

Is Customary Law Still a Source of International Law?

Professor **Tomáš PERÁČEK**¹
PhD. student **Michal KAŠŠAJ**²

Abstract

The main objective of our scientific study is to examine the justification for the existence of custom as a source of international law, as today's dynamic era is gradually pushing unwritten sources of law into the background. International custom is one of the last sources of international law, which is unwritten, general and therefore binding for all subjects of international law. Since it is an unwritten source of public international law, a number of questions arise in connection with the emergence, requirements and application of international custom. The focus of the research is the issue of international custom, pointing out application problems, statements of international judicial authorities as well as the mutual relationship between an international treaty and international custom. When examining this issue, we relied on the available relevant professional and scientific literature as well as case law using appropriate scientific research methods. The results of our study indicate that, despite suggestions to eliminate custom as a source of international law, legal custom has its irreplaceable place both in the sources of international law and in the decision-making activities of courts and other bodies.

Keywords: international custom, international law, source of law, unwritten source of law.

JEL Classification: K12, K22, K33, K41

DOI: 10.62768/PLPA/2025/14/4/02

Please cite this article as:	Article History
Peráček, Tomáš & Michal Kaššaj, „Is customary law still a source of international law?“, <i>Perspectives of Law and Public Administration</i> 14, no. 4 (December 2025): 632-645.	Received: 20 August 2025 Revised: 23 November 2025 Accepted: 07 December 2025

1. Introduction

In the typology of international sources of law, one of the basic sources of international law is international custom. Although the Statute of the International Court of Justice places legal custom in second place, this fact does not imply its hierarchical position in the system of sources of international law.³ Although in the past there was a noticeable tendency in older literature to underestimate the role of international custom, today it is generally accepted that both basic sources of international law, i.e.

¹ Tomáš Peráček - Faculty of Management, Comenius University Bratislava, Slovakia, peracek2@uniba.sk, ORCID: 0000-0002-3498-5640. **Corresponding author.**

² Michal Kaššaj - Faculty of Management, Comenius University Bratislava, Slovakia, kassaj2@uniba.sk, ORCID: 0009-0003-4212-3316.

³ United Nations. Statute of the International Court of Justice, available at: <https://www.icj-cij.org/statute>.

international customs and international treaties, have an equal position.⁴ However, the problem in identifying a customary rule may be that, unlike other sources of international law, the process of the emergence of customary rules is not regulated by precise procedural rules. The customary process is not formal by its nature, but rather spontaneous. Without these precise formal, and therefore procedural, rules, it is difficult to determine whether and when a new customary rule has been formed. The case law of international courts and the doctrine of international law play an even greater role here. However, this is where a double paradox lies. The first can be described as the fact that custom arises from the practice of states, which in international relations are mainly government acts. There is no (yet) mandatory jurisdiction of international courts in the international system. They are impartial bodies for resolving disputes of a legal nature. Their function is to interpret and apply international law, not to create customary rules. Nevertheless, we mostly learn about the content of customary rules from this case law.⁵ The second paradox is closely related to the doctrine of international law, which tries to work with international custom as a formal source of law, despite its informal nature. This means that different theories of international law project their ideas about the essentials of international custom into the interpretation of it in different ways.

With this scientific study, we want to examine the issue of international custom as one of the basic sources of public international law. We believe that international custom is still an interesting and important topic for scientific processing, especially considering that there are very few unwritten sources of law in today's modern law. In our opinion, the elimination of unwritten sources of law is related to the state of legal certainty that individual legal systems are trying to achieve. International law bodies are also trying to achieve this state through codification. Despite these efforts, international custom occupies a vital role within the system of public international law. We base this opinion on the fact that international custom, together with international treaties, is among the basic sources of public international law. The examination of the mutual relationship between these two sources of law is all the more interesting because international custom fills the gaps in international treaty law. Since international custom has been examined in detail countless times by various judicial authorities, the opinions and judgments of these international judicial bodies specify and explain the understanding of the issue of international custom for the needs of legal practice. International custom is applied to a relatively large extent in humanitarian law, where these unwritten rules protect the weakest.

