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# The Nature and Context of Rules and the Identification of Customary International Law

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## Abstract

*The International Court of Justice (ICJ) regularly invokes a two-element test for the identification of customary international law: state practice accompanied by opinio juris. Yet the Court's application of this test has appeared inconsistent. In some cases, an absence of evidence of opinio juris leads to a finding that an alleged rule of customary international law does not exist; yet in other cases, there is no clear evidence of opinio juris on the part of states participating in the practice, but the Court nevertheless concludes that the alleged customary rule exists. In other cases, the Court concludes that a customary rule exists apparently based on evidence of opinio juris alone. This article argues that these judgments do not undermine the ICJ's claim to be applying a two-element analysis but reveal something fundamental about how customary international law is identified – namely, that how the existence of state practice and opinio juris is evaluated may vary depending on the nature of the customary rule under investigation (for example, whether it is a permissive or prohibitive rule) and the context of underlying international law rules in which that alleged new customary international law rule is located.*

The International Court of Justice (ICJ) regularly invokes a two-element test for the identification of customary international law: state practice accompanied by *opinio juris*. Yet, in its case law, the Court's application of the test has appeared inconsistent as to whether it actually requires both elements to be fulfilled in order for a customary international law rule to be identified. In some cases, a lack of evidence of *opinio juris* on the part of states participating in a practice has been, predictably, fatal to the

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argument that a rule of customary international law exists.<sup>1</sup> Yet, in other cases, there is no clear evidence of *opinio juris* on the part of states participating in the practice, but the Court nevertheless concludes that the alleged customary rule exists.<sup>2</sup> In other cases, widespread *opinio juris* has appeared sufficient to conclude that a customary rule exists, despite an apparent absence of state practice in support of the rule.<sup>3</sup>

This article argues that these judgments do not undermine or contradict the Court's claim to be applying a two-element analysis but, properly understood, reveal something fundamental about how customary international law is identified – namely, that how the existence of state practice and *opinio juris* is evaluated, and the kind of evidence that may be used to satisfy each element, may vary depending on the nature of the customary rule under investigation (for example, whether it is a permissive or prohibitive rule) and the context of underlying international law rules in which that alleged rule is located.

For example, consider a case in which it was necessary to determine whether a new customary prohibition on a particular conduct had been established, as in the *Case of the SS Lotus*.<sup>4</sup> In that case, the state practice that would support an alleged new customary prohibition on the exercise of extraterritorial jurisdiction – omission by states to exercise extraterritorial jurisdiction – was also consistent with the context of underlying international law rules in which states were currently permitted, but not required, to perform that conduct. For the new prohibitive customary rule to be identified, it needed to be shown that their omission was due to an acceptance that that conduct was required by a customary prohibition, otherwise it would simply be presumed that states were acting pursuant to the existing permission granted by the underlying international law rules. That is, for the new customary prohibition to be identified, positive evidence of *opinio juris* on the part of states omitting to exercise extraterritorial jurisdiction was needed to clarify the meaning of their practice and determine whether it supported the alleged new customary rule.

Contrast this with a case in which it was necessary to determine whether conduct prohibited by international law was now allowed under a new permissive customary rule, as in the *Case Concerning Right of Passage*.<sup>5</sup> In this case, the state practice that would support a customary rule permitting passage – a practice of passing across a state's territory without authorization – was inconsistent with the underlying international law rules: the principles of territorial sovereignty and integrity prohibit entry onto a state's territory without its consent. Where practice supporting an alleged customary rule is inconsistent with the context of underlying international law rules in

<sup>1</sup> *Case of the SS Lotus*, 1927 PCIJ Series A, No. 10; *Colombian-Peruvian Asylum Case*, Judgment, 20 November 1950, ICJ Reports (1950) 266; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 22; *North Sea Continental Shelf*, Judgment, 20 February 1969, ICJ Reports (1969) 3.

<sup>2</sup> *Case Concerning Right of Passage over Indian Territory*, Merits, 12 April 1960, ICJ Reports (1960) 6; *Dispute Regarding Navigational and Related Rights*, Judgment, 13 July 2009, ICJ Reports (2009) 213.

<sup>3</sup> *Military and Paramilitary Activities in and against Nicaragua*, Merits, 27 June 1986, ICJ Reports (1986) 14.

<sup>4</sup> *Case of the SS Lotus*, *supra* note 1.

<sup>5</sup> *Right of Passage*, *supra* note 2.

this way, it is argued that *opinio juris* for the new rule may – in certain circumstances – be inferred from a state’s participation in the supportive practice.

Section 1 introduces the two-element test for the identification of customary international law. Section 2 explains how the nature and context of a customary rule may influence the application of the two-element test and how these factors impact the inquiry into the existence of *opinio juris*. Sections 3 and 4 then show how, when the nature and context of a rule are taken into account, those cases in which the Court has found the existence of a customary rule even when *opinio juris* or state practice appears to be absent are correct applications of the two-element test.

## 1 The Two-element Test in the Jurisprudence of the ICJ

Article 38(1)(b) of the ICJ Statute refers to ‘international custom, as evidence of a general practice accepted as law’.<sup>6</sup> The confusing drafting of that provision is widely recognized,<sup>7</sup> and it is of little assistance in determining how customary international law rules are to be identified in practice. Rather, through its jurisprudence, the Court has elaborated a two-element approach, distinguishing between state practice and *opinio juris* and elaborating on how each element is to be fulfilled, such as the generality of practice required and the kinds of evidence that may be consulted.<sup>8</sup>

The ICJ has been consistent in its expression of the view that customary international law is general practice accepted as law.<sup>9</sup> Yet the Court has in certain cases simply asserted that customary rules exist without conducting any analysis of state practice and *opinio juris*.<sup>10</sup> These cases could charitably be explained as examples of ‘elision in judicial reasoning’<sup>11</sup> or simply a lack of clarity in the drafting of the Court’s judgments. However, more problematic are those cases where a rule of customary international law has been identified, even though one of the

<sup>6</sup> Statute of the International Court of Justice 1945, 33 UNTS 993, Art. 38(1)(b).

<sup>7</sup> See, e.g., International Law Commission (ILC), First Report on Formation and Evidence of Customary International Law by Michael Wood, Special Rapporteur, Doc. A/CN.4/663, 17 May 2013, para. 31.

<sup>8</sup> Tams, ‘Meta-Custom and the Court: A Study in Judicial Law-Making’, 14 *Law and Practice of International Tribunals (LP ICT)* (2015) 51, at 58.

<sup>9</sup> ILC, First Report, *supra* note 7, paras 57–65; see, e.g., *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports (2019) 95, para. 149 (‘the criteria which it has repeatedly laid down for identifying a rule of customary international law’); *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 55.

<sup>10</sup> For example, in *Nicaragua*, the International Court of Justice (ICJ) held that Common Articles 1 and 3 of the Geneva Conventions were customary rules, despite a ‘complete failure to inquire whether *opinio juris* and practice support’ that conclusion. *Nicaragua*, *supra* note 3, para. 218; T. Meron, *The Making of International Criminal Justice: The View from the Bench* (2011), at 30; see also Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’, 26 *European Journal of International Law (EJIL)* (2015) 417; Mendelson, ‘The International Court of Justice and the Sources of International Law’, in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (1996) 63, at 67.

