METHODS FOR THE IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW IN THE INTERNATIONAL COURT OF JUSTICE'S JURISPRUDENCE: 2000–2009

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'Sometimes the most important historical events are the non-events: the things that did not occur,' says the British historian Niall Ferguson.[1] Such a statement may well describe in large measure the International Court of Justice's case-law regarding the methods for the identification of rules of customary international law during the period 2000–2009. The previous two decades had been marked by two milestones in this domain: the eighties by the judgment on the merits in *Nicaragua*,[2] and the nineties by the Court's advisory opinion in *Nuclear Weapons*.[3] There was, though, no single decision by the Court of comparative significance regarding methods of customary international law during the first decade of the new millennium. Further, some of the most important determinations in this domain were those in which the Court did not declare the existence of a customary international rule. However, this is not to say that the above-mentioned conclusion applies to all of the Court's jurisprudence related to customary international law. The conclusion is limited to the Court's decisions regarding the methods for the recognition of norms of this character. In fact, the Court made very important pronouncements as to the content of customary international law in many domains, such as the use of force, territorial occupation, diplomatic protection, and international humanitarian law.

Nor should this generalization obscure the somehow paradoxical richness—in conceptual terms—of the Court's jurisprudence in this field, which emerges when assessing its decisions over the first decade of the new millennium. This article is devoted to highlighting such richness, and is divided into eight parts. The first part illustrates the influence that the International Court of Justice (ICJ or the Court) has over the creation and development of customary international law. The second briefly presents the two traditional methods for the recognition of customary international law. The third part illustrates not only that the Court applied both methods during the period of analysis, but also the specific cases in which this was so. The fourth part displays some

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[1] N Ferguson, *The Ascent of Money: A Financial History of the World* (Allen Lane, London, 2009) 165.

[2] *Case Concerning Military and Paramilitary Activities In And Against Nicaragua. (Nicaragua v United States of America)* [1986] ICJ Rep 14.

[3] *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226.

[*ICLQ* vol 60, July 2011 pp 681–712] doi:10.1017/S0020589311000273

https://doi.org/10.1017/S0020589311000273 Published online by Cambridge University Press

non-traditional approaches to the recognition of customary international law that the Court exceptionally deployed over the period. The fifth part presents the Court's analysis of the single case of the decade in which it dealt with a regional international custom. The sixth part shows the Court's silences regarding customary international law, namely, issues of this character that were raised and that the Court decided not to address. The seventh part offers a balance of the case-law in this area during the first decade of the new millennium. Finally, the eighth part concludes.[4]

I. THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN THE CREATION OF CUSTOMARY INTERNATIONAL LAW

It is clear that, by virtue of Article 59 of the Statute, the Court's judgments have a binding effect only between the parties involved in the particular dispute.[5] However, this is not to say that the Court's pronouncements lack influence in the development of international law in general and of customary international law in particular. Such influence has been openly recognized by former judges and presidents of the Court. Humphrey Waldock, for instance, expressed:

> [T]he Court . . . is . . . fully capable, if given sufficient opportunities, to make a valuable contribution both to the settlement of disputes and to the development of international law.
>
> The contribution of the Court to the modern law of the sea has, for instance, been both considerable and, in the idiom of today, progressive, without departing from the Court's judicial character. . . . In its judgments . . . the Court performed the classic function of a court in determining and clarifying what it conceived to be the existing law. In doing so, however, it threw fresh light on the considerations and the principles on which the law was based in a manner to suggest the path for future development. . . .[6]

Likewise, Judge Rossalyn Higgins, expanded on this concept and stated that:

> [I]t is, in fact, hard to point to a case in which all the Court has done is to apply clear, existing law to the facts. Through a series of maritime cases the Court has

[4] There is the pretension, criticized by the French historian Michel de Certeau, in the selection of historical periods of ignoring what has happened before. See M de Certeau, 'Escrituras e Historias', in Francisco Ortega (ed), *La Irrupción de lo Impensado* (Pontificia Universidad Javeriana, Bogotá, 2004) 132–33. Two comments are worth making in this regard for the purpose of this paper. The first, and obvious one given the relatively short existence of the Court, is that, although the focus is on the case-law of the first decade of the new millennium jurisprudence, the article does take into consideration Court's pronouncements prior to the period under analysis in order to offer a more complete assessment of the main topic and to avoid such pretension. The second is that I do not claim that the richness of the Court's jurisprudence regarding methods for the identification of customary international law during 2000–2009 only started occurring during this period.

[5] See Statute of the International Court of Justice.

[6] H Waldock, 'The International Court of Justice as Seen From the Bar and Bench', (1983) 54 British Yearbook of International Law 1, 4.

https://doi.org/10.1017/S0020589311000273 Published online by Cambridge University Press

> developed a corpus of law about maritime delimitation. It has clarified contentious topics in the use of force, including self-help (*Corfu Channel*) and use of force in response to low level unlawful military activity (*Nicaragua* v. *United States*). It has, in various cases of territorial title, built on the classic law to clarify further the legal role of *effectivités* in establishing title. It has developed the law on the stability and finality of boundaries and explained the place of *uti possidetis* in current international law. . . .
>
> [F]ar from being treated as a subsidiary source of international law, the judgments and opinions of the Court are treated as authoritative pronouncements of the current state of international law. . . .[7]

The Court's contribution to the development of international law in general is by no means limited to its judgments and also extends to its advisory opinions. Indeed, the Court itself so recognized in its advisory opinion in *Legality of Nuclear Weapons*:

> [I]t is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. . . . The Court . . . states the existing law and does not legislate. This is so even if, in stating and applying the law, *the Court necessarily has to specify its scope and sometimes note its general trend*.[8]

The role that the Court specifically plays in the creation and development of customary international law has also been significant. This role is perceived through two channels: first, State practice in response to the Court's decisions regarding customary international law and, second, the influence that the Court's pronouncements in this matter has over other international courts and tribunals applying the declared customary rule. Some particular events well illustrate these two points.

The Court's decisions stating that certain treaty provisions have the status of customary international law have sometimes led States, even those not party to the treaty, to regard themselves bound to comply with the obligations provided therein. This was the case with common articles 1 and 3 of the Geneva Conventions, which were declared as customary norms by the Court in *Nicaragua*.[9] Since then, States have assumed that these provisions have such nature. Theodor Meron points out about such State behavior:

> [In *Nicaragua*], the Court held that common articles 1 and 3 of the Geneva Conventions constitute general principles of humanitarian law that are biding on the United States—in other words, that they are customary law. . . . In any event, the impact of *Nicaragua* on the subsequent development of the law was such that

[7] R Higgins, *Problems & Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994) 202.
[8] *Nuclear Weapons* (n 3) para 18.
[9] See *Nicaragua* (n 2) paras 218–220.

https://doi.org/10.1017/S0020589311000273 Published online by Cambridge University Press

> the customary character of Articles 1 and 3 . . . is now taken for granted and almost never questioned. . . .[10]

The second channel of influence is that, once the Court has declared that a certain rule is customary international law, other international courts and tribunals do not discuss such categorization but apply the rule, relying on the Court's decision. According to Judge Higgins, there have been cases in which the European Court of Justice has cited the International Court of Justice 'as the short route to ensuring that a claimed rule was indeed customary international law . . .'.[11] She offers a concrete example: the ruling in *Opel Austria*. There, the European Court stated that '[T]he principle of good faith . . . is a rule of customary international law, whose existence has been recognized by the International Court of Justice . . . and it is therefore binding on the Community.'[12] Boisson de Chazournes and Heathcote illustrate that this was also what the Law of the Sea Tribunal did in its decision in *M/V Saiga*, where the Tribunal based the customary law status of the state of necessity on the Court's judgment in *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*. There, the Court declared such principle to have this character,[13] despite the fact that controversy surrounded this recognition before the ruling.[14] In addition, the pronouncement in *Gabcikovo-Nagymaros* has prompted one of the most complex and still not fully resolved issues in foreign investment law during the last decade: how to interpret necessity clauses provided for in bilateral investment treaties. Several arbitration tribunals have relied on the customary character of article 25 of the International Law Commission's Articles on State Responsibility, as stated by the Court in *Gabcikovo-Nagymaros*, to interpret the open text of one of these clauses,[15] and other tribunals have also heavily relied on such judgment to apply article 25 when the particular treaty in question did not provide for a necessity

[10] T Meron, *The Humanization of International Law* (Brill, Leiden, 2006) 403.

[11] R Higgins, 'The ICJ, the ECJ, and the Integrity of International Law', (2003) 52 ICLQ 1, 8–9.

[12] Case T-115/94 *Opel Austria GmbH v. Council of the European Union* [1997] ECR II–39, 90, 93.

[13] See *Case Concerning The Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, para 51.

