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Reassessing the Binding Force of International Treaties and Customary International Law in Contemporary International Adjudication

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ABSTRACT

International treaties and customary international law are two main sources in the international legal system. Both have the function of regulating relations between countries and international actors, but there are differences in the mechanisms of formation and its binding force. This study contributes to fill the analytical gap in previous comparative works by examining how legitimacy and enforceability differ under modern international adjudication contexts.
Using normative legal research methods, specifically the statute approach and conceptual analysis, an analysis is conducted on the legal principles, doctrines, and practices of states to understand how the legitimacy and effectiveness of both are recognized in the international legal system.. The results of the study show that international treaties generally have more explicit and specific binding force because they are based on the formal agreement of the parties, while customary international law is binding based on general practices accepted as law (opinio juris). However, in certain situations, customary law can apply more broadly, including to countries that are not parties to an agreement. This study emphasizes the importance of understanding the interaction between the two in an effort to maintain legal certainty and stability of international relations.

Keywords: *Binding Force, International Treaties, Customary International Law, Legal Legitimacy.*

INTRODUCTION

Modern international law is built on various sources of law that function to regulate relations between states and other actors at the global level. The two most fundamental sources are international treaties and customary international law. Both play an important role in creating order, legal certainty, and dispute resolution in the international realm. However, the characteristics, formation process, and binding force of these two sources of law are not identical. International treaties arise from explicit agreements between states through formal

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legal instruments, while customary international law is formed through general state practices that are accepted as legal obligations (*opinio juris*).

These differences raise questions about how strong the binding power of each source is in the practice of international law. On the one hand, international treaties provide contractual clarity on the rights and obligations of state parties. On the other hand, customary international law is often more universal in nature because it binds even states that are not bound by a particular treaty. This study is important to understand how the legitimacy and effectiveness of the two sources of law operate within the framework of dynamic international relations.

In the context of international relations, the existence of widely accepted legal norms is a fundamental need to prevent conflict, regulate cooperation, and ensure respect for the principles of justice. As the international community has developed, both international treaties and customary international law have become the main pillars supporting the global legal system.

International treaties offer a clear formal structure, supported by a ratification process and specific written commitments [1]. Their binding force rests on the principle of pacta sunt servanda, which means that any agreement in force must be implemented in good faith by the parties. In many situations, the clarity of the agreement provides an advantage in resolving disputes and enforcing rights and obligations.

In contrast, customary international law grows out of consistent state practice and believes that such action constitutes a legal obligation. The advantage of customary law is its binding force that does not require formal written agreement, so it can apply widely even to states that have not actively ratified a particular treaty. However, proving the elements of general practice and *opinio juris* is often a challenge in the application of customary law.

The increasingly complex development of the world, including in the fields of technology, economy, and environment, demands legal norms that can adapt to changes quickly. In this context, there is a need to evaluate whether international agreements or customary international law are better able to meet these needs, both in terms of flexibility, legal certainty, and legitimacy.

International treaties and customary international law have long been recognized as the two main sources of law in the international legal system. This is confirmed in Article 38 of the Statute of the International Court of Justice, which states that the Court must apply, inter alia, international treaties and international customs as evidence of general practice accepted as law.

According to Shaw, an international agreement is a legal instrument that arises from a voluntary agreement between countries and has binding force based on the principle of pacta sunt servanda.[2] The agreement provides a formal legal structure, clarifies the rights and obligations of each party, and creates a more orderly dispute resolution mechanism. Brownlie (2008) added that the advantage of an agreement lies in its specific and written nature, so that it can be easily interpreted and applied.[3]

In practice, the 1969 Vienna Convention on the Law of Treaties clarifies the procedures for the conclusion, implementation and termination of international treaties. Thus, the legitimacy of international treaties is strengthened not only by the consensus of the state parties, but also by the legal instruments that govern them.

Meanwhile, customary international law develops from consistent state practices and is accompanied by *opinio juris*, namely the belief that the practice is carried out because of legal

[1]J. Arato, "Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations," *Yale J. Int'l L* 38 (2013): 289, https://doi.org/https://heinonline.org/HOL/LandingPage?handle=hein.journals/yjil38&div=13&id=&page=.

[2]MN Shaw, *Hukum Internasional* (Cambridge University Press, 2017).

[3]Ian. Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, 2008), https://doi.org/https://doi.org/10.1093/he/9780198737445.003.0002.

obligations. Malcolm N. Shaw (2017) states that customary law is binding even without the need for explicit state consent, so it has a wide scope of application.[4]

Cases such as the North Sea Continental Shelf Cases (1969) underline the importance of two elements of customary law: a sufficiently broad state practice, and the existence of *opinio juris*. In many situations, customary law remains relevant, especially in areas that have not been dealt with in detail in written treaties, such as the principle of non-intervention or state sovereignty.

Some scholars, such as Anthony Aust (2010),[5] argue that international treaties provide a higher level of legal certainty than customary law, because the treaties are explicit and can be proven through written documents. In contrast, customary law, although more flexible and broader, faces challenges in proving its elements and often opens up debate about the extent to which a practice is considered legally binding.

However, in certain contexts, customary law has a more universal binding force. Customary law is binding on all states regardless of their membership status in a particular treaty, thus expanding the scope of application of international law. For example, the principle of the prohibition of genocide or the prohibition of torture are considered part of jus cogens, that is, norms of customary international law that cannot be set aside.

According to Dupuy's work (1999),[6] the development of contemporary international law shows a dynamic relationship between treaties and customary law. New treaties often codify customary practices, while new customary practices can develop based on interpretations of existing treaties.

