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Max Planck Institute for Research on Collective Goods, Kurt-Schumacher-Str. 10, D-53113 Bonn
http://www.coll.mpg.de

The International Court of Justice and the Judicial Politics of Identifying Customary International Law

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Niels Petersen*

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Abstract

It is often observed in the literature on customary international law that the identification practice of the International Court of Justice for customary norms deviates from the traditional definition of customary law in Art. 38 (1) lit. b of the ICJ Statute. However, while there are many normative and descriptive accounts on customary law and the Court's practice, few studies try to explain the jurisprudence of the ICJ. This study aims at closing this gap. I argue that the ICJ's argumentation pattern is due to the institutional constraints that the Court faces. In order for its decisions to be accepted, it has to signal impartiality through its reasoning. However, the analysis of state practice necessarily entails the selection of particular instances of practice, which could tarnish the image of an impartial court. In contrast, if the Court resorts to the consent of the parties or widely accepted international documents, it signals impartiality.

* Professor of Public Law, International Law, and EU Law at the University of Münster. I am grateful to Henrike Boll, Ingo Borgdorf, Marius Dotzauer, Christoph Engel, Stephanie Engel, Thorsten Jakob, Marius Kühne, Isabel Lischewski, Sylwia Luszczek, Robert Scherf, Armin Steinbach, Malte Steuber, and Halil Topçuk for comments and advice on earlier versions of this paper.

1. Introduction

Customary law is international law's most controversial source. Coinciding with the ILC study on customary international law,[1] there have recently been several studies trying to shed new light on the normative underpinnings of customary law.[2] There have been further studies analysing the jurisprudence of the International Court of Justice (ICJ) regarding customary law. These often find a divergence between the definition of customary law in Art. 38 (1) lit. b of the ICJ Statute and the actual practice of the ICJ.[3] Two papers have received particular attention: On the one hand, *Stephen Choi* and *Mitu Gulati* provocatively argued that the Court completely ignores the traditional definition when identifying customary norms.[4] On the other hand, *Stefan Talmon* found that the ICJ, in the majority of cases, "has simply asserted the rules that it applies."[5]

However, if legal doctrine does not determine the Court's identification of customary international law, which are the factors that shape the Court's decision-making? The existing studies do not explore this question in detail, but only offer some speculation.[6] *Choi* and *Gulati* suggest that judges might be driven by efficiency concerns or a home-state bias.[7] *Talmon* consid-

1 See M. Wood, First Report on formation and evidence of customary international law, UN Doc. A/CN.4/663 (2013); Second Report on identification of customary international law, UN Doc. A/CN.4/672 (2014); Third Report on identification of customary international law, UN Doc. A/CN.4/682 (2015).

2 See, e.g., B.D. Lepard, *Customary International Law: A New Theory with Practical Applications* (2010); C.A. Bradley and M. Gulati, 'Withdrawing from International Custom', 120 *Yale Law Journal* (2010) 202; L. Blutman, 'Conceptual Confusions and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail', 25 *European Journal of International Law* (2014) 529; P.-H. Verdier and E. Voeten, 'Precedent, Custom and Change in Customary International Law: An Explanatory Theory', 108 *American Journal of International Law* (2014) 389; C.A. Bradley (ed), Custom's Future: International Law in a Changing World (2016).

3 See R.B. Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates', 21 *European Journal of International Law* (2010) 173; R. Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011) 673, at 692; G.I. Hernández, *The International Court of Justice and the Judicial Function* (2014), at 91; S. Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', 26 *European Journal of International Law* (2015) 417; S.J. Choi and M. Gulati, 'Customary International Law: How do Courts Do It?', in C.A. Bradley (ed.), *Custom's Future: International Law in a Changing World* (2016) 117. See also T. Ginsburg, 'Bounded Discretion in International Judicial Lawmaking', 45 *Virginia Journal of International Law* (2005) 631, at 640 (arguing that it is "fair to characterize much customary international law as actually being declared by judicial bodies rather than arising from the explicit agreement of states"). Contra: A. Alvarez-Jiménez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000-2009', 60 *International and Comparative Law Quarterly* (2011) 681, at 711 (arguing that the "flexible, deductive approach" has lost in importance in the recent jurisprudence of the International Court of Justice).

4 Choi and Gulati, *supra* note 3, at 147.

5 Talmon, *supra* note 3, at 441.

6 See also G. Shaffer and T. Ginsburg, 'The Empirical Turn in International Legal Scholarship', 106 *American Journal of International Law* (2012) 1, at 12 (remarking a lack of empirical scholarship on customary international law).

7 Choi and Gulati, *supra* note 3, at 147.

ers judicial assertion as a "gateway for judicial legislation" and warns that the Court should not "overstep the [methodological] limits".[8]

This paper aims to close this gap in the existing research. It analyses which factors drive the Court's decision-making. I argue that fears according to which courts use the identification of customary international law as a means for judicial legislation according to their political preferences are largely unfounded. Even though the judges have only weak legal constraints, they face significant institutional constraints. For this reason their identification strategies aim at gaining legitimacy in order to preserve their judicial authority.

The paper consists of three main parts. First, it sets out the conceptual framework of the paper and explains the research design. Second, it analyses the two main constraints that judges face in their decision-making and develops a hypothesis how these influence the ICJ's jurisprudence on customary international law. The third part, finally, consists of an empirical analysis of the strategies of the ICJ in identifying customary international law. For this purpose, I have analysed all instances in which the Court identified a norm of customary international law and classified the arguments upon which the Court based its decisions. The result shows that institutional constraints play a significant role in the judges' decision-making.

2. Concept and Measurement

The main aim of this paper is the analysis of factors that influence judicial decision-making. If we assume that legal norms do not completely determine judicial decision-making,[9] the question of judicial motivation becomes imminent. There are, broadly, three explanations on offer. The approach that is arguably the most provocative for traditional legal scholars argues that judges mainly follow their political preferences. The most examined court in this respect is the U.S. Supreme Court for which some studies suggest a significant correlation between the political preferences of the judges and their judicial decision-making.[10] In international law scholarship, there is a corresponding discussion on whether judges have a home-state or regional bias.[11]

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8 *Id.*,

9 See A. von Bogdandy and I. Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers', 12 *German Law Journal* (2011) 979, at 984.

10 See J.A. Segal and A.D. Cover, 'Ideological Values and the Votes of U.S. Supreme Court Justices', 83 *American Political Science Review* (1989) 557; J.A. Segal, L. Epstein, C.M. Cameron and H.J. Spaeth, 'Ideological Values and the Votes of U.S. Supreme Court Justices Revisited', 57 *Journal of Politics* (1995) 812; J.A. Segal and H.J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002). See also T. Brennan, L. Epstein and N. Staudt, 'The Political Economy of Judging', 93 *Minnesota Law Review* (2009) 1503 (according to whom decisions are also influenced by the economic environment); T.E. George and L. Epstein, 'On the Nature of Supreme Court Decision Making', 86 *American Political Science Review* (1992) 323; (proposing an integrated model according to which judicial decisions are influenced both by legal and extralegal factors).

11 See, on the one hand, E.A. Posner and M.F.P. de Figueiredo, 'Is the International Court of Justice Biased?', 34 *Journal of Legal Studies* (2005) 599 (finding such a bias for the judges of the ICJ) and, on the other hand, E. Voeten, 'The Impartiality of International Judges: Evidence from the European Court of

A second approach argues that, even though judges enjoy certain discretion, their decisions are largely determined by legal norms and legal doctrine. The argument is supported by empirical studies on the U.S. Supreme Court, finding that legal régimes or legal tools have a significant influence on the decision-making of the Court.[12] Finally, there is an institutionalist approach that assumes that judicial decisions are shaped by the institutional setting.[13] According to this explanation, judicial power depends on the legitimacy of the judicial institutions so that judges strive to enhance their legitimacy through their decision-making.[14] These three approaches do not exclude each other. To the contrary, it is rather likely that all three factors influence judicial decision-making to some extent. However, the extent may vary depending on the normative or institutional context. This study wants to examine which of these factors is the dominant one in the field of customary international law.

If we want to analyse judicial motivation, we face a problem of measurement: We cannot observe it directly. Therefore, we have to find indirect ways of measuring motivation.[15] What we can observe are the outcome of the case and the legal reasoning. The mere outcome tells

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Human Rights', 102 *American Political Science Review* (2008) 417 (arguing that such a bias is largely absent in the ECtHR).

12 See M.J. Richards and H.M. Kritzer, 'Jurisprudential Regimes in Supreme Court Decision Making', 96 *American Political Science Review* (2002) 305 (arguing that Supreme Court decision-making is structured by jurisprudential régimes, but recognizing that these régimes are themselves human constructs); S. Brenner and M. Stier, 'Retesting Segal and Spaeth's Stare Decisis Model', 40 *American Journal of Political Science* (1996) 1036 (finding that the doctrine of precedent has a certain influence on the decision-making of Supreme Court Justices); S.A. Lindquist and D.E. Klein, 'The Influence of Jurisprudential Considerations on Supreme Court Decision Making: A Study of Conflict Cases', 40 *Law & Society Review* (2006) 135 (arguing that "the desire to find legally sound, persuasive solutions to legal questions plays a significant role" in the decision-making of the U.S. Supreme Court); M.A. Bailey and F. Maltzman, 'Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court', 102 *American Political Science Review* (2008) 369 (arguing that legal factors play a role in the Supreme Court's decision-making, but that this effect varies across justices); M.A. Bailey and F. Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (2011).

13 On the concept of institutionalism, see, in general, J.G. March and J.P. Olsen, 'The New Institutionalism: Organizational Factors in Political Life', 78 American Political Science Review (1984) 734; S. Steinmo, 'Historical Institutionalism', in D. della Porta and M. Keating (eds), *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective* (2008) 118.

14 See M. Shapiro, *Courts: A comparative and political analysis* (1981); A. Stone Sweet, 'Constitutional politics: The reciprocal impact of lawmaking and constitutional adjudication', in P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (1998) 111; A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000); K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (2001); G. Vanberg, *The Politics of Constitutional Review in Germany* (2005). Specifically for international courts, see also T. Ginsburg, 'Political Constraints on International Courts', in C. Romano, K. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (2014) 483, at 487-94; L.R. Helfer and K.J. Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts', 14 *Theoretical Inquiries in Law* (2013) 478; K.J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014); E. Voeten, 'Public Opinion and the Legitimacy of International Courts', 14 *Theoretical Inquiries in Law* (2013) 411; K.J. Alter, L.R. Helfer and M.R. Madsen, 'How Context Shapes the Authority of International Courts', 79 *Law and Contemporary Problems* (forthcoming 2016).

