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## IDENTIFICATION OF CUSTOM IN INTERNATIONAL LAW

*The paper analyzes an issue of fundamental significance for international law the procedure for the identification of custom in public international law. Since customary law may be qualified as a sui generis source of international law, instruments and procedures for proving customs are of major importance. Particular attention is given to the role of custom in modern international law. The first part of the paper outlines the work of the International Law Commission relating to formation and evidence of customary law, including its identification. The second part of the article analyzes the jurisprudence of the International Court of Justice concerning the process of formation of customary law, instruments through which it is evidenced, as well as the procedures for evidencing it. Particularly noteworthy is the necessity to introduce objectified rules for detecting customs and to determine the scope of these rules, both internationally for a number of actors, as well as internally in the legal systems of States.*

**Key words:** *Customary international law. Identification of customary international law. International Law Commission. International Court of Justice.*

### 1. INTRODUCTION

Customary law is of vital importance for public international law. Customs were the first and predominant source of international law and, at the same time, the basic means for the creation of new rules of interna-

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tional law. With the formation of the modern international community, customs seem to have become a source of secondary importance due to a fact that universal codification of international law started to occur within the United Nations.<sup>1</sup> However, it must be stressed that the International Court of Justice (ICJ) made an important contribution to maintaining customs in the contemporary international community, even assigning them certain novel functions which are of relevance for the entire international legal order.<sup>2</sup> Numerous authors have dealt with the scope and legal nature of international custom, as well as its dichotomous structure, attempting at the same time to offer theoretical explanations for the specific subjective construction contained in Article 38 of the Court's Statute. A rough distinction between traditional and modern customs is perceived in the works of the doctrine.<sup>3</sup> This paper will, *inter alia*, indicate some of the main differences that exist between traditional customs and customs that operate in the modern international community.

## 2. WORK OF THE INTERNATIONAL LAW COMMISSION RELATING TO IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

At its sixty-fourth session, the International Law Commission (ILC) decided to include on its agenda the topic "Formation and evidence of

<sup>1</sup> For such an opinion see: P. Kelly, "The twilight of customary international law", *Virginia Journal of International Law (Va. J. Int'l L)* 40/1999 2000, 450-492.

<sup>2</sup> In a number of cases the ICJ accepted the application of rules contained in conventions not yet in force, although it was always in relation to State, which expressed its willingness to become bound by the treaty in question. The Court traced the legal basis for such a decision in the customary nature of the rules included in the convention. A treaty with a limited number of State parties may evolve into law which is generally recognized. The famous Briand Kellogg Pact may serve as an illustration. Furthermore, rules contained in Draft Articles on State Responsibility for Internationally Wrongful Acts prepared by the International Law Commission undoubtedly represent customary international law, despite the fact that they are not yet in force. As correctly stated by Pellet, "the impact of the draft articles on international law will only increase in time, as is demonstrated by the growing number of references to the draft articles in recent years." A. Pellet, "The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts", in J. Crawford, A. Pellet, S. Olleson (eds), *The Law of International Responsibility*, Oxford University Press, Oxford 2010, 87. See also: C. Annacker, "Part Two of the ILC's Draft Articles on State Responsibility", *German Yearbook of International Law (GYBIL)* 37/1994, 206; H. P. Aust, "Through the Prism of Diversity: the Articles on State Responsibility in the Light of the ILC Fragmentation Report", *GYBIL* 49/2006, 165; J. Crawford, "Revising the Draft Articles on State Responsibility", *European Journal of International Law (EJIL)* 10/1999, 435.

<sup>3</sup> A. E. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", *American Journal of International Law (AJIL)* 95(4)/ 2001, 757-791.

customary international law”.<sup>4</sup> At the session that followed, the ILC appointed Mr. Michael Wood as Special Rapporteur. In his first address to the Commission Mr. Wood observed that the procedure of evidencing customary law is very complex and that it represents one of the fundamental problems of international law. Such an observation came as no surprise. Although the Special Rapporteur Manley Hudson identified instruments for proving custom quite a while ago,<sup>5</sup> there is no unified position or objective rules that would undoubtedly determine if a custom is created or from which moment and for which States it may be considered as an unquestionable source of law.<sup>6</sup>

The work before the Commission should result in the adoption of a practical guide<sup>7</sup> that would include rules relating to the procedure of proving customs, confirm instruments that are to be used as evidence and assist judges of both international and national courts in the course of their work. From the methodological point of view, working on such a guide implies a long and comprehensive analysis of the jurisprudence of different international bodies, the ICJ in particular. The very manner in which the analysis is posited implicates an extremely wide field of research, since instruments that constitute evidence of customary law are varied and numerous and are to be found in both international and national law. The publication of the International Committee of the Red Cross entitled “Customary International Humanitarian Law” serves as an indicator as to how long and serious the venture of evidencing customary law may be.<sup>8</sup> Therefore, the role of the guide which is on the ILC’s pro-

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<sup>4</sup> Official Records of the General Assembly, Sixty sixth Session, Supplement No. 10 (A/66/10), paras. 365 367.

<sup>5</sup> Special Rapporteur Hudson considered that following elements may constitute evidence of customary international law: texts of international treaties, judgments of international courts, judgments of national courts, national laws, diplomatic correspondence, opinions of national legal advisors and practice of international organizations. See: M. Hudson, “Article 24 of the Statute of the International Law Commission”, *Yearbook of the International Law Commission (Yearbook)* 2/1950, UN Doc. A/CN. 4/16.

<sup>6</sup> Statute of the International Law Commission offers some assistance as to what may constitute evidence of customary rules. Article 24 of the Statute provides that “The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.” As means for evidencing State practice Baxter mentions the following: “diplomatic correspondence, the decision of a municipal court, a resolution of an international organization, a decision of an arbitral tribunal, a press communiqué or a municipal statute.” R. R. Baxter, “Multilateral Treaties as Evidence of Customary International Law”, *British Yearbook of International Law (BYIL)*, 41/1965 1966, 275.

<sup>7</sup> See: Official Records of the General Assembly, Sixty seventh Session, Supplement No. 10 (A/67/10).

