NOTE E COMMENTI

RECENT DEVELOPMENTS IN ICJ'S JURISPRUDENCE ON THE IDENTIFICATION OF CUSTOMARY LAW

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1. Article 38, para. 1, of the Statute of the International Court of Justice states that: «The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply […] international custom, as evidence of a general practice accepted as law».

In absence of a specific rule, the mentioned article has been used to identify sources of international law. It contributes, on the one hand, to enhance the role of customary law in international law and, on the other hand, to specify the constitutive elements of international custom (practice and *opinio iuris*).

Despite the well-known importance given to custom in international law, its identification remains complex. In fact, the process surrounding the birth of a rule of customary law, as well as the methodology used by international courts and tribunals in order to ascertain the formation and the existence of such rule, have always attracted scholars, posing several theoretical problems difficult to solve[1].

Doctrine and jurisprudence tried to "fill the gap" but the importance of the issue was confirmed when the International Law Commission (ILC) was commissioned to study the topic on the "Formation and evidence of customary international law", choosing Michael Wood as Special Rapporteur. After a year, commissioners decided to change the title of the topic focusing on the "Identification of customary international law". Finally, the ILC presented

[1] How many repetitions are needed in order to make a custom? How types of conducts can be considered as "practice"? Do all States of international community should be involved or some of them (the most affected) should be considered sufficient? How can the *opinio iuris* be ascertain? Does the violation of a custom indicate that it has been outdated?

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its 16 conclusions in 2018. As made clear by the commentary «the draft conclusions concern the methodology of identifying rules of customary international law, and their content, are to be determined»[2].

On 13 July 2023, the International Court of Justice (ICJ) delivered its judgment about "Question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast"[3]. The decision is interesting because the Court had to assess the existence of a custom and, doing that, it challenged its previous jurisprudence, the ILC's conclusions and prevailing doctrine, with the consequence to open a new debate on the topic.

2. Before explaining in detail the most relevant legal aspects of the judgment, it is necessary to retrace the facts at the origin of the dispute.

In 2013 Nicaragua filed an application instituting a proceeding before the ICJ against Colombia for a controversy concerning the delimitation of maritime boundaries between them. In particular, Nicaragua argued the right to an extension of its continental shelf beyond 200 nautical miles, according to Article 76 of UNCLOS. In accordance with the latter article, it did a submission before the Commission on the Limits of the Continental Shelf (CLCS). The claim was objected by Colombia which observed that such extension would have determined an unjustified intrusion into its 200 nautical miles.

On 4th October 2022, the Court issued an order stating that a decision on two questions of law was required in order to reach a solution for the case, in particular: under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State? What are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and, in this regard, do paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea reflect customary international law[4]?.

In the judgment delivered on 13 July 2023, the Court answered only to the first question, considering the second redundant. Judges found that «un-

[2] International Law Commission, *Draft Conclusions on Identification of Customary International Law with Commentaries*, in *Yearbook of the International Law Commission*, 2018, vol. II, part two, 122.

[3] International Court of Justice, *Question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast* (*Nicaragua v. Colombia*), Judgment of 13th July 2023.

[4] International Court of Justice, *Question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast* (*Nicaragua v. Colombia*), Order of 4th October 2022.

der customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State»[5].

In the following paragraphs we will discuss about how the Court arrived at this conclusion, in particular we will focus on the method and the reasoning used by judges in order to derive the existence of a custom by an analysis of the paragraph 77 of the judgment[6]. To this end, a premise is needed. The topic of custom in international law is particularly complex. It poses theoretical and empirical problems of great complexity on which the literature is extremely wide. Therefore, this paper does not aspire to represent a detailed study on the matter but, rather, to encourage the reflection on some of aspects of international custom, having as a starting point a judgment which opens again the debate on the topic.

3. The assessment of *opinio iuris* is, probably, the most interesting part of the decision. In this regard, the Court made two different statements which will be analysed in this paragraph.