15 On such problems of measurement when concepts cannot be observed directly, see, e.g., K.A. Bollen, *Structural Equations with Latent Variables* (1989); H.E. Brady, 'Doing Good and Doing Better: How Far Does the Quantitative Template Get Us?', in H.E. Brady and D. Collier (eds), *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (2004) 53; D. Collier, H.E. Brady and J. Seawright, 'Critiques, Responses, and Trade-Offs: Drawing Together the Debate', in H.E. Brady and D. Collier (eds), *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (2004), 195, at 202-9.

us very little about judicial motivation. If we want to determine whether an outcome has been motivated by adherence to legal doctrine or political preferences, we would need a baseline regarding the expected outcome in order to compare the actual with the expected result.

However, it is extremely difficult to establish such a baseline for either an expected 'legal' or 'political' result. In order to determine the expected 'legal' result, we would need to compare the actual outcome with the 'right' legal outcome, something that is impossible to determine in a world where we have reasonable disagreement about legal interpretation. Studies on the U.S. Supreme Court often take the expected political preferences of judges as a baseline and compare their actual voting behavior with the voting behavior that should be expected if they were driven by political preferences.[16] However, such a solution is not viable in the field of international relations, where political preferences cannot easily be represented in a one-dimensional left/right policy space.

Instead, this study will focus on the court's legal reasoning. Certainly, legal reasoning is no perfect proxy of judicial motivation. Judges can justify their opinions with different reasons than the ones that motivated them. Even if judges were motivated by political considerations, they would rarely openly say so in a judicial opinion. Nevertheless, the reasons given for an opinion may contain certain information about judicial motivation. If judges do not give any reasons for a specific conclusion, it is unlikely that they derived the result through a logical deduction from abstract legal norms. Otherwise, they would have disclosed the reasons that guided their decision-making. Similarly, if judges give certain signals through their reasoning which would not be necessary from a purely doctrinal point of view, then we can interpret these signals and draw conclusions on the factors that were driving judicial decision-making.

This study will look at the identification of customary international law by the ICJ. I will establish a classification of different arguments that the Court uses to identify customary norms. This classification contains information in two dimensions. On the one hand, I will look at the different arguments in detail and use the context in order to justify why the use of certain arguments indicates a specific motivation.[17] On the other hand, I will quantify the number of times that the Court uses a specific argument in order to observe the relative importance of a specific argument in the Court's jurisprudence.

3. Constraints of Judicial Decision-Making

In the following, I will elaborate theoretical predictions to what extent the three factors identified in the previous section influence the identification of customary international law. In the first part, I will argue that legal constraints are rather weak. For this reason, one might expect

16 See, e.g., Segal and Cover, ‚Ideological Values', *supra* note 10, at 559-61.

17 On the importance of context in qualitative studies, see R. Adcock and D. Collier, 'Measurement Validity: A Shared Standard for Qualitative and Quantitative Research' 95 *American Political Science Review* (2001) 529, 534.

that the judges' political preferences on what constitutes a 'good' international order play a significant role in the jurisprudence. This is supported, in particular, by the debate on "modern" customary law. Nevertheless, in the second part, I will argue that institutional constraints will prevent judges from merely following their political preferences.

A. Doctrinal Constraints and the Discussion on "Modern" Customary Law

There is a lot of conceptual confusion and uncertainty about custom.[18] Scholars disagree on the constitutive elements of customary law and on the methods of their identification.[19] In particular, there has been a widespread discussion on the emergence of "modern" approaches to customary international law.[20] In contrast to "traditional" approaches that are primarily concerned with the identification of patterns of state practice,[21] modern customary law is rather based on interpretative techniques and *opinio juris*.[22] Modern approaches to customary law do not only differ from traditional ones regarding the method of interpretation, but also on the role of judges in identifying customary rules. Many proponents of modern approaches advocate a more active role of courts, asking them not merely to find, but actively to shape and develop customary law.

18 E. Kadens and E.A. Young, 'How Customary is Customary International Law?', 54 *William & Mary Law Review* (2013) 885, at 906. See also M. Koskenniemi, 'The Pull of the Mainstream', 88 *Michigan Law Review* (1990) 1946, at 1947 (referring to customary law as a "theoretical minefield").

19 M. Byers, *Custom, Power and the Power of Rules* (1999), at 129-46; J.P. Kelly, 'The Twilight of Customary International Law', 40 *Virginia Journal of International Law* (2000) 449, at 498-517; R. Kolb, 'Selected Problems in the Theory of Customary International Law', 50 *Netherlands International Law Review* (2003) 119; H. Hestermeyer, 'Access to Medication as a Human Right', 8 *Max Planck Yearbook of United Nations Law* (2004) 101, at 158; D. Terris, C. Romano and L. Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (2007), at 113; G.J. Postema, 'Custom in international Law: a normative practice account', in A. Perreau-Saussine and J.B. Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (2007) 279, at 281-82; N. Petersen, 'Customary Law without Custom? - Rules, Principles, and the Role of State Practice in International Norm Creation', 23 *American University International Law Review* (2008) 275, at 276-77; C.A. Bradley and M. Gulati, 'Customary International Law and Withdrawal Rights in an Age of Treaties', 21 *Duke Journal of Comparative and International Law* (2010) 1, at 3-5; H. Charlesworth, 'Law-making and sources', in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (2012) 187, at 193-94; Blutman, *supra* note 2; C.A. Bradley, 'Customary International Law Adjudication as Common Law Adjudication', in C.A. Bradley (ed), *Custom's Future: International Law in a Changing World* (2016) 34, at 35-38.

20 The term is often ascribed to A.E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *American Journal of International Law* (2001) 757. However, similar terms have been used before; see, e.g., G. Abi-Saab, 'Cour général de droit international public', 207 *Recueil des Cours* (1987) 9, at 176-178 (distinguishing between "coutume traditionnelle" and "nouvelle coutume"). But see also P. Tomka, 'Custom and the International Court of Justice', 12 *The Law and Practice of International Courts and Tribunals* (2013) 195, who argues that the distinction "take[s] the point too far by insisting on theorizing this development".

21 See, e.g., M.H. Mendelson, 'The Formation of Customary International Law', 272 *Recueil des Cours* (1998) 155.

22 Roberts, *supra* note 20, at 758; W.T. Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches', 45 *Georgetown Journal of International Law* (2014) 445, at 470.

In a recent paper, *Curtis Bradley* likened the development of customary international law to be similar to the development of common law rules.[23] For this reason, he proposed a Common Law account in which judges actively develop custom, taking into account state preferences and consequentialist considerations.[24] Similarly, *Eyal Benvenisti* advocates that judges have a legislative function when they identify norms of customary law.[25] His account has both a normative and a descriptive dimension. He argues that courts, when exercising this legislative function, should be and actually are indeed guided by efficiency considerations.[26]

Some authors use the weakening of the practice requirement to infuse customary international law with ethical values. For example, *Brian Lepard* argues that norms that objectively promote fundamental ethical principles should be presumed to have legal authority.[27] Furthermore, *John Tasioulas* offers "a moral judgment-based account of customary international law".[28] *Tasioulas* argues that "customary norms can come into being despite the absence of general state practice, or at the extreme, even in the teeth of considerable countervailing practice."[29] He allows for a trading-off of state practice against *opinio juris* if the norm in question is of high moral importance for the legitimacy of international law.[30]

Even though the term "modern" customary law is rather new, the tendency to infuse customary international law with moral values is no recent development. *Louis Sohn* wanted to consider certain UN General Assembly resolutions, such as the Universal declaration of human rights, as automatically binding because they represented the consensus of the international community.[31] *Fernando Tesón* argued that it was inappropriate to require state practice for the establishment of customary rules enshrining fundamental moral principles.[32]

Most often, however, the attempt to charge customary law with moral principles has not been made explicit. Instead, morally desirable outcomes were presented as results of an objective application of legal methodology. This is particularly the case for the field of international

23 Bradley, *supra* note 19.
24 *Id*., at 49-50.
25 E. Benvenisti, 'Customary international law as a judicial tool for promoting efficiency', in E. Benvenisti and M. Hirsch (eds), *The Impact of International Law on International Cooperation* (2004) 85, at 87.
26 *Id*., at 88-114.
27 Lepard, supra note 2, at 110-11.
28 J. Tasioulas, 'Custom, Consent, and Human Rights', in C.A. Bradley (ed), *Custom's Future: International Law in a Changing World* (2016) 95, at 95. See also earlier accounts making a similar point: J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', 16 *Oxford Journal of Legal Studies* (1996) 85; J. Tasioulas, 'Customary international law and the quest for global justice', in A. Perreau-Saussine and J.B. Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (2007) 307. See also T. Meron, 'International Law in the Age of Human Rights: General Course on Public International Law', 301 *Recueil des Cours de l'Academie de Droit International* (2003) 9, at 388 (arguing that there is "a direct relationship between the importance attributed by international community to particular norms and the readiness to lower the burden of proof required to establish custom").
29 *Id*.
30 *Id*., at 101-2.
31 L.B. Sohn, 'The Human Rights Law of the Charter', 12 *Texas International Law Journal* (1977) 129, at 133.
32 F.R. Tesón, 'Two Mistakes about Democracy', 92 *ASIL Proceedings* (1998) 126, at 127.

human rights law. This tendency is probably best summarized by *Martti Koskenniemi* in a review article of *Theodore Meron*'s book on human rights as customary law:[33]

> "The feeling is, in other words, that Professor Meron has quite strong opinions about which norms should be included among those that are binding even beyond specific treaties, and that he uses whichever arguments are available to support them."[34]

Consequently, "modern" customary international law is often not primarily characterized by methodological rigor, but rather by an attempt to reconcile legal interpretation with considerations of efficiency or moral intuitions about human rights and the international community that most international lawyers share.[35] In the absence of methodological constraints, customary law thus seems to be an entry gate for the "progressive" development of international law and a tool for judicial lawmaking.

B. Judicial Politics and the Search for Legitimacy

However, courts do not only face doctrinal, but also institutional constraints. They are usually unable to implement their own decisions.[36] For this reason, courts cannot act independently of the preferences of the political actors who are affected by their decisions.[37] States have several ways to impose sanctions on courts and thus to constrain judicial decision-making indirectly.[38] First, they can choose not to comply with a judgment.[39] In the history of the ICJ, there are several examples of such failures to comply.[40] Non-compliance may hurt courts in two ways: On the one hand, the decision they have rendered will be ineffective; on the other hand, frequent non-compliance may damage the reputation of the Court and thus weaken its institutional position.

