it could be reasonable to ponder that customary law was not a source formally ratified by the State, so bind it would be a kind of interference (Cassese 2001). Nevertheless, States had a pactum tacitum (tacit consent) in the matter of custom, an idea that were brought by medieval jurists from Roman tradition. Such consent is not attached to a contractual view, but to
the tradition, something very similar with the present view of custom. An Italian
medieval jurist, Bartolus de Sassoferrato (1313 – 1357), assumed that:

“A statute obtains [its] consent expressly, and therefore does not require other
conjectures [about its existence]. But custom requires tacit [consent]. Therefore
a long passage of time is necessary, so that [the custom] may become apparent
through the consent of the people and their perseverance [in the act]” (Kadens
and Young 2013, 889-890).

As it is possible to perceive in our time, medieval jurists did not agree on
which acts were considered as customary. There were many debates concerning
for how long or how many times an act should be practiced for it to be considered
a custom. There was even some discussion on whether a judge should declare an
act as a custom before it was considered law, what reminds us of the necessity of
opinio juri
s that many scholars nowadays claim. Despite the relevant density of the
debates, custom in the middle ages was, as a matter of fact, “not a defined thing
but rather a more or less indeterminate set of possible conforming behaviors”
(Kadens and Young 2013, 895). In other words, the idea of custom was used and
manipulated to achieve a desired decision.

More than three centuries later, Spanish scholar Francisco Suárez wrote in
his book _Treatise on Laws and God the Lawgiver_, that the concept of _jus gentium_
(the “law of nations”) is attached to customs that were agreed upon and adhered
by nations worldwide. In fact, the position defended by Suárez was more related
to the ones of medieval times, often developing similar arguments (Kadens and
Young 2013) The jurist Savigny was also an enthusiast of the customary law rules’
binding status, since they were a consensus in the State's practice (D’Amato 1970,
70). Furthermore, it is necessary to highlight the importance of customary law in
international humanitarian law, mainly with the adoption in 1899 at the Hague
Peace Conference, of the Martens Clause, which stated that:

“[I]n cases not included in the Regulations adopted by them (the Hague Peace
Convention’s rules of war) those inhabitants and the belligerents remain under
protection and the rule (sous la sauvegarde et sous l’empire) of the principles of the
law of nations as they result from the usages established among civilized peoples,
from the laws of humanity, and the dictates of the public conscience” (Cassese

In modern times, mainly after World War II, the most accepted definition of
custom can be found in the Statute of the International Court of Justice (ICJ), in
its Article 38(1)(b). In its jurisprudence, the Court settled, basically, two necessary
components for the constitution of custom; the State practice and the _opinio juris;
_a subjective element that is related to the consent of the State in the legal status of
the conduct in question (International Law Association 2000).

The jurisprudence of the ICJ and also of its predecessor, the Permanent Court
of International Justice (PCIJ), has helped to clarify many issues concerning the
International Law Commission

formation of customary international law, in cases such as the *Lotus* (1927), the *Asylum* (1950), the *North Sea Continental Shelf* (1969) and the *Nicaragua* (1986) cases. Nonetheless, it important to remark that, in the last decade, the Court has not made much progress in several topics concerning custom, keeping a very cautious behavior in ascertaining the existence of customary norms. For instance, the Court avoided pronouncement about issues as the customary character of universal criminal jurisdiction, the legal status of United Nations General Assembly Resolutions and others topics that concern scholars and the legal international community. It is possible to perceive that, despite the long history of custom, it still gives rise to debate.

2. Statement of the issue

2.1. Sources of international law

In every legal system, there is a body of rules and principles that establishes the rights and obligations of its subjects, which can be called “primary rules”. Alongside them, each system contains what may be called “secondary rules”, which are the rules “applied to determine what are the primary rules, how they come into existence and how they can be changed” (Thirlway 2010, 95). In municipal legal systems, these are, for example, the rules establishing the process that must be followed for legislation to pass, and the resulting legislation would join the body of primary rules of the system.

Similarly, international law also contains secondary rules, which are referred to as sources of international law. They are, however, less clearly defined than municipal secondary rules, since, at the international level, there is neither a legislative body comparable to a national Parliament nor a system of binding precedents (Thirlway 2010, 96).

A distinction may be drawn between the material and the formal sources of international law. The former “provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application” (Brownlie 2008, 3). Simply put, they are the place in which a rules’ terms are laid down, encompassing the actual content of a rule (Shaw 2003, 67). The formal sources of international law, on the other hand, are the binding legal procedures for the creation of international rules, conferring authority upon them (Thirlway 2010, 97).

