Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion

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Abstract

Methodology is probably not the strong point of the International Court of Justice or, indeed, of international law in general. Unlike its approach to methods of treaty interpretation, the Court has hardly ever stated its methodology for determining the existence, content and scope of the rules of customary international law that it applies. There are only isolated references in the Court’s jurisprudence to the inductive and deductive method of law determination. It is not only the Court itself that has largely remained silent on its methodology for the determination of customary international law, but the legal literature also has had little to say on this subject. In view of the fact that determining the law has also always meant developing, and ultimately creating, the law it is surprising that the question of the Court’s methodology has attracted such little interest. This article aims to refocus attention on the methodology used by the Court when determining the rules of customary international law that it applies, and it highlights the role played by methodology in the development of customary international law. It starts by defining the terms ‘induction’ and ‘deduction’ and examining their use by the Court. It then explores the situations in which the Court uses inductive and deductive reasoning, the different forms and functions of deduction and the relationship between the two methods. The article challenges the various theories distinguishing between inductive and deductive custom and demonstrates that the main method employed by the Court is neither induction nor deduction but, rather, assertion.

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1 Introduction

Methodology is probably not the strong point of the International Court of Justice (ICJ) or, indeed, of international law in general.¹ Unlike its approach to methods of treaty interpretation, the Court has hardly ever stated its methodology for determining the existence, content and scope of the rules of customary international law that it applies.² There are only isolated references in the ICJ’s jurisprudence to the inductive and deductive method of law determination.³ In the Gulf of Maine case, a Chamber of the Court stated that ‘customary international law ... comprises a set of customary rules whose presence in the opinio juris of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice and not by deduction from preconceived ideas’.⁴ The use of the words ‘can be’, rather than ‘is’, implies that customary international law rules can also be discovered deductively. That deduction is part of the Court’s methodological arsenal is demonstrated by the fact that in the North Sea Continental Shelf cases five judges used the deductive method in their separate or dissenting opinions.⁵ For example, Judge Lachs stated that in ‘the event that the customary law character of the principle of equidistance cannot be proved, there exists another reason which seems more cogent for recognizing this character. That is the deduction of the necessity of this principle from the fundamental concept of the continental shelf.’⁶ In the Court’s more recent jurisprudence, the Arrest Warrant case is widely seen as an example of deductive reasoning,⁷ while the Jurisdictional Immunities of the State case is regarded as a prime example of the Court using the inductive method.⁸

² The determination of a rule and that of its content and scope are frequently one and the same.
⁶ Ibid., at 179, Dissenting Opinion of Judge Lachs.
It is not only the ICJ itself that has largely remained silent on its methodology for the determination of customary international law. The legal literature has also had little to say on this subject. The great debate in the 1960s between Georg Schwarzenberger and Wilfred Jenks over the right method in international adjudication remains an isolated incident. Jenks saw in Schwarzenberger’s inductive approach to international law ‘a challenge to creative jurisprudence’, while, for Schwarzenberger, the deductive method was nothing more than ‘judicial legislation’ in disguise. In view of the fact that determining the law also always means developing and, ultimately, creating the law, it is surprising that the question of the Court’s methodology has attracted such little interest. In the entire ten volumes of the Max Planck Encyclopedia of Public International Law, there is no mention at all of the ‘inductive method’ or the ‘deductive method’, not even in Martti Koskenniemi’s entry on ‘Methodology of International Law’.

This article aims to refocus attention on the methodology used by the ICJ when determining the rules of customary international law that it applies and to highlight the role played by methodology in the development of customary international law. It starts by defining the terms ‘induction’ and ‘deduction’ and examining their use by the Court. It then explores the situations in which the Court uses inductive and deductive reasoning, the different forms and functions of deduction and the relationship between the two methods. The article challenges the various theories distinguishing between inductive and deductive custom and demonstrates that the main method employed by the Court is neither induction nor deduction but, rather, assertion.

2 The Meaning of the Terms ‘Induction’ and ‘Deduction’

There is a lot of terminological confusion with regard to methodology in international law. The term ‘methodology of international law’ has been used both in the wider meaning of the methods used in the acquisition of scientific knowledge of the international legal system and in the narrower and more specialized meaning of the methods

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10 Schwarzenberger, supra note 9, at 126–127.

11 Cf. Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports (1949) 174, at 190, Independent Opinion of Judge Alvarez: ‘[I]n many cases it is quite impossible to say where the development of law ends and where its creation begins’.

employed to determine the existence of rules of international law. The methods of determining the rules of international law must be distinguished from the methods of application of these rules in a specific case. The application of a rule of international law is a second step following its determination. It is with this narrower meaning that the terms ‘induction’ and ‘deduction’ usually are used. The concepts of induction and deduction have their origin in Aristotle’s logic, which distinguished two forms of dialectical reasoning: syllogistic (or deductive) and inductive. Each of these forms of reasoning makes use of old knowledge to impart new. The syllogism assumes an audience that accepts its premises; induction exhibits the universal as being implicit in the clearly known particular. Aristotle’s distinction between syllogism and inductive argument is not precisely equivalent to the modern usage of the terms induction and deduction. Logical reasoning is also not to be equated with legal reasoning. For example, judicial deduction is not the same as logical deduction. The logic of judicial decisions is not the logic of the syllogism but, rather, the logic of the law – logical reasoning is replaced by legal reasoning, which has its basis in the traditions of the legal system.

For the purpose of determining the existence of rules of customary international law by the ICJ, the inductive method may be defined as inference of a general rule from a pattern of empirically observable individual instances of State practice and opinio juris. Induction is a process of going from the specific to the general. It is a systematic process of observation and empirical generalization. The deductive method, on the other hand, may be defined as inference, by way of legal reasoning, of a specific rule from an existing and generally accepted (but not necessarily hierarchically superior) rule or principle. Deduction is a process of going from the general to the specific.

Any examination of the methods used by the ICJ when determining rules of customary international law is complicated by its inconsistent and non-technical use of induction and deduction. While the Court and individual judges have, on occasion, used the terms in the sense defined here, they have also used the terms ‘infer’ and, even more confusingly, ‘deduce’ when deriving a general rule for state practice. For example, in the Arrest Warrant case, the Court stated that it ‘has carefully examined State practice. ... It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction.’ This statement has led some to conclude wrongly that

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14 Dominé, supra note 13, at 355.
15 On ‘induction’ and ‘deduction’ as methodological terms, see Jung, supra note 7, at 20–25.
17 Jenks, supra note 9, at 646.
18 See, e.g., the cases in notes 3–5 in this article.
19 See, e.g., North Sea Continental Shelf, supra note 5, at 43, para. 76; Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), ICJ Reports (1993) 38, at 242, para. 102, Separate Opinion of Judge Weeramantry.
20 Arrest Warrant, supra note 7, at 24, para. 58. See also Fisheries Jurisdiction (United Kingdom v. Iceland), ICJ Reports (1974) 3, at 52, para. 21, Joint Separate Opinions of Judge Forster, Bengzon, Jimenez de Arechaga, Nagendra Singh and Ruda; Delimitation of the Maritime Boundary, supra note 4, at 373, para. 19, Dissenting Opinion of Judge Gros; Barcelona Traction, supra note 3, at 330, para. 40, Separate Opinion of Judge Ammoun.
the Court describes ‘the deductive process ... as appropriate for determining the contents of customary international law’. In light of this terminological confusion, it is essential to look to what the Court actually does, rather than to what it says it does, when examining its methodology.

