Data Protection Principles, and Customary International Law

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ABSTRACT *Given the rapid technological advancement and cross-border nature of data flows, data protection has become a critical issue of global concern. The absence of a unified, binding global framework has exacerbated the complexity of this issue. Existing legal instruments are either inadequate, non-binding, non-comprehensive, or regional with limited geographical scope. Given the urgent need for international standards in data protection, this article examines the possibility of Customary International Law (CIL) addressing Data protection principles (DPP). The author posits that widespread state practice, combined with existing international and regional legal frameworks, provides a strong basis for the emergence of customary international rules governing DPP.*

KEYWORDS *Data Protection Principles, Customary International Law, State Practice, International Frameworks.*

List of abbreviations

(OECD) The Organization for Economic Co-operation and Development
(APEC) Asia-Pacific Economic Cooperation Forum
(GAG) General Assembly Guidelines for the Regulation of Computerized Personal Data Files
(GDPR) General Data Protection Regulation
(ECOWAS) Economic Community of West African States
(DPP) Data protection principles
(CCPA) California Consumer Privacy Act
(PIPL) China's Personal Information Protection Law
(CETS) The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data"
(ILA) International Law Association
(CIL) Customary International Law
(ICJ) International Court of Justice

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Introduction

There are no unified, universal rules regarding data protection. International human rights treaties like the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) contain very limited privacy provisions, which are not sufficient to cover the complicated area of digital data. Guidelines, such as those issued by the Organization for Economic Co-operation and Development (OECD)[1] and the Asia-Pacific Economic Cooperation Forum (APEC),[2] the General Assembly Guidelines for the Regulation of Computerized Personal Data Files (GAG);[3] are non-binding and lack comprehensiveness. Other frameworks, like the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS),[4] the General Data Protection Regulation (GDPR),[5] and the Personal Data Protection within Economic Community of West African States (ECOWAS),[6] are regional treaties with limited geographical scope.

The problem of the study lies in the absence of comprehensive, binding universal rules governing one of the most complicated, rapidly developing, cross-border areas: data protection in the digital age. The rapid development of technology has posed significant challenges and has exacerbated the complexity of the current landscape. Consequently, in the absence of binding international rules, it is imperative to explore alternative legal frameworks, particularly CIL, to see the extent to which CIL has developed alongside the development of technology, and to evaluate whether it has sufficient rules to effectively regulate this area.

To this end, several pivotal questions are posed: what are the component elements of international custom? Does the existence of one element suffice for the establishment of CIL? Does the adoption of DPP by national laws and international frameworks contribute to the formation of CIL? Do these laws and international frameworks suffice for the establishment of CIL governing the DPP? To address these questions, the study will be divided into two chapters. The

[1] "Guidelines on the Protection of Privacy and Transborder Flows of Personal Data." Came into effect in September 23, 1980. Organisation for Economic Co-operation and Development (OECD). https://doi.org/10.1787/9789264196391-en.

[2] "APEC Privacy Framework." Issued in 2015. Asia-Pacific Economic Cooperation. https://www.apec.org/docs/default-source/Publications/2017/8/APEC-Privacy-Framework-%282015%29/217_ECSG_2015-APEC-Privacy-Framework.pdf.

[3] "Guidelines for the Regulation of Computerized Personal Data Files." Adopted in December 14, 1990. General Assembly resolution 45/95. https://digitallibrary.un.org/record/105299?v=pdf.

[4] "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data" (CETS). opened for signature January 28, 1981. Council of Europe No. 108. https://rm.coe.int/1680078b37.

[5] "General Data Protection Regulation 2016/679." Came into force in May 25, 2018. The European Parliament and the European Council. https://gdpr-info.eu/

[6] "Personal Data Protection Within ECOWAS". Adopted in February 16, 2010. Supplementary Act of Economic Community of West African States (ECOWAS). https://www.statewatch.org/media/documents/news/2013/mar/ecowas-dp-act.pdf.

first chapter will be dedicated to discussing the principles of DPP as reflected in state practices and various international frameworks, and the second chapter will examine the concept of CIL.
The study holds great significance as it aims to identify possible legal rules governing a complex transborder area that currently lacks unified, universal rules.

1. First Chapter: DPP in practice

Given the novelty of cyberspace, legislation on state action in this area is still in its infancy.[7] Prior to the late 1990s, few countries had comprehensive data privacy laws, and existing laws were mostly local.[8] However, technological developments have since accelerated legislation in this area.
The US Freedom of Information Act (FOIA) 1967[9] and the Data Protection Act 1970 of the German state of Hesse,[10] followed by Sweden's data protection law of 1973 (*Datalagen*),[11] were among the first data protection laws established decades before the Internet and the World Wide Web became ubiquitous.[12] These laws, alongside the adoption of the OECD Privacy Guidelines in 1980 and the implementation of the APEC Privacy, all the way to the GDPR in 2018, contributed significantly to the development of DPP. The number of data laws continues to rise. Currently, 137 out of 194, or 71% of countries have enacted data protection and privacy legislation. An additional 9% have draft legislation pending, while 15% have no data protection legislation at all.[13] Each country has different levels of data protection laws. Some, such as Europe have very robust