<sup>8</sup> J. M. Henckaerts, L. Doswald Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross, Cambridge University Press, Cambridge

gram of work is accordingly less ambitious since its main aim is to objectify both instruments and the procedure for identifying customary international law, with no ambition as to its codification.

The process of creating customary law is a specific legal construction in many respects. On the one hand, it represents a spontaneous undertaking due to the fact that States voluntarily subject themselves to a particular practice that is in accordance with their interests. On the other hand, it is an entirely atypical procedure if compared to the process of creating rules in national law since it implies an unwritten rule. The very moment in which the custom obtains the written form is usually after the act of crystallization. Thus in the case of custom, an organic process appears which is highly specific and difficult to incorporate into clear and objective rules. That is why the decision of the Commission to work on the adoption of a guide for the practice of States rather than on the text of the convention should be considered as justified.

### 2.1. First report of the Special Rapporteur

At the Commission's sixty-fifth session the Special Rapporteur presented his first report on elements for proving custom.<sup>9</sup> In order to implement the work relating to the formation and evidence of customary process it is necessary to divide the entire matter into a number of segments. The Commission thus selected the following elements: general overview, State practice, subjective element of custom (*opinio juris sive necessitatis*), relevant practice of international organizations, relevant judgments and opinions of the doctrine. In addition to these core areas, other important questions are also identified, such as the issue of the obligatory character of custom and its features in modern international law, the question of the creation of *erga omnes* rules, rules of *jus cogens* and their relationship with customary rules, as well as the relationship between universal customs and universal treaties.<sup>10</sup>

2009. Such publications may assist in the preparation of the practical guide which is on the ILC's agenda since they may serve as a sort of codification of a part of international law. A special focus is on the practice of States regarding the mandatory character of customs in international humanitarian law. States wish to accord the status of customary law only to rules that dispose of absolute application in their practice, at the same time refusing such status to a number of other rules presented in this publication.

<sup>9</sup> First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur, International Law Commission, Sixty fifth session, Geneva, 6 May – 7 June and 8 July – 9 August 2013, General Assembly, A/CN.4/663. The Special Rapporteur recalls at the very beginning of his work that this is not the first time that the ILC is dealing with such an important matter. A special position should thus be accorded to the origins of the Commission's work, i.e. when in 1950 it introduced to its agenda the topic entitled "Ways and Means of Making the Evidence of Customary International Law More Readily Available". *Yearbook* 2/1950, 367–374.

<sup>10</sup> First report on formation and evidence of customary international law by Michael Wood, 6–11. See also: A/CN.4/659, summary.

An important matter to be examined in the course of the examination of evidence in customary process is the issue of fragmentation of international law both *ratione materiae* and *ratione loci*. Regarding the material aspect, views are expressed by various authors that autonomous legal regimes have started to appear such as international humanitarian law, human rights law and international criminal law.<sup>11</sup> These authors claim that the method of forming rules in these areas, their application and scope, differ from other rules of general international law.<sup>12</sup> The introduction of special and autonomous legal regimes would mean, quite naturally, their exemption from the effects of rules of general international law. This would lead to the disintegration of the entire international legal regime, an exemption of peremptory rules and eventually it may undermine the general international legal order. Such a process would be dangerous and harmful in every respect. On the other hand, the process of making custom may be perceived through the emergence of comprehensive regional regimes, such as the European Union, where rules are established through special legal techniques and are applied in a manner which is not accepted in general international law. There are views that rules of universal international law are unenforceable within *ordre communautaire*. As in the previous case, an exemption for such a regional legal order from the general international law would certainly be detrimental for the international community as a whole.<sup>13</sup> If one takes into consideration the obvious uniqueness of the international order and the width of the issue of formation and evidence of customary law, the task of the Commission is more legally-technical in its nature, as it involves the determination of objective rules to detect the existence of custom, determine the process of their creation and their final formation. The aim of the Commission's work is therefore justifiably reduced to creating clear indicators in the customary process, rather than giving the final judgment as to whether a particular rule has been established as a custom or not.<sup>14</sup>

The ILC was particularly interested in the relationship between customary and imperative rules. As these rules mainly arose out of cus-

<sup>11</sup> For sociological analysis of custom in the modern international community see: E. Posner, J.L. Goldsmith, "Understanding the Resemblance between Modern and Traditional Customary International Law", *Va. J. Int'l L* 40(2)/1999, 639.

<sup>12</sup> T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford 1989, 28 32.

<sup>13</sup> A clear critique of any sort of fragmentation in international law is contained in the declaration of Judge Greenwood: "International law is not a series of fragmented specialist and self contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law". Declaration of Judge Greenwood, Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment of 19 June 2012, *ICJ Reports* 2012, 394, para. 8.

<sup>14</sup> First report on formation and evidence of customary international law by Michael Wood, 9.

tomary law, views were expressed that they should also be included in the guide. Even though their definition is contained in the 1969 Convention on the Law of Treaties,<sup>15</sup> *jus cogens* rules still provoke various controversies not only in practice but also and mainly in the doctrine of international law. There is no agreement as to which norms fulfilled the necessary conditions in order to be considered as peremptory norms. However, there seems to be no doubt as regards their legal effect. On the other hand, if we observe positive international law, cogent norms are inevitable in the process of creating customs since they represent formal restrictions regarding trends in State practice and the very process of formation of new customary rules. Some authors tend to interpret contemporary cogent norms as general customary law.<sup>16</sup> However, this is an excessively liberal conception because the necessary form possessed by cogent norms would thus be diluted and, as a result, an unjustified extension of norms pretending to acquire such legal nature would occur. Clearly, general customary law may, over time, lead to the creation of cogent norms. Nevertheless, it is also apparent that not all general customary rules have so far reached the required level of imperativeness in order to be considered as *jus cogens*. The theoretical discord regarding rules of cogent character has led the members of the Commission to avoid including the issue of *jus cogens* in the scope of the present topic.<sup>17</sup> Still, the ILC's work on the guide would not be possible without taking into account cogent norms and they will surely be elaborated on to the extent necessary.

As one of the unavoidable issues related to customary law, a question arises regarding its relationship with treaties. On the one hand, there is formal equality between them<sup>18</sup>, on the other hand there is a reverse rela-

<sup>15</sup> Article 53 of the Convention on the Law of Treaties. *United Nations Treaty Series (UNTS)* 1155/1980, 344.