3 The Inductive Method and the Need for Deductive Reasoning

There is widespread agreement that customary international law is, as a rule, ascertained by induction. For example, Commissioner Fred K. Nielson stated in the case of Dujay v. United Mexican States that the ‘existence or non-existence of a rule of [customary] international law is established by a process of inductive reasoning’. The reason for the use of the inductive method is not that all states have to comply with the rules of customary international law, or that it is necessitated by the sovereign equality of states and the requirement of the unity of the international legal order, but, rather, due to the fact that the two elements of customary international law are, of necessity, gathered in an empirical and inductive way. As the ICJ observed, ‘[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States’.

The Court cannot freely choose between induction and deduction when ascertaining rules of customary international law. However, there are certain situations in

25 For this view, see Albert Bleckmann, Allgemeine Staats- und Völkerrechtslehre (1995), at 520.
26 Continental Shelf (Libyan Arab Jamahiriya/Malta), ICJ Reports (1985) 13, at 29, para. 27; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports (1986) 14, at 97, para. 183.
which the inductive method is impossible to use.27 Four such situations may be identified. In the first, state practice is non-existent because a question is too new. In the Gulf of Main case, a Chamber of the Court held that ‘practice is still rather sparse, owing to the relative newness of the question’ and that this ‘precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law’.28 At present, for example, on the question of the exploitation of marine genetic resources in areas beyond national jurisdiction, there is little to no state practice from which to induce any customary international law rule on the legality of such activity. This lack of state practice may explain the resort to the deductive method in cases such as Reparation for Injuries where the Court was ‘faced with a new situation’.29

Second, state practice is conflicting or too disparate and thus inconclusive. For example, on more than one occasion, the ICJ has been faced with the situation of the parties adducing contradictory state practice on the question of the method of continental shelf delimitation. In the Libya/Malta Continental Shelf case, the Court had no doubt about the importance of state practice in that matter but concluded that the ‘practice, however interpreted, falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any method, as obligatory’.30 Similarly, in Qatar v. Bahrain, the Court stated that it was not ‘aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations’.31

Third, the opinio juris of states cannot be established. It was pointed out by Judge Sørensen in the North Sea Continental Shelf cases that ‘[i]n view of the manner in which international relations are conducted, there may be numerous cases in which it is practically impossible for one government to produce conclusive evidence of the motives which have prompted the action and policy of other governments’.32 This is especially so in cases of a negative practice of states consisting of abstention and omission. Customary international law rules prohibiting certain actions are thus more likely to be arrived at by deduction than induction.

Fourth, there is a discrepancy between state practice and opinio juris. For example, in the Nicaragua case, the ICJ was faced with a considerable practice of states intervening in other states’ internal affairs, while, at the same time, there was opinio juris supporting an obligation of non-intervention.33 This may explain why the Court did

27 Cf. Jenks, supra note 9, at 638.
28 Delimitation of the Maritime Boundary, supra note 4, at 290, para. 81.
29 Reparation for Injuries, supra note 12, at 182; see also 190, Independent Opinion of Judge Alvarez, 218. Dissenting Opinion of Judge Krylov.
30 Continental Shelf (Libyan Arab Jamahiriya/Malta), supra note 26, at 38, para. 44. See also North Sea Continental Shelf, supra note 5, at 45, para. 81.
31 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, ICJ Reports (2001) 40, at 101–102, para. 205.
32 North Sea Continental Shelf, supra note 5, at 246, Dissenting Opinion of Judge Sørensen. See also Asylum (Colombia/Peru), ICJ Reports (1950) 266, at 370, para. 17, Dissenting Opinion of Judge Caicedo Castilla.
not only rely on the inductive method alone but also deduced the principle of non-intervention directly from the principle of the sovereign equality of states.\textsuperscript{34}

If induction were the only method for ascertaining the rules of customary international law, the Court would have to pronounce a \textit{non liquet} whenever the inductive method was practically impossible to apply (and treaty rules or general principles were inapplicable). However, as Judge Higgins pointed out, it is ‘an important and well-established principle that the concept of \textit{non liquet} ... is no part of the Court’s jurisprudence’.\textsuperscript{35} It is suggested that the Court resorts to deductive reasoning in order to avoid a \textit{non liquet}. The deductive method is not an alternative to the inductive method but, rather, is complementary to it and may be applied whenever the Court cannot ascertain any rules of customary international law by way of induction.\textsuperscript{36}

\section*{4 Normative, Functional and Analogical Deduction}

The ICJ does not employ one single method of deduction but resorts to at least three different methods: normative, functional and analogical deduction. First, there is normative deduction. New rules are inferred by deductive reasoning from existing rules and principles of customary international law. In the Gulf of Maine case, a Chamber of the Court inferred practical methods for the delimitation of a single maritime boundary from special international law rules.\textsuperscript{37} New rules may also be inferred from axiomatic principles such as sovereignty, sovereign equality or territorial sovereignty.\textsuperscript{38} For example, in the Jurisdictional Immunities of the State case, the Court derived ‘the rule of State immunity ... from the principle of sovereign equality of States’.\textsuperscript{39} While this inference may suggest itself, the same cannot be said for the wide-ranging deduction of a state’s right ‘to the protection of its communications with counsel relating to an arbitration or to negotiations, in particular, to the protection of the correspondence between them, as well as to the protection of confidentiality of any documents and data prepared by counsel to advise that State in such a context’ from ‘the principle of sovereign equality of States’.\textsuperscript{40} In addition, the Court has inferred new rules from

\textsuperscript{14} Ibid., at 106, para. 202.
\textsuperscript{15} Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports (1996) 226, at 591, para 36, Dissenting Opinion of Judge Higgins. See also Corfu Channel (United Kingdom v. Albania), Merits, ICJ Reports (1949) 4, at 83, Dissenting Opinion of Judge Azevedo.
\textsuperscript{16} Cf. Jenks, supra note 9, at 626–627, 644, 658–660. Even Georg Schwarzenberger, supra note 9, at 38, the main proponent of the inductive approach to international law, was not advocating a complete renunciation of the deductive method.
\textsuperscript{17} Delimitation of the Maritime Boundary, supra note 4, at 300, para. 114.
\textsuperscript{18} Bleckmann, supra note 25, at 619, stating that the view that individual legal rules may be deduced from the principle of sovereignty is almost generally recognized. For the view that is opposed to the deduction of new rules from principles such as sovereignty, see Schwarzenberger, supra note 9, at 129.
\textsuperscript{19} Jurisdictional Immunities of the State, supra note 8, at 123, para. 57.
\textsuperscript{20} Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Request for the Indication of Provisional Measures, Order of 3 March 2014, para. 27.
substantive customary law principles such as ‘the land dominates the sea’\textsuperscript{41} or ‘the implied powers of international organizations’.\textsuperscript{42}