<sup>11</sup> Akehurst, ‘Custom as a Source of International Law’, 47(1) *British Yearbook of International Law* (1975) 1, at 32.

elements – state practice or *opinio juris* – appears to be missing. In some cases, as the two-element approach would predict, an absence of evidence of *opinio juris* has led to a finding by the Court that an alleged rule of customary international law does not exist: the *Colombian-Peruvian Asylum* case, the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion and the *North Sea Continental Shelf* cases.<sup>12</sup> Yet in *Military and Paramilitary Activities in and against Nicaragua*, the Court concluded that a customary rule exists apparently based on evidence of *opinio juris* alone.<sup>13</sup> In other cases, there has been no clear evidence of *opinio juris* on the part of states participating in the practice, but the Court nevertheless has concluded that the alleged customary rule exists: the *Case Concerning Right of Passage over Indian Territory* and the more recent *Dispute Regarding Navigational and Related Rights*.<sup>14</sup>

These apparent inconsistencies in the Court's approach have led scholars to cast doubt on whether the Court really does, as it claims, apply a two-element test when identifying rules of customary international law. Rudolf Geiger has argued that such inconsistencies indicate that 'the Court's openly proclaimed standards for establishing specific customary rules are quite different from how the Court really proceeds'.<sup>15</sup> Likewise, Alberto Alvarez-Jimenez has suggested that the Court does not really apply the two-element test but has developed a new 'flexible deductive' approach to the identification of customary international law,<sup>16</sup> while Loretta Chan has argued that the Court is engaging in law creation.<sup>17</sup> Ambitious alternative accounts of the nature and identification of customary international law have rejected the two-element test in favour of, for example, the 'reflective interpretive approach' developed by Anthea Roberts, which claims to reconcile the varying weight given to practice and *opinio juris*;<sup>18</sup> Frederick Kirgis' 'sliding scale' between practice and *opinio juris*;<sup>19</sup> or the single element approach advanced by the International Law Association, in which the role of *opinio juris* is diminished.<sup>20</sup> Jack Goldsmith and Eric Posner have sought to explain

<sup>12</sup> *Colombian-Peruvian Asylum Case*, *supra* note 1; *Nuclear Weapons*, *supra* note 1; *North Sea*, *supra* note 1.

<sup>13</sup> *Nicaragua*, *supra* note 3.

<sup>14</sup> *Navigational and Related Rights*, *supra* note 2.

<sup>15</sup> Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal', in U. Fastenach (ed.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011) 673, at 674; see also Kelly, 'The Twilight of Customary International Law', 40 *Virginia Journal of International Law* (2000) 449, at 469–470; Choi and Gulati, 'Customary International Law: How Do Courts Do It?', in C.A. Bradley (ed.), *Custom's Future: International Law in a Changing World* (2016) 177, at 146.

<sup>16</sup> Alvarez-Jimenez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence 2000–2009', 60 *International and Comparative Law Quarterly* (2011) 681, at 689.

<sup>17</sup> Chan, 'The Dominance of the International Court of Justice in the Creation of Customary International Law', 6 *Southampton Student Law Review* (2016) 44.

<sup>18</sup> Roberts, 'Traditional and Modern Custom', 9 *American Journal of International Law (AJIL)* (2001) 757.

<sup>19</sup> Kirgis, 'Custom on a Sliding Scale', 81(1) *AJIL* (1987) 146.

<sup>20</sup> International Law Association (ILA), *Statement of Principles Applicable to the Formation of Customary International Law* (2000).

customary international law on the basis of game theory,<sup>21</sup> while Andrew Guzman has applied rational choice theory.<sup>22</sup>

However, support for such alternative approaches remains limited to scholarly writings, and they have ‘gained no traction with states and no significant following among practitioners’.<sup>23</sup> Despite the ongoing debate, it seems that the Court at least still considers itself to be adhering to the two-element test.<sup>24</sup> This article seeks to defend the position that, in the cases listed above, the ICJ is indeed doing what it says it is doing and is applying the two-element test for the identification of customary international law. The apparent inconsistencies in the Court’s approach can be explained by how the nature and context of an alleged customary rule can influence how the two-element test is applied in different cases and, in particular, the type of evidence that may be used to satisfy each element.

It is true that, besides the nature and context of the customary rule concerned, there are many other factors that can account, to some extent, for the variation in the Court’s jurisprudence, without requiring abandonment of the two-element test. For example, the application of the two-element test may vary depending on the subject matter concerned.<sup>25</sup> The ICJ’s jurisprudence spans 73 years – 98 including the Permanent Court of International Justice (PCIJ) – so it is also unsurprising to find that its approach to the two-element test has evolved over time. The Court has shown greater flexibility in the kinds of materials it has accepted as evidence of state practice, accepting that statements as well as conduct may constitute practice.<sup>26</sup> With now nearly 200 states whose practice must be assessed, and especially in light of the Court’s limited fact-finding powers,<sup>27</sup> the Court increasingly relies on its own precedents and work already conducted by the International Law Commission (ILC)<sup>28</sup> rather than engaging in a detailed evaluation of practice.<sup>29</sup>

However, this article is not concerned with how variations according to chronology or subject matter, or the political context of the various cases, may have impacted the application of the test for custom by the Court. The argument made here is that taking

<sup>21</sup> Goldsmith and Posner, ‘A Theory of Customary International Law’, 66 *University of Chicago Law Review* (1999) 1113; see also Chinen, ‘Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner’, 23 *Michigan Journal of International Law (MJIL)* (2001) 143.

<sup>22</sup> Guzman, ‘Saving Customary International Law’, 27 *MJIL* (2005) 115.

<sup>23</sup> Wood, ‘Concluding Observations’, 19(1) *International Community Law Review* (2017) 156, at 157. GA Res. 73/203, 20 December 2018 (welcoming and taking note of the ILC’s conclusions on identification of customary international law, which reaffirmed the two-element approach, was adopted by consensus).

<sup>24</sup> *Immunities*, *supra* note 9, para. 55; Tomka, ‘Custom and the International Court of Justice’, 12 *LP ICT* (2013) 195, at 197.

<sup>25</sup> ILC, Second Report on Formation and Evidence of Customary International Law by Michael Wood, Special Rapporteur, Doc. A/CN.4/672, 22 May 2014, para. 28. For example, *Immunities*, *supra* note 9, para. 55; P. Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (2016), at 423–424; cf. Kolb ‘Selected Problems in the Theory of Customary International Law’, 50(2) *Netherlands International Law Review* (2003) 119, at 122.

<sup>26</sup> Tams, *supra* note 8, at 67.

<sup>27</sup> Meron, *supra* note 10, at 31–32.

<sup>28</sup> Tams, *supra* note 8, at 73–75; Tomka, *supra* note 24, at 196–198.

<sup>29</sup> Meron, *supra* note 10, at 31.

the nature and context of the alleged customary rule into account can explain why in the cases mentioned above, despite applying the same two-element test for custom, the Court's approach has varied. More significantly, this analysis brings greater clarity and precision to our understanding of the process by which customary international law is identified.

## 2 The Nature and Context of a Customary Rule

In practice, the kinds of acts that constitute state practice supporting the existence of an alleged customary rule will normally vary depending on the nature of the rule concerned. This can be shown by considering the kinds of acts required to constitute a practice supporting the existence of (i) permissive rules – for example, the right of self-defence; (ii) prohibitive rules (negative duties), such as the prohibition on the use of force by states; and (iii) prescriptive rules (positive duties) – for example, the duty to render assistance to those in distress at sea. This is not the only possible taxonomy of legal rules, but it reflects the cases analysed below and will be used to demonstrate how the nature of a rule impacts the application of the test for customary international law (see [Table 1](#)).

So, for example, practice in support of some customary rules – prohibitions – will typically consist of omissions. This observation must be qualified since statements, such as diplomatic protests and military manuals, are now accepted to be capable of constituting not only *opinio juris* but also practice in favour of the rule they express.<sup>30</sup> Regardless of the nature of the rule, a statement in support can constitute a form of state practice, and so there may be affirmative practice of this kind even when considering the existence of a customary prohibition. However, where such statements are absent or insufficient to establish the customary rule, the nature of the rule will help identify the kinds of acts that would form a supportive practice. It is these kinds of scenarios, which do not involve state practice in the form of statements, with which this analysis is concerned.

Of course, how the nature of a given rule is characterized is not an objective or neutral question. A prohibition on doing X could conceivably be characterized as a positive duty to do not-X and vice versa. Similarly, whether a particular customary rule forms an exception to a more general rule, or even an exception to an exception, is not a static or absolute truth but, rather, will depend on how the area of law and particular dispute are analysed.<sup>31</sup> When the identification of customary international law occurs in the context of litigation, much will therefore depend on how the issue is argued by the parties and how the rules involved are ultimately characterized by the Court. This will influence the application of the two-element test in that case by

<sup>30</sup> ILC, Conclusions on Identification of Customary International Law, with Commentaries, Doc. A/73/10 (2018), Conclusion 6, Commentary, para. 2; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), at 5–6.

