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## Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation

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# CUSTOMARY LAW WITHOUT CUSTOM? RULES, PRINCIPLES, AND THE ROLE OF STATE PRACTICE IN INTERNATIONAL NORM CREATION

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## I. THE SOURCES OF UNWRITTEN INTERNATIONAL LAW

Unwritten norms play a crucial role in international law. While customary law has nearly no significance in national legal orders, it is still an important source of international law, despite the growing importance of treaty law. This is due to the lack of central legislation. The body of written norms alone cannot serve as a basis for a coherent legal order with the consequence that the *lacuna* must be filled by unwritten rules and principles.

However, theories of the sources of unwritten international law are problematic. Despite the importance of customary law, the criteria for the identification of customary norms are less than clear. Although Article 38(1)(b) of the Statute of the International Court of Justice ("ICJ Statute")<sup>1</sup> defines custom as a general practice that has been accepted as law, there is no consensus on how to elucidate the two elements of this definition. In particular, the element of state practice is subject to controversy.<sup>2</sup> Scholars have debated what kind

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1. Statute of the International Court of Justice art. 38 para. 1, June 26, 1945, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187.

2. See Holger Hestermeyer, *Access to Medication as a Human Right*, in 8 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 101, 159 (Armin von

of activity constitutes state practice and disagree on the duration and frequency of the activity that is necessary to satisfy the definition.<sup>3</sup> Further, it seems practically impossible to ascertain the practices of the nearly 200 states in the international community. Thus, a survey of customary international law is often highly selective and takes into account only major powers and the most affected states.<sup>4</sup> But even in this smaller focus there is no adequate and systematic method for proving the elements of custom. Consequently, international law arguments based on custom always suffer from a considerable degree of arbitrariness.<sup>5</sup>

This Article seeks to analyze the role of state practice in the formation of unwritten international legal norms. I will argue that certain categories of legal norms should be classified as general principles of international law instead of custom, and thus should not require the proof of state practice as a constituent element. I will undertake this analysis in three stages: First, I will sketch methodological developments in the identification of customary international law. Second, I will outline and explain my argument in more detail. Finally, I will analyze the role of state practice as an

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Bogdandy & Rüdiger Wolfrum eds., 2004) (noting the lack of definite rules for recognizing customary international law).

3. See ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 58 (1971) (noting that there is no consensus as to how much time a practice must be maintained to evidence the existence of a custom); G. I. Tunkin, *Remarks On the Juridical Nature of Customary Norms of International Law*, 49 CAL. L. REV. 419, 420 (1961) (arguing that the element of time is not dispositive as to whether a customary law exists).

4. See KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 81 (1964) (acknowledging that factors such as wealth, power, and size play a role in the formation of international custom); Michael Byers, *Introduction: Power, Obligation, and Customary International Law*, 11 DUKE J. COMP. & INT'L L. 81, 84 (2001) (suggesting that an emphasis on state practice in the formation of customary international law has the inequitable result that international legal norms will disproportionately favor wealthier states).

5. See Hestermeyer, *supra* note 2, at 158 (arguing that uncertainty in the area of customary international law is growing); Onuma Yasuaki, *A Transcivilization Perspective on Global Legal Order in the Twenty-first Century: A Way to Overcome West-centric and Judiciary-centric Deficits in International Legal Thoughts*, in *TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY* 151, 179 (Ronald S.J. Macdonald & Douglas M. Johnston eds., 2005) (criticizing the manner in which western scholars identify state practice).

element of customary law and show that it is not a necessary element for the formation of all unwritten law.

#### A. CUSTOM: FROM INDUCTIVE TO INTERPRETATIVE APPROACHES

Practice was the crucial constituent element in the traditional understanding of customary international law. Courts and international tribunals concentrated on this objective element and tried to identify certain patterns of state behavior. Customary law was thus determined with an inductive approach by collecting and systematizing facts of state conduct.<sup>6</sup> Consequently, it is not astonishing that some authors, such as Guggenheim and Kelsen, proposed to dispense with *opinio juris* as a constituent element of custom and to rely only on practice.<sup>7</sup>

However, the method of establishing rules of customary law has changed significantly in modern legal scholarship. The range of state behavior that is considered practice has broadened in scope considerably. Not only explicit conduct, but also paper practice—such as the conduct and pronouncements of international organizations—is recognized as practice by a majority of legal scholars.<sup>8</sup> Moreover, the scholars have increasingly begun to

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6. See Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, in 4 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 153, 216 (1993); see also, e.g., S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) (holding that binding international law derives from the will of states as expressed via their actions and in conventions generally accepted as expressing principles of international law).

7. Paul Guggenheim, *Les Deux Eléments de la Coutume en Droit International*, in LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC: ETUDES EN L'HONNEUR DE GEORGES SCHELLE 275-84 (Charles Rousseau ed., 1950); Hans Kelsen, *Théorie du droit international coutumier* [*Theory of International Customary Law*], 1 REVUE INTERNATIONALE DE LA THÉORIE DU DROIT 253-74 (1939) (Fr.). Both have, however, revised their opinion in later contributions. See HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 440 (Robert W. Tucker 2d ed. 1966) [hereinafter KELSEN, PRINCIPLES] (adding a second element to the definition of custom: that the individuals exercising the relevant action or abstention are convinced that they fulfill a duty or exercise a right); PAUL GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC [TREATISE OF INTERNATIONAL LAW] 101 (Librairie de l'Université, Georg & Cie S.A. 1967) (Fr.).

8. See Rudolf Bernhardt, *Customary International Law*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 898, 900 (Rudolf Bernhardt ed., 1992) (asserting that omissions by states are evidence of customary law and that any state agency can contribute to that state's customary law); Michel Virally, *Le Rôle des*

emphasize the hierarchical structure of the international legal order. In such approaches, interpretative methods of norm identification have gained in importance as against a strict analysis of behavioral patterns.<sup>9</sup>

Indeed, references to state practice are often only a formality. In the field of international human rights, certain obligations are widely accepted to form part of customary law.<sup>10</sup> These include the prohibition of genocide, slavery, torture and other cruel, inhumane or degrading treatment or punishment, prolonged arbitrary detention,

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*"Principes" dans le Développement du Droit International [The Role of "Principles" in the Development of International Law], in RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM [COLLECTION OF STUDIES ON INTERNATIONAL LAW IN TRIBUTE TO PAUL GUGGENHEIM] 531, 550 (1968) (Fr.) (demonstrating that a declaration of principle constitutes a method of establishing a rule of customary law); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 124-25 (2005) (suggesting that diplomatic correspondence, treaties, statements by heads of state, and domestic laws can serve to demonstrate state practice); see also Michael Akehurst, *Custom as a Source of International Law*, in THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1974-1975, at 1, 4 (1977) (canvassing and criticizing the debate among scholars regarding whether a given category of state action merely confirms the existence of an already recognized custom or whether such state action is being employed by a state with a view to the establishment of custom). Although this broad approach to state practice is disputed, it reflects the majority of academic commentators and the legal jurisprudence. See Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523, 525-30 (2004) (distinguishing between the subjective and objective elements, with respect to the formation of customary law, that are present in the practices of any state).*

9. See, e.g., Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, in 281 RECUEIL DES COURS 9, 86 (1999) (noting that the process of "hierarchization" has increased over the last decade as scholars have attempted to define the scope of *jus cogens* and *erga omnes* obligations). Some have criticized this development, however, on the grounds that the norms underlying the international legal order must be of high quality if the goal of governing international relations is to be achieved. See generally Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).

10. See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987); Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 133 (1977) (noting that even states that have expressed doubt concerning the legality of the Universal Declaration of Human Rights have invoked it when other states have violated the terms of that instrument).

and systematic racial discrimination.<sup>11</sup> However, these rights are far from being guaranteed universally around the globe. It suffices to read reports of the U.N. Human Rights Commission or of Amnesty International to become aware that these guarantees are still violated in a systematic manner by many states.<sup>12</sup>

Further evidence of the declining importance of state practice as a constituent element can be found in the jurisprudence of the International Court of Justice ("ICJ"). In *Military and Paramilitary Activities ("Nicaragua judgment")*,<sup>13</sup> the ICJ still defined customary law as consisting of state practice and *opinio juris*.<sup>14</sup> However, in its subsequent analysis of the facts, the ICJ concentrated exclusively on the subjective element of *opinio juris* without directing any analysis to actual state conduct.<sup>15</sup> Thus, the court in principle had upheld the traditional two-pronged approach, while in substance it only examined *opinio juris*.<sup>16</sup>

### 1. Customary Law Without Consuetudo

Considering this trend towards an interpretative approach to customary law, it is not surprising that several authors propose to concentrate on the *opinio juris* element of custom, whether for specific fields of law or for customary law in general. According to these approaches state practice retains merely an auxiliary function to determine *opinio juris*.

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11. See Simma, *supra* note 6, at 219; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. a (listing only such human rights protections whose customary status had been established as of 1987).

12. See, e.g., Office of the United Nations High Commissioner for Human Rights, *Annual Report 2006*, available at <http://www.ohchr.org/Documents/AboutUs/annualreport2006.pdf> (highlighting human rights abuses across the globe).

13. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (referring to the dispute between the United States and Nicaragua in relation to the fall of the Nicaraguan government in 1979 and the United States' support for and involvement with the "contras").

14. See *id.* at 97.

15. See *id.* at 98-104.

16. See Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 97 (1988) (criticizing the ICJ for not analyzing the specific conduct of states to ascertain whether customary law prohibited the actions of the United States in the *Nicaragua judgment*).

The first author to have proposed the abandonment of the requirement of *consuetudo* was Bin Cheng, when he claimed that the emergence of instant custom was possible if a consensus among states on the existence of a certain rule could be identified.<sup>17</sup> In Bin Cheng's opinion, the U.N. Resolutions on Outer Space,<sup>18</sup> which had been adopted unanimously, constituted instant customary law and required no further proof of state practice. He argues that there is logically no room for other constituent elements if there is already a clearly established consensus among states.<sup>19</sup>

Andrew Guzman's rational choice approach to international law takes the same direction.<sup>20</sup> Guzman's approach supposes that the validity of an unwritten international law is dependent on state compliance. A customary rule is established when it influences state conduct because of its legal nature.<sup>21</sup> Consequently, only the subjective evaluation of rules by states is relevant for the determination of customary law.<sup>22</sup> State practice may provide evidence of *opinio juris*, but state practice need not be shown to prove the existence of customary law.<sup>23</sup>

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17. See Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23, 35-40 (1965).

18. See G.A. Res. 1721, U.N. GAOR, 16th Sess., Supp. No. 17, U.N. Doc. A/5100 (Dec. 20, 1961); G.A. Res. 1962, U.N. GAOR, 18th Sess., Supp. No. 15, U.N. Doc. A/5515 (Dec. 13, 1963).

19. See Bin Cheng, *On the Nature and Sources of International Law*, in INTERNATIONAL LAW, TEACHING, AND PRACTICE 201, 222-29 (Bin Cheng ed., 1982) (arguing that usage is not necessary when there is unanimity among states regarding a rule of international law).

20. See Guzman, *supra* note 8, at 122 (defining the rational choice approach as one that looks to the incentives for states to behave in a particular manner).

21. See *id.* at 139-40.

22. See *id.* at 148-49.

23. See *id.* at 149 (noting that state practice can serve as a tool for discerning *opinio juris* by identifying a state's intent to be bound by a norm). However, the majority of the rational choice approaches still consider state practice to be a constituent element of custom. See Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 567-68 (2002) (asserting that *opinio juris* without practice is "nothing more than rhetoric"); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 541 (2005) (rejecting the Goldsmith-Posner model of rational choice theory, arguing that their model remains unsupported). Still others deny the legal quality of international law. See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005) (reasoning that international law evolves as a result of states acting



Other authors do not reject the requirement of state practice in general. Some scholars have proposed to consider certain declarations of the U.N. General Assembly, such as the Universal Declaration of Human Rights,<sup>24</sup> as directly binding because they represent the consensus of the international community.<sup>25</sup> Other scholars want to differentiate between different types of customary norms. While state practice is considered suitable for the establishment of coordinative rules, it is deemed inappropriate for norms enshrining fundamental moral principles.<sup>26</sup>

The approaches to redefining customary law by suppressing state practice as a constituent element have received much criticism. Famous is the statement of Robert Jennings, who wrote that what most modern scholars qualify as customary law "is not only *not* customary law: it does not even faintly resemble a customary law."<sup>27</sup> By its very notion, custom requires a *consuetudo*, the existence of state practice. Moreover, Article 38(1)(b) of the ICJ Statute,<sup>28</sup> which is generally accepted as the principal authority for the sources of international law,<sup>29</sup> defines customary law as "*general practice*

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rationally to maximize their interests, according to the distribution of state power, and the perceptions of other states' interest).

24. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

25. See Sohn, *supra* note 10, at 133; Humphrey Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, 11 INT'L & COMP. L. Q. SUPP. 1, 15 (1965). See also Yasuaki, *supra* note 5, at 176-89 (suggesting that U.N. General Assembly Resolutions are to an extent more reliable as a source of universal norms than is customary law).

26. See Fernando R. Tesón, *Two Mistakes about Democracy*, 92 AM. SOC'Y INT'L L. PROC. 126, 127 (1998) (arguing that it is inappropriate to condition the identification of norms concerning fundamental moral principles on the presence of a state practice).

27. See Robert Y. Jennings, *The Identification of International Law*, in INTERNATIONAL LAW, TEACHING, AND PRACTICE, *supra* note 19, at 3, 5.

28. Statute of the International Court of Justice, *supra* note 1, art. 38, para. 1.

29. See, e.g., David A. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. INT'L & COMP. L. REV. 331, 359 n.124 (2007) (citing the ICJ Statute as an authority on the hierarchy of sources of international law).

accepted as law.”<sup>30</sup> State practice under such a definition is thus an indispensable element of custom.<sup>31</sup>

## 2. *Sliding Scale Approaches*

A further group of scholars<sup>32</sup> advocate a more flexible relationship between the two constituent elements of custom without wishing totally to abandon one of them. These authors argue that state practice and *opinio juris* are rather supposed to interact on a sliding scale. According to them, the existence of frequent and consistent state practice lightens the burden of proving *opinio juris*, while a clearly demonstrated *opinio juris* establishes a customary rule without any need to show an affirmative state practice.<sup>33</sup> Thus, where one is presented with a custom between these two extremes, it is necessary to prove both elements. The stronger one element can be shown, the less need there is for the other in order to demonstrate the existence of a customary norm. Some scholars propose to include some substantive considerations according to which the lack of state practice can only be balanced if the norms have a moral impact.<sup>34</sup>

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30. Statute of the International Court of Justice, *supra* note 1, art. 38, para. 1 (emphasis added).

31. See, e.g., Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 132 (2007) (discussing the practice and behavior of states as a widely accepted element of customary international law under both Article 38(1)(b) and the Restatement (Third) of Foreign Relations Law § 102).

32. See Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 149 (1987) (describing the trade off between state practice and *opinio juris* and illustrating the relationship graphically); John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. LEGAL STUD. 85, 109 (1996) (analyzing various arguments that place more emphasis on either state practice or *opinio juris* and concluding that custom must be derived on a case by case basis from some combination of the two); Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 774 (2001) (advocating an approach to custom that reflects both state practice and *opinio juris* in equilibrium, and critiquing the sliding scale approach due to its tendency to overemphasize one component at the expense of the other).

33. See Kirgis, Jr., *supra* note 32, at 149 (describing the sliding scale approach and explaining that an affirmative showing of one component may substitute for the other, particularly in cases of “morally distasteful” or “destabilizing” activity).

34. See Tasioulas, *supra* note 32, at 113 (arguing that the sliding scale approach is a particularly appropriate interpretation of norm identification in cases where the norm at issue expresses an important moral value, such as peaceful co-

These approaches are, however, subject to the same critique as those we have dealt with previously.<sup>35</sup> Customary law without custom is difficult to imagine.

### 3. *From Legal Methodology to Equity*

This confusion in the legal doctrine underlying customary law has led Martti Koskenniemi to the conclusion that it is impossible to justify human rights by positive legal reasoning:

But it is also, and more fundamentally, useless because we do not wish to condone anything that states may do or say, and because it is really our certainty that genocide or torture is illegal that allows us to understand state behaviour and to accept or reject its legal message, not state behaviour itself that allows us to understand that these practices are prohibited by law. It seems to me that if we are uncertain of the latter *fact*, then there is really little in this world we can feel confident about.<sup>36</sup>

Thus, Koskenniemi proposes that human rights should not be introduced into the positivist discourse in order not to deprive them of their critical potential.<sup>37</sup> This, indeed, is a surrender before the challenges of modern legal doctrine. However, these challenges have to be addressed if human rights in particular and unwritten international law in general are to be taken seriously.

## B. GENERAL PRINCIPLES

The most promising proposal has been brought forward by Bruno Simma and Philip Alston in a seminal article on the sources of human rights law.<sup>38</sup> After a thorough analysis of the present theory of customary international law, they propose to use general principles in

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existence); Roberts, *supra* note 32, at 790 (explaining that occasional state practice in breach of a custom with high moral content will not detract from the custom's general character).

35. See *supra* notes 28-31 and accompanying text (discussing state practice as a component of customary law by definition).

36. Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1952 (1990) (emphasis added).

37. See *id.* at 1962 (arguing that technical definitions of human rights best serve arguments in support of denying rights).

38. See generally Simma & Alston, *supra* note 16.

the sense of Article 38(1)(c) of the ICJ Statute<sup>39</sup> as sources of fundamental human rights.<sup>40</sup> These general principles become effective through general acceptance or recognition by states.<sup>41</sup> Resolutions of the U.N. General Assembly can in particular be a means for such recognition.<sup>42</sup>

While this approach would convincingly solve the problem of the normativity of human rights law<sup>43</sup> despite the absence of state practice, some problems remain. If general principles can be established solely by their acceptance, the only significant distinction that they would have from customary rules would be the absence of a requirement of state practice. Human rights would thus be privileged because fewer conditions would have to be met to establish unwritten human rights norms. Simma and Alston justify this special treatment of human rights norms by the special nature of human rights.<sup>44</sup> Therefore, compliance with human rights standards concern internal

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39. Statute of the International Court of Justice, *supra* note 1, art. 38, para. 1(c).