In the North Sea Continental Shelf cases, the Court deduced from the existing customary international law principles that continental shelf delimitation must be the object of agreement between the states concerned and that such agreement must be arrived at in accordance with equitable principles and the ‘actual rules of law ... binding upon States for all delimitations’, namely that States ‘are under an obligation to enter into negotiations with a view to arriving at an agreement’ and ‘to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied’.\textsuperscript{43} In the Corfu Channel case, the Court deduced the obligation of a coastal state in times of peace to warn ships of the existence of a minefield in its territorial sea from:

certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.\textsuperscript{44}

The ICJ employed a triangular method of legal reasoning familiar in common law systems. In cases where a precedent is similar to the case at bar in some important respects, but dissimilar in others, the Court identifies the general principle or rationale underlying the precedent and then decides whether this principle or rationale furnishes a suitable ground for deciding the case. The United Kingdom has relied, \textit{inter alia}, on Hague Convention VIII of 1907, which imposes in time of war a duty on belligerents and neutrals to notify shipowners of the existence of minefields.\textsuperscript{45} The Convention itself – even assuming that it was declaratory of customary international law – was not applicable in that case as it relates only to war and not to peace time and deals only with the direct laying of mines and not with their laying by a third party. The United Kingdom argued, however, that the minimum standard of conduct applicable in time of war to belligerents and neutrals was reflective of a general principle of international law that was applicable to the present case.\textsuperscript{46} The Court followed the United Kingdom’s reasoning and based the duty to warn ships of the existence of a minefield in times of peace not on Hague Convention VIII but, rather, on certain


\textsuperscript{42} Reparation for Injuries, supra note 12, at 182–183; but see also 213–214, Dissenting Opinion of Judge Badawi Pasha. Badawi Pasha questions whether there was such a principle of implied powers in international law.

\textsuperscript{43} North Sea Continental Shelf, supra note 5, at 46–47, para. 85. See also Delimitation of the Maritime Boundary, supra note 4, at 293, para. 91. For the view that the Court based its decision on ‘existing rules and principles of law’ rather than directly upon equity, see Lowe, ‘The Role of Equity in International Law’, 12 Australian Year Book of International Law (1988–1989) 54, at 61.

\textsuperscript{44} Corfu Channel, supra note 35, at 22.

\textsuperscript{45} Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines 1907 (1908) 2 AJIL Suppl. 138–145, Arts 3. 4.

\textsuperscript{46} Corfu Channel, supra note 35. Memorial of the United Kingdom, 30 September 1947, at 37–38, paras 63–65.
general and well-recognized principles spelled out in that Convention for the particular conditions of warfare.\footnote{Ibid., at 22.}

Second, there is functional deduction. The ICJ deduces rules from general considerations concerning the function of a person or an organization. For example, in the Reparation for Injuries case, the Court stated that ‘the rights and duties of an entity such as the Organization [of the United Nations] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice’\footnote{Ibid., at 184–185.} and inferred from the functions of the United Nations that it had ‘capacity to bring claims on the international plane, and that it possesses a right of functional protection in respect of its agents’.\footnote{Reparation for Injuries, supra note 12, at 180.} Similarly, in the case concerning South West Africa, the Court held that the supervisory functions of the League of Nations with regard to mandated territories were transferred to the United Nations because it was ‘performing similar, though not identical, supervisory functions’.\footnote{Ibid., at 184–185.} That the Court’s finding was a result of functional deduction becomes clear from the separate opinion of Judge McNair, who called the Court’s contention that there had been an automatic succession by the United Nations to the rights and functions of the Council of the League ‘pure inference’ and ‘a piece of judicial legislation’.\footnote{International Status of South West Africa, ICJ Reports (1950) 128, at 136.} Judge Read accused the Court of basing the succession simply on the ‘similarity in the functions of the organizations’.\footnote{Ibid., at 159 and 162, Dissenting Opinion of Judge McNair.}

A more recent example of functional deduction can be found in the Arrest Warrant case.\footnote{Arrest Warrant, supra note 7, at 3. Judge Van den Wyngaert, however, seems to have treated the Court’s reasoning as a ‘mere analogy with immunities for diplomatic agents and Heads of State’ (ibid., at 146, para. 14). For the view that the case was not an example of an ‘argument from analogy’, see also Thirlway, ‘The Law and Procedure of the International Court of Justice 1960–1989: Supplement, 2005: Parts One and Two’, 76 British Year Book of International Law (2005) 1, at 95.} After asserting without proof or reasoning that foreign ministers ‘enjoy immunities from jurisdiction in other States’,\footnote{Arrest Warrant, supra note 7, at 20–21, para. 51.} the ICJ then looked to customary international law to define the exact content of these immunities.\footnote{Ibid., supra note 7, at 21, para. 52.} The Court stated:

\[\text{In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs.}\]\footnote{Ibid., at 21, para. 52.}

After doing so, the Court concluded that ‘the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability’.\footnote{Ibid., at 22, para. 54.} The Court’s
A deductive approach was heavily criticized by Judge Oda, who referred to this kind of reasoning as ‘a hornbook-like explanation’, and by Judge Van den Wyngaert, who rejected an assimilation of heads of state and foreign ministers ‘for the only reason that their functions may be compared’.

Third, there is ‘analogical deduction’. Analogical deduction from the Quran (‘Q’iyas’) is one of the major methods of reasoning in Islamic law. The use of this method by the ICJ may be a reflection of ‘the main forms of civilization and ... the principal legal systems of the world’ being represented on its bench. By way of analogical deduction, the rationale of an existing rule is extended to a situation that does not fall within the wording of that rule. It requires a common cause or link between the two situations. Analogical deduction allows for the determination of a new rule for the new situation and thus differs from the application, by analogy, of an existing rule or precedent to the new situation in Western legal tradition. For example, in the Libya/Malta Continental Shelf case, the Court determined a (new) customary international rule law giving states an entitlement to 200 nautical miles of continental shelf. The Court found a link between the continental shelf and the exclusive economic zone in the fact that the rights over the seabed within the exclusive economic zone are defined by reference to the regime of the continental shelf. The Court concluded:

Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf. It follows that, for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone.

Three years earlier, the ICJ had noticed only a ‘trend’ towards the 200-nautical-mile distance criterion with regard to the continental shelf. The Court did not attempt to prove, by examining state practice and opinio juris, that in the meantime a new rule of customary international law had come into existence, but, instead, it determined the existence of such a rule by way of analogical deduction from the existing 200-nautical-mile distance criterion with regard to the exclusive economic zone. These examples show that there is a constant process of development of international law through the Court, a process that involves a considerable element of innovation.

58 Ibid., at 52, para. 14, Dissenting Opinion of Judge Oda.
59 Ibid., at 146, para. 16, Dissenting Opinion of Judge Van den Wyngaert.
61 Statute of the International Court of Justice 1945, 1 UNTS 993, Art. 9.
62 Continental Shelf (Libyan Arab Jamahiriya/Malta), supra note 26, at 33, para. 34.
63 Continental Shelf (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982) 18, at 48–49, para. 48.
64 For the view that there was no opinio juris supporting the 200-nautical-mile distance criterion with regard to the continental shelf, see Continental Shelf (Libyan Arab Jamahiriya/Malta), supra note 26, at 69, Separate Opinion of Vice-President Sette-Camara.
65 Cf. Kirchner, supra note 1, at 228–229.
The deductive process in its various forms is a convenient and, in fact, routine legal technique for developing rules of customary international law.