2.1.1. Article 38 of the Statute of the International Court of Justice

Usually, the sources of international law are accepted as set out in Article 38 (1) of the Statute of the International Court of Justice [hereinafter ICJ Statute] (Thirlway 2008, 98), which reproduces almost identically the text of Article 38 of the Statute of the Permanent Court of International Justice. The provision reads as follows:
“[a]rticle 38.1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

Although the expression “sources” is not present in the wording of Article 38 (1), it is clear that it was the intent of its drafters to indicate that, by applying what is listed, the ICJ would be applying international law, warranting the conclusion that items “a” to “d” constitute its recognized sources. This is, however, by no means an undisputed matter, since there has been criticism of Article 38 as a definition of the sources of international law. According to Cançado Trindade, Article 38 is not and never had the intention to be a mandatory and exhaustive formulation of the sources of international law, but only a guide for the Court’s judicial operation (Trindade 2010, 114-115). Nonetheless, the practice of States has not endorsed any new approach (Thirlway 2010, 99).

According to the text of Article 38 (1), the three main sources of international law are treaties, custom and general principles of law. The order in which they are presented is not to be perceived as hierarchical, although treaties and custom are usually considered to be in a more prominent position than general principles of law, since the latter were included in the list in order to provide a “fall-back source of law” for cases in which no conventional or customary norm could be found. There is not, however, any indication of a hierarchy between treaties and custom (Thirlway 2010, 113-114).

In addition to these three formal—because they refer to an authoritative process—sources, the ICJ may apply judicial decisions and doctrinal teachings as subsidiary means. These are material sources, since they do not generate rules, but rather provide evidence of their existence. The reason for them to be applied in a subsidiary manner is that, as taught by Thirlway:

“(…) if a rule of international law is stated in a judicial decision, or in a textbook, it will be stated as a rule deriving either from treaty, custom or the general principles of law. The judge, or the author of the textbook, will not assert that the rule stated is law because he has stated it; he will state it because he considers that it derives from one of the three principal sources indicated in paragraph (a) to (c) of Article 38” (Thirlway 2010, 110).

The focus of the ILC in the present topic will be on the source contained in Article 38(1)(b): international custom, to which we must now turn our attention.
2.2. Definition and nature of customary international law

Article 38(1)(b), as quoted above, provides the most authoritative definition of international custom (Cassese 2005, 156), even if not an undisputed one (Kunz 1953, 664), describing it as “evidence of a general practice accepted as law”. This formulation reflects the widely accepted two-element theory that states that custom is composed of two elements: State practice and *opinio juris*, both of which will be further explored in the next section of this study guide.

International custom, described by Hans Kelsen as “unconscious and unintentional law-making”, does not arise from a deliberate legislative process, but rather as a collateral effect of the conduct of States in their international relations (Cassese 2005, 156). Another distinguishing feature of custom is that it binds all the members of the international community, or of a regional group, in the case of a regional custom—differently from treaties, which are binding only upon those States that gave their express consent through signature and ratification.

As to its nature, custom may be regarded as a form of *tacit agreement*, by which States, in behaving in certain ways towards each other, tacitly agree to guide their future conduct by it and be legally bound by it (Thirlway 2010, 102). This view, based on the voluntarist or consensual theory of the nature of international law, according to which States must consent in order to be legally bound, presents certain theoretical difficulties. Among them, is the reason why new States are bound by existing customary international law, to which they have not consented to (Harris 2010, 33). However this approach is rejected by the overwhelming majority of writers (Kunz 1953, 664), it is still the one to which the ICJ adheres (Harris 2010, 33).

The typical approach of the natural law doctrine is to consider custom not as a procedure for the creation of norms, but only the evidence of a pre-existing legal rule. The same view was taken in Savigny’s historical jurisprudence—law is found, not made—and in Duguit’s sociological—law as the product of social solidarity—and Scelle’s biological jurisprudence—law as a translation of a biological social necessity. The same ideas can be found in the writings of international law’s prominent scholars Hersch Lauterpacht and Roberto Ago (Kunz 1953, 664).

The positivist approach is that customary law must be seen, like all law, as man-made, positive law, which regulates its own creation. It is an independent procedure for international law creation, which can lead to norms of general—binding on all States—or particular international law. Treaties are a different procedure, that can only produce norms of particular international law, i.e. norms binding only the State parties to the treaty (Kunz 1953, 665).

2.3. Elements of customary international law

2.3.1. The two-element theory

However custom can be described as a legal obligation deriving from a settled
conduct which creates a legitimate expectation, it has long been acknowledged, in international law, that the mere existence of a consistent practice does not suffice to create an international rule. For that purpose, it is required that said practice be accompanied by a psychological or subjective element, consistent in the belief that adherence to it is required by a rule of law (Thirlway 2010, 101-102).

This combination is traditionally referred to as the “two-element theory”, by which for a customary rule to arise, two elements must be present: on the one hand, there must be a significant State practice, and, on the other hand, the practice must follow from *opinio juris*, i.e. the belief that such practice reflects international law (Cassese 2005, 156).