<sup>31</sup> See Methymaki and Tzanakopoulos, 'Freedom with Their Exception', in F. Paddeu and L. Bartels (eds), *Exceptions in International Law* (2020) 225, at 236–237, 240.



**Table 1:** Supportive practice and the nature of a customary rule

Alleged customary rule	Supportive practice
Permissive rule	<i>Permitted conduct being done</i>
Prescriptive rule / positive duty	<i>Required conduct being done</i>
Prohibitive rule / negative duty	<i>Prohibited conduct not being done (omission)</i>

determining what kind of conduct will constitute the supportive state practice that needs to be established and what conduct will be qualified as practice contrary to the alleged customary rule.

In cases where there is practice both supportive of, and contrary to, an alleged customary rule, this framing may make all the difference.<sup>32</sup> In the ICJ advisory proceedings concerning *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, some participants argued that the customary status of the right to self-determination did not entail ‘an obligation to implement that right within the boundaries of the non-self-governing territory’.<sup>33</sup> That is, they disputed the existence of a customary prohibition on, for example, dividing up a non-self-governing territory so as to maintain part of it under colonial control after independence. However, in its advisory opinion, the Court characterized the question as whether there existed a permissive rule, acting as an exception to that prohibition.<sup>34</sup> Given the existing contrary practice where colonial states have failed to respect the territorial integrity of self-governing territories, it may have been difficult to show ‘extensive and virtually uniform’ practice in support of the prohibitive customary rule, especially given its specificity.<sup>35</sup> Yet, when the question becomes one of the existence of a new customary rule permitting interference with the boundaries of a non-self-governing territory, it is much easier for the Court to find that the conduct in question must be prohibited because no such permissive customary rule can be shown to exist – in this case, due to the clear evidence of contrary *opinio juris*.<sup>36</sup> The body of practice remains the same and the two-element test remains the same, but the characterization of the nature of the rules in question effectively determines the outcome of the case.

The characterization of the nature of the rules at issue may also determine which party must bear the burden of establishing that a customary international law rule exists.<sup>37</sup> In the *Jurisdictional Immunities of the State* case, Italy accepted that under international law states are ‘generally entitled to immunity’ in respect of *acta jure imperii*.<sup>38</sup>

<sup>32</sup> Chasapis Tassinis ‘Customary International Law: Interpretation from Beginning to End’, 31(1) *EJIL* (2020) 235, at 256.

<sup>33</sup> *Chagos Archipelago*, *supra* note 9, para. 159.

<sup>34</sup> *Ibid.*, paras 159–160; see also Chasapis Tassinis, *supra* note 32, at 262–263.

<sup>35</sup> Kolb, *supra* note 25, at 131.

<sup>36</sup> *Chagos Archipelago*, *supra* note 9, para. 160.

<sup>37</sup> This is not the result of any formal rules as to allocation of burdens before the ICJ. Rather, if a dispute is characterized as turning on the existence of a particular customary rule, it is the party that wishes to rely on that rule that will need to demonstrate convincingly that evidence sufficient to identify it exists. See Methymaki and Tzanakopoulos, *supra* note 31, at 239.

<sup>38</sup> *Immunities*, *supra* note 9, para. 61.

Similarly, in the *Arrest Warrant of 1 April 2000* case, Belgium accepted that ‘Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State’.<sup>39</sup> In both cases, those views were shared by the other party to the dispute and also adopted by the Court in its judgment. Italy and Belgium thus, perhaps unwisely, allowed themselves to be placed in the position of arguing for the existence of permissive customary exceptions to an established rule prohibiting the exercise of jurisdiction, rather than making the dispute a question of whether that prohibitive customary rule establishing state immunity, relied on by the other parties, exists in the first place.<sup>40</sup> Where a party must prove the existence of a customary exception, that characterization alone will render their task more difficult since ‘the amount of practice needed to establish a new rule which conflicts with the previously accepted rule is much greater than the amount of practice needed to establish a new rule in vacuo’ or to demonstrate the continued existence of a well-established customary rule despite some contrary practice.<sup>41</sup> In both cases, the Court concluded that there was insufficient practice to support the existence of the alleged customary exceptions to state immunity. Indeed, there does not appear to be any case before the ICJ where a party has succeeded in an argument relying on a customary rule that has been characterized as an exception to an existing customary rule.<sup>42</sup>

The nature of the alleged customary rule – or, rather, the nature it is characterized as having by an actor seeking to establish whether the rule exists – will therefore impact the identification of state practice, as the nature of the rule will determine in many cases what conduct must be found to be widespread and representative.

### ***A The Importance of Opinio Juris in Identifying Customary Prohibitions***

Conclusion 3 of the ILC’s 2018 conclusions on the ‘[i]dentification of customary international law’ states that, ‘[i]n assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found’.<sup>43</sup> In relation to the nature of the rule, the commentary to that conclusion notes that, ‘where

<sup>39</sup> *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Merits, 14 February 2002, ICJ Reports (2002) 3, paras 49, 56.

<sup>40</sup> See the criticism of Judge Van den Wyngaert in *ibid.*, paras. 11–23, Dissenting Opinion of Judge Van den Wyngaert. Cf. Alvarez-Jimenez, *supra* note 16, at 694.

<sup>41</sup> Akehurst, *supra* note 11, at 13; Kolb, *supra* note 25, at 133; Pellet, ‘Le droit international à la lumière de la pratique: l’introuvable théorie de la réalité’, 414 *Recueil des cours* (2021) 9, at 349.

<sup>42</sup> See also the Court’s rejection of the existence of a customary exception in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, 24 May 2007, ICJ Reports (2007) 582, paras 87–89.

<sup>43</sup> ILC, Conclusions, *supra* note 30, Conclusion 3. From paragraph 5 of the commentary to that conclusion, it seems that ‘particular circumstances’ is intended to refer to the factual circumstances in which the practice occurred – for example: ‘Statements made casually, or in the heat of the moment, will usually carry less weight than those that are carefully considered; those made by junior officials may carry less weight than those voiced by senior members of the Government.’



prohibitive rules are concerned, it may sometimes be difficult to find much affirmative State practice (as opposed to inaction); cases involving such rules are more likely to turn on evaluating whether the inaction is accepted as law'.<sup>44</sup>

That is, not only will the prohibitive nature of the rule impact what constitutes a supportive state practice, which will normally consist of inaction/omissions, but where the nature of the rule is prohibitive, the ILC suggests that this will impact the identification of the other element – *opinio juris* – as the identification of the rule in such cases is 'more likely' to turn on the evaluation of *opinio juris*. However, if the ILC is also correct in saying that 'the existence of one element may not be deduced merely from the existence of the other',<sup>45</sup> then even affirmative state practice cannot lead to any automatic conclusion that such practice is accepted as law. *Opinio juris* accompanying the practice should still need to be demonstrated independently for a customary rule to be identified, regardless of whether the practice consists of omissions or affirmative practice. So, what is it about prohibitions that makes the identification of an *opinio juris* especially important? If *opinio juris* is always a *sine qua non* for the identification of custom, how is it possible for cases involving prohibitions to be more likely to turn on evaluating whether the practice is accepted as law?

This apparent inconsistency in the ILC's position can be explained. When establishing customary prohibitions, evidence of *opinio juris* is particularly important because, in addition to constituting one necessary element of the two-element test, *opinio juris* is needed to determine whether inaction should count as state practice in support of a new customary rule. Without *opinio juris* to indicate that a state was consciously choosing not to act, inaction is ambiguous: the state not acting in a certain way could be doing so because it believes it is prohibited under a new rule of customary law, but it could be choosing not to act for another reason or for no reason.<sup>46</sup>

The importance of *opinio juris* in this situation flows from a broader principle and is not limited to prohibitive customary rules or even practice involving omissions. As Maurice Mendelson has observed, positive action can be ambiguous as to whether or not it supports a particular customary rule, and, in such situations, evidence of *opinio juris* will also be particularly important.<sup>47</sup> The ambiguity of the practice means that evidence of *opinio juris* on the part of states participating in the practice is needed to clarify the meaning of the practice before it can count in support of the alleged

<sup>44</sup> *Ibid.*, Conclusion 3, commentary, para. 4; see also Talmon, *supra* note 10, at 422; Meron, *supra* note 10, at 32. Supportive practice of omissions should be distinguished from silent acquiescence of states in the conduct of others, which is relevant rather to the *opinio juris* element. See section 4 of this article; cf. ILC, Second Report, *supra* note 25, para. 42.