[7] Gary Brown, and Keira Poellet, "The Customary International Law of cyberspace," *Strategic Studies Quarterly* 6, no. 3 (2012): 129, https://apps.dtic.mil/sti/pdfs/ADA584414.pdf.
[8] Dowling Jr Donald C, "International Data Protection and Privacy Law," 2009, 2, accessed June 3, 2024. https://intellicentrics.ca/wp-content/uploads/dlm_uploads/2014/09/article intldataprotectionandprivacylaw v5-1.pdf.
[9] "A Brief History of Data Protection: How Did It All Start?," INPLP, accessed July 11, 2024. https://inplp.com/latest-news/article/a-brief-history-of-data-protection-how-did-it-all-start/.
[10] Germany, Hesse. 1970. Data Protection Act [HE 1970]. Law and Ordinance Gazette Hesse. 625. https://starweb.hessen.de/cache/GVBL/1970/00041.pdf.
[11] "Data Protection in Sweden," GDPRhub, accessed July 11, 2024. https://gdprhub.eu/Data_Protection_in_Sweden#History.
[12] Fredric D. Bellamy, "U.S. Data Privacy Laws to Enter New Era in 2023," Reuters, accessed July 11, 2024. https://www.reuters.com/legal/legalindustry/us-data-privacy-laws-enter-new-era-2023-2023-01.
12/#:~:text=In%201970%2C%20the%20German%20state,World%20Wide%20Web%20became%20ubiquitous.
[13] "Data Protection and Privacy Legislation Worldwide," UN Trade and Development, accessed July 19, 2024. https://unctad.org/page/data-protection-and-privacy-legislation-worldwide.

policies protecting personal information, while others, such as some countries in Africa and South America, have very limited ones.[14]
In this study, we will examine several major data protection frameworks at the international and regional levels, in addition to two main frameworks at the domestic level, namely the Personal Information Protection Law (PIPL) of China and the California Consumer Privacy Act (CCPA) of the United States.[15] These laws, along with the GDPR, were chosen as their respective jurisdictions collectively account for 90% of global trade.[16]We will also explore international frameworks such as those developed by the OECD, APEC, and the ECOWAS. By analyzing these regulations, we aim to demonstrate the convergence of DPP across different jurisdictions and assess the potential for these similarities to contribute to shaping CIL governing DPP. DPP include several key concepts such as lawfulness, fairness, Transparency, Purpose limitation, Data Minimization, Retention period, and Accuracy, among others.

1. 1 Lawfulness, fairness

There are several grounds for lawfulness, including consent, which is recognized at the international, regional and national level.

1. 1. 1 Consent

Art. 6 of the GDPR, Art. 13 of the PIPL, Article 5(2) of CETS, and Article. 23 of the ECOWAS require consent as the primary legal basis for lawful processing. While CCPA does not specify legal basis for data collection, it allows consumers to opt out of data sales, requiring explicit permission from companies to proceed.[17]Principle 1 of GAG emphasizes that personal information must be collected and processed fairly and lawfully.

1. 1. 2 The requirement of consent when transferring data outside the country

Under Article 39 of the PIPL, the transfer of personal data outside China requires separate consent. In contrast, Article 49 of GDPR considers consent itself a valid

[14] "Data Protection Laws Around the World," Databasix UK, accessed July 19, 2024. https://www.dbxuk.com/blog-2023/data-protection-laws-around-the-world.
[15] California. 2018/2020. California Consumer Privacy Act of 2018 as amended by California Privacy Rights Act 2020. Adopted 28 June 2018. https://cdp.cooley.com/ccpa-2018/
[16] Lauren Kyger, "Data localization" and other barriers to digital trade," hinrichfoundation, accessed august 8, 2024, https://www.hinrichfoundation.com/research/tradevistas/digital/data-localization/
[17] "Data Protection Laws and Regulations USA 2023-2024," International Comparative Legal Guides, last modified July 20, 2023. https://iclg.com/practice-areas/data-protection-laws-and-regulations/usa.

ground for the transfer of personal data as a derogation from the main grounds for cross-border data transfer. The CCPA does not explicitly address transfer mechanisms but, like Article 36 of ECOWAS conditions transfers to third parties on providing the same level of protection for consumer rights.

1. 2 Transparency

Both the GDPR (Recital 39 and Article 7) and PIPL Article7 require clear disclosure of processing rules, purposes, methods and scope. The CCPA (Section 1798.100(a)) requires businesses to inform consumers of the categories and purposes of personal information collected and whether it is sold or shared. Likewise, ECOWAS Article 27 and CETS (Article 8 and Article 5(3)(a)) require data controllers to inform data subjects about the processing of their personal data, ensuring that processing is conducted fairly and transparently.

1. 3 Purpose limitation

The GDPR (Recital 39 and Article 89) requires the collection of personal data for specified, explicit and legitimate purposes. The PIPL (Article 6 and 14) requires processing for specific and reasonable purposes, minimizes the impact of individual rights, and requires re-obtaining consent if the purposes change. The CCPA (Subsections (a)(1) and (a)(2)) focuses on disclosure of the categories and purposes of information collected, and prohibits additional collection or use without notice. The OECD Article 9 and CETS (Article 5(4)) emphasize identifying the purposes when collecting. The GAG in Principle 3 emphasizes defining purposes, maintaining relevant data, and requiring consent for non-compliant use.

1. 4 Processing sensitive personal information

Article 28 of the PIPL and Article 9 of the GDPR define sensitive personal information, provide stricter rules, and allow its access and processing only for specific purposes. Likewise, Section 30 of the ECOWAS lists sensitive personal information and prohibits its processing with some exceptions, and Section 140 (a) and (c) of the CCPA require businesses to use sensitive personal information only for specific purposes.