From the point of view of systematics, our scientific study is divided into several logically connected chapters, in addition to the introduction and conclusion. In the introduction, we analyze the issue of international custom in a general way, while trying to place this scientific study in a broad context and emphasize why it is important and significant. In the second chapter, labeled "Materials and Methods", we present and describe in detail the scientific methods of investigation used as well as the material

⁴ Williams Fisher John, *Aspects of modern international law*. Oxford University Press, 1939, 117.

⁵ Popa Tache Cristina Elena. "Defense or cooperation between states and international investors in times of crisis?" *Juridical Tribune* 11, no. Special issue (2021): 380–394.

used, especially scientific literature, court decisions, and legal regulations. In the third main chapter, marked as "Results and Discussion", we examine and discuss the differences between international custom and international custom or politeness. We also pay attention to the possibility of the emergence of the so-called. Local custom, that is, a custom that should arise only between two states. An integral part is also the treatment of the relationship between international custom and international treaty. In conclusion, we present the results and findings of our research.

2. Aim, Materials and Methods

We aim to achieve the main and specific objectives primarily through a thorough examination of international documents, treaties and case law. Other key sources of knowledge include professional and scientific literature sources, including older ones from the first half of the 20th century, but also articles from scientific journals indexed in the Web of Science and Scopus databases. The key formal source on which this scientific study of ours is based is the Statute of the International Court of Justice.

Among the scientific research methods applied, logical reasoning plays a primary role, which is applicable not only in legal sciences. It is a method that determines the rules of human judgment based on many years of experience. No less important is the role of abstraction as a method that ensures the unification of several thought processes, resulting in the separation of the most important ideas, especially when examining judicial decisions. Synthesis as another applicable scientific research method was used in dividing the text into individual parts, subsequent analysis of these parts and finally their combination into a single whole. The methods of description, synthesis, analysis and comparison were used in all parts of this scientific study

In order to obtain new knowledge, we examined and assessed carefully selected sources, especially case law, the content and meaning of which we assessed in the context of knowledge from professional and scientific literature, taking into account its usability in practice.

3. Results

3.1. International Custom. General Considerations

One of the basic sources of public international law is international custom. Compared to an international treaty, it is an unwritten rule of international law. Article 38(1)(b) of the Statute of the International Court of Justice identifies international custom as a primary source of international law, which defines international custom as evidence of general practice accepted as law. According to Jennings, international custom is as legally binding as international treaties and has the same normative force.⁶

International custom differs from international treaties in its unwritten form.

⁶ Jennings Robert, *Oppenheim's International Law*. 1. ed. Longman Group UK Limited, 1993, 2887.

Nowadays, in national systems, most sources of law are in written form. Unwritten norms are rare in modern legal systems and, due to the principle of legal certainty, they are often replaced by written law. As stated by Bajžíková et al., international custom contains a static and dynamic aspect. The static aspect appears as a form of law that assigns validity to the content of a legal norm. In this aspect, custom does not exceed the limits of positive law. The dynamic aspect represents the creation of the custom process.⁷

3.2. The static aspect of international custom

The static aspect of international custom establishes the form of law that grants validity to the content of the norm. Since international custom is unwritten, it is not easy to identify it, determine its content, but also to determine the subjects that this custom will bind. In clarifying the above-mentioned problems, states cannot do without the help of international judicial bodies and representatives of the science of international law. Klučka is of the opinion that judgments, opinions or other statements are not in themselves capable of creating international custom, but they help in determining whether a particular case is a custom, and if so, what its content is.⁸

The static model of international custom consists of two elements, namely *usus longaevus* (material element) and *opinio iuris* (subjective element). In principle, these two elements also determine the essentials of custom. The material element, or otherwise called “*usus longaevus*”, is the qualified/general practice of subjects of international law. Malenovsky argues that this general practice must exhibit certain characteristics, namely: repetition, uniformity and consistency, continuity, generality, and long-term duration.⁹