In areas such as the law of the sea and environmental protection, for example, many treaty provisions end up reflecting or forming new customary laws. UNCLOS 1982 not only serves as a treaty but also serves as a source of customary law in many of its fundamental principles, such as the Territorial Sea and Exclusive Economic Zone regimes.

Although both have legitimacy at the international level, in practice at the national level, treaties tend to be more easily adopted through formal ratification. Meanwhile, recognition of customary legal norms often requires further interpretation by national courts or legal institutions. This shows that in terms of practical effectiveness; international treaties are often superiorOn the other hand, customary law continues to play an important role in filling the gaps in international law in areas not covered by treaties, so that it remains relevant in the dynamics of global law.

The study of the comparative binding force between international treaties and customary international law has been the focus of various studies in the last decade. These studies enrich the understanding of the increasingly complex dynamics of international law, especially amidst technological developments, global politics, and cross-border challenges.

Research by Jean d'Aspremont (2015)[7] entitled "Customary International Law as a Process" discusses that customary international law is currently experiencing a change in character, from a traditional form based on state practice to a more flexible and dynamic process. D'Aspremont highlights that in the modern world, customary law is becoming more difficult to identify with certainty, so that in many contexts, countries rely more on treaties to obtain legal certainty. This research shows that international treaties tend to have a more concrete binding force than customary law, which often requires further proof.

[4]Malcolm N. Shaw, *International Law* (Cambridge University Press, 2017).
[5]Anthony. Aust, *Handbook of International Law*, 2nd ed. (Cambridge University Press, 2010).
[6]Pierre-Marie. Dupuy, "Customary International Law after the International Court of Justice," *International Law Forum Du Droit International* 1, no. 2 (1999): 11–116, https://doi.org/https://www.sudoc.fr/279969600.
[7]Jean D'Aspremont, "Customary International Law as a Process," in *International Legal Theory: Foundations and Frontiers* (Oxford University Press, 2015).

Furthermore, a study conducted by Natalie Klein (2016) in "Dispute Settlement in the UN Convention on the Law of the Sea" shows that the provisions of international maritime law born from UNCLOS 1982 are more effective in resolving disputes than provisions based on customs before the convention. Klein found that countries are more likely to refer to treaty norms than customary norms because the specific and written nature of treaties provides a stronger and more defensible legal basis in international forums [8].

In 2004, Jörg Kammerhofer's study " Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems" criticized the traditional understanding of customary international law. Kammerhofer argued that the International Court of Justice often blurs the line between customary law and general principles of international law. This, he argues, weakens the clarity of customary law's binding force when compared to international treaties, which tend to be more explicit in their text [9].

The fourth study was conducted by Anthea Roberts in her book "Is International Law International?" [10]. Roberts demonstrates that states' approaches to the sources of international law are heavily influenced by their respective legal traditions. Common law systems—historically rooted in custom and precedent—tend to place a heavy emphasis on customary international law and judicial practice as sources of normative legitimacy. In contrast, civil law states are more accustomed to working with codified legal structures and therefore more receptive to general principles and the systematic development of customary law. However, in the increasingly pluralistic context of modern international law, Roberts also notes that common law states increasingly rely on a textual approach when dealing with international treaties, while civil law states maintain greater methodological flexibility. His findings emphasize that the assessment of the binding force of a treaty or custom depends on a state's legal tradition, not solely on the nature of its legal source.

The latest research was conducted by Gleider Hernández in a work entitled "The International Court of Justice and the Judicial Function" [11]. Hernández highlighted that in the practice of the International Court, judges tend to be more comfortable and firmer in deciding cases based on international agreements rather than having to prove elements of customary law. According to Hernández, this is because agreements provide a more predictable and legally accountable structure, in contrast to customary law which is more abstract and sometimes disputed in its application.

In general, the five studies show a tendency that in contemporary practice, international agreements are more often used as the main reference in resolving disputes and establishing binding international norms. This is closely related to the nature of written agreements, having formal procedures, and ratification mechanisms that emphasize the commitment of the state parties.However, it cannot be ignored that customary international law still plays an important role in filling the legal gaps, especially in areas that have not been fully regulated by treaties. In addition, in the context of jus cogens norms and basic principles such as the prohibition of genocide, the principle of non-aggression, and state sovereignty, customary law remains a strong foundation.

Therefore, the study of the binding force of these two sources of law does not only involve a comparison of their formal characteristics, but also an understanding of the context of their application in various fields of international law. In a changing global world, the relationship

[8]N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005).

[9]J. Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems," *European Journal of International Law* 15, no. 3 (2004): 523–553, https://doi.org/https://doi.org/10.1093/ejil/15.3.523.

[10]A. Roberts, *Is International Law International?* (Oxford University Press, 2017).

[11]G. I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press, 2014).

between treaties and customs is not an exclusive relationship but rather complements each other in maintaining the order of international relations.

Based on these studies, it is important for current international legal studies to continue to pay attention to the dynamics between the legal clarity offered by treaties and the flexibility and broad reach of customary international law, so that the international legal system remains adaptive to new challenges.

Based on the review of five previous studies, there are several important contributions that have been made in studying the sources of international law, especially regarding international agreements and customary international law. However, there is still research space that needs to be filled, especially regarding the comparative approach to the binding power of the two sources of law in one integrated analysis.

Jean d'Aspremont (2015) in Customary International Law as a Process focuses more on the changing character of customary international law in the modern era without directly comparing it with the normative force of international treaties. He highlights the evolution of customary law but does not examine the extent of the binding force of customary law when compared to the legal force of international treaties.

