

# ON THE POSSIBILITIES OF AND FOR PERSISTENT OBJECTION

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## INTRODUCTION

The inspiration for recent interrogations into the possibilities of withdrawing from international custom emanate from an anonymous judge's observation of the abilities that States have to exit from "unwritten and un-negotiated" rules of customary international law: "Why are nations often allowed to withdraw unilaterally from treaties, which are expressly negotiated and usually written down, but are never allowed to withdraw from unwritten and un-negotiated [customary international law] rules?"<sup>1</sup> Contained within this statement is the ready parity that the judge infers (or seeks to infer) from the making of public international law *via* custom as opposed to *via* convention, and on the apparent disparity that exists within that conceptual framework when comparing one formal source of public international law with another. Yet, entrenched within the self-same statement are claims that attempt to relate *other* differences that exist between custom and convention—the idea of the making of custom as a diffuse and "un-negotiated" exercise, and of its product being *lex non scripta*, whereas conventions, by comparison, are "expressly negotiated and usually written down"<sup>2</sup>—to the point where it is legitimate to ask whether rightful analogies can be drawn at all between and among the formal

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1. See generally Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE LAW J. 202 (2010).

2. The 1969 Vienna Convention on the Law of Treaties confines itself to "international agreement[s] concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever [their] particular designation." See Vienna Convention on the Law of Treaties, art. 2, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. However, some have argued that there is no reason in principle to disqualify unwritten agreements from consideration as treaties "[p]rovided [that] the text can be reduced to a permanent, readable form (even if this is done by down-loading and printing out from a computer)." ANTHONY AUST, MODERN LAW AND TREATY PRACTICE 19 (2d ed. 2007).

sources of public international law as enunciated in Article 38 (1) of the 1945 Statute of the International Court of Justice.<sup>3</sup>

In this short article, a rejoinder to the important call for a theoretically-informed discourse on the coherence of these formal sources as itemized in the Statute of the Court, we shall consider this provision of the Statute from the optic of generality—and assess the extent to which this might affect our understanding of how notions of consent and consensus impact and should impact the making of public international law.<sup>4</sup> We allude to the separate enquiries examining the *basis* of obligation in public international law, as attentions are focused on the construction of persistent objection in the context of custom and what this might tell us about any unified theory connecting the formal sources of the discipline—aware of the health warning once issued against a narrow interpretation of Article 38 (1) of the Statute of the Court, that public international law “has to be identified by reference to what the actors (most often States), often without benefit of the pronouncement of the International Court of Justice, believe normative in their relations with each other.”<sup>5</sup> Some attempt is made to address the limitations on the possibilities of persistent objection in view of the current and continuing significance of the consent of States in this exercise,<sup>6</sup> before, in the penultimate section of the article, we emphasize a contextual appreciation of the formal sources of public international law as they appear in the Statute of the Court, based on their distinctiveness of function and respective histories and associations.<sup>7</sup>

## I. THE OPTIC OF GENERALITY

It is worthwhile exploring Article 38 (1) of the Statute of the International Court of Justice from the optic of generality, since that

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3. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031, 3 Bevans 1179 [hereinafter ICJ Statute].

4. See generally ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 157-60 (2007).

5. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 18 (1994). For a contemporary application of this approach, see also CHRISTINE BELL, *ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA* (2008). This observation gains special resonance when it is viewed against Art. 34 (1) of the Court’s Statute—that “[o]nly States may be parties in cases before the Court.” See ICJ Statute, *supra* note 3. To be sure, the Statute does provide for the advisory competence of the Court: Art. 65. See *id.*; see also U.N. Charter art. 96.

6. Bradley & Gulati, *supra* note 1, at 213-14.

7. For a classic statement on the individuality and interrelation of the formal sources of public international law, consider Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT’L L. 82 (1988). See also Frederick Pollock, *The Sources of International Law*, 2 COLUM. L. REV. 511 (1902).

provision invokes the notion of “generality” at several intervals, but it does so in senses that cannot be assumed to be identical with one another. It will be recalled that this provision instructs the Court to apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>8</sup>

Distinctions do need to be drawn here on the meanings of generality because a close reading of this aspect of the Statute will reveal that there are at least three *separate* connotations awarded to the notion of generality that appear in Article 38 (1) (a) through (c) of the Statute.<sup>9</sup> The provision commences its itemization of the formal sources of public international law with international conventions, “whether general or particular,” thus referring to their specific *materia* and, in consequence we can presume, to their potential and ultimate geographic reach.<sup>10</sup> Article 38 (1) (a) maintains, however, that irrespective of their general or particular character, such

8. Amongst other things, this excerpt appears as Art. 38 (1) of the Statute. Art. 38 (2) announces that this provision “shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto” and the reference in Art. 38 (1) (d) of the Statute is to another aspect of the Statute in Art. 59 which provides that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” ICJ Statute, *supra* note 3.

9. We shall set aside Art. 38 (1) (d) for it concerns judicial decisions and the teaching of the most highly qualified publicists of the various nations as a means for the *determination*—and not the creation—of rules of law, and “subsidiary means” for the determination of rules of law at that. As Sir Robert Jennings and Sir Arthur Watts remark, “[a]lthough Article 38 does not in terms state that it contains the formal sources of international law, it is usually inferred.” See I OPPENHEIM’S INTERNATIONAL LAW: PEACE (§9) 24 [hereinafter OPPENHEIM’S] (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

10. See Alain Pellet, *Article 38*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 677, 746-48 (Andreas Zimmerman, Karin Oellers-Frahm & Christian Tomuschat eds., 2006). See also Alan Boyle, *Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change*, in THE LAW OF THE SEA: PROGRESS AND PROSPECTS 40, 46-47 (David Freestone, Richard Barnes & David M. Ong eds., 2006). There is no reason to doubt the usefulness of this mode of analysis for customary international law: as the International Court of Justice found in *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, “that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack.” See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 105 (§199) (June 27). At another point, the Court spoke of “the existence, and the acceptance by the United States, of a customary principle which has universal application.” *Id.* at 107 (§204). See also Pellet, *supra* note 10, at 762-64.