[14] See L de Chazournes and S Heathcote, 'The Role of the New International Adjudicator', in DJ Bederman and L Reed (eds) 'The Visible College of International Law', *Proceedings of the 95th Annual Meeting* (American Society of International Law, Washington, 2001) 129, 133.

[15] See, for instance, *CMS Gas Transmission Company v. the Argentine Republic*, Award, ICSID, Case No. ARB/01/8, 12 May 2005, 315. *Enron Corporation and Ponderosa Assets v. Argentina*, Award, ICSID, Case No. ARB/01/3, IIC 292, 22 May 2007, 265–8, and 275–7.
It is worth-mentioning that, although using the customary rule of necessity to interpret BIT necessity clauses has been regarded an error of law, such declaration does not affect the influence that the Court's pronouncement had on the tribunals. For the reasons supporting the declaration of existence of the said error, see, for instance, *CMS Gas Transmission Company v. Argentine Republic*, Case No ARB/01/8, ICSID, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic 25 September 2007, 132.

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clause.[16] No tribunal has even attempted to embark on an analysis on its own regarding whether the norm is indeed international custom. Given such an attitude, States can be expected to assume the existence of the rule, invoke it whenever they face critical situations, and find the given international tribunal willing to assess the defence. It is fair to say that this intense debate would not have taken place without the Court's *Gabcikovo-Nagymaros* decision.

In sum, as a result of the Court's declarations of customary norms, States invoke them in international litigation, and courts and tribunals apply them, relying on the Court's statements. The overall process ends up reinforcing the customary nature of the given norm so declared by the International Court.[17]

It is nonetheless important not to overemphasize the role that the Court plays in the creation of customary international law. First of all, the limited jurisdiction of the Court makes possible the existence of large areas of customary international law that are created and developed without the Court's pronouncements. Moreover, States remain the most powerful actors in the formation and evolution of customary international law and can certainly take a different stand from the Court on particular issues, thereby diluting the impact of its determinations to a certain extent. In this sense, I share D'Amato's view that 'the customary rules that survive the legal evolutionary process are those that are best adapted to serve the mutual self-interest of all states.'[18] The Court cannot ignore this reality.

But despite the constraints on the Court, it is clear that, when it intervenes, the Court remains as a prominent actor within the process of creation and evolution of customary international rules. Consequently, the methods that the Court deploys to assess the existence of norms of this character are of capital importance, for they may determine the degree of ease or difficulty of the declaration of such existence.

[16] See, for instance, *Decision on Liability* in *Suez, Sociedad General de Aguas de Barcelona S.A, and Vivendi Universal S.A. v. the Argentine Republic*; *AWG Group v. the Argentine Republic*, 30 July 2010 available at <http://ita.law.uvic.ca/documents/VivendiSecondAnnulmentDecision.pdf>, accessed January 13 2011, 258.

[17] Academic scholarship regarding the debate over the interactions between BIT necessity clauses and the customary rule of necessity abounds. See, for instance, A Bjorklund, 'Emergency Exceptions: State of Necessity and Force Majeure', in P Muchlinski, F Ortino and C Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP, Oxford, 2008) 459; J Alvarez and K Khamsi, 'The Argentine Crisis and Foreign Investors. A Glimpse into the Heart of the Investment Regime', (2008) 1 Yearbook on International Investment Law & Policy 379; A Alvarez-Jiménez, 'New Approaches to the State of Necessity in Customary International Law: Insights from WTO Law and Foreign Investment Law', (2008) 19 American Review of International Arbitration 463; and A Alvarez-Jiménez, 'Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law: A New Approach Based on the Complexity of Argentina's 2001 Crisis', (2010) 27 Journal of International Arbitration 141.

[18] A D'Amato, 'Trashing Customary International Law' (1987) 81 AJIL 101, 104.

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II. THE INTERNATIONAL COURT OF JUSTICE'S APPROACHES TO THE RECOGNITION OF CUSTOMARY INTERNATIONAL RULES

Article 38(1)(b) of the Statute of the Court establishes the requirements for the recognition of customary norms by providing that '[T]he Court . . . shall apply: b) international customs, as evidence of a general practice accepted as law.'[19] On the basis of this provision, two requirements must be met: first, uniform State practice, and second, *opinio juris*. From this provision, the Court has inferred the existence of two main and traditional methods for the recognition of international customs: the strict inductive method and the flexible deductive approach.

The 20th century ended with a heated debate about the conflicting approaches to customary international law that the Court had developed since its creation after the Second World War, namely, the strict inductive approach embedded most prominently in the judgment in the *North Sea Continental Shelf Cases*[20] and the flexible deductive approach introduced by the Court in its judgment in *Nicaragua*.

A. The Strict Inductive Method to the Declaration of Rules of Customary International Law

Under the strict inductive method, the Court declares the existence of customary norms only once it has been demonstrated that the two requirements of article 38 are present. The underlying justification for the strict approach is that declarations of rules as customary international law imply that all States have to comply with the relevant rules, regardless of whether or not they have participated in the creation and development of the given state practice and regardless of its impact on their interests. Therefore, it is not surprising that, given such a reality, the Court adopted, for instance, a strict approach towards the recognition of rules of customary international law embodied in international treaties negotiated by a limited number of States. The ICJ set the basis of this strict approach in *North Sea Continental Shelf*.

The Court declared that the process of a treaty's becoming an international custom was possible but stated that 'this result is not lightly to be regarded as having been attained.'[21] Then the Court proceeded to establish strict requirements for the transformation of treaty provisions binding on a few States into rules of international customary law binding on all. First, the treaty provision must not be one with regard to which reservations by parties to the treaty are permitted. Second, the international convention must have been the subject of widespread ratification by States most interested in or affected by the given provision. Third, the transformation of treaty law into customary international

[19] See (n 5).

[20] See *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany /Netherlands)* [1969] ICJ Rep 3.

[21] ibid.

https://doi.org/10.1017/S0020589311000273 Published online by Cambridge University Press

law usually requires the passage of a considerable amount of time. However, such transformation can take place in a short span of time, but in order for this to happen, the practice must be virtually uniform.[22] Finally, the ICJ set a high threshold for the *opinio juris* and determined that it had to be demonstrated that States adopting the practice regarded it as mandatory and not because they thought it convenient. The Court held:

> The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial an protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[23]

B. The Flexible Deductive Approach to the Declaration of Rules of Customary International Law

The flexible approach developed by the ICJ regarding the requirements for the declaration of rules of customary international law was adopted in its judgment in the *Nicaragua* case. The main features of this flexible jurisprudence are three. First, complete uniformity of State practice is not necessary for a customary rule of international law to emerge. In fact, States' behaviour contrary to the practice could constitute a violation of the rule rather than preventing it from crystallizing as customary.[24] The second fundamental feature of this flexible trend is the loosening of the requirements for inference of the existence of *opinio juris*. This second requirement may not only be inferred from States' beliefs that they are complying with a mandatory precept, but also from declarations of the UN General Assembly.[25] The third significant characteristic of this flexible approach is the recognition that customary international law does not lose such nature when it is embodied in multilateral treaties.[26]

[22] See ibid 72–74.

[23] ibid 77. For a detailed analysis of this judgment regarding customary international law, see P Haggenmacher, 'La Doctrine de Deux Éléments du Droit Coutumier Dans la Pratique de la Cour Internationale', (1986) LXXXX Revue Générale de Droit International Public 1.

[24] See *Nicaragua* (n 2) 186. [25] See ibid 188. [26] See ibid 174.

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The *Nicaragua* judgment loosened the requirements to declare the existence of customary international law. Indeed, Schachter considered that *Nicaragua* inverted the process of creation. Under the strict approach, State practice came first, and *opinio juris* followed. Since the aforementioned decision, *opinio juris* appears first as a declaration embodied in a UN General Assembly resolution; then State practice will confirm the customary character of the given declaration.[27] Assessing *Nicaragua*, Theodore Meron said:

> [W]here a treaty concerns a particular area of law, however, even if it does not bind the parties to the dispute in question, the ICJ has tended to treat the texts of the treaty as a distillation of the customary rule, eschewing examination of primary materials establishing stated practice and *opinio juris* . . .[28]

However, the flexible approach of the Court towards customary international law, as articulated in *Nicaragua*, was attenuated 10 years later in the Court's advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*. There, the UN General Assembly asked the Court to answer the question of whether the threat or use of nuclear weapons was in any circumstance permitted under international law.[29] In this Advisory Opinion, the Court did not take the same path followed in *Nicaragua*. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. In certain circumstances, they can provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption. It is also necessary to see whether an *opinio juris* exists as to its normative character; or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule. On this occasion, negative votes against the UN resolutions and State practice contrary to the rule were seen as acts preventing the rule from crystallizing as customary international law.[30] It is important to state that, in its advisory opinion in *Nuclear Weapons*, the Court attenuated

[27] O Schachter, 'New Custom: Power, Opinio Juris and Contrary Practice' in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubieszewski* (The Hague: Kluwer Law International, Leiden, 1996) 531, 532.

