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## OPTION REPORTS

### CUSTOMARY INTERNATIONAL LAW

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The following report is one of a series produced by the Constitutional Design Group, a group of scholars dedicated to distributing data and analysis useful to those engaged in constitutional design. The primary intent of the reports is to provide current and historical information about design options in written constitutions as well as representative and illustrative text for important constitutional provisions. Most of the information in these reports comes from data from the Comparative Constitutions Project (CCP), a project sponsored by the National Science Foundation. Interested readers are encouraged to visit [constitutionmaking.org](http://constitutionmaking.org) for further resources for scholars and practitioners of constitutional design.

Note that the dates provided herein for constitutional texts reflect either the year of initial promulgation *or* of a subsequent amendment, depending on the version used for analysis. For example, Brazil 2005 refers to the Brazilian Constitution of 1988, as amended through 2005.

## 1. INTRODUCTION

Customary international law, sometimes called the law of nations, is a body of rules that binds states in their interactions with each other. For a norm to be recognized as constituting customary international law, it must meet two requirements: it must be widely observed by states, and it must be accompanied by evidence of *opinio juris*, the belief by states that the norm is legally required. Constitutions differ on whether customary international law is recognized, and what its status is in the domestic legal order.

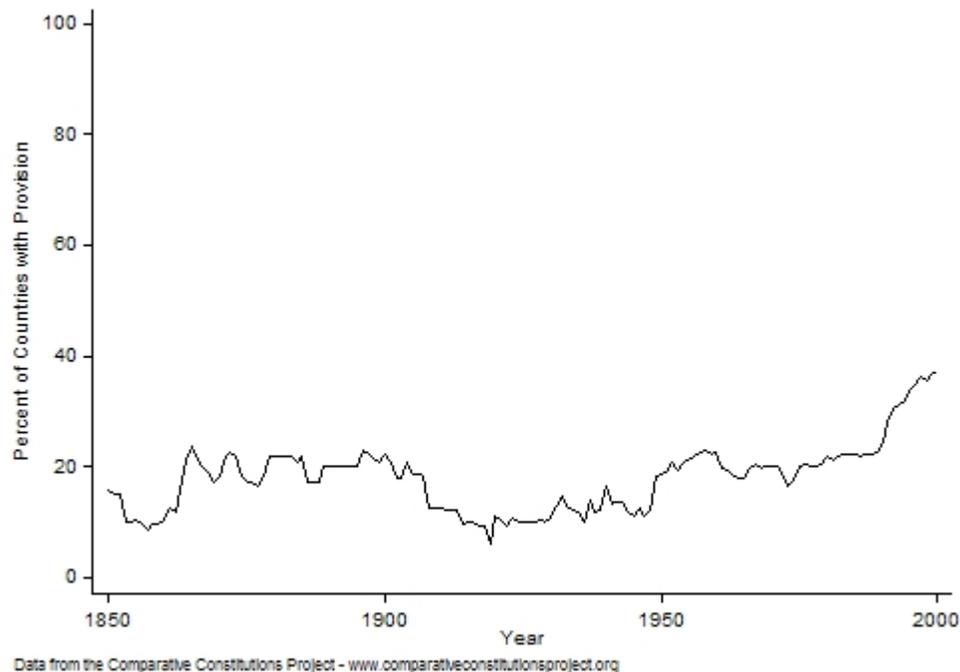
## 2. DATA SOURCE(S)

The analysis reported below is based on data the Comparative Constitutions Project (please see the appendix to view the question text). As of this writing, the project's sample includes 574 of the roughly 800 constitutions put in force since 1789, including more than 90% of constitutions written since World War II.

## 3. CLASSIFICATION AND HISTORICAL TRENDS

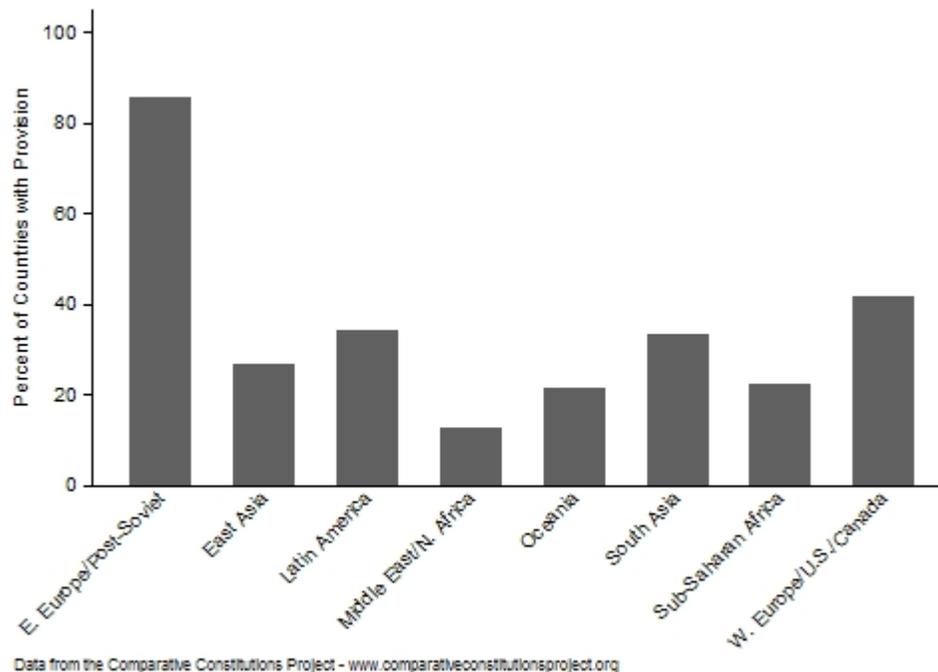
About 25% of constitutions refer to customary international law or the law of nations; only 13% of all constitutions specify that it is directly applicable.