conventions shall establish rules that are “expressly recognized” by the contesting States—an explicit testament to the significance that consent has in the making of public international law *via* convention, as confirmed by the doctrine of the privity of treaties in Article 34 of the 1969 Vienna Convention on the Law of Treaties.<sup>11</sup>

This, then, is quite different to the sense in which the notion of generality is summoned in Article 38 (1) (b) of the Statute concerning international custom “as evidence of a general practice accepted as law,”<sup>12</sup> where it serves as an approximate quantification—and only an *approximate* quantification—of the amount of practice that is necessary for an international custom to occur.<sup>13</sup> The idea of “general practice” therefore goes to the required quantum of that practice; it advises that a unanimous practice of States<sup>14</sup> accepted as law—that is, of an express consent of all States—need not exist, or, at least, it need not be demonstrated before the Court, in order for an international custom to be said to exist. Generality is therefore pedalled into service on this front not in respect of the content or geographic reach of a given rule, but, rather, as a means of identification of the extent of the empirical foundations that are envisaged by the Statute for a rule of international custom to be brought into being. We can appreciate why this might well have been the case at the time of the adoption of the United Nations Charter; indeed, it has been observed that the proliferation

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11. VCLT, *supra* note 2, at art. 34 (“A treaty does not create either obligations or rights for a third State without its consent.”). Hugh Thirlway notes that there are “two apparent exceptions to this principle—but they are only apparent.” One concerns an obligation contained in a treaty that becomes part of custom; the other concerns the acceptance of a State not a party to a treaty of “an obligation stated in the treaty, or to derive a benefit from the treaty” if all States concerned agree to that arrangement. See Hugh Thirlway, *The Sources of International Law*, in *INTERNATIONAL LAW* 115, 120 (Malcolm D. Evans ed., 2d ed. 2006). Importantly, article 34 of the Vienna Convention denotes this rule as a “general”—not an “absolute”—rule concerning third States. See CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* 23–51 (1993).

12. An unfortunate turn of phrase given that “it is custom that is the source applied, and that it is practice which evidences custom.” See HIGGINS, *supra* note 5, at 18; see also R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 7 (3d ed. 1999).

13. R.R. Baxter, *Treaties and Custom*, 129 *HAGUE RECUEIL* 25, 67 (1970). Though Akehurst has argued that this does not necessarily entail a relaxed approach to the formation of custom, since the International Court of Justice has adopted a “stringent” requirement for general practice in the *North Sea Continental Shelf Cases* in its requirement of “extensive and virtually uniform practice” on behalf of States, including those whose interests have been specially affected. See Michael Akehurst, *Custom as A Source of International Law*, 47 *BRIT. Y.B. INT’L L.* 1, 17 (1974) (“If the case had involved, not the transformation of a treaty provision into customary law, but the creation of custom in some other way, it is possible that the Court would not have laid down such a stringent requirement.”). See also Louis B. Sohn, “*Generally Accepted*” *International Rules*, 61 *WASH. L. REV.* 1073 (1986).

14. See BOYLE & CHINKIN, *supra* note 4, at 41 (noting the qualification for States and that such is not the stipulation spelt out in Art. 38 (1) (b) of the Statute).

of States in the period after the Second World War “has made it harder and harder to discern unanimous patterns.”<sup>15</sup> Nevertheless, we are still left to decipher whether, as it is put in the ninth edition of *Oppenheim’s International Law*, “[c]ustom is itself a matter of general rather than universal consent,”<sup>16</sup> or whether the premise of international custom is, in actual fact, the consent of States no matter whether this is issued on an express or presumed basis.<sup>17</sup>

The third and final sense of generality to emerge from Article 38 (1) of the Statute relates to its reference to “general principles of law recognized by civilized nations.” Here, the sense of generality that is conveyed relates to the very character of the legal proposition that is at stake: we are dealing with a “principle” of law, but it is a “general principle” that we are (or ought to be) concerned with.<sup>18</sup> The common inference that is made of this aspect of Article 38 (1) of the Statute is that it “enables” the International Court of Justice to make use of principles that can be characterized as “general” in nature, principles (such as estoppel and natural justice) that might not otherwise find the requisite degree of State support as a matter of international custom,<sup>19</sup> and which facilitate the completeness of the system of public international law for the purposes of adjudication.<sup>20</sup> The scope for *non liquet* is thereby minimized.<sup>21</sup>

15. Detlev F. Vagts, *International Relations Looks At Customary International Law: A Traditionalist’s Defence*, 15 EUR. J. INT’L L. 1031, 1039 (2004).

16. OPPENHEIM’S, *supra* note 9, at 24 (§9). Bradley & Gulati remind us of the first edition of *Oppenheim*, published in 1905, and its mentioning of the concept of “common consent.” See Bradley & Gulati, *supra* note 1, at 227. However, see *infra* discussion accompanying notes 25 and 26.

17. Note the emphasis placed on formal consent for custom in H.C.M. Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AUSTL. Y.B. INT’L L. 1, 3, 11 (1984-1987). See also Thirlway, *supra* note 11, at 121-22 (“[o]ne approach is to regard all custom as a form of tacit agreement”) and *id.* at 125; see also the discussion of Bradley & Gulati, *supra* note 1, at 222-24.

18. See Pellet, *supra* note 10, at 767 (“there can be no doubt that, when associated with ‘general’ the word ‘principle’ implies a wide-ranging norm”); see also IAN BROWNLE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 19 (7th ed. 2008).

19. See VAUGHAN LOWE, INTERNATIONAL LAW 87 (2007). Jennings posits that some have been prone to regard this aspect of Article 38 (1) of the Statute as “a sort of comparative lawyer’s charter.” See Robert Y. Jennings, *What Is International Law and How Do We Tell it When We See It?*, 37 ANNUAIRE SUISSE DE DROIT INT’L 59, 72 (1981). For Henkin, this is “a source available only as necessary for interstitial use, to fill out what international law requires but has not been recognized as customary law because it has not yet been invoked often and widely enough.” LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 40 (1995).