In the first of them, the Court declared that «the practice of States before the CLCS is indicative of *opinio iuris*, even if such practice may have been motivated in part by considerations other than a sense of legal obligation»[7].

There is no doubt that such position is particularly unexpected and it is really difficult to comprehend how judges failed to grasp its implications on the concept of *opinio iuris*. In order to understand what the impact of this reasoning may be, it is necessary to make some general considerations on the subjective element of custom.

Article 38, para.1(b), of the ICJ Statute defines the international custom «as evidence of a general practice accepted as law». Even though, over the years, some doctrines tried to attribute a predominant role alternatively to practice or to *opinio iuris*, the traditional thesis, which is actually the prevailing one, places both requirements on the same level. The International Court of Justice has constantly reiterated in its jurisprudence that a custom, as such, implies the necessary presence of both the objective and the subjective element. Moreover, the so-called "two-elements" approach was confirmed in the ILC's Draft conclusions on identification of customary international law[8].

[5] International Court of Justice, *Question of the delimitation*, Judgment of 13 July 2023, cit., 31.
[6] *Ibidem*, 29.
[7] *Ibidem.*
[8] International Law Commission, *Draft Conclusions*, cit., 125.

With regard to the notion of *opinio iuris*, it notoriously refers to a sense of legal obligation accompanying State's behaviour; both doctrine and jurisprudence converge on this point. The ICJ, in the *North Sea Continental Shelf* case, affirmed that «The need for such a belief [of obligation] is implicit in the very notion of the *opinio iuris sive necessitatis*»[9]. Such definition was supported by the ILC, whose conclusion 9 on customary law underlines that «the requirement, as constituent element of customary international law, that the general practice be accepted as law (*opinio iuris*) means that the practice in question must be undertaken with a sense of legal right or obligation»[10].

In fact, States may well act in a certain way for extra-juridical reasons but, in those cases, we are dealing with a mere usage or habit[11]. An authoritative part of doctrine emphasized the distinction between *opinio necessitatis* and *opinio iuris*. The first one is the stage where States' practice may be regarded as imposed by social, economic or political needs. If such practice does not encounter strong and consistent opposition from other States but it is gradually accepted, a customary rule crystallizes. At this later stage, it may be held that the practice is dictated by international law (*opinio iuris*). It is only at the end of this process (in which the exactly moment of the transformation is difficult to pinpoint) that a customary rule may be said to exist[12].

Consequently, it is correct to affirm that the *opinio iuris* is the element allowing a behaviour to acquire the nature of customary law[13]. This implies that in absence of *opinio iuris*, interpreted as the conviction that a certain behaviour is legally binding, it is not possible to deduce that a custom exists.

For this reason, the ICJ denied the existence of customary rule in all cases where it did not consider the *opinio iuris* to be sufficiently traceable[14].

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[9] International Court of Justice *North Sea Continental Shelf*, Judgment of 20th February 1969, I.C.J. Reports 1969, 45. In a similar vein the PCIJ expressed in the *Lotus* case where it affirmed that «the rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law», Permanent Court of International Justice, *The case of the S.S. "Lotus"*, Judgment of 7Th September 1927, Judgment series A, No.10, 1927, 18. The concept was reiterated by the ICJ in other occasions. It has been confirmed also in *Jurisdictional Immunities of the State* (*Germany v. Italy*), Judgment, I.C.J. Reports 2012, 122; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports, 132.

[10] ILC, *Draft conclusions*, cit., 128.

[11] H.W.A. THIRLWAY, *International Customary Law and Codification*, Leiden, 1972, 48, 53-56; K. WOLFKE, *Custom in Present International Law*, Dordrecht-Boston, 1993, 40-41; M.E. VILLIGER, *Customary International law and Treaties*, The Hague-London-Boston, 1997, 48; M. MENDELSON, *The Formation of Customary International Law*, in *Collected Courses of The Hague Academy of International Law*, 1998, vol. CCLXXII, 245-246; See also: ILC, *Draft conclusion*, cit., 126; B. CONFORTI, M. IOVANE, *Diritto internazionale*, Napoli, 2021, 12th edition, 42-43.