Second, states can sometimes exit the jurisdiction of an international court by withdrawing their acceptance of the Court's compulsory jurisdiction or refuse to accept the jurisdiction in the first place.[41] The fewer states have accepted the compulsory jurisdiction of the Court, the weaker is the Court's institutional position. In the context of the International Court of Justice, exit from compulsory jurisdiction is relatively easy. There are two prominent examples in this respect:[42] France withdrew from the compulsory jurisdiction of the ICJ after the decision in

33 T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989).
34 Koskenniemi, *supra* note 18, at 1952.
35 See Kelly, *supra* note 19, at 497-98.
36 This is not a specific feature of international courts, but applies to domestic courts as well, see Alter, *New Terrain*, *supra* note 14, at 32. See also J.K. Staton and W.H. Moore, 'Judicial Power in Domestic and International Politics', 65 *International Organization* (2011) 553; Ginsburg, *supra* note 14, at 486 (arguing that institutional distinctions between domestic and international courts are overstated).
37 Ginsburg, *supra* note 14, at 487.
38 See R.H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', 98 *American Journal of International Law* (2004) 247, at 263-267.
39 Ginsburg, *supra* note 14, at 491-92.
40 See C. Schulte, *Compliance with Decisions of the International Court of Justice* (2004), at 271-75.
41 Ginsburg, *supra* note 3, at 657; Ginsburg, *supra* note 14, at 490.
42 S. Oda, 'The Compulsory Jurisdiction of the International Court of Justice: A Myth? – A Statistical Analysis of the Contentious Cases', 49 *International and Comparative Law Quarterly* (2000) 251, at 264;

the *Nuclear Tests* cases in the 1970s,[43] and the United States withdrew after the ICJ had found to have jurisdiction in the Nicaragua case in 1984.[44]

Despite this sanctioning potential, however, international courts also have a certain level of independence from state governments.[45] First, withdrawing from the jurisdiction of the ICJ is not without costs. Once a state has withdrawn from the jurisdiction of the ICJ, it cannot bring claims against other states. Therefore, if a state values the International Court of Justice as a means of dispute resolution, one unfavourable decision does not automatically lead to a withdrawal. Second, governments may face external constraints concerning the compliance with a specific judgment. Internationally, states may jeopardize their reputation if they do not comply with a judgment of an international court or tribunal.[46] On the domestic level, they may be forced to comply with judgments of the ICJ by national courts if the latter decide that the government is bound by international law,[47] or they may be influenced by transnational or domestic pressure groups that are in favour of the ICJ ruling.[48]

What consequences do these considerations on the decision-making of international courts and tribunals? *Martin Shapiro* has pointed out that courts transform dispute resolution from a dyadic into a triadic relationship.[49] However, they have to be careful that this triadic relationship is not perceived to break down into a dyad, the Court seemingly becoming an ally of one of the parties.[50] Consequently, in order to preserve their acceptance, international tribunals

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R.O. Keohane, A. Moravcsik and A.-M. Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', 54 *International Organization* (2000) 457, at 480; Ginsburg, *supra* note 14, at 490.

43 *Nuclear Tests (Australia v. France)*, 20 December 1974, ICJ Reports (1974) 253; *Nuclear Tests (New Zealand v. France)*, 20 December 1974, ICJ Reports (1974) 457.

44 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Jurisdiction and Admissibility, 26 November 1984, ICJ Reports (1984) 392.

45 E. Voeten, 'International Judicial Independence', in J.L. Dunoff and M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013) 421; Alter, *New Terrain*, *supra* note 14, at 52-58.

46 On reputation as compliance promoting mechanism, see R.O. Keohane, *After Hegemony. Cooperation and Discord in the World Political Economy* (1984), at 105-108; G.W. Downs and M.A. Jones, 'Reputation, Compliance, and International Law', 31 *Journal of Legal Studies* (2002) 95; A.T. Guzman, *How International Law Works: A Rational Choice Theory* (2008), at 71-117; R. Brewster, 'Reputation in International Relations and International Law Theory', in J.L. Dunoff and M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013) 524; J.V. Stein, 'The Engines of Compliance', in J.L. Dunoff and M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013) 477, at 481-483.

47 See S. Dothan, 'How International Courts Enhance Their Legitimay', 14 *Theoretical Inquiries in Law* (2013) 455, at 463-67; Alter, *New Terrain*, *supra* note 14, at 53.

48 On the influence of transnational and domestic pressure groups, see M.E. Keck & K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998); T. Risse & S.C. Ropp, 'International human rights norms and domestic change: conclusions', in: T. Risse, S.C. Ropp & K. Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (1999) 234; T. Risse, ''Let's Argue!': Communicative Action in World Politics', 54 International Organization (2000) 1; K. Sikkink, 'Restructuring World Politics: The Limits and Asymmetries of Soft Power', in: S. Khagram, J.V. Riker & K. Sikkink, Restructuring World Politics (2002) 301; J.P. Trachtman, 'International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law', 11 *Chicago Journal of International Law* (2010) 127.

49 Shapiro, *supra* note 14, at 1. On the triadic structure of dispute resolution by international tribunals see also W. Sandholtz and A. Stone Sweet, 'Law, politics, and international governance', in C. Reus-Smit (ed), *The Politics of International Law* (2004) 238, 247-8.

50 Shapiro, *supra* note 14, at 8.

have to appear as neutral arbiters whose decisions are based on "legal" principles and not on a political agenda.[51] If a court is not regarded as legitimate, non-compliance with its decisions will neither hurt a state's reputation nor entice domestic courts to force the government into compliance with international law.[52] Furthermore, states would be less willing to bring new cases to the court or might even withdraw from the court's jurisdiction entirely.

If we apply these considerations to the identification of customary international law, then it is unlikely that the ICJ will show significant activism. Instead, the Court will try to signal impartiality. It will base its decisions only on those customary norms that are generally acceptable to states. However, such general acceptability can be based on several grounds. A norm can be generally acceptable because its identification stands on firm methodological grounds; it can be acceptable because states signalled acceptance of the norm in the past or during the proceedings before the ICJ; or the content of the norm is of such a universal moral appeal that states will at least not openly oppose its application. It is thus not important for the Court to develop a coherent methodology of identifying customary international law. Instead, identification strategies may differ depending on the circumstances of each individual case and the preferences of the affected parties.

4. Judicial Strategies to Identify Customary International Law: An empirical Analysis

The hypothesis that judges face institutional constraints in their decision-making and that, for this reason, they try to signal impartiality through their identification strategy of customary norms is an attempt to predict and explain judicial identification strategies of customary international law. But is this theoretical hypothesis reflected in the practice of the International Court of Justice? In order to test the hypothesis empirically, I performed a qualitative analysis of all judgments and advisory opinions of the International Court of Justice since its establishment in 1949, in which the Court positively identified of a rule of customary international law.

A. Research Design

The analysis was not limited to instances where the Court explicitly referred to "customary law" or "custom". Instead, it also looked at passages where the Court was dealing with rules of "general international law", the analysis of "state practice", or with norms of "jus cogens" or "erga omnes" character.

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51 Stone Sweet, *Governing with Judges*, *supra* note 14, at 199-200; M. Shapiro, 'The Success of Judicial Review and Democracy', in M. Shapiro and A. Stone Sweet (eds), *On Law, Politics, and Judicialization* (2002) 149, at 165; E.A. Posner and J.C. Yoo, 'Judicial Independence in International Tribunals', 93 *California Law Review* (2005) 1, at 21; Dothan, *supra* note 47, at 459. Specifically regarding the ICJ, see also Y. Shany, *Assessing the Effectiveness of International Courts* (2014), at 171-174.

52 See Helfer and Alter, *supra* note 14, at 483.

The study focused only on cases where the Court positively identified a customary norm. I assume that the burden of justification for confirming a customary rule is higher than for rejecting a customary norm. On the one hand, denying the existence of a customary norm will rarely be associated with judicial lawmaking and thus pose legitimacy problems except if the Court rejects a norm that is widely believed to exist. On the other hand, the analysis of state practice that leads to the positive identification of a norm has to be more detailed, while it would, in principle, suffice to cite a few examples inconsistent with the normative proposition in order to reject the existence of custom. For this reason, using the same classification scheme for both types of situations would not do justice to the reasoning of the Court.

I limited the systematic analysis to cases in which the Court confirmed the positive existence of a customary norm. In contrast, I did not construct a separate database for situations in which the Court rejected the customary status of a norm because I do not believe that this would have added valuable information to the analysis. However, I will occasionally highlight differences in the qualitative analysis of the specific arguments where this reveals interesting information.

The arguments that were used for positively identifying a customary norm were categorized according to a specific classification scheme. The categories of this scheme are not exclusive. Instead, the identification of one specific customary norm could be based on different arguments at the same time. In total, the analysis includes 48 decisions from the *Corfu Channel* case in 1949 to the *Costa Rica v. Nicaragua* case in 2015, and in total 95 instances in which the Court positively identified the existence of a customary norm.

I have to make two further specifications: First, the analysis counted every rule of international law that was identified only once. For example, the Court held in several judgments that Art. 31 of the Vienna Convention on the Law of Treaties formed part of customary international law.[53] However, only the first of these statements was included in the database in order not to inflate the count of one argument because the same situation arises over and over again.

53 *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, 12 November 1991, ICJ Reports (1991) 53, at ¶ 48; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, 11 September 1992, ICJ Reports (1992) 351, at ¶ 380; *Territorial Dispute (Libya v. Chad)*, 3 February 1994, ICJ Reports (1994) 6, at ¶ 41; *Oil Platforms: Preliminary Objections (Iran v. United States)*, 12 December 1996, ICJ Reports (1996) 803, at ¶ 23; *Kasikili/Sedudu Island (Botswana/Namibia)*, 13 December 1999, ICJ Reports (1999) 1045, at ¶ 18; *LaGrand (Germany v. United States)*, 27 June 2001, ICJ Reports (2001) 466, at ¶ 99; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, 17 December 2002, ICJ Reports (2002) 625, at ¶ 37; *Avena and Other Mexican Nationals (Mexico v. U.S.)*, 31 March 2004, ICJ Reports (2004) 12, at ¶ 83; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, 15 December 2004, ICJ Reports (2004) 279, at ¶ 100; *Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, at ¶ 94; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*, 26 February 2007, ICJ Reports (2007) 43, at ¶ 160; Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), 4 June 2008, ICJ Reports (2008) 177, at ¶ 112; *Navigational and Related Rights (Costa Rica v. Nicaragua)*, 13 July 2009, ICJ Reports (2009) 213, at ¶ 47; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, ICJ Reports (2010) 14, at ¶¶ 64, 65; *Maritime Dispute (Peru v. Chile)*, 27 January 2014, ICJ Reports (2014) 3, at ¶ 57; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, judgment of 3 February 2015, at ¶ 138, available online at http://www.icj-cij.org (last visited 15 March 2016).