20. See Pellet, *supra* note 10, at 765 (though advising, at 766, that the Court has referred to Art. 38 (1) (c) of its Statute “with an extreme parsimony”).

21. See Daniel Bodansky, *Non Liqueur and the Incompleteness of International Law*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 153, 166 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999). See also Pellet, *supra* note 10, at 764-65.

That said, in a faint echo of what the Statute provides for international custom, there might be some sense that these general principles derive their authority from the general practice of States in that they are recognized by some (and not necessarily all) “civilized nations” (whosoever those might be).<sup>22</sup> This would present generality with a double significance when it comes to Article 38 (1) (c) of the Statute, which would not only describe the character of the principle that is in issue in a particular case, but which would also speak to the scope of State validation that is necessary for such principles to be properly so-called and, ultimately, to exist as a form of public international law. So, for instance, Karen Knop has compared the general principles of law offered by Sir Humphrey Waldock in his general course on public international law at the Hague Academy of International Law in 1962,<sup>23</sup> with the separate opinion of Vice-President Christopher J. Weeramantry of the International Court of Justice in *Case Concerning the Gabčíkovo-Nagymaros Project* of September 1997, when advancing the principle of sustainable development. Her reflection is that:

In comparison with what Waldock describes, Vice President Weeramantry’s is a much more thoroughgoing attempt to establish the generality of general principles of law. His examples suggest an effort to correct as the judge sees fit for historical and cultural biases. They encompass the past as well as and even in contrast to the present; cultures as opposed to just states; living law as opposed to exclusively written; underlying cultural values as well as the legal rules they

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22. See Bradley & Gulati, *supra* note 1, at 208. It is interesting to observe that Art. 38 (1) (c) refers to “civilized nations,” whereas Art. 38 (1) (d) mentions “the various nations.” See ICJ Statute, *supra* note 3.

23. See Humphrey Waldock, *General Course on Public International Law*, 106 HAGUE RECUEIL 1, 66 (1962). For Waldock, two principles underpinned the concept of general principles of law:

First, by the accidents of history, some of the principal European systems of law have penetrated over large areas of the globe, mixing in greater or less degree with the indigenous law and often displacing it in just those spheres of law in which we have seen that international law has most readily borrowed from domestic law. In consequence, there is a much larger unity in the fundamental concepts of the legal systems of the world to-day than there might otherwise have been . . . Secondly, it was never intended under paragraph (c) [of Art. 38 (1) of the Statute of the International Court of Justice] that proof should be furnished of the manifestation of a principle in every known legal system . . . and certainly it has never been the practice . . . Truth to tell, arbitral tribunals, which usually consist of one, three or five judges, have probably done no more in most cases than take into account their own knowledge of the principles of the systems in which the arbitrators were themselves trained, and these would usually have been Roman law, Common law, or Germanic systems.

*Id.* For Knop, “[p]ut differently, either non-Western legal systems are simply not factored into general principles of law because the judges rely on their own, usually Western backgrounds as representative, or non-Western legal traditions are modified and thus more insidiously excluded by ‘the accidents of history’ sometimes known as imperialism.” Karen Knop, *Reflections on Thomas Franck, Race and Nationalism (1960): “General Principles of Law” and Situated Generality*, 35 N.Y. U. J. INT’L L. & POL. 437, 457 (2003).

validate. Indeed, Vice President Weeramantry applies to a Communist-era engineering project in central Europe environmental wisdom that he seeks to show has been law for centuries in non-European, and once in European, parts of the world.<sup>24</sup>

## II. THE CONSTRUCTION OF PERSISTENT OBJECTION

As outlined here, the formal sources of public international law introduce us to the range of modalities that exist for the making of public international law in present times, which need to be distinguished from what has been called the basis of obligation within public international law—as reflected in “the common consent of the international community.”<sup>25</sup> Article 38 (1) of the Statute thus articulates—in an unspecific way truth be told, but, nevertheless, it articulates—the rules in respect of each of these formal sources of law and legal obligation, and, as such, it casts a certain impression of the greater or lesser extent to which each formal source comports with the *basis* of the discipline.<sup>26</sup> Our interpretations must therefore observe the connectability of each of these formal sources to the agreed underpinnings of the system—of the exact extent to which consent is supposed to inform the making of international conventions, international custom, as well as general principles of law—while we remain conscious, of course, that the foundations of the system were set well before all States were able to, or allowed to, or in existence in order to, issue their respective consents on *how* the primary rules of public international law could and should be made.<sup>27</sup> Whereas the narrative for some States might well therefore be the constitutionalization of consent to

24. Knop, *supra* note 23, at 458–59 (opposing Waldock’s position that “it was never intended . . . that proof should be furnished of the manifestation of a principle *in every known legal system*”) (emphasis added). Note the concerns regarding subjectivity in the process that produced the predecessor to Art. 38 (1) (c) on general principles of law in 1920 by the Advisory Committee of Jurists. See Pellet, *supra* note 10, at 765.

25. See OPPENHEIM’S, *supra* note 9, at 23 (§8) (“The sources of law . . . concern the particular rules which constitute the system, and the processes by which the rules become identifiable as rules of law. The sources of the rules of law, while therefore distinct from the basis of law, are nevertheless necessarily related to the basis of the legal system as a whole.”). See also *id.* at 14–16, 24 (§9).

26. See *id.* at 24 (§9) (“The sources set out in Article 38 are, in fact, such as will ensure the conformity of the resulting rules as a whole with that common consent of the international community which is the basis of international law.”); J.L. Brierly, *The Basis of Obligation in International Law, in THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS I* (Sir Hersch Lauterpacht & C.H.M. Waldock eds., 1958); P.E. Corbett, *The Consent of States and the Sources of the Law of Nations*, 6 BRIT. Y.B. INT’L L. 20 (1925); Oscar Schachter, *Towards A Theory of International Obligation*, 8 VA. J. INT’L L. 300, 301–02 (1968).