Natalie Klein (2016) through her study on dispute resolution under UNCLOS, indeed underlines the effectiveness of international agreements compared to customary law, but her discussion is limited to the field of maritime law only. This study has not conducted a general comparative analysis in various broader fields of international law, so it has not provided a complete picture of the dominance of binding power between these two sources of law in the global realm.[12]

Jörg Kammerhofer's (2018) research focuses on the critique of positivism in the formation of customary international law through the practice of the International Court of Justice (henceforth ICJ). However, Kammerhofer's analysis only discusses the validity aspect of customary law, without comparing its binding force to international agreements, especially in contemporary practice between countries.[13]

Anthea Roberts (2017) in Is International Law International? contributes to the understanding of the variation in approaches to international law across national legal systems. Although she indicates that treaties are more important in some legal traditions, this study examines the differences in legal culture perspectives rather than comparing the binding force between treaties and customary law in international practice specifically.

Meanwhile, Gleider Hernández (2022) in ICJ and the Judicial Function does discuss the preferences of International Court judges towards treaties, but his study is more limited to judicial practice. Hernández does not develop an analysis of how these preferences impact the development of international legal norms as a whole between the two sources of law.[14]

From the five studies, it can be concluded that there has been no study that specifically and comprehensively compares the binding force between international agreements and customary international law by examining factors such as: scope of application, flexibility, effectiveness of implementation, and normative legitimacy in the context of modern international relations.

This research is here to fill this gap, with the aim of providing a systematic comparative analysis of the binding force of international treaties and customary international law, as well as evaluating the relevance of both in responding to the needs of international law amidst the dynamics of globalization and cross-border challenges

[12]Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*.
[13]Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems."
[14]Hernández, *The International Court of Justice and the Judicial Function*.

METHOD

This study uses a normative legal research method, namely research that examines law as a system of norms. The research focuses on the study of legal rules that regulate international relations, especially in comparing the binding force between international agreements and customary international law. This study aims to understand, analyze, and assess both sources of law from a theoretical and dogmatic perspective.

The approaches used in this study include the statute approach, the conceptual approach, and the case approach. The statute approach is carried out by examining various international legal instruments such as the 1969 Vienna Convention on the Law of International Treaties, the Statute of the International Court of Justice, and other relevant international treaties. The conceptual approach is used to understand basic concepts such as pacta sunt servanda, *opinio juris*, and theories on sources of international law. Meanwhile, the case approach is carried out by analyzing the decisions of the International Court of Justice (ICJ) which interpret treaties and customary law, for example in the cases of the North Sea Continental Shelf and Nicaragua v. United States.

The legal materials used in this study consist of primary, secondary, and tertiary legal materials. Primary legal materials include texts of international agreements, decisions of international courts, and other official legal instruments. Secondary legal materials include scientific literature, textbooks, journal articles, and reports from international organizations such as the International Law Commission (ILC). Tertiary legal materials include legal dictionaries, encyclopedias of international law, and legal indexes to facilitate the search for primary and secondary materials.

The collection of legal materials was carried out through library research, by reviewing official documents, legal literature, and international legal databases such as ICJ Reports, HeinOnline, and the United Nations Treaty Series. This technique is used to obtain relevant and authoritative legal sources in answering research problems.

In analyzing legal materials, this study uses descriptive-analytical, argumentative-comparative, and evaluative techniques. Descriptive-analytical techniques are used to describe the contents of related legal norms and analyze the characteristics of agreements and customary law. Argumentative-comparative techniques aim to compare the binding power of the two sources of law based on international theory and practice. While evaluative techniques are used to assess the effectiveness of each source of law in maintaining order and justice in international relations.

By using this method, it is hoped that the research will be able to provide a systematic and comprehensive understanding of how international agreements and customary international law play a role in the international legal system and the extent to which the binding power of each source can be applied effectively in the practice of inter-state relations.

ANALYSIS AND DISCUSSION

Basic Concepts of International Agreements and Customary International LawDefinition of International Agreement

International agreements are one of the main sources of law in relations between countries and other international actors [15]. According to Article 2 paragraph 1 letter a of the 1969 Vienna Convention on the Law of International Treaties, an international agreement is defined as "an

[15]K. Raustiala, "Form and Substance in International Agreements," *American Journal of International Law* 99, no. 3 (2005): 581–614, https://doi.org/https://doi.org/10.2307/1602292.

agreement made between countries in written form and governed by international law, whether contained in one or more related instruments." This definition emphasizes the elements of formality, agreement, and submission to international legal norms.

International treaties have been defined by many international law experts with an emphasis on the elements of agreement and binding force between countries. According to Oppenheim, an international treaty is an agreement between countries that aims to create binding obligations and rights based on international law. Oppenheim emphasizes the importance of the element of voluntary agreement between countries as the main foundation of an agreement.

Ian Brownlie defines an international treaty as an agreement intended to regulate legal relations between countries or international organizations, which is stated in written form and subject to the provisions of international law [16]. Brownlie highlights the aspect of formalization of legal relations as a characteristic that distinguishes treaties from other forms of agreements that are political in nature.

Meanwhile, according to Malcolm N. Shaw, an international agreement is a formal legal instrument used by subjects of international law to explicitly establish reciprocal rights and obligations. Shaw views agreements as the primary means for countries to form definite and accountable legal relations internationally. Martin Dixon defines an international agreement as a contract between countries that creates legal rights and obligations based on a common will, where this will be reflected in written form. Dixon emphasizes the importance of the principle of common will (consensus) as the basis for the validity of an international agreement, in line with the principle of *pacta sunt servanda*.