<sup>45</sup> ILC, Conclusions, *supra* note 30, Conclusion 3(2), commentary, para. 8.

<sup>46</sup> See Buzzini, 'Les comportements passifs des états et leur incidence sur la réglementation de l'emploi de la force en droit international général', in E. Cannizzarro and P. Palchetti (eds), *Customary International Law on the Use of Force: A Methodological Approach* (2005) 79, at 82.

<sup>47</sup> Mendelson, 'The Formation of Customary International Law', 272 *Receuil des Cours* (1998) 188, at 273. Mendelson sees the role of *opinio juris* in such cases as negative: its absence can explain why certain practice should not count as practice for custom because it is motivated by comity and so on. He also goes further in concluding that, where the practice is not ambiguous, the subjective element does not need to be present (at 292). Neither view is adopted here.

customary rule. Whether practice is ambiguous in this way will depend on both the nature of the customary rule it is alleged to support and the context of the underlying international law rules in which the new rule is said to be located.

## B *The Context of the Customary Rule*

As the ICJ has observed, ‘a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates ... in the context of a wider framework of legal rules of which it forms only a part’.<sup>48</sup> The existence of a rule of customary international law must be evaluated in the context of those underlying international law rules.<sup>49</sup> Depending on the context of underlying international law rules and the nature of the alleged new customary rule, the state practice supportive of the new rule may be consistent or inconsistent with those underlying international law rules. For example, consider a situation where, under international law, the position is that certain conduct – say, the exercise of extraterritorial criminal jurisdiction – is permitted unless a prohibition can be shown. To establish the prohibitive customary rule, the practice required would be states not doing the act that is permitted by the underlying international law rules and alleged to be prohibited by the emerging customary rule. In this case, the practice required to establish the new rule is consistent with the underlying international law rules.

However, where the context is that all exercises of criminal jurisdiction extraterritorially are prohibited unless the existence of a permissive rule is shown, the practice required to establish such a permissive customary rule would be states doing the acts that are prohibited under the underlying international law rules and alleged to be permitted under the emerging rule. In this case, therefore, the practice required to establish the new customary rule would be inconsistent with the underlying international law rules.<sup>50</sup> Again, the possibility for state practice to take the form of statements in which states express a view as to the content of customary international law shows that these are not universal truths: a statement by a state that a new customary law rule exists will not be inconsistent with the underlying international law rules (except in the unlikely scenario that international law prohibits the making of statements about what the law is). However, in the kinds of situations we are concerned with here, where state practice for the new rule does not consist only of statements, the practice may be either consistent or inconsistent with the underlying international law rules.

Where practice that would be supportive of an alleged new customary rule is also consistent with the underlying international law rules that exist in the background, the practice will be ambiguous in the sense that it could be supportive of either the alleged new rule or those underlying rules. In this situation, *opinio juris* is particularly important because, without evidence of *opinio juris* for the existence of the new rule,

<sup>48</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73, para. 10.

<sup>49</sup> ILC, Conclusions, *supra* note 30, Conclusion 3, commentary, para. 3.

<sup>50</sup> To the extent that this inconsistency amounts to a breach of the acting state’s obligations under those underlying international law rules, this may of course engage the responsibility of the acting state (subject to the application of any defences and so on). However, this is not relevant for the discussion here.

states will be presumed to be acting consistently with the underlying international law rules, and the practice may simply strengthen existing customary international law.<sup>51</sup> This is why, in many cases, ascertaining the existence of a prohibitive customary rule will, as the ILC has observed, ‘turn on evaluating whether the inaction is accepted as law’. Without evidence of *opinio juris* to clarify the legal significance, if any, that states attach to their omission to perform an act, inaction by states could constitute practice supporting a new customary prohibition on the act concerned, but it is equally compatible with the view that, under the underlying international law rules, states are permitted to perform such an act but are not obliged to do so and are merely choosing not to exercise that permission.

The point is well illustrated by the *Colombian-Peruvian Asylum* case. General customary international law permitted both the state of nationality of an individual alleged to have committed a crime on its territory (the territorial state – Peru) and the state into whose embassy an individual has fled and which is purporting to grant asylum (the asylum-granting state – Colombia) to make their own judgment as to whether or not the alleged crime was a political offence. If the asylum-granting state qualified the alleged crime as a political offence, the territorial state may contest the qualification through dispute-settlement mechanisms, although they need not choose to do so. It is this general permissive rule that provides the backdrop against which the existence of the alleged new customary rule must be assessed. Colombia argued that a new local customary rule recognized the right of the asylum-granting state to make a unilateral and definitive determination as to the nature of the asylum seeker’s offence.<sup>52</sup> In effect, Colombia was alleging the existence of a new customary prohibition that now required territorial states not to challenge the asylum-granting state’s qualification. The ICJ was therefore required to decide whether a prohibitive rule existed in the form of local customary international law derogating from a general permissive rule of customary international law.<sup>53</sup>

While Colombia referred to a ‘large number of particular cases in which diplomatic asylum was in fact granted and respected’ as state practice in support of the rule – that is, a practice of omissions by the territorial state to challenge the asylum-granting state’s qualification – it could not produce evidence of *opinio juris* in support of the prohibition.<sup>54</sup> There was no evidence to suggest a new right of unilateral qualification was invoked or, if it was, that this was ‘exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them’.<sup>55</sup> The Court concluded that Colombia had not shown that the new customary rule was established.<sup>56</sup> There was practice in support of the new customary prohibition in the form of the omission of territorial states to challenge

<sup>51</sup> Mendelson, *supra* note 47, at 192.

<sup>52</sup> *Asylum*, *supra* note 1, at 276.

<sup>53</sup> *Ibid.*, at 275.

<sup>54</sup> *Ibid.*, at 277.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, at 277–278.

the asylum-granting state's qualification. However, given its context, this is also consistent with the underlying permissive rule of general customary international law allowing – but not requiring – the territorial state to challenge the qualification by the asylum-granting state. Territorial states may simply be electing not to challenge those qualifications 'merely for reasons of political expediency'. For the inaction to count as state practice in support of the new local customary prohibition, evidence of *opinio juris* would be needed to remove the ambiguity from the omission.

Of course, in many cases, determining what the underlying international law rules are will itself require an evaluation of customary international law and, like the characterization of the nature of a rule, this is not a neutral or objective exercise. In litigation, the underlying international law rules may be as significant a point of contention among the parties as the evidence for the alleged new customary rule itself. The PCIJ's *Case of the SS Lotus* is the classic example. The question at issue was whether Turkey had lawfully exercised criminal jurisdiction over the *Lotus*' French captain, who was prosecuted on arrival in Istanbul for his role in that ship's collision with the Turkish vessel *Boz-Court*, causing the death of eight sailors and passengers. France argued that, in the context of underlying international law rules whereby states are prohibited from exercising jurisdiction extraterritorially, it was for Turkey to establish a permissive rule allowing the exercise of jurisdiction by the non-flag state.<sup>57</sup> The PCIJ disagreed on the much criticized<sup>58</sup> basis that 'restrictions on the independence of States cannot be presumed'.<sup>59</sup> In the context of an underlying general permission enjoyed by states, the Court held that it was for France to demonstrate that a prohibitive rule of international law had come into existence that would render Turkey's exercise of jurisdiction unlawful. That France was ultimately unsuccessful in this case was, as in *Asylum*, due to a lack of evidence of *opinio juris*: since the examples invoked by France of omissions by states to exercise extraterritorial jurisdiction were consistent with both the alleged new rule and the underlying international law rules, evidence of *opinio juris* was needed to remove the ambiguity from the practice if the new customary prohibition was to be established.<sup>60</sup> It was only 'if such abstention were based on their being conscious of having a duty to abstain' that it would be possible to speak of a customary rule.<sup>61</sup>

As was pointed out even at the time, however, we cannot simply assume that states enjoy unlimited freedom to act unless a rule of international law imposes a prohibition.<sup>62</sup> Determining the backdrop of underlying international law rules will therefore

<sup>57</sup> France argued that such a permissive rule would take the form of an express or implicit agreement rather than a rule of general customary international law. *Lotus*, *supra* note 1, at 7.