[12] CASSESE, *International Law*, Oxford, 2003, 2nd edition, 157-158.

[13] G. SCHWARZENBERGER, *The Inductive Approach to International Law*, in *Harward Law Review*, 1947, vol. LX, 550.

[14] International Court of Justice, *Colombian-Peruvian asylum case*, Judgment of 20th November 1950, I.C.J. Report 1950, 277; International Court of Justice, *Legality of the Threat or*

Having in mind such considerations, on the one hand, the meaning of *opinio iuris* and, on the other hand, the need to demonstrate it, the Court's statement is open to criticism.

First of all, the problem concerns the denial of the notion of *opinio iuris* which, by definition, is connoted by a sense of respect for a legal obligation. The breaking point is evident if we compare the words of the Court with the commentary to the ILC's Draft conclusions on customary law: the first affirmed that «the practice (...) is indicative of *opinio iuris* even if (…) motivated in part by considerations other than a sense of a legal obligation»; the latter declared that «It is crucial to establish, in each case, that States have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law»[15]. It is clear that judges recognized that the requirement of *opinio iuris* is met even if the reasons leading States to act in a certain way are, in part, extra-juridical. The consequence is the loss of the intrinsic meaning of the notion of *opinio iuris*.

A second problematic aspect, which is a consequence of the first, is that such approach also creates problems of compatibility with Article 38 of the Statute of the ICJ which requires judges to decide by the application of custom but only if the general practice is accepted as law.

What if the Court decides a case using a customary law but in absence of the subjective element defined as acceptance as law? What if the Court opens to the option according to which the requirement of *opinio iuris* is met even if States acted in a certain way for extra-legal considerations? Is it possible to support the idea that it decided by applying custom or, maybe, the decision was taken considering a mere usage or habit?

As already explained, the *opinio iuris* is the element transforming a practice into a custom[16], but if the Court decides a case admitting that considerations other than a sense of legal obligation suffices, the risk is to transform a habit into a norm, confusing what is legally binding and what is not.

As anticipated, there is a second part of the decision referring to the subjective element of custom, in particular judges affirmed that «In addition, given its extent over a long period of time, this State practice may be seen as an expression of *opinio iuris*, which is a constitutive element of customary

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Use of Nuclear Weapons, Advisory Opinion of 8th July 1996, I.C.J. Reports 1996, 254; International Court of Justice, *Case Concerning Military and Paramilitary activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment of 27th June 1986, I.C.J. Reports 1986, 108-109.

[15] ILC, *Draft Conclusions*, cit., 138.

[16] As underlined by Dinstein, *opinio iuris* «underpins the transition of State practice from the normal to the normative». Y. DINSTEIN, *The Interaction between Customary International Law and Treaties*, in *Collected Courses of the Hague Academy of International Law*, 2007, 294,

international law»[17]. This statement opens a very debated issue regarding whether a certain State's behaviour may represent the evidence of the existence of both *opinio iuris* and practice.

It is not the aim of the present contribution to enter into the origin of the debate and in the relative implications, but this case represents a further occasion to explain why, despite some authors assume that a widespread and uniform practice may amount to a presumption of *opinio iuris*, the thesis according to which the two elements should be considered separately is more convincing[18].

As noted by the ICJ in the *North Sea Continental Shelf* case «The frequency, or even habitual character of the acts is not enough [to prove the *opinio iuris*]. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but are motivated only by considerations of courtesy, convenience, or tradition, and not by any sense of legal duty»[19]. In general terms, the *opinio iuris* should not be ascertained on the basis of practice because the latter cannot explain the reasons for which States act in a certain way and, therefore, whether they do so because they feel to be compelled.

Such position was confirmed by the conclusion 3, para. 2, of the ILC's work on customary law which states that «Each of the two constitutive elements is to be separately ascertained. This requires an assessment of evidence for each element».