[28] T Meron, 'Revival of Customary Humanitarian Law', (2005) 99 American Journal of International Law 817, 819.

[29] UNGA Res 49/75 (K) (15 December 1994). A strict application of *Nicaragua* would have eventually led to the declaration that the use of nuclear weapons was condemned by customary international law. In effect, on November 24, 1961, the General Assembly adopted Resolution 1653(XVI) declaring the use of nuclear weapons 'a direct violation of the Charter of the United Nations.' *Nuclear Weapons* (n 3) 71. Moreover, since 1961, according to the Court, the General Assembly had enacted resolutions each year invoking Resolution 1653 and requesting member States to conclude a treaty banning the use of nuclear weapons. Such resolutions, said the Court, had been adopted by large majorities. See ibid 73.

[30] See ibid 70–73.

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but did not reverse the position it took in *Nicaragua* regarding customary international law, so the flexible trend persists.[31]

There has been healthy debate about the Court's positions on customary international law. The strict approach has been criticized on the ground that it is not truly representative, since customs are declared to exist on the basis of the practice of a few States, mainly imperialist powers, and the approach serves to legitimate the status quo.[32] This situation clearly does not exist in the flexible approach, since international customary rules are declared on the basis of treaties or UN General Assembly resolutions endorsed by a large number of States.[33]

In addition, Anthea Roberts, for instance, relying on Henkin, claims that the deductive approach is more appropriate to the current era in which new and important values have entered the international scene, relating to matters such as the environment, human rights, and the use of force. These are normative values for which State practice is less relevant. On the other hand, there is less room for contrary practice or dissenting States, since this would shock the conscience of humankind.[34] However, the deductive approach has received a significant amount of criticism. D'Amato claims, for instance, that the Court misunderstands customary international law, which always starts with State practice, and is not necessarily reflected in UN resolutions.[35] Further, the approach has been criticized for not truly reflecting State practice and for pursuing mostly aspirational goals. Consequently, the regulatory function of customary rules recognized through this approach is doubtful.[36]

III. THE TRADITIONAL METHODS FOR THE ASSESSMENT OF THE EXISTENCE OF CUSTOMARY INTERNATIONAL LAW IN THE ICJ'S CASE-LAW: 2000–2009

The fear of some that the flexible inductive approach would predominate in the Court's jurisprudence did not materialise during the first decade of the new millennium. On balance, although both approaches remain available for the Court and it has used them, it was the strict approach that was applied with more relevant consequences for the development of international law during the said period.

A. The International Court of Justice's Application of the Flexible Deductive Approach to the Recognition of Customary International Law

Although the Court applied the flexible deductive method for the recognition of customary international norms five times during the first decade of the new

[31] For a complete assessment of this advisory opinion, see L de Chazournes and P Sands *International Law, the International Court of Justice and Nuclear Weapons* (CUP, Cambridge, 1999).

[32] See AE Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', (2001) 95 American Journal of International Law 757, 768.

[33] See ibid 769. [34] See ibid 764–66. [35] See D'Amato (n 18) 102.

[36] See Roberts (n 32) 769.

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millennium, such applications—in which the requirements of article 38 were not fully addressed—did not have a meaningful impact on the evolution of international law. This was so because the relevant treaty provisions or UN General Assembly Resolution were widely recognized as customary or as reflecting customary law.

For instance, in *Armed Activities* the Court declared that article 3 of the Fourth Hague Convention respecting the Laws and Customs of War—providing that parties to armed conflicts would be responsible for acts carried out by individuals making up part of their armed forces, regardless of whether they acted on or against instructions[37]—had customary status.[38] The Court declared:

> [A]ccording to a well-established rule of customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 . . . a party to an armed conflict shall be responsible for acts by persons formed part of its armed forces.[39]

As can be seen, the Court applied the flexible approach and did not think it necessary to demonstrate the requirements of article 38 in relation to Hague Convention article 3. This provision is widely held to constitute customary law.

Similarly, in the advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court declared the customary nature of the provision of the UN General Assembly Resolution 2625(XXV) entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,' according to which 'no territorial acquisition resulting from the threat or use of force shall be recognized as legal.'[40] After quoting the Declaration, the Court stated:

> [T]he principles as to the use of force incorporated in the Charter reflect customary international law . . . ; the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.[41]

[37] See International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=51&case=116&code=co&p3=4> accessed 7 February 2011, 213–14.

[38] See ibid 214. The Court relied on its previous advisory opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* [1999] ICJ Rep 62, 87.

[39] *Armed Activities* (n 37) 214.

[40] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep 136, 87. For assessment of this opinion, see SC Breau, 'Decisions of International Tribunals: International Court of Justice: Part I. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion, 9 July 2004', (2005) 54 ICLQ 1003; and JM Robledo, 'L'Avis de la C.I.J sur les Conséquences Juridiques de L'Edification D'un Mur Dans le Territoire Palestinien Occupé: Timidité ou Prudence?', (2005) 109 Revue Générale de Droit International Public 521.

[41] *Wall Opinion* (n 40) 87.

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Again, given the widespread consensus regarding the customary character of this provision,[42] it is not surprising that the Court applied the flexible approach without analyzing such status on the basis of contemporary State practice and *opinio juris*.

There was nothing new either when the Court confirmed, in *Armed Activities*, the customary character of the following provisions of the Friendly Relations Declaration:

> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force . . .
>
> . . . no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.[43]

All the Court said in support of this conclusion was, '[t]hese provisions are declaratory of customary international law,'[44] which well illustrates the use of the flexible approach. Again, no controversy was generated as a result of this finding and its bases.

Equally undisputed was the Court's declaration as customary international law of article 29 of the Vienna Convention on Diplomatic Relations, according to which

> [t]he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.[45]

The Court made such declaration in its judgment in the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, in passing and in the following terms:

> The Court recalls that the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations, while addressed to diplomatic agents, is necessarily applicable to Heads of State.[46]

[42] See A Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', in M Schmitt and J Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein* (Martinus Nijhoff Publishers, Leiden, 2007) 439, 442. [43] *Armed Activities* (n 37) 162. [44] ibid 162.

[45] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964), United Nations, Treaty Series, Volume 500, p. 223.

[46] International Court of Justice, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, 174, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=93&case=136&code=djf&p3=4>, accessed 21 January 2011.

https://doi.org/10.1017/S0020589311000273 Published online by Cambridge University Press

The Court, again, applied the flexible approach and recognized a treaty provision as customary law without a detailed analysis. Certainly, no controversy was created by this conclusion, since there are 187 States party to the Convention[47] out of the 192 State members of the United Nations, for instance.

Finally, the Court attached customary character to Article 33(4) of the Vienna Convention on the Law of Treaties over interpretation of treaties in different languages. The provision sets forth:

> [W]hen a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[48]

The Court in its judgment in the *LaGrand Case* made this declaration:

> In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law. . . .[49]

Article 33(4) was then transformed from treaty law into customary international law without proving such nature. Such proof seemed to be necessary not only because the United States is not party to the VCLT, but also because, on the basis of the customary character of article 34, the Court interpreted its Statute to establish the binding character of its provisional measures.[50] The Court's finding regarding article 33(4) of the VCLT and its lack of justification did not receive comment.[51] Moreover, this conclusion reinforced a consistent Court pattern: to always declare as customary the provisions of the VCLT that arise before the Court. As Aust points out, 'There has been as yet no case where the Court has found that the Convention . . . does not reflect customary law.'[52]

As can be seen, the Court applied the flexible approach in the sense that it recognized the customary status of provisions included in treaties or

[47] See <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en>, accessed 22 January 2011.

[48] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), United Nations, Treaty Series, Volume 1155, p. 331.

[49] International Court of Justice, *LaGrand Case (Germany v. United States of America),* Judgment of 27 June 2001, available at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=04&case=104&code=gus&p3=4 accessed 7 January 2011, [101]. For an evaluation of more contemporary use of Art 33(4), see A Aust, *Modern Treaty Law and Practice* (2nd edn CUP, Cambridge, 2007) 2, 53–55.

[50] See *LaGrand* (n 49) 102–109.

[51] See J Fitzpatrick, 'The Unreality of International Law in the United States and the LaGrand Case', (2002) 27 Yale Journal of International Law 427; JR Crook, 'The 2001 Judicial Activity of the International Court of Justice', (2002) 96 AJIL 397, 401; and J Matringe, 'L'Arrêt de la Cour Internationale de Justice dans L'Affaire La Grand (Allemagne c Etats-Unis d'Amerique) du 27 Juin 2001', (2002) XLVIII Annuaire Français de Droit International 215, 239 (status of Art 33(4) referred to without comment).