1. 5 Data Minimization

Article 5(1)(c) of the GDPR, OECD Principle 8, Article 6 of the PIPL, and CCPA Section 1798.100(c), emphasize data minimization, collection, use and retention of personal data. Information on what is necessary for specific, legitimate purposes to mitigate the risks associated with excessive data collection and misuse. The CCPA focuses on the necessity and proportionality of data collection and use by businesses. PIPL aligns closely with the GDPR by prohibiting excessive collection. At the same time, OECD Principle 7 emphasizes the quality

and relevance of data. Principle 3 of the GAG emphasizes that the personal data shall be relevant and sufficient for the specified purposes.

1. 6 Accuracy

The GDPR Article 5(1)(d), Recital 39; PIPL Article. 8; CCPA 1798.130 (a)(1), and ECOWAS Article 26, emphasise the importance of ensuring that personal data is accurate and up-to-date, with provisions for prompt correction or deletion of inaccurate data. Similarly, Principle 8 of the OECD and Principle 2 of the GAG emphasise the need for data to be relevant, accurate, complete and regularly updated."

1. 7 Retention period

Article 5(1)(e) of the GDPR states that personal data shall only be retained for as long as is necessary for identification purposes, with exceptions for archiving, research or statistical purposes under Article 89(1) with appropriate safeguards. Article 19 of the PIPL requires that the retention period be the minimum necessary to achieve the purpose of processing, with exceptions permitted by other laws. CCPA 1798.100 (a)(3) requires companies to disclose retention periods or the criteria used to determine them, ensuring that data is not retained for longer than necessary. Likewise, CETS Article 5(4) and Principle 3 of the GAG affirm that retention periods shall not exceed what is necessary to achieve the specified purposes.

1. 8 Integrity, Confidentiality, and Security

Article 32 and 5(1)(f) of the GDPR, highlight the responsibilities of data controllers and processors to ensure data security. Article 9 of the PIPL requires personal information processors to secure the data they handle. CCPA Section 1798.100(e) requires appropriate security measures tailored to the nature of the personal information. The OECD guidelines call for data to be protected through reasonable security safeguards. Likewise, Article 28 of ECOWAS, Article 7 of CETS, and Principle 7 of the GAG emphasize the adoption of adequate security measures to protect against various risks, including accidental or unauthorized access, loss, misuse, or disclosure.

1. 9 Accountability

The GDPR provides a detailed framework, including penalties of up to €20 million or 4% of annual global turnover (Article 83). While the CCPA does not explicitly recognize accountability, it does hold primary data collectors responsible for compliance, including third-party obligations (1798.100(d)(4)).[18]

[18] OneTrust, *Comparing Privacy Laws*, 38.

The PIPL imposes fines and establishes third-party accountability (Article 66). Article 29 of ECOWAS requires data controllers to select data processors with adequate safeguards and ensure compliance with security measures. Principle 8 of GAG provides for neutral and independent authorities to oversee data protection and impose sanctions for violations.

1. 10 Conditions applicable to child's consent in relation to information society services

Section 1798.120(c) of the CCPA prohibits the sale or sharing of personal data of those under the age of 16, and it requires direct consent of teens between the ages of 13 and 16 and parental consent of children under 13 for such actions. In contrast, Article 8 of the GDPR allows Member States to set the age between 13 and 16 years, with parental consent required for younger children for any processing activities. The PIPL, under Articles 31 and 32, consider children's data to be sensitive information, and it requires parental consent for children under 14 years of age.

1. 11 Data Subjects' Rights

Each of the GAG (Principles 4), PIPL (Articles 44–48), CCPA (Sections 1798.105, 106, 110, 115, 120), GDPR (Articles. 15–22), and the OECD (Article 13), ensure the right to access, correct, and delete personal information.

1. 12 Notification

Each of the CCPA Section 1798.100, PIPL Article 17, and GDPR Article 13. mandates disclosure of the identity and contact details of the controller or processor, the purposes of processing, the legal basis for processing, recipients of the data, and individuals' rights regarding access, rectification, erasure, and data portability.

DPP also covered by other international and national legal frameworks. The APEC Privacy Framework includes DPP that are consistent with those in the GDPR, specifically in Articles 15 to 25 of the Framework.

In addition to the legal frameworks mentioned above, Data Protection Principles (DPP) have been adopted by other legislations. For example the Saudi Data Protection System,[19] the India Digital Personal Data Protection Act 2023,[20]

[19] Saudi Arabia. 2020. *Personal Data Protection System.* *https://moi.absher.sa/wps/wcm/connect/moi/42553296-b7d1-46aa-a5f7-32515dda570f/%D9%86%D8%B8%D8%A7%D9%85+%D8%AD%D9%85%D8%A7%D9%8A%D8%A9+%D8%A7%D9%84%D8%A8%D9%8A%D8%A7%D9%86%D8%A7%D8%AA+%D8%A7%D9%84%D8%B4%D8%AE%D8%B5%D9%8A%D8%A9.pdf?MOD=AJPERES&CVID=oqdvjlc*.

[20] "What Data is Protected by the India Digital Personal Data Protection Act 2023? A Comprehensive Guide to the India Data Privacy Law," secureprivacy, accessed July 7,

Canada's National Standard for the Personal Information Protection Model Act,[21] the Privacy Act and its Australian Privacy Principles ('APPs'),[22] the Russian Federation Federal Law on Personal Data,[23] and Data Protection Act 2018 of UK.[24]

1. 13 Conclusion

The worldwide adoption of DPP at the national, regional, and international levels indicates that individual states recognize these principles as essential. Though there are minor deviations in details, the main ideas remain consistent, and the core concepts are present. Therefore, it necessitates questioning whether this worldwide adaptation of these principles could lead to them becoming part of CIL. To answer this question, it is vital to examine the concept of CIL, and assess the current status of DPP to determine whether they qualify to be considered part of CIL?