5 The Different Functions of Deductive Reasoning

The use of the deductive method is not limited to identifying rules of customary international law. It may also serve other purposes. Deductive reasoning, for example, may be employed to confirm and strengthen results reached by induction. In the Jurisdictional Immunities of the State case, after having examined in detail state practice and opinio juris and concluding that ‘practice shows that ... States generally proceed on the basis that there is a right to immunity under international law’, the ICJ continued its reasoning and deduced the rule of state immunity from the principle of the sovereign equality of states. However, the use of deductive reasoning can also mean that the Court wants to make up for a less than comprehensive or conclusive inductive process. Judge Jessup stated in his separate opinion in Barcelona Traction:

No survey of State practice can, strictly speaking, be comprehensive and the practice of a single State may vary from time to time – perhaps depending on whether it is in the position of plaintiff or defendant. However, I am not seeking to marshal all the evidence necessary to establish a rule of customary international law. Having indicated the underlying principles and the bases of the international law regarding diplomatic protection of nationals and national interests, I need only cite some examples to show that these conclusions are not unsupported by State practice and doctrine.

Where a rule of customary international law is logical, because it can be deduced from an existing underlying principle, the burden of proving the rule by way of inductive reasoning is proportionally diminished. In essence, a logical rule requires a smaller pool of state practice and opinio juris. Deduction can thus be used to lower the standard of inductive evidence.

In cases where state practice and opinio juris are contradictory or inconclusive, the imposition of a burden of proof is necessary for the inductive method to achieve a result. The burden of proof can be established by deduction. In the Asylum case, Haya de la Torre, the leader of an opposition party in Peru, had asked for political asylum in the Colombian embassy in Lima. The issue was whether Colombia could decide the political character of his alleged crimes with binding effect on Peru. The Court held that the:

facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions ... that it is not possible to discern in all this any constant and uniform usage, accepted as law.

67 Jurisdictional Immunities of the State, supra note 8, at 122–123, paras 55–56.
68 Ibid., at 123, para. 57.
69 Barcelona Traction, supra note 3, at 196, para. 6, Separate Opinion of Judge Jessup.
71 Asylum (Colombia/Peru), supra note 32, at 277.
By using the inductive method, the Court could thus not reach a decision on which state — Peru or Colombia — was to decide on the political character of the alleged crime in the context of diplomatic asylum. The Court solved the problem by deducing a rule from the principle of territorial sovereignty that imposed a burden of proof on Colombia. It said:

In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. ... Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.\(^\text{72}\)

It was thus for Colombia to show that there was a rule of customary international law giving it the right to decide on the political character of the offence. It could not do this because there was no ‘constant and uniform usage practised by the States in question’.\(^\text{73}\)

Similarly, in *Qatar v. Bahrain*, the Court also established a burden of proof by way of inductive reasoning.\(^\text{74}\) Bahrain claimed that it had acquired sovereignty over all the low-tide elevations in dispute between the parties.\(^\text{75}\) Whether this claim was well founded depended upon the answer to the question of whether low-tide elevations are territory and can be appropriated in conformity with the rules and principles of territorial acquisition. The Court concluded that there was no ‘uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations’.\(^\text{76}\) This finding would have resulted in a *non liquet*. The Court, however, resorted to deduction and compared low-tide elevations with islands, which are generally accepted as constituting *terra firma* subject to the rules and principles of territorial acquisition. The Court found that ‘low-tide elevations cannot be equated with islands’.\(^\text{77}\) It concluded that it ‘is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory’.\(^\text{78}\) It thus became incumbent upon Bahrain to prove customary international law ‘rules and legal principles’ that unequivocally permitted the appropriation of low-tide elevations. Of course, it could not do so because, as the Court had previously established, there was no ‘uniform and widespread State practice’ giving rise to such rules or legal principles. As induction had not produced a rule either way, the case was ultimately decided on the burden of proof established by deduction.

\(^\text{72}\) Ibid., at 274–275.
\(^\text{73}\) Ibid., at 276.
\(^\text{74}\) *Maritime Delimitation between Qatar and Bahrain*, supra note 31, at 40.
\(^\text{75}\) Ibid., at 101, para. 204.
\(^\text{76}\) Ibid., at 102, para. 205.
\(^\text{77}\) Ibid., at 102, para. 208.
\(^\text{78}\) Ibid., at 102, para. 206 (emphasis added); but see also 124, para. 7, Separate Opinion of Judge Oda: ‘[T]he questions of whether sovereignty over an islet or a low-tide elevation may be acquired through appropriation by a State ... sea remain open matters’.
6 Traditional Inductive Custom versus Modern Deductive Custom?

There are probably few topics in international law that are more over-theorized than the creation and determination of custom. Indeed, at times, one might get the impression that the topic has been theorized to death. As Ian Brownlie so aptly put it, ‘[t]here is no doubt room for a whole treatise on the harm caused to the business of legal investigation by theory’. With rare exceptions, the theories on custom ‘have not only failed to improve the quality of thought but have deflected lawyers from the application of ordinary methods of legal analysis’. 79 It has been argued that there are different categories of customary international law – ‘traditional custom’ and ‘modern custom’. 80 For example, Anthea Roberts says that:

[...]traditional custom is evolutionary and is identified through an inductive process in which a general custom is derived from specific instances of state practice. ... By contrast, modern custom is derived by a deductive process that begins 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. 81

One argument is that modern custom is related to new and important moral values and global challenges, such as peace, human rights and the environment, where the actual practice of states has been characterized by too many violations to serve as a sound basis for induction. In these areas, there is also an urgent need to create new rules and fill existing gaps; traditional custom is ill-suited to do this, being both too burdensome and slow to develop. Modern custom, on the other hand, can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the United Nations General Assembly (UNGA), which can declare existing customs, crystallize emerging customs and generate new customs. For these reasons, it is claimed, international human rights law, international humanitarian law, international criminal law and international environmental law should be arrived at by deduction. 82

Christian Tomuschat in his Hague lectures of 1993 went one step further, arguing for a special category of “deductive” customary law — that is, customary international law rules that can be directly deduced from “the constitutional foundations of the international community” based on “sovereign equality” and the “core philosophy of humanity.” In the case of deductive customary law, it is to be neither necessary nor appropriate to collect empirically the relevant practice and opinio juris of states in order to corroborate the rules arrived at by deduction. This view is closely linked to ideas of constitutionalism and an international public order. It assumes that an unwritten “constitution of the international community” exists in which certain core values are entrenched, in particular, peace, human life and dignity. From these constitutional norms, other rules of international law can be derived by way of deduction. Tomuschat seeks support for his view of different categories of customary law in the statement of the Chamber in Gulf of Maine that:

> customary international law ... in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the opinio juris of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.

This statement by the ICJ’s Chamber is understood to mean that there are two categories of customary international law, one proved by induction and the other by deduction from the constitutional foundations of the international community. However, the Chamber’s statement could also be read differently, in the sense that in the first category state practice and opinio juris are clearly settled, whereas in the second they must be established by inductive reasoning.