<sup>58</sup> E.g. R. Kolb, *Theory of International Law* (2016), at 224–232; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403, paras 3, 8, Declaration of Judge Simma.

<sup>59</sup> *Lotus*, *supra* note 1, at 18.

<sup>60</sup> ILA, Statement, *supra* note 20, section 6, commentary.

<sup>61</sup> *Lotus*, *supra* note 1, at 28; ILA, Statement, *supra* note 20, section 6, commentary; Mendelson, *supra* note 47, at 274.

<sup>62</sup> Brierly, 'The Lotus Case', 174 *Law Quarterly Review* (1928) 154, at 155–156.

be a more complex task and ultimately will depend on an analysis of the particular area of international law concerned.<sup>63</sup> For example, in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ, like the PCIJ in *Lotus*, took the view that for nuclear weapons to be unlawful it was the existence of a prohibitive customary international law rule that needed to be established in the context of an underlying general permission. However, rather than simply assuming that no restrictions on state freedom can be presumed, the Court reached this conclusion based on an evaluation of practice in the field of arms control, which showed that the illegality of the use of various weapons under international law results from prohibitive rules, against a background where all weapons are otherwise permitted under international law.<sup>64</sup> By contrast, when attempting to establish new customary rules in the *jus ad bellum*, the underlying international law rules will virtually always provide that the use of force by states is prohibited as, since 1945, international law has imposed a comprehensive prohibition on the use of force, both through a quasi-universal treaty and general customary international law, with two exceptions narrowly defined.

The facts analysed in the *Nuclear Weapons* opinion illustrate well the ambiguity of omissions as practice establishing prohibitions<sup>65</sup> and, in particular, how in such cases it is *opinio juris* that effectively creates a supportive state practice out of inaction.<sup>66</sup> The inaction in question – consistent non-utilization of nuclear weapons since 1945 – was relied on both by states arguing for a new customary prohibition on nuclear weapons and by those arguing for the continued existence of the general permission for states to use those weapons that are not prohibited.<sup>67</sup> In the latter case, the states argued that non-use of nuclear weapons was the result of a policy of deterrence, meaning they reserved their right to use nuclear weapons. In the former, it was argued that states were observing a customary prohibition. Their inaction was consistent with both customary international law rules.

The Court held that, since states were ‘profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*’, the Court did ‘not consider itself able to find that there is such an *opinio juris*’.<sup>68</sup> Yet the difficulty seems rather that the participants in the case were in agreement that non-recourse to nuclear weapons reflects an *opinio juris* by states but not in agreement over what that opinion is. For some, it is an acceptance that they are prohibited by international law from using nuclear weapons, while, for others, it is that although they have chosen not to use nuclear weapons they remain permitted to do so under international law. The problem was therefore that the *opinio juris* of

<sup>63</sup> Kolb, *supra* note 58, at 232–233. It has been suggested that, beyond prohibited and permitted acts, there is also behaviour that is ‘legally neutral’ and unregulated under international law. H. Thirlway, *The Sources of International Law* (2nd edn, 2019), at 18. However, this view is not adopted here.

<sup>64</sup> *Nuclear Weapons*, *supra* note 1, at para. 52.

<sup>65</sup> Mendelson, *supra* note 47, at 274.

<sup>66</sup> See Haggemacher, ‘La Doctrine des deux éléments du droit coutumier dans la pratique de la Cour Internationale de Justice’, 1 *Revue General de Droit International Public* (1986) 6, at 72.

<sup>67</sup> *Nuclear Weapons*, *supra* note 1, paras 65–66.

<sup>68</sup> *Ibid.*, para. 67.

states was divided: some accepted that their practice was governed by the alleged new prohibitive customary rule, whereas others accepted that their practice continued to be regulated by the underlying customary permission. This divided *opinio juris* produced a divided practice, by removing the ambiguity from the omissions of the different groups of states. The statements during the proceedings revealed that some of those omissions were practice that accepted that states were permitted to use nuclear weapons, while others were practice in acceptance of the new prohibition. Taken as a whole, the practice in support of the new prohibitive customary rule was not sufficiently widespread and representative to fulfil the two-element test for identification of customary international law.

The preceding analysis has shown that the importance of *opinio juris* in identifying customary rules of a prohibitive nature results from the ambiguity created by the context in which that prohibitive rule is said to be located, as the state practice is consistent with more than one customary rule. Yet there is no reason why this reasoning should apply only to situations where the alleged customary rule is a prohibition or even where the practice in question consists of omissions. There is nothing necessarily ambiguous about omissions. Indeed, where a customary rule is prescriptive in nature (a positive duty), omissions are not ambiguous: consistent failure to perform the required conduct would constitute practice clearly contrary to a prescriptive customary rule. Moreover, as seen in Table 2, affirmative practice can also be ambiguous, in a context where it is consistent with both the underlying international law rules and the alleged new customary rule.

In *North Sea Continental Shelf*, absence of *opinio juris* was fatal to the argument that a prescriptive customary rule existed requiring states to use the equidistance principle when establishing maritime boundaries. The Court quoted the PCIJ's reasoning in *Lotus*, describing it as 'by analogy, applicable almost word for word, *mutatis mutandis*, to the present case'.<sup>69</sup> However, this is not strictly true. Whereas, in *Lotus*, the conduct in question was an omission – abstention from instituting criminal proceedings – the conduct in *North Sea* was affirmative: incidences where states agreed to draw, or did draw, boundaries according to the principle of equidistance.<sup>70</sup> The analogy between the two cases is possible because in both cases the practice supportive of the alleged new customary rule – whether a prohibition or a prescription – is also consistent with the underlying international law rules. In *North Sea*, the performance of the conduct was consistent both with the existence of a prescriptive rule requiring states to use the equidistance principle and with the underlying principles of international law absent such a rule, whereby (for non-parties to the 1958 Geneva Convention on the Continental Shelf) such conduct was not required but still permitted.<sup>71</sup> Evidence of *opinio juris* was therefore essential to show that the ambiguous practice supported the alleged new prescriptive rule.

<sup>69</sup> *North Sea*, *supra* note 1, para. 78.

<sup>70</sup> I.L.A. Statement, *supra* note 20, section 6, commentary; Mendelson, *supra* note 47, at 274–275; Bos, 'The Identification of Custom in International Law', 25 *German Yearbook of International Law* (1982) 9, at 33.

<sup>71</sup> See also *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 3 June 1985, ICJ Reports (1985) 13, para. 44. Convention on the Continental Shelf 1958, 499 UNTS 311.



**Table 2:** The nature of a customary rule and consistency of the supportive practice with the context

Alleged customary rule	Supportive practice	Context of underlying international law rules	
		Permissive rule	Prohibitive rule
Prohibitive rule / negative duty	<i>Prohibited conduct not being done</i>	Consistent <i>Lotus; Asylum</i>	N/A
Prescriptive rule / positive duty	<i>Required conduct being done</i>	Consistent <i>North Sea</i>	Inconsistent
Permissive rule	<i>Permitted conduct being done</i>	N/A	Inconsistent <i>(Lotus as argued by France)</i>

### 3 Cases where State Practice Appears to Be Absent

Together, *Lotus*, *Asylum*, *Nuclear Weapons* and *North Sea* show that, where practice supportive of a customary rule is consistent with the underlying international law rules, evidence of *opinio juris* will be needed to remove the ambiguity from that practice and clarify that states are acting – or not acting – in the belief that they are required to do so by a new rule of customary international law. In these cases, the absence or insufficiency of *opinio juris* was, as the two-element test would predict, fatal to arguments that a customary rule exists. Yet understanding the importance of *opinio juris* in removing ambiguity from practice can also help us understand other cases, where the Court has concluded that a customary rule has been established. In cases where the Court has appeared to give scant regard to whether sufficient state practice in support of a new customary rule exists, the nature and context of the rule can explain how such cases are applications of the two-element test.