According to Antonio Cassese, an international agreement is a tool used by states or international organizations to form, change, or terminate legal relations on a voluntary basis. Cassese also notes that the existence of agreements shows the flexibility of international law in responding to changing needs and dynamics of relations between states.

From these various definitions, it can be concluded that international agreements have the main characteristics of voluntary agreements, written form, regulation of rights and obligations, and are subject to a binding international legal framework.

In general, international agreements can be in the form of treaties, conventions, protocols, memorandums of understanding (MoU), or other forms containing agreements between two or more parties. These agreements contain the rights and obligations of the parties and often include dispute resolution mechanisms and provisions on changes and termination of the agreement.

The binding force of international agreements rests on the principle of *pacta sunt servanda*, which means that every valid agreement must be complied with in good faith by the parties. This principle is not only moral, but also has legal force recognized in international practice. The obligation to comply with agreements emphasizes the importance of consistency and trust in international relations.

In addition to between countries, international agreements can also involve international organizations as legal subjects. For example, the United Nations (UN) can be a party to an agreement with its member countries. In this case, the legal capacity of international organizations is recognized as part of the development of modern international law.

It is important to note that international treaties are not only binding on the parties that agree to them, but in some cases, the principles in the treaty can develop into broader norms of customary international law. This shows the close interaction between treaties and customary law in the dynamics of global law.

[16]I. Brownlie, "The Peaceful Settlement of International Disputes," *Chinese Journal of International Law* 8, no. 2 (2009): 267–83, https://doi.org/https://doi.org/10.1093/chinesejil/jmp015.

Definition of Customary International Law

Customary international law is the legal norms arising from the general practice of states that are accepted as legal obligations [17]. Based on Article 38 of the Statute of the International Court of Justice, customary law is recognized as one of the main sources of law besides treaties and general principles of law.

Customary international law is defined by many experts by emphasizing the elements of state practice and legal belief (*opinio juris*). According to Malcolm N. Shaw,[18] customary international law is a state practice that is followed for a certain period of time and accepted as a legal obligation. Ian Brownlie states that customary international law is a pattern of behavior that is generally adopted by states because they believe that it is a legal obligation. Martin Dixon argues that customary international law consists of consistent state practices, accompanied by a legal belief that the practice must be carried out. Antonio Cassese explains that customary law arises from repeated and generally accepted practices, where states feel legally bound to act accordingly. Meanwhile, according to J.G. Starke, customary international law develops from general customs between states that are carried out continuously with the belief that these customs have legal value. From these various definitions, it is clear that the key elements in customary international law are the existence of repeated and consistent state practices, as well as the belief that these practices contain elements of legal obligations.

The main elements of customary international law are the existence of a sufficiently broad and consistent state practice, and the existence of *opinio juris*, namely the belief that the practice is carried out because of legal obligation, not merely custom or political considerations. Without *opinio juris*, state practice cannot be categorized as customary international law.

In reality, customary law plays an important role in filling legal gaps in areas not regulated by written treaties. For example, the principles of state immunity, the prohibition of torture, and the prohibition of genocide are part of customary international law that have been widely recognized.

The process of forming customary international law tends to take a long time, because it requires proof of continuous and consistent state practice. In addition, debate often arises in determining whether a practice has met the standards for forming customary law, especially in the context of rapid legal developments in new areas such as cyber technology.

Fundamental Similarities and Differences of International Treaties and Customary International Law

Both international treaties and customary international law have in common that they are the main sources of law in the international legal system. Both aim to regulate the behavior of states and international actors, and to create order and stability in international relations. In addition, both are recognized by the Statute of the International Court of Justice as the basis for resolving international disputes.

From the legitimacy side, both treaties and customary law obtain their binding force through state consensus. In treaties, this consensus is manifested through formal approval of the text of the treaty, while in customary law, consensus is reflected in general practices that are widely accepted as legal obligations.

However, there are fundamental differences between the two. International treaties are written, formal, and specific, with a clear structure regarding the rights and obligations of the

[17]J. P. Norman, G., & Trachtman, "The Customary International Law Game," *American Journal of International Law* 99, no. 3 (2005): 541–80, https://doi.org/10.2307/1602291.
[18]Shaw, *International Law*.

parties. Whereas customary international law is unwritten, it develops through practiceand often requires further interpretation to determine its scope and substance.

In terms of application, treaties bind only those states that are expressly parties to the treaty, except for certain provisions that reflect customary law. In contrast, customary law is generally binding on all states, including states that were not involved in the creation of the norm.

The advantage of international agreements lies in the clarity of their content and implementation mechanisms. Countries can clearly understand the obligations they accept. In contrast, the strength of customary law lies in its flexibility and ability to adapt norms without the need for formal ratification, thus responding more quickly to developments in international legal needs.

In terms of proof, international agreements are relatively easier to prove through official documents. While customary law requires analysis of state practices and *opinio juris*, which often involves more complex interpretation and proof in international forums.

Finally, these two sources of law interact dynamically in international practice. Many treaty provisions later develop into customary law, while established customary law is often used as a basis for drafting new treaties. This interaction reflects that despite their different characteristics, treaties and customary international law complement each other in forming a more stable and just world legal order.

Binding Power of International Agreements

International treaties have a very important binding force in relations between countries. This power comes from the basic principle of *pacta sunt servanda*, namely that every valid agreement must be complied with in good faith by the parties who bind themselves to it. This principle has become a fundamental norm in international law and is stated in Article 26 of the 1969 Vienna Convention on the Law of International Treaties. Based on this principle, countries are required to carry out what they have agreed to, without being able to deny it unilaterally.