[52] See Aust (n 49) 11.

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UN General Assembly resolutions, without such recognition generating controversy or altering the legal status quo. The prominence of this method was one of those important things that 'did not happen' during the first decade of the new millennium.

B. Application by the International Court of Justice of Its Strict Inductive Approach to Customary International Law

There were cases in which the conditions set forth in article 38 were evaluated with rigor by the Court and after intense internal discussion during which some judges held different views regarding the final decision adopted. Unlike experience with the flexible method, the strict approach was applied by the Court with much more significant consequences for the pertinent area of international law, in some cases, during the period 2000–2009. This conclusion shows that the fear that adoption of the flexible deductive approach would lead, in the long run, to the diminishing importance of the strict inductive method for the recognition of customary rules, has not materialized.

The first decision in which the Court applied the strict inductive method was its judgment in *Arrest Warrant*. A case concerning the legality of the arrest warrant *in absentia* issued by a Belgian judge against Abdulaye Yerodia Ndombasi, then Minister of the Democratic Republic of Congo (DRC), for crimes against humanity that took place in the DRC and that did not involve Belgian citizens or interests. Belgium sought to exert universal jurisdiction to prosecute crimes of this nature; the DRC claimed that Belgium lacked jurisdiction to issue the arrest warrant and that this warrant violated the international law principle according to which foreign ministers enjoyed criminal immunity.[53]

Given that there was no treaty specifically dealing with the issue in dispute, the Court held that the issue had to be decided according to customary international law[54] and did not apply the flexible approach to recognize that immunity for ministers for foreign affairs had an exception: the prosecution of ministers for crimes against humanity committed during their time in office. The ICJ pointed out that immunity for ministers for foreign affairs did not exist for their personal benefit, but to ensure the carrying out of their duties,[55] since they had to represent their governments in international negotiations and had to be able to travel freely. On these grounds, the Court held that ministers for foreign affairs enjoyed inviolability and full immunity from criminal jurisdiction.[56]

[53] See International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, 11. See HR Fabri and JM Sorel, 'Chronique de Jurisprudence de la Cour Internationale de Justice', (2003) 130 Journal de Droit International 855, 863.

[54] See *Arrest Warrant*, (n 53) 53.

[55] See ibid.

[56] See ibid 54.

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Belgium adduced treaties creating international criminal tribunals, some domestic legislation, and judicial decisions in the *Pinochet* (UK House of Lords) and *Qadaffi* (French Court of Cassation) cases in support of its argument that ministers for foreign affairs did not enjoy immunity for war crimes or crimes against humanity.[57] After careful consideration, the Court concluded that there was no exception to the immunity for ministers under such circumstances. It said:

> The Court has carefully examined State practice, including national legislation and those decisions of national higher courts, such as the House of Lords or the French Court of Cassation. 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 and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[58]

As can be seen, the strict approach was employed by the Court in arriving at its conclusion, since the Court assessed the State practice requirement with particular rigour and, on the basis of its absence, rejected the declaration of the existence of the exception as a matter of customary international law. Nonetheless, this conclusion was not unanimous. Judge Al-Khasawneh was of the view that combating grave crimes had achieved the status of *jus cogens* and would then prevail over rules on immunity.[59] For his part, Judge Oda held a different view and stated that customary law was unclear on whether foreign ministers enjoyed the immunity of diplomatic agents and that the issue of whether immunity could also be invoked for serious breaches of international law was too new to have a definitive answer.[60]

Theodor Meron seems to suggest that the Court applied the flexible approach, since it concluded, without proof of State practice and *opinio juris*, that the customary rule of immunity of foreign ministers did not contemplate any exception.[61] I respectfully disagree on the basis of the allocation of burden of proof of customary norms. Implicit in the finding of the Court is the fact that Belgium had to prove the existence of the exception as a matter of customary international law. The Court assessed State practice only regarding this exception, not the overall scope of the rule of immunity, and, applying the strict approach, did not find the exception to have been demonstrated, as noted above.

The second application of the strict approach is found in the judgment on preliminary objections in the *Case Concerning Ahmadou Sadio Diallo*

[57] See ibid 56.
[58] ibid 58.
[59] See Dissenting Opinion of Judge Al-Khasawneh, 7.
[60] See Dissenting Opinion of Judge Oda, 14.
[61] See Meron (n 10) 403 and, similarly, JR Crook, 'The 2002 Judicial Activity of the International Court of Justice', (2003) 97 AJIL 352, 354.

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(Republic of Guinea v Democratic Republic of the Congo).[62] The facts of the *Diallo* dispute before the ICJ can be summarized as follows: Ahmadou Sadio Diallo is a Guinean businessman who lived in the Democratic Republic of Congo (DRC) for three decades and founded two companies there. They started having problems with major Congolese public institutions in the 1980s, eventually bringing a damages claim against these institutions for US$36 billion, an amount that is three times the DRC's foreign debt. In 1995, the Prime Minister ordered the expulsion of Mr Diallo on the grounds that his 'presence and conduct have breached public . . . especially in the economic, financial and monetary areas, and continue to do so.'[63]

Guinea sought to exercise its right to diplomatic protection of Mr Diallo's rights as an individual and as a shareholder of his companies, specifically, his rights to oversee, control, and manage the companies. Guinea also sought to exercise its right to diplomatic protection, by substitution, of these companies, in order to recover the debts owed to them, despite the fact that the ICJ had declared in its judgment in *Barcelona Traction* that only the State of incorporation of legal persons could seek their diplomatic protection.[64] To support this claim, Guinea argued that multiple bilateral investment treaties (BITs) and international arbitration awards had recognized that shareholders could seek reparation for damages caused by host States to their companies. The Court did not accept this argument, tacitly applying the strict approach by saying:

> The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in customary rules of diplomatic protection; it could equally show the contrary. The arbitrations relied on by Guinea are also special cases, whether based on specific international agreements between two or more States, including the one responsible for the allegedly unlawful acts regarding the companies concerned . . . or based on agreements concluded directly between a company and the State allegedly responsible for the prejudice to it. . . .[65]

As can be seen, in its decision on Preliminary Objections in the *Diallo* dispute, in which it was asked to consider multiple BITs as evidence of changes in customary international law, the Court applied its strict approach to the

[62] See International Court of Justice, *Case Concerning Ahmadou Sadio Diallo. (Republic of Guinea v. Democratic Republic of the Congo, Preliminary Objections of 24 May 2007*, available at <http://www.icj-cij.org/docket/files/70/6503.pdf> accessed 10 February 2011.

[63] See ibid 15.

[64] See International Court of Justice, *Case Concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, Second Phase, [1970] ICJ Rep 3, 70.

[65] *Diallo* (n 62) 90.

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recognition of rules of customary international law. Indeed, the Court assumed that the existence of multiple treaties could be seen as an expression of States' contracting out of the customary rule. Rather than change it, such existence reaffirmed the rule;[66] there is no trace of the *Nicaragua* flexible approach in the above-mentioned statement.

Another application of the strict approach could be said to have taken place in the judgment in the *Case Concerning Maritime Delimitation in the Black Sea (Romania v Ukraine)* regarding whether there was a customary rule concerning the method to be used to measure coastal lengths in delimitations of continental shelves or exclusive economic zones or to draw single delimitation lines. This issue was governed in the dispute by articles 74 and 83 of the 1982 UN Convention on the Law of the Sea, which do not define any method and mandate for the delimitation to result in an equitable solution. To this end, the Court has developed a process comprising several stages: first, the Court establishes a provisional delimitation line; second, the Court assesses whether there are factors or relevant circumstances that require the Court to adjust or shift the provisional line to ensure an equitable solution. Finally, the third stage comprises an assessment of whether the provisional line, adjusted or not, leads to an equitable result due to *a marked disproportion* between the ratio of the given coastal lengths and the ratio between the respective maritime areas of each State in light of the delimitation line.[67] Thus, the methodology to measure coastal lengths plays a key role at this stage of the maritime delimitation process. These provisions of UNCLOS are silent as to the methodology, so the Court had to determine whether there was one developed by State practice and concluded that there was none by saying:

> The continental shelf and exclusive economic zones allocations are not to be assigned in proportion of the length of respective coastlines. Rather, the Court will check, *ex post facto*, on the equitableness of the delimitation line it has constructed. . . .
>
> This checking can only be approximate. Diverse techniques have in the past been used for assessing coastal lengths, *with no clear requirement of international law having been shown* as to whether the real coastline should be followed, or

[66] The ICJ did not quote its previous judgment in *North Sea Continental Shelf* as a basis to reject Guinea's claim. Such absence does not prevent me from arguing that the ICJ applied the strict approach toward the recognition of customary rules of international law, since the conclusion of the ICJ shows that it did not apply the flexible approach of *Nicaragua*. In addition, and as Frouville states, there is a lack of *opinio juris* in the situation the Court alludes to. See O Frouville, 'Affaire Ahmadou Sadio Diallo (République de Guinée c. République Démocratique du Congo). Exceptions Préliminaires: Le Roman Inachevé de la Protection Diplomatique', (2007) LIII Annuaire Français de Droit International 291, 319.