27. Consider the important discussion of Lowe on the connectability of primary and secondary rules of obligation. See A.V. Lowe, *Do General Rules of International Law Exist?*, 9 REV. INT’L STUDIES 207, 208–09 (1983).

greater or lesser degrees for the making of all public international laws, for other States the narrative is sure to be or to seem otherwise—that is one of a fated and projected normativity, of yesterday’s rules presented as *faits accomplis* and established propositions, remote from any sustained notion of, or commitment to, the constitutionalization of consent.<sup>28</sup>

Be this as it may, it is appropriate for us to enquire whether the formal sources of law are governed by separate logics and logistics of operation. Is the omission of any requirement for express recognition in Article 38 (1) (b) of the Statute for the making of international custom intended to be meaningful and relevant? Are we meant to deduce anything significant about the *function* of consent in the making of international custom *when compared with that for international conventions*? Without more, one can see how a literal reading of the Statute could lead one to this sobering conclusion,<sup>29</sup> but it is through the jurisprudence of the International Court of Justice that we have developed a heightened sensitivity to the possibilities of and for persistent objection in public international law—and, with it, the significance that consent has in the formation of international custom.<sup>30</sup> So, in its first decision on the matter, in the *Asylum Case* of November 1950, the Court found that no custom existed on the rule concerning unilateral and definitive qualification of offences eligible for asylum—but it went on to say that “even if it could be supposed that such a custom existed between certain Latin American States only, it could not be invoked against Peru which, far from having its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions [on Political Asylum] of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in

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28. Such is the “paradox” of consent. See A.V. Lowe, *Preface*, in MATTHEW CRAVEN, *THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES* v (2007). *But see* Thirlway, *supra* note 11, at 122 (observing that the clean-slate theory for decolonized States was “later quietly abandoned by its adherents”); Vienna Convention on the Succession of States in Respect to Treaties art. 16, Aug. 23, 1978, 1946 U.N.T.S. 3 (“A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.”).

29. *Cf.* Lowe, *supra* note 27, at 208–09 (presenting the relationship between the general practice of States for the making of international custom and the concept of consent of States as one of reconciliation).

30. Jonathan I. Charney, *Universal International Law*, 89 AM. J. INT’L L. 529, 541 (1993) (“All arguments supporting the persistent objector rule are based on the view that international law is the product of the consent of states.”).



matters of diplomatic asylum.”<sup>31</sup> Just over a year later, in December 1951, the Court ruled in the *Fisheries Case* that the ten-mile rule for the closing lines of bays “would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.”<sup>32</sup>

For the Court, therefore, these cases were both about the actualization of persistent objection in practice,<sup>33</sup> or of “putting States outside the binding force of the rule.”<sup>34</sup> Both Peru and Norway were bound together in a sort of thematic unity as choice practitioners of persistent objection, even though the Court had found in each case that the rule in question—that is, the target of the respective persistent objections—possessed insufficient empirical foundations to command the force of law. A custom, or customary rule, as argued by Colombia and the United Kingdom respectively, did not therefore exist in the first place according to the Court—and even if the said rules had indeed come into existence, continued the Court in *obiter dicta* that were remarkably reminiscent of one another, neither would have been capable of binding its respective persistent objectors. Though the Court did not impart the precise requirements necessary for a successful persistent objection to occur, it is implicit from the jurisprudence of the Court that it relied on a certain construction of what was entailed by this process—that the persistent objector would need to ensure that its objections are made known simultaneous to formation of a given rule,<sup>35</sup> and that there must be some (though unspecified) durability to the objections that have been made (for Norway, the Court said, had “always opposed” the rule under discussion).<sup>36</sup> Objections must therefore be properly and appropriately timed, and they

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31. *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 277–78 (Nov. 20). As the Court pointed out, the 1933 Convention had at that point in time only been ratified by not more than eleven States; the 1939 Convention by two States only. *Id.* at 277.

32. *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116, 131 (Dec. 18).

33. *See generally* *Asylum Case*, 1950 I.C.J. 266; *Fisheries Case*, 1951 I.C.J. 116; *see also* *North Sea Continental Shelf Cases (Fed. Rep. of Ger. v. Den.; Fed. Rep. of Ger. v. Neth.)*, 1969 I.C.J. 3, 27 (Feb. 20) (observing that “as soon as concrete delimitations of North Sea continental shelf areas began to be carried out, the Federal Republic [of Germany] . . . at once reserved its position with regard to those delimitations which (effected on an equidistance basis) might be prejudicial to the delimitation of its own continental shelf areas”).

34. *See* *Lowe*, *supra* note 27, at 208.

35. *See* *BROWNLIE*, *supra* note 18, at 11-12 (stating that there can be no subsequent persistent objection, i.e. persistent objection subsequent to the formation of a given rule). *But see* Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 170 (2005).

36. *See generally* *Asylum Case*, 1950 I.C.J. 266; *see also* *Fisheries Case*, 1951 I.C.J. at 131.

must be, in a manner of speaking, persistent; we can safely assume that sporadic or isolated objections will not do.<sup>37</sup>

The persistent objections of both Peru and Norway on these occasions also had the effect of grounding the Court's scepticism of the advent of the international custom alleged before it: in the *Asylum Case*, the Court formed the view that the facts brought to its knowledge "disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence";<sup>38</sup> likewise, in the *Fisheries Case*, the Court had discerned too many vagaries in the practice of States from where it was standing.<sup>39</sup> In other words, in both sets of circumstances, the presence of persistent objection had served to underscore the disparities that were deemed to have riddled the practice before the Court but, as we have also found, the legal significance of a *finding* of persistent objection was more than that, at least in theoretical terms. According to the Court, even if the practice of States had been sufficient to tide a given rule past the requisite threshold of empirical foundation, that rule would not have (and, in the Court's reckoning, could not have) bound the persistent objector for the want of or the withholding of its consent. The value of the identification of persistent objection, therefore, is that it confers on the persistent objector State the status of not being bound by the rule to which it has given persistent objection—as and when that rule does command the force of law.<sup>40</sup>

Stated in these terms, it is clear that this construction of persistent objection relies on the temporal arc of a given rule—charting its lifespan, as it were—in order that the period for *permissible* persistent objection can

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37. See Bradley & Gulati, *supra* note 1, at 211 ("Persistent objection must involve affirmative international communications, not mere silence or adherence to contrary laws or practices, and there are few examples of agreed-upon successful persistent objection").

