

# SOURCES OF INTERNATIONAL LAW: customary law



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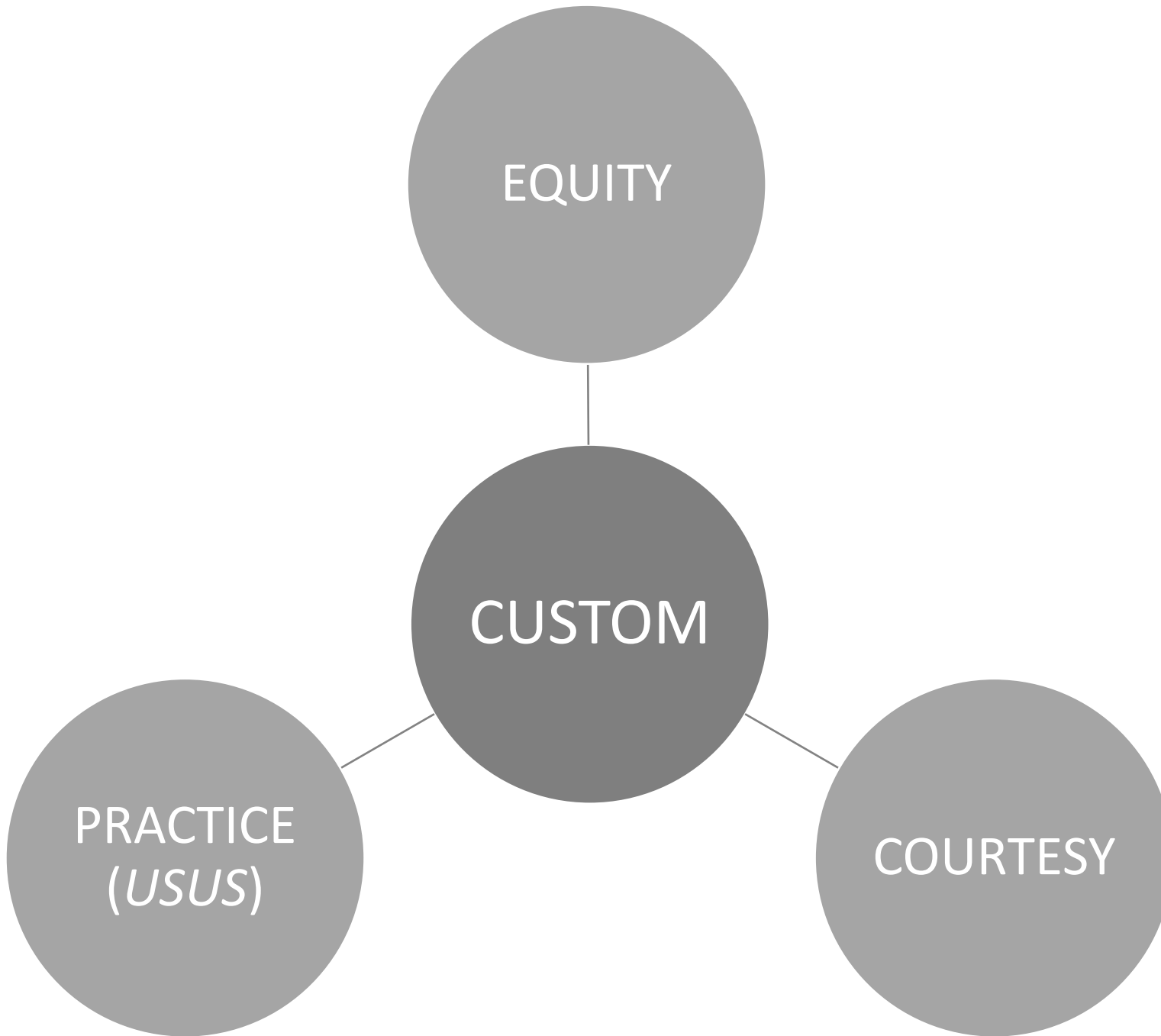
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# art. 38 of the Statute of the International Court of Justice

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
  - **international custom**, as evidence of a general practice accepted as law;
  - the **general principles of law** recognized by civilized nations;
  - subject to the provisions of Article 59, **judicial decisions** and the **teachings** of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.