**Figure 1. Percent of Constitutions that refer to Customary International Law by Year (N=574)**



As figure 1 suggests, written constitutions have long made reference to customary international law, beginning with the United States' Constitution's somewhat cryptic provision allowing Congress to define offenses against the law of nations. The percentage of constitutions referencing customary international law declined in the early 1900s, but began to rise in the second half of the 20<sup>th</sup> century with a significant jump in the 1990s. As Figure 2 suggests, new constitutions written in Eastern and Central Europe after the collapse of the Berlin Wall were responsible for the recent increase. Roughly 40% of constitutions in force as of 2000 mention customary international law.

**Figure 2. Percent of Constitutions that refer to Customary International Law in force in 2000 by Region (N=181)**



#### 4. NOTES ON ATYPICAL CASES

The constitutional provisions rarely mention the exact phrase “customary international law” or “law of nations”. Most frequently the phrase used is “the rules of international law” or “generally recognized norms (*or principles*) of international law”.

Many African states specify national/local or African (tribal) customary law instead of international customary law (Kenya, 1997; Marshall Islands, 1979, Ghana, 1996; Zimbabwe, 2000). We do not include local customary law in the present analysis.

Some constitutions limit application of customary law only to specific areas (e.g. foreign policy, matters affecting personal status of foreigners, human rights etc.) For example, Ecuador’s Constitution of 1967 limits application of customary international law to inter-state relations:

“The Ecuadorian State proclaims peace and cooperation as the system of international coexistence and the juridical equality of states; it condemns the use or threat of force as a means of settling disputes, and repudiates the spoils of war as a source of law. It defends the solution of international conflicts by legal and peaceful methods, and declares that

international law is the standard of conduct for states in their relations with one another” (article 9).

## 5. SAMPLE CONSTITUTIONAL PROVISIONS

(Note: dates provided reflect the version of the constitution used to obtain sample provisions, and represent either initial year of promulgation or year through which subsequent amendments are included.)

The set of sample provisions is divided into the following section:

1. Customary International Law is Directly Binding
2. Customary International Law is Binding and Superior to Ordinary Law
3. Customary International Law Requires Incorporation

### 5.1. Customary International Law is Directly Binding

The generally recognized rules of International Law are valid parts of Federal law.

- *Austria 2004, Article 9*

The law of nations is part of the national legislation. The provisions of said law shall specially prevail in cases of civil war. In consequence, such wars shall be terminated by treaties between the belligerents, who are to observe the humane practices of Christian and civilized nations.

- *Colombia 1830, Article 91*

The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the Nation.

- *Philippines 1940, Article 2.3*

The Law of nations is made a part of the Law of the Republic; therefore, civil war may be terminated by means of treaties between belligerents recognized as such, and said belligerents shall be bound to respect the humanitarian practices of Christian and civilized nations.

- *Dominican Republic 1896, Article 106*

The Italian juridical order conforms to the generally recognized norms of international law.

- *Italy 2003, Article 10*

The legal system of East Timor shall adopt the general or common principles of international law.

- *East Timor 2002, Article 9*

## **5.2. Customary International Law is Binding and Superior to Ordinary Law**

The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles.

- *Belarus 2004, Article 8*

The general rules of international law are an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

- *Germany 2002, Article 25*

Ratified international agreements and the generally accepted rules of international law shall have precedence over the law of Serbia and Montenegro and over the law of the member states.

- *Yugoslavia 2003, Article 16*

The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law.

- *Hungary 2003, Article 7*

Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system.

- *Russia 1993, Article 15.4*

## **5.3. Customary International Law Requires Incorporation**

The Dominican Republic recognizes and applies the norms of general and American international law to the extent that its public powers have adopted them and declares itself in favor of the economic solidarity of the countries of America and will support any initiative proposed to protect its basic products and raw materials.

- *Dominican Republic 1994, Article 3*

The rule of law extends to all persons found within the territory of the Republic, with the exception of limitations established in the Constitution, in international treaties, and by provisions of general international law accepted by Guatemala.

- *Guatemala 1965, Article 144*

The sovereignty of Seychelles over its territory is and shall remain absolute, subject only to such obligations at international law as are freely accepted by Seychelles.

- *Seychelles 1979, Article 2.2*

## 6. APPENDIX

This report is based on the following question(s) from the Comparative Constitution Project's "survey instrument":

[CUSTLAW] Does the Constitution refer to 'customary' international law or the 'law of nations'?

1. Yes
2. No
97. Unable to Determine

[CUSTLAW2] What is the status of customary international law in the constitution?

1. directly binding
2. directly binding and superior to ordinary law
3. requires incorporation
90. other, please specify in the comment section
97. Unable to Determine
98. Not specified

Instructions: Please note other provisions. There are many formulations which bind the country by customary international law. If you are uncertain, please ask using the message board.

For additional documentation on the Comparative Constitutions Project, (including the full codebook, the sample, the sources of constitutional texts and translation issues related to those texts, coding procedures, publicly available data, etc.) please visit the project website at [www.comparativeconstitutionsproject.org](http://www.comparativeconstitutionsproject.org).