Repetition. According to recent literature,¹⁰ certain state behaviours are regularly repeated throughout historical processes (e.g., the regular passage of the Portuguese through Indian territory, for the administration of their territories, the transport of goods, etc.). A customary rule should not arise from a single precedent, but should be a repetition of a certain type of behavior. However, some authors such as Cheng¹¹ also admit the possibility of the existence of an immediate custom. This would be a custom where there is not a sufficiently long practice of states or there need not be any, the essential thing is that the States are strongly convinced of the legal bindingness and thus no practice is necessary. However, this concept has not found understanding

⁷ Bajžíková Lubica, Nováčková Daniela and Paškrťová Lucia. “New Generation EU Agreements – The Basis for Future World Trade.” *Juridical Tribune - Review of Comparative and International Law* 14, no. 1 (2024): 116–129. doi:10.62768/TBJ/2024/14/1/07.

⁸ Klučka Ján, *Public international law (general and special part)*. Wolters Kluwer, 2008, 683.

⁹ Malenovsky Jan, *International public law, General part and relation to other legal systems*. Masaryk University, 2014, 396.

¹⁰ Weston Burns and Jonathan Carlson, *International Law and World Order*. West Publishing company, 1980, 1441.

¹¹ Cheng Bin, *Studies in International Law - „Instant“ International Customary Law?*, Oxford Scholarship, 1997), 798.

among the States and the courts.

Uniformity and consistency. Complete uniformity is not required, but substantial uniformity is. The International Court of Justice in the case *United Kingdom v. Norway* (Fisheries Case) with reference to the above, refused to recognize the existence of a 10 nautical mile rule for bays. In connection with uniformity and consistency, the judgment in *Diplomatic Asylum* is very significant, where the Court stated that "the party relying on a custom must prove that this custom is in accordance with the uniform and constant practice of the States concerned and that this practice is an expression of the law of the State granting asylum. This situation follows from Article 38 of the Statute of the International Court of Justice, which defines international custom as evidence of a general practice accepted as law. The Court works with the facts that have been submitted to it and these facts testify to great uncertainty and contradiction and inconsistency in the implementation of diplomatic asylum. ...practice is in many cases influenced by politically motivated approaches and therefore it is not possible to recognize a constant and uniform practice accepted as law."¹² In the *Colombian-Peruvian Asylum* case, the Colombian government pointed to several facts that demonstrated "repeated, uniform and consistent conduct", but the International Court of Justice held that it had not demonstrated whether the relevant conduct was not carried out solely on the basis of a contractual requirement or for political reasons.¹³

Continuity. The process of creating a custom is significantly slowed down or may even stop if the behavior of individual states is not continuous. According to Malenovský, behaviour is not considered continuous when states respond consistently in some similar situations but act differently in others. Frequent interruptions of a certain continuous behavior greatly complicate the emergence of a customary rule.¹⁴

Generality. To meet the condition of generality, it is not necessary to apply a certain practice worldwide. The failure of States to apply a certain practice may either imply tacit consent or lack of interest in the matter. In the *Lotus* case, the Permanent Court of International Justice, as early as 1927, incorrectly assessed the consequences of refraining from protest, as well as the significance of general agreement that States other than the flag State did not apply criminal prosecution.¹⁵ In such and similar cases, according to Brownlie, it should be clear that inaction is tacit consent to the emerging customary rule.¹⁶

Longevity. Traditional international law required longterm duration as one of the main conditions, in the sense of many years of practice. Even in the opinion of the

¹² International Court of Justice. 1951. *United Kingdom v. Norway in the case Fisheries*, Judgment of December 18th, 1951, Number 1951/58, available at: <https://www.icj-cij.org/node/100132>.

¹³ International Court of Justice. 1950. *Colombian v. Peruvian in the case Asylum*, Judgment of November 20th, 1950, available at: <https://www.icj-cij.org/node/103077>.

¹⁴ Malenovsky Jan, *International public law, General part and relation to other legal systems*. Masaryk University, 2014, 396.