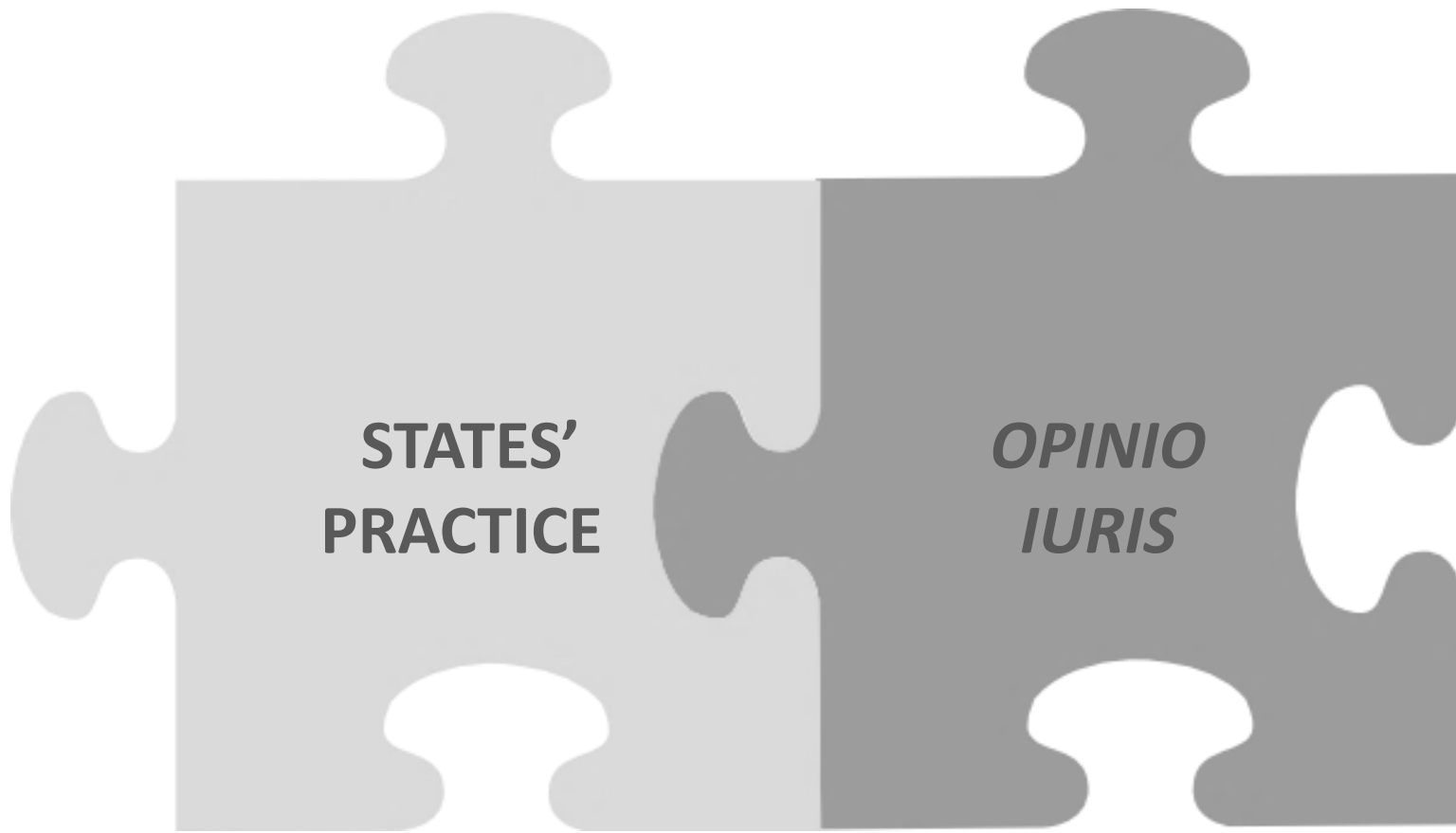
what is international custom?