38. See *Asylum Case*, 1950 I.C.J. at 266.

39. See *Fisheries Case*, 1951 I.C.J. at 131 ("[T]he Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral tribunals have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.").

40. See Lowe, *supra* note 27, at 208.

be appropriately identified and made known: this must occur at some point from the perceived conception of the aforementioned rule right through to the moment of its crystallization as custom.<sup>41</sup> These markings on that arc—at the points of conception and crystallization of the aforementioned rule—might appear problematic terms to say the least and to provoke more questions than they are able to answer, but, in the absence of any further detailed instruction, they do provide a rough and ready field guide to the essential manifestations of persistent objection in practice. It is for this reason that we find analysis of persistent objection often interposed against “a developing rule of customary law,”<sup>42</sup> or, at other times, against so-called “emerging” customary international law.<sup>43</sup> That, then, is the function of these idioms of developing or emerging custom: it is to demarcate *when* the possibilities of persistent objection must be realized, seized and acted upon by States; it is not to suggest that there is any difference in legal terms between the position of non-persistent objector States and persistent objector States to a given rule *at any point during its formation*. That difference would only obtain *after* the formation or crystallization of a rule,

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41. See *Asylum Case*, 1950 I.C.J. 266 and *Fisheries Case*, 1951 I.C.J. 116. See also Bradley & Gulati, *supra* note 1, at 210 (discussing when the space between the point of conception of a rule and its crystallization might be unusually short or what has been described as “instant”); Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?*, 5 INDIAN J. INT’L L. 23, 37 (1965) (suggesting as an instance of instant international customary law General Assembly Resolutions 1721 (XVI) (Dec. 20, 1961) and 1962 (XVIII) (Dec. 13, 1963) on outer space when, he writes, “there is no reason why an *opinio juris communis* may not grow up in a very short period of time among all or simply some Members of the United Nations with the result that a new rule of international customary law comes into being among them” and “there is also no reason why they may not use an Assembly resolution to ‘positivize’ their new common *opinio juris*”). Perhaps another example of this phenomenon in action could derive from the 1960 Declaration on the Granting of Independence to Colonial Territories and Peoples, G.A. Resn. 1514 (XV) (Dec. 14, 1960), U.N. G.A.O.R. 15th Sess., Supp. 16, at 66, in which the General Assembly declared (in the fifth operative paragraph) that “[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.” It is the timing of action which the Resolution emphasizes for the realization of decolonization that is of interest to us here. See KAREN KNOP, *DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 74–75* (2002). See also D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW 105* (7th ed., 2010).

42. See Akehurst, *supra* note 13, at 26.

43. See Lowe, *supra* note 27, at 207. See also Bradley & Gulati, *supra* note 1, at 236 (“an emerging [customary international law] rule”).

so that we can tabulate the separate legal consequences for non-persistent objector and persistent objector States thus:<sup>44</sup>

	Emerging Custom	Established Custom
Non-Persistent Objector State	( <i>x</i> ) Not Bound	( <input checked="" type="checkbox"/> ) Bound
Persistent Objector State	( <i>x</i> ) Not Bound	( <i>x</i> ) Not Bound

This diagrammatic representation of the legal significance of persistent objection is not, however, complete, since it does not factor into its findings the legal position of the persistent objector State in respect of peremptory norms of public international law, or *jus cogens*.<sup>45</sup> Can a State enter persistent objections to a rule of this designation or character? It will be recalled that such rules are defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties as those “accepted and recognized by the international community of States as a whole [and] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” This statement is important because of the extent to which it defines *jus cogens*

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44. Were it at all otherwise, the legal significance of persistent objection would be reflected on the front of emerging custom—and not, as is represented in tabulated form above, on the front of established custom. *Contra* Lowe, *supra* note 27, at 208. On this account of things, the non-persistent objector State and persistent objector State alike would be bound by established custom, but, additionally, the non-persistent objector State would be bound by emerging custom, whereas, in direct consequence of its persistent objection, the persistent objector State would not be. If this were so, the non-persistent objector State would therefore be bound in equal terms by *both* emerging as well as established custom, in a version of persistent objection that could be rendered thus:

	Emerging Custom	Established Custom
Non-Persistent Objector State	( <input checked="" type="checkbox"/> ) Bound	( <input checked="" type="checkbox"/> ) Bound
Persistent Objector State	( <i>x</i> ) Not Bound	( <input checked="" type="checkbox"/> ) Bound

But can this really be so? Does it not credit “emerging custom” with an authority that it does not really deserve? Is it at all proper to equate emerging custom with established custom in this way? If not, what, then, is the exact utility of the concept of “emerging custom”? As a descriptive rather than normative device—but descriptive of what exactly? A harbinger of future normative change—a sign of things to come perchance—and no more? Could it not therefore form part of the phenomenon to which we now attach the appellation of “international soft law”? *Accord* C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850 (1989).

45. See John Tasioulas, *Customary International Law and the Quest for Global Justice*, in THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 307, 310 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007).

by reference to general international law,<sup>46</sup> so that candidates for *jus cogens* would appear to be forthcoming from that pool of existing norms that can already claim the status of general international law, or of custom.<sup>47</sup>

Furthermore, as far as the Vienna Convention is concerned, we have a clear sense that the consent of each and every State is *not* required for the making of *jus cogens*, because what matters for rules of that character is the acceptance and recognition of each of these rules by (in the words of the Convention) *the international community of States as a whole*.<sup>48</sup> The fact that rules of *jus cogens* status do not admit any derogation—the Vienna Convention is quite categorical on this point, even though its *travaux préparatoires* might not spell out the full implications of this position—distinguishes such rules from rules of international custom, and provides commanding evidence of a limitation on the possibilities for persistent objection in public international law: “The very concept of *jus cogens* makes it reasonable to argue that peremptory rules do not admit of any persistent objection. If the purpose of peremptory rules is to allow the common interest of States to prevail over the conflicting interest of a single State or a small number of States, this purpose would be frustrated if that State or a small number of States were allowed to escape the application of

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46. VCLT, *supra* note 2, at art. 53 (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”) (emphasis added). *See also id.* at art. 64 (concerning the emergence of “a new peremptory norm of general international law”, when “any existing treaty which is in conflict with that norm becomes void and terminates.”) (emphasis added).