2. Second Chapter

2. 1 CIL and DPP

The uniqueness of data protection lies in its inherently trans-border and dynamically evolving nature. Due to the ease with which data crosses national borders, traditional domestic legislations are inadequate for complete governance, unlike many other legal domains. Consequently, the absence of unified, universally binding treaties addressing the topic fosters various issues stemming from its transnational character. In light of this, it is necessary to investigate alternative legal framework options to tackle this issue. Among these, CIL stands out as a potential source to govern data protection. Customary international law is of great importance as it reflects universally accepted practices and principles that bind states, even in the absence of formal treaties.
To this end, several critical questions must be posed: What constitutes CIL? How is it established? To what extent can the existence of analogous DPP in the

2024. https://secureprivacy.ai/blog/india-digital-personal-data-protection-act-2023-guide-protected data#:~:text=The%20India%20Digital%20Personal%20Data%20Protection%20Act%202023%20(DPDPA)%20is,data%20of%20individuals%20in%20India.

[21] Canada. 2000. Personal Information Protection and Electronic Documents Act. https://laws-lois.justice.gc.ca/ENG/ACTS/P-8.6/FullText.html.

[22] "Australia – Data Protection Overview, October 2023," DataGuidance, accessed July 19, 2024. https://www.dataguidance.com/notes/australia-data-protection-overview.

[23] Russian. Federal Council. 2006. *Federation Federal Law on Personal Data*. https://www.dataguidance.com/sites/default/files/en_20190809_russian_personal_data_federal_law_2.pdf .

[24] United Kingdom. 2018. *Data Protection Act.* https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted.

domestic laws of various countries contribute to the formation of CIL? How can regional declarations and agreements aid in the formulation of CIL? Is it possible for one of the two CIL elements alone to create a customary rule? How do acquiescence and persistent objector rule contribute to the formation of CIL regarding DPP?

According to traditional positivist and individualist interpretations, states are bound by international law only through consent, emphasing sovereignty. However, this view is challenged by the shift towards international solidarity, where law is seen as essential to peace and cooperation.[25]

The disagreements over the nature and relative significance of the custom components lead some to believe that custom is expected to demise.[26] However, this is not true for crucial domains like human rights duties, as custom has grown in importance as a source of this law. As early as 1946, the French delegation to the United Nations commission on human rights representing the majority of opinion, stated that "the question of human rights was a matter no longer of domestic, but of international concern."[27]

2. 1. 1 What is CIL?

We can find the classic formulation of the term "custom" in Article 38 of the statute of the International Court of Justice (ICJ), which defines custom as "general practice accepted as law". According to this definition, there are two constituent elements contributing to the formulation of CIL. The first one is general practice, and the second one is the *Opinio Juris*.

Since the late nineteenth century, international legal scholars have drawn from domestic law the idea that legally recognized custom, as opposed to purely social custom, is composed of two distinct elements, one objective (material), the other subjective (psychological).[28]

There is some agreement among scholars of international law that both elements of CIL, state practice and *Opinio Juris sive necessitas*, or the objective and subjective aspects, are necessary for the formation of a rule of CIL. The ICJ, in the Continental Shelf (Libya v. Malta) case, states that it is also axiomatic that the substance of CIL is to be looked for largely in the actual practice and *Opinio Juris* of States.[29]

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[25] Hilary CM Charlesworth, "*Customary International Law and the Nicaragua case*," (Australian Year Book of International Law 11 1984-1987), 2–3, https://heinonline.org/HOL/Page?handle=hein.journals/ayil11&collection=journals&id=23&startid=23&endid=54.

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

[27] Lori Lyman Bruun, "Beyond the 1948 Convention-Emerging Principles of Genocide in CIL," *Md. J. Int'l L. & Trade* 17 (1993): 214. http://digitalcommons.law.umaryland.edu/mjil/vol17/iss2/4.

[28] Charlesworth, *Nicaragua case*, 4.

[29] Continental Shelf (Libya. v. Malta), Judgment, 1985 I.C.J. Rep. 3, ¶ 27 (June 3).

State practice is the easiest way to analyze the development of custom, as examining state actions is more visible and easily documented than motives.[30] According to the International Law Commission (ILC), state practices can take many forms, including physical and verbal actions, and even inaction under certain circumstances. They include but are not limited to conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference, legislative and administrative acts; and decisions of national courts.[31]

2. 1. 2 Time and Frequency Criteria for CIL

For the practice to serve as a rule of CIL, it must be widely accepted. The ICJ referred to "general acceptance" or "widespread" state practice as necessary.[32]Although rare, there are cases in which a rule of behavior may arise from a single precedent without repetition.[33]
A customary rule does not need to be "old" or long-standing to be legally recognized.[34] The ICJ noted in the North Sea Continental Shelf Cases that a short time frame does not preclude the establishment of a new rule of CIL, provided that State behavior is widespread and essentially homogeneous, especially of States with significant interests.[35]

2. 1. 3 Opinio juris

When governments follow a widespread and consistent practice out of a sense of legal obligation, this practice gives rise to CIL.[36] *Opinio Juris* concerns the expression of beliefs rather than actual beliefs.[37] For a global practice to develop into a customary norm of international law, it must be recognized by states as legally binding.[38]
Opinio Juris indicates that states must accept that a rule of international law already exists independently of their practices. This indicates that the rule