40. See Simma & Alston, *supra* note 16, at 102-06. Cf. Albert Bleckmann, *Zur originären Entstehung gewohnheitsrechtlicher Menschenrechtsnormen* [The Original Formation of Customary Human Rights Norms], in MENSCHENRECHTSSCHUTZ DURCH GEWOHNHEITSRECHT [HUMAN RIGHTS PROTECTION THROUGH CUSTOMARY LAW] 29, 42-43 (Eckart Klein ed., 2002); Oscar Schachter, *New Custom: Power, Opinio Juris and Contrary Practice*, in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY 531, 539 (Jerzy Makarczyk ed., 1996) (discussing and approving the theory advanced by Simma and Alston). But see Robert B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 16 (1995) (critiquing the argument that general principles may serve as independent rules of international law).

41. See Simma & Alston, *supra* note 16, at 102 (emphasizing that the general principles do not derive from speculation, but instead from states' acceptance and recognition).

42. See *id.* at 104 (arguing that customary law should be based on the express articulation of general principles by states).

43. See Balakrishnan Rajagopal, *The Allure of Normativity*, 11 HARV. HUM. RTS. J. 363, 363 (1998) (reviewing PHILIP ALSTON, HUMAN RIGHTS LAW (1996)) (discussing the tendency within the international human rights community to deemphasize pragmatic issues and instead focus on establishing moral certainties as binding principles).

44. See Simma & Alston, *supra* note 16, at 99 (distinguishing human rights obligations from other customary law which can be derived from examining patterns of state interaction).

relations within states and are thus independent of the cross-border interaction of states, which are addressed by state practice.<sup>45</sup>

The thesis of this Article is that Simma and Alston's treatment of human rights norms can be applied generally to unwritten international law. The distinction that I propose does not primarily consider the dichotomy of internal norms versus interstate norms, but is based on a theoretical differentiation between norms. I marshal Robert Alexy's distinction between rules and principles<sup>46</sup> and argue that this differentiation can be used to distinguish customary international law from general principles.<sup>47</sup>

## II. RULES AND PRINCIPLES

In order to frame the argument, we first must look at the difference between rules and principles. Subsequently, I will address the relationship between both norm categories and, finally, show how principles may be identified in international legal discourse.

### A. THE DISTINCTION BETWEEN RULES AND PRINCIPLES

The distinction between legal rules and principles is not new and has frequently been used in international law.<sup>48</sup> However, there is no

45. See *id.* (inquiring why human rights obligations could be recognized at all under traditional theories of customary international law when there is generally a total lack of state interaction in the performance of human rights obligations and thus a general absence of the traditional state practice element of customary law).

46. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 47-48 (Julian Rivers trans., 2002) (defining principles as norms that can be satisfied to varying degrees and rules as norms that are either satisfied or unsatisfied).

47. This thesis refers to and tries to modify a proposal of Stefan Kadelbach & Thomas Kleinlein. See Stefan Kadelbach & Thomas Kleinlein, *Überstaatliches Verfassungsrecht* [Supranational Constitutional Law], 44 ARCHIV DES VÖLKERRECHTS [ARCHIVE OF INTERNATIONAL LAW] 235, 255-65 (2006). It is important not to confuse terminology. Alexy's principles are not the same as general principles of international law although the employed expressions are very similar. In this article, I will use the term "principle" or "legal principle" when referring to Alexy's differentiation. When I want to address the source of international law described in Article 38(1)(c) of the ICJ Statute, I will use the term "general principles."

48. See, e.g., D.W. Greig, *The Underlying Principles of International Humanitarian Law*, 9 AUSTL. Y.B. INT'L L. 46, 65 (1985); Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 207, 213-19

consensus on what the difference is between these two categories of laws.<sup>49</sup> Most often the term principles is used for the more general, fundamental norms of a legal order, while concrete provisions are called rules.<sup>50</sup> Such a distinction is, however, of no heuristic value because it is only of gradual and not qualitative character.<sup>51</sup>

For the following analysis, I adopt the differentiation proposed by Robert Alexy.<sup>52</sup> The principal criterion to distinguish rules and principles is the effect of norms in case of a norm collision.<sup>53</sup> If two rules conflict, this collision has to be solved by particular collision rules, such as the *lex specialis* rule or the *lex posterior* rule.<sup>54</sup> As a consequence, the hierarchy between the two norms is always static. For example, let us suppose that there is a collision between rule A and rule B and that rule A is more specific. Then rule A will always

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(Michael Byers ed., 2000) (analyzing the relationship between principles and rules, and their role in judicial decision-making); Robert Kolb, *Principles as Sources of International Law*, 53 NETH. INT'L L. REV. 1, 26 (2006) (distinguishing general principles of law from the detailed rules developed through the application of general principles).

49. See generally ALEXY, *supra* note 46, at 45-47.

50. Compare Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 838 (1972) (describing the difference between rules and principles as one of degree and commenting that rules prescribe specific acts, while principles prescribe more general actions), with George C. Christie, *The Model of Principles*, 1968 DUKE L.J. 649, 669 (arguing that principles are simply vague extensions of rules).

51. See Christie, *supra* note 50, at 669 (asserting that under the current legal universe of rules and principles, judges may resort to an ever more vague description of the norm to support a number of possible decisions in a case).

52. See ALEXY, *supra* note 46, at 47-48; see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 26-27 (1977) (noting that conflicting principles may be balanced against one another while conflicting rules cannot). Dworkin's conception differs in some respects, however, as he conceives rights more as a "trump card" than as something which may be weighed against the achievement of public goals. *Id.* at 266-72.

53. See, e.g., ALEXY, *supra* note 46, at 48-50 (defining a norm collision as an instance where two norms lead to two mutually incompatible legal judgments). The dichotomic differentiation between rules and principles has often been criticized for analytical and normative reasons. I do not want to address these criticisms in this contribution because other scholars have already dealt extensively with them. See, e.g., *id.* at 61-66; Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574, 589-93 (2004) (reviewing ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (Julian Rivers trans., 2002)).

54. See ALEXY, *supra* note 46, at 49.

prevail. The situation is different if two principles come into conflict.<sup>55</sup> The relationship between principle C and principle D is dynamic. It is not determined by collision rules, but by a balancing of goods.<sup>56</sup> This balancing may in one case lead to the result that principle C prevails, but under different circumstances principle D may prove more compelling.<sup>57</sup>

From this distinction, we can draw further conclusions about the nature of principles and rules. As principles are characterized by a balancing of goods in cases of conflict, they always serve the purpose of protecting a common or an individual good and are thus value-related.<sup>58</sup> Rules, on the other hand, are in general conduct-related. In the latter respect, there are, however, exceptions. It is possible to imagine situations in which a value is protected in an absolute manner, always prevailing over conflicting values. In such a case, the protective norm has to be classified as a rule. Such rules will, however, be exceptional. In a world of conflicting goals and values, the latter could only be protected by rules if a hierarchy of values was established which allows a solution of conflicts between these values. Even if theoretically conceivable, such legal systems would lack the necessary flexibility so that their existence is improbable in practice.<sup>59</sup> Moreover, rules may prescribe specific conduct in order to protect a certain value—for instance, the prohibition of torture shall protect human dignity. In this case, however, the protection that the rule provides is only indirect and can

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55. See *id.* at 48 (describing the difference between competing principles and conflicts of rules as the most defining distinction between the two).

56. See Robert Alexy, *Zum Begriff des Rechtsprinzips* [The Concept of Legal Principles], in ARGUMENTATION UND HERMENEUTIK IN DER JURISPRUDENZ [ARGUMENTATION AND HERMENEUTICS IN JURISPRUDENCE] 59, 64 (Werner Krawietz et al. eds., 1979) (F.R.G.).

57. See ALEXY, *supra* note 46, at 54-55 (noting that the balancing of competing principles is controlled by the idea of “conditional relation of precedence”).

58. See DWORKIN, *supra* note 52, at 26 (discussing the importance of the “weight” of a principle and noting that court rulings based upon a balancing will often result in a controversial decision).

59. See Mattias Kumm, *Liberale Gerechtigkeitstheorien und die Struktur der Grundrechte* [Liberal Theories of Justice and the Structure of Fundamental Rights], in JURISTISCHE GRUNDLAGENFORSCHUNG [LEGAL RESEARCH] 218, 220 (Robert Alexy ed., 2005).

be considered the effect of the principle. In these cases, principles can be reasons for the existence of certain protective rules.<sup>60</sup>

To clarify the concept of principles in international law, let us consider humanitarian intervention. Basically, the underlying problem is the conflict of two core principles in the international legal order—the preservation of peace and the protection of human rights.<sup>61</sup> Assuming that we generally accept humanitarian intervention as an exception to the prohibition of the use of force,<sup>62</sup> we have to balance the two principles according to the factual circumstances for determining its legality. Neither of the two principles will always prevail. Rather, the result of balancing the two goals depends on the dimension and gravity of the human rights violation, the potential effects of the military intervention, and the danger that such intervention poses to international peace and security.<sup>63</sup>

## B. THE RELATIONSHIP BETWEEN RULES AND PRINCIPLES

However, the debate on humanitarian intervention is more complex. Many scholars deny the acceptability of a military intervention for humanitarian reasons, claiming that a gross violation

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60. See Neil MacCormick, "Principles" of Law, 19 JURIDICAL REV. 217, 222 (1974) (Scot.) (describing variations upon liability rules as examples of a broader liability principle that has been applied to a specific circumstance).