47. *But see, e.g.*, Jacob Werksman & Ruth Khalastchi, *Nuclear Weapons and Jus Cogens: Peremptory Norms and Justice Pre-empted*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 181, 188 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999) and Mary Ellen Turpel & Philippe Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONNECTICUT J. INT’L L. 364 (1988).

48. An observation that cannot be overstated: *see* James Crawford, *Responsibility to the International Community As A Whole*, 8 INDIANA J. GLOBAL LEGAL STUDIES 303 (2001) and Juan Antonio Carrillo Salcedo, *Reflections on the Existence of A Hierarchy of Norms in International Law*, 8 EUROPEAN J. INT’L L. 583, 588 (1997). However, note that:

[A]ll states consent to a secondary rule of law-creation which deems all states which have not persistently objected to an emerging (i.e., substantive) rule of law to be bound by it, without being at all concerned with the question [of] whether or not such states consent to the primary rule, whenever the primary rule is “generally accepted” by states. Here the consensual nature of international law is preserved in the requirement of consent to the secondary rule, although it is excluded in the case of the primary rule.

*Cf.* Lowe, *supra* note 27, at 208 (comparing the construction of custom). A similar line of reasoning, that of attenuated consent, could be adopted as the basis of the secondary rule governing the creation of *jus cogens*—States who are parties to the Vienna Convention are bound by its terms, including Arts. 53 and 64—except that the concept of *jus cogens* does not admit persistent objection, *infra* notes 49 and 50; note, too, that the concept has been described as “one that is not widely endorsed by State practice.” *See* Dinah Shelton, *International Law and “Relative Normativity”*, in INTERNATIONAL LAW 159, 164, 166 (Malcolm D. Evans ed., 2006). *Cf.* Bradley & Gulati, *supra* note 1, at 212 (conceiving norms of *jus cogens* as arising from “nearly universal practice”).

a peremptory rule on the ground of persistent objection.”<sup>49</sup> Others have written of how the “primary purpose” of *jus cogens* would appear to be “to override the will of persistent objectors to a norm of customary international law.”<sup>50</sup> Given this state of affairs, a more complete tabulation of the possibilities for, as well as the limitations of, persistent objection might well be set out in the following terms:

	Emerging Custom	Established Custom	<i>Jus Cogens</i>
Non-Persistent Objector State	(x) Not Bound	(√) Bound	(√) Bound
Persistent Objector State	(x) Not Bound	(x) Not Bound	(√) Bound

### III. A CONTEXTUAL APPRECIATION OF THE FORMAL SOURCES OF PUBLIC INTERNATIONAL LAW

The focus on the formal sources of public international law as analogous sources, one directly comparable to the other, tends to detract from the view which emphasizes the distinctiveness of each of these formal sources in terms of their respective function and histories,<sup>51</sup> but also, and in turn, their *interaction* with one another in the overall scheme of things. It has been appropriately observed that the formal sources in the Statute of the International Court of Justice “are not self-contained but interrelated, and each source gives rise to rules which have to be understood against the background of rules deriving from other sources, so that any non-consensual element in one source of law may indirectly affect the rules deriving from other sources.”<sup>52</sup> We might term this a contextual appreciation of Article 38 (1) of the Statute, and of the functioning of the formal sources in practice, and it is evident from the four Geneva Conventions of August 1949—which, even though they authorize exit as “treaties that reflect core principles of international public policy,”<sup>53</sup>

49. MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* 67 (1997). See also Shelton, *supra* note 48, at 162.

50. Shelton, *supra* note 48, at 172-73 (“[*Jus cogens* is a necessary development in international law, required because the modern independence of States demands an international *ordre public* containing rules that require strict compliance.”).

51. See Simma & Alston, *supra* note 7.

52. OPPENHEIM’S, *supra* note 9, at 25 (§9); see also Charlesworth, *supra* note 17, at 12-15.

53. Bradley & Gulati, *supra* note 1, at 204. As does the 1968 Nuclear Non-Proliferation Treaty, 729 U.N.T.S. 161:

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have

provide that denunciation of the Conventions “shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.”<sup>54</sup>

The Geneva Conventions, then, do not envisage conventional arrangements as operating in a normative vacuum, a space free of all other constraints and regulations, but as belonging to an evolving and highly intricate order that continues to bind *parties to an international armed conflict* notwithstanding their status as *High Contracting Parties* to the Geneva Conventions. The Conventions do this by appealing to the Martens Clause,<sup>55</sup> most famously expressed in the preamble to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex, and which provided that “[u]ntil a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience.”<sup>56</sup> This is done in the very provision that professes the possibilities of denunciation of the Geneva Conventions; there is no equivalent statement to appear in the provision regarding denunciation in

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jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests (art. X (1)).

54. Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 142, Aug. 12, 1949, 75 U.N.T.S. 135. This provision, is, however, common to all four Geneva Conventions. *See also* Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 63, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 62, Aug. 12, 1949, 75 U.N.T.S. 85, and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 158, Aug. 12, 1949, 75 U.N.T.S. 287. *See also* Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 99, June 8, 1977, 1125 U.N.T.S. 3 and Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 25, June 8, 1977, 1125 U.N.T.S. 609. For their part, the High Contracting Parties of the Vienna Convention on the Law of Treaties affirmed in its preamble “that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.” VCLT, *supra* note 2, at pmb1. *See also* AUST, *supra* note 2, at 11-14.