### 2.3.2. The objective element: State practice

Let us turn, firstly, to the objective or material element of customary international law: State practice, also referred to as “constant and uniform usage” in the Asylum case (Colombian-Peruvian Asylum 1950, 14). In analyzing State practice, the following issues must be taken into consideration: whose practice is relevant, which forms may practice take, how uniform must it be, for how long must it observed, and what is the role of specially affected States.

#### 2.3.2.1. Whose practice counts?

It is widely accepted that the reiterated conduct of States fulfills the objective element for the formation of customary norms. However, it is not clear whose conduct, among State organs, is relevant. The notion of “State” comprises the executive, the legislature and the judiciary, as well as private persons and entities acting on behalf of the State (Mendelson 1998, 198).

Authors from the early 20th century took the position that only the conduct of those entitled to express the State’s consent to be bound, assuming international obligations on its behalf (normally, the Heads of State and Government and the Minister of Foreign Affairs), should be considered as relevant to the formation of customary international law. This view derives from the notion of custom as a form of unwritten treaty law or tacit agreement (Mendelson 1998, 198).

Nonetheless, acts by a State’s legislature and public administration may also affect its international relations and the rights of foreigners—being, therefore, relevant to international law. Additionally, decisions by domestic courts, as well as the ones by international tribunals, may be evidence of State practice. It can be said that judicial decisions have a dual function in the formation of customary rules: on the one hand, they may be an evidence of State practice within the meaning of Article 38 (1) (b) of the ICJ Statute, and, on the other hand, they are “subsidiary means for the determination of rules of law”, as laid out in Article 38 (1) (d) (Mendelson 1998, 200).

Moreover, it is important to highlight that it is not only the conduct of States
that affects the formation of customary rules. The practice of international organizations may also contribute to it, since, in many situations, they act in their own name and may possess international personality (Shaw 2003, 241). It may be argued, however, that the practice of, for instance, the United Nations General Assembly represents the practice or the belief (as will be seen in section 2.3.2 of this guide) of the member States, rather than that of the organization itself. In a broader sense, contributions to the formation of customary international law may also be made by other entities, such as non-governmental organizations, multinational corporations and even individuals, however in an indirect manner (Mendelson 1998, 203).

Regarding this matter, the International Law Association, in its work on the formation of customary international law, proposed the following principles as applicable to it (International Law Association 2000):

7. Acts of individuals, corporations etc. do not count as State practice, unless carried out on behalf of the State or adopted (“ratified”) by it.
8. The activities of territorial governmental entities within a State which do not enjoy separate international legal personality do not as such normally constitute State practice, unless carried out on behalf of the State or adopted (“ratified”) by it.
9. The practice of the executive, legislative and judicial organs of the State is to be considered, according to the circumstances, as State practice.
10. Although international courts and tribunals ultimately derive their authority from States, it is not appropriate to regard their decisions as a form of State practice.
11. The practice of intergovernmental organizations in their own right is a form of “State practice.”

2.3.2.2. Forms of practice

Along with the question of whose practice counts, there is the issue of which forms may practice take, a matter closely related with the identification of norms of customary international law. Custom may be evidenced by numerous material sources, such as, among others, diplomatic correspondence, policy statements, press releases, official legal advisers’ opinions, military manuals, state legislation, judicial decisions by national and international courts, resolutions of the UN General Assembly (Brownlie 2008, 6-7).

Firstly, there is the question of whether statements count as State practice. On the one hand, it may be argued that verbal acts, however they can articulate a norm, cannot configure the objective element of custom (D’Amato 1971, 88). On the other hand, statements may be considered a form of practice, since important acts of a State, such as the recognition of another State, are not necessarily physical acts (Kammerhofer 2004, 526). One may also consider that the difference between physical and verbal acts is not substantial, although statements usually carry less weight as evidence of State practice (Mendelson 1998, 205).

According to Mendelson, an act does not count as practice if it is not
communicated to at least one other State (Mendelson 1998, 204). The same conclusion was reached by the International Law Association's Committee on Formation of Customary Law and is found in Principle 5 of the Report: “5. Acts do not count as practice if they are not public.” (International Law Association 2000, 15). Therefore, acts such as secret military instructions and internal memoranda would not count as State practice.

In some cases, omissions can also count as State practice. For example, by abstaining from the prosecution of foreign diplomats suspected or accused of crimes, States contributed significantly to the creation of the rule of diplomatic immunity (Mendelson 1998). However, there must be caution when considering omissions as evidence of State practice, as the jurisprudence demonstrates. In the *Lotus* case, the Permanent Court of International Justice rejected France's argument in favor of a rule restricting jurisdiction over negligent acts committed on board of a ship to the flag State, which it justified by citing the almost complete absence of prosecutions by States others than the flag State. The PCIJ considered that such omission was not a clear evidence of custom, since the abstention from prosecution could be motivated by various reasons—not necessarily by the existence of a customary norm (*The Case of the S.S. "Lotus"* 1927). The same approach was taken by the ICJ in the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, when it dismissed the argument that there was a customary rule prohibiting the use of such weapons because States had refrained from using them since 1945 (*Legality of the Use or Threat of Nuclear Weapons* 1996).