<sup>16</sup> A. de Hoogh, *Obligations Erga Omnes and International Crimes*, Kluwer Law International, 1996, 45-48; P. Reuter, *Introduction au droit des traités*, Librairie Armand Colin, 1972, 139-140; A. Kaczorowska, *Public International Law*, 4<sup>th</sup> edition, Routledge, 2010, 28; R. Jennings, A. Watts (eds.), *Oppenheim's International Law*, 9<sup>th</sup> edition, Oxford University Press, Oxford 1992, 7-8; R. B. Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates", *EJIL* 21/2010, 173, 177; A. D'Amato, *The Concept of Custom in International Law*, Cornell University Press, 1971, 132; A. Cassese, "For an Enhanced Role of Jus Cogens", in A. Cassese (ed.), *Realizing Utopia*, Oxford University Press, Oxford 2012, 158, 164; T. Meron, "On a Hierarchy of International Human Rights", *AJIL* 80/1986, 13-21; A. McNair, *Law of Treaties*, Clarendon Press, 1961, 213-215; J. Paust, "The Reality of Jus Cogens", *Connecticut Journal of International Law* 7/1991, 81, 82; J. Crawford, *Brownlie's Principles of Public International Law*, 8th edition, Oxford University Press, Oxford 2012, 594; N. G. Onuf, R. K. Birney, "Peremptory Norms of International Law: Their Source, Function and Future", *Denver Journal of International Law and Policy* 4/1974, 187, 191.

<sup>17</sup> First report on formation and evidence of customary international law by Michael Wood, 11.

<sup>18</sup> In the meaning of Article 38 of the Statute of the International Court of Justice.

tion in the sense that customary law often acquires written form through codification while treaties become part of general customary law. The importance of custom in modern international law is perceived through ensuring the implementation of legal obligation in situations when certain rules of the treaty may apply to States which are not parties. The 1969 Convention on the Law of Treaties may serve as an example.<sup>19</sup>

## 2.2. Second report of the Special Rapporteur

During the Special Rapporteur's work on his first report it was suggested that the title of the topic was only provisional. Based on the discussions led in the Commission it was finally decided that the topic in the second report would be entitled "Identification of customary international law". This is a welcome change since it better reflects the very essence of the Commission's work on the present topic, i.e., an effort to establish objectified rules for detecting customary law. Due to the fact that States are the primary creators of customary process, comments provided by certain among them have already been received during the work on the second report.<sup>20</sup> According to reports submitted by States, but more importantly, based on the jurisprudence of international bodies, the ICJ in particular, it may be concluded that there is a general acceptance of custom's dichotomous legal nature in the spirit of Article 38 of the Statute of the Court – State practice and *opinio juris*.<sup>21</sup> The conclusion of the Commission seems to follow the same line of reasoning.<sup>22</sup>

The subsequent work of the Commission is designed to adopt basic guidelines relating to fundamental elements of custom – practice and *opinio juris*. As far as practice is concerned, it needs to meet certain requirements in order to qualify as a relevant constituent of custom. Above all, it must emanate from the State.<sup>23</sup> In addition, the act that is attributed to the State must represent a clear manifestation of will which is per-

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<sup>19</sup> E. W. Vierdag, "The Law Governing Treaty Relations between Parties to the Vienna Convention on the Law of Treaties and States not Parties to the Convention", *AJIL* 1982, 779 801.

<sup>20</sup> The following States have already submitted their reports to the Special Rapporteur: Belgium, Botswana, Cuba, Czech Republic, El Salvador, Germany, Ireland, Russia, and Great Britain. Second report on identification of customary international law by Michael Wood, Special Rapporteur, International Law Commission, Sixty sixth session, 2014, UN Doc. A/69/10, 4.

<sup>21</sup> *Ibid.*, 8 *et seq.*

<sup>22</sup> *Ibid.*, 7 8.

<sup>23</sup> M. H. Mendelson, "The Formation of Customary International Law", *Recueil des Cours* 272/1998, 155 201. Rules of attribution, similar to those relating to attribution as regards State responsibility, are to be applied here. ILC Draft Articles on the Responsibility of State for Internationally Wrongful Acts, *Yearbook* 1/2001, chp. II; J. Crawford, *State Responsibility. The General Part*, Cambridge University Press, 2013, 113 126. Thus, in order to be relevant, the practice must emanate from official State organs, legisla

formed in the same manner as it used to be done and in which it will continue to be done in the future. Such acts of the State need not necessarily be identical. In certain cases they may take the form of a legislative act, in other cases they might consist in press releases or be derived from a decision of the national court.<sup>24</sup> Some authors suggest that: “[w]ith the development of international organizations, the votes and views of states have come to have legal significance as evidence of customary law.”<sup>25</sup> Although these views are frequently cited, one should be very careful when automatically attributing votes or discussions to States in the sense of creating practice as an element of custom. Though it undoubtedly represents the position of the State in question, it can hardly be claimed that such acts also constitute practice suitable for creating custom since the *animus* of the State is missing. The will of the State expressed by voting within an organ of an international organization reflects the adoption of the resolution, not the creation of a custom. This objection may be classified as material, even though from a formal point of view the State’s will could be considered as suitable for the creation of practice attributed to it. It is also essential to distinguish between acts of State representatives performed in their official capacity when there are stronger grounds for attribution, and situations in which they act in a personal or professional capacity such as, for example, members of the ILC and expert groups, when their actions can in no way be treated as acts of States and therefore are of no relevance for the process of creating practice. Since it is apparent that manifestations of practice may be quite different, there are situations in which a State, through its acts, expresses disparate or not quite identical positions. All of these different manifestations should be taken into account in a balanced way. Thus the ILC itself held that there is no hierarchy among elements of practice of the subject in question.<sup>26</sup>

tive, judicial or administrative, and regardless of their position in the internal organization of authority.