61. See Nico Krisch, Review Essay, *Legality, Morality, and the Dilemma of Humanitarian Intervention after Kosovo*, 13 EUR. J. INT'L L. 323, 331 (2002).

62. See, e.g., Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1763, 1771 (2000) (arguing that while the parameters for the use of force are not totally clear, it is likely that the U.N. Charter implicitly permits humanitarian intervention).

63. See, e.g., Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 347-51 (1967) (asserting that where a test attempts to balance competing principles, such test must be informed by the standards of the legal system from which the principles derive—in this case, the international legal order); see also Richard B. Lillich, *Humanitarian Intervention through the United Nations: Towards the Development of Criteria*, 53 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG JOURNAL OF INTERNATIONAL LAW] 557, 562-63 (1993) (F.R.G.) (reviewing the twelve criteria set forth by the International Law Association for assessing the legality under international law of humanitarian interventions); John Norton Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205, 262 (1969) (concluding that the U.N. Charter contains complementary policies restricting unilateral force, yet urging action to protect human rights).



of human rights can never justify an exception to the prohibition of the use of force.<sup>64</sup> According to this position, the preservation of peace always prevails; a balancing with the protection of human rights is *a priori* excluded.<sup>65</sup> Such an argument is not directed against the existence of principles as such. It only shows that the preservation of international peace and security is not only protected by a legal principle, but also by a rule. According to Article 2(4) of the U.N. Charter,<sup>66</sup> “all members shall refrain in their international relations from the threat or use of force.” The preservation of peace is the underlying principle, which has been specified by the rule prohibiting the use of force.<sup>67</sup>

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64. See, e.g., Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 2-3 (1999) (emphasizing that Article 2(4) of the U.N. Charter is a “watertight” prohibition against the use of force); see also Marcello G. Kohen, *L'Emploi de la Force et la Crise du Kosovo: Vers un Nouveau Désordre Juridique International [The Use of Force and the Crisis in Kosovo: Toward a New International Legal Disorder]*, 32 REVUE BELGE DE DROIT INTERNATIONAL [BELGIAN INTERNATIONAL LAW REVIEW] 122, 134 (1999) (rejecting the argument that the use of force to prevent a humanitarian crisis in Kosovo was permissible); Nico Krisch, *Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council*, in 3 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 59, 59-60 (Jochen A. Frowein & Rüdiger Wolfrum eds., 1999) (reflecting on potential justifications for human rights-based military intervention in Kosovo and Iraq, and arguing that the intervening states claimed the right to enforce their collective will unilaterally); Micheal Byers & Simon Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION 177, 178-79 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) (offering an “exceptional illegality” approach for justifying humanitarian intervention that would be “more consistent with the position of states, and in keeping with the principles of international law”).

65. See, e.g., Simma, *supra* note 64, at 5 (explaining that in the absence of U.N. Security Council authorization of the use of force, military action in the form of humanitarian intervention is necessarily a breach of Article 2(4) of the U.N. Charter).

66. U.N. Charter art. 2, para. 4 (requiring that all members should refrain from the threat or use of force).

67. See J.L. HOLZGREFE, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION, *supra* note 64, at 15, 40 (arguing that the phrase, “or in any other manner inconsistent with the purposes of the United Nations,” in Article 2, para. 4 of the U.N. Charter supplements the prohibition on the unauthorized use of force, and does not provide a loophole as some critics have suggested).

If there is a conflict between a rule and a principle, the former generally prevails because it is the more specific norm.<sup>68</sup> The scope of a rule cannot be limited by conflicting principles, but only by exceptional rules, such as the right to self-defense. In such a case, principles only come into play if the conflicting rule refers either explicitly or implicitly to principles.<sup>69</sup> Assuming that humanitarian intervention would be recognized as an exception to the prohibition of the use of force, such a *rule* would require in its application the balancing of the underlying principles. In World Trade Organization (“WTO”) law, Article XX of the General Agreement on Tariffs and Trade (“GATT”)<sup>70</sup> and Article XIV of the General Agreement on Trade in Services (“GATS”)<sup>71</sup> have similar effects. Both provide for exceptions from the rules of world trade law in order to pursue the principles enumerated in those articles.<sup>72</sup> Principles are thus important in three types of legal arguments: first, in situations that are not governed by any rule; second, in constellations of rules where the relevant rules refer either explicitly or implicitly to external principles; and finally, when a rule is open to interpretation and can be specified by underlying principles.<sup>73</sup>

### C. THE IDENTIFICATION OF PRINCIPLES IN THE INTERNATIONAL LEGAL ORDER

The two concepts that I have used for my argument are often criticized, not without reason, for being a gateway into the legal

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68. See ALEXY, *supra* note 46, at 83-84.

69. See *id.* at 72-75.

70. General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (containing a list of general exceptions to the general agreement, such as when it is necessary to protect public morals, or human, animal or plant life, among others).

71. General Agreement on Trade in Services art. XIV, Apr. 15, 1994, 1869 U.N.T.S. 183 (1994) (providing exceptions to the general agreement that are substantially similar to the exceptions provided in Article XX of the GATT).

72. See Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129, 1132-36 (1999) (discussing the history and evolution of Article XX exceptions under the GATT).

73. JAN-REINARD SIECKMANN, *REGELMODELLE UND PRINZIPIENMODELLE DES RECHTSSYSTEMS [RULES-BASED AND PRINCIPLES-BASED MODELS OF THE LEGAL SYSTEM]* 141 (1990).

discourse for natural law maxims.<sup>74</sup> According to the drafting history, general principles in the sense of Article 38(1)(c) of the ICJ Statute<sup>75</sup> were meant to serve as a counterbalance to legal positivism.<sup>76</sup> In order to rationalize the legal discourse, the requirement “as recognized by civilized nations” has been introduced.<sup>77</sup> Only those natural law principles that have been widely recognized by the international community as such should enter into legal discourse.<sup>78</sup> The recognition requirement thus already shows that general principles do not necessarily have to be derived from natural law maxims. They rather refer to the implicit consensus of the international community.<sup>79</sup> They are thus distinct from customary international law insofar as they do not require the proof of state practice. The existence of an *opinio juris* is thus sufficient to establish general principles.<sup>80</sup>

This implicit state consensus can be identified by referring to not directly binding declarations of a considerable part of the international community. Such expressions of an *opinio juris* may be found in resolutions of the U.N. General Assembly or declarations of other representative international bodies and organs. Further, the preambles of multilateral treaties, which are not directly legally binding, may indicate the existence of general principles.

The second strand of critique addresses the concept of legal principles as such. Ronald Dworkin introduced the category of

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74. See, e.g., Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 269, 293-95 (2001) (describing the historical relationship between *ius gentium* and natural law and the natural law-relation of general principles).

75. Statute of the International Court of Justice, *supra* note 1, art. 38, para. 1.

76. See, e.g., William C. Bradford, *The Duty to Defend Them: A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365, 1439 (2003) (citing Justice Kotaro Tanaka of the ICJ as stating that Article 38(1)(c) “extends the concept of the source of international law beyond the limit of legal positivism according to which . . . international law is nothing but the law of the consent and auto-limitation of the state”).

77. See, e.g., Hall, *supra* note 74, at 293.

78. See *id.* at 292 (reiterating that recognition is key to the idea of general principles, not consent or enactment of measures on the international legal stage).

79. See ALFRED VERDROSS, *DIE QUELLEN DES UNIVERSELLEN VÖLKERRECHTS* [THE SOURCES OF UNIVERSAL INTERNATIONAL LAW] 128 (1973) (explaining that principles can be recognized through implicit consensus).

80. See Simma & Alston, *supra* note 16, at 104.

principles in order to attack Hart's legal positivism.<sup>81</sup> He criticized Hart's theory<sup>82</sup> by showing that modern legal systems cannot be conceived as a pure system of rules.<sup>83</sup> They always contain principles that cannot be identified by purely formal means, like a coherent rule of recognition.<sup>84</sup> Courts have to argue with principles being derived from moral considerations.<sup>85</sup> It is one of the merits of Dworkin's analysis to point out that it is impossible to understand modern and complex legal systems as pure systems of rules.<sup>86</sup> Legal systems, including international law, always require legal decisions in which a balancing of goods is necessary. However, it is not compelling to derive principles from moral considerations.<sup>87</sup> By trying to qualify legal principles as general principles of law in the sense of Article 38(1)(c) of the ICJ Statute,<sup>88</sup> this Article tries to rationalize the debate regarding legal principles. The latter cannot be derived by moral considerations alone, but in essence have to be identified by formal indicators.

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81. See DWORKIN, *supra* note 52, at 28-45 (explaining that legal principles are a conceptual predecessor to formal rules of law and as such form a basis on which modern jurisprudence rests).