For these reasons, the proposed solution is not convincing. First of all, the fact that there is a conduct and that it is reiterated for a long period of time does not imply that it is carried out for a sense of a legal obligation. A practice, even when consistent over the time, cannot prove, on its own, why States act in a certain way[20]. This conclusion is especially true in this specif-

[17] The ICJ had already expressed in similar terms in the Gulf of Maine case, where it affirmed that «the *opinion juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice». International Court of Justice, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment of 12th October 1984, I.C.J. Reports 1984, 299.

[18] In this sense Y. DINSTEIN, *op. cit.*, 297; P. DUMBERRY, *The Formation and Identification of Rules of Customary International Law in International Investment Law*, Cambridge, 2016, 313.

[19] International Court of Justice, *North Sea Continental Shelf*, cit., 45. In that occasion the Court recalled the *Lotus* case, where the PCIJ stated that «Even if the rarity of the judicial decisions to be found […] were sufficient to prove […] the circumstance alleged […], it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so», Permanent Court of International Justice, *The case of the S.S. "Lotus"*, cit., 28.

[20] As noted by M. MENDELSON, *The formation*, cit., 206-207«What must, however, be avoided is counting the same act as an instance of both the subjective and the objective element. If one adheres to the 'mainstream' view that it is necessary for both elements to be present, and in particular for the subjective element to be accompanied by 'real' practice, this must necessarily preclude treating a statement as both an act and a manifestation of belief (or

ic case, where the practice consists in an omission and not into a positive behaviour. In such cases the assessment of the acceptance as law is more difficult because the omission is generally not justified by States, so it is not easy the distinction of what is done for a sense of prohibition or for extra-juridical reasons. Omission, more than positive behaviour, may be symptom of disinterest, lack of convenience, political reasons, etc.

In other words, judges based the assessment of *opinio iuris* presuming that States' abstention was carried out with a sense of legal obligation which should have emerged, mainly, from submissions before the CLCS. Apart from the weakness of the reasoning according to which the *opinio iuris* can be deduced by the practice of abstention, all submissions made by States in accordance with Article 76 before the CLCS do not provide any evidence of the fact that their abstention was based on the conviction of the existence of a prohibition. This data is so real that the same Court admitted that the practice in question «may have been motivated in part by considerations other than a sense of legal obligation», as explained before. Even considering the practice of the few costal States that are non-parties of UNCLOS it is not possible to trace the reason of their omission.

Secondly, the assumption according to which a States' practice is an expression of *opinio iuris*, even if extended for a long period of time, produces the effect to nullify the relevance of the subjective element, implicitly admitting that practice suffices for proving the existence of a custom.

It is true that, sometime, as underlined by the commentary to the Draft conclusions on customary law, «the same material may be used to ascertain practice and acceptance as law»[21], nevertheless, to this end, it should not only constitute a material conduct, but it also should be capable of demonstrating the conviction that the State acted in compliance with a legal obligation. This is not the case of the submissions made before the CLCS because they do not explain the reason of States' abstention. Such argument is also the basis for which the ILC also made clear that «the existence of one element may not be deduced merely from the existence of the other»[22] which is, practically, what the Court did in this decision.

Here, the risk is to unbalance the equal relationship that should govern the relation between *opinio iuris* and practice in favour of the latter, leading to derive the existence of a custom on the sole basis of the practice.

4. In the part of the judgment focusing on practice, the Court noted that the vast majority of States (both Parties and non-parties of UNCLOS) refrained from claiming an extended continental shelf encroaching on mari-

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will)»; see also M. BYERS, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, Cambridge, 1999, 136-141.

[21] ILC, *Draft Conclusions*, cit., 129.

[22] *Ibidem*.

time areas within 200 nautical miles of other States. Judges concluded that «taken as a whole, the practice of States may be considered sufficiently widespread and uniform for the purpose of the identification of customary international law»[23].

Despite, *prima facie*, the reasoning seems persuasive, after a better scrutiny, such conclusion does not appear satisfying. The Court's analysis is superficial. In fact, with regard to States parties of UNCLOS, judges only considered their submissions before the CLCS omitting to investigate other forms of practice. They were satisfied by the negative practice reported by Columbia without proceeding with their own analysis of the available practice[24].