[67] See International Court of Justice, *Case Concerning Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment of 3 February 2009, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=95&case=132&code=ru&p3=4> accessed 7 February 2011, 116–22. See CG Lathrop, 'Maritime Delimitation in the Black Sea (Romania v. Ukraine)', (2009) 103 AJIL 543, 546.

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> baselines used, or whether or not coasts relating to internal waters should be excluded.[68]

As can be seen, although the Court did not explicitly state that it was looking for a technique compelled by customary international law, its reference to general international law clearly included it. The Court tacitly applied the strict method in requiring a convincing demonstration of the existence of State practice using a specific technique to measure coastal lengths. The Court did not declare that the practice existed.

A final example of the application of the strict approach took place in the *Case Concerning Sovereignty over Pedra Blanca/Pulau Batu Puteh, Middle Rocks and South Ledge*, in which the Court was addressing the question whether British conduct during the nineteenth century regarding the granite island Pedra Branca/Pulau Batu Puteh gave rise to sovereignty over it, despite the fact that the British Empire did not have formal title. The specific issue was whether State practice included a requirement of the performance of symbolic acts as the only means to show the presence of *effectivités*.[69] The Court concluded that such requirement did not exist and pointed out:

> The facts about the construction and commissioning of the lighthouse on Pedra Branca/Pulau Batu Puteh—and indeed for the most part its operation over the many years since—are not themselves the subject of significant dispute between the Parties. They also agree on the law: it 'requires an intention to acquire sovereignty, a permanent intention to do so and overt action to implement the intention and to make the intention to acquire manifest to other States'. There is some disagreement on whether practice also requires elements of formality. Symbolic acts accompanying the acquisition of territory are very common both generally and in British practice. They are not however always present. The Court does not consider that the practice demonstrates a requirement that there be a symbolic act. Rather the intention to acquire sovereignty may appear from the conduct of the Parties, particularly conduct occurring over a long period.[70]

It is then clear that, despite the fact that symbolic acts were *very common*, the Court did not regard this State practice as establishing a requirement, since

[68] *Black Sea*, (n 67) 211, 212.

[69] *Effectivités* are defined as 'the effective exercise of powers appertaining to the authority of the State over a given territory.' International Court of Justice, *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, 172.

[70] International Court of Justice, *Case Concerning Sovereignty over Pedra Blanca/Pulau Batu Puteh, Middle Rocks and South Ledge*, Judgment of 23 May 2008, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=2b&case=130&code=masi&p3=4>, last visited 10 February 2010, 149. For a detailed analysis of this finding, see C Bories, 'L'Arrêt de la Cour Internationale de Justice du 23 Mai 2008 dans L'Affaire Souveraineté sur Pedra Blanca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour)', (2008) LIV Annuaire Français de Droit International 227, 235. For an assessment of this judgment, although without touching on the specific issue dealt here with, see CG Lathrop, 'Sovereignty over Pedra Blanca/Pulau Batu Puteh, Middle Rocks and South Edge (Malaysia/Singapore)', (2008) 102 AJIL 828.

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there were other means to prove sovereign acts.[71] In other words, there was no *opinio juris* regarding the requirement, and the Court applied a strict test to the identification of customary international rules.

In sum, the Court applied its strict approach to customary international law four times, and on each occasion it denied the given state practice the status of customary law.

IV. NON-TRADITIONAL METHODS USED BY THE COURT TO DECLARE THE EXISTENCE OF CUSTOMARY INTERNATIONAL NORMS

In addition to the strict and flexible approaches, the Court has other methods to declare the existence of customary norms: first, declarations of this nature also grounded on the Court's past decisions or on other judicial rulings; and second, implicit recognition of customary international norms.

A. Recognition of Customary Rules Also Grounded on Judicial Decisions

The ICJ has recognized the existence of customary law not only on the basis of State practice and *opinio juris*, but also on the basis of previous international judicial decisions, thereby moving in the direction that the International Law Commission has in this regard, as will be seen in Part VII. The point with respect to this untraditional method is certainly not whether the Court explicitly declares that an international custom exists or not because a set of consistent judicial decisions so expresses. Such pronouncement will never come from the Court, because State practice must always remain a key component of such rules. The issue is much more subtle: the Court relies on its own past judicial decisions or on others' as part of the justification for the declaration of existence or absence of a customary role.

Both domestic and international tribunals commonly make use of previous judicial decisions to justify their interpretation of the applicable law to the dispute at hand. This is a usual feature of judicial reasoning and one that neatly falls within the secondary character that article 38 attaches to judicial decisions: the applicability of the law to the case at hand is undisputed, and what the Court does is that it uses judicial decisions to justify the interpretation of the given law. I am not dealing with this situation here.

On the contrary, the Court's reliance on past judicial decisions to justify or deny the existence of a customary international rule takes place at a higher level, the starting point in the process of judicial reasoning: the determination of the applicable law. There is then much more legal significance when the Court uses past judicial decisions to determine whether a State practice is

[71] For instance, the Court found the following, among others: the adoption of legislation dealing with the given territory, (see *Sovereignty over Pedra Blanca* (n 70) 173–74); and installation of military communications equipment in the territory under dispute (see ibid 248).

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customary law and, therefore, part of the applicable law of the case than when the Court does the same but regarding the interpretation of the previously determined applicable law.

The ICJ deployed this first untraditional method in the *Wall* opinion. There, the Court declared that people within non-self-governing territories also had the right to self-determination and cited developments in international law supporting such right. But in addition, part of the justification for this conclusion was the Court's repeated decisions stating the existence of such a right. The Court said:

> The Court would recall that in 1971 it emphasized that current developments in '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 [such territories]'. The Court went on to state that 'These developments leave little doubt that the ultimate objective of the sacred trust' referred to in Article 22, paragraph 1, of the Covenant of the League of Nations 'was the self-determination . . . of the peoples concerned' (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, paras. 52–53). The Court has referred to this principle on a number of occasions in its jurisprudence (ibid; see also *Western Sahara, Advisory Opinion, I.C.J. Report. 1975*, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal* v. *Australia)*, *Judgment, I. C. J. Reports 1995*, p. 102, para. 29).[72]

In addition, the Court dealt again in the *Wall* opinion with the application to Israel of the Fourth Hague Convention, which included the Hague Regulations, to which Israel was not party. The Court declared that the latter had the status of customary international law relying, first, on the text of the Fourth Hague Convention declaring the customary character of the Regulations and, second, on judicial statements as to the said nature. The Court pointed out:

> As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared 'to revise the general laws and customs of war' existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the 'rules laid down in the Convention were recognised by al1 civilised nations, and were regarded as being declaratory of the laws and customs of war' (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of

[72] *Wall Opinion* (n 40) 88. Judge Higgins highlighted the lack of justification for the position the Court took regarding self-determination. See Judge Higgins Opinion, 30.

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> belligerents in their conduct of military operations *(Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C. J. Reports 1996 (1)*, p. 256, para. 75*)*. The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.[73]

One can simply note that the Court demonstrated the customary nature of the Fourth Hague Regulation[74] mainly on the basis of past case-law. Relying on the participants' assertion of the Regulation as customary should add little, since the Court itself had declared, unequivocally and for good reasons, in *Nicaragua* that:

> [T]he mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. . . . The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.[75]

Another example of reliance on judicial decisions, but with an opposite outcome in that the Court did not recognize the existence of a custom, can be seen in the judgment in the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*. In this case, Nigeria was of the view that the oil practice of States constituted an important element in the establishment of maritime boundaries. However, Cameroon opposed this argument, stating that oil concessions were not relevant for this purpose in international law.[76] Siding with the latter, the Court relied on its own past judgments in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, *Continental Shelf (Libyan Arab Jamahiriya/Malta*) and on past arbitration awards, *Guinea/Guinea Bissau*, *Delimitation of Maritime Areas between Canada und the French Republic (St. Pierre et Miquelon)* to come to the conclusion that 'overall, it follows from the jurisprudence that . . . oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line . . ..'[77] As can be seen, the

[73] *Wall Opinion* (n 40) 89.