¹⁵ Permanent Court of International Justice. 1927. *French Republic v. Republic of Turkey*, in the case „S.S. Lotus“, No. 10, Judgment of September 7th, 1927, available at: <https://www.ilsa.org/Jessup/Jessup16/Batch%201/TheLotusCase.pdf>.

¹⁶ Brownlie James, *Principles of public international law*. Eurokódex, 2013, 868.

Permanent Court of International Justice in the case of the Competence of the European Danube Commission, the court specified long-term duration as “practice dating back to time immemorial”.¹⁷ In today’s, modern public international law, long-term duration is understood as a much shorter period. However, Villinger expresses the opinion that, similarly to traditional international law, modern public international law also requires longterm duration as one of the essential conditions, but due to the higher intensity of international life, the Internet, faster communication and the activity of international organizations, the formation of customs has significantly accelerated.¹⁸

Subjective element – Opinio iuris. The subjective element of international custom is the so-called opinio iuris et necessitatis. In connection with this concept, we analyze the Statute of the International Court of Justice, which in Article 38 refers to “general practice accepted as law”. Several authors interpret the term “accepted as law” differently. According to Williams, some authors interpret this term as the recognition of a certain state practice as binding, while others understand the term as “the conviction that this practice is required or is in accordance with prevailing international law”.¹⁹ The most challenging aspect of opinio iuris is proving that this practice is accepted as law. If opinio iuris were absent during the formation of a customary rule, it would only be a rule of courtesy, which is not legally binding according to Brownlie.²⁰

The International Court of Justice has issued several judgments, some of which have recognized the existence of opinio iuris and others have either not recognized it or have assessed it as too weak to constitute a customary rule. In the first case (Delimitation of the Maritime Boundary in the Gulf of Maine Area), the International Court of Justice recognized opinio iuris on the basis of evidence of general practice, or on the basis of a consensus in the literature related to State conduct, or on the basis of previous conclusions of the International Court of Justice or other international tribunals. On the other hand, although less frequent, the International Court of Justice has taken a more cautious position and required stronger evidence of recognition of the validity of this unwritten rule in the practice of States.

Among the more stringent judgments, we include, for example, the judgment in the Lotus case, in which the Permanent Court of International Justice stated: “Even if the rarity of judicial decisions that we find among the cases were sufficient to establish in fact the circumstances to which the representatives of the French Government refer, this would only prove that States have repeatedly refrained from initiating criminal prosecutions, but it would not by any means mean that States felt obliged to do so. International custom arises only if this refraining was based on the fact that States considered themselves obliged to refrain from criminal prosecutions.”²¹

¹⁷ Permanent Court of International Justice. 1927. French Republic v. Republic of Turkey, in the case „S.S. Lotus“, No. 10, Judgment of September 7th, 1927, available at: <https://www.ilsa.org/Jessup/Jessup16/Batch%201/TheLotusCase.pdf>.

¹⁸ Villinger Mark Eugen, *Customary International Law and Treaties*. Kluwer Law International, 1997, 378.

¹⁹ Williams Fisher John, *Aspects of modern International law*. Oxford University Press, 1939, 117.

²⁰ Brownlie James, *Principles of public international law*. Eurokódex, 2013, 868.

²¹ Permanent Court of International Justice. 1927. French Republic v. Republic of Turkey, in the case „S.S. Lotus“, No. 10, Judgment of September 7th, 1927, available at: <https://www.ilsa.org/Jessup/Jessup16/>

This line of thought was also confirmed by the International Court of Justice in a series of cases concerning the North Sea Continental Shelf. The International Court of Justice strictly required proof of *opinio iuris*. Even in the argument that in special circumstances the equidistance rule for determining the continental shelf had become part of general customary law at the time of the signing of the Geneva Convention, the International Court of Justice did not see the existence of *opinio iuris*. Subsequently, the arguments of the States in the North Sea Continental Shelf dispute were directed towards the fact that the practice of States based on the Convention had created a customary rule, but even this argument was not sufficient for the International Court of Justice to establish *opinio iuris*.²²