There are several problems with these theoretical categorizations of custom. First of all, they do not find any support in the ICJ’s jurisprudence. On the contrary, in the South West Africa case, the Court rejected the deduction of rules of law from “humanitarian considerations” and “moral principles.” The methods employed by the Court for the determination of rules of customary international law do not depend on the nature or content of these rules or on whether they respond to moral issues and global challenges. Induction and deduction as methods of legal reasoning are value neutral. As shown earlier, the Court has employed deductive reasoning not to develop

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83 Tomuschat, ‘Obligations Arising for States without or against Their Will’, 241 RCD (1993) 195, at 297; on the deductive approach, see 293–304.
84 Ibid., at 307; see also 292–293, 300, 302–303.
85 Cf. ibid., at 299.
86 Delimitation of the Maritime Boundary, supra note 4, at 299, para. 111.
87 Tomuschat, supra note 83, at 298–299. See also Worster, supra note 70, at 17.
88 Kolb, supra note 82, at 126, n. 30.
89 South West Africa (Liberia v. South Africa), Judgment, ICJ Reports (1966) 6, at 34, paras 49–50.
90 For the view that the choice of the deductive method depends on the subject matter of the dispute, see Birgit Schlütter, Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia (2010), at 326, 328, 329. See also Kolb, supra note 82, at 129.
international law progressively but to develop it in situations where the inductive method could not yield any result.\textsuperscript{91}

The use of the terms ‘traditional’ and ‘modern’ suggests a chronological sequence and implies a change of methodology in determining custom over time. Thus, it has been said that there was ‘a movement from the inductive to the deductive method of ascertaining custom’.\textsuperscript{92} But the deductive method is not a recent or modern phenomenon; it was used by the Court’s predecessor, the Permanent Court of International Justice (PCIJ). In the \textit{Lotus} case, the PCIJ deduced from ‘the principle of the freedom of the seas’ the rule that ‘vessels on the high seas are subject to no authority except that of the State whose flag they fly’.\textsuperscript{93} The ICJ in its first judgment of the merits deduced certain obligations from ‘general and well-recognized principles’.\textsuperscript{94} Deduction is not a modern phenomenon and, furthermore, has hardly been used in recent years. Writing in 2011, Alberto Alvarez-Jiménez concluded that the ICJ had not applied the deductive method ‘with meaningful impact during the first decade of the new millennium’.\textsuperscript{95} The two methods are thus neither traditional nor modern in a chronological sense but, instead, have been used consistently throughout the Court’s jurisprudence.\textsuperscript{96}

The \textit{Nicaragua} case is often identified as the turning point in the ICJ’s methodology from the inductive to the deductive method.\textsuperscript{97} In this case, the Court stated:

\begin{quote}
The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to \textit{deduce} the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules. ... The Court has however to be satisfied that there exists in customary international law an \textit{opinio juris} as to the binding character of such abstention. This \textit{opinio juris} may, though with all due caution, be \textit{deduced} from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions.\textsuperscript{98}
\end{quote}

Based on the Court’s peculiar and untechnical use of the term ‘deduce’, the deductive method has been mistakenly equated with a loosening of the requirements of customary international law. It has been argued that there is no longer a need for consistent practice by states, that \textit{opinio juris} is sufficient to prove custom – that is, that \textit{opinio juris} has been substituted for state practice – or that the order of examination of state practice and \textit{opinio juris} has been reversed.\textsuperscript{99} The quantity and quality of state practice and \textit{opinio juris}, and the relationship between the two, are not questions of induction or deduction but, rather, questions of evidence of the elements of customary

\begin{footnotes}
\footnotetext[91]{See section 3 in this article.}
\footnotetext[92]{Meron, ‘International Law in the Age of Human Rights: General Course on Public International Law’, 301 RCD (2003) 9, at 378.}
\footnotetext[93]{\textit{The SS ‘Lotus’} 1927 PCIJ Series A, No. 10, 18, at 25.}
\footnotetext[94]{\textit{Corfu Channel}, supra note 35, at 22. See also De Visscher, supra note 22, at 37.}
\footnotetext[95]{Alvarez-Jiménez, supra note 24, at 708; see also 711, noting ‘the re-emergence of the strict inductive approach’ in the period 2000–2009.}
\footnotetext[96]{See also Worster, supra note 70, at 2, 6–7.}
\footnotetext[97]{Cf. Roberts, supra note 81, at 758.}
\footnotetext[98]{\textit{Military and Paramilitary Activities}, supra note 26, at 98, para. 186; 99, para. 188 (emphasis added).}
\footnotetext[99]{See, e.g., Abi-Saab, ‘Cours général de droit international public’, 207 RCD (1987) 9, at 177; Roberts, supra note 81, at 758; Worster, supra note 70, at 4–5.}
\end{footnotes}
international law. In the Nicaragua case, the Court did not abandon the traditional two-element test of customary international law but, with ‘the attitude of states towards certain General Assembly resolutions’, introduced a new piece of evidence of opinio juris.

This method was confirmed in the Nuclear Weapons advisory opinion where the ICJ referred to UNGA resolutions as ‘evidence’ of opinio juris. The Court did not look to the resolutions as such but to ‘the attitude of States’ towards these resolutions. It did not ‘deduce’ any rules of customary international law from UNGA resolutions and, therefore, did not use the deductive method. On the contrary, by taking a sample of states’ attitudes and by looking at underlying consistencies as evidence of a customary rule, the Court engaged in an inherently inductive process. The Court’s methodology for determining rules of customary international law must be distinguished from the constitutive elements and evidence of these rules.

Modern custom has been associated with the progressive development of international law, and the deductive method has been equated with ‘quasi-legislation’. Traditional inductive custom, on the other hand, is said to be conservative, positivistic and characterized by descriptive accuracy. The inductive method is, however, just as subjective, unpredictable and prone to law creation by the Court as the deductive method. Traditional custom is to be established by examining the practice and opinio juris of states. This is not a mathematical exercise of simply counting state behaviour but, rather, a process prone to subjectivity and selectivity. It is practically impossible for the Court to examine the practice and opinio juris of almost 200 states. Thus, any customary rule will, by necessity, be based on a selection of state practice – a selection made by the Court. The Court could thus engage in a self-fulfilling collection of state practice – that is, a selective collection of practice that is supportive of a preconceived rule of customary law.