<sup>24</sup> The second report of the Special Rapporteur cites various acts that may be interpreted as elements of practice attributed to States: diplomatic correspondence, statements of officials, press conferences, opinions of official legal advisers, official manuals for internal organs, administrative decisions, comments of States submitted at the request of the ILC, decisions of courts,... J. Crawford, (2012), 24. It is clear that this list is not closed but may be altered depending on the particular manifestation of will. It may even be the General Assembly resolution adopted with a positive vote of the State in question in cases when its vote may be taken as its manifestation of will which is attributed to it as an element of custom. Separate Opinion of Judge Ammoun, *Barcelona Traction, Light and Power Company, Limited*, Judgment of 5 February 1970, *I.C.J. Reports* 1970, 302-303. There are opinions that decisions of the Security Council may also represent an obvious indicator of practice for the States that adopt them by voting.

<sup>25</sup> R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, Oxford University Press, Oxford 1963, 2.

<sup>26</sup> Second report on identification of customary international law by Michael Wood, Draft Conclusion 8, Weighing evidence of practice, 33.



Universal or general customs require an additional criterion to be met which relates to the general character of practice. This is a specific condition which is interpreted in a relative manner by the organ that applies law, the ICJ in particular. The practice is required to be widespread, which means that it encompasses States belonging to different regions, representative States and States whose interests are particularly affected.<sup>27</sup> In order to be suitable for creating custom, practice needs to be consistent and uniform. Repetitive actions are thus essential for the formation of customary law. Naturally, actions can never be absolutely identical, nor are they always performed by the same actors. Circumstances also vary. However, the purpose of the action in question should in no way be changed.<sup>28</sup> This interpretation is not entirely justified since it goes beyond the domain of practice and is already halfway to the second, subjective element of custom which reflects the sense of legal obligation. Nevertheless, a clear distinction should be made between consistent practice of States where minor deviations may be tolerated, and practice which is inconsistent enough to consider it an indication of the creation of a novel, different custom.

State practice as the first element of custom raises no major disagreements since it may be considered a measurable category. The second element, *opinio juris*, is far more difficult to prove. It is often referred to as the subjective or qualitative element of custom. It actually points to a voluntary subordination to a particular rule of law, thus providing international law with a new evaluative dimension. It is particularly difficult to distinguish between practice that creates custom and practice which is not eligible to form a rule of customary law. An effort is visible in the second report of the Special Rapporteur to detect tangible criteria that could serve as grounds for recognizing the existence of the subjective element in the process of formation of customary law. The report tends to suggest that *opinio juris* is formed according to the interests of individual States. When national interests of a number of States match and they accordingly take identical or similar actions during an extended period of time, the subjective element of customary law is constituted.<sup>29</sup> However, this

<sup>27</sup> J. L. Kunz, "The Nature of Customary International Law", *AJIL* 47/1953, 666. See also: North Sea Continental Shelf Cases, (Federal Republic of Germany v. Netherlands, Federal Republic of Germany v. Denmark), Judgment of 20 February 1969, *ICJ Reports* 1969, 42, para. 73. Creation of custom in the law of outer space may be used here as an example. Only a limited number of States were in a position to use this area in a rather short period of time. However, this was not an obstacle to establish certain general rules which have since become mandatory for all the States in the world.

<sup>28</sup> J. Barboza, "The Customary Rule: From Chrysalis to Butterfly", in C.A. Armas Barea et al. (eds.), *Liber Amicorum 'In Memoriam' of Judge José María Ruda*, Kluwer Law International, 2000, 7.

<sup>29</sup> Second report on formation and evidence of customary international law by Michael Wood, 42 et seq.

mental element should be present with every State participating in the creation of custom. “The normative sense of behavior can be determined only once we first know the ‘internal aspect’ – that is, how the State itself understands its conduct.”<sup>30</sup> A psychological element is introduced to the legal environment, thus granting customs special position among sources of international law. Although this is a highly delicate issue, it seems that conclusions relating to the second element of custom ought to have been more specific in explaining how the subjective element should be recognized in practice.<sup>31</sup>

There is an expectation that the future work of the Commission will improve rules that have already been accepted and further shape the framework for the objective identification of customs in international law. For the moment, however, the impression remains that the Special Rapporteur could have offered more through his reports, especially if we take into account the rich jurisprudence of the ICJ on this issue, but also abundant theoretical studies. Framework rules that have so far emerged from the report are not of much assistance for clarifying ambiguities which are inherent in the identification of customary international law.

### 3. IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW IN THE JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE

The principal judicial organ of the United Nations and its case law will surely be of particular significance for the present topic since members of the Commission expressed the view that the jurisprudence of the ICJ “may be considered the primary source of material on the formation and evidence of rules of customary international law”.<sup>32</sup> Being a result of a thorough analysis of the entire case-law of the ICJ relating to customary international law, this part of the paper will firstly outline the reasons for according such a particular importance to the approach employed by the Court when faced with the task of identifying the customary nature of a

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<sup>30</sup> M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, Cambridge 2005, 388.

<sup>31</sup> Draft Conclusion 10 (Role of acceptance as law): 1. The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation. 2. Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage. Second report on formation and evidence of customary international law by Michael Wood, 49–50.

<sup>32</sup> Report of the International Law Commission on the work of its sixty fifth session, 6 May to 7 June and 8 July to 9 August 2013, General Assembly Official Records, Sixty eighth Session, Supplement No. 10 (A/68/10), chp. VII, 98, para. 93.

rule in question. Secondly, it will be argued that there is coherence in the jurisprudence of the Court as regards certain general issues relating to the identification of customs. The analysis has, however, shown an inconsistent approach of the Court regarding evidence of particular rules of customary international law. The last part of the paper will therefore review different approaches used by the Court in particular cases in order to prove the existence of a customary rule.

### 3.1. Relevance of the ICJ's case law for the work of the ILC on the present topic

The significance of ICJ's case law for the work of the ILC on this topic may be discerned at multiple levels.

First of all, the very wording of the topic to be discussed by the ILC seems to be tailored according to the Court's role in dealing with customary law.<sup>33</sup> The term "identification" encompasses evidence, but it actually does not include formation. The choice of the ILC regarding the title of the topic must have been heavily influenced by the Court and its contribution to the topic, since the Court only identifies customs, it does not create them.<sup>34</sup>

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<sup>33</sup> Instead of the initial title "Formation and evidence of customary international law", the topic under present consideration is now entitled "Identification of customary international law". *Ibid.*, 95, para. 76.