In *Military and Paramilitary Activities in and against Nicaragua*, the USA’s reservation to its declaration accepting the jurisdiction of the ICJ prevented the Court from applying multilateral treaties, such as the UN Charter. To decide the case, the Court therefore needed to identify which of the relevant Charter provisions, if any, reflected rules of customary international law. In doing so, the Court referred to the two-element test, but, in concluding that a customary prohibition on the use of force exists, it did not actually analyse in detail whether there exists sufficient state practice supportive of the rule, only making a general reference to ‘abstention’ from using force by states.<sup>72</sup> Nor did the Court evaluate the extent of practice contrary to the prohibition, only observing that practice need not be in ‘absolutely rigorous conformity with the rule’.<sup>73</sup> The Court focused instead on ‘*opinio juris* as to the binding character of such abstention’, which it found in United Nations (UN) General Assembly resolutions, notably the Friendly Relations Declaration,<sup>74</sup> statements by the parties and references

<sup>72</sup> *Nicaragua*, *supra* note 3, para. 188.

<sup>73</sup> *Ibid.*, para. 186.

<sup>74</sup> GA Res. 2625 (XXV), 24 October 1970.

by states to the prohibition on force as *jus cogens*.<sup>75</sup> As a result, the Court has been criticized for not actually applying the two-element test or, at best, getting things the wrong way around by presuming the existence of the customary rule based on *opinio juris* alone and then interpreting state practice so as to justify its existence.<sup>76</sup>

One could argue that the unusual jurisdictional limitation in *Nicaragua*, as well as its subject matter, explains why the Court may have been willing to be less rigorous in its identification of customary international law in this case. There was no question that all parties were bound by a treaty obligation to refrain from the use of force under the UN Charter; the need to determine whether a customary prohibition existed arose due to the USA's reservation excluding disputes under multilateral treaties from the Court's jurisdiction. Faced with a choice between making a strained argument for the existence of custom and the absurdity of concluding that it was unable to adjudicate the USA's compliance with a fundamental international law obligation to which it was clearly subject, some may argue that it is unsurprising that the Court would have opted for the former.

However, considered in light of the previous analysis of the nature and context of customary rules and the role of *opinio juris*, the Court's reasoning is not as strained as has been alleged, although the judgment may be criticized for lack of clarity. As we have seen, in establishing customary prohibitions, there is little choice but to begin with an assessment of *opinio juris*, which is essential not only as an element for the identification of customary international law in its own right but also in order to identify the state practice element. Where supportive practice consists of abstentions – in this case, abstention from using force – and where such an abstention is clearly permitted by the underlying international law rules, *opinio juris* is essential to remove the ambiguity from the practice.<sup>77</sup> It is the *opinio juris* of states that reveals that their absence of action is indeed a legally relevant practice. In any case, it is not clear why the two-element test should be understood as requiring any particular order of analysis of state practice and *opinio juris* when identifying custom, provided both elements are ultimately found to be present: both are necessary and one can start with the analysis of either, which will need to be returned to and revised in light of the analysis of the other.<sup>78</sup> In this case, the widespread *opinio juris* in support of the prohibitive customary rule, evidenced in particular by the Friendly Relations Declaration, means that the ambiguous abstention of those states from using force is transformed into a widespread practice in support of the customary prohibition on force.

Moreover, if one takes the view that statements by states can constitute practice in support of a customary rule they express, the consensus adoption by states in the UN General Assembly of the Friendly Relations Declaration, with its language recognizing the prohibition as an independent rule of custom,<sup>79</sup> will in itself constitute both *opinio*

<sup>75</sup> *Nicaragua*, *supra* note 3, paras 188–190.

<sup>76</sup> A.A. D'Amato, *The Concept of Custom in International Law* (1971), at 102.

<sup>77</sup> Mendelson, *supra* note 47, at 275–277.

<sup>78</sup> ILC, Conclusions, *supra* note 30, Conclusion 3, commentary, para. 9.

<sup>79</sup> *Nicaragua*, *supra* note 3, para. 188; see also *Chagos Archipelago*, *supra* note 9, paras. 151–155.

*juris* and widespread state practice in support of the customary prohibition. This case thus illustrates the point made earlier that a different analysis needs to be applied where the practice in support of a customary rule consists of statements by states as to the content of that rule – practice in the form of statements will not be ambiguous as to the rule it supports.

The Court was therefore correct to tolerate the existence of some contrary practice, characterizing it as mere breaches of the prohibition on force that do not undermine the existence of the customary rule.<sup>80</sup> Balanced against the considerable supportive practice of states that do abstain from using force in the acceptance that this conduct is required by law, the Court was justified in concluding that there is nevertheless both a widespread and representative practice and *opinio juris* supporting the existence of a customary prohibition on force. It is therefore not necessary to explain the judgment away as a product of the political circumstances.

#### 4 Cases where Evidence of *Opinio Juris* Appears to Be Absent

The preceding analysis has shown why in some cases *opinio juris* plays a particularly important role in identifying customary international law rules. In such cases, a proper understanding of the nature and context of the alleged customary rule reveals the dual role of *opinio juris*: both as one-half of the two-element test and as a means to identify relevant state practice where the context makes conduct ambiguous. Yet what of those cases where a customary international law rule has been found to exist apparently without evidence that the *opinio juris* element of the test is fulfilled? These cases too can be reconciled with the two-element test if one takes the nature and context of the alleged customary rule into account.

The *Case Concerning Right of Passage over Indian Territory* concerned whether a new permissive customary rule had been established granting Portugal ‘right of passage’ over India’s territory between the coast and Portugal’s enclaves as well as the scope of that rule. The question was treated by the Court as one of the existence of a new permissive rule of local custom that acted as *lex specialis* to general customary international law principles of territorial sovereignty that require permission from a state for passage over its territory.<sup>81</sup> These underlying principles of international law formed the context for the alleged new customary rule, and unless Portugal could show the existence of that new permissive *lex specialis* rule, Portugal’s passage without authorization would be prohibited by them.

Portugal’s submissions as to the existence of a local custom alleged that there was an ‘unbroken practice’ that ‘was based, on the part of all concerned, on the conviction that what was involved was a legal obligation (*opinio juris sive necessitatis*)’.<sup>82</sup>

<sup>80</sup> Cf. D’Amato, *supra* note 76, at 102; Tasioulas, ‘Prosper Weil and the Mask of Classicism’, 114 *AJIL Unbound* (2020) 92, at 95.

<sup>81</sup> *Right of Passage*, *supra* note 2, at 43–44. Portugal made an alternative argument based on general customary international law, but the Court did not address this in its judgment.

<sup>82</sup> *Ibid.*, at 11.

Consistent with the permissive nature of the alleged customary rule, that supportive practice consisted of the allegedly permitted conduct – passage across the territory without authorization – being performed by Portugal. In its judgment, the Court noted the existence of ‘a constant and uniform practice’ in relation to the free passage of private persons, civil officials and goods. Thus, the state practice element appears to be present. The Court continued: ‘This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.’<sup>83</sup> In one sentence, the Court appears to have leapt from finding that a constant and uniform practice existed to a conclusion that it had been accepted as law by both the parties.<sup>84</sup> The *opinio juris* of India is perhaps evidenced by the failure to object to Portugal’s practice of passage over the years, although the Court does not make this clear. In any case, no positive evidence of Portugal’s *opinio juris* is provided. It appears the Court has inferred Portugal’s *opinio juris* for the permissive rule from its participation in the supportive practice alone, contrary to the Court’s later statement in *North Sea* that ‘acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature’.<sup>85</sup>

It is possible that the Court’s willingness to find the existence of the rule reflects the specific context of decolonization in which the decision took place or that, over time, the Court has refined the two-element test, developing a more rigorous approach so that such inferences would now no longer be made. Yet the *Right of Passage* and *North Sea* judgments occurred in relatively close succession in 1960 and 1969 respectively. Moreover, an almost identical inference of *opinio juris* on the part of an acting state from their practice alone can be seen in one of the Court’s more recent judgments, not involving decolonization, in the *Dispute Regarding Navigational and Related Rights*.