[74] The point worth highlighting is that judicial decisions were invoked as part of the justification of such a character. The Court ratified this customary character in *Armed Activities* on the basis of its prior decision in the *Wall* opinion and applied it to the dispute. Neither the DRC nor Uganda was party to the Regulations. See *Armed Activities* (n 37) 217, 219.
For analysis of the customary character of the Hague Regulations, see G Fox, *Humanitarian Occupation* (CUP, Cambridge, 2009) 224, and T Meron, 'The Humanization of Humanitarian Law', (2000) 81 AJIL 348.

[75] *Nicaragua* (n 2) 184.

[76] See International Court of Justice, *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=74&case=94&code=cn&p3=4>, accessed 10 February 2011 [302–03].

[77] ibid 304. The Court ratified this approach in its judgment in *Black Sea* (n 67) 198.

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Court carried out the analysis of the legal point implicitly related to customary law also on the basis of judicial decisions. Part of the reason why oil concessions were not relevant to maritime delimitations in international law (customary law) was that past judicial pronouncements of the Court and of other tribunals had not pointed in this direction.

Rather than constituting a new development, the above-mentioned judgments ratify a trend that already existed in the Court's jurisprudence and that led Meron to point out that:

> [C]ourts and governments [are relying] on precedent rather than repeatedly engaging in detailed analysis of the customary status of the same principle. Practice thus appears to give judicial decisions a greater weight than that accorded by Article 38 of the ICJ Statute. . . .[78]

B. A New Approach to Customary International Law: Implicit Customary Rules

The second non-traditional approach deployed by the Court is the implicit recognition of customary rules, which has taken place when the Court regarded a State practice or a treaty provision as if it were customary but without making an explicit pronouncement about its character. The first occasion in which the Court used this non-traditional method was in the judgment on the merits in the *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)*. There, Bahrain claimed that it had de facto status as an archipelagic State under Part IV of the 1982 Law of the Sea Convention and that its article 47 should consequently be applied, entitling it to draw archipelagic baselines.[79] Qatar contested this claim by arguing that Part IV had not reached the status of customary international law.[80] The Court did not have jurisdiction to adjudicate the dispute on the basis of the Convention, since neither Bahrain nor Qatar were parties to it,[81] and explicitly declared that 'customary international law, therefore, is the applicable law.'[82] The Court directly applied Part IV, determined that Bahrain could not be regarded as an archipelagic State,[83] and concluded 'that Bahrain is not entitled to apply the method of straight baselines. . . .'[84]

Although the Court did not explicitly declare that Part IV of the Convention reflected customary international law, it is important to mention that the Court implicitly regarded it to be so, since the Court assessed the provision by examining the condition for its application and determined that Bahrain did

[78] Meron (n 10) 402.

[79] See International Court of Justice, *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain). Merits*, Judgment of 16 March 2001, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=61&case=87&code=qb&p3=4> accessed 7 February 2011, 81.

[80] See ibid 182.

[81] See ibid 167.

[82] ibid 167.

[83] ibid 214.

[84] See ibid 215.

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not meet it. The existence of the implicit recognition of customary norms in this case is also supported by the fact that the Court did not make use of the arguendo technique, which exists in international adjudication. According to this technique, the Court could have inverted the order of analysis by stating that, before addressing the customary character, it would assume, arguendo, that Part IV was a customary rule and proceed to assess first whether Bahrain met the requirements of archipelagic States provided for therein. Once the Court found that Bahrain did not meet them, the Court could have stated that there was no need to rule on whether the said norm had customary status. Thus, there was a way to resolve the issue of whether Bahrain was an archipelagic State without pronouncing on the customary character of Part IV. However, the Court did not use the technique, which would allow the inference that it considered the provision to reflect customary international law.[85]

A final illustration of this tacit recognition of customary rules is *Maritime Delimitation Between Qatar and Bahrain*. There, both parties agreed that article 15 UNCLOS, headed 'Delimitation of the territorial sea between States with opposite or adjacent coasts,' was customary international law,[86] and the Court explained how it would apply the rule. It said:

> [T]he most logical and widely practiced approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in light of the existence of special circumstances. . . .
>
> The equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. It can only be drawn when the baselines are known.[87]

According to Bahrain, on the basis of conventional and customary international law, the low-water line was determinative for the breadth of the territorial sea,[88] while for Qatar, this line was not 'obligatory as a rule of general application,' and instead, the high-water line should have been used.[89] The Court did not assess whether the use of the low-water line was a customary rule and simply assumed it to be so by stating:

> The Court, therefore, will accordingly now turn to the determination of the relevant coasts from which the breadth of the territorial seas of the Parties is measured. In this respect the Court recalls that under the applicable rules of

[85] For a recent use of the arguendo technique in international adjudication, see WTO Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand, United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties (US – Customs Bond Directive*) (16 July 2008) WT/DS343/AB/R, WT/DS345/AB/R, [310]–[19], available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds345_e.htm>, accessed 9 February 2011.

[86] See *Maritime Delimitation Between Qatar and Bahrain*, (n 79) 175.

[87] ibid 176–77.

[88] See ibid 180.

[89] ibid 179.

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> international law the normal baseline for measuring this breadth is the low-water line along the Coast (Art. 5, 1982 Convention on the Law of the Sea).[90]

As can be seen in these two decisions, the ICJ recognized, for practical purposes, the existence of customary rules without making a specific pronouncement thereupon and avoiding the application of any of its traditional approaches to customary norms.

V. DETERMINATION OF REGIONAL CUSTOMARY RULES

In addition to its recognition of general customary international law, the Court also dealt with regional customary international rules during the first decade of the new millennium. In the judgment in the *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Costa Rica claimed that Nicaragua had an obligation, under customary law, to allow riparians on the Costa Rican bank of the River San Juan to fish in it for their subsistence.[91] According to Costa Rica, the practice had existed well before and continued after the Treaty of 1858 regulating navigational rights in the river.[92] Nicaragua, for its part, recognized that it had tolerated the practice but that it was not an international obligation.[93] Thus, the debate did not focus on a universal customary rule of international law, but on a regional one based on State practice in the River San Juan.

The Court declared that the practice had been in place in a very remote area for the benefit of a tiny Costa Rican population, a fact that both parties recognized, and that it was not well documented.[94] The Court, based on the long-lasting existence of the practice, affirmed its customary character and stated:

> [F]or the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a long period, is particularly significant. The Court accordingly concludes that Costa Rica has a customary right. . . .[95]

This statement implies that, on the basis of the proved presence of the undisturbed practice, the Court presumed the existence of the custom, and it was for Nicaragua to demonstrate that the customary right did not exist. In sum, while the Court requested proof of the existence of the practice, it

[90] ibid 181.

[91] See International Court of Justice, *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=37&case=133&code=coni&p3=4> accessed 16 March 2010 [134]. For a comment, see E Bjorge, International Court of Justice, 'Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)', Judgment of 13 July 2009, (2011) 60 ICLQ 271.

[92] See *Navigational Rights* (n 91) 140. [93] See ibid. [94] See ibid 141.

[95] ibid.

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did not require Costa Rica to provide proof of the *opinio juris*, and the declaration of the existence of the custom was made by the Court without such proof.[96]

It could be said that the undisturbed character of the practice proved the *opinio juris*, but this would not hold true, since Nicaragua argued that it had simply tolerated the practice, which means that it did not believe that it had a customary obligation. To prove the *opinio juris* would have required a demonstration that Nicaragua was not merely tolerating the practice, but that its lack of opposition to the practice was due to the belief of the existence of an international obligation owed to Costa Rica.[97] The Court did not make the declaration of the existence of the custom on the basis of the demonstration of this belief.[98]

In its judgment, the Court also assessed whether the customary right to fish for subsistence also included the right to fish for subsistence from boats. The Court found that, on the one hand, the evidence of this practice was recent and limited, and on the other, Nicaragua usually rejected it. There was not a right based on an international custom.[99] In sum, this regional state practice, did not reach the status of custom because of its short existence and, most prominently, the opposition to it.

VI. THE SILENCE OF THE INTERNATIONAL COURT OF JUSTICE REGARDING CUSTOMARY INTERNATIONAL LAW

When assessing the Court's new millennium jurisprudence related to the methods to determine whether there is a rule of customary international law, it is important to highlight that there are also silences, usually prominent, in this regard. Not always does the Court take the opportunity offered by cases to pronounce on the nature of a given State practice as an international customary norm. There may be, in abstract, multiple reasons for this silence, which can be either related to the early stage of development of the State practice in question, with the convenience of waiting for a future case with a more suitable factual situation, or to the judicial strategy of avoidance to leave to States the resolution of complex issues.

[96] In its separate opinion, Judge Sepulveda-Amador opposed the Court's conclusion. He claimed that it was based neither on state practice nor on *opinio juris*. See Separate Opinion of Judge Sepulveda-Amador, 22–8.