The International Court of Justice subsequently stated this conclusion in its judgment, reasoning that “military and paramilitary activities against Nicaragua”. The Court, after considering the conduct in the case, recalled that, as was stated in the North Sea Continental Shelf cases, it is absolutely necessary, in order to create a new customary rule, for a procedure to be adopted which contains both the elements of “*usus longaevus*” and “*opinio iuris sive necessitatis*”. In the case in point, the International Court of Justice stated that either the States which act in this way or the States which respond to that procedure must conduct themselves in such a way that their conduct constitutes “evidence of the belief that the practice is binding by reason of the existence of a rule of law requiring it”.²³

3.3. The dynamic aspect of international custom

Under the term dynamic aspect of international custom, Tache and Sararu understand the process of international custom formation itself. The ideas about how international custom arises are quite different. Some authors are inclined to a spontaneous normforming development.²⁴ This process is best illustrated by a snowball that rolls down a hill and continues to gain more volume. However, observers are not interested in the individual parts of the ball that gradually stick together, but are interested in the ball as a whole. According to Malenovski, such an understanding of international custom is rather typical of Anglo-Saxon legal sciences.²⁵

On the other hand, there is a consensus theory, according to which there is no fundamental difference between the formation of custom and the formation of an international treaty. Both are based on the consent of states. As stated by Vršanský et

Batch%201/TheLotusCase.pdf.

²² International Court of Justice. 1969. Federal Republic of Germany v. Denmark, Case North Sea Continental Shelf, Judgment, of February 20, 1969, available at: <https://www.icj-cij.org/case/52>.

²³ International Court of Justice. 1986. Nicaragua v. United States of America, Case Military and Paramilitary Activities in and against Nicaragua, Judgment of 27 June 1986, available at: <https://www.icj-cij.org/node/100900>.

²⁴ Popa Tache Cristina Elena and Săraru Catalin Silviu. “Evaluating today’s multi-dependencies in digital transformation, corporate governance and public international law triad.” *Cogent Social Sciences* 10, no. 1 (2024): 2370945. <https://doi.org/10.1080/23311886.2024.2370945>.

²⁵ Malenovsky Jan, *International public law, General part and relation to other legal systems*. Masaryk University, 2014, 396.

al., similarly to the case of an international treaty, in the case of international custom, a certain state acts in a certain way, to which other states react either with a consenting expression of will or with a disapproval. Both of these approaches ultimately result in a different assessment of the process of creating custom from the perspective of public international law. On the one hand, there are supporters of the theory of spontaneity, who are convinced of the unpredictability and non-modifiable nature of custom by the norms of international law. On the other hand, there are supporters of the consensus theory, who speak of its unambiguous predictability, knowability and therefore modifiable by positive international law.²⁶

According to David et al., however, both schools of thought are essentially identical in that international custom, compared to treaty law, is significantly less codified. The process of creating custom is therefore not entirely simple and to a large extent also depends on the behavior of individual subjects of international law, especially sovereign states.²⁷ However, if individual states act in such a way that they fulfill both the objective and subjective elements, international custom will arise, which is considered a fundamental source of international law. Danilenko et al. state that it is neither necessary nor appropriate for this process to be regulated by laws or other regulations. However, in his opinion, the element of “*opinio iuris*”, which is very often questioned, is all the more important.²⁸

David et al. argue that international custom is not exactly the same as international custom or courtesy. As an example, states can be cited that they sign treaties with a blue pen, but this fact alone does not imply that states are obliged to use a blue pen when signing treaties. Failure to respect the rules of comity is not an unlawful conduct that would give rise to the responsibility of a particular state. Compliance with international customs is enforced by retort, that is, by a measure taken by one state against another with the aim of forcing it to refrain from an action that is contrary to international custom or comity. It is not excluded that international custom will lead to the creation of a norm of international law. This process also works the other way around, and therefore, some rules may gradually lose their legal significance and may become rules of comity.