2.3.2.3. Duration and uniformity of practice

However the passage of time may evidence the generality and consistency of a practice, international law does not require a minimum duration of it (Brownlie 2008, 7). Practice must be continued and reiterated, but there is no rule establishing for how long such a practice must have been repeated (Kunz 1953, 666). The ICJ, in the judgment of the *North Sea Continental Shelf* cases, stated that the passage of only a short period of time was not an obstacle to the formation of a customary rule, as long as, during that time, State practice was extensive and virtually uniform (*North Sea Continental Shelf* 1969, at 74). In some areas of international law, such as airspace and outer space law, rules have emerged quite quickly, in what was called “instant” customary international law (Cheng 1997, 136).

As to the uniformity of the practice, the ICJ has pronounced, in the *Asylum* case that a practice does not need to be completely uniform to be the basis of international custom, as long as it is consistent (*Colombian-Peruvian Asylum* 1950, at 276-277). This was reaffirmed in the *North Sea Continental Shelf* cases (*North Sea Continental Shelf* 1969, at 73). In the *Nicaragua* case, the Court noted that a practice does not always need to be followed for it to indicate a customary rule, sufficing that any departure from it is considered a breach of international
In addition to its affirmation that practice does not have to be completely uniform, the ICJ, in the *North Sea Continental Shelf* decision, highlighted the importance of the practice of “States whose interests are specially affected” (*North Sea Continental Shelf* 1969, at 74). It is sometimes argued—as it was, for instance, by Germany in the *Fisheries Jurisdiction* case—that a new custom cannot arise without the acceptance of the specially affected States. However, there is no evidence in support of such an affirmation (Danilenko 1993, 95).

2.3.2. The subjective element: *opinio juris sive necessitatis*

Having dealt with the main ideas on the objective element of custom, let us now turn to its subjective or psychological aspect, known by the Latin expression *opinio juris sive necessitatis*, which literally translates as “opinion of law or necessity”, or simply *opinio juris*. It is reflected in the text of Article 38 (1) (b), as it provides that, for custom to exist, a general practice must be accepted as law. It continues, however, to be the most disputed and least comprehended facet of customary international law (Kammerhofer 2004, 532).

2.3.2.1. Meaning and function of *opinio juris sive necessitatis*

Mendelson defines *opinio juris sive necessitatis* as “a belief in the legally permissible or obligatory nature of the conduct in question, or of its necessity” (Mendelson 1998, 269). The International Court of Justice corroborated this idea in its judgment in the *North Sea Continental Shelf* cases, in what became the judicial *locus classicus* on the matter (Thirlway 2010, 102), affirming 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. 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*.” (International Court of Justice 1969, at 77).

Therefore, for a State practice to be significant, it must be accompanied by such conviction. In that sense, *opinio juris* is necessary in order to distinguish a rule of customary international law from a rule of international comity, which is based upon a consistent practice in inter-State relations, but without the “feeling of legal obligation” (Harris 2010, 30). An example of a practice amounting to international comity, but not custom, is the saluting at sea by a ship of another ship flying a different flag (Harris 2010, 30). The ICJ has pointed this out in the *North Sea Continental Shelf* judgment, establishing *opinio juris* as the main distinguishing feature between custom and comity or courtesy:

“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.” (North Sea Continental Shelf 1969, at 77).

Despite its long-standing recognition in international law as an element of custom, *opinio juris* presents a significant paradox: how can a practice develop into a customary norm if States must believe the rule already exists before their practice can be significant for its creation? Can an initially erroneous belief in the existence of a rule produce law when shared among States? Some approaches have been taken in order to solve this problem: to deny the two-element theory; to assume that *opinio juris* is the only essential element, State practice being merely a proof of it; to consider custom as essentially practice, *opinio juris* being relevant only to differentiate it from mere comity or courtesy (Thirlway 2010, 102-103). Nonetheless, it is still not possible to find a widely agreed solution to the paradox.

### 2.3.2.2. Evidence of *opinio juris sive necessitatis*

Given the abstract, “state of mind” nature of *opinio juris sive necessitatis*, it is difficult to attribute it to a State (Thirlway 2010, 103), thus proof is the essential problem of the subjective element (Brownlie 2008, 8). Also, *opinio juris* can often be demonstrated by the same acts, statements or omissions used to prove State practice, blurring the distinction between the two elements.