[97] For a comment on this conclusion, briefly highlighting the absence of *opinio juris*, see P Weckel, 'Chronique de Jurisprudence Internationale. Court Internationale de Justice. Arret du 13 juillet 2009. Differend Relatif a Des Droit de Navigation et des Droit Connexes (Costa Rica – Nicaragua)', (2009) 113 Revue Général de Droit International Public 931, 928.

[98] It cannot be claimed that the Court, in general, does not require proof of the *opinio juris* for the recognition of regional customary international law. This is a conclusion that could be made only on the basis of a steady case-law in this regard and not only on a single case.

[99] *See Navigational Rights* (n 91) 143.

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The declaration of a rule as customary or the denial of such status may have important consequences on States' practice in the sense that the declaration may promote the practice of the given rule, as was mentioned above in Part I, while the denial may give States a powerful reason not to follow the specific practice in question, thereby affecting its possible emergence as custom in the future. It is thus not surprising that the Court may decide to remain silent on a claim that a certain practice, treaty, or soft-law norm has reached the status of customary international law when there are strong opposite views regarding such nature among States.

In *Arrest Warrant*,[100] the DRC argued that universal criminal jurisdiction was contrary to international law,[101] while Belgium made the key claim that there was an obligation under customary international law to prosecute perpetrators of serious violations of international humanitarian law.[102] During the proceedings, though, both parties decided that the Court should decide only whether the arrest warrant was a violation of the diplomatic immunities of foreign ministers.[103] As a matter of procedure, the Court had jurisdiction to decide only on the lawfulness of the arrest warrant in the operative part of the judgment, and it did not on the issue of universal jurisdiction. Nonetheless, the Court was not prevented from addressing the latter subject-matter in the reasoning of the judgment, and the Court tacitly said so.[104] During the Court's deliberation, several judges argued that the Court should address the issue of universal jurisdiction.[105] In particular, the President of the Court, Judge Guillaume, expressed the need for it to do so on the basis of the interest of all States in this matter.[106] The Court nonetheless decided to remain silent on this important topic and to leave its evolution to States alone.[107] Praising the majority, Judge Oda explicitly supported this silence by stating: '[T]he Court has shown wisdom in refraining from taking a definitive stance in this respect [universal jurisdiction] as the law is not sufficiently developed. . . .'[108] To be

[100] For a brief description of the facts of this dispute, see text to n 53.

[101] See *Arrest Warrant* (n 53) 17.

[102] See Joint Opinion of Judges Higgins, Kooijmans and Buergenthal, 8.

[103] As to the DRC's decision in this regard, see ibid 7. As to Belgium's position, see ibid 9.

[104] See *Arrest Warrant* (n 53) 43, and Joint Opinion of Judges Higgins, Kooijmans and Buergenthal, 12, 13 and 16.

[105] See ibid 3. These judges assessed domestic laws and rulings as evidence of State practice, and international treaties. See ibid 20–43. See also the Separate Opinion of Judge Guillaume, 1.

[106] See ibid.

[107] According to Judges Higgins, Kooijmans and Buergenthal, national legislation and case-law is neutral as to universal jurisdiction. There is neither a customary rule regarding universal jurisdiction nor an *opinio juris* considering it unlawful. See Joint Opinion of Judges Higgins, Kooijmans and Buergenthal, 45. However, these judges supported the view that there was a trend toward allowing States to punish crimes against humanity. See ibid 52. For his part, Judge Guillaume was of the view that there was no customary or conventional international rule regarding universal jurisdiction. See Separate Opinion of Judge Guillaume, 12. In his view, universal jurisdiction would promote judicial chaos and favor only powerful States. See ibid 15.

[108] Dissenting Opinion of Judge Oda, 12.

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sure, this silence did not go unnoticed. According to Ruiz Fabri and Sorel, the Court in addressing the issue of universal jurisdiction '[n]'a vraisembablement pas voulu courir le risque de faire ouvrir la boite de Pandore que pourrait bien être le premier.'[109]

Similarly, in *Armed Activities*, the DRC claimed that Uganda had exploited the former's natural resources in the Congolese occupied territory, and had therefore violated the principle of sovereignty of natural resources embodied in UN General Assembly resolution 1803(XVII) on Permanent Sovereignty over Natural Resources, adopted in 1962; the Declaration on the Establishment of a New International Economic Order contained in UN General Assembly resolution 3201 (S.VI) of 1974; and the Charter of Economic Rights and Duties of States, adopted by the UN General Assembly in its resolution 3281(XXIX) of 1974.[110] The Court declared that the principle was a customary international law but said nothing about whether UN General Assembly resolution 1803 or the Charter of Economic Rights and Duties had or had not the status of customary international law. The Court very briefly stated, with no further analysis, that these Resolutions were not applicable to the facts of the case. Instead, the Court framed them under the *jus in bello* and, specifically, article 47 of the Hague Regulations of 1907 and article 33 of the Geneva Convention IV of 1949, both banning pillage by occupying powers,[111] and which the Court found to have been violated by Uganda.[112]

Turning first to Resolution 1803, according to Judge Koroma the Court endorsed its customary nature when it declared the customary law status of the principle of permanent sovereignty over natural resources.[113] However, despite the great authority that this judge carries in interpreting the scope of what the Court meant in this regard, the fact is that the Court did not explicitly make the recognition[114] but could well have done so for two reasons: first, Resolution 1803, although not unanimous, was supported by UN member States of various kinds;[115] and second, some international commercial

[109] R Fabri and Sorel, (n 53) 863.
[110] See *Armed Activities* (n 37) 226.
[111] See ibid 244.
[112] See ibid 246, 248.
[113] See Separate Opinion of Judge Koroma, 11.
[114] Scholars commenting on this judgment have not understood the Resolutions as having been declared as customary international law. See, for instance, P Weckel and G Areou, 'Chronique de Jurisprudence Internationale', (2006) 110 Revue Générale de Droit International Public 173, 183; R Dufresne, 'Reflections and Extrapolation on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case', (2007–2008) 40 New York University Journal of International Law and Politics 171, 215–16; PN Okowa, 'Current Developments: Decisions of International Courts and Tribunals. Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)', (2006) 55 ICLQ 742, 751; and F Latty, 'La Cour Internationale de Justice Face aux Tiraillements du Droit International: Les Arrêt dans Les Affaires des Activités Armées sur le Territoire du Congo (RDC c. Ouganda, 19 Décembre 2005; RDC c. Rwanda, 3 Février, 2006)', (2006) LI Annuaire Français de Droit International 205, 232.
[115] Resolution 1803 was adopted by 87 votes to 2, with 12 abstentions. The United States supported the resolution, France and South Africa were against it, and the countries under the

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arbitration tribunals had previously held so on the basis of this wide support.[116] It is then striking that, being in a clear position to apply the deductive approach based on *Nuclear Weapons*, the Court decided not to make an explicit recognition of Resolution 1803 as a customary norm. There were powerful reasons for this silence, given the very sensitive topics the Resolution deals with, such as compensation for expropriation. For instance, it provides:

> 1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned. . . .
>
> 4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.[117]

A similar analysis can be made regarding the assessment of the customary character of the Charter of Economic Rights and Duties of States, which was approved by an overwhelming majority in the General Assembly, but with the opposition of the then most important powers, on which the effectiveness of the resolution depended.[118] The Court could well have concluded, on the basis of *Nuclear Weapons*, that the Charter lacked customary nature because of the strong opposition it received.[119] However, it decided to remain silent and the reason was, highly likely and once again, the sensitive of the subject-matter of the Resolution. It is not surprising then that the Court adopted a hands-off approach to the nature of these resolutions, since both deal with a range of key elements related to the economic relations between developed and developing countries.

influence of the Soviet Union and Ghana and Burma abstained. See S Schwebel, 'The Story of the United Nations Declaration on Permanent Sovereignty over Natural Resources', in S Schwebel (ed) *Justice in International Law: Selected Writings* (CUP, Cambridge, 1994) 24.

[116] See *Texaco v Libya*, Award on the Merits of 10 October 1977, 53 ILR 389 and *Kuwait v Aminoil*, Award of 24 March, 143. See, generally, S Ripinsky & K Williams, *Damages in International Investment Law* (BIICL, London, 2008) 72–4.

[117] UN General Assembly Resolution 1803(XVII) on Permanent Sovereignty over Natural Resources, available at <http://www2.ohchr.org/english/law/resources.htm> accessed 12 February 2011. For instance, the notion of appropriate compensation has been hotly debated by capital-exporting countries, which are always in favour of full compensation as the standard in this regard. This is the standard that has almost always been included in bilateral investment treaties. See Schwebel (n 115) 244.

[118] See Schachter (n 27) 535.

[119] See, generally, Ripinsky and Williams (n 116) 73.