[30] Brown, and Poellet, "The Customary International Law," 129.
[31] International law commission, *Draft conclusions on identification of* Customary International Law *with commentaries* (ILC, 2018), conclusion 6, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.
[32] Charlesworth, *Nicaragua case*, 7.
[33] Grigory I Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law," *Calif. L. Rev*. 49 (1961): 419, https://heinonline.org/HOL/License.
[34] International Law Association, *Statement of Principles Applicable to the Formation of General* Customary International Law (London: ILA, 2000), section 12(b), 19, https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf
[35] North Sea Continental Shelf (Germany. v. Denmark and Netherlands), Judgment, 1969 I.C.J. Rep. 3, ¶ 74 (Feb 20).
[36] Brown, and Poellet, "The Customary International Law of cyberspace," 126.
[37] Roberts, "Traditional and Modern Approaches," 757–758.
[38] Tunkin, "Remarks on the Juridical Nature," 422–423.

precedes government practices and is not a product of them.[39] It is not necessary to have explicit evidence of a legal obligation (such as official statements); instead, it can be deduced from actions or inactions.[40]

2. 1. 4 Assessing the qualification of DPP as CIL

The application of the two criteria for CIL to DPP—namely, state practice and *Opinio Juris*—is a complex task. Prima facie, the widespread adoption of comparable DPP by numerous countries' laws suggests that the practice element predominates, while the second criterion, *Opinio Juris,* appears to be absent. As a result, one element is missing, leading to the failure of establishing CIL. Nonetheless, the reality shows something different, from which we can derive evidence to prove the existence of CIL governing DPP.

Therefore, it is crucial to delve deeper into this issue and examine whether the formation of CIL truly requires both elements, or if the presence of one element suffices. Additionally, it is important to determine whether the DPP genuinely lack the *Opinio Juris* element or if this element is manifested in other ways that have not yet been adequately recognized.

Despite the seeming agreement on the necessity of the two elements *Opinio Juris* and state practice, for the formation of CIL, they are frequently given distinct interpretations and weights.[41] According to the International Law Association (ILA), even in the absence of clear evidence that states believe they are legally bound to adhere to this practice, broad and consistent behavior among states may be enough to create a CIL rule.[42] This perspective represents a departure from a traditional test of CIL.

Professor Guggenheim argues that CIL should be based solely on consistent and general State practice without the subjective element of jurisprudence. He believes that including the need for states to recognize these practices as legally binding complicates the establishment of customary rules and diminishes the role of custom as an independent source of international law.[43] According to Kelsen, customary rules of international law are not created by the common consent of members of the international community but by the long-established practice of a large number of states, including those considered important in terms of power, culture, and other factors.[44]

The ICJ, in many cases, has relied solely on practice to derive customary rules**.** In the Fisheries case, the Court emphasized that the low-water mark – generally recognized in State practice – should be used to measure the territorial sea of a

[39] Tunkin, "Remarks on the Juridical Nature," 424.
[40] USA. Restatement § 102(b) (2).102 (b).
[41] Bhupinder S. Chimni, "Customary International Law: A third world perspective," *American Journal of International Law* 112, no. 1 (2018): 2. https://www.jstor.org/stable/10.2307/26568923
[42] International Law Association, *Statement of Principles*, section17. 40–41.
[43] Tunkin, "Remarks on the Juridical," 425–426.
[44] Tunkin, "Remarks on the Juridical," 425.

coastal State. Countries have traditionally chosen the low-water mark, rather than the high-water mark, or the mean between high and low tides, for the purpose of calculating the width of the territorial sea.[45]

The ICJ explained nationality by citing state practices.[46] The Court refers to state practice and numerous international instruments as the basis for designating legal entities of states for diplomatic protection.[47]

The ICJ cited State practice to demonstrate that the institution of the exclusive economic zone, together with the rule of entitlement based on distance, had been incorporated into CIL.[48]

On the other hand, Roberts presents two types of custom, traditional custom and modern custom, the latter is derived by a deductive process that starts with general statements of rules rather than particular instances of practice. This approach emphasizes *Opinio Juris* rather than state practice because it relies primarily on statements rather than actions.[49] The ICJ's ruling in the Nicaragua case serves as a noteworthy illustration of this deductive method. Although the Court ostensibly followed the traditional CIL test,[50] it took its cues from sources like General Assembly resolutions, which established norms like the non-use of force and non-intervention.[51] The Court decided that it was sufficient for conduct to generally comply with rule statements rather than closely scrutinising state practice, as long as instances of discordant practice were handled as violations of the relevant rule rather than as the creation of a new one.[52] In other words, the court requested very little evidence of actual practice in light of what it seemed to regard as unambiguous evidence of the opinion of the international community as expressed in documents such as the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[53]

This raises the question of whether DPP possesses the element of *Opinio Juris*. To explore this, we must examine the role of international frameworks in shaping this element and consider the implications of DPP adoption by many international frameworks for the formation of *Opinio Juris* and, consequently, the development of relevant CIL.

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[45] Anglo-Norwegian Fisheries Case (United Kingdom v. Norway), judgment, 1951 I.C.J. Rep. 116, 128 (18 Dec)

[46] Nottebohm Case (Liechtenstein. v. Guatemala), judgment, 1955 I.C.J. Rep. 4, 23 (April 6).

[47] Barcelona Traction, Light and Power Company (Belgium v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶ 70 (Feb 5).