It is also for the ICJ to decide what counts as state practice, whether practice is extensive, consistent and uniform (enough) and how to deal with inconsistent patterns of practice. The acceptance of certain patterns of conduct as customary law is more than the mere observation and recording of regularities of behaviour. Value judgments are

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100 Military and Paramilitary Activities, supra note 26, at 97, para. 183.
101 Nuclear Weapons, supra note 35, at 254, para. 70.
102 Military and Paramilitary Activities, supra note 26, at 99, para. 188.
103 Worster, supra note 70, at 46.
104 Schüle, supra note 1, at 8; Jung, supra note 7, at 66–67.
106 Cf. Roberts, supra note 81, at 760.
107 Cf. Kolb, supra note 82, at 130–133. See also Kirchner, supra note 1, at 239.
always implicit in the recognition of practice as custom.\textsuperscript{110} The Court may interpret inconsistent state practice as a breach of an existing custom,\textsuperscript{111} the beginning of a new custom or no custom at all. It is for the Court to weigh inconsistent state practice. For example, in the \textit{Reservations to the Genocide Convention} case, the Court rejected by seven votes to five the existence of a rule of customary international law to the effect that a state making a reservation can only become a party to a treaty if the reservation is accepted by all parties to the treaty, although the general practice of states, as well as the administrative practice of the Secretariat of the League of Nations and the Secretary-General of the United Nations, has indicated just such a rule.\textsuperscript{112} The Court stated:

The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits one to state that such a rule exists, determining with sufficient precision the effect of objections made to reservations. In fact, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule.\textsuperscript{113}

The minority, on the other hand, concluded that ‘the practice of governments has resulted in a rule of law requiring the unanimous consent of all the parties to a treaty before a reservation can take effect and the State proposing it can become a party’.\textsuperscript{114} The International Law Commission in its report to the UNGA also reached the same conclusion at exactly the same time.\textsuperscript{115} The fact that such wide disagreement is possible on the question of state practice underlines the subjectivity involved in evaluating the evidence before the ICJ. The uncertainties inherent in the inductive method are, however, not only limited to the collection, selection and assessment of state practice but also cover the process of rule determination.\textsuperscript{116} It is the Court that formulates the rule that is inferred from a particular practice. This rule may be broad or narrow, abstract or specific, with or without exceptions.\textsuperscript{117} Every induction is based on a number of premises and conceptions that are rarely laid open but, rather, are defined by the Court. And as if all this were not enough, there are still the subjectivities immanent in the process of determining the psychological element of customary international law – the \textit{opinio juris} of states – which is often arrived at by fiction rather than by induction.\textsuperscript{118} In sum, if the Court is eager to be ‘creative’ and progressively develop


\textsuperscript{111} \textit{Military and Paramilitary Activities}, supra note 26, at 98, para. 186.


\textsuperscript{114} \textit{Ibid.}, at 32, Dissenting Opinion of Judge Guerrero, McNair, Read and Hsu Mo.


\textsuperscript{116} On the uncertainties of the inductive method, see also Bleckmann, supra note 22, at 505.

\textsuperscript{117} Cf. Lowe, supra note 43, at 60.

\textsuperscript{118} For Hans Kelsen, \textit{opinio juris} was a fiction to disguise the creative powers of the judge. Kelsen, ‘Théorie du droit international coutumier’, 1 \textit{Revue international de le théorie du droit} [new series] (1939) 253, at 266.
rules of customary international law, it does not need to resort to a 'modern deductive custom'.

7 Assertion as the ICJ’s Main Method

Examinations of the ICJ’s methodology usually focus on the dichotomy of induction versus deduction. This dichotomy, however, presents an incomplete or even distorted picture. The main method employed by the Court is not induction or deduction but assertion. In the large majority of cases, the Court does not offer any (inductive or deductive) reasoning but simply asserts the law as it sees fit. Of course, one would not expect the Court to examine state practice and *opinio juris*, or employ a process of deductive reasoning, in order to establish long and well-recognized rules of customary international law, such as the inviolability of diplomatic agents. After all, the Court’s judgments are not papers in a student law review where every statement must be supported by a reference. However, the Court’s assertions have not been limited to what may be regarded as notorious custom. The Court has not only asserted positive rules, but it has also denied the existence of (alleged) rules of customary international law simply by stating that there is no ‘uniform and widespread State practice’ without providing any support for this assertion.

Over the years, the ICJ has pulled a number of customary international law ‘rabbits’ out of its hat. The following examples can only give a flavour of its method of assertion. In its first judgment on the merits, in the *Corfu Channel* case, the Court established a right of innocent passage for warships through international straits, stating: 

*It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent.*

The Court did not adduce any evidence of state practice and *opinio juris* for this assertion, despite the fact that, at the time, such a right was far from being ‘generally recognized’. Prominent voices in the literature had concluded that there was no ‘right’ of innocent passage for warships, and several judges pointed to the lack of state practice. Judge Krylow stated that the ‘practice of States in this matter is far from


123 *Corfu Channel*, *supra* note 35, at 28 (emphasis added).

uniform, and it is impossible to say that an international custom exists in regard to it’.\(^{125}\) It was Judge Krylov again who accused the majority of ‘the creation of a new rule of international law’ when the Court in the *Reparations for Injuries* case asserted the objective legal personality of international organizations such as the United Nations.\(^ {126}\) Without offering any (inductive or deductive) reasoning, the Court stated rather apodictically that:

> the Court’s opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.\(^ {127}\)

Rather than being ‘in conformity with international law’, the concept of objective international personality of international organizations was contrary to the existing principle of customary international law that treaties, including treaties constituting international organizations, could not create obligations or rights for third states.\(^ {128}\)

As stated by Judge Read in his separate opinion in the *South West Africa* case, ‘[i]t is a principle of international law that the parties to a multilateral treaty, regardless of their number or importance, cannot prejudice the legal rights of other States.’\(^ {129}\) The Court’s opinion was aptly criticized by Georg Schwarzenberger who stated:

> The argument that fifty States have the power to create an international personality which ... existing subjects of international law are bound to recognise is a mere assertion. Apart from being far from convincing, it is hardly a substitute for evidence of an existing rule of customary international law to this effect.\(^ {130}\)

In the *Nicaragua* case, the Court declared that the rules in Article 3 common to the four Geneva Conventions of 12 August 1949 that deal with armed conflicts ‘not of an international character’ were not only reflective of customary international law but also constituted a minimum yardstick – ‘that, in the event of international armed conflicts, these rules, in addition to the more elaborate rules which are also to apply to international conflicts’.\(^ {131}\) In his dissenting opinion, Sir Robert Jennings called this finding ‘a matter [not] free from difficulty’.\(^ {132}\) Doubts about the Court’s extension of common Article 3 to all armed conflicts as customary international law were expressed, which considered that the parties to the Geneva Conventions had built a

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\(^{125}\) Ibid., at 74, Dissenting Opinion of Judge Krylov.


\(^{127}\) Ibid., at 185 (emphasis added).


\(^{129}\) *International Status of South-West Africa*, supra note 50, at 165, Separate Opinion of Judge Read.

\(^{130}\) Schwarzenberger, supra note 9, at 469; see also 128–129.


\(^{132}\) *Military and Paramilitary Activities*, supra note 26, at 53, Dissenting Opinion of Judge Jennings; see also 184, Separate Opinion of Judge Ago.
poor record of compliance with the rules stated in common Article 3 and the virtual absence of any evidence of state practice or reasoning supporting this conclusion. More recently, the ICJ asserted the customary international law immunity *ratione personae* of high-ranking state officials. In the *Arrest Warrant* case, it said:

> The Court would observe at the outset that in international law it is firmly established that ... certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.