For the abovementioned reasons, a further study of practice, considering the behaviour of States as a whole, is needed in order to assess whether the practice may be considered general.

As indicated by Article 38 of the ICJ Statute, the practice must be general. In the jurisprudence of the ICJ, the generality is interpreted as a symptom widespread and representative practice: it does not need the participation of all States as a whole but, nevertheless, the involvement of States «whose interests are specially affected» is required[25] .

The ILC confirmed such statement affirming that «The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent»[26]. It also clarified that generality does not mean that the practice in question must be followed by States universally, nevertheless the assessment of generality needs the participation of the so-called «specially affected States», that are States which are particularly involved in the relevant activity or are the most likely to be concerned with the alleged rule[27].

In this specific case the so called "most affected" States are those having certain geomorphic and geographical requirements, in particular a natural prolongation of the continental shelf beyond the 200 nautical miles intruding into another State's 200 nautical miles.

As noted by Columbia, the CLCS received 93 submissions (from 73 States): among them 38 cannot be considered because they do not reach the 200 nautical miles of another States; between the remaining 55 submissions

[23] International Court of Justice, *Question of the delimitation*, Judgment of 13 July 2023, cit., 29.

[24] In the *Lotus* case, the Permanent Court of International Justice clearly clarified that, in order to ascertain the existence of a custom, the Court cannot limit itself to the arguments reported by Parties, but it must research all precedents, teachings and facts available capable to reveal the existence of a customary rule. Permanent Court of International Justice, *The case of the S.S. "Lotus"*, cit., 31.

[25] International Court of Justice, *North Sea Continental Shelf*, cit., 43.

[26] ILC, *Draft Conclusions*, cit., 135.

[27] *Ibidem*, 136.

(from 43 States), 51 (corresponding to 39 States) do not claim an extension of the continental shelf within 200 nautical miles from the coast of other States; so, only 4 States made the claim encroaching upon the entitlement within 200 nautical miles of another State (China, Republic of Korea, Somalia and Nicaragua)[28].

Despite the data reported by Columbia are real, some considerations should be done. First of all, in the four relevant cases of China, Republic of Korea, Somalia and Nicaragua none of the opposing States have never raised an objection referring to the existence of an international custom forbidding the claim in question (of course, with the only exception of Columbia).

Secondly, the Court failed to take into account the situation of others 51 submissions from 39 States which did not claim an extended continental shelf falling into 200 nautical miles of another State. In fact, among these submissions, almost ten are the result of boundary agreements between two or more States, where the extension of the continental shelves in overlapping areas was resolved through treaties[29], so they cannot be relevant in order to infer a practice. At the opposite, they may confirm the absence of a custom because States felt the necessity to regulate the respective rights and duties in overlapping maritime areas through treaties. In this regard, it is important to note that the treaty between the Federated States of Micronesia and the Republic of Palau at Article 2, para. 3, establishes that «no Party shall claim an extended continental shelf that intrudes into the Exclusive Economic Zone, as delimited by Annex I, of the other Party»[30], clearly showing that for both States no custom existed in this regard.

As concerns the remaining States, judges did a sort of "selection" of practice considering exclusively submissions made before the CLCS and

[28] Verbatim record 2202/26, Public sitting held on Tuesday 6 December 2022, at 10 a.m., at the Peace Palace, President Donoghue, presiding, in the case concerning *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (*Nicaragua v. Colombia*), 33-34.

[29] Joint submission by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland in the area of the Celtic Sea and the Bay of Biscay; Joint submission by the Republic of Mauritius and the Republic of Seychelles in the region of the Mascarene Plateau; Joint submission by the Federated States of Micronesia, Papua New Guinea and Solomon Islands concerning the Ontong Java Plateau; Joint submission by France and South Africa in the area of the Crozet Archipelago and the Prince Edward Islands; Joint submission by Malaysia and Viet Nam in the southern part of the South China Sea; Joint submission by United Kingdom of Great Britain and Northern Ireland in respect of the Falkland Islands, and of South Georgia and the South Sandwich Islands; Joint Submission by Tuvalu, France and New Zealand (Tokelau) in respect of the area of the Robbie Ridge; Joint Submission by Cabo Verde, The Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone in respect of areas in the Atlantic Ocean adjacent to the coast of West Africa; Joint Submission of the Republic of Benin and the Togolese Republic; Joint Submission by Costa Rica and Ecuador in the Panama Basin.