# definition of custom

*„(...) not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (...)*

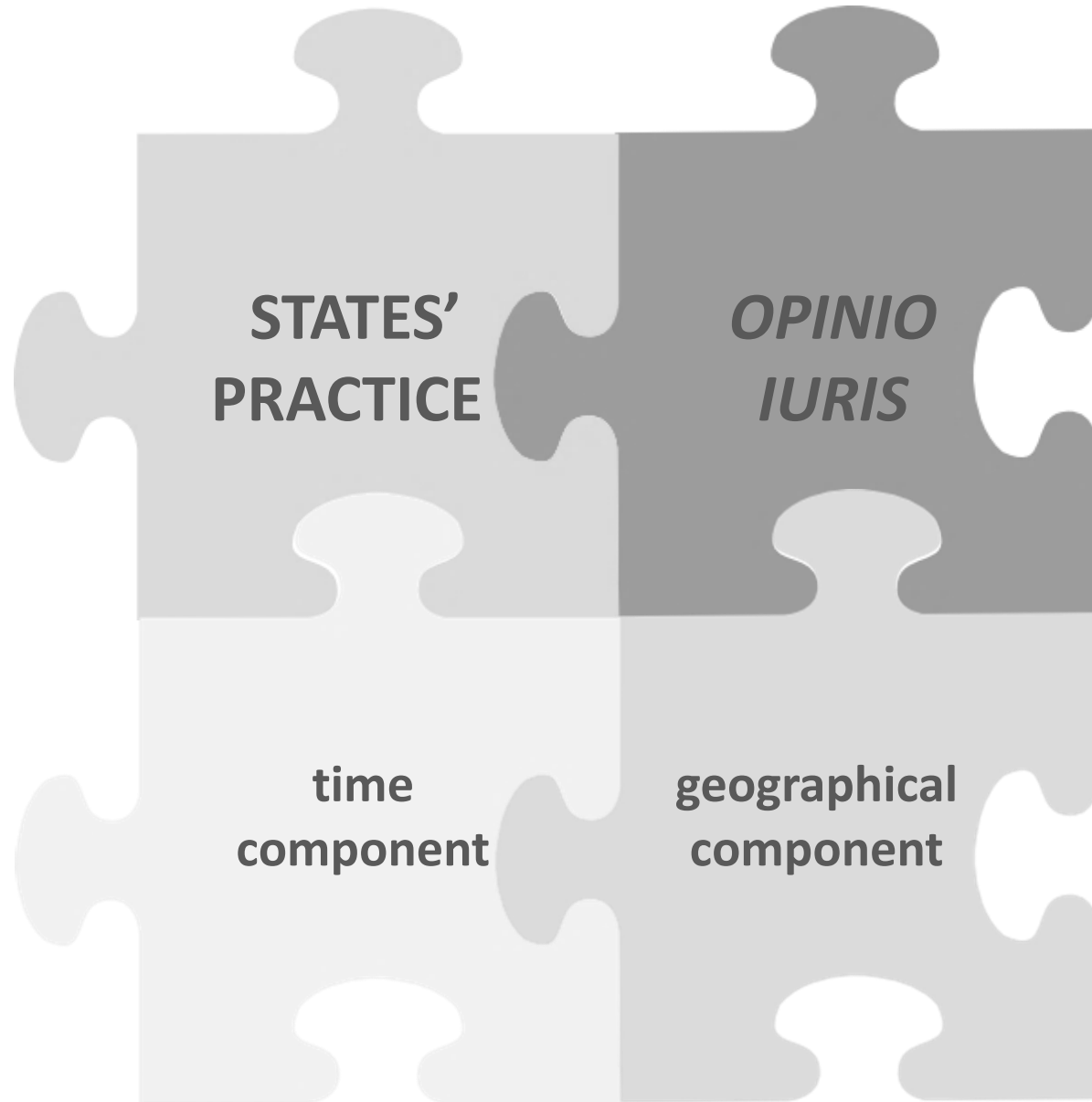
*The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”*

**North Sea Continental Shelf case – ICJ, 1969**



**STATES'  
PRACTICE**

***OPINIO  
IURIS***



## ABSENCE OF PROTEST OF OTHER STATES

- unilateral declaration designed to object to an act or action performed by another State

## ACQUIESCENCE BY OTHER STATES

- *„equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent’ and as found upon the principles of good faith and equity”*
- Gulf of Maine Case, 1984



# types of customs



**ACTION**

**NON-ACTION/  
/FAILURE TO  
ACT**

examples of customary law

# examples of customary law

## diplomatic and consular law

- e.g. **diplomatic immunity**
- Vienna Convention on Diplomatic Relations, 1961
- Vienna Convention on Consular Relations, 1963

## law of the sea

- e.g. **delimitation of continental shelf, principle of open sea**
- United Nations Convention on the Law of the Sea, 1982

## space law

- e.g. **freedom of outer space**
- e.g. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967

international vs. local (regional) custom

# international vs. local (regional) custom

## EXAMPLES

**freedom of outer  
space**

**diplomatic  
asylum**

persistent objector

*ius cogens* as a customary law



relations between international agreement  
and customary law

# relations between international agreement and customary law

**codification**

**collision of norms**

# codification of customary norms

- **DECLARATORY EFFECT** – international agreement codifies or restates an existing customary rule
- **CRYSTALLIZING EFFECT** – international agreement brings to maturity an emerging customary rule, that is a rule that was still in the formative stage (*in statu nascendi*)
- **GENERATING EFFECT** – international agreement materializes whenever a treaty provision creating new law sets in motion a process whereby it gradually brings about, or contributes to, the formation of a corresponding customary rule

# collision of customary and treaty's norms

- **lex posterior derogat priori** - more recent law prevails over (abrogates, overrules, trumps) an inconsistent earlier law.
  1. both customary and treaty sources of law exist
  2. these two sources cannot be construed consistently
- **lex specialis derogat generali** - specific law prevails over (abrogates, overrules, trumps) general law.
  1. both customary and treaty sources of law exist
  2. these two sources cannot be construed consistently.