The Court’s ‘observation’ was made without argument or reference to any supporting state practice and *opino juris*. Judge Koroma pertinently remarked: ‘While it would have been interesting if the Court had done so, the Court did not consider it necessary to undertake a disquisition of the law in order to reach its decision.’ The use of the phrases ‘the Court would observe’, ‘the Court observes’ and ‘in the Court’s view’ provides a strong indication for assertion. This is also shown in *Armed Activities on the Territory of the Congo* where the Court stated:

> The Court observes that, under customary international law ... territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

Again, the Court offered no reasoning, although opinion on the question is divided. While some – like the Court – take the view that occupation requires that the foreign army has actually substituted its own authority for that of the ousted government (actual control test), others take the view that it is sufficient that the foreign army has potential control – that it is controlling the area and is therefore in a position to substitute its own authority for that of the former government (potential control test). Scholarly opinion mostly supports the potential control test. This test was also endorsed by the United States Military Tribunal at Nuremberg and a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia. In situations such as this, the Court’s method of assertion seems rather questionable.

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134 *Arrest Warrant*, supra note 7, at 20, para. 51 (emphasis added); for criticism of the Court’s assertion, see 52, para. 14, Dissenting Opinion of Judge Oda: 142, para. 10; 147, para. 16, Dissenting Opinion of Judge Van den Wyngaert.


136 *Arrest Warrant*, supra note 7, at 61, para. 6, Separate Opinion of Judge Koroma.


139 United States Military Tribunal, Nuremberg, Case No. 47, *Trial of Wilhelm List and Others (The Hostages Trial)*, reprinted in 8 Law Reports of Trials of War Criminals 34, at 56.

The ICJ has developed several techniques of assertion. Reference to the International Law Commission (ILC) is a favourite shortcut in establishing rules of customary international law. Thus, the Court referred to the work of the ILC and the Commission’s statement that ‘the notion of state of necessity is ... deeply rooted in general legal thinking’ before asserting that ‘the state of necessity is a ground recognized by customary international law’. The Court also frequently holds that a certain (draft) article adopted by the ILC ‘reflects’ customary international law without engaging in an examination of state practice or opinio juris itself. In light of the ILC’s extensive review of state practice and opinio juris in its reports and commentaries, this simply may be an example of the Court outsourcing the inductive process to the Commission. But the ILC’s task is not limited to the codification of existing rules of customary international law. In none of the cases where the Court has found a (draft) article of the ILC to reflect customary international law did it enquire whether the Commission was actually codifying international law or whether it was not perhaps progressively developing international law. In all cases, the ILC has served as a kind of pseudo-witness for a rule having acquired the status of customary international law.

Another method of assertion is for the ICJ simply to observe ex cathedra that a certain treaty provision is reflective of customary international law. This method has allowed it to hold that several provisions of the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations, the United Nations

Convention on the Law of the Sea,\(^{147}\) the four Geneva Conventions of 1949,\(^{148}\) and Hague Convention IV on Respecting the Laws and Customs of War on Land and the Regulation Concerning the Laws and Customs of War on Land were part of customary international law.\(^{149}\) Such assertions of customary international law status of certain treaty provisions are all the more noteworthy since state practice has not always been in conformity with these provisions.\(^{150}\)

In addition to treaty provisions, the ICJ has also declared certain provisions of UNGA resolutions and even entire resolutions to be reflective of customary international law. In the *Nicaragua* case, the Court ‘pointed to the customary content of certain provisions [in UNGA Resolution 2625 (XXV) – the Friendly Relations Declaration\(^ {151}\)] such as the principles of the non-use of force and non-intervention’.\(^ {152}\) Some 25 years later, in the *Kosovo* advisory opinion, the Court went one step further declaring that the entire ‘Declaration ... reflects customary international law’.\(^ {153}\) However, in none of these cases was the assertion that a certain provision of a UNGA resolution ‘may be taken to reflect customary international law’ backed by any (inductive or deductive) reasoning.\(^ {154}\)

The same is true for the ICJ’s observations that an obligation qualifies as *erga omnes* or that a norm is of a peremptory character (*jus cogens*). In the *Barcelona Traction* case, the Court simply stated in an *obiter dictum* that ‘obligations of a State towards the international community as a whole ... are obligations *erga omnes*.\(^ {155}\)
omnes’ and then identified obligations that derive from ‘the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’, as such obligations.\textsuperscript{155} In the advisory opinion in the Construction of a Wall case, the Court expressed the ‘view’ that rules of humanitarian law applicable in armed conflict ‘incorporate obligations which are essentially of an erga omnes character’.\textsuperscript{156} Similarly, in the Belgium v. Senegal case, the Court merely declared that ‘in the Court’s opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens).’\textsuperscript{157} The statement that the prohibition is ‘grounded in a widespread international practice and on the opinio juris of States’\textsuperscript{158} did no more than pay lip service to the elements of customary international law and could not make up for the required enquiry into whether the norm was ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation [was] permitted’.\textsuperscript{159}

Another technique employed by the ICJ is to build upon and develop its own assertions. The principle of uti possidetis juris may serve as an example. This was initially a regional doctrine according to which, upon independence, new states in Latin America inherited territories and boundaries of the former Spanish colonies.\textsuperscript{160} In the Burkina Faso/Mali Frontier Dispute, a Chamber of the Court was expressly requested to solve the dispute on the basis of the principle of uti possidetis juris. Although there was no need, for the purposes of the case, to show that this was a general principle of customary international law, the Chamber nonetheless asserted its general scope.\textsuperscript{161} The Chamber stated: ‘It [uti possidetis juris] is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.’\textsuperscript{162} No evidence was adduced for the general scope of the ‘principle’ and, in particular, its geographical application outside Latin America and Africa, its intertemporal

\textsuperscript{155} Barcelona Traction, supra note 3, at 32, paras 33–34; but see also 340, para. 8, Dissenting Opinion of Judge Riphagen) who pointed out that this ‘distinction can of course be drawn. But it is still difficult to hold that this distinction would necessarily correspond to an a priori classification in accordance with the nature of the interests protected by such obligations, a classification which is already in itself a fairly doubtful one.’

\textsuperscript{156} Construction of a Wall, supra note 142, at 199, para. 157.

\textsuperscript{157} Questions Relating to the Obligation to Prosecute or Extradite, supra note 145, at 457, para. 99 (emphasis added). For the view that the statement on the jus cogens character of the prohibition of torture was ‘a mere obiter dictum, which the Court could have omitted without depriving its reasoning of any vital element’, see 477, para. 27, Separate Opinion of Judge Abraham.

\textsuperscript{158} Ibid.

\textsuperscript{159} Ibid., at 565, para. 20 (emphasis added).
The general scope of the principle was later confirmed by the full Court. While the principle of *uti possidetis juris* was originally applied to land territory and the determination of land frontiers only, the Court in the *Land, Island and Maritime Dispute* extended the application of the principle to offshore islands and historic bays and, in the *Territorial and Maritime Dispute in the Caribbean Sea*, to the territorial sea. The logical next step for the Court will be to apply the principle to the delimitation of the exclusive economic zone and the continental shelf.