[48] Continental Shelf (Libya. v. Malta), Judgment, 1985 I.C.J. Rep. 3, ¶ 34 (June 3).

[49] Roberts, "Traditional and modern approaches," 757–758.

[50] Roberts, "Traditional and Modern Approaches," 758–759.

[51] *Nicar. v. U.S.*, 1986, I.C.J. ¶ 186

[52] Roberts, "Traditional and modern approaches," 758–759.

[53] International Law Association, *Statement of Principles*, section 19 (b). 41.

2. 1. 5 Multilateral treaties and acts of international organizations

Besides the practices of states, international and regional frameworks have contributed significantly to strengthening DPP. Notable Examples include the GDPR, APEC, ECOWAS, OECD privacy rules, and the GAG.
Treaties and declarations, which they are statements about the lawfulness of activity, constitute *Opinio Juris.*[54] Multilateral forums, such as the United Nations General Assembly, the United Nations Security Council, regional organizations, and specialized international bodies, play a crucial role in shaping contemporary international law. Major developments often arise or gain support from proposals, reports and treaties discussed within these forums.[55] The ICJ refers to numerous international instruments as the basis for designating states entitled to provide diplomatic protection for corporate entities,[56]It took its cues from sources such as "the Charter of the United Nations and that of the Organization of American States" … to ascertain the content of the CIL.[57]
Roberts focuses on *Opinio Juris* above state practice, arguing that modern custom is derived through a deductive process that begins with general assertions of rules. Because this approach relies on statements rather than actions, modern customs can develop rapidly through multilateral treaties and declarations made by international bodies such as the General Assembly, which has the power to affirm, crystallize, and establish customs.[58]Historically, specific treaty provisions have been replicated in the practice of states outside the treaty, eventually becoming CIL.[59]
The actions of international organizations influence CIL, as demonstrated by the ICJ's consideration of the deposit practices of the UN Secretary-General and the military activities of intergovernmental organizations.[60] If this is the case, the data protection principles developed by various international organizations – such as the EU, OECD, APEC, and the UN General Assembly – can be considered manifestations of opinio juris. Consequently, these principles contribute to shaping CIL in the field of data protection.

2. 1. 6 Conformity and generality of a practice

Despite the fact that DPP have been adopted and codified by the laws of different countries in very similar terms, there are still some minor differences between

[54] Roberts, "Traditional and modern approaches," 757–758.
[55] Universal International Law Author(s): Jonathan I. Charney Source: The American Journal of International Law, Oct., 1993, Vol. 87, No. 4 (Oct., 1993), pp. 529-551 Published by: Cambridge University Press Stable URL: https://www.jstor.org/stable/2203615. 543–544
[56] *Belgium v. Spain*, 1970 I.C.J. ¶ 70.
[57] *Nicaragua v. U.S.A.,* 1986 I.C.J. ¶ 183.
[58] Roberts, "Traditional and modern approaches," 757–758.
[59] International Law Association, *Statement of Principles,* section 24 (a). 46.
[60] International Law Association, *Statement of Principles,* section 11. 19.

them. This raises the question of whether these differences have any impact on the establishment of customary rules.
According to the ICJ, state practices need not be perfect or strictly conform to a norm to be considered CIL. It is sufficient that the conduct of the state is generally consistent with the norm, and instances of inconsistency should be treated as violations rather than as recognition of a new norm.[61] If a state acts in a way that appears inconsistent with a recognized rule but justifies its actions by appealing to exceptions or justifications within the rule itself, then that behaviour, regardless of whether the justification is valid, serves to confirm the rule rather than to weaken it.[62]
As for the popularity, the same applies. Bodansky argues that CIL can be established not only on uniformities of state behavior but also on regularities in behavior. In other words, CIL is formed even when states do not fully comply with a particular norm.[63]
The Restatement in Section 102 (2) provides that for a practice to be considered general and consistent, it need not be universally followed. However, it should be widely accepted among countries participating in the relevant activity. The failure of a large number of important countries to adopt it could prevent this practice from becoming general CIL.[64]
Minor deviations from the General DPP do not diminish their basic consistency. Therefore, these deviations do not undermine the existence of widespread commitment to these principles.

2. 1. 7 The Persistent Objector Rule

Even if we assume that the DPP are not universally accepted, there is at least no significant objection to them. According to the persistent objector rule, a norm can still become established even if there are objections. If a norm can become CIL despite objections, it is even more likely to become accepted and qualify as a custom when there are no objections. Therefore, the lack of opposition to DPP indicates that these rules are more likely to be recognized as CIL. In other words, if DPP can evolve into a custom despite some objections, the absence of objections makes it even more likely for these principles to be accepted as CIL.
Regardless of a state's acceptance, CIL is viewed as universal, imposing rights and obligations on all of them. In contrast to treaty law, which binds only consenting states, CIL applies generally to all.[65] This is consistent with

[61] *Nicaragua v. U.S.A.*, 1986 I.C.J. ¶ 186.
[62] International law commission, *Draft conclusions*, conclusion 8 comment 7.
[63] Daniel Bodansky, "Customary (and not so customary) international environmental law." *Ind. J. Global Legal Stud.* 3 (1995): 105, https://www.repository.law.indiana.edu/ijgls/vol3/iss1/7.
[64] USA. Restatement § 102(b).
[65] Pierre-Hugues Verdier, and Erik Voeten, "Precedent, compliance, and change in Customary International Law: an explanatory theory," *American Journal of International*

consensual international law through the "persistent objector" principle.[66] This rule allows states individually or in small groups to avoid being bound by emerging CIL norms if they clearly and continuously object while the norm is forming.[67] However, historically, this type of opposition and exemption has been rare.[68]