At the same time, however, references to different rules of the Vienna Convention on the Law of Treaties were counted as individual instances as long as they appeared for the first time. Second, the analysis only comprises generalizable rules that can also be applied in other contexts. This excludes references to binary customary law or the analysis of the concrete practice of the two parties regarding the dispute in question.

Furthermore, there are several caveats to the analysis. First, the status of a rule of international law in the argumentation of the Court is not always clear. For example, the judges do not specify in every case whether they are dealing with a rule of customary law or with a general principle in the sense of Art. 38 (2) lit. c ICJ Statute. If in doubt, I qualified a rule as customary. Second, the category of state practice only includes the analysis of individual state practice. Treaties or resolutions of the UN General Assembly, which are often considered as multilateral state practice in international law doctrine, have been measured in separate categories. Third, the classification is not free of subjective evaluation. Some classifications are rather simple: It is relatively easy to see whether the Court refers to a treaty or a resolution of an international institution when identifying a norm of customary law. However, in other cases, one may debate whether an argument is a functional, a deductive, or an equitable consideration. However, this is a general problem in the social sciences. For this reason, I have listed all cases in which the Court refers to a specific argument in the corresponding footnotes. This allows every reader to check my classification and to come to different conclusions.

B. Summary of the Results

Table 1: Identification of Customary Law

Type of Argument	Frequency
Treaties	47.4%
Consent of parties	30.5%
Precedent	17.9%
Resolutions of international institutions	15.8%
General reference to state practice	12.6%
Assertion	10.5%
Functional arguments	6.3%
Equitable considerations	3.2%

The results of the classification are shown in table 1. They confirm the hypothesis developed in the theoretical part. The main identification mechanism is the reference to treaties and General Assembly resolutions.[54] This reference has two aims: First, it is used as a legitimation device. The Court has been relying on treaties or General Assembly resolutions in order to

54 This finding is confirmed by other authors; see, in particular, Choi and Gulati, *supra* note 3, at 131-36. See also L. Condorelli, 'Customary International Law: The Yesterday, Today, and Tomorrow of General International Law', in A. Cassese (ed), *Realizing Utopia: The Future of International Law* (2012) 147 (arguing that in certain areas of international law we assume that what is proclaimed in the corresponding treaties is, at the same time, also part of customary international law).

show that the specific principle was accepted by the vast majority of the international community. Second, the Court has been using written texts to add specificity to the often vague, unwritten principles.

urthermore, the Court frequently relies on the consent of the parties. It painstakingly analyses whether the parties to the particular case have consented to the norm in question. If the Court finds consent, it is less rigorous in establishing that the customary norm in question is indeed a norm of universal scope. From a doctrinal perspective, this finding is surprising as the consent of the parties cannot be a sufficient reason for the identification of a customary norm. After all, the norm that is to be identified is a general norm with an effect *erga omnes*. The mere consent of the parties of a particular case is not more than the indication of an *opinio juris* of the involved states. If the Court thus heavily relies on consent, it shows two things: First, it is a sign that the Court is rather more concerned with resolving the specific dispute at issue than with developing and shaping international law as a whole. Second, highlighting the consent of the parties is a signal of impartiality that is supposed to promote the acceptance of the decision and thus the Court's legitimacy.

These two strategies cover most of the identification activity of the ICJ. However, in certain cases, the Court also relies on other arguments. It sometimes refers to individual state practice. But it usually does so in order to show that a customary norm does *not* exist. If it refers to state practice when confirming the existence of a customary norm, this reference is usually of a very general character. There is not one case in which the positive identification of a customary norm was based on a detailed analysis of individual state practice. In other cases, it refers to functionalist arguments, to equitable principles, or relies on a simple assertion – without much further reasoning. Finally, the Court sometimes bases customary norms on precedents – either from its own jurisprudence or the jurisprudence of other international courts or tribunals.

C. Analysis of the Specific Arguments

The quantitative assessment of the different arguments has only demonstrated the relative use of different types of arguments by the ICJ. In this part, I will add a qualitative dimension analyzing the different arguments in their context in order to examine whether we can find further indications for the factors driving judicial decision-making.

1. General Consent of the Parties

Even though it is second to treaties in quantitative terms, consent of the parties to the dispute is arguably the most important consideration to identify a norm of customary international law.[55] In some judgments, the Court is painstakingly concerned with pointing out that all par-

55 See *Corfu Channel (U.K. v. Albania)*, 9 April 1949, ICJ Reports (1949) 4, at 22, 28; *Reservations to the Convention on the Prevention and Punishment of Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports (1951) 15, at 23; *Fisheries Case (U.K. v. Norway)*, 18 December 1951, ICJ Reports (1951) 116, at 136-37; *Interhandel (Switzerland v. U.S.)*, 21 March 1959, ICJ Reports (1959) 6, at 27; *Barcelona Trac-*

ties to a particular dispute have consented to the norm in question.[56] The most prominent example of using consent as a basis for customary norms is the *Nicaragua* judgment.[57] In its analysis of the applicable rules of customary international law, the Court leaned heavily on the consent of the parties.[58] The Court starts out its examination by observing

> "that there is in fact evidence [...] of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention."[59]

In the following, it refers to the assertion of the United States in its Counter-Memorial on jurisdiction and admissibility that "Article 2 (4) of the Charter *is* customary and general international law"[60], and to the "attitude of the Parties" to General Assembly resolution 2625 (XXV) when analysing the scope of the prohibition of the use of force.[61] With regard to the principle of non-intervention, it referred to "numerous declarations adopted by international organizations and conferences in which the United States and Nicaragua have participated".[62] Finally, the Court also relied on principles of humanitarian law that it derived from the Geneva Conventions that the United States had ratified.[63]

Consequently, the Court used consent in order to overcome jurisdictional issues. Because of a reservation of the United States, the Court could not apply the multilateral treaties governing the issue at hand. For this reason, it relied on customary law. The reference to consent can be seen as an expression of the principle of good faith. The United States should not be able to deny the applicability of rules to which it had agreed in general.

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tion (Belgium v. Spain), 5 February 1970, ICJ Reports (1970) 3, at ¶ 74; *Fisheries Jurisdiction (U.K. v. Iceland)*, 25 July 1974, ICJ Reports (1974) 3, at ¶ 52; *Delimitation of the Maritime Boundary in the Gulf of Maine (Can. v. U.S.)*, 12 October 1984, ICJ Reports (1984) 246, at ¶ 94; *Continental Shelf (Libya v. Malta)*, 3 June 1985, ICJ Reports (1985) 13, at ¶ 45; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, 27 June 1986, ICJ Reports (1986) 14, at ¶¶ 184, 187-89, 198, 203-204, 218; *Frontier Dispute (Burkina Faso v. Mali)*, 22 December 1986, ICJ Reports (1986) 554, at ¶ 20; *Land, Island and Maritime Frontier Dispute*, *supra* note 53, at ¶ 40; *Gabcíkovo-Nagymaros (Hungary v. Slovakia)*, 25 September 1997, ICJ Reports (1997) 7, at ¶¶ 42-43, 50-51, 99, 109, 123; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, 16 March 2001, ICJ Reports (2001) 40, at ¶¶ 175, 184-185; *Israeli Wall*, *supra* note 53, at ¶¶ 89, 100; *Pulp Mills*, *supra* note 53, at ¶ 203; *Jurisdictional Immunities of the State (Germany v. Italy)*, 3 February 2012, ICJ Reports (2012) 99, at ¶¶ 59-61; *Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012, ICJ Reports (2012) 422, at ¶ 97; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, 19 November 2012, ICJ Reports (2012) 624, at ¶¶ 114, 138; *Certain Activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, judgment of 16 December 2015, at ¶ 106, available online at http://www.icj-cij.org (last visited 15 March 2016).

56 See I. Venzke, 'Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction', 14 *Theoretical Inquiries in Law* (2013) 381, at 392.

57 *Military and Paramilitary Activities*, *supra* note 55, at ¶¶ 184, 187-89, 198, 203-204, 218.

58 See B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of International Law* (1992) 82, at 97 (calling this tendency "astonishing"); C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Cours* (1999) 13, at 326-327.

59 *Military and Paramilitary Activities*, *supra* note 55, at ¶ 184.

60 *Id*., at ¶ 187 (emphasis in the original).

61 *Id*., at ¶ 188.

62 *Id*., at ¶ 203.

63 *Id*., at ¶ 218.

However, even if the Court relies on consent, this does not mean that the parties necessarily agree on the application of the rule in the concrete case. Instead, what is important is that the parties have accepted the rule in the abstract, while the Court claims autonomy to interpret and apply the rule. In the *Corfu Channel* case, the Court had to deal with the question whether the damaging of British war ships through Albanian mines in the Corfu Channel violated international law.[64] The Court noted that it was

> "generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State".[65]

Albania did not challenge the existence of such a right of passage.[66] However, it denied that the Corfu Channel belonged to the group of international straights. There was thus no disagreement on the existence of the customary norm, but on its application. The Court argued that the Corfu Channel had always been used by international maritime traffic and was thus to be considered as an international waterway.[67]

In contrast, the Court does usually not assert the existence of a customary norm if one of the parties is explicitly opposed to the norm in question. The most prominent example is the *North Sea Continental Shelf* case.[68] For the delimitation of the continental shelf, Denmark and the Netherlands asked the Court to apply the equidistance principle contained in Art. 6 of the 1958 Geneva Continental Shelf Convention.[69] While Denmark and the Netherlands had ratified the convention, Germany had only signed, but not ratified, and objected to the application in its argument before the Court. The Court concluded that Art. 6 of the 1958 Geneva Convention did not reflect customary international law.[70]

This pattern can also be found in further judgments. In *Territorial and Maritime Dispute*, the parties did not agree on whether Paragraphs 4 to 9 of the Art. 76 of the United Nations Convention on the Law of the Sea (UNCLOS) formed part of customary international law.[71] Colombia had explicitly opposed the provisions to be considered as rules of customary international law.[72] The Court sidestepped the issue by declaring that, for the present case, it did not have "to decide whether other provisions of Article 76 of UNCLOS form part of customary international law".[73] In the 2015 *Genocide Convention* case, the parties disagreed on whether

64 *Corfu Channel*, *supra* note 55.
65 *Id*., at 28.
66 *Id*.
67 *Id*., at 28-29.
68 *North Sea Continental Shelf (Germany v. Denmark; Germany v. the Netherlands)*, 20 February 1969, ICJ Reports (1969) 3.
69 See *id*., at ¶ 37.
70 *Id*., at ¶¶ 37-81.
71 *Territorial and Maritime Dispute*, *supra* note 55, at ¶ 117.
72 *Id*.
73 *Id*., at ¶ 118.