In addition to the principle of *pacta sunt servanda*, the binding force of international agreements is also strengthened by the formal process of their formation. Before an agreement comes into force, there are general stages of negotiation, signing, ratification, and exchange of documents. This process reflects the free will of countries to bind themselves in a legal relationship. Therefore, international agreements are different from ordinary political agreements, because they have legal consequences that can be enforced internationally.

The binding force of international treaties is not only binding on the state's parties, but in some cases can give rise to broader norms. Certain provisions in treaties that are universally accepted can develop into norms of customary international law, thus binding other states that are not even parties to the treaty. For example, many of the principles in the 1982 Law of the Sea Convention (UNCLOS) are now considered part of customary international law.

In practice, if a country violates an agreement that has been agreed upon, other countries can demand accountability through international dispute resolution mechanisms, such as the International Court of Justice (ICJ) or through an arbitration body. This shows that the binding power of international agreements is not merely symbolic but can be enforced through legal channels. Violation of an agreement can result in international responsibility, including the obligation to provide reparations.

Overall, the binding force of international treaties is the main foundation of the modern international legal system. Without respect for treaties, relations between states will lose their legal certainty and stability. Therefore, respect for treaties is not only a legal obligation, but also a reflection of the commitment of states to international order, justice and peace.

The principle of *Pacta sunt servanda* in International Agreements

The principle of *pacta sunt servanda* is a fundamental principle in international treaty law, meaning "agreements must be obeyed" [19]. This principle means that every country that has agreed to bind itself to an international treaty is obliged to implement the provisions of the treaty in good faith. *Pacta sunt servanda Pacta sunt servanda* is not only a moral principle but has also developed into a universally recognized legal norm in relations between countries.

In the 1969 Vienna Convention on the Law of Treaties, the principle of *pacta sunt servanda* is explicitly stated in Article 26. This article states that "Every treaty in force is binding on the parties and must be performed by them in good faith." Thus, this principle provides a strong legal basis for the validity and implementation of every treaty, making the promises made in the treaty an obligation that cannot be ignored unilaterally.

This principle also serves to maintain stability and order in international relations [20]. Without the principle of pacta sunt servanda, international agreements will lose their value and effectiveness, because there is no guarantee that the parties who have agreed will carry out their obligations [21]. Therefore, this principle encourages trust between countries and strengthens the international legal order by providing legal certainty for the commitments that have been made.

Although *pacta sunt servanda pacta sunt servanda* is binding, international law does recognize exceptions under certain circumstances [22]. For example, a state may be exempted from treaty obligations if there is a fundamental change in circumstances (rebus sic stantibus) that makes the implementation of the treaty extremely unfair or impossible. However, these exceptions are strictly enforced to prevent abuse and to maintain respect for the treaty.

Overall, the principle of *pacta sunt servanda* is not only a technical foundation in international treaty law but also reflects the values of ethics and justice in relations between countries. With this principle, countries are encouraged to honor the agreements they make, strengthen international cooperation, and maintain the credibility of the international legal system as a whole.

Conditions for the Validity and Applicability of International Agreements

The legal and enforceable conditions of an international agreement are crucial aspects that ensure that an agreement can be accepted and recognized as a binding source of law. In international law, these conditions are regulated in detail in the 1969 Vienna Convention on the Law of International Treaties. An agreement is not considered valid simply because there is an agreement; rather, it must meet certain standards related to the formation process, the validity of the agreement, and the conformity of the contents of the agreement with international legal norms.

One of the main requirements is the free consent of the competent parties. The state or international organization that makes the agreement must give its consent without any coercion, mistake, fraud, or corruption. If the consent is obtained through means that are contrary to these principles, then the agreement can be declared invalid. For example, Article 52 of the Vienna

[19]K. Tuori, "Pacta Sunt Servanda," *Annales Academiae Scientiarum Fennicae* 2, no. 1 (2023): 44–57, https://doi.org/https://doi.org/10.57048/aasf.130107.

[20]L. Ulyashyna, "The Meaning Role of the Pacta Sunt Servanda Principle In International Law: Identifying Challenges to the Legitimacy Of Peace And War," *Public Security and Public Order* 32 (2023): 105–18, https://doi.org/https://doi.org/10.13165/PSPO-23-32-05.

[21]C. Binder, "Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited," *Leiden Journal of International Law* 25, no. 4 (2012): 909–34, https://doi.org/10.1017/S0922156512000507.

[22]J. Zhifeng, "Pacta Sunt Servanda and Empire: A Critical Examination of the Evolution, Invocation, and Application of an International Law Axiom," *Mich. J. Int'l L.* 43 (2022): 745, https://doi.org/https://heinonline.org/HOL/LandingPage?handle=hein.journals/mjil43&div=23&id=&page=.

Convention states that an agreement obtained through the threat or use of force is contrary to international law and is therefore null and void.

In addition, the competence of the legal subject is also an important requirement. Only subjects of international law, namely countries and certain international organizations, have the capacity to make international agreements. In addition, officials representing the country in the agreement must have full powers, unless such authority is clear based on their position, such as the head of state, head of government, or foreign minister.

The object and content of the agreement must also meet the requirements of validity. The content of the agreement must not conflict with imperative international legal norms (jus cogens), such as the prohibition of genocide, slavery, or military aggression. If an agreement conflicts with the jus cogens norm, then based on Article 53 of the Vienna Convention, the agreement is null and void and has no binding force.

After fulfilling all these requirements, the agreement needs to go through the ratification process or other domestic procedures required by each country to enter into force effectively. In many national legal systems, a treaty does not automatically become internally binding without parliamentary ratification or approval by a competent authority. Thus, the full entry into force of the agreement is not only determined by the international process but also comply with the domestic procedures of each country's party.