[30] Treaty between the Federated States of Micronesia and the Republic of Palau concerning maritime boundaries and cooperation on related matters.

omitting to evaluate the practice of the same States in other occasions and situations.

Referring to the different forms of State practice which may be considered, the ILC stated that they «include but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts»[31].

Therefore, it cannot be shareable the Court's decision to consider only submissions before the CLCS in order to infer the existence of a custom, leaving aside the other forms of practice expressing in the opposite direction.

This is the case of some States which made several declarations claiming an extension of their continental shelves despite the overlapping with other States's 200 nautical miles: Canada and Russia in an overlapping area in the Artic Ocean; Cameroon in respect of the Gulf of Guinea in an area overlapping with the Equatorial Guinea; France in respect of Saint-Pierre-et-Miquelon in an area overlapping with Canada; Tanzania in respect of the Indian Ocean in an area overlapping with Kenya; and Argentina in respect of the South Atlantic Ocean in an area overlapping with Chile.

The commentary at the ILC's Draft conclusions on customary law expressly underlines that also claims before national or international courts or tribunals amount to practice[32]. In this sense, the Court lacked to consider several disputes before international courts and tribunals, where some States claimed an entitlement over a continental shelf beyond 200 nautical miles encroaching with another State's 200 nautical miles. In this regard, it is possible to cite: the arbitration between Barbados and Trinidad and Tobago[33]; some cases before ITLOS Bangladesh v. Myanmar[34], Ghana v. Cote d'Ivoire[35]; Mauritius v. Maldives[36]; the conciliation between Timor-Leste

[31] ILC, *Draft Conclusions*, cit., 133.

[32] ILC, *Draft Articles*, 134.

[33] In this case Trinidad and Tobago claimed an extension of its continental shelf beyond 200 nautical miles determining an overlapping with the EEZ of Barbados; at the opposite, Barbados replied that it should have violated the sovereign its rights over the area. Arbitral tribunal constituted pursuant to article 287, and in accordance with annex VII, of the UNCLOS, *Award of the arbitral tribunal concerning the maritime boundary between Barbados and the Republic of Trinidad and Tobago*, decision of 11th April 2006.

[34] In the specific case both Parties made claims to the continental shelf beyond 200 nautical miles in an area overlapping and each Party denies the other's entitlement to the continental shelf beyond 200 nautical miles. International Tribunal for the Law of the Sea, *Delimitation of the maritime boundary in the Bay of Bengal* (*Bangladesh/Myanmar*), Judgment of 14th March 2012, ITLOS Reports 2012, 4.

[35] International Tribunal for the Law of the Sea, *Delimitation of the Maritime Boundary in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*), Judgment of 23th September 2017, ITLOS Reports 2017, 4.

and Australia[37]; the arbitration between Bangladesh and India[38]; the ICJ's judgment in Somalia v. Kenya[39].

With a look at the practice just mentioned, is it still possible to say that the practice is general?

It can be argued that, in order to be general, a practice does not necessarily have to require all States to conform to it and that some contrary behaviours can be tolerated. Nevertheless, the behaviour of approximately 18 States (on a total of 43 considered as "specially affected" in this case) moving in the opposite direction of the Court's conclusion may hardly contribute to define «widespread and uniform» the practice in question.

Another interesting aspect related to practice in the present judgment is that the Court had to evaluate if an abstention (the fact that the vast majority of States parties and non-parties of the UNCLOS have not claim a continental shelf within 200 nautical miles of the baselines of another State) may be interpreted as expression of a prohibition under customary law.