When considering whether Costa Rica enjoyed a customary right for its fishermen to engage in subsistence fishing along the banks of the San Juan River, the Court concluded that the permissive rule existed, based on ‘the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period’.<sup>86</sup> Nicaragua’s *opinio juris* (the reacting state) is evidenced by its failure to object to Costa Rica’s practice in support of the new rule. However, the Court did not even discuss the *opinio juris* of Costa Rica (the acting state), which one must assume was inferred from their consistent supportive practice.<sup>87</sup> Again, it seems that acting in a certain way can demonstrate something of a

<sup>83</sup> *Ibid.*, at 40.

<sup>84</sup> Bos, *supra* note 70, at 34–35; cf. Pellet and Müller, who consider that in this case the practice ‘takes the place of’ *opinio juris*. Pellet and Müller, ‘Article 38’, in A. Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, 2019) 819, para. 238.

<sup>85</sup> *North Sea*, *supra* note 1, para. 76.

<sup>86</sup> *Navigational and Related Rights*, *supra* note 2, para. 141.

<sup>87</sup> Alvarez-Jimenez, *supra* note 16, at 703–704.

juridical nature: the Court appears to have inferred the acting state's *opinio juris* from the fact that the state has engaged in a consistent practice in support of the new rule.

Both these cases involve bilateral customs, so it is possible that the situation is more akin to an estoppel or tacit agreement, and it is necessary to be cautious when drawing conclusions about the identification of customary international law more generally. Still, the Court did analyse both cases in terms of customary international law and the two-element test of state practice and *opinio juris*.<sup>88</sup> The key question in both cases is therefore: why did the Court not simply say, as in *Asylum*, that there is no evidence that the practice by Portugal and Costa Rica was engaged in 'as a right appertaining to them and respected by the territorial States as a duty incumbent on them' and so conclude that the two-element test had not been met?

### A Failure to React to Practice as Evidence of *Opinio Juris*

The discrepancy between the cases can be explained by the nature and context of the customary international law rules being identified. So far, we have not considered the reactions of other states to practice in support of a new customary rule, but protest and acquiescence are central to the identification of custom.<sup>89</sup> The Court appears to have concluded that *opinio juris* in support of the new rule existed on the part of India and Nicaragua based on their failure to object to the consistent practice of the other party. The possibility that failure to react over time to a practice may serve as evidence of *opinio juris* has been acknowledged by the ILC<sup>90</sup> and highlights a further way in which context is relevant to the identification of customary international law rules: it impacts our interpretation of the reactions of other states. Where a practice is inconsistent with the underlying international law rules, we are more justified in expecting negative reactions from other states and in drawing conclusions from their absence. As a result, the failure of other states to react negatively to such a practice may – subject to the caveats discussed below – be taken as evidence of their *opinio juris*.

Therefore, a crucial difference between *Asylum* and both *Right of Passage and Navigational and Related Rights* is that, in the latter two cases, both Portugal and Costa Rica's actions in support of the new permissive customary rule would be unlawful under the underlying international law rules: states are generally prohibited from encroaching on another state's territory. Where India and Nicaragua had omitted to act, it was a failure to protest against actions that would have been clearly prohibited by the underlying general international law. Even though they were under no obligation to do so, it would be expected that India and Nicaragua would react negatively to any breaches,<sup>91</sup> especially where it is their territory that was being encroached upon.

<sup>88</sup> The ILC special rapporteur considers *Right of Passage* to be 'one of the first cases in which the Court elaborated on the methodology for ascertaining customary international law'. ILC, Second Report, *supra* note 25, para. 68. The bilateral nature of the rule will of course impact the quantity of practice and *opinio juris* required since only two states are involved.

<sup>89</sup> Akehurst, *supra* note 11, at 38.

<sup>90</sup> ILC, Conclusions, *supra* note 30, Conclusion 10(3).

<sup>91</sup> Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15(3) *EJIL* (2004) 523, at 529.

This is one way in which the bilateral context of these cases may have made a difference: since there is an even greater expectation that states will react to apparent violations of international law of which they are the victim, India and Nicaragua's lack of response strongly suggests an acceptance that the actions were permitted under the new customary rule.<sup>92</sup> However, even in cases involving general customary rules, one may expect some negative reactions from other states in response to an apparent violation of international law against another state.<sup>93</sup>

By contrast, in *Asylum*, the territorial states were failing to react to qualifications of crimes by asylum-granting states that were lawful under the underlying international law rules. Under general international law, both the asylum-granting state and the territorial state were permitted to make a qualification as to the nature of the crime, even if the territorial state believed it was wrong and went on to challenge that qualification. As a result, it was not to be expected that the territorial states would object to every qualification made by an asylum-granting state, and so no conclusion could be drawn from their failure to do so. As the Court pointed out, the omission to challenge the qualification could be for a number of reasons consistent with the underlying international law rules, not necessarily because the territorial state had accepted as law the alleged new customary prohibition on such challenges that was advanced by Colombia.

## B *Inferring Opinio Juris from State Action*

The more difficult question concerns the missing *opinio juris* of the acting states – Portugal and Costa Rica. In both cases, it appears that the Court inferred the acting state's *opinio juris* for a new customary international law rule from the fact that that state had engaged in consistent practice supportive of the new rule. It is clear that, in certain circumstances, *opinio juris* can be inferred from a state's conduct.<sup>94</sup> For example, if a state makes a report to the UN Security Council under Article 51 of the UN Charter, this must imply acceptance by that state that the customary right of self-defence extends to the kind of situation at hand.<sup>95</sup> The difficulty is where the same conduct by states provides both state practice and sufficient evidence of *opinio juris* and is thereby concluded to be lawful under customary international law. If this were possible, there would be a clear risk of a circular argument developing, whereby the mere fact that an act has been committed leads to the conclusion that it is lawful. Thus, the ILC rightly observes that 'the existence of one element may not be deduced merely from the existence of the other'.<sup>96</sup>

Yet, while mere adherence to a practice will not suffice to establish *opinio juris*, the fact that states have engaged in a practice may contribute, alongside some additional element(s), to a conclusion that *opinio juris* for the practice is present. This avoids the

<sup>92</sup> See *Fisheries (United Kingdom v. Norway)*, Judgment, 18 December 1951, ICJ Reports (1951) 116, at 139.

<sup>93</sup> ILC, Second Report, *supra* note 25, para. 77.

<sup>94</sup> Cf. D'Amato, *supra* note 76, at 74–76.

<sup>95</sup> And the absence of such a report may suggest the contrary. *Nicaragua*, *supra* note 3, para. 200.

<sup>96</sup> ILC, Conclusions, *supra* note 30, Conclusion 3(2), commentary, para. 8.



potential problem of 'double counting' the same act as being sufficient to fulfil both elements of the two-element test, but equally avoids the risk of under-counting the behaviour of states, which must be able, at least in some circumstances, to contribute to our understanding of whether they accept that international law allows that behaviour.<sup>97</sup> This additional element may be provided by the nature and context of the alleged customary rule being identified, and taking them into account can explain the reasoning in both *Right of Passage* and *Navigational and Related Rights* and why it differed from the prohibitive and prescriptive rule cases analysed previously.

In *North Sea*, the ICJ was quite right to observe that 'acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature' as the practice in that case was ambiguous. It was consistent with both the underlying international law and the alleged new customary rule. As a result, it would not be possible to conclude based on the practice that the acting state accepts the alleged new prescriptive rule as law. However, this reasoning does not apply to cases where the supportive practice is inconsistent with the underlying international law that provides the context for the identification of the alleged customary rule, as will be the case when, like in *Right of Passage* and *Navigational and Related Rights*, the existence of a permissive rule is being established in the context of an underlying prohibition.