Local customs. We believe that the issue of local customs can best be examined by the example of the dispute between Portugal and India. This dispute ended with the judgment of the International Court of Justice on 12 April 1960. The dispute between Portugal and India arose at a time when the so-called Portuguese India still existed. It was a Portuguese territory, of which several villages were located in the interior of the state of India and one village was located on the coast. The only access to this territory was to sail by boat to the shores of India to a Portuguese seaside village and then cross India to Portuguese territory.

On 22 December 1955, Portugal filed a lawsuit with the International Court of

²⁶ Vršanský Peter and Valuch Jozef, *Public international law general part*. Wolters Kluwer, 2012, 416.

²⁷ David Vladislav, Sladký Pavel and Zbořil František, *International public law with casuistry*. Leges, 2008, 427.

²⁸ Danilenko George, *Law making in the International Community*. Kluwer Academic Publisher, 1993, 343.

Justice, claiming that there was a right of passage between its territories (between the coast and the inland villages) through Indian territory, which India must tolerate. In this case, the International Court of Justice leaned towards the emergence of a local custom between these territories and ruled in favor of Portugal. The right of passage therefore belonged to Portugal, but only to the exercise of sovereign rights. One of the Court's arguments was that no international treaty governed this matter. The International Court of Justice stated that an international custom can also be local and can even arise only between two states, and this local custom (as a *lex specialis*) takes precedence over the general customary rule. Also based on these arguments, the court ruled in the case that "Portugal has the right of passage through Indian territory on the basis of a longstanding legal custom from the time of British colonization, which arose between two states". However, this right applied solely to civil passage. When military convoys passed through, Portugal always specifically requested passage, and therefore in such a case a local custom could not arise, because passage was conditional on the consent of the British government.²⁹

3.4. The relationship between international custom and international treaty

There is no formal hierarchy of sources in public international law. Therefore, it is not possible to state unequivocally whether international treaties take precedence over customary law, or vice versa. It is this state of affairs that creates the so-called complementary approach to understanding the relationship between custom and international treaty. Namely, the emergence of an international treaty does not eliminate existing international custom. According to Villinger, resolving this situation/relationship is not at all the task of an international treaty; on the contrary, its task is precisely to strengthen the binding nature of international custom.

According to Kwiecień, the complementary approach means that a special legal rule supplements a general one, and either source may serve as the general or the special rule depending on the context.³⁰ However, the situation where there would be a collision between these two basic sources of law is problematic. In this case, legal doctrine uses two basic derogation rules, while the use of the specific one depends individually on each case.

1. *Lex specialis derogat legi generali* (a special rule prevails over a general one) – in this case too it is quite difficult to determine which legal regulation is special and which is general. Therefore, we agree with the applied view that both custom and international treaty can be considered special legal regulation, depending on the situation.

2. *Lex posterior derogat legi priori* (a later law repeals an earlier law) – in this

²⁹ International Court of Justice. 1960. Portugal versus India, Case Right of Passage over Indian Territory (Judgement), Judgement of 12 April 1960, available at: <https://www.icj-cij.org/node/100422>.

³⁰ Kwiecień Roman. "The Formal Sources of International Law, the Relationship between Treaties and Custom, and the International Law-Making Process." *Australian Year Book of International Law* 40, no. 1 (2022): 46–66.

case the situation is simpler. Since most customs require longterm validity as one of their conditions, a treaty would more likely repeal a custom. Of course, the opposite situation can also occur, which will be less common. Here, however, we must consider the question of whether a particular source of law – a treaty – can repeal international custom as a general source of law. However, we agree with the opinion of Villinger that there is no single and unambiguous answer to this question.³¹

In the situation outlined above, we would reach a state of a certain superiority of sources of law. However, public international law does not recognize the hierarchical arrangement of sources and therefore the situations that we mentioned above. Moreover, they do not occur often and when they do, it is necessary to suddenly prioritize one of the sources of law. However, it should be noted that there are also imperative/mandatory legal norms that do not allow deviation. They also do not allow for a possible interpretation that would be in conflict with them. Therefore, according to some authors, the priority of a particular source will depend on which of the given sources is more in line with the mandatory norm of international law.³²

International custom is therefore an unwritten source of law that is not easy to identify, and therefore states approach the conclusion of treaties through which they try to codify these customs. Nevertheless, written law provides a greater degree of legal certainty. However, the opposite situation can also occur, namely that international treaties create a certain space for the emergence of international customs. This reasoning is also supported by case law concerning the North Sea Shoal.