In the practice of the ICJ, two methods of approach can be identified. The first, more flexible method, which was followed by the Court in many cases, is to assume the existence of *opinio juris* from the evidence of State practice. The other, more rigorous approach, adopted by the Court in a minority of cases, requires more positive evidence of the belief that a given practice is legally obligatory (Brownlie 2008, 8-9).

The stricter method was applied in three important cases: by the PCIJ in the *Lotus* case and by the ICJ in the *North Sea Continental Shelf* and *Nicaragua* cases (Brownlie 2008, 9-10). In these cases, a higher standard of proof was required, since the Court did not accept that a continuous practice was *prima facie* evidence of the belief in the existence of a legal obligation (Brownlie 2008, 9-10).

In a recent decision, the Special Tribunal for Lebanon (STL) provided an interesting example of the identification of customary norms, when it recognized a customary definition of terrorism in time of peace. The STL considered judicial decisions as evidence of *opinio juris*, under the justification that they reflected a legal opinion as to the essential elements of the crime of terrorism (Ayyash et al. 2011, at 100).

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1 Alvarez-Jiménez states that the Court adopted in the *Nicaragua* case what he calls “flexible deductive approach” —as opposed to the “strict inductive approach” observed in the *North Sea Continental Shelf* cases—, by which it loosens the requirements for the verification of *opinio juris*. In *Nicaragua*, it did so by inferring *opinio juris* from an UNGA Resolution, to which practice followed (Alvarez-Jiménez 2011).
2.4. Applicability of customary international law

As aforementioned, customary international law, as opposed to treaties, which are applicable only to State parties, applies to all States. Nonetheless, there are a few situations in which customary norms are binding on only a few States or, on the other hand, may not bind a specific State. These two possible exceptions to the universal applicability of customary international law are, respectively, local or special custom and the theory of persistent objection.

2.4.1. Local or special custom

A local or special customary international rule binds only a group of States, regional or not. A well-known example of local custom is the practice of diplomatic asylum in Latin American countries, that was the subject of the *Asylum* and *Haya de la Torre* cases before the ICJ (Thirlway 2010). In the *Asylum* case, the Court, however, not recognizing the applicability of the local customary rule to Peru, acknowledged the existence of this kind of rule (Colombian-Peruvian Asylum 1950).

There is not a minimum number of States required for the formation of a local customary norm. In the *Right of Passage over Indian Territory* case, in which Portugal claimed that a custom existed between itself and India, the ICJ recognized the possibility of the continued practice between two States forming the basis of mutual rights and obligations between them (Right of Passage over Indian Territory 1960, at 37).

From the ruling of the ICJ in the *Asylum* case, it would seem that a local customary rule must be based on the same two elements as all customary norms: State practice and *opinio juris*. Nevertheless, it must meet two additional requirements: the tacit acceptance of all parties concerned and the allocation of the burden of proof on the State claiming the existence of the rule (Cassese 2005, 164).

2.4.2. The persistent objector theory

The persistent objector theory contemplates the possibility of a State contracting out of a customary rule in the process of its formation. There must be clear evidence of objection, since there is a presumption of acceptance that has to be rebutted. The principle was recognized by the ICJ in the *Anglo-Norwegian Fisheries* and *Asylum* cases (Brownlie 2008, 11).

However, there is considerable criticism to the theory, since there is not much

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2 “The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.” (Colombian-Peruvian Asylum Case 1950, 277-278).
State practice to support it (Thirlway 2010, 108, Cassese 2005, 163). Neither is the international case law very supportive of the principle, since the ICJ’s pronouncements in Anglo-Norwegian Fisheries and Asylum were obiter dicta. Additionally, it may be argued that it would be very difficult for an individual State to opt out of a customary rule, since it would face the pressure of the vast majority of the members of the international community (Cassese 2005, 163).

2.5. Relationship between customary international law and other law-making processes

2.5.1. Customary international law and treaties

Treaties, along with custom, are one of the main sources of international law, according to Article 38 (1) (a) of the ICJ Statute. They consist of “international agreements concluded between States in written form and governed by international law” (Vienna Convention on the Law of Treaties, Article 2(1)(1)). The main features that distinguish treaty law from customary law are related to the fact that the former is binding only upon State parties and it is presented in written form.

Despite these differences and the fact that they are distinct processes of law-making, treaties and custom sometimes are intertwined. That is mainly because custom arises from continued practice of States and treaties are one of the most typical and important acts of a State in relation to other States (Thirlway 2010, 111).

In the North Sea Continental Shelf cases, the ICJ identified three ways in which treaties and custom may be related. Firstly, treaties can be declaratory of a pre-existing rule of customary international law, in its entirety or partially—the first hypothesis being rather unlikely. That is the case of many rules contained in treaties such as the Vienna Convention on Diplomatic Relations, the Vienna Convention on the Law of Treaties, and the Montego Bay Convention on the Law of the Sea.