82. See H.L.A. HART, *THE CONCEPT OF LAW* 259 (Peter Cane et al. eds., 2d ed. 1994) (1961) (responding to Dworkin's criticism of his work as portraying the legal system as "all or nothing" rules, and admitting that legal principles have a role, albeit small, to play in the understanding of the legal system as a whole).

83. See DWORKIN, *supra* note 52, at 22-45 (critically assessing Hart's concept of legal positivism because legal principles, policies and rights are influential, especially in cases of judicial discretion, yet defy traditional categorization as a cohesive or formalized set of rules).

84. See *id.* at 43-45 (characterizing the view of legal positivists as being that legal principles cannot be categorized or even listed as legal principles because they are countless and constantly evolving).

85. See *id.* at 28-45 (explaining that legal rights, policies, and principles can exist prior to formal rules of law, and form the theoretical basis upon which judges can draw to express moral considerations and beliefs which may exist outside of formal rules of law).

86. See SIECKMANN, *supra* note 73, at 247; Roger Cotterrell, *Legality, Liberalism's Empire: Reflections on Ronald Dworkin's Legal Philosophy*, 1987 AM. B. FOUND. RES. J. 509, 514 (1987) (stating that Dworkin views legal discourse expansively and not in a narrow, easily catalogued system of rules and regulations).

87. See Cotterrell, *supra* note 86, at 514 (explaining the central role and inseparability of morality in both the development of jurisprudence and to the lawyer and legal practice itself).

88. Statute of the International Court of Justice, *supra* note 1, art. 38, para. 1.

### III. THE DISPENSABILITY OF STATE PRACTICE FOR ESTABLISHING LEGAL PRINCIPLES

As we have seen, the difference in establishing either custom or general principles is the requirement of state practice. This section will explain why this difference justifies a separate category for legal norms because of their character either as rules or as principles. As shall be shown in the following, it is the function of state practice to stabilize the system of customary norms. However, the practice requirement can only fulfill this function in the course of establishing rules. Principles are characterized by a functional difference that renders the practice requirement dispensable. Finally, it shall be shown that it is compatible with the doctrine of sources to qualify legal principles as general principles of law in the sense of ICJ Statute Article 38(1)(c).

#### A. THE FUNCTION OF STATE PRACTICE

The function of state practice cannot be determined without considering the theory we are employing to explain the normativity of customary law. In the following, we will examine the most important theories of the role of state practice in the establishment of customary norms.<sup>89</sup>

##### 1. Customary Law as Pactum Tacitum

The oldest theory of customary law considers custom as *pactum tacitum*. This opinion can be found in the works of Francisco Suarez,<sup>90</sup> Hugo Grotius,<sup>91</sup> Christian Wolff,<sup>92</sup> and Emer de Vattel.<sup>93</sup>

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89. See generally Alfred Verdross, *Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts* [Origins and Foundation of Universal Customary International Law], 29 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG J. INT'L L.] 635 (1969) (providing a detailed overview of classical theories of customary international law).

90. FRANCISCO SUAREZ, DE LEGIBUS, AC DEO LEGISLATOR [ON LAWS AND GOD THE LAWGIVER] (1612), reprinted in 2 THE CLASSICS OF INTERNATIONAL LAW: SELECTIONS FROM THREE WORKS OF FRANCISCO SUAREZ, S. J. 90-101 (Gwladys L. Williams et al. trans., Carnegie Endowment for International Peace 1964) (1617).

91. HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES [ON THE LAW OF WAR AND PEACE: THREE BOOKS] (1646), reprinted in 3 THE CLASSICS OF

According to this theory, customary law is established through a tacit treaty of the states. Tacit treaties only need a common will of the parties. A subjective element is thus sufficient. Practice is only needed to determine the existence of a corresponding subjective element.<sup>94</sup> Consequently, practice is nothing more than an auxiliary in identifying customary law and consequently need not be considered a constituent element of customary law.

## 2. Compliance Theories

### a. Compliance and Legitimacy

Modern, preponderantly American theories of customary law attempt to determine the validity of customary law according to its ability to secure compliance. An influential approach in this respect was presented by Thomas Franck in his treatise *The Power of Legitimacy Among Nations*.<sup>95</sup> Franck tries to determine the validity of a norm by proving its legitimacy. Only legitimate norms are supposed to exercise a sufficient compliance-pull.<sup>96</sup> For this purpose, he elaborates four criteria for the identification of a rule of customary

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INTERNATIONAL LAW 9, 15 (James B. Scott ed., Francis W. Kelsey trans., Carnegie Institution of Washington 1913) (1625).

92. CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* [LAW OF NATIONS TREATED ACCORDING TO A SCIENTIFIC METHOD] (1764), *reprinted in* 13 *THE CLASSICS OF INTERNATIONAL LAW* 9, 18-19 (James B. Scott ed., Joseph H. Drake trans., Carnegie Endowment for International Peace 1934) (1764).

93. *See* E. DE Vattel, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* [THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW, APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS] (1758), *reprinted in* 3 *THE CLASSICS OF INTERNATIONAL LAW* 3, 8 (James B. Scott ed., Charles G. Fenwick trans., Carnegie Institution of Washington 1916) (1758).

94. René-Jean Dupuy, *Coutume sage et coutume sauvage* [*Wise Custom and Wild Custom*], in *LA COMMUNAUTÉ INTERNATIONALE: MÉLANGES OFFERTS À CHARLES ROUSSEAU* [THE INTERNATIONAL COMMUNITY: VARIOUS WORKS IN TRIBUTE TO CHARLES ROUSSEAU] 75, 77 (1974) (positing that tacit agreement gives support to the consensual element of customary law).

95. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

96. *See id.* at 24 (accepting a common definition of legitimacy that includes generally accepted rules as they operate to exert influence over states).

law: pedigree, determinacy, coherence, and adherence.<sup>97</sup> In his conceptualization, state practice does not play a role. It only serves as an auxiliary to identify one of the four elements establishing a rule of customary law.<sup>98</sup>

#### b. Rational Choice Approaches

Other authors relying on compliance use game theory and rational choice models to predict whether states will comply with certain rules and whether the rules may thus be considered valid.<sup>99</sup> They propose to establish customary law by identifying the equilibrium of different behavioral patterns.<sup>100</sup> The approaches based on rational choice models differ however in terms of the consequences of their analyses.

The contribution having received the most attention was the normative critique of international law by Jack Goldsmith and Eric Posner.<sup>101</sup> They claim that behavioral patterns in international relations can be explained by game theoretic models.<sup>102</sup> According to

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97. *Id.* at 49; see also Anthony S. Winer, *The CISG Convention and Thomas Franck's Theory of Legitimacy*, 19 N.W. J. INT'L L. & BUS. 1, 5 (1998) (explaining how Franck's four properties can exert influence in the arena of international law and particularly in the case of the acceptance and legitimacy of the CISG Convention).

98. See FRANCK, *supra* note 95, at 49 (elucidating the indicators of legitimacy, among which community practice is not a factor, as Franck stresses the importance of viewing rules as dynamic sources and not staid practices of states).

99. See Guzman, *supra* note 8, at 163, 166-71, 173 (applying rational choice analysis to treaty formation, persistent and subsequent objectors, and new states). See generally Norman & Trachtman, *supra* note 23, at 541-42 (analyzing rationalist theory under a "repeated multilateral prisoner's dilemma model" of customary international law); Swaine, *supra* note 23, at 621 (using game theory to demonstrate the shortcomings of traditional customary international law).

100. See Guzman, *supra* note 8, at 118 (stating that Guzman's theory of customary international law still rests on the understanding that behavioral norms create customary law among states); Norman & Trachtman, *supra* note 23, at 541-42 (asserting that customary international law has the innate ability to affect state behavior); Swaine, *supra* note 23, at 621 (suggesting that states may prefer the flexibility of customary law because it allows them, if their behavior changes, to abandon customary law with little economic fallout).

101. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113-77 (1999) (explaining their novel presentation of the "norms" of customary international law and how they stem from national self-interest rather than legal or moral obligations).

102. See *id.* at 1120.

their theory, patterns of coherent state behavior only emerge in cases of coercion or coincidence of interest.<sup>103</sup> However, if there is a coincidence of interest, law is not needed to coordinate state behavior. Thus, Goldsmith and Posner deny the effectiveness of customary international law.<sup>104</sup>

Other rational choice approaches do not contest the legal quality of customary international law.<sup>105</sup> However, they disagree on the importance of state practice in establishing customary norms. Some authors try to identify custom on the basis of behavioral patterns so that state practice is the decisive element.<sup>106</sup> Andrew Guzman, on the other hand, concentrates on the subjective evaluation of rules by states for the determination of customary law.<sup>107</sup> Thus, state practice may be evidence of *opinio juris*, but it is not required for proof of customary law.

### c. Evaluation

If the validity of legal norms is supposed to depend on compliance, the primary function of law should be the influence upon and determination of individual behavior.<sup>108</sup> However, approaches concentrating on compliance do not give an answer in this respect. The main characteristic of law is its contra-factuality.<sup>109</sup> Law is only effective in influencing behavior if states comply with

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103. See *id.* at 1122-24.