Art. 10 (2) of the ILC Articles on State Responsibility reflected customary law. Again, the Court avoided deciding on the issue and argued the provision did not apply to the case.[74]

The importance of consent as a basis for customary norms underlines two characteristics of the ICJ's style of reasoning. On the one hand, the Court has a considerable interest in its judgments being accepted by both parties. Certainly, it is rarely possible to avoid that a decision has both a winning and a losing party. However, by basing its arguments on principles both parties have explicitly consented to, the Court makes the acceptance by the losing party more likely. On the other hand, the Court is in many cases rather interested in settling the dispute at issue than in proclaiming general and abstract principles of international law. Consent is a very narrow basis for a judgment. However, in order to achieve acceptance, the Court is willing to concede the generalizability of its legal reasoning and to refrain from an active development of international law. The reliance on consent is thus a strong indication that the ICJ takes into account institutional constraints in its reasoning and decision-making.

2. Customary Law Derived from Treaties and General Assembly Resolutions

A second important means to identify norms of customary international law is the reference to international treaties,[75] General Assembly resolutions,[76] and documents of the International Law Commission (ILC).[77] In this respect, the ICJ usually relies on so-called *traités lois* or

74 *Croatia v. Serbia*, *supra* note 53, at ¶¶ 102-104.

75 See *Nottebohm (Liechtenstein v. Guatemala)*, 6 April 1955, ICJ Reports (1955) 4, at 23; *Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] Notwithstanding Resolution 276 [1970]*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16, at ¶ 94; *Fisheries Jurisdiction (U.K. v. Iceland)*, Jurisdiction of the Court, 2 February 1973, ICJ Reports (1973) 3, at ¶ 36; *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975) 12, at ¶¶ 52-59; *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 24 May 1980 ICJ Reports (1980) 3, at ¶ 62; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73, at ¶¶ 46-47; *Continental Shelf (Tunisia v. Libya)*, 24 February 1982, ICJ Reports (1982) 18, at ¶¶ 45, 101, 111; *Gulf of Maine*, *supra* note 55, at ¶ 94; *Continental Shelf (Libya v. Malta)*, *supra* note 55, at ¶¶ 34, 77; *Military and Paramilitary Activities*, supra note 55, at ¶¶ 183-192, 198, 212, 218; *Arbitral Award*, *supra* note 53, at ¶ 48; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, 14 June 1993, ICJ Reports (1993) 38, at ¶¶ 48, 54-58; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, at ¶¶ 79, 82; *Gabcíkovo-Nagymaros*, *supra* note 55, at ¶¶ 46, 109, 142; *Qatar v. Bahrain*, *supra* note 55, at ¶¶ 167, 175, 184, 185, 195, 201, 207, 208, 214; *LaGrand*, *supra* note 53, at ¶ 101; *Arrest Warrant of 11 April 2000 (D.R.C. v. Belgium)*, 14 February 2002, ICJ Reports (2002) 3, at ¶ 52; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, 10 October 2002, ICJ Reports (2002) 303, at ¶¶ 263, 264; *Israeli Wall*, *supra* note 53, at ¶¶ 78, 87-89; *Armed Activities on the Territory of the Congo (D.R.C. v. Uganda)*, 19 December 2005, ICJ Reports (2005) 168, at ¶¶ 172, 214, 217; *Armed Activities on the Territory of the Congo (D.R.C. v. Rwanda)*, 3 February 2006, ICJ Reports (2006) 6, at ¶¶ 41, 46; *Certain Questions of Mutual Assistance*, *supra* note 53, at ¶¶ 124, 174; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403, at ¶ 80; *Obligation to Prosecute or Extradite*, *supra* note 55, at ¶¶ 99, 113; *Territorial and Maritime Dispute*, *supra* note 55, at ¶¶ 114, 117, 138-39, 177, 182.

76 See *Reservations to the Genocide Convention*, supra note 55, at 23; *Western Sahara*, *supra* note 75, at ¶¶ 52-59; *Military and Paramilitary Activities*, *supra* note 55, ¶¶ 188, 202-04; 228; *Armed Activities (D.R.C. v. Uganda)*, *supra* note 75, at ¶¶ 162, 244; *Kosovo*, *supra* note 75, at ¶ 80.

77 See *Gabcíkovo-Nagymaros*, *supra* note 55, at ¶¶ 50, 83, 123; *Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 29 April 1999, ICJ Reports (1999) 62, at ¶ 62; *Bosnia v. Serbia*, *supra* note 53, at ¶¶ 385, 388, 398, 420; *Jurisdictional Immunities*, *supra* note 55, at ¶ 58; *Croatia v. Serbia*, *supra* note 53, at ¶ 128.

lawmaking treaties.[78] The treaties and documents it refers most frequently to are the Vienna Convention on the Law of Treaties (VCLT), the UNCLOS, and the ILC Articles on State Responsibility.[79] However, the ICJ does not resort to international treaties to extend their scope to states that have not ratified the particular treaty and are explicitly opposed to it. Instead, the reference to treaties and resolutions is in many cases closely connected to the reliance on consent, discussed in the previous section.

We can distinguish several constellations in which the Court relies on treaties as means of identifying customary international law. In a first group of cases, the reference to treaties is an expression of the consent principle discussed in the previous section. For example, the Court relies on treaties when both parties have ratified a particular treaty, even if the treaty does not directly govern the concrete case. In *Nicaragua*, the Court relied on the UN Charter as a reflection of customary law.[80] The Charter had been ratified by both parties, but the Court did not have jurisdiction to apply the Charter. In *Gabcíkovo-Nagymaros*, the Court relied on the VCLT Convention of the Law of Treaties as evidence for customary international law.[81] Again, both parties had ratified the VCLT, but it was inapplicable *ratione temporis*, as the treaty in question had been concluded before the entry into force of the VCLT.[82]

In other cases, the Court relied on a treaty if only one party had ratified the treaty, but if the other had acknowledged that the treaty reflected to a large extent customary law. On this basis, the ICJ applied the UNCLOS in *Qatar v. Bahrain* and in the *Territorial and Maritime Dispute* between Nicaragua and Colombia, even though one of the parties was not directly bound by UNCLOS in both disputes.[83] Finally, there are a few cases in which certain documents are not binding for either of the parties, but in which the parties agree on the status as customary law.[84] In the Israeli Wall Advisory Opinion, for example, the Court held that the Hague regulations, annexed to the Fourth Hague Convention from 1907, formed part of customary law.[85] It noted that the customary status of the Hague Regulations had been recognized by all participants in the proceedings before the Court.[86]

In contrast, as we have already seen, the ICJ is very reluctant to extend the scope of a treaty if one party has not ratified the respective treaty and explicitly objects to its application.[87] In the North Sea Continental Shelf judgment, the Court refused to accept Art. 6 of the Geneva Con-

78 On the concept of lawmaking treaties, see P. Daillier, M. Forteau and A. Pellet, *Droit international public* (8th ed. 2009), at ¶ 65.
79 GA Res. 56/83 (Dec. 12, 2001).
80 *Military and Paramilitary Activities*, *supra* note 55, at ¶¶ 187-90.
81 *Gabcíkovo-Nagymaros*, *supra* note 55, at ¶¶ 46, 99, 109, 142.
82 See *id*., at ¶¶ 42, 43, 99.
83 *Qatar v. Bahrain*, *supra* note 55, at ¶ 167; *Territorial and Maritime Dispute*, *supra* note 55, at ¶¶ 114, 138.
84 See *Gabcíkovo-Nagymaros*, *supra* note 55, at ¶¶ 50, 123 (relating to Art. 33 Articles on State Responsibility and to Art. 12 Draft Articles on the Succession of States)
85 *Israeli Wall*, *supra* note 53, at ¶ 89.
86 *Id*.
87 See *supra*, II C 1.

tinental Shelf Convention as customary law against the opposition of Germany.[88] Equally, in the *Territorial and Maritime Dispute* between Nicaragua and Colombia, the Court avoided applying a specific provision of the UNCLOS when Colombia explicitly objected to its application.[89]

In a second group of cases, the Court relies on treaties as means to identify customary law if the principles expressed by the treaty concern abstract meta-rules, which seem to form part of almost any legal system so that no state could reasonably object to them. Most prominently, the Court referred to the principles of treaty interpretation expressed in Art. 31 and 32 VCLT in numerous cases.[90] But the Court also referred to other principles of the VCLT unlikely to be disputed. These comprise the principle of *pacta sunt servanda* (Art. 26 VCLT),[91] the prohibition to invoke provisions of domestic law as a justification for the failure to perform a treaty (Art. 27 VCLT),[92] and the principle of non-retroactivity of treaties (Art. 28 VCLT).[93]

Similarly, the ICJ often derives several hardly contested rules from the ILC (Draft) Articles on State Responsibility.[94] These include the principles that counter-measures have to be proportionate,[95] that the conduct of an organ of a state is attributable to the respective state,[96] that what constitutes an internationally wrongful act is governed by international law,[97] and that whether a wrongful act has been committed has to be determined according to the law applicable at the time of committal.[98]

The final category includes cases in which the ICJ relies on treaties to afford the status of customary law to widely accepted principles of high moral value. In *Nicaragua*, the Court argued that the common Art. 3 of the four Geneva Conventions formed part of customary international law:

> "There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'."[99]

88 *North Sea Continental Shelf*, *supra* note 68.
89 *Territorial and Maritime Dispute*, *supra* note 55, at ¶¶ 117-18. See also above, notes 71-73, and the accompanying text.
90 See *supra* note 53.
91 *Pulp Mills*, *supra* note 53, at ¶ 145.
92 *Id*., at ¶ 121; *Obligation to Prosecute or Extradite*, *supra* note 55, at ¶ 113.
93 *Obligation to Prosecute or Extradite*, *supra* note 55, at ¶ 100.
94 For an account on the influence of the ILC Articles on the Court's jurisprudence, see J. Crawford, 'The International Court of Justice and the Law of State Responsibility', in C.J. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice* (2013) 71, at 81-85.
95 *Gabcíkovo-Nagymaros*, *supra* note 55, at ¶ 83.
96 *Special Rapporteur of the Commission on Human Rights*, *supra* note 77, at ¶ 62. See also *Bosnia v. Serbia*, *supra* note 53, at ¶¶ 385, 388, 395, 398 where the ICJ refers to the Articles on State Responsibility as evidence for rules of attribution.
97 *Croatia v. Serbia*, *supra* note 53, at ¶ 128.
98 *Jurisdictional Immunities*, *supra* note 55, at ¶ 58.
99 *Military and Paramilitary Activities*, *supra* note 55, at ¶ 218.