<sup>34</sup> Stern considers it "absolutely clear" that the Court's confirmation of a customary nature of a rule in question in a dispute between two States "could not help but have a certain impact above and beyond the two States concerned". B. Stern, "Custom at the Heart of International Law", *Duke Journal of Comparative and International Law* 11/2001, 101. Kopelmanas's words on the relevance of the Permanent Court of International Justice (PCIJ) for the issue of identifying customary law may as well apply to its successor. The author does not take the PCIJ's role for granted. He believes that its doctrine on the matter of identification of customary international law is "unstable and vague". However, Kopelmanas stresses that the Court's position needs to be acknowledged and that the question "can be raised most frequently before the Court". L. Kopelmanas, "Custom as a Means of the Creation of International Law", *BYIL* 18/1937, 129 fn. 1. The same author's further position on the decisions of international courts as factors in the evolution of custom seems to go too far, beyond the role usually attributed to them. He considers the judge to be "the author *par excellence* of custom". *Ibid.*, 141. This statement should be taken as an excessive interpretation of the Court's contribution to identification of customary international law. We agree with the author that important rules of international law, such as those relating to the interpretation of treaties or the rules on State responsibility indeed became undisputed rules of positive customary international law due to the fact that they were declared as such by numerous decisions of both the PCIJ and ICJ. Nevertheless, it does not mean that the Court is their creator, but that it simply contributed to the clarification of the matters previously prone to States' contradictory views. Katzenstein's position that "international judicial decisions shape contemporary understandings of international legal rules" seems to better express the nature of the Court's role with regard to customary law. S. Katzenstein, "International Adjudication and Custom Breaking by Domestic Courts", *Duke Law Journal* 62/2012 2013, 683. Baxter's statement relating to *Nottebohm*

Secondly, the most accurate and widely accepted definition of international custom is contained in the Statute of the ICJ. Article 38 (1) (b) defines custom as “evidence of a general practice accepted as law”. This observation relates to both the formal and material aspect of the definition contained in the ICJ’s Statute. Namely, the two-element approach is well established in the case law of the Court and may be considered as a part of its “settled jurisprudence”. The Commission itself obviously has no intention of departing from such an understanding of international custom.<sup>35</sup>

Thirdly, the ILC insists on analyzing the influence that other sources of law may have in relation to evidence of customary international law. Weight to be accorded to particular acts, including acts qualified as soft law, is best perceived through the jurisprudence of the Court.<sup>36</sup>

Finally, in addition to the previous reasons which all relate, in one way or another, to the Court itself or its personal approach to identifying customary international law and may therefore be qualified as intrinsic in their nature, the last remark relating to the importance of the Court’s case-law could be referred to as extrinsic. The ILC clearly noted that State practice as an element of customary international law may, *inter alia*, be evidenced by States’ arguments before international courts, ICJ in particular.<sup>37</sup>

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case that “the very assertion of the International Court that Articles 1 and 5 of the Convention had passed into customary international law did make them pass into customary international law” should be understood in the same manner. R.R.Baxter, 296. Finally, it should not be neglected that even Judge Manley Hudson, when reporting to the ILC on the five elements required for “the emergence of a principle or rule of customary international law”, considered as the fifth element that the presence of each of the previous four elements “is to be established as a fact by a competent international authority”. M. Hudson, 26, para. 11. For the comment on Hudson’s inclusion of this element see A. D’Amato, “Wanted: A Comprehensive Theory of Custom in International Law, *Texas International Law Forum* 4/1968, 39 40.

<sup>35</sup> Report of the International Law Commission on the work of its sixty fifth session, 99, para. 101.

<sup>36</sup> In addition to the Court’s early judgments, in which it shed important light on the relevance of international treaties and various unilateral acts for the identification of customary law, the Court has recently made an important elaboration of certain soft law acts, such as General Assembly resolutions, and the weight that should be attributed to them when evidencing customary law. *North Sea Continental Shelf Cases*, 41 42, paras. 68 74. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports 1996*, 254 255, para. 70.

<sup>37</sup> Report of the International Law Commission on the work of its sixty fifth session, 98, para. 91. The Court has, however, cautiously approached the position proclaimed by the parties during the dispute, and has insisted that States “must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.” *North Sea Continental Shelf Cases*, 44, para. 77. The Court confirmed its position in the case relating to *Military and Paramilitary Activities in*

### 3.2. Coherence in the case-law of the Court as regards certain general issues of customary law identification

Certain general aspects of customary international law have constantly been invoked by the ICJ in its judgments and must therefore be regarded as indisputable. Both the Permanent Court of International Justice (PCIJ) and the ICJ have constantly held that international customary law is formed through State practice followed by *opinio juris*.

As early as 1927 the PCIJ stated that international law emanates from, *inter alia*, “usages generally accepted as expressing principles of law”.<sup>38</sup> The ICJ, as its successor, has constantly held the same position. It is indicative to cite two quite recent judgments delivered by the Court. They may be taken as proof that perception of international customary law in the twenty-first century differs in no way from its conception adopted almost a century earlier. In its judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the Court expressed the opinion that the prohibition of torture is a part of customary international law since it “is grounded in a widespread international practice and on the *opinio juris* of States”.<sup>39</sup> The Court was consistent with the traditional conception of international custom in a judgment delivered several months earlier in the case concerning *Jurisdictional Immunities of the State*. The Court considered that its task is to “determine .... the existence of international custom, as evidence of a general practice accepted

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*and against Nicaragua*. Referring to the position proclaimed by the United States to the principle of non intervention, the Court concluded that “the United States authorities have on some occasions clearly stated grounds for intervening in the affairs of a foreign State (...). But these were statements of international policy, and not an assertion of rules of existing international law.” *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v. United States of America), Judgment on the Merits of 27 June 1986, *ICJ Reports* 1986, 108, para. 207. States’ explicit acknowledgment of a particular rule’s customary nature, as a part of its argumentation during pleadings, is thus not taken for granted by the Court as evidence of its attitude towards that particular rule. P. M. Dupuy, “La pratique de l’article 38 du Statut de la Cour internationale de justice dans le cadre des plaidoiries écrites et orales” in *Collection of Essays by Legal Advisers of International Organizations and Practitioners in the Field of International Law*, United Nations, New York 1999, 377 394.