104. See *id.* at 1132 (insisting that states act in their own self-interest, not out of a sense of obligation).

105. See Norman & Trachtman, *supra* note 23, at 541-42 (refuting Goldsmith and Posner's claim and contending that customary international law can change the relative incentives of states to comply).

106. See *id.* at 544 (stating that customary international law requires at least some degree of state practice); Swaine, *supra* note 23, at 592 (focusing on state interest in rational choice analysis).

107. See Guzman, *supra* note 8, at 122.

108. See, e.g., Edward Jenks, *Address Before the Sociological Society: The Function of Law in Society* (June 26, 1923), in 5 J. COMP. LEGIS. & INT'L L. 169, 171 (1923).

109. NIKLAS LUHMANN, *AUSDIFFERENZIERUNG DES RECHTS* [DIFFERENTIATION OF LAW] 84 (1981); see also MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES* 6 (1999); Stefan Oeter, *International Law and General Systems Theory*, 44 GERMAN Y.B. INT'L L. 72, 88 (2001); Andreas Fischer-Lescano & Philip Liste, *Völkerrechtspolitik* [The Politics of International Law], 12 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN [JOURNAL OF INTERNATIONAL RELATIONS] 209, 212 (2005) (quoting LUHMANN, *supra*, at 84).



the law for reasons independent of the content of the law.<sup>110</sup> If a certain behavior could also be expected without legal norms—for example, because it lies in the best interest of the participating states anyway—law would not serve any social purpose, but merely mirror existing factual relationships between states.<sup>111</sup>

Game theoretic or legitimacy focused models may provide an explanation as to why certain customary norms emerge.<sup>112</sup> They do not, however, give any reason for state compliance with such norms. International law is only effective if the violation of legal provisions imposes additional costs on states.<sup>113</sup> The question of whether such additional costs arise in the case of a violation of international law is an empirical one and cannot be explained by rational choice models or by approaches concentrating on the legitimacy of norms. Exemplary is the circular argument of Goldsmith and Posner. Their model presupposes that international law lacks the potential to influence state behavior because of content-independent reasons.<sup>114</sup> It is no surprise, then, that their rational choice analysis reveals that legal norms lack effectiveness—this is a direct consequence of their premise.

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110. See generally Anne van Aaken, *Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of Jus Standi Provisions*, 32 CONF. ON NEW POL. ECON. 29 (2006) (distinguishing compliance with effectiveness of legal norms). The notion of compliance aims at the simultaneity of state behavior and norm-content, while effectiveness considers the reason why states comply with a norm. Even if states comply, a norm is only effective if compliance is induced by content-independent reasons. See *id.* at 30-32.

111. See Goldsmith & Posner, *supra* note 101, at 1132 (presenting the rational choice perspective, which holds that a customary norm does not cause behavior, but merely reflects behavior that is induced by states' self interest).

112. See Anne van Aaken, *To Do Away With International Law? Some Limits to "The Limits of International Law,"* 17 EUR. J. INT'L L. 289, 292 (2006) (questioning methodology used by Goldsmith and Posner in their game theory analysis).

113. See Guzman, *supra* note 8, at 134.

114. See Goldsmith & Posner, *supra* note 101, at 1132 (insisting that payoffs, and not customary international law, are the only factors determining state behavior).

### 3. Positivist Approach

Today's majority view in European legal scholarship considers customary law to be state practice with a supervening *opinio juris* because customary law is recognized by the international community as a source of law.<sup>115</sup> However, this argument seems at first glance to be circular. It does not explain why the recognition of the international community has any normative character.<sup>116</sup> The existence of a doctrine of sources cannot be established by reliance upon elements of this doctrine itself.<sup>117</sup>

#### a. Normative Foundations of Customary Law

An explanation may be found in the positivist legal theory of H.L.A. Hart.<sup>118</sup> Hart distinguishes between primary and secondary rules of a legal order.<sup>119</sup> While primary rules are rules that direct general conduct, secondary rules are rules of recognition.<sup>120</sup> Their function is to identify primary rules. Rules of recognition tell us which rules can be considered law.<sup>121</sup> The secondary rules of the international legal order would thus be the sources doctrine.<sup>122</sup>

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115. See Bernhardt, *supra* note 8, at 901.

116. See *id.* ("Consuetudo, State practice accepted as obligatory, is binding because the international legal order recognizes this source of law.")

117. See Alejandro Lorite Escorihuela, *Alf Ross: Towards a Realist Critique and Reconstruction of International Law*, 14 EUR. J. INT'L L. 703, 730 (2003) (criticizing the sources doctrine for encompassing a "paradoxical exposition of the sources of law in a norm the very authority of which the sources are supposed to explain").

118. See, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1957); H.L.A. Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953 (1957).

119. See HART, *supra* note 82, at 100-10.

120. *Id.* at 100.

121. *Id.*

122. But Hart is not very clear on whether international law contains secondary rules. "In form, international law resembles such a regime of primary rules, even though the content of its often elaborate rules are very unlike those of a primitive society, and many of its concepts, methods, and techniques are the same as those of modern municipal law." HART, *supra* note 82, at 227. However, if a centralized legislative procedure is not required, there is no reason why the sources doctrine should not be considered as a rule of recognition in the sense of his theory. Despite some practical problems, it provides a tool for the identification of the primary rules of international law.

In order to establish the secondary rules of a legal order, Hart does not resort to a normative explanation.<sup>123</sup> He does not deduct the legal order from a basic norm. Instead he refers to sociology.<sup>124</sup> Secondary rules are valid if they are recognized by courts and officials in their decisions.<sup>125</sup> Understood in light of Hart's theory, recognition of the rule on establishment of custom by the international community does not refer back to the sources doctrine.<sup>126</sup> It has to be understood as empirical recognition rather than in the normative sense of a basic norm.

b. The Role of State Practice

The insight that state practice is a constituent element of customary law because the corresponding rule of recognition requires it to be does not explain the normative reason for a requirement of state practice.<sup>127</sup> If we want to analyze the distinctive characteristics of custom and general principles, we have to determine the function of state practice as an element for proving the existence of the law. As we have seen, the classical theory of international custom perceived state practice not as a normative requirement, but only as a means of proving the existence of consent between the states.

The inductive method for determining customary law can be traced back to the sociological positivism of Auguste Comte.<sup>128</sup> According to this school, science had to be based on facts.<sup>129</sup> Awareness could only be attained through experience.<sup>130</sup> The

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123. But see Kelsen, *PRINCIPLES*, *supra* note 7, at 558 (introducing the basic norm (*Grundnorm*) as reason for the normativity of every legal system).

124. See HART, *supra* note 82, at 100.

125. *Id.* at 105.

126. But see Escorihuela, *supra* note 117, at 729 (deriding the sources doctrine of ICJ Statute Article 38 as "sheer metaphysics" and suggesting its rejection in favor of analysis of judicial decisions).

127. See Guzman, *supra* note 8, at 122 (denigrating state practice as having no direct contribution to the existence of customary norms, while conceding that it may influence state conduct).

128. See Oscar Schachter, *International Law in Theory and Practice*, in 178 RECUEIL DES COURS 9, 60 (1982) (Fr.) (noting the influence of Comte's sociological positivism on legal thinkers).

129. AUGUSTE COMTE, DISCOURS SUR L'ESPRIT POSITIF [DISCOURSE ON THE POSITIVE SPIRIT] (1844).

130. *Id.*

prevailing method was thus an inductive one, deriving patterns of behavior by an abstraction from facts. However, as law is per definition not descriptive, but always prescriptive,<sup>131</sup> the sociological methodology cannot be transferred to the legal sciences without reflection. The reason for introducing practice as a constituent element of customary law is rather a more modest one: law should not consist of abstract, utopian norms, but rather be affiliated with social reality.<sup>132</sup> Behavior is thus not a normative reason itself. Its consideration is just a means to reconcile law and reality.

The reconciliation of law and reality by consideration of state practice is particularly important for norms that have a coordinative function in bilateral situations.<sup>133</sup> Such norms are of a directly reciprocal character; in other words, any state can react to non-compliance by denying the fulfillment of the corresponding obligation.<sup>134</sup> If coordinative norms are thus not supported by a basically consistent state practice, they would lose their conduct guiding function.<sup>135</sup> State practice is thus a formal requirement that encourages the stability of norms.

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131. See Craig Haney, *Psychological and Legal Change: On the Limits of a Factual Jurisprudence*, 4 L. & HUM. BEHAV. 147, 163 (1980) (distinguishing between prescriptive and descriptive disciplines).

132. See *id.* at 148 (describing the emergence in the nineteenth century of a concept of law whereby the law was viewed as an instrument for achieving positive goals).

133. See Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT'L L. 907, 908 (2003) (suggesting that multilateral, as contrasted with bilateral, obligations presuppose a collective interest of states above and beyond the particular interests of each state participating in the obligation).

134. See *id.* (introducing the concept of suspending obligations as a countermeasure for breach).

135. See Kirgis, Jr., *supra* note 32, at 148-49 (discussing the relationship between conduct, consistency, and state practice); see also Daniel Bodansky, *Customary (and Not so Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 111 (1995) (discussing transboundary pollution and claiming that consistent, uniform state practice is emphasized in traditional customary law).