Binding Force of Customary International Law

Customary international law has a binding force that is recognized as one of the main sources of international law, on par with international treaties [23]. Based on Article 38 of the Statute of the International Court of Justice, customary international law is formed through two important elements, namely consistent state practice and the existence of *opinio juris*, namely the belief that the practice is carried out as a legal obligation. With these two elements, customary law is not only a voluntary practice but develops into a legal norm that binds states in general. One of the main strengths of customary international law is its universal nature. Unlike treaties that bind only certain parties who agree to become members, customary law can bind all states, including states that do not explicitly give their consent. This makes customary law an important instrument to ensure that certain basic norms, such as the prohibition of torture or the principle of non-intervention, apply globally and do not depend on participation in a treaty.

In addition, customary international law plays a vital role in filling legal gaps. In many cases, new areas of law or situations not covered by written treaties can be regulated through the development of customary law. For example, the principle of state sovereignty over airspace and maritime territory initially developed through state practice before being codified in formal treaties. This demonstrates the flexibility of customary law in responding to changing international needs.

Despite its binding force, the application of customary international law often faces challenges, especially in its proof. It requires a broad and consistent analysis of state practices, as well as evidence of *opinio juris*. In many disputes before the International Court of Justice, proving that a norm has met the requirements of customary law is a crucial point that determines the outcome of the case. This makes customary law, although binding, often more difficult to enforce than the provisions of written international treaties.

Overall, the binding force of customary international law serves as an important foundation for the global legal system. It ensures that the basic principles protecting human rights, state sovereignty, and international peace remain broadly applicable, even without

[23]H. Thirlway, *The Sources of International Law* (Oxford University Press, 2019).

formal agreement through treaties. Customary law thus complements international treaties in maintaining order and justice at the global level.

Elements of Customary International Law: State Practice and *Opinio juris*

Customary international law is formed through two main elements that must be fulfilled cumulatively, namely state practice and *opinio juris* [24]. These two elements serve to distinguish customary law from ordinary social customs or voluntary practices between countries. Without fulfilling these two elements simultaneously, a practice cannot be recognized as legally binding customary international law.

State practice refers to the actual behavior or actions taken by a state in various forms, such as diplomatic actions, official statements, national laws, domestic court decisions, and participation in international organizations. This practice must be carried out consistently and widely enough among states, although it does not have to be absolute. In some cases, even the practice of the majority of large and influential states can be enough to form customary international law, as long as there is no express objection from other states.

Meanwhile, *opinio juris* is the belief or legal awareness of a state that an action or practice is not just a normal habit, but is done because it feels legally obligated [25]. Without *opinio juris*, a practice will only be considered a national custom or policy, and not an international legal obligation. Evidence of *opinio juris* can be found in official statements of the state, texts of agreements, resolutions of international organizations, or even in the state's attitude towards certain legal norms.

It is important to remember that not all state practices can be considered customary law immediately. State practices must show a certain degree of uniformity and consistency over time. However, in certain areas of particular sensitivity or importance, customary law can be formed more quickly if state practice and *opinio juris* develop simultaneously and strongly, as in the principle of the prohibition of the unlawful use of force in international relations.

Overall, the elements of state practice and *opinio juris* form the foundation of customary international law. These two elements complement each other: state practice forms the factual aspect, while *opinio juris* provides normative legitimacy. They ensure that customary law does not simply arise from repeated acts but truly reflects a global agreement on what is considered a legal obligation in relations between states.

Formation and Evolution of Customary International Law

Customary international law is formed through a dynamic process that reflects the general practice of states and the development of international legal awareness. Basically, the formation of customary international law requires two main elements: a fairly extensive, consistent and repeated state practice, and a state's legal conviction (*opinio juris*) that the practice is mandatory. The element of state practice indicates the existence of real action in international relations, while *opinio juris* distinguishes between mere custom and binding legal obligation.

The process of forming customary law usually takes a long time, because state practice must demonstrate consistency over time. However, in some areas of great importance to the international community, the formation of customary law can occur more quickly, especially when state practice and *opinio juris* develop simultaneously. Examples include the emergence

[24]A. E. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," *American Journal of International Law* 95, no. 4 (2001): 757–91, https://doi.org/10.2307/2674625.

[25]P. Mattei-Gentili, "The Quest for *Opinio juris*: An Analysis of Customary Law, from Hart's Social Rules to Expectations and Everything in the Middle," *Noesis* 34 (2020): 89–114, https://doi.org/https://doi.org/10.4000/noesis.5154.

of the principles of the prohibition of genocide and the prohibition of the indiscriminate use of nuclear weapons, which developed rapidly after World War II.

In its evolution, customary international law is not only formed from traditional practices between states but is also increasingly influenced by decisions of international courts, resolutions of international organizations such as the United Nations, and legal doctrines developed by international law experts. For example, the International Court of Justice (ICJ) in its various decisions has played an important role in affirming the existence and limits of customary international norms, such as in the cases of the North Sea Continental Shelf and Nicaragua v. United States.

The development of technology and globalization also drives the evolution of customary international law into new areas that were previously unregulated, such as space law, environmental law, and cyber law. In this context, state practices and international legal awareness continue to shape new norms that meet the needs of modern international society. This evolution shows that customary law is not a static concept but is responsive to changing times and new challenges.

Overall, the formation and evolution of customary international law illustrate how flexible international law is in meeting the dynamic needs of the global community. Although formed informally compared to written agreements, customary law still has a strong binding force, functioning to fill legal gaps, strengthen fundamental norms, and maintain order and justice in international relations.