Secondly, treaties can crystallize developing customary rules, thus transforming lex ferenda in lex lata. That is usually the case of conventions which result from the works of the International Law Commission, since its objective is precisely the codification and progressive development of international law.

Finally, custom can arise from practice, after the adoption of a treaty, of States that are not parties to that treaty. Such was the argument presented by Denmark and the Netherlands in the North Sea Continental Shelf cases, which was rejected with respect to the delimitation article, but accepted in relation with other articles of the 1958 Geneva Convention on the Continental Shelf.

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3 An obiter dictum is an observation that, however included in the Court’s decision, is not necessary to its reasoning, i.e., it is a dispensable part of the judgment or opinion.

4 Lex ferenda means "law which ought to be made", developing law; lex lata means "law which has been made, positive law" (Thirlway 2010, 96). In the present context, a custom in a late stage of development (lex ferenda) is made positive law (lex lata) through its crystallization in a treaty.
Another important remark of the ICJ in this decision is that, for a treaty rule to pass to the corpus of customary international law, it must be of a norm-creating character. For that matter, one must observe if the rule at hand may be derogated or if it may be subject of reservations. (North Sea Continental Shelf 1969, Thirlway 2010, 102-103).

2.5.2. Customary international law and soft law

Soft law is a term used to describe a range of non-legally binding instruments used by States and international organizations in contemporary international relations, as opposed to hard law, which is always binding. Therefore, treaties in force are by definition hard law, and so are UN Security Council resolutions adopted under Chapter VII of the UN Charter, since all UN member States have agreed to accept and execute such decisions, in accordance with Article 25 of the Charter. However, UN General Assembly resolutions and declarations, as non-binding or “soft” agreements, fall into the definition of soft law (Boyle 2010, 124).

The non-legally binding character of resolutions of international organizations, such as UN General Assembly resolutions, and of multilateral declarations by States, for instance the Universal Declaration of Human Rights, does not prevent its effect on customary international law. As with treaties, for a non-binding resolution to form customary rules, its wording must be of a norm-creating character (Boyle 2010, 134).

The context in which these instruments are negotiated is relevant when analyzing the opinio juris of States—since their motives to vote for or against a resolution are not necessarily related to the conviction in the existence of a rule of law (Thirlway 2010, 118). Nonetheless, they can provide a record of the belief of States in a certain rule, thus serving as evidence of opinio juris. The degree of support should also be taken into consideration, since a resolution approved by unanimous vote or consensus will weigh more than one agreed on by a two-thirds majority of States. The opposition of the most affected States, for instance, may prevent the law-making effect of a resolution (Boyle 2010, 135).

2.5.3. Customary international law and jus cogens

Peremptory norms of international law or norms of jus cogens have a superior hierarchy in relation to other rules. This classification is reflected in the text of Article 53 of the Vienna Convention on the Law of Treaties, according to which a treaty is void if it conflicts with a peremptory norm of international law. In the words of Article 53,

“(…) a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

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Normally, a rule of *jus cogens* is a rule of customary law, as it is implied in Article 53 (“general international law”), thus it must be based on consistent State practice and *opinio juris*. For a rule to be of a superior hierarchy, there must be a conviction that a developing rule is of that nature—a kind of “superior *opinio juris*” (Thirlway 2010, 119)

The usefulness of this concept is, however, very much disputed. The *jus cogens* character of certain norms has been argued before the ICJ in a handful of cases, such as the recent *Jurisdictional Immunities of the State* case, in which Italy contended that the prohibition of forced labor was norm of *jus cogens* and that it derogated the State immunity rule—a thesis the Court did not uphold (*Jurisdictional Immunities of the State* 2012). The ICJ has, indeed, recognized the *jus cogens* nature of the rules such as the prohibition of the use of force (*Military and Paramilitary Activities in and against Nicaragua* 1986) and the prohibition of torture (*Questions relating to the obligation to prosecute or extradite* 2012). Nonetheless, these pronouncements were *obiter dicta*.

### 2.6. Case law

#### 2.6.1. PCIJ: *Lotus* case (France v. Turkey)

The *S.S. Lotus* case was judged in 1927 by the Permanent Court of International Justice, which was the principal judicial organ of the League of Nations and whose Statute was later reproduced in the ICJ Statute. The case, however the earliest judicial pronouncement on the formation and verification of customary norms, remains relevant until the present days.

The case was proposed by France against Turkey, due to the criminal proceedings the latter had initiated in its national courts against a French national. The proceedings concerned the collision between the *S.S. Lotus*, a ship flying the French flag, and the *Boz-Kourt*, which flew the Turkish flag. According to France, Turkey lacked jurisdiction to prosecute the French lieutenant. The Court, therefore, had to pronounce on whether there was a rule of international law prohibiting the exercise of jurisdiction by Turkey in the case concerned. After analyzing the evidence brought by France, it concluded that it was not possible to verify the existence of a customary norm affirming that the jurisdiction in collision cases was of the flag State.