The requirement to object continuously during the unclear period of norm formation makes the rule challenging to apply effectively. Moreover, persistent objection offers limited practical benefit since objecting states face significant international pressure to conform and risk being treated as violators. Instances of persistent objection are rare[69] and with limited practical importance.[70] For example, the United States initially objected to expanded fisheries and territorial sea zones but eventually conformed, and South Africa objected to the international law against apartheid but was ultimately forced to comply. The ICJ has referenced the rule in dicta but has not upheld it decisively in cases, indicating its weak support in state practice.[71]

2. 1. 8 The consent requirement

The adoption of DPP by many states, especially important ones, makes it unnecessary for all countries to adopt these principles individually. Some argue that individual states should accept the rule as law. But it is clear that acceptance is necessary only from the international community of countries together, and not from each country individually.[72] Article 102 of the restatement provides that rules of international law are those accepted by the international community of states as such.[73]

Law 108, no. 3 (2014): 390, https://www.jstor.org/stable/10.5305/amerjintelaw.108.3.0389.

[66] Charlesworth, *Nicaragua case*, 3–4.

[67] James A Green, *The persistent objector rule in international law* (Oxford University Press, 2016), 2, https://books.google.iq/books?hl=en&lr=&id=MiaPCwAAQBAJ&oi=fnd&pg=PP1&dq=Green,+James+A.+The+persistent+objector+rule+in+international+law&ots=S8Lb8lzfJL&sig=yYWBERVgQyHzniaaRvYTZyCF-NE&redir_esc=y#v=onepage&q=Green%2C%20James%20A.%20The%20persistent%20objector%20rule%20in%20international%20law&f=false

[68] USA. Restatement § 102(b) (2).

[69] Jonathan I Charney, "Universal international law," *American Journal of International Law* 87, no. 4 (1993): 538–540, https://www.jstor.org/stable/2203615.

[70] Shelly Aviv Yeini, "The Persistent Objector Doctrine: Identifying Contradictions," *Chi. J. Int'l L. 22* (2021): 583, https://chicagounbound.uchicago.edu/cjil/vol22/iss2/4.

[71] Jonathan I Charney, "Universal international law," 538–540, https://heinonline.org/HOL/Page?handle=hein.journals/ajil87&collection=journals&id=539&startid=&endid=561.

[72] Charney, "Universal international law," 536.

[73] USA. Restatement § 102 (b).

Acceptance can be established by acquiescence. However, the acquiescence of states is often not equivalent to knowing and voluntary assent unless it is aware of the subject of the consent and must know that failing to protest will be taken as acceptance. Therefore, acquiescence, if it obliges, must be tantamount to actual consent, though it is a consent expressed by no action as opposed to action. It is evident from a review of the numerous assessments of the evolution of CIL that demonstrating that the failure to object to a developing norm of CIL constitutes consent is difficult and opaque.[74]

Moreover, authorities only take into account the activities of a few states – usually the largest, most well-known or most interested states – when reviewing the evidence required to establish CIL. The opinions and awareness of other countries that adopt a neutral position are rarely taken into account. Instead, decision- makers assume that the absence of opposition equals acquiescence when a critical mass of evidence is gathered. This assumption masks the fact that many states have not developed an opinion because they do not know the law is being made.[75]

The ICJ's examination of the custom in the Nicaragua case shows how precisely Sir Robert Jennings is that it is impractical to fully rationalize contemporary law solely on the terms of Article 38 of the Statute of the ICJ.[76]

Martti Koskenniemi argues that modern international practice often conceals an attempt to interpret custom in terms of bilateral justice. The ICJ has been ambiguous about the nature of the unwritten laws it recognizes. In cases such as Anglo-Norwegian Fisheries (1951)[77] and Fisheries Jurisdiction (1974),[78] the ICJ focused more on the specific interests involved rather than applying a general rule. This trend has continued in many cases of maritime borders. Moreover, in the Nicaragua case (1986),[79] the ICJ did not strictly justify its customary rules, such as non-use of force, non-interference, respect for sovereignty, and humanitarian rules, based on actual practice and *Opinio Juris.*[80]

The evidence historically used to establish new norms of international law is far less thorough and convincing than theoretical claims suggest. It is also far less than what is required to prove that all states genuinely or implicitly agreed to every new rule of CIL.[81]

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[74] Charney, "Universal international law," 537.
[75] Charney, "Universal international law," 537.
[76] Charlesworth, *Nicaragua case*, 27.
[77] Fisheries ((United Kingdom. V. Norway) Merits, Judgment, 1951 I.C.J. Rep. 116, 133 (18 December).
[78] Fisheries (Britain and Northern Ireland v. Iceland), Merits, Judgment, 1974 I.C.J. Rep. 3, ¶ 69-79 (25 July).
[79] *Nicar. v. U.S., 1986*, I.C.J. ¶ 97-115, 183–220.
[80] Martti Koskenniemi, "The Politics of International Law." *European Journal of International Law 1, no. 1* (1990): 4-32, 27. http://ejil.org/pdfs/1/1/1144.pdf
[81] Charney, "Universal international law," 538.