Another example of the technique of creeping assertion is the metamorphosis from the ‘principle’ to the ‘right’ of self-determination. In the advisory opinion in *Namibia*, the ICJ asserted that the ‘development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations’, made the principle of self-determination applicable to all of them. Four years later, in the *Western Sahara* case, the Court endorsed the ‘principle of self-determination as a right of peoples’. In the *East Timor* case, the Court held that ‘Portugal’s assertion that the right of peoples to self-determination ... has an *erga omnes* character is irreproachable’. In the advisory opinion in *Construction of a Wall*, the Court finally made Portugal’s assertion its own when, referring to the judgment in the *East Timor* case, it stated that the ‘Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes*’. At no stage did the Court take any account of practice and of the *opinio juris* of states or offer any inductive reasoning for the new right.

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161 The applicability of *uti possidetis juris* to a juridical question arising in the Middle East was questioned by the arbitral tribunal in the *Eritrea/Yemen Arbitration (Phase One: Territorial Sovereignty and Scope of Dispute)*, 9 October 1998, 114 ILR 1, at 34, para. 99. See also *Maritime Delimitation between Qatar and Bahrain*, supra note 31, at 251, para. 10, Separate Opinion of Judge Al-Khasawneh: 408, para. 430. Dissenting Opinion of Judge Torres-Bernárdez. Torres-Bernárdez questioned the application of *uti possidetis juris* to acts or facts that took place or any situation that ceased to exist before the generalization of the norm. See also *Frontier Dispute (Burkina Faso/Mali)*, judgment of 16 April 2013, para. 5, Separate Opinion of Judge Yusuf, who questioned whether the African concept of respect of boundaries existing on achievement of independence was identical with the principle of *uti possidetis juris* of Spanish-American origin.

164 *Territorial and Maritime Dispute between Nicaragua and Honduras*, supra note 147, at 706, para. 151; see also 787, para. 19, Dissenting Opinion of Judge Torres-Bernárdez.

165 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Reports (1992) 351, at 558, para. 333: 589, para. 386: ‘[T]he principle of the *uti possidetis juris* should apply to the waters of the Gulf as well as to the land’ (emphasis added). See also *Territorial and Maritime Dispute between Nicaragua and Honduras*, supra note 147, at 707, para. 156.

166 *Territorial and Maritime Dispute between Nicaragua and Honduras*, supra note 147, at 728, para. 232.

167 Cf. ibid., at 728, para. 231.


171 *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports (1995) 90, at 102, para. 29 (emphasis added).

172 *Construction of a Wall*, supra note 142, at 172, para. 88.
8 Conclusion

In practice, when determining the rules of customary international law, the ICJ does not use one single methodology but, instead, uses a mixture of induction, deduction and assertion.\textsuperscript{173} In the Arrest Warrant case, for example, the Court first asserted, in abstract terms, that foreign ministers enjoy immunities. It then established the content of these immunities, namely absolute and full immunity from criminal jurisdiction, by way of functional deduction. Finally, it stated that it had examined state practice in order to ascertain whether there existed ‘under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs’.\textsuperscript{174} It is this blending of methods that is characteristic of the Court’s methodology.

There is no greater danger of law creation in deduction than there is in induction. Indeed, it could be argued that rules arrived at by deduction are not ‘created’ by the Court at all.\textsuperscript{175} Like implied powers or implied (contract) terms, there are ‘implied rules’ – that is, rules that are already contained in existing rules or principles and that may be arrived at by deductive reasoning. These implied rules may be regarded as ‘direct and inevitable consequences’ of existing rules.\textsuperscript{176} Thus, the deductive method is also compatible with the consent principle in international law.\textsuperscript{177} The implied rules are covered by states’ consent to the existing rules or principles from which they are deduced. In this sense, deduction is the logically consistent extrapolation of the established body of customary international law. It is, however, important that new rules of customary international law are deduced only from existing legal rules or principles and not from postulated values. Otherwise, the Court would simply emulate the classical theorists with their naturalistic and self-assured deductions.\textsuperscript{178} The deductive method finds its limits in the actual will of states, as expressed by their constant and uniform practice.\textsuperscript{179} Thus, in the event of a conflict between rules of customary international law arrived at by induction and those arrived at by deduction, the former will prevail. In addition, any result reached by deductive reasoning must not be contrary to existing norms of jus cogens.

The gateway for judicial legislation is neither induction nor deduction but, rather, the ICJ’s use of assertion as a method to determine the rules of customary international law. No matter what it may say on the subject, in a majority of cases the Court has not examined the practice and opinio juris of states but, instead, has simply asserted the rules that it applies. Even its own members have criticized this methodological

\textsuperscript{173} On the mixture of induction and deduction, see also Schlütter, supra note 90, at 172; Jung, supra note 7, at 24, 131; Worster, supra note 70, at 1–2.
\textsuperscript{174} Arrest Warrant, supra note 7, at 24, para. 58.
\textsuperscript{175} But, see Kelly, ‘The Twilight of Customary International Law’, 40 VJIL (2000) 449, at 526, who argues that the Court frequently creates law, which it terms customary, by utilizing deductive rather than inductive methodologies.
\textsuperscript{176} Cf. North Sea Continental Shelf, supra note 5, at 158, Dissenting Opinion of Judge Koretsky.
\textsuperscript{177} Jung, supra note 7, at 24, 69–70.
\textsuperscript{178} D’Amato, supra note 119, at 511.
\textsuperscript{179} Cf. Tomuschat, supra note 83, at 307; Jung, supra note 7, at 35.
approach. However, assertion is not always merely a convenient methodological shortcut. There are situations where the inductive and deductive methods will not allow the Court to fulfil its normal judicial function of determining the applicable rules of customary international law because induction is virtually impossible or because there are no relevant general rules or principles from which to deduce the applicable law. Judicial assertion is the price states have to pay for the Court not to declare an epistemological *non liquet*. It must be careful, however, not to overstep the limits of the method of assertion. If the Court’s assertions do not convince its clients, States may simply stay away from the Court.

9 Summary Propositions

• The Court rarely explicitly states its methodology for determining the rules of international law.
• Induction and deduction are epistemological methods used by the Court to reach certain conclusions in the process of identifying existing rules of customary international law.
• The Court’s methodology for identifying rules of customary international law must be distinguished from the elements and evidence of those rules.
• Customary international law is, as a rule, ascertained by inductive reasoning.
• The inductive method finds its limits in the requirements of customary international law.
• The Court resorts to deductive reasoning in order to avoid a *non liquet*.
• The Court does not employ one single deductive method but resorts to normative, functional and analogical deduction.
• Deductive reasoning is not limited to identifying rules of customary international law but may also be used to confirm the results reached by induction, replace or lower the standard of inductive evidence or establish a burden of proof necessary for the inductive method to reach a result.
• Induction and deduction are not two competing or opposing monolithic analytical methods but, in practice, are intermixed.
• The Court does not distinguish between ‘traditional custom’ identified through an inductive process and ‘modern custom’ derived by a deductive process.
• The use of the two methods is neither traditional nor modern in a chronological sense but has been consistent throughout the Court’s jurisprudence.

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See section 3 earlier in this article.

• The Court’s jurisprudence does not support a special category of ‘deductive customary law’ that is deduced from the constitutional foundations of the international community.
• The choice of methodology may result in differing outcomes, but there is no evidence that the Court deliberately chooses a certain method to produce a predetermined result.
• The inductive method is as subjective, unpredictable and prone to law creation by the Court as the deductive method.
• The main method employed by the Court is not induction or deduction but assertion.