This case is often cited as supportive of the positivist view of international law, due to its affirmation that all international rules are based on the consent of States (Janis and Noyes 2006, 115). Moreover, the Court put the burden of proof on France, requiring a high standard of evidence in order to prove the existence of custom, as the following passage demonstrates:

“Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often,
in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true.” (S. S. Lotus 1927, 28).

2.6.2. ICJ: Asylum case (Colombia v. Peru)

The Colombian-Peruvian Asylum case, or simply Asylum case, was brought before the ICJ by Colombia against Peru. It concerned the situation of a Peruvian general, who, after an unsuccessful overthrow, sought refuge in the Colombian embassy in Lima. The main dispute in the case was whether Peru was bound or not by an alleged local custom that granted diplomatic asylum, which would force Peru to allow a safe passage of the general to Colombia.

In order to prove the existence of this customary rule, Colombia presented many cases in which diplomatic asylum was respected. However, Colombia could not prove this as a rule, since many of those cases were contradictory and, furthermore, it was impossible to define whether it was a matter of politics or law, thus being impossible to conclude that there was opinio juris. Moreover, the Court stated that Peru could not be bound to this custom, even if Colombia had successfully proven its existence, since Peru had never had attitudes adhering to it and had, actually, on the contrary, objected to the rule (Briggs 1951, Colombian-Peruvian Asylum 1950).

2.6.3. ICJ: North Sea Continental Shelf cases (Germany v. Denmark and Germany v. The Netherlands)

The judgment in the North Sea Continental Shelf cases, delivered by the ICJ in 1969, is one of the most important decisions of the Court’s jurisprudence and one of the few occasions in which it went deeply into the analysis of the formation and identification of customary international law (Harris 2010, 27).

The case was proposed by the Federal Republic of Germany against, separately, the Netherlands and Denmark, being reunited in one single case by the ICJ (North Sea Continental Shelf, at 17). The main controversy of the case was whether the rule of delimitation of the continental shelf contained in Article 6 of the 1958 Geneva Convention on the Continental Shelf—the equidistance principle—had become a customary rule binding on Germany—who was not a party to said convention.

The Court decided that, however a treaty rule can also be a rule of customary law, this was not the case of Article 6. In its reasoning, it established in which ways custom and treaties may interact: they can be declaratory of pre-existing customary law, crystallize developing customary law, or give rise to a custom after
its adoption. Also, for a rule of treaty to be also considered a customary rule, it must have a norm-creating character, which means that it cannot admit derogations or be subject to reservations (North Sea Continental Shelf 1969, at 71-72).

It was also in this case that the Court highlighted the importance of the practice of the specially affected States, considering it a determining factor in the incorporation of treaty norms into the corpus of customary international law. As to the necessary duration of practice, it was affirmed that the passing of only a short period of time was not an obstacle to the formation of a customary rule, as long as during that time the practice is extensive and representative, including that of the States whose interests are specially affected (North Sea Continental Shelf 1969, at 74).

2.6.4. ICJ: Nicaragua case (Nicaragua v. United States of America)

Another important judgment that delimits the notion of custom as law is the one in the Military and Paramilitary Activities in and against Nicaragua case (Bederman 2010), proposed by Nicaragua against the United States of America and decided by the Court in 1986. The dispute concerns the actions of the United States towards Nicaragua in the context of the Sandinista Revolution. Nicaragua claimed that the United States had breached international law by using direct armed force against it and by giving assistance to the “contras”, which were guerrillas fighting to depose the Sandinista government (Harris 2010, 727).

The use of force is outlawed by Article 2(4) of the UN Charter. Nonetheless, the United States had made a reservation to its acceptance to the ICJ’s jurisdiction, excluding “disputes arising under a multilateral treaty” from it. Therefore, the Court could decide whether the United States had violated Article 2(4), since the UN Charter is a multilateral treaty. However, the Court ruled that the prohibition of the use of force was also a rule of customary international law, thus it could exercise jurisdiction in respect of the application of such rules (Harris 2010, 727, Military and Paramilitary Activities in and against Nicaragua 1986, at 185).

In its reasoning, the Court affirmed that, for the establishment of a customary rule, the conduct of States does not need to have been completely consistent. It is sufficient that the practice of States is, in general, consistent with the rule, and that situations of conduct inconsistent with it are treated as breaches of that rule, and not as indicative of the existence of a new rule. Also, if a State acts in a manner which is considered incompatible with a customary rule, but tries to justify its conduct by resorting to exceptions and justifications contained within the rule, this behavior confirms, rather than weakens, the rule (Military and Paramilitary Activities in and against Nicaragua 1986, at 186).