According to Tache, an explicit reference to the customary rule is also found in international agreements on investment protection.³³ In this case, however, three situations come into consideration when the role of the customary rule is important. In the first case, a bilateral investment treaty explicitly refers to the application of customary international law; in the second case, the role of customary law is emphasized when one of the parties to the treaty argues in the proceedings before the tribunal that a certain provision must be interpreted in the light of a customary rule or, in the third case, that the BIT requires the interpretation of its provisions in accordance with customary international law.

In the context of explicit references to customary rules in BITs, one of the fundamental reasons for the continued importance of customary rules could be that this type of treaty explicitly refers to the application of customary international law. However, as Dumbery points out, it is important to note that explicit reference to a customary rule is found only in a minority of investment treaties. In this case, the arbitral tribunal must necessarily determine the content of the customary rule when faced with such a specific provision.³⁴ Such a direct reference to custom can sometimes be found

³¹ Villinger Mark Eugen, *Customary International Law and Treaties*. Kluwer Law International, 1997, 378.

³² Villarreal Julio Francisco and Barruto Oscar Cubas 2024. "Can Public International Law Custom Serve as a Sufficient Source of Law when Regulating the Justiciability of Acts Iure Imperii?" *Revista Juridica* 3, no. 80 (2024): 495–522. doi:10.26668/revistajur.2316-753X.v3i80.7346.

³³ Popa Tache Cristina Elena 2021. "Defense or cooperation between states and international investors in times of crisis?" *Juridical Tribune* 11, no. Special issue (2021): 380–394.

³⁴ Dumbery, Patrick. 2016. "Has the Fair and Equitable Treatment Standard Become a Rule of Customary

in the fair and equitable treatment clause. However, according to some authors such as Popa, this is a relatively new phenomenon. Given that the fair and equitable treatment clause standard has given rise to diverse and conflicting interpretations regarding its scope and content, several states have clarified this principle in their bilateral investment treaties in such a way that this standard is not only linked to international law, but that it is in fact a reference to a minimum standard of protection under customary international law.³⁵ According to Lando, an ideal example of such a response is that concerning the parties to the North American Free Trade Agreement and its Article 1105.³⁶ According to this treaty provision, the parties to the North American Free Trade Agreement must grant “fair and equitable treatment” under international law to foreign investors. As Mantilla further states, in 2001 the parties to the said agreement issued their Notes on the Interpretation of Certain Provisions of Chapter 11, including Article 1105.³⁷ These Notes, among other things, according to Dumberry, clarify that Article 1105 establishes a minimum standard of protection for foreigners based on customary international law as the minimum standard of treatment to be provided to investments by investors of the other party.³⁸ The parties to the North American Free Trade Agreement subsequently repeatedly argued in their submissions in tribunal proceedings the customary nature of the minimum standard of protection applicable under Article 1105. Nicholson³⁹ points out that the United States and Canada later followed this approach in their 2004 model bilateral investment treaties. Within the European continent, the bilateral investment treaties concluded between Canada and the Slovak Republic, or between Canada and the Czech Republic, also provide a suitable example of the application of custom (BIT between the Slovak Republic and Canada, 2010; BIT between the Czech Republic and Canada, 2009).

Batool points out that Canada, as a subject of international law, is also a signatory to the Comprehensive Economic and Trade Agreement of 2014, which it concluded with the European Union.⁴⁰ Both contracting parties sought to achieve the same goal of limiting the scope of the fair and equitable treatment clause by including in the provisions of the treaty a specific list of various situations involving a breach of fair and equitable treatment obligations without an explicit reference to the concept of

International Law?” *Journal of International Dispute Settlement* 8, no. 1 (2016): 155-178.