## B. THE QUALITATIVE DIFFERENCE BETWEEN RULES AND PRINCIPLES

State practice does not provide a similar function in the context of legal principles, however. With respect to principles, the removal of the requirement of state practice increases the rationality of legal discourse, and, in contradistinction to its role with respect to rules, such a treatment does not decrease the stability of the international legal system. This argument shall be elaborated in two steps: First we will inquire into the structural difference between rules and principles and second we will consider the functional difference between the two concepts.

### *1. Structural Difference Between Rules and Principles*

Rules can be classified either as facilitative rules or as moral rules.<sup>136</sup> Both types have in common that they prescribe concrete conduct. They can thus easily be identified by analyzing a conduct-related practice. Principles, on the other hand, serve to protect individual or common values and thus always have a moral function.<sup>137</sup> They do not refer to a certain conduct, but to a specific objective. Consequently, it is not possible to describe principles with reference to specific conduct because different conduct may lead to the same objective. It is certainly conceivable to derive principles by means of an inductive reasoning that analyzes patterns of behavior. However, such a mode of reasoning is always indirect. In this context, state practice is not the formal confirmation of a norm anymore, but only an indication of the existence of a more abstract principle. Consequently, there is no normative reason to treat state practice differently than other indicators. In the context of principles, it should thus not be considered a constituent element, but only one factor amongst others in determining the existence of an *opinio juris*.

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136. See Roberts, *supra* note 32, at 764 (2001) (discussing the legal spectrum between facilitative and moral rules); see also HART, *supra* note 82, at 79-81 (explaining the distinction between primary and secondary rules which essentially regulate moral and legal conduct, respectively).

137. Kadelbach & Kleinlein, *supra* note 47, at 262-63 (discussing the moral underpinnings of principles and listing several moral values protected by principles).

## 2. Principles and Filling Lacuna

Moreover, the rationality of the legal argumentation could be increased by abandoning the practice requirement.<sup>138</sup> In this context, we have to distinguish two situations. On one hand, we will consider the preservation of public goods, and on the other hand we will deal with the protection of individual human rights.

### a. The Preservation of Public Goods

It is impossible for a legal order to provide a specific rule to cover every legally relevant situation. As the international legal order is characterized by decentralized legislation, the lack of rules governing a certain situation is even more common than in national legal orders. However, a *non liquet* is excluded as a result of legal decisions.<sup>139</sup> Therefore, the lawyer has to find different solutions for problems that cannot be determined by rules. The classical approach to this situation in international legal scholarship is the application of the *Lotus* principle.<sup>140</sup> According to this principle, any attempt to constrain the state's freedom of action in the absence of a legal prohibition is a violation of state sovereignty.<sup>141</sup>

However, in cases where two states rely simultaneously on their sovereignty, this approach often does not provide a suitable solution. A clear delimitation of competing freedoms is not possible on an abstract level without further guidelines.<sup>142</sup> A good example is the

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138. See generally Martti Koskenniemi, *General Principles: Reflexions on Constructivist Thinking in International Law*, in 18 OIKEUSTIEDE-JURISPRUDENTIA 120, 138-41 (1985) (suggesting that the application of legal principles could rationalize legal discourse).

139. See, e.g., *Lighthouses* (Fr. v. Greece), 1934 P.C.I.J. (ser. A/B) No. 62 (May 17); *Interpretation of Convention of 1919 Concerning Employment of Women During the Night*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 50 (Nov. 15). See generally JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 150-51 (Cambridge Univ. Press 2003); Prosper Weil, "The Court Cannot Conclude Definitively . . ." *Non Liqueur Revisited*, 36 COLUM. J. TRANSNAT'L L. 109, 109-19 (1998) (canvassing the debate over *non liquet* in international law).

140. See S.S. "Lotus," 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (formulating the background assumption in international law that a state is constrained only by rules to which it has consented).

141. *Id.*

142. See generally MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE*

law of transboundary pollution,<sup>143</sup> which is in principle governed by competing sovereignty considerations.<sup>144</sup> In the Trail Smelter Arbitration,<sup>145</sup> Canada and the United States disputed the liability of Canada for the cross-border effects of smelter pollution.<sup>146</sup> At Trail, a Canadian smelting plant discharged 600 to 700 tons of sulphur dioxide into the atmosphere every day. The sulphur dioxide gas clouds carried southwards over the U.S.-Canadian border and caused extensive damage to crops, timber, pasture, livestock, and buildings in the United States. In the arbitration, the United States claimed damages for the pollution of its territory.

In such a case, both parties may rely on their territorial sovereignty. While Canada may claim that it has the right to use its territory as it likes, the United States will rely on its own territorial integrity, according to which the United States need not tolerate any conduct that causes harm to its territory.<sup>147</sup> The core of the dispute is thus a pure balancing of competing interests. Such a balancing of competing interests may, however, only be accomplished by resort to principles of equity,<sup>148</sup> which will be even more difficult and arbitrary in multilateral than in bilateral situations.<sup>149</sup>

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STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 206-09 (1989) (considering state sovereignty-based arguments).

143. See generally EYAL BENVENISTI, *SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE* 22-42 (2002) (discussing how *Lotus* limitations inhibit optimal resource allocations on an international scale).

144. Wolfgang Graf Vitzthum, *Raum und Umwelt [Space and Environment]*, in *VÖLKERRECHT [INTERNATIONAL LAW]* 357, ¶ 94 (3d ed. 2004) (F.R.G.) (stating that customary law is not an efficient mechanism for governing transboundary pollution).

145. Trail Smelter (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (Perm. Ct. Arb. 1935).

146. See Kevin J. Madders, *Trail Smelter Arbitration*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 900, 900-01 (Rudolf Bernhardt ed., 2000) (explaining the facts of the case and the difficulties of resolving the issues through diplomatic channels).

147. See Albrecht Randelzhofer, *Transfrontier Pollution*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 146, at 913, 913-14 (discussing the competing principles of sovereignty and territorial integrity).

148. See Madders, *supra* note 146, at 902 (analogizing the *Trail Smelter* case to equitable decisions of the U.S. Supreme Court on interstate disputes).

149. See John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 *CORNELL INT'L L. J.* 109, 181 (1998) (discussing the difficulty of incorporating equity as a concept into multilateral international arbitrations such as that concerning the Law of the Sea); see also JOHN GRAHAM MERRILLS,

In the absence of rules governing a certain situation, legal principles may increase the rationality of the legal discourse, as principles may serve as authoritative guidelines for balancing the competing interests.<sup>150</sup> They may play a particularly important role in relation to the protection of public goods, which shall be understood as goods to which everyone has free access without having to bear the costs of his conduct.<sup>151</sup> Examples of common goods are environmental goods, such as clean air and water. Because these constellations deal with the protection of specific goods, and not with the regulation of a certain conduct, they will often not be governed by customary rules. In order to handle such cases, we need legal principles if we do not want to rely on equity alone.

b. The Protection of Human Rights

With regard to the protection of human rights, the second constellation we have identified, reciprocity plays no role whatsoever.<sup>152</sup> The motivation to protect one's own citizens does not depend on whether other states observe human rights.<sup>153</sup> The behavior of other states does not give an incentive for complying with human rights obligations.<sup>154</sup> Human rights norms may in the worst case be utopian, but they do not impair the stability of the international legal system. State practice is thus not a precondition for their determination.

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INTERNATIONAL DISPUTE SETTLEMENT 138-39 (Grotius Publications Ltd. 2d ed. 1991) (discussing the problems with courts relying on equity in the context of multilateral treaties).

150. See KOSKENNIEMI, *supra* note 142, at 142.

151. See generally Garret Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

152. *But see* Articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 48, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) (addressing when a non-injured state is permitted to invoke violations committed by another state); Bruno Simma, *From Bilateralism to Community Interests in International Law*, in 250 RECUEIL DES COURS 217, 364-73 (1994) (Fr.) (discussing the development of responsibility in the human rights field and differentiating human rights obligations from other international obligations).

153. See Simma, *supra* note 152, at 365 (differentiating between human rights treaties and typical international treaties by stating that human rights treaties are primarily for protecting citizens from the states party to the treaty).

154. See *id.* at 369 (contending that while states party to a human rights treaty may not realize tangible benefits, there are, from a *normative* point of view, nevertheless reciprocal legal rights and duties).