<sup>38</sup> The Case of the SS ‘Lotus’ (France v. Turkey), 1927 PCIJ (ser. A) No. 10, 18. PCIJ further clarified the very essence of customary law by focusing on the imperative presence of both elements: “Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances (...) it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstentions were based on their being conscious of having a duty to abstain, would it be possible to speak of an international custom.” *Ibid.*, 107.

<sup>39</sup> *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment of 20 July 2012, *ICJ Reports* 2012, 457, para. 99.

as law”.<sup>40</sup> In order to do that the Court thought it necessary to “apply the criteria which it has repeatedly laid down for identifying a rule of customary international law”.<sup>41</sup> The Court seems to consider these criteria as being part of its settled jurisprudence as it simply chose to refer to its most important judgments in this regard.

In the *North Sea Continental Shelf* cases the Court has not only insisted upon both “settled practice” and *opinio juris*, it has further elaborated on specific features that the two elements need to possess in order to be considered as candidates for the objective and subjective elements of custom. The Court took the position that “State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform ... and should moreover have occurred in such a way as to show general recognition that a rule of law or legal obligation is involved.”<sup>42</sup> In addition, the same judgment tends to provide for guidance on the relevant criteria that State practice, as an objective element of custom, needs to meet. Attention should, according to the Court, be devoted to the frequency and habitual character of acts, as well as the level of their excessiveness and virtual uniformity.<sup>43</sup> The ICJ has also stressed the significance of actual practice, observing that “it 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”.<sup>44</sup> Furthermore, in another case well known for the Court’s elaboration on different aspects of customary international law – *Military and Paramilitary Activities in and against Nicaragua*, the ICJ clearly stated that State practice is not expected to provide for absolute uniformity with respect to a particular rule as a requirement for customary law, but rather to meet the condition of consistency and generality. It held that “in order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule”.<sup>45</sup> The importance of consistency as crite-

<sup>40</sup> Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, *ICJ Reports* 2012, 122, para. 55.

<sup>41</sup> *Ibid.*

<sup>42</sup> *North Sea Continental Shelf Cases*, 43, para. 74.

<sup>43</sup> *Ibid.*, 44, para. 77.

<sup>44</sup> *Continental Shelf case (Libyan Arab Jamahiriya v. Malta)*, Judgment of 3 June 1985, *ICJ Reports* 1985, 29–30, para. 27. In another case the Court referred to “the actual practice of States” as “expressive, or creative, of customary rules”. *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, *ICJ Reports* 1982, 46, para. 43.

<sup>45</sup> *Military and Paramilitary Activities in and against Nicaragua*, 98, para. 186.

ria for State practice was also confirmed, though in an indirect manner, in the famous *Asylum* case.<sup>46</sup>

The issue of *opinio juris* as the second necessary element of custom, has not, as opposed to State practice, received that much elaboration in the case-law of the Court. In the *Nicaragua* case the ICJ simply indicated that the existence in the *opinio juris* of States of the principle of non-intervention should be backed by established and substantial practice.<sup>47</sup> The Court went on to explain that “either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”<sup>48</sup> This statement, originally proclaimed by the Court in the *North Sea Continental Shelf* cases,<sup>49</sup> reveals the only so far “settled” aspect of the subjective element of customary law. Since it is implied in State practice and, therefore, needs to be deduced from it, the *opinio juris* element is, according to some authors, at the very root of all problems relating to the identification of customary international law.<sup>50</sup>

### 3.3. Incoherence in the Court’s case-law as regards evidence of particular rules of customary international law

The ICJ does not apply a single, uniform approach to the identification of rules of customary international law. The Special Rapporteur has so far made a distinction between two basic approaches, taking presence of a detailed analysis as the relevant criterion.<sup>51</sup> However, Mr. Wood’s differentiation neither reveals nuances in these two approaches which may be identified through a close examination of its case law, nor

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<sup>46</sup> The Court observed that “the facts ... 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 (...) any constant and uniform usage, accepted as law” Colombian Peruvian Asylum case (*Colombia v. Peru*), Judgment of 20 November 1950, *ICJ Reports* 1950, 277.

<sup>47</sup> *Military and Paramilitary Activities in and against Nicaragua*, 106, para. 202.

<sup>48</sup> *Ibid.*, 108–109, para. 207.

<sup>49</sup> *North Sea Continental Shelf Cases*, 44, para. 77.

<sup>50</sup> Stern believes that the element of *opinio juris* “undeniably gives the judge a very wide margin in which to maneuver.” She also considers that there is much truth in Kelsen’s words that *opinio juris* masks the role of the judge in the creation of law. B. Stern, 101–102.

<sup>51</sup> According to the Rapporteur, the first approach consists in ascertaining the customary nature of a rule in question without any detailed analysis of either of the two elements, whereas the second one engages the Court in a thorough analysis of State practice and *opinio juris*. It seems that the Special Rapporteur was aware of the “risk of oversimplification” that may occur as a result of such a distinction. First report on formation and evidence of customary international law by Michael Wood, 24, para. 62.

focuses on the very essence of the problem. The relevant criterion should be qualitative, not quantitative.

In general, the Court considers it crucial to “satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by the practice”.<sup>52</sup> Still, it is in various manners and using different techniques that the Court reaches such a conclusion.

It is quite often that the Court chooses not to enter into the complex and cumbersome process of investigating and evaluating State practice, but instead simply declares that a rule is to be considered as customary international law. Such a flexible or liberal approach, which will be referred to as “identification without evidence”, may also vary from case to case and therefore, different categories of the first approach may be identified depending on the level of flexibility in the Court’s approach. In certain cases, the Court simply ascertains that a rule in question “reflects customary international law” without any additional reference to its previous case-law, State practice or other arguments.<sup>53</sup> This approach may be qualified as extensively flexible and should be avoided, since by using it the Court departs in a rather disturbing manner from its “openly proclaimed standards” for establishing customary law.<sup>54</sup> The second version of the first approach is quite similar to the previous one since it also tends to identify the rule as customary international law without properly evidencing it. This approach, however, differs from the excessively flexible one by the Court’s tendency to find some kind of support for its position, although this “support” can in no way be considered as evidence of either State practice or *opinio juris*. For example, the Court has the habit of simply pointing to the position taken by the ILC as regards the customary character of a rule in question. This kind of approach was used by the Court in its judgment in the case concerning *Gabčikovo-Nagymaros Project*, where the Court simply stated that the conditions for a state of necessity, as a ground for precluding wrongfulness, included in the ILC Draft Article 33, “reflect customary international law”.<sup>55</sup> This approach is

<sup>52</sup> Military and Paramilitary Activities in and against Nicaragua, 98, para. 184.