³⁵Popa Tache Cristina Elena. “International investment protection in front of the states role in crisis times to managing disputes.” *Juridical Tribune* 10, no. 3 (2020): 455–465.

³⁶ Lando Massimo. “Secret Custom or the Impact of Judicial Deliberations on the Identification of customary International Law.” *Cambridge Law Journal* 81, no. 3 (2022): 550–580. <https://doi.org/10.1017/S0008197322000253>.

³⁷ Mantilla Giovanni. “From treaty to custom: Shifting paths in the recent development of international humanitarian law.” *Leiden Journal of International Law* 37, no. 2 (2024): 359–378. <https://doi.org/10.1017/S0922156523000705>.

³⁸ Dumberry, Patrick. 2016. “Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?” *Journal of International Dispute Settlement* 8, no. 1 (2016): 155-178.

³⁹ Nicholson Rován 2021. “The International Court of Justice as a shortcut to identifying custom.” *Law and Practice of International Courts and Tribunals* 20, no. 3 (2021): 490–518.

⁴⁰ Batool, Madiha. 2022. “Military intervention as an international normative custom and human security.” *Regulating Human Rights, Social Security, and Socio-Economic Structures in a Global Perspective*, (2022): 142–161. doi: 10.4018/978-1-6684-4620-1.ch009.

“customary international law” (EU–Canada CETA). In other words, the absence of the concept of custom cannot be considered as a sign that the contracting parties sought to avoid using the concept altogether. This provision could also be a reflection of the customary principle of a minimum standard of treatment. Finally, we would like to add that in some bilateral investment treaties there are clauses on the prohibition of expropriation, which refer explicitly to custom (US 2004 Model BIT). Overall, therefore, the continuing importance of customary rules is undeniable, especially in situations where bilateral investment treaties expressly refer to this concept, with the result that the tribunal deciding the dispute simply has to apply these rules.

4. Conclusion

The main objective of our scientific study was to analyze international custom as one of the basic sources of public international law. Based on the available and, in our opinion, particularly appropriate scientific literature, we analyzed the issue of international custom in a general sense. We explained the basic concepts that the science of international law associates with the concept of custom, such as its legal basis of international custom and the basic requirements that are associated with this concept. Our analysis confirms that these requirements remain essential to the creation of customary law, because they determine the potential emergence of legal custom. The analysis of the static aspect of international custom pointed to two basic elements, namely general practice (*usus longaevis*) and acceptance of this practice as law (*opinio iuris*). In our opinion, the contribution of this part is also the theoretical and legal examination of these elements, while these elements were also formed in the case law of the International Court of Justice, which enriched the theoretical part with an analysis of the relevant case law and thus increased its added value for legal practice.

As part of the examination of the dynamic aspect of international custom, we analyzed the process of creating international custom itself. The result is the opinion that international legal science knows two basic theories of the creation of custom, which show both differences and common features. Our research also examined the fundamental differences between international custom as a legally binding source of law and international custom, which is not legally binding. There are situations where a practice may appear to constitute customary international law, while in reality it remains only a rule of comity. In connection with the examination of international custom, we did not forget to examine the issue of local custom.

In the last part of our scientific study, we examined in quite detail the mutual relationship between international custom and international treaty. The principle of complementarity itself explains to us that these sources complement each other, but the analysis of the situation when these two basic sources of international law would contradict each other is beneficial. Based on our research, we managed to find out that despite the indications to eliminate custom as a source of international law, legal custom has its irreplaceable place and application both in the sources of international law and in the decisionmaking activities of courts and other bodies.

Acknowledgement

Supported by the EU NextGenerationEU through the Recovery and Resilience Plan for Slovakia under the project within the Smart Transformational and Innovation Consortium Slovakia (STICS) No. 09I02-03-V01-00011.

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