55. *See* MARCO SASSÒLI & ANTOINE A. BOUVIER, I HOW DOES THE LAW PROTECT IN WAR? 132 (2d ed., 2006).

56. Hague Convention (II) with Respect to the Laws and Customs of War on Land preamble, § 2, July 29, 1899, 32 Stat. 1803. The Regulations Respecting the Laws and Customs of War on Land were attached as the Annex to the Convention.

the First Additional Protocol (which carries the modern iteration of the Martens Clause in the operative part of its text),<sup>57</sup> or in the Second Additional Protocol (which pays its homage to the clause in the penultimate paragraph of its preamble).<sup>58</sup>

We see this holistic engagement with the formal sources of public international law steadily at work in the advisory opinion of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons* in July 1996, where the Court was prepared to consider what it called the “present *corpus juris*” of nuclear weapons in its entirety.<sup>59</sup> It did so by examining the conventional position on nuclear weapons before turning to the position of custom on such weapons,<sup>60</sup> where it took account of the resolutions of the General Assembly; for the Court, these could hold “normative value”<sup>61</sup> in terms of the evidence they provide of the *opinio juris sive necessitatis* of States,<sup>62</sup> but also in terms of their actual content: “that application,” by the General Assembly, in Resolution 1653 (XVI) of November 24, 1961, “of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons.”<sup>63</sup> No conventional or customary prohibition of nuclear weapons was found to exist by the Court,<sup>64</sup> but it then moved to consider the principles and rules of international humanitarian law that were applicable.<sup>65</sup> The Court spoke of the “large number of customary rules” that had been developed by States for the regulation of international armed conflicts as well as the neutral

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57. Geneva Protocol I, *supra* note 54, art. 1(2).

58. And its manner of doing so—“that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience”—has been taken to reflect the paucity of the customary regulation of non-international armed conflicts at that point in time: in a notable reformulation of the Martens Clause in the Second Additional Protocol, the principles of humanity and the dictates of public conscience are mentioned but “the usages established between civilized nations” are not. Geneva Protocol II, *supra* note 54, at pmb1. See also Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EUR. J. INT’L L. 187, 209 (2000).

59. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 237 (July 8). See also William R. Hearn, *The International Legal Regime Regulating Nuclear Deterrence and Warfare*, 61 BRITISH Y.B. INT’L L. 199, 222-25 (1990) (discussing the derivation of customary international law regarding the use of nuclear weapons from both State actions as well as State statements of belief).

60. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. at 253.

61. *Id.* at 254.

62. *Id.* at 255.

63. *Id.* (“[I]f such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification.”).

64. *Id.* at 256.

65. *Id.*



relations of States for the duration of those armed conflicts (i.e. as between belligerent States and non-belligerent States), before it made reference to “a body of legal prescriptions”<sup>66</sup> and “cardinal principles” that constituted what the Court called “the fabric of [international] humanitarian law.”<sup>67</sup>

Those cardinal principles were identified as the principle of distinction between combatants and non-combatants and the principle of unnecessary suffering,<sup>68</sup> and it is in this context that the Court formed its conclusion that:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” as the Court put it in its Judgment . . . in the *Corfu Channel* case . . . that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.<sup>69</sup>

The Court was therefore approaching these “cardinal principles” from the angle of their status as custom—hence “intransgressible principles of *international customary law*.”<sup>70</sup> At this precise moment, it was not resorting to the patois of general principles of law—to Article 38 (1) (c) of its Statute—to render the formal validity of the two principles that it had in its sights,<sup>71</sup> even though one is tempted to ask after the place and

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66. *Id.* at 256-61.

67. *Id.* at 257.

68. *Id.*

69. *Id.* at 257.

70. *Id.* (emphasis added).

71. This is confirmed in the paragraphs immediately following the Court’s statement of “intransgressible principles of international customary law,” where the Court invoked the conclusion of the Nuremberg International Military Tribunal that the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land “were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war,” *id.* at 258 (quoting Trial of the Major War Criminals Before the International Military Tribunal), and the position of the United Nations Secretary-General in introducing the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (where the Secretary-General maintained that “the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law”), *id.* (quoting The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶¶ 34, 35, U.N. Doc. S/25704 (May 3, 1993) (second emphasis added). It is then that the Court delivered the following verdict:

The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification

possibilities for general principles of law beyond mere “domestic derivatives.”<sup>72</sup> The fact of the Court’s quantification of both of these international customs as “intransgressible”<sup>73</sup> might suggest that the Court

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instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States.

*Id.* Consider, too, the position of the Court in its *Nicaragua* judgment when it concluded that “the conduct of the United States may be judged according to the fundamental general principles of humanitarian law; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles.” *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 113 (June 27).

72. See BROWNIE, *supra* note 18, at 17-19 (discussing general principles of international law). But could the principles under discussion truthfully qualify as “general” principles of law? As examples of “this type of general principle,” Brownlie mentions the principles of consent, reciprocity, equality of States, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction and the freedom of the high seas. *Id.* at 17. See also JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 128-29 (2003). The principle of proportionality might constitute another such example, but, in its advisory opinion, the Court found that “[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.” *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. at 245. This considers the “principle” of proportionality in the context of the *jus ad bellum*; as far as its relevance for the *jus in bello* is concerned, the Court observed that “any right of recourse to [belligerent] reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality.” *Id.* at 246. *But see* Christopher Greenwood, *Jus ad bellum and jus in bello in the Nuclear Weapons Advisory Opinion*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, *supra* note 21, at 261-62; *see also* JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 169 (2004). It is Judge Rosalyn Higgins who gave a fuller understanding of the function of the principle of proportionality in respect of the *jus in bello* in her dissenting opinion, when she wrote: “The principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.” *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. at 587 (dissenting opinion of Judge Higgins). To be sure, the Court had earlier said that “States must take environmental considerations into account *when assessing what is necessary and proportionate in the pursuit of legitimate military objectives*. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.” *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. at 242 (emphasis added). The Court was addressing the matter of the protection of the environment *during an armed conflict*.