On several occasions, the Court confirmed the customary nature of the fundamental principles of humanitarian law.[100] Moreover, the Court asserted that the principle of self-determination, as reflected by General Assembly resolution 2625 (XXV), was part of customary international law. Other customary norms of high moral value, which, according to the Court, are reflected by treaties or General Assembly resolutions, include the prohibition of genocide[101] and torture.[102]

All of these principles are widely accepted by the international community and belong to the ethical cornerstones of the international legal order. Certainly, some of these principles are still often violated in practice today, so that it might be doubtful whether they would meet the traditional requirements of customary international law.[103] However, states will rarely ever deny their general validity.[104] They will rather deny accusations of violating international law on factual grounds or try to carve out specific exceptions. For this reason, the Court does not jeopardize its legitimacy by proclaiming these principles. It would rather endanger its credibility if it denied legal status to such widely accepted principles, even if the supporting practice may not always be uniform.[105]

Unlike consent, the reliance on treaties could, in principle, also be an expression of a doctrinal approach or of a progressive development of the international legal. Doctrinally, treaties or resolutions of international organizations are often seen as indications of *opinio juris* or even 'paper' practice.[106] However, there may sometimes be conflicts between this paper practice and actual practice.[107] If the Court relies on different human rights instruments to justify why torture is prohibited under customary international law,[108] it should have at least discussed the relevance of a considerable practice of torture that still exists in the world.

This observation might suggest that the Court is using treaties as a means to develop international law progressively. However, in most cases, in which the Court bases the identification of a customary norm on treaties or resolutions of international institutions, it takes into account whether the treaty norm is accepted by the parties of the case. If one party refuses to recognize the customary status a norm, the Court avoids to proclaim a corresponding custom-

100 See, e.g., *Nuclear Weapons*, *supra* note 75, at ¶¶ 79, 82; *Armed Activities (D.R.C. v. Uganda)*, *supra* note 75, at ¶ 214.
101 *Armed Activities (D.R.C. v. Rwanda)*, *supra* note 75, at ¶ 64.
102 *Obligation to Prosecute or Extradite*, *supra* note 55, at ¶ 99.
103 Simma and Alston, *supra* note 58, at 90.
104 See N. Petersen, 'International Law, Cultural Diversity and Democratic Rule – Beyond the Divide Between Universalism and Relativism', 1 *Asian Journal of International Law* (2011) 149, at 152.
105 See A. von Bogdandy and I. Venzke, *In Whose Name? – A Public Law Theory of International Adjudication* (2014), at 57-59 (describing the legitimacy crisis of the ICJ in the 1960s when the Court declined jurisdiction in several cases concerning the South African Apartheid policy).
106 See M. Virally, 'Le rôle des „principes" dans le développement du droit international', in *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968) 531, at 550; M. Akehurst, 'Custom as a Source of International Law', 47 *British Yearbook of International Law* (1974) 1, at 4; T. Treves, 'Customary International Law', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (2012), at ¶ 47.
107 See Simma&Alston, supra note 58, at 90-92.
108 See *Obligation to Prosecute or Extradite*, *supra* note 55, at ¶ 99.

ary rule. This suggests that treaties or resolutions are primarily an instrument to signal impartiality and that the Court is rather motivated by its institutional position than by doctrinal concerns or political preferences.

3. Analysis of Individual State Practice

Detailed analyses of state practice are rare in the Court's jurisprudence if we exclude multilateral (or "paper") practice expressed through treaties or resolutions as analysed in the previous section. If the Court examines state practice thoroughly, it usually comes to the conclusion that a principle of customary international law does *not* exist.[109] One recent example is the *Jurisdictional Immunities* case.[110] In the judgment, the Court had to analyse the extent of the jurisdictional immunity of states before foreign courts. The Court first observed that states were generally entitled to immunity with regard to *acta jure imperii*.[111] Subsequently, it examined whether there was a customary exception to this principle with regard to war crimes. For this purpose, it made a detailed analysis of the relevant State practice, which consisted primarily of decisions of domestic courts.[112] It observed that most domestic courts had granted immunity to foreign States even for acts classified as war crimes.[113] The only other country in which national courts had issued judgments consistent with the practice of the Italian courts had been Greece.[114] In Greece, the Hellenic Supreme Court had denied immunity to Germany for acts of war crimes committed during the Second World War. But even there, the Greek Special Supreme Court had overturned the judgment of the Hellenic Supreme Court in its *Distomo* judgment, so that the Greek practice had only limited precedential value.[115]

In judgments in which the Court confirmed the positive existence of a customary rule, practice was a mere auxiliary instrument. It usually confirmed a result that had already been found through other means. And even here, the Court predominantly refers to practice only in the abstract without analysing the specific practice in detail.[116] For example, in the dispute between Argentina and Uruguay concerning the *Pulp Mills on the River Uruguay*, the Court observed

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109 See *Corfu Channel*, *supra* note 55, at 35; *Asylum Case (Colombia v. Peru)*, 20 November 1950, ICJ Reports (1950) 266, at 276-78; *Fisheries Case*, *supra* note 55, at 131; *North Sea Continental Shelf*, *supra* note 68, at ¶¶ 70-81; *Nuclear Weapons*, *supra* note 75, at ¶ 71; *Arrest Warrant*, *supra* note 75, at ¶ 58; *Ahmadou Sadio Diallo (Republic of Guinea v. D.R.C.)*, Preliminary Objections, 24 May 2007, ICJ Reports (2007) 582, at ¶¶ 86-93; *Jurisdictional Immunities*, *supra* note 55, at ¶¶ 73-76, 83-85.

110 *Jurisdictional Immunities*, *supra* note 55, at ¶¶ 73-76, 83-85.

111 *Id*., at ¶ 61.

112 *Id*., at ¶¶ 73-76.

113 *Id*., at ¶¶ 73-75.

114 *Id*., at ¶ 76.

115 *Id*.

116 See *Fisheries Case*, *supra* note 55, at 128; *Nottebohm*, *supra* note 75, at 22; *Barcelona Traction*, *supra* note 55, at ¶ 70; *Fisheries Jurisdiction*, *supra* note 55, at ¶¶ 23, 26; *Western Sahara*, *supra* note 75, at ¶ 80; *Continental Shelf (Tunisia v. Libya)*, *supra* note 75, at ¶ 111; *Qatar v. Bahrain*, *supra* note 55, at ¶ 173; *Cameroon v. Nigeria*, *supra* note 75, at ¶¶ 263, 264; *Kosovo*, *supra* note 75, at ¶ 79; *Pulp Mills*, *supra* note 53, at ¶ 204; *Obligation to Prosecute or Extradite*, *supra* note 55, at ¶ 97. See also Wood, First report, *supra* note 1, at ¶ 62 (arguing that the Court refers to practice without a detailed analysis when it considers the existence of a customary norm to be obvious).

> "a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[117]

The only judgments where the Court analyses state practice in detail are cases, which concern the bilateral practice of the parties.[118] In its decision on *Navigational Rights*, The Court held that Costa Rican fishermen had a customary right to subsistence fishing in the San Juan River.[119] Nicaragua had not denied such a practice, but only claimed a lack of *opinio juris* – a claim that was rejected by the Court.[120] In *Right of Passage*, the Court determined that Portugal had a general right of passage over Indian territory, based on a long continued practice between the two states.[121] However, these cases do not concern generalizable norms that are applicable outside the context of the specific case.

Consequently, even though state practice is seen as a constitutive element of customary international law in most international law textbooks and treatises,[122] it only plays a marginal role in the case law of the ICJ. The fact that the Court pays only lip service to the traditional definition of custom is a strong sign that doctrinal constraints play a minor role in the identification process of customary law. At the same time, it is also an indication that the Court is motivated by institutional concerns. State practice is often difficult to observe and rarely homogenous. Therefore, courts necessarily have to be selective if they want to confirm the existence of a norm of customary international law based on State practice.[123] This selectivity in identifying the relevant State practice could give the impression of partiality, e.g., that the Court favours the practice of one party over the practice of another, Northern practice over Southern practice or the practice of influential States over that of less influential ones. In order to preserve their own legitimacy, courts have to avoid such an impression.

4. Functional Arguments, Equity, Assertion

There is a further group of cases in which the ICJ neither refers to consent, treaties, or state practice in order to establish a customary norm. When rendering a decision, courts do not

117 *Pulp Mills*, *supra* note 53, at ¶ 204.
118 See, e.g, *Right of Passage over Indian Territorry (Portugal v. India)*, 12 April 1960, ICJ Reports (1960) 6, at 39; *Navigational Rights*, *supra* note 53, at ¶¶ 140-41.
119 *Navigational Rights*, *supra* note 53, at ¶¶ 140-41.
120 *Id*., at ¶ 141.
121 *Right of Passage*, *supra* note 118, at 39.
122 Daillier, Forteau and Pellet, *supra* note 78, at ¶ 207; A. Cassese, *International Law* (2nd ed. 2005), at 156; J. Crawford, *Brownlie's Principles of Public International Law* (8th ed. 2012), at 23; Treves, *supra* note 106, at ¶ 8; H. Thirlway, *The Sources of International Law* (2014), at 56-57; Wood, Third report, *supra* note 1, at ¶ 13; C.J. Tams, 'Die Identifikation des Völkergewohnheitsrechts', 47 *Berichte der deutschen Gesellschaft für Internationales Recht* (2016) 323, at 333.
123 Talmon, *supra* note 3, at 432. See, e.g., R. Pavoni, 'An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of States', 21 *Italian Yearbook of International Law* (2011) 143 (accusing the ICJ of neglecting important parts the US practice in *Jurisdictional Immunities*).

usually have the option of a *non liquet*.[124] They cannot simply refrain from deciding because there is no legal norm governing the case. In such situations, the ICJ primarily relies on three strategies: First, it resorts to functional arguments. These arguments try to show that certain norms necessarily follow from the characteristics of a specific institution. Second, the Court relies on considerations of equity. In some cases, finally, the Court simply asserts the existence of a legal norm without making an attempt to justify its finding.