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VII. AN ASSESSMENT OF THE COURT'S JURISPRUDENCE ON CUSTOMARY INTERNATIONAL LAW: 2000–2009

A. The Traditional Methods for the Recognition of Customary International Law

From a historical perspective, one can say that, if the creation of the flexible deductive approach in *Nicaragua* gave tremendous momentum to this method, such momentum has faded over the last two decades. In effect, the approach was attenuated by the Court in *Nuclear Weapons* in the nineties, as was mentioned, and was not applied with meaningful impact during the first decade of the new millennium. Such fading is further confirmed by the fact that the most important decisions regarding this method were instances of non-application: the Court's decision in *Diallo* and its silence in *Armed Activities*. To be sure, this is far from saying that the flexible deductive approach is no longer relevant. The approach remains available to be used by the Court, but during the first decade of the millennium, the Court seemed to have been aware of some of the political constraints that inhibit the use of the method.

The opposite phenomenon may be taking place regarding the strict inductive approach, which could be seen as regaining relevance, at least during the period under consideration. The decisions of the Court in *Arrest Warrant* and *Diallo*, mainly, had important consequences in the respective areas of the international law at issue in these disputes. Thus this method cannot be regarded as part of the remote history of the Court's dealings with customary international law. It is alive and operating. In sum, at this moment the strict inductive and the flexible deductive approaches coexist.

B. Non-traditional Methods to Assess the Existence of Customary International Law

The jurisprudence of the first decade of the new millennium also reveals that the Court has other methods to deal with customary international law. However, it should not be concluded from the existence of these methods that all of them are as important for the Court as its traditional approaches. While the existence of the non-traditional methods illustrates a certain margin of maneuverability for the Court when deciding customary international law issues, the case-law reveals that the inductive and deductive approaches remain the most important, while the use of the others is somehow exceptional and marginal.

Turning to each of the untraditional methods, it is important to say, first, that although reliance on judicial decisions as part of the elements to ground the existence of a customary norm or to declare that it lacks this nature is not strictly speaking in total accordance with article 38 of the Statute, because

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judicial decisions are not State practice,[120] this reliance makes sense in practical terms. Although the international legal system has gained in sophistication in recent decades with the emergence of various new forms of State actions, such as declarations, good practices, and other forms of soft law that complement the more traditional primary sources, the fact remains that the system still lacks the degree of complexity of domestic legal systems, and solid grounds to provide a persuasive decision may sometimes not be readily available. The Court's use of its own case-law or of other judicial decisions to give weight to the declaration or to the confirmation of a certain customary rule may well be a tool that needs to be deployed to provide a persuasive motivation for this decision.

Second, the relevance of judicial decisions in the assessment of the existence of customary international law is not novel, since article 24 of the Statute of the ILC, a body entrusted with the task, among others, of identifying customary international norms, explicitly refers to such decisions as proof of customary international law.[121] Certainly, what the Court has to apply is its own Statute only, but the use of judicial decisions, particularly its own case-law, to ground the existence of customary norms illustrates that the Court is moving in the direction of the mandate that the UN gave to the ILC.[122]

As to implicit customary rules, it could be said that a State practice whose customary nature is contested by the disputants should always deserve a complete assessment by the Court prior to its application as customary law. Just to avoid the issue, as the Court did twice in *Maritime Delimitation Between Qatar and Bahrain*,[123] as if the dispute on this point had not taken place, is not an adequate response to the parties. Implicit customary rules under these circumstances should not exist. Further, the fact that the Court has tacitly admitted the existence of implicit customary rules does not suggest that one could expect a wide use of this possibility, or that the Court could freely use this method, even regarding the fundamental issues in disputes. One matter is the existence of the method, and another is how often it is used. In this sense, this method of implicit customary rules has remained exceptional within the Court's case-law in the period under analysis

[120] See International Committee of the Red Cross, JM Henckaerts & L Doswald-Beck, *Customary International Humanitarian Law Vol 1* (CUP, Cambridge, 2005) xxxiv.

[121] See Statute of the International Law Commission, available at <http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf>, accessed 8 February 2011.

[122] This is not to say that there has not been any relevant State practice supporting the existence or non-existence of the customary rule, but to argue that part of the grounds for the decision by the Court has been its own prior judgments or other tribunals' decisions. Of course international judicial decisions also play a role in the identification of customary international law applicable in domestic litigation in some national legal systems. See, for instance, United States District Court, Southern District of New York, *Ken Wiwa, et. Al* v. *Royal Dutch Petroleum Co. et al*., Order 28 April 2009, at 10.

[123] See text n 83, n 84 and n 90.

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here, and one should expect that this exceptional character would continue in the future.

In any case, the existence of the above-mentioned non-traditional methods—even despite their marginality—also seems to show that article 38 of the Statute has some limitations in responding to new realities in State practice under specific circumstances. This is certainly not to say that article 38 has become an unworkable provision, but simply that the provision may have a structure that does not always well suit particular situations, or at least, that the Court thinks that a certain practice is indeed a custom, although the Court is unable or unwilling to demonstrate it on the basis of the requirements of Article 38.

C. Regional Customary Law

As to regional customary international law, little can be said on the basis of a single decision in this regard, the judgment in *Navigational Rights*. However, although the existence of customs of this nature should not be taken lightly, room for more flexibility in their declaration—by not requesting a full proof of the elements of article 38—could eventually exist,[124] since the concern for imposing international obligations on a large number of States that have not participated in the creation of the custom considerably lessens in the event of a regional custom grounded on bilateral relations, as the above-mentioned judgment illustrates.

However, a word of caution is also due: the fact that a practice is regional should by no means be seen to imply that the international obligation in question always becomes less transcendent to the point that regional customs could always easily be declared. In fact, it can be entirely possible that major State interests are involved in a discussion on whether or not a regional custom exists, and a Court decision recognizing the given custom may have a significant impact on the State on which the obligation would be imposed. Certainly, under this set of circumstances, the Court should recognize the existence of the custom on the basis of a complete demonstration of the requirements of article 38. In any case, it is possible to say the Court's approach to regional customary law in *Navigational Rights* differs from the one the Court adopted regarding another regional custom in the *Asylum Case*

[124] However, this is not to say that regional customary international law has a lesser binding status than general customary international law, since several authors and the ILC have argued that the former could be seen as having an informal higher hierarchy than the latter due to the principle of *lex specialis*. See International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', finalized by M Koskenniemi, Fifty-eight session, (13 April 2006), available at <http://daccessdds.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement>, accessed 10 February 2011, 85.

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(Colombia/Peru), in which the Court requested full proof of the requirements of article 38.[125]

A final point relates to States' absence of opposition to the practice as a key requirement for the emergence of a right grounded on a regional custom.[126] Mere acquiescence, not a belief of having an obligation, is a threshold that needs to be handled with care in regional customary law in which there is an asymmetry of power between the States concerned. Although power plays a role in the formation of customary international law, caution is in order so as not to allow it to over-extend its reach. The factual situation in *Navigational Rights* involved two States that were even in their power, but acquiescence could be too low a threshold for recognition of a regional custom if a State in a weak power position and acquiesces to a practice carried out by a more powerful neighbor. Acquiescence in this case may have much to do with convenience and fear of affecting the overall bilateral relations and not with the recognition by the less powerful State of the existence of a right in favour of the more powerful one.

VIII. CONCLUSION

Despite the significant role that the Court played in the creation of customary international norms at the end of 20th century, it is possible to say that, at a general level, Fergusson's statement, 'Sometimes the most important historical events are the non-events,' is relevant when portraying the Court's jurisprudence over the years 2000–2009 regarding the methods for the declaration of the existence of this kind of international norm. The most important things were those that did not occur: the flexible deductive approach was not particularly important, and the Court avoided dealing with the customary character of universal criminal jurisdiction and with the customary status of UN General Assembly resolutions 1803(XVII) on Permanent Sovereignty over Natural and 3281(XXIX), the Charter of Economic Rights and Duties of States. Each of these three issues is very important for the community of States, but their customary nature is still in formation or is highly debated. The Court's decision not to address them was notable.

However, there are certainly also events to highlight: the re-emergence of the strict inductive approach and the identification of non-traditional methods that, although still marginal, may well remain as tools to justify decisions in the coming years. Future evaluations of the methods for the identification of customary rules of international law may also pay close attention to the Court's silences in this field, which speak volumes about judicial restraint. On

[125] See International Court of Justice, *Asylum Case (Colombia/Peru)*, Judgment of 20 November 1950, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=f8&case=7&code=cp&p3=4>, accessed 7 February 2011, 277–8.

[126] See text to n 95.

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the whole, this article has sought to broaden the assessment of the methods for the recognition of customary international law, and to demonstrate that an exclusive focus on the dichotomy between the flexible and strict approaches is incomplete, as the Court's case-law in the first decade of the new millennium reveals.

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