Michael Akehurst has argued that, for permissive customary rules, 'a claim that States are entitled to act in a particular way can be inferred from the fact that they do act in that way'<sup>98</sup> and that it seems natural at least to presume that when states act in a certain way they consider that their behavior is lawful. If it is natural to assume that generally when states act they accept that they are acting lawfully, then it is reasonable, in a situation where they are repeatedly acting inconsistently with the underlying international law rules, to interpret that as an acceptance – or at least a claim – that the law has changed. In *Right of Passage* and *Navigational and Related Rights*, in the context of the underlying general customary rules prohibiting entrance onto another state's territory, Portugal and Costa Rica were repeatedly acting in a manner that appears to violate the underlying international law rules. The practice is not ambiguous: it is consistent only with the alleged new customary rule; otherwise, the acting state is simply repeatedly breaching existing law. In this context, an inference that a long and constant practice inconsistent with the underlying international law rules is based on the acting state's acceptance that a legal permission to act in this way exists (*opinio juris*) seems justified. *Right of Passage* and *Navigational and Related Rights* therefore demonstrate that the nature and context of a customary rule matter for the inferences we can make both about the acting state's *opinio juris*, based on their participation in the practice, and about the *opinio juris* of the state acted upon or in a position to react to the practice. When the nature and context of the alleged rule is taken into account, we can see that the two-element test was met in both cases.

<sup>97</sup> See ILC, Second Report, *supra* note 25, paras 70, 74 ('[a]cceptance as law" should thus generally not be evidenced by the very practice alleged to be prescribed by customary international law') (emphasis added).

<sup>98</sup> Akehurst, *supra* note 11, at 37–38.

The situations in which inferences of *opinio juris* may be made from either the actions of states or an absence of reaction are relatively rare and will depend on the particular circumstances. Arguments that long and consistent state practice implies an *opinio juris* on the part of the acting state are limited to contexts where the repeated practice in support of a new customary rule is inconsistent with the underlying international law rules.<sup>99</sup> Not every action inconsistent with the underlying international law rules implies an *opinio juris*: isolated examples of inconsistent conduct by a state do not justify the inference of an acceptance that the law has changed and should be ‘treated as breaches of that rule, not as indications of the recognition of a new rule’.<sup>100</sup>

Moreover, any conclusion that practice is accompanied by *opinio juris* will obviously be negated if the acting state tries to justify their practice by reference to the underlying international law rules.<sup>101</sup> It could also be that the particular factual circumstances should prevent any inference of *opinio juris* for a new rule.<sup>102</sup> In any case, even where an inference is made as to the individual *opinio juris* of the acting state, evidence of the general *opinio juris* of other states must still be found for the two-element test to be fulfilled and a new customary rule to be identified. Other states reacting negatively to a practice or suggesting that the practice breaches international law would show that, despite the inference of *opinio juris* on the part of the acting state, general *opinio juris* for the rule was not present.<sup>103</sup> However, states should not be expected to express a negative reaction to every incidence of conduct contrary to existing international law or risk their silence being interpreted as acceptance of a new customary rule. It is only where the circumstances generate an expectation of a reaction – for example, because the state in question is directly affected by the practice or because the acting state is repeatedly acting in a way inconsistent with international law – that a failure to react may evidence acceptance of a new rule.<sup>104</sup>

Finally, the *Right of Passage and Navigational and Related Rights* cases highlight the points made earlier about the characterization of the rules at issue in a dispute. It is obviously possible, in principle, to analyse both cases as instead concerning the

<sup>99</sup> In practice, this situation is only likely to arise when establishing permissive rules in the context of an underlying prohibition. It is unlikely one would ever have to establish the existence of a customary rule prohibiting X in the context of underlying international law imposing a duty to do X or vice versa.

<sup>100</sup> *Nicaragua*, *supra* note 3, para. 186.

<sup>101</sup> Akehurst, *supra* note 11, at 38.

<sup>102</sup> E.g. in the case of the April 2018 airstrikes against Syria, the USA and France provided no legal justification for their actions. No inference of *opinio juris* on the part of those states should take place in such circumstances, first because one of the actors, the United Kingdom, did advance a legal justification (albeit an unconvincing one) by reference to a new permissive rule of humanitarian intervention, and the silence of its co-actors suggests that they did not accept their actions as lawful. Second, the nature of the acts – flagrant violations of the prohibition on force – is such that they call for justification; failure to provide one suggests the states may not accept that what they did was lawful. Similarly, while some other states reacted by explicitly condemning the strikes as illegal, many more did not. In the circumstances, it does not seem correct to infer from this non-reaction that those other states were accepting this conduct by three states contrary to a well-established customary rule as lawful.

<sup>103</sup> See ILC, Conclusions, *supra* note 30, Conclusion 3, commentary, para. 7; Akehurst, *supra* note 11, at 38.

<sup>104</sup> Although not in the context of identifying customary international law, see *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, 15 June 1962, ICJ Reports (1962) 6, at 23.

identification of a prohibitive rule of custom that prevents India and Nicaragua from obstructing the other party's passage or fishing respectively, in a context where the underlying international law rules permitted – but did not require – those states to restrict access to their territory. Framed in this way, the absence of positive evidence of *opinio juris* would be an insurmountable obstacle for Portugal and Costa Rica's arguments: the territorial states' omission to object to the passage or to fishing is consistent with both the alleged prohibitive rule and the underlying international law rules and so constitutes an ambiguous practice from which no inference of *opinio juris* for the alleged new prohibition on restricting access can be made. Yet these cases also demonstrate the limits of how a dispute may be characterized: the parties and, indeed, the Court are not completely free to manipulate the nature of a rule to their own advantage. There is a correct analysis, and it will depend on the context and development of the area of international law in question. If *Right of Passage* really concerned the establishment of a new prohibition on obstructing Portugal's passage, then what underlying international law rule was providing the underlying permission for Portugal's passage? No obvious candidate exists. The customary rule to be identified must be permissive because the established underlying principles of territorial sovereignty and integrity clearly prohibit such encroachments on another state's territory.

## 5 Conclusion

This article has shown how the nature and context of a customary rule impact the identification of customary international law and, in particular, their effect on how the existence of the elements of state practice and *opinio juris* is evaluated. In situations where state practice does not consist of statements by states as to the content of customary international law, taking into account the nature of a customary rule, the kinds of acts that constitute practice in support of the rule and how this interacts with the underlying international law rules brings greater precision to a process that can appear opaque or mysterious. Where the nature of an alleged customary rule is such that practice in support of that rule is also consistent with the context of underlying international law rules in which the alleged rule is located, it will be ambiguous. Evidence of *opinio juris* for the new rule will therefore be essential to clarify the meaning of the practice and for the new customary rule to be identified. By contrast, where practice supporting an alleged customary rule is inconsistent with the context of underlying international law rules, an acting state's *opinio juris* for the new rule may be inferred from their consistent participation in the supportive practice, while the *opinio juris* of other states may be evidenced by their failure to react negatively to that practice.

When the nature and context of the customary rules being identified are taken into account in this way, we can see that in the cases above the Court was applying the two-element test of state practice accompanied by *opinio juris*. The analysis has also revealed how states involved in litigation disregard the nature and context of customary rules at their peril: cases may be won or lost based on how the natures of the rules concerned are characterized by the parties or the Court.

Although arguing that *opinio juris* for a new customary rule may in certain circumstances be inferred from state practice, and evidenced by an absence of reaction by other states, the analysis above does not support the view that those states with the power or inclination to act inconsistently with existing international law will as a result be able to shape customary international law to their will through their practice alone. As set out above, inferences of *opinio juris* from practice may be made only in limited circumstances. For an acting state, repeatedly engaging in what appears to be a violation of existing law in this way carries its own risks. In any case, any such inference will only be as to the *opinio juris* of the acting state. Although the *opinio juris* of other states may be evidenced by their failure to react to practice inconsistent with existing law, this is only where the circumstances are such as to create an expectation of a reaction, and their statements of protest will be sufficient to prevent any such conclusion. Overall, this article has not diminished the need for evidence of *opinio juris* but highlighted its importance: it is not only one-half of the two-element test for identification of customary international law, but, in some situations, the state practice element is dependent on evidence of *opinio juris* to turn ambiguous state conduct into legally meaningful practice.