(a) Functional arguments: There are a few cases in which the Court resorted to functional arguments.[125] In *Barcelona Traction*, it analysed the nature of legal personality and argued that Belgium could not exercise diplomatic protection for the shareholders of a Canadian company because individual shareholders were generally not allowed to exercise rights on behalf of the company.[126] In the *Arrest Warrant* case, the Court used functional considerations when determining the extent of the immunity of foreign ministers.[127] In this case, Belgium had issued an arrest warrant against the acting foreign minister of the Democratic Republic of Congo (DRC). The DRC challenged this arrest warrant before the ICJ. It argued that the warrant had violated the foreign minister's immunity. Belgium countered that the immunity of foreign ministers did not extend to war crimes or crimes against humanity.

There were two ways of framing the inquiry. First, the Court could have framed it as a question of the extent of the principle of immunity. Does the immunity of foreign ministers also extend to acts of war crimes or crimes against humanity? Under this framing, the DRC would have had to prove a uniform practice of applying the principle of immunity even in cases where the concerned person had committed war crimes or crimes against humanity. The second possibility was to frame the problem as a question of principle and exception. The Court would then have imposed a burden on Belgium to prove a uniform practice that there is an exception to the immunity principle in cases of war crimes and crimes against humanity.

The ICJ chose the second avenue. It did not analyse state practice and *opinio iuris* to establish the general principle of immunity. Instead, it made a functional argument:

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124 See H. Lauterpacht, 'Some Observations on the Prohibition of 'Non Liquet' and the Completeness of the Law', in F.M. van Asbeck *et al.* (eds), *Symbolae Verzijl* (1958) 196; P. Weil, '"The court cannot conclude definitively..." *Non Liquet* Revisited', 36 *Columbia Journal of Transnational Law* (1998) 109. But see also J. Stone, '*Non Liquet* and the Function of Law in the International Community', 35 *British Yearbook of International Law* (1959) 124 (arguing that courts are neither prohibited, nor obliged to declare a *non liquet*); U. Fastenrath, *Lücken im Völkerrecht* (1990), at 272-284 (arguing that there is no prohibition of a *non liquet* in international law); J. von Bernstorff, 'Hans Kelsen on Judicial Law-Making by International Courts and Tribunals: A Theory of Global Judicial Imperialism?', 14 *The Law and Practice of International Courts and Tribunals* (2015) 35, at 49-50 (advocating that sectorial courts and tribunals should hand down sectorial *non liquets* if they deal with questions of general international law in order not to promote the fragmentation of international law).

125 See *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174, at 178-84; *Reservations to the Genocide Convention*, *supra* note 55, at 22; *Barcelona Traction*, *supra* note 55, at ¶¶ 39-49; *Nuclear Tests*, *supra* note 43, at ¶ 49; *Arrest Warrant*, *supra* note 75, at ¶¶ 53-54.

126 *Barcelona Traction*, *supra* note 55, at ¶¶ 41, 42.

127 *Arrest Warrant*, *supra* note 75, at ¶¶ 53-54.

> "In the performance of these functions, [the foreign minister] is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. [...] The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability."[128]

The Court thus established a normative preconception of a full immunity principle on functional grounds. It then went on to analyse the state practice on whether there was an exception for the case of war crimes and crimes against humanity. However, it was unable to find a uniform practice in this respect.[129] For this reason, it held that the Belgian arrest warrant violated the immunity principle.

(b) Equity: In cases concerning the delimitation of continental shelf areas and maritime boundaries, the Court often relied on considerations of equity when it could not come up with a different solution.[130] The seminal case is the *North Sea Continental Shelf* judgment.[131] In *North Sea Continental Shelf*, the Court found that there was no customary rule governing the case. The predominant equidistance principle had not been sufficiently supported by state practice and *opinio iuris*.[132] In order to resolve the case, the Court referred to equitable considerations.[133] It imposed a procedural obligation to negotiate on the parties and established some factors to be considered in these negotiations.

However, the Court quickly realized that the reference to equity was too vague to provide a solution for many conflicts.[134] For this reason, it refined its approach in subsequent cases. In *Gulf of Maine*, the Court held that the delimitation of maritime boundaries had to be effected by agreement of the parties.[135] In the absence of such an agreement, "delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result."[136]

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128 *Id*., at ¶¶ 53-54.
129 *Id*., at ¶ 58.
130 See *North Sea Continental Shelf*, *supra* note 68, at ¶ 85; *Gulf of Maine*, *supra* note 55, at ¶ 112; *Continental Shelf (Libya v. Malta)*, *supra* note 55, at ¶ 60; *Maritime Delimitation (Denmark v. Norway)*, *supra* note 75, ¶ 48. See also *Fisheries Jurisdiction*, *supra* note 55, at ¶¶ 63-68 (where the Court established the concept of preferential fishing rights based on equity considerations); *Interpretation of the Agreement between the WHO and Egypt*, *supra* note 75, at ¶¶ 43-49 (where the Court derives a duty to negotiate and inform the other party from the principle of good faith).
131 *North Sea Continental Shelf*, *supra* note 68.
132 *Id*., at ¶¶ 70-82.
133 *Id*., at ¶¶ 83-99.
134 V. Lowe and A. Tzanakopoulos, 'The Development of the Law of the Sea by the International Court of Justice', in C.J. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice* (2013) 177, at 189.
135 *Gulf of Maine*, *supra* note 55, at ¶ 112.
136 *Id*.

A similar wording can be found in the ICJ's judgment on the delimitation of the *Continental Shelf* between Libya and Malta. Here, the Court argued that "the delimitation of a continental shelf boundary must be effected by the application of equitable principles in all the relevant circumstances in order to achieve an equitable result."[137] On this basis, the Court introduced a two-step-procedure to determine the boundary of the continental shelf. First, it effected a provisional delimitation based on a criterion of distance from the coast, before considering corrections of the initial result based on requirements derived from other criteria.[138] In particular, it considered the disproportionate length of opposing coastlines as a primary criterion for correcting the provisional result.[139] It later refined this approach by making the disproportionality test a separate third stage in its determination of maritime boundaries.[140]

Over the course of several judgments and decades, the Court thus developed a refined approach for delimiting maritime boundaries. The three-stage test applied by the Court is neither based on specific treaty provisions nor on state practice. Rather, the Court justified its approach referring to considerations of equity.[141] If cases of boundary limitations come to court, the parties usually have a strong interest in resolving the dispute at hand.[142] While they have preferences regarding the exact shape of the boundary, they deem the resolution of the dispute to be more important than the exact outcome of the ruling.[143] What is important for the resolution of the dispute, however, is the impartiality of the Court. If the Court seems to side with one party, the other will most likely not accept the result.[144]

For this reason, courts have strong incentives to make compromises in such situations.[145] In order to signal their impartiality, they will usually give each party a share of the cake. By developing a flexible approach to maritime boundary delimitation, the ICJ has put itself into a position to strike such compromises. The equidistance principle may be easy to administer, but it often favours one party. For this reason, the Court only uses it as a starting point, but applies certain corrections later on in order to grant concessions to the party that is disadvantaged by the application of the mere equidistance criterion. The reliance on equitable principles is thus an instrument to ensure compliance in an area where clear rules do not exist and where they would also not be appropriate to resolve most disputes in a satisfactory way for both parties.

137 *Continental Shelf (Libya v. Malta), supra* note 55, at ¶ 45.
138 *Id*., at ¶¶ 60-61.
139 *Id*., at ¶ 57.
140 *Territorial and Maritime Dispute, supra* note 55, at ¶¶ 190-93.
141 See T. Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (2015), at 352-353.
142 B.A. Simmons, 'Capacity, Commitment, and Compliance', 46 *Journal of Conflict Resolution* (2002) 829, at 832.
143 N. Petersen, 'The Role of Consent and Uncertainty in the Formation of Customary International Law', in B. Lepard (ed), *Reexamining Customary Internationl Law* (forthcoming 2016).
144 B. Kingsbury, 'International courts: uneven judicialization in global order', in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (2012) 203, at 216.
145 See Stone Sweet, *Governing with Judges*, *supra* note 14, at 200.

(c) Assertion: Finally, the ICJ sometimes just proclaims the existence of specific customary norms without justifying how it derived them.[146] The most famous example is probably the birth of the concept of *erga omnes* principles in Barcelona Traction.[147] When determining whether Belgium had standing to exercise diplomatic protection on behalf of Belgian shareholders of a Canadian company, the Court argued that,

> "[i]n particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[148]

The Court then continued to specify these obligations:

> "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law".[149]

The Court did not make any effort to justify how it derived the concept of *erga omnes* or the principles to which it attributed this status. The Court probably deemed such a justification to be unnecessary for two reasons. First, the cited passages are only *obiter dicta*. After having established the category of *erga omnes* rights, the Court quickly noted that Belgium could not rely on the violation of an *erga omnes* principle in the present case.[150] Second, the Court could assume that the mentioned norms had such a high moral importance that it was unnecessary to justify their existence in customary international law.

The importance of this passage lies in its precedential value. The concept of *erga omnes* obligations influenced the later development of international law to a significant extent.[151] In particular, the Court referred to the concept of *erga omnes* developed in *Barcelona Traction* several times in later judgments.[152] In these subsequent decisions, the reference to *erga omnes*

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146 See *Reparations for Injuries*, *supra* note 125, at 185; *Reservations to the Genocide Convention*, *supra* note 55, at 21; *Fisheries Case*, *supra* note 55, at 129; *Monetory Gold removed from Rome in 1943 (Italy v. France, U.K., and U.S.)*, 15 June 1954, ICJ Reports (1954) 19, at 32; *Temple of Preah Vihear (Cambodia v. Thailand)*, 15 June 1962, ICJ Reports (1962) 6, at 26; *Barcelona Traction*, *supra* note 55, at ¶¶ 33-34; *Military and Paramilitary Activities*, *supra* note 55, at ¶ 115; *Nuclear Weapons*, *supra* note 75, at ¶ 29; *Gabcíkovo-Nagymaros*, *supra* note 55, at ¶ 152; *Qatar v. Bahrain*, *supra* note 55, at ¶ 223. See also Talmon, *supra* note 3, at 434-40, who even argues that assertion is the main method of identification employed by the ICJ. However, his category of assertion is broader than the one employed in thus study, as *Talmon* also includes reference to treaties, resolutions, or the work of the ILC.