3. Previous work by ILC

However the International Law Commission (ILC) has developed an extensive
debate on sources of international law, this debate was mainly restrained to the law of treaties. Trying to amplify the debate on the matter of custom as a source of international law, and recognizing its importance, the ILC has, in 2011, incorporated the subject “Formation and evidence of customary international law” in its long-term programme of work (A/67/10). The main scope of the ILC studies on this matter are focused on the formation and finding of evidences of customary international law (A/CN.4/653).

Nonetheless, the Commission has debated the topic before. In its article 24, the statute of the ILC provides that:

“The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.”

In this regard, the ILC had debates already in its second session aiming at “making the evidence of customary international law more readily available” (ILC 1950, 367). These evidences were related to the State practice and international courts’ decisions (ILC 1950). Since then, and in other opportunities, the International Law Commission has tried to seek and evaluate different kinds of practices that could constitute a custom.

For instance, the ILC has adopted measures in order to standardize the idea of State practice (A/CN.4/659) and these procedures were considered by the ILC as fundamental to identify custom as a rule in international law. Therefore, the ILC has tried to fulfill with definitions the subjective spaces of custom identification as a rule of international law.

The International Law Commission recognizes that State practice is found “in the conjunct of internal law, municipal court decisions, practice of the executive branch, diplomatic practice and treaty practice”. (A/CN.4/659, 14.). Nonetheless, the ILC has drawn a scenario in which the State practice must been seen with some limits:

“[p]ractice does not offer examples of countermeasures taken by non-injured States or international organizations against a responsible international organization. On the other hand, in the context of the rarity of cases in which countermeasures against an international organization could have been taken by a non-injured State or international organization, the absence of practice relating to countermeasures cannot lead to the conclusion that countermeasures by non-injured States or international organizations would be inadmissible.”

In addition, the ILC has made statements related to the subjective element, the opinio juris, supporting the idea that the subjective element is a “sense among States of the existence or non-existence of an obligatory rule.” (A/CN.4/659, p. 17). To identify this common sense between States, the Commission tries to enumerate
a non-exhaustive list of conduct such as the State’s practice in treaties, decisions of municipal courts and others (A/CN.4/659).

Moreover, the Commission recognizes the significance of judicial pronouncements and scholars’ opinions to identify custom as part of international law system. For example: “on balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25” (ILC 2001, 114).

Finally, it is important to highlight that the International Law Commission has tried to clarify its position on this process. Although the Commission plays an important role in codification, it also has considerable jobs associated to progressive development of international law. In fact, the Commission intends to reduce these differences and in many works such difference does not appear. As a result, the emergence of a customary rule in the international law system is not only part of the progressive development of international law, but also a source for future codifications (A/CN.4/659).

4. Questions to ponder

1. When considering the proposed topic, the ILC members are recommended to bear in mind the following questions.
2. What are the elements of customary international law? Is the two-element theory still relevant? Can there be custom without one of these elements?
3. What constitutes State practice? What kind of State behavior is relevant to the formation of customary international law and how can one identify it?
4. What constitutes opinio juris? Where can one find evidence of it in the practice of States and how is it different from the objective element of custom?
5. How do norms of local or special customary international law arise? What distinguish them from norms of general customary international law?
6. What is the relevance of the persistent objector theory to the formation of customary international law?
7. How does custom interact with other forms of international law-making (treaties, soft law, jus cogens)?
8. What can we learn from the practice of international courts, such as the International Court of Justice, in the identification of customary norms?
9. The answer for these and other question that may arise in the course of the debates shall be found in norms of customary international law. It is the role of the Commission to crystallize such norms, the existence of which shall be determined by observing the existence of State practice and opinio juris. As a result, the ILC member shall submit a set of draft articles, guiding principles or a report on its conclusions to the UN General Assembly.
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Abstract

It is widely accepted that custom, alongside treaties and general principles of law, is one of the main sources of public international law, as enumerated in Article 38 (1) of the Statute of the International Court of Justice (ICJ). Nonetheless, international custom is often seen as a problematic means of law-making, mainly due to the grey area involving its character, consistency and acceptance. For that reason, the international community is concerned with establishing a coherent theoretical basis for the formation and evidence of customary international law. Article 38 (1) (b) defines custom “as evidence of a general practice accepted as law”. This definition leads to the widely accepted two-element theory, according to which international custom is composed of two main elements: State practice and opinio juris sive necessitatis. The first can be described as an objective element consisting of any act, articulation or other behavior of a State, and the second, as the notion, by the State, that such practice is required by, or consistent with prevailing international law. This last element, although often considered in a superficial manner, as presumed from the existence of practice, is essential to distinguish international custom from mere comity, as the ICJ has recognized in a number of cases. Setting aside the mists surrounding international custom has also been the main task of the International Law Commission, in its work of codification of international norms.