2. 1. 9 Acquiescence

Even if there is no universal belief that DPP has become mandatory, at least there is no outright rejection of the issue. Even those countries that do not explicitly recognize these principles either have yet to develop data protection laws or don't oppose such principles. Therefore, the pivotal issue lies in discerning the legal implications of the non-rejection of these principles by those countries.
The ICJ, in both Cases Fisheries[82] and Lotus,[83] asserts that governments' lack of formal objections indicated acceptance of practices under international law. In the first case regarding Norway's use of straight baselines for maritime delimitation, the absence of objections from states, despite their interests in North Sea fisheries, implied widespread acceptance of Norway's method as lawful under international norms. This tacit acceptance by multiple governments supported Norway's enforcement of its maritime boundaries using straight baselines, affirming an international consensus on its legality. Similarly, in the second case involving jurisdiction in maritime collisions, states' failure to protest foreign court proceedings suggested tacit consent to concurrent jurisdiction.
The lack of reaction could be interpreted as acquiescence. This concept is equivalent to implicit recognition demonstrated through unilateral actions, which the other party may interpret as consent.[84] Essentially, silence can matter, but only if the other state's actions necessitate a response,[85] and if the state had the knowledge, time, and resources to respond, i.e., if it was in a position to react. Under CIL, a state's inaction regarding a practice cannot be interpreted as acknowledgment of the practice if it was unaware of it or had not had enough time to react.[86]

3. Conclusion

In the absence of a comprehensive set of global regulations, the worldwide acceptance of DPP across various national, regional, and international frameworks calls for a thorough assessment of their standing under CIL.
Although there is a seeming agreement on the necessity of both belief and state practice to constitute CIL. Some argue that consistent tate practice alone may be sufficient, even without a general belief. According to the ILA, widespread and consistent conduct between states may be sufficient to establish a rule of CIL, even in the absence of clear *Opinio Juris*. The ICJ often relies on state practices to derive customary rules.

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[82] *United Kingdom v. Norway*, 1951 I.C.J. at 139.
[83] S.S. Lotus (French. V. Turkey), Judgments,1927 I.C.J. Rep.5, 29 (7 September).
[84] Delimitation of the Maritime Boundary in the Gulf of Maine Area Advisory Opinion, 1984 I.C.J. Rep. 246 ¶ 130 (20 Jan).
[85] Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge advisory opinion, 2008 I.C.J. Rep. 12 ¶ 121(May 23).
[86] International law commission, *Draft conclusions,* conclusion 10 comment 8.

Conversely, some call for a more stringent requirement for *Opinio Juris*. Multilateral forums and specialized international bodies play a major role in shaping contemporary international law. While the ICJ in the Nicaragua case ostensibly adhered to the traditional test of CIL, it pointed to sources such as General Assembly resolutions, which establish rules such as the prohibition of force and non-intervention. In other words, the court requested very little evidence of actual practice in light of what it seemed to regard as unambiguous evidence of the opinion of the international community in accordance with the Charter of the United Nations, and used other sources such as the Organization of American States to identify CIL. In the Barcelona Traction case, the ICJ cited international instruments to recognize the legal status of states with respect to diplomatic protection. Additionally, the actions of international organizations have a significant impact on CIL, as evidenced by the ICJ's consideration of the UN Secretary-General's Practice on the Deposit and Military Activities of Intergovernmental Organizations. Thus, international frameworks related to data protection, such as the GDPR, APEC, ECOWAS, OECD, and GAG, are crucial in establishing CIL on DPP.

The ICJ has been ambiguous about the nature of the unwritten laws it recognizes. In certain cases, the ICJ focused more on the specific interests involved rather than applying a general rule. This trend has continued in many cases related to maritime borders.

Challenges to the recognition of DPP as CIL include issues of consistency and generality of practice. CIL can be established even if states do not fully comply with a rule. The ICJ has held that state practice need not be exemplary to be considered CIL; it is sufficient that the conduct is generally consistent with the rule, with inconsistencies being considered violations rather than new rules. This view is supported by Restatement (III).

Even if DPP are not universally accepted, there is no fundamental objection to them. Under the persistent objector rule, a rule can still be created despite objections. If a rule can become CIL despite objections, it is more likely to be accepted and classified as customary when there are no objections. Therefore, the lack of opposition to DPP indicates that these rules are more likely to be recognized as CIL.

Additionally, cases of persistent objection are rare and of limited practical importance. The ICJ has referred to this rule in its rulings but has not decisively upheld it in cases, indicating weak support for it.

Moreover, even countries that do not explicitly recognize DPP, either have not yet developed data protection laws or do not oppose such principles. The ICJ, in the Fisheries and Lotus cases, confirmed that the absence of formal objections by governments indicates acceptance of practices under international law. This principle suggests that the silence of states towards evolving norms regarding DPP can be considered tacit agreement.

In sum, the two elements of custom, the practice and *Opinio Juris*, were not always present in the formation of CIL. Therefore, whether DPP is supported by state practice alone, as evidenced by the widespread adoption by various

countries, or by both legal belief and state practice, as evidenced by the adoption of DPP by numerous international frameworks, the establishment of customary rules is not significantly affected, and it is possible to develop customary rule with only one element. Additionally, the presence of some deviations from these principles does not undermine their standing, as state practices need not be perfect or completely consistent with the norm. Moreover, even if some countries consistently refuse to apply certain rules, these rules can still become CIL. Similarly, the absence of formal objections by governments toward a practice by others strengthens the argument that it has become part of CIL.

In conclusion, it is plausible that the DPP has already become part of CIL or is on the verge of achieving this status, as the rapid advancement of technology poses significant data challenges, leaving countries with little choice but to act quickly.