147 *Barcelona Traction*, *supra* note 55, at ¶¶ 33-34.

148 *Id*., at ¶ 33 (emphasis in the original).

149 *Id*., at ¶ 34.

150 *Id*., at ¶ 35.

151 See N. Petersen, 'Lawmaking by the International Court of Justice', 12 *German Law Journal* (2011) 1295, at 1307-10.

152 See *East Timor (Portugal v. Australia)*, 30 June 1995, ICJ Reports (1995) 90, at ¶ 29; *Israeli Wall*, *supra* note 53, at ¶ 155; *Obligation to Prosecute or Extradite*, *supra* note 55, at ¶ 68.

obligations was not a mere *obiter dictum* anymore. Instead, the Court derived concrete consequences from its classification. In its *Israeli Wall* opinion, the Court argued that the construction of the wall by the Israeli authorities violated obligations *erga omnes*.[153] For this reason, the Court held that "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory".[154] In *Obligation to Prosecute or Extradite*, the Court derived Belgium's standing to invoke Senegal's responsibility under the Convention against Torture from the *erga omes* nature of the Convention's obligations.[155]

It is not a rare phenomenon for courts to introduce important and possibly controversial legal concepts in contexts where they will rarely face opposition.[156] When the U.S. Supreme Court introduced the principle of constitutional review in *Marbury v. Madison*, it did so in order to reinforce the position of the executive, even though the concept as such is primarily directed against the political branches. It was only later that the Court resorted to its power to review the constitutional compatibility of statutes and turned it against the government. Similarly, when the ICJ introduced the concept of *erga omnes* in Barcelona Traction, it did so in an *obiter dictum* without any consequences for the result of the decision. It took the Court more than twenty years to refer to the concept of *erga omnes* obligations for a second time. By then, however, international law scholarship and the majority of States had predominantly accepted the concept.[157] Consequently, the Court could base its decision on the concept without having to fear strong opposition against its reasoning.

(d) Summary: These three gap-filling argumentation patterns are more difficult to qualify than the reliance on consent or treaties. While all three are difficult to reconcile with a doctrinal explanation, they could be regarded as an expression of political preferences of the judges. In particular, if the Court merely asserts certain legal principles, as it did in the *Barcelona Traction* case, it is likely that the judges had the intention to engage in judicial lawmaking. However, even though assertion is a significant argumentation pattern, it is much less important then reliance on consent or treaties. Furthermore, as the *Barcelona Traction* case shows, even in these situations, the Court is mindful of its institutional position. It introduces the principle through an *obiter dictum*, and only picked it up two decades later and attached legal consequences to it once the principle had received a positive reception by states and in international law scholarship.

In contrast, the main purpose of the equity argument in the law of the sea is to signal impartiality. The doctrinal framework developed by the Court is so flexible that it does not impose significant constraints for future decisions. Rather, it is supposed to give the Court flexibility to decide individual boundary delimitations in a way that they are acceptable to both parties of

153 *Israeli Wall*, *supra* note 53, at ¶¶ 155-56.
154 *Id.*, at 159.
155 *Obligation to Prosecute or Extradite*, *supra* note 55, at ¶ 70.
156 See B.E. Friedman and E.F. Delaney, 'Becoming Supreme: The Federal Foundation of Judicial Supremacy', 111 *Columbia Law Review* (2011) 1137, at 1152-59.
157 Petersen, *supra* note 151, at 1308-10.

the dispute. Finally, functional considerations could, at the same time, be a sign of institutional constraints or of political preferences. However, even if the latter interpretation were pertinent, it would not change the overall picture given that the argumentation pattern is of only minor importance in quantitative terms.

5. Customary Law and Precedent

In some judgments, finally, the ICJ relies on precedents when identifying a customary norm. In the vast majority of cases, the Court refers to its own former decisions or to decisions of its predecessor, the Permanent Court of International Justice (PCIJ).[158] In such situations, the Court disburdens itself from justifying a customary principle that it had already justified in an earlier decision. Furthermore, it reinforces its own position and signals coherence. However, the Court sometimes merely evokes the impression that it is only applying already established legal norms while it is in fact developing the law. For example, in its *East Timor* decision, the Court argued that the principle of self-determination had *erga omnes* character.[159] It asserted that

> "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court."[160]

But the decisions the Court referred to, the South West Africa[161] and the Western Sahara[162] advisory opinions, dealt with the interpretation of the principle of self-determination governed by treaty instruments, while the Court in East Timor referred to the principle of self-determination contained in customary law.

The law of the sea is another field where the Court relies on precedents without revealing that it is, in fact, developing the law. In its 2012 judgment regarding the *Territorial and Maritime Dispute* between Nicaragua and Colombia, the Court applied a three-step analysis for the de-

158 See *Nottebohm*, *supra* note 75, at 22; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 12 July 1973, ICJ Reports (1973) 166, 222; *Continental Shelf (Tunisia v. Libya)*, *supra* note 75, at ¶¶ 45, 101; *Continental Shelf (Libya v. Malta)*, *supra* note 55, at ¶¶ 55-58; *Military and Paramilitary Activities*, *supra* note 55, at ¶¶ 202; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, 26 April 1988, ICJ Reports (1988) 12, at ¶ 57; *Land, Island and Maritime Frontier Dispute*, *supra* note 53, at ¶ 73; *Maritime Delimitation between Greenland and Jan Mayen*, *supra* note 55, at ¶¶ 50-53; *East Timor*, *supra* note 152, at ¶ 29; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 66, at ¶ 25; *Gabcíkovo-Nagymaros*, *supra* note 55, at ¶¶ 83; *Armed Activities (D.R.C. v. Uganda)*, *supra* note 75, at ¶¶ 172, 217; *Armed Activities (D.R.C. v. Rwanda)*, *supra* note 75, at ¶ 46; *Ahmadou Sadio Diallo*, *supra* note 109, at ¶¶ 86-93; *Pulp* Mills, *supra* note 53, at ¶ 101; *Territorial and Maritime Dispute*, *supra* note 55, at ¶¶ 138-39, 182, 190-93.

159 *East Timor*, *supra* note 152, at ¶ 29.

160 *Id.*

161 *South West Africa*, *supra* note 75, at ¶¶ 52-53.

162 *Western Sahara*, *supra* note 75, at ¶¶ 54-59.

limitation of overlapping continental shelf and exclusive economic zone entitlements.[163] It justified this three-step analysis with a reference to earlier judgments.[164] The first judgment to which the Court referred was the 1985 *Continental Shelf* judgment regarding a dispute between Libya and Malta. However, in the 1985 decision, the test of the Court had only consisted of two explicit stages.[165] The two last steps of the 2012 test had still been part of the same step in 1985.

In other cases, it is doubtful whether the argument used in the precedent can really be transferred to subsequent cases. This is particularly the case if the Court based the identification of a customary rule on the consent of the parties. In its Nicaragua judgment, the Court observed that "[t]he Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence."[166] It called this necessity and proportionality requirement "a rule well established in customary international law".[167] Later it referred to the Nicaragua judgment in its *Nuclear Weapons* and *Oil Platforms* decisions to justify necessity and proportionality as preconditions to self-defence.[168]

These observations show that resorting to precedents is not necessarily a confirmation of a doctrinal approach of the ICJ. Instead, the Court sometimes uses precedents for a progressive development of international law, extending the scope of concepts beyond the decision in the precedent to which it refers. Nevertheless, the reasoning shows that the judges are mindful of their institutional constraints. By relying on precedents, they want to highlight the coherence of the Court's case-law. At the same time, they signal impartiality as the decision appears to be based on already firmly established legal principles so that the Court is only 'applying', not 'developing', the law.

5. Conclusion

Robert Jennings once famously quipped that "[m]ost of what we perversely persist in calling customary international law is not only not customary law: it does not even faintly resemble a customary law".[169] This paper sought to explain this phenomenon. Three potential explanations for the Court's decision-making have been offered: a doctrinal approach according to which the decisions are primarily determined through legal norms and legal doctrine, a policy approach arguing that judges develop international law according to their political preferences, and an institutional approach which focuses on the institutional constraints that judges

163 *Territorial and Maritime Dispute*, *supra* note 55, at ¶¶ 189-199.
164 *Id*., at ¶ 189.
165 *Continental Shelf (Libya v. Malta)*, *supra* note 55, at ¶ 60.
166 *Military and Paramilitary Activities*, *supra* note 55, at ¶ 194.
167 *Id*., at ¶ 176.
168 *Nuclear Weapons*, *supra* note 75, at ¶ 41; *Oil Platforms*, *supra* note 158, at ¶¶ 74, 76.
169 R.Y. Jennings, 'The Identification of International Law', in Bin Cheng (ed), *International Law. Teaching and Practice*, (1982) 3, 5.

face. In line with previous findings, it has been argued that the doctrinal approach cannot explain the ICJ's jurisprudence on customary international law. Unlike the definition of customary law in Art. 38 (1) lit. b ICJ Statute suggests, the analysis of individual state practice only plays a marginal role in the Court's argumentation. In contrast, the Court prominently relies on the consent of the parties to a particular customary norm even though the consent of the parties of a case only has a very minor significance in the doctrine of customary law.

However, even if legal doctrine has no important constraining function for the identification of customary norms, this does not mean that judges automatically follow their political preferences. Instead, the Court's reasoning, which predominantly resorts to consent, treaties or resolutions of international institutions that the Court primarily wants to signal impartiality in order to enhance its own legitimacy. This does not exclude that the Court, in certain cases, also tries to develop international law progressively. Examples are the establishment of the principle of *erga omnes* norms in *Barcelona Traction* or the extension of legal concepts when relying on precedents. However, in quantitative terms, these instances are rather the exception. Furthermore, even in such situations, the Court takes its institutional constraints into account and tries to preserve its authority by referring to precedents or by relegating sweeping statements to *obiter dicta*.