<sup>53</sup> Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment of 16 March 2001, *ICJ Reports* 2001, 97, para. 185, and 100, para. 201. Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, 666, para. 118.

<sup>54</sup> R. H. Geiger, “Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal”, in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, Oxford University Press, Oxford 2011, 692.

<sup>55</sup> *Gabčikovo Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *ICJ Reports* 1997, 40–41, para. 52. Similarly, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), the Court did not bother to provide evidence for its statement that a particular rule is a rule of customary international law. It



not to be confused with the Court's reliance on the work and research of ILC as regards State practice in situations in which, instead of making its own research on the subject, the Court uses a "shortcut" and accepts the thorough analysis of State practice already conducted by the Commission.<sup>56</sup> Even though the Court does not engage itself in the process of collecting evidence of State practice and *opinio juris*, its reliance on the work of the ILC should be considered as acceptable. It may be presumed that often the ILC has put in several decades of long work on a certain topic and can offer a research of State practice on a particular subject that the Court would never be able to either collect or examine during the course of proceedings in a case at hand. Another variation of the "identification without evidence" approach is reflected in the Court's reasoning that the fundamental character of a rule in question is in itself enough to identify it as customary law. In the Advisory Opinion delivered by the Court in *Legality of the Threat or Use of Nuclear Weapons*, the ICJ claimed that "it is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'" that they "are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".<sup>57</sup> The Court itself offered an

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simply stated that the rule in question "is one of customary international law" and that it is "reflected" in a particular article of the ILC's Draft Articles on State Responsibility for Internationally Wrongful Act. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, *ICJ Reports* 2007, 202, para. 385, 207, para. 398, 217, para. 420. The same approach was used by the Court in its Advisory Opinion concerning immunity of a Special Rapporteur of the Commission on Human Rights. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, *ICJ Reports* 1999, 87, para. 62.

<sup>56</sup> In the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), the Chamber of the ICJ concluded that it "can best express its thinking on this subject by quoting the comment made by the Court, in its Judgment of 20 February 1969" which referred to "the records of the International Law Commission, which had the matter under consideration from 1950 to 1956". *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), Judgment of 12 October 1984, *ICJ Reports* 1984, 297, para. 107. Quite recently the Court used the same approach and relied exclusively on the work and research provided by the ILC. In the case concerning *Jurisdictional Immunities of the State*, it held that "the International Law Commission concluded in 1980 that the rule of State immunity had been 'adopted as a general rule of customary international law solidly rooted in the current practice of States'". The Court, however, thought it necessary to stress that the Commission's conclusion "was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention". *Jurisdictional Immunities of the State*, 123, para. 56.

<sup>57</sup> *Legality of the Threat or Use of Nuclear Weapons*, 257, para. 79.

explanation for using such an approach in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*. It seems to suggest that no particular State practice is necessary to be proven with regard to basic legal principles as customary international law.<sup>58</sup> It may be expected that the Court will continue to use the flexible “identification without evidence” approach with regard to abstract rules incapable of being applied directly to the facts of the case.<sup>59</sup> It might also be expected that such an approach would prevail in respect to rules appertaining to newly developed areas of international law. In the case concerning *Pulp Mills on the River Uruguay*, the Court not only pointed out that “the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory” but also considered “that this obligation ‘is now part of the *corpus* of international law relating to the environment’”.<sup>60</sup> Two remarks need to be made on this point. First of all, the Court’s approach to identifying rules of customary international law does not vary depending on the specificities of a particular field of law. The Court will most probably use the flexible approach in certain areas of international law in which State practice has not so far reached the necessary level of coherence, but in relation to which there is common understanding in the international community as regards the importance of such basic principles. However, the reason should be traced to the general and abstract nature of the rule, not the fact that it belongs to a specific area of international law. Secondly, the Court extended the customary effect of a rule in question to a new area of international law by simply invoking its previous statement on the subject. It does not consider it necessary to conduct a novel procedure for identification of the customary nature of a rule in question with regard to the specific sphere of relations between States.

The second approach used by the Court when identifying rules of customary law will be qualified as “identification through evidence”. As will be seen, this approach also varies.

In certain cases the Court “satisfies” itself by invoking its own statements contained in previous decisions as to the customary nature of the rule in question.<sup>61</sup> The Court should, however, bear in mind that the

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<sup>58</sup> Such legal principles, according to the Court, “lay down guidelines to be followed with a view to an essential objective.” *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, 290, para. 81.

<sup>59</sup> The Special Rapporteur’s explanation for using such an approach relies on the “obvious” character of the matter and the fact that the Court views it as “unquestioned law”. First report on formation and evidence of customary international law by Michael Wood, 24, para. 62.

<sup>60</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, *ICJ Reports* 2010, 55–56, para. 101.