### 3. Principles in Legal Doctrine and Jurisprudence

Parts of legal doctrine and international jurisprudence have already implicitly admitted that international law contains principles not being supported by state practice. Some authors, although in principle recognizing a strict practice requirement, have postulated that special rules could be deducted from general customary principles even if a contrary state practice existed.<sup>155</sup> Such a mode of deductive reasoning has also been adopted by the ICJ in its *Nuclear Tests Case*, where the court finds that international obligations assumed through unilateral declarations are binding because of the principle of good faith.<sup>156</sup> This finding, however, cannot be supported without also abandoning the practice requirement for the general norm. This is a consequence of the fact that, if a special rule logically follows from a general principle, the contravening practice would also disprove the existence of the general norm.<sup>157</sup> It is thus telling that the ICJ in the *Nuclear Tests Case* merely assumed the existence of the good faith principle without substantiating it.<sup>158</sup>

#### C. GENERAL PRINCIPLES AND INTERNATIONAL CONSENSUS

Having shown that the difference between rules and principles justifies a distinct classification in the system of sources, it stands to reason that legal principles should be qualified as general principles

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155. See Albert Bleckmann, *Völkergewohnheitsrecht trotz widersprüchlicher Praxis?* [Customary International Law in Spite of Contradictory Practice?], 36 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG J. INT'L L.] 374, 390 (1976) (stating that some specific principles could be derived from overarching principles and that the specific principles would not need to be confirmed through state practice); Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, in 241 RECUEIL DES COURS 292-304 (1993) (Fr.).

156. *Nuclear Tests Case* (Austl. v. Fr.), 1974 I.C.J. 253, 267-68 (Dec. 20) (finding that the principle of good faith transformed France's unilateral declaration that it would abstain from further nuclear testing to a legal obligation to so abstain).

157. But see 1 OPPENHEIM'S INTERNATIONAL LAW 29 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992) (arguing that the ICJ in the *Nicaragua* judgment found state practice necessary to a rule of customary international law need not have been rigorously in conformity with the rule thus established).

158. See *Nuclear Tests Case*, 1974 I.C.J. at 268 ("One of the basic principles governing the creation and performance of legal obligations, *whatever their source*, is the principle of good faith.") (emphasis added).

in the sense of ICJ Statute Article 38(1)(c).<sup>159</sup> Some authors pretend that general principles can only be identified by analogy to the *forum domesticum*.<sup>160</sup> They draw their argument from the drafting history of the Statute of the Permanent Court of International Justice ("PCIJ Statute").<sup>161</sup> However, the conclusion drawn from the drafting history is not without debate.<sup>162</sup> Furthermore, according to Article 32 of the Vienna Convention on the Law of Treaties, drafting history is only a subsidiary means of interpreting treaties.<sup>163</sup>

General principles were originally meant to serve a gap-filling function.<sup>164</sup> The drafters of the ICJ Statute feared that certain situations would be covered neither by treaty provisions nor by customary law.<sup>165</sup> In order to avoid a *non liquet*, they introduced the "general principles of law recognized by civilized nations."<sup>166</sup> The element of recognition by civilized nations was added because the majority of the drafting committee wanted to prevent general

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159. Statute of the International Court of Justice, *supra* note 1, art. 38, para. 1.

160. See Béla Vitanyi, *Les positions Doctrinales Concernant le sens de la Notion de "Principes Généraux de Droit Reconnus par les Nations Civilisées,"* 86 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 48, 96-102 (1982) (Fr.) (giving an overview of doctrinal approaches identifying general principles by analogy to the *forum domesticum*).

161. See G. J. H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 139-46 (1983) (discussing the ICJ Statute drafters' dual view of general principles of law, first as accepted by all nations, and second as natural law).

162. See Simma & Alston, *supra* note 16, at 102 (stating that the drafters of the ICJ Statute did not want speculation to lead to the formation of general principles, but rather general acceptance or recognition by states).

163. Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331.

164. See M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law,"* 11 MICH. J. INT'L L. 768, 776 (1990) (examining how general principles are used to clarify and interpret international law); Johan G. Lammers, *General Principles of Law Recognized by Civilized Nations*, in ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER 53, 64 (Frits Kalshoven et al. eds., 1980) (describing the use of general principles by arbitral tribunals prior to the establishment of the PCIJ). See generally Alain Pellet, *Article 38*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 677 (Andreas Zimmermann et al. eds., 2006) (stating that although general principles of law were relied upon occasionally prior to the establishment of the PCIJ, the specific language of Article 38 encouraged reliance on general principles).

165. See Pellet, *supra* note 164, at 765 (noting that some drafters were concerned that the use of general principles would lead to subjectivity by judges).

166. Statute of the International Court of Justice, *supra* note 1, art. 38, para. 1.

principles from being a gateway for principles of natural law.<sup>167</sup> Contrary to treaty or customary norms, which both require an expression of state consensus either by drafting a written agreement or by a specific explicit practice, general principles thus appeal to the implicit consensus of states.<sup>168</sup>

When the PCIJ Statute was drafted there were no other means to determine such an implicit consensus than by resorting to the internal legal orders of the members of the international community.<sup>169</sup> Such analogies to national private law corresponded to the coordinative character of the international legal system of the beginning of the last century.<sup>170</sup> Today, however, the structure of the legal order has changed and other means to determine an implicit state consensus have developed.<sup>171</sup> There are thus two modes to determine general principles: on the one hand, they can be derived by analogy to national legal orders; on the other hand, they can be established by reference to resolutions of the U.N. General Assembly or of other international institutions representing a considerable majority of the international community.<sup>172</sup>

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167. See VAN HOOFF, *supra* note 161, at 139.

168. See VERDROSS, *supra* note 79.

169. See VAN HOOFF, *supra* note 161, at 138-39 (noting the feeling that the international community was relatively homogeneous at the time the PCIJ was created and the view that internal legal orders were thus representative of general principles).

170. See Bleckmann, *supra* note 40, at 39.

171. See Simma & Alston, *supra* note 16, at 102.

172. See Lammers, *supra* note 164, at 59 (reiterating that general principles could be found in *foro domestico* or in the principle of *res judicata*); Bassiouni, *supra* note 164, at 772 (discovering two legal sources for general principles in Article 38(I)(3) of the PCIJ Statute and Article 38(1)(c) of the ICJ Statute); Hermann Mosler, *General Principles of Law*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 519-25 (Rudolf Bernhardt ed., 1995) (providing examples of international decisions which used one of the different modes to determine general principles); Kadelbach & Kleinlein, *supra* note 47, at 255-56 (distinguishing three categories of general principles: (1) those which can be derived from national legal order; (2) those which can be established by an implicit international consensus; and (3) those which are inherent in every legal order—though this group could be perceived as a subgroup of the first two categories); see also *supra* Part II.C (explaining the second mode of determining general principles in more detail).

## CONCLUSION

Even in times of an increasing institutionalization of international law, unwritten international law counts—indeed, it may even gain importance. This is so, in particular, if one accepts that international regimes are not self-contained. It plays a considerable role in the discussions on human rights,<sup>173</sup> democracy,<sup>174</sup> and accountability in the context of international financial institutions, as well as in attempts to introduce human rights<sup>175</sup> and environmental<sup>176</sup> considerations into the scope of world trade law. Considering the growing complexity of present international law, a rethinking of the doctrine of sources becomes necessary. It is not without reason that this issue has attracted much attention in recent international law scholarship. This Article has attempted to reanimate the discussion of general principles of law as a second primary source of unwritten

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173. See generally John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretative Analysis of the IBRD and IDA Articles of Agreement*, 33 CORNELL INT'L L.J. 331 (2000) (examining how one could interpret the World Bank Charter in light of universal human rights); Genoveva Hernández Uriz, *To Lend or Not to Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197 (2001) (providing the human rights provisions incorporated into the World Bank's Chad/Cameroon project loan as an example of effective application of a human rights policy).

174. See STEFANIE KILLINGER, *THE WORLD BANK'S NON-POLITICAL MANDATE* 150-55 (2003); Adrian Leftwich, *Governance, Democracy and Development in the Third World*, 14 THIRD WORLD Q. 605, 610-11 (243).

175. See JAN NEUMANN, *DIE KOORDINATION DES WTO-RECHTS MIT ANDEREN VÖLKERRECHTLICHEN ORDNUNGEN* [THE COORDINATION OF WTO LAW WITH OTHER INTERNATIONAL LEGAL ORDERS] 288 (2002) (F.R.G.); Ernst-Ulrich Petersmann, *Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationships*, 4 J. INT'L ECON. L. 3, 37-38 (2001) (suggesting that the WTO use universal human rights when interpreting WTO rules).

176. See Rao Geping, *The Law Applied by World Trade Organization Panels*, 17 TEMP. INT'L & COMP. L.J. 125, 130-31 (2003) (examining the *Beef-Hormone* dispute as one based in environmental law and critiquing the Panel's holding that customary international law did not override WTO provisions even if it was considered a general principle because it was not clear how widely accepted it was by the international community); Sarah Harrell, *Beyond "Reach"? An Analysis of the European Union's Chemical Regulation Program Under World Trade Organization Agreements*, 24 WIS. INT'L L.J. 471, 484 (2006) (arguing that the precautionary principle of environmental law is so widely accepted, evidenced by its inclusion in numerous environmental treaties, that it rises to the level of customary international law and could have an effect on WTO decisions).

international law besides custom. The point of departure for the distinction between both categories of sources is a differentiation between two different types of norms drawn from legal theory—rules and principles. While rules are conduct-related and must thus be determined according to the traditional inductive approach of custom, principles are value-related. Thus, principles are consequently identified by a rather interpretative approach, taking into account resolutions of plenary international institutions and law-making treaties. This approach does not diminish the uncertainty related to arguments based on unwritten international law. It attempts, however, to provide a theoretical foundation and framework of evaluation for what is already a widespread practice in international legal discourse.