73. Note that the Court later found that “international law leaves no doubt that the principle of neutrality, whatever its content, *which is of a fundamental character similar to that of the humanitarian principles and rules*, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.” *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. at 261 (emphasis added). *See also* Luigi Condorelli, *International Humanitarian Law, Or the Court’s Explanation of a Terra Somewhat Incognita To It*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, *supra* note 21, at 234.

had deftly accorded them the ranking of *jus cogens*,<sup>74</sup> and that it had devised an imaginative vocabulary for conferring peremptory status upon them for, whatever else this term might or might not mean, it would appear to foreclose *any* possibilities of and for persistent objection to the customs under discussion.<sup>75</sup> However, an alternative reading of the dynamic of these international customs would be that it is precisely because *no State* had entered persistent objections to them during the period of their formation that the Court felt the confidence to describe them as “intransgressible”—that is that no State could lawfully transgress them, even as a *prima facie* matter.<sup>76</sup> In other words, the period for any permissible persistent objection to these fundamental rules—or cardinal principles—of distinction and unnecessary suffering had long since lapsed, and the Court reached this conclusion without any apparent need for recourse to the concept of *jus cogens*: it is then and only then, after its finding of the intransgressible

74. For such an intimation, consider Shelton, *supra* note 48, at 168 (“Whether ‘intransgressible’ means the rules are peremptory or only that they are general customary international law legally binding on States not party to the conventions that contain them is uncertain.”). See also Werksman & Khalastchi, *supra* note 47, at 183.

75. Ditto the “fundamental character” of the principle of neutrality. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. at 261. The International Committee of the Red Cross took “no view” on the possibilities for persistent objection in its recent compendium on customary international humanitarian law: I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxxix (2005) (Jean-Marie Henckaerts & Louise Doswald-Beck eds.). However, it also claimed, *id.* at 151, that “[i]t appears that the United States is a ‘persistent objector’” to the first part of Rule 45 (“The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited”) and that France, the United Kingdom and the United States “are persistent objectors with regard to the application of the first part of this rule to the use of nuclear weapons.” *Id.* This latter statement is cast in much more concrete terms than the former concerning only the United States, and *does* entail that the International Committee of the Red Cross took a view on the possibilities of persistent objection to customary international humanitarian law: France, the United Kingdom and the United States are here described as actual—rather than apparent—persistent objectors. However, a few pages further into the study, the International Committee of the Red Cross resumes its cautiousness and non-committal language, since these three States are described as being:

specially affected as far as possession of nuclear weapons is concerned, and their objection to the application of this specific rule [i.e. Rule 45] to such weapons has been consistent since the adoption of this rule in treaty form in 1977. Therefore, if the doctrine of “persistent objector” is possible in the context of humanitarian rules, these three States are not bound by this specific rule as far as any use of nuclear weapons is concerned.

*Id.* at 154-55 (emphasis added). See also Camilla G. Guldhal, *The Role of Persistent Objection in International Humanitarian Law*, 77 NORDIC J. INT’L L. 51 (2008). On reasons why international humanitarian law might not admit persistent objection, see Werksman & Khalastchi, *supra* note 47, at 194-96.

76. Perhaps a third possible interpretation of this controversial formulation is to regard it as tautologous—as the Court saying no more than that the intransgressibility of these principles stems from their status as customary international law, i.e. the principles are intransgressible *by virtue of* their existence of custom—but it is not clear why the Court would have chosen to approach matters with a statement of the obvious in quite this way.

character of these principles of international custom,<sup>77</sup> that the Court went on to declare:

It has been maintained in these proceedings that these principles and rules of [international] humanitarian law are part of *jus cogens* as defined in . . . the Vienna Convention on the Law of Treaties . . . The question whether a norm is part of the *jus cogens* relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of [international] humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the [international] humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on the matter.<sup>78</sup>

### CONCLUSION

This short Article should give us some pause to reflect upon the *individuality* of each of the formal sources of public international law as presented in Article 38 (1) of the Statute of the International Court of Justice—and to conclude that, despite appearances and popular perceptions, they are each governed by different sets of premises and imperatives, and relate in different ways and with different nuances to the concept of the consent of States.<sup>79</sup> The International Court of Justice has recognized this, most vividly in its decision in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* in June 1986, where it held that “even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty law must deprive the customary norm of its applicability as distinct from that of the treaty norm.”<sup>80</sup> We could say as much for the relationship between international custom and *general principles of law recognized by civilized nations*,<sup>81</sup> as we could the relationship between general principles of law recognized by civilized nations and international conventions.<sup>82</sup>

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77. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. at 267.

78. *Id.* at 258.

79. *See, e.g.*, note 48.

80. *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 94-95 (June 27).

81. *See* Peter Hulst, *Three Sources—No River, A Hard Look at the Sources of Public International Law with Particular Emphasis on Custom and “General Principles of Law”*, 54 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 219 (1999).

82. *See* ANTONIO CASSESE, INTERNATIONAL LAW 188 (2d ed. 2005).

Importantly, therefore, the formal sources of law exist and continue to exist alongside one another, so that one “source” should not be pursued or applied to the exclusion of other considerations or “sources,”<sup>83</sup> and, throughout, we should be alert to the possibilities of overlap or coincidence.<sup>84</sup> Within this framework, we have examined the possibilities of and for persistent objection against international customs, an exercise that has helped illuminate what the *differences* between and among the formal sources of public international law might be, but, as outlined in the preceding pages, it has also made plain the importance of further work in calculating what these differences actually are, as well as why they are what they are.

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83. See Charlesworth, *supra* note 17, at 12-15; see also Oscar Schachter, *Entangled Treaty and Custom*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 717 (Yoram Dinstein & Mala Tabory eds., 1989). Even *within* a conventional regime, the Vienna Convention on the Law of Treaties envisages that, for the purposes of treaty interpretation, “[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties” (Art. 31 (3)). VCLT, *supra* note 2, at 12-13.

84. In the *Nicaragua Case*, the Court found that “[t]he areas governed by the two sources of law . . . do not overlap exactly, and the rules do not have the same content.” *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27).