<sup>61</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, *ICJ Reports* 2008, 219, para. 112. Invocation of previous case

temporal element may be of significance in situations in which it is “relying on precedent rather than repeatedly engaging in detailed analysis”.<sup>62</sup> Subsequent practice of States must be taken into consideration instead of simply presuming that States continue to act in the same manner in which they used to act at a certain point in the past.<sup>63</sup>

The genuine “identification through evidence” approach consists, however, in the Court’s own examination of both State practice and *opinio juris* in order to reach a conclusion about the existence of a customary rule. Relevant case-law in which the Court decided to apply this model tends to suggest that a number of questions still remain open and that the ILC should endeavor to clarify them in the course of its future work on the subject. First of all, what seems to be the weight accorded by the Court to the two elements of custom – State practice on the one hand and *opinio juris* on the other? Is it always easy to make a distinction between the two elements in the Court’s analysis, or has the Court “blurred the distinction between State practice and *opinio juris*”?<sup>64</sup> As opposed to situations in which the Court engages in a thorough examination of State practice, there are cases when reference to State practice is only a formality. Thus, instead of focusing on the objective element and traditionally deducing *opinio juris* from a detailed analysis of State practice, the Court sometimes gives more weight to the subjective element and focuses exclusively on the examination of *opinio juris*.<sup>65</sup> Secondly, there is the eter-

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law notwithstanding, the position of State parties to the dispute stresses the relevance of the Court’s position regarding the customary nature of a particular rule even outside of the context of the case at hand. This remark further indicates how important it is to establish clear and unequivocal standards with regard to identification of customary law. Pulp Mills on the River Uruguay, 103 104, para. 273. Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment of 6 November 2003, *ICJ Reports* 2003, 198, para. 76. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, *ICJ Reports* 2004, 194, para. 140.

<sup>62</sup> T. Meron, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches*, Oxford University Press, Oxford 2011, 31.

<sup>63</sup> Chigara takes the position that “indirect violation of custom occurs when an international tribunal invokes and applies customary international law, as previously declared by another tribunal, without scrutinizing the basis for such a declaration”. B. Chigara, “International Tribunal for the Law of the Sea and Customary International Law”, *Loyola of Los Angeles International and Comparative Law Review* 22/2000, 450. We see no reason why the same would not apply to invocation of previous case law of the same international tribunal.

<sup>64</sup> O. Yasuaki, “Is the International Court of Justice an Emperor Without Clothes?”, *International Legal Theory* 81/2002, 16.

<sup>65</sup> The ICJ expressly stated that it has to be satisfied “that there exists in customary international law an *opinio juris* as to the binding character of such abstention.” Military and Paramilitary Activities in and against Nicaragua, 99, para. 188. Referring to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the Court noted that “the adoption by States of this text affords an indication of their *opinio juris* as

nal question of what constitutes State practice and what weight should be accorded to certain acts of States? It may generally be noted that there is a tendency in the Court's jurisprudence to widen the range of State activities to be considered as practice for the purposes of identifying customary international law. The Court has so far relied on international instruments of universal application – both binding and non-binding, domestic law, decisions of national and international fora.<sup>66</sup> In addition it stressed the significance of the claims advanced by States before tribunals, as well as their statements outside legal fora, more particularly in the course of the studies undertaken by ILC and in the context of adoption of international treaties.<sup>67</sup> What is more, the ICJ observed that the practice needs not “be documented in any formal way in any official record”.<sup>68</sup> Thirdly, it may be concluded from the Court's jurisprudence that it is with enormous discrepancies with regard to the level of thoroughness that the ICJ embarks on an analysis of State practice. In certain cases it does not outline particular examples of State practice but only generally refers to some of its elements.<sup>69</sup> On other occasions the Court chooses to be more analytical and largely cites specific instruments of both international and national law. The ICJ's judgment in the case concerning *Jurisdictional Immunities of the State* is quite indicative since it reveals the variations in the Court's approach to evidencing State practice even within a single judgment.<sup>70</sup>

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to customary international law on the question”. *Ibid.*, 101, para. 191. It further stressed that “expressions of an *opinio juris* regarding the existence of the principle of non intervention in customary international law are numerous and not difficult to find”. *Ibid.*, 106, para. 202. Petersen qualifies this insistence of the Court on the subjective element as an interpretative approach to international custom. N. Petersen, “Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation”, *American University International Law Review* 23/2007 2008, 278.

<sup>66</sup> Questions relating to the Obligation to Prosecute or Extradite, 457, para. 99.

<sup>67</sup> Jurisdictional Immunities of the State, 122, para. 55.

<sup>68</sup> Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of 13 July 2009, *ICJ Reports* 2009, 265, para. 141.

<sup>69</sup> Questions relating to the Obligation to Prosecute or Extradite, 457, para. 99.

<sup>70</sup> With regard to the customary nature of a right to immunity, the Court considered it enough to rely on the work of the ILC. While examining whether customary international law developed to a point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict, ICJ referred to a couple of decisions of national courts in order to deny the proposition advanced by Italy. At a later point of the same judgment the Court uses a third approach and cites a large number of decisions of both national courts of different States, as well as the relevant jurisprudence of the European Court of Human Rights. *Jurisdictional Immunities of the State*, 123, para. 56, 134 135, para. 77, 136, para. 83, 137, para. 84, 139 para. 90.

#### 4. CONCLUDING REMARKS

The main objectives of this study were to present one of the fundamental issues of public international law – the process of formation and evidence of international customs. This issue belongs to the group of systemic questions and it would be too ambitious to expect that it could be fully elaborated on in a single article. The approach therefore consisted in detecting some objective indicators in the process of formation and evidence of customary law, i.e. its identification. The paper analyzes the work of the International Law Commission on the one hand, and the inevitable case law of the International Court of Justice on the other. It is obvious that members of the ILC chose the safe method of largely relying on the settled jurisprudence of the Court relating to the identification of customary international law. The impression, nevertheless, remains that the Special Rapporteur has frequently been sparse in his reports and has missed the opportunity to synthesize abundant practice and positions of the doctrine into more precise and comprehensive rules that would provide assistance to those intended.

International customary law owes its longevity to both the ILC and ICJ. Even though the World Court strengthened the role of international custom and clarified certain general aspects of customary international law, it obviously considered it unnecessary to introduce more coherence with regard to its approach to identifying rules of customary law in specific cases. Sometimes the Court applied the “identification without evidence” approach. On other occasions it preferred to use the model qualified in this paper as “identification through evidence”. Though the analysis of the jurisprudence revealed certain templates in the Court’s attitude towards identification of customary international law, there still exist a number of inconsistencies. It is beyond dispute that the identification of customary international law cannot be conducted in a completely mechanical manner. However, “objectively determinable and replicable procedures of legal methodology”<sup>71</sup> should prevail over reasons of judicial strategy and discretion, which seem to be at the very root of the problem. It remains to be seen whether the work of the ILC will produce a reversible impact on the future case law of the Court.

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<sup>71</sup> A. D’Amato, 39.