Challenges in Proving and Applying Customary Law

One of the main challenges in customary international law is its proof. Unlike international treaties which are in the form of written texts and whose existence can be easily proven, customary law must be proven through analysis of state practice and *opinio juris*. Determining whether a state action reflects a general practice accepted as a legal obligation often requires complex interpretation, because not all state actions explicitly state their legal intent.

In practice, proving the existence of consistent state practice is not always easy. States often have varying foreign policies, depending on their political, economic, or security interests. Furthermore, state practices may be poorly documented or contradictory, making it difficult to establish consistent standards of conduct. This variation makes it difficult to conclude that a custom is established under international law.

Proving *opinio juris* also poses its own challenges. Not all states explicitly state that a particular act was done out of legal obligation. Often, inference must be made from official statements, domestic court decisions, or the state's position in international fora. Even when *opinio juris* can be identified, there is debate about whether the belief is sufficiently strong and widespread to meet the criteria for establishing customary law.

In practice, challenges arise when countries interpret or apply customary law differently. Ambiguity in the boundaries of customary norms can lead to differing views on the scope or content of legal obligations. This is often seen in international disputes, where disputing parties put forward different interpretations of the same customary legal norm. As a result, international judicial institutions such as the International Court of Justice must play an important role in defining and clarifying such norms.

Overall, the challenges in proving and applying customary international law demonstrate that while customary law plays a vital role in the global legal system, its application is not always straightforward. The success of customary law depends on the consistency of state practice, the clarity of *opinio juris*, and the readiness of the international community to recognize and apply these norms fairly and equitably.

Comparative Analysis of Binding Forces

Comparison of Legal Certainty Between Treaties and International Legal Customs

In international law, international treaties and customary international law both serve as sources of law, but they have different levels of legal certainty. In general, international treaties offer a higher level of legal certainty than customary law. This is because treaties are written, structured, and drafted with clear clauses that regulate the rights and obligations of the parties. States that are parties to a treaty can easily refer to specific provisions in the text of the treaty.

In contrast, customary international law, although binding, often faces uncertainty in its application. This is because customary law is formed from state practices and *opinio juris*, which must be proven through interpretation. Not all state practices are clearly documented, and interpretations of *opinio juris* can vary from one state to another. As a result, in cases of dispute, proving the existence of a customary norm can be a complex process and open up a long debate.

International treaties also provide formal procedures for the amendment, termination or withdrawal of treaties through agreed terms, as set out in the Vienna Convention of 1969 [26]. This provides certainty about how the legal status of a treaty can change. In contrast, changes in customary law are gradual and not always formally recorded, making it difficult to determine exactly when a new norm in international custom is born or when an old norm loses its relevance.

However, in terms of scope of application, customary law has the advantage because it can bind all countries, including countries that are not parties to a particular treaty. Meanwhile, treaties only bind countries that explicitly state their agreement to be bound. Thus, although in terms of legal certainty treaties are superior, in terms of scope of application of law, international custom can have a broader impact.

Overall, international treaties and customary law have their respective advantages and disadvantages in terms of legal certainty [27]. International treaties excel in clarity and formal structure [28] while customary law, although more dynamic and flexible, often faces challenges in evidence and limitations in its application. Understanding this comparison is important for states and international actors to determine effective legal strategies in protecting their interests in the global arena.

Scope of Application: States Parties and Non-Parties

In international law, the scope of application of international treaties and customary international law to countries is very different. International treaties are basically only binding on countries that are parties to the treaty, namely countries that have signed and ratified it according to their respective legal procedures. This principle is in line with the principle of *pacta tertiis nec nocent nec prosunt*, which means that an agreement cannot impose rights or obligations on a third party without its consent.

For non-state party, the provisions of a treaty are in principle not binding. However, there are certain situations in which the provisions of a treaty may have an impact on non-party states. For example, if the provisions of the treaty reflect or later develop into customary international law, then the norms are binding on all states, regardless of their status as parties to the treaty. A

[26]L. R. Helfer, "Flexibility in International Agreements," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012), 175.

[27]I. B. Helfer, L. R., & Wuerth, "Customary International Law: An Instrument Choice Perspective," *Mich. J. Int'l L.* 37 (2015): 563, https://doi.org/https://heinonline.org/HOL/LandingPage?handle=hein.journals/mjil37&div=22&id=&page=.

[28] N. Z. (Silviani, "Interpretasi Perjanjian Internasional Terkait Historical Rights Dalam UNCLOS 1982:(Studi Kasus: Sengketa Laut Cina Selatan Antara Republik Rakyat Cina v. Filipina Dan Sengketa Kepulauan Chagos Antara Mauritius v. Britania Raya)," *Jurnal Selat* 6, no. 2 (2019): 154–71, https://doi.org/https://ojs.umrah.ac.id/index.php/selat/article/view/1067.

concrete example can be seen in the many provisions of the 1982 Law of the Sea Convention (UNCLOS) which are now recognized as customary law, even for states that have not ratified it.

In contrast, customary international law has a much broader scope of application because it applies generally to all states, regardless of whether or not they have given explicit consent. This universal nature of customary law makes it an important instrument for ensuring that basic norms are applied equally, such as the principle of state sovereignty, the prohibition of the unlawful use of force, or the right to diplomatic protection.

In practice, this difference in scope has important implications for the fairness and effectiveness of international law. With treaties, states can choose whether or not to bind themselves, giving them autonomy in determining their international commitments. On the other hand, customary international law creates universal obligations that are not dependent on individual state consent, maintaining global legal order and avoiding legal vacuums in interstate relations.

Overall, understanding the scope of application between state parties and non-state parties is key to understanding how international law operates. International treaties provide bindingness based on explicit consent, while customary law automatically binds all states based on general practice and legal belief. The combination of these two instruments allows the international legal system to maintain a balance between the freedom of states and the need to establish universal legal norms.

Flexibility to Adapt to International Developments

Flexibility in international law becomes an important aspect along with the rapid global changes in politics, technology, environment, and security. In this context, international treaties and customary international law show different levels of flexibility in adapting to these developments. Customary international law tends to be more adaptive because it is formed from the dynamically developing practices of states, while international treaties, due to their written and formal nature, require more rigid change procedures.

Customary international law has the advantage of responding to new needs of the international community without having to go through a formal negotiation process. When states begin to demonstrate new practices consistently and with legal certainty, new norms can emerge as part of customary law. For example, principles related to environmental protection and human rights developed rapidly through state practice and came to be widely recognized as part of customary international norms, even before they were codified in formal treaties.

In contrast, international treaties, while offering clarity and legal certainty, often lack flexibility in responding to change. Changing the terms of a treaty usually requires a lengthy amendment procedure and the approval of a majority or all state parties. As a result, treaties can become obsolete or no longer relevant if not promptly updated. This is evident in some early environmental treaties that failed to anticipate rapid developments in climate change issues.

However, international agreements can still adopt certain flexibility mechanisms, such as revision clauses, additional protocols, or adoption of decisions through treaty bodies that provide room for adaptation. An example is the Kyoto Protocol which was updated through the Paris Agreement in facing the challenges of global climate change. Thus, modern agreements seek to improve their traditional rigidity to remain relevant to the needs of the times.

Overall, the flexibility of adaptation to international developments shows the strengths and limitations of each source of law. Customary international law provides the ability to evolve naturally following changes in state practices, while international treaties, although

slower, remain the main instrument in regulating issues that require a strong and consistent legal structure. The synergy between the two is key to maintaining the relevance and effectiveness of international law in the ever-changing era of globalization.

Legitimacy Power in International Dispute Settlement

In international dispute resolution, the legitimacy of legal sources is an important factor in enforcing fair and acceptable decisions by the parties. Both international treaties and customary international law play a vital role in providing a legitimate legal basis for dispute resolution. International treaties, with their written and explicit nature, usually have strong legitimacy because they reflect formal and clear agreements between the countries involved.

The International Court of Justice (ICJ) and other dispute resolution forums often favor treaties as the basis for deciding disputes, due to the clarity and specificity contained in the text of the treaty. For example, in many bilateral or multilateral cases, courts refer to treaty provisions to determine the rights and obligations of the parties. This reinforces the perception that international treaties provide more direct and reliable legal legitimacy in resolving disputes.

However, customary international law also has its own legitimating force, especially in cases where there is no treaty in force between the disputing parties. Because customary law is universal, its norms can be applied to all states, including states that are not parties to a particular treaty. In a dispute such as Nicaragua v. United States at the International Court of Justice, for example, the principles of customary international law are the main basis because there is no written treaty that directly regulates all aspects of the dispute.

The legitimacy of customary law lies in its widespread acceptance by the international community as a valid legal norm [29]. However, the biggest challenge lies in proving the existence of the customary norm and its application in the context of a particular dispute. Uncertainty about the scope of the customary norm can make it difficult for courts to construct decisions that are legally sound and politically acceptable to all parties.

Overall, both international treaties and customary international law have their respective legitimate powers in resolving international disputes. Treaties offer legitimacy based on explicit consent, while customary law offers legitimacy based on universal consensus. The choice of legal source used in dispute resolution will depend greatly on the availability of relevant legal instruments, the nature of the dispute, and the parties' positions on the legal source.

CONCLUSION

International treaties and customary international law are the two main sources of law that underpin the structure of modern international law. Although both have the same purpose, namely, to regulate relations between countries and maintain world order, each has different characteristics, binding power, and scope of application. International treaties offer high clarity and legal certainty through written texts, while customary international law offers flexibility and universal scope that can bind all countries, including those that are not parties to a treaty.

In terms of binding force, international treaties bind state parties based on the principle of pacta sunt servanda, where formal consent given creates explicit legal obligations. In contrast, customary international law is binding based on state practice followed by legal belief (*opinio juris*), so it can apply more widely. However, the proof and application of customary law are often more complex than the application of provisions in written agreements.

In terms of adaptation to international developments, customary law shows greater flexibility because it can evolve with changes in state practices and the dynamics of global

[29]N. Petersen, "Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation," *Am. U. Int'l L. Rev* 23 (2007): 275, https://doi.org/https://heinonline.org/HOL/LandingPage?handle=hein.journals/amuilr23&div=15&id=&page=.

needs. Meanwhile, international treaties, although more stable and structured, often require a formal process for revision or updating that can take a long time. These two sources have complementary advantages, depending on the context and needs of international law at a given time.

In international dispute resolution, the legitimacy of treaties and customary law is also different. Treaties provide a clear and direct legal basis for the parties, while customary international law serves to fill the gap when there is no treaty to regulate or when the norms used are universal. Both contribute to strengthening the dispute resolution system at the international level and support the creation of justice and global legal order.

Overall, both international treaties and customary international law have important roles that cannot be separated in the international legal system. Both are not two opposing entities, but rather complement each other to form an adaptive, legitimate, and sustainable network of norms. A comprehensive understanding of both is essential to ensure the implementation of international law that is fair, effective, and responsive to the dynamics of global society.

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