Judges answered affirmatively to this question, but a further reflection is necessary in order to understand whether and which under conditions an omission may amount to practice.

In general term, it is widely accepted that the evidence of a practice is easier to ascertain when States involve in positive behaviour (so material acts); at the opposite, when States act into omissive way, the assessment of

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[36] The Maldives claimed an extension of its continental shelf beyond 200 nautical miles intruding within 200 nautical miles from the baselines of the Chagos Archipelago (Mauritius). Mauritius argued that the Maldives cannot extend its continental shelf into its exclusive economic zone because it had undertaken a specific commitment not to do so. International Tribunal for the Law of the Sea, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* (*Mauritius/Maldives*), Judgment of 28th April 2023.

[37] Australia argued its right to an extension of its continental shelf f beyond 200 nautical miles up to the edge of the Timor Trough, falling into the 200 nautical miles of Timor-Leste. Permanent Court of Arbitration, *In the Matter of the Marine Boundary between Timor-Leste and Australia* (*Timor Sea* conciliation), Award of 9Th May 2018, PCA Case no. 2016-10.

[38] The arbitral tribunal delimited maritime boundaries between two States claiming an extension of their continental shelf. The tribunal created a so called "grey-area" beyond 200 M of Bangladesh's coast but within 200 M of the coast of India. Permanent Court of Arbitration, *In the matter of the Bay of Bengal Maritime Boundary Arbitration between The People's Republic of Bangladesh and the Republic of India*, Award of 7th July 2014.

[39] Somalia asked the Court to determine the maritime boundaries with Kenya by recognizing an extension of its continental shelf beyond the 200 nautical miles in an area of overlapping between them. The ICJ affirmed that « Depending on the extent of Kenya's entitlement to a continental shelf beyond 200 nautical miles as it may be established in the future on the basis of the Commission's recommendation, the delimitation line might give rise to an area of limited size located beyond 200 nautical miles from the coast of Kenya and within 200 nautical miles from the coast of Somalia, but on the Kenyan side of the delimitation line ("grey area")». International Court of Justice, *Maritime Delimitation in the Indian Ocean* (*Somalia v. Kenya*), Judgment of 12th October 2021, I.C.J. Reports 2021, 277.

the existence of a practice is more complex because inaction may have different meaning: lack of interest, tacit agreement, etc.

In the *Lotus* case, the Permanent Court of International Justice recognized that abstention can be considered as a practice but only when «such abstentions were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom»[40] and it was confirmed by the subsequent jurisprudence[41].

In other words, the Court confirmed that inaction should be interpret in order to verify whether the abstention is accompanied by the conviction to respect a legal duty: only when these two requirements are met, the existence of an international custom can be confirmed. Many scholars embrace this conclusion[42]: the simple abstention cannot prove the existence of a prohibition in absence of the acceptance as law, it is only from the latter that it will be possible to deduce that abstention is held as a duty and not simply for lack of interest[43]. The consequence is that inaction may represent a form of practice but in such case a strongest prove of the *opinio iuris* is fundamental. As underlined by Dinstein «The requirement of an unambiguous communal *opinio iuris* is particularly striking where general State practice consists of acts of omission […]. One must not rush to the conclusion that a mode of conduct is prohibited by customary international law only because States do not indulge in that activity»[44].

The ILC also confirmed that «Practice […] may, under certain circumstances, include inaction», this practically means that «The State in question needs to be conscious of refraining from acting in a given situation, and it cannot simply be assumed that abstention from acting is deliberate»[45].

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[40] Permanent Court of International Justice, *The Case of the S.S. Lotus*, cit., 28.

[41] International Court of Justice, *Nottebohm Case (second phase)*, Judgment of April 6th, 1955, I.C.J. Reports 1955, 4; International Court of Justice, *Militarv and Puramilitary Activities in und aguinst Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27th June 1986, I.C.J. Reports 1986, 99; International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8th July 1996, I.C.J. Reports 1996, 254.

[42] G.I. TUNKIN, *Remarks on the Juridical Nature of Customary Norms of International Law*, in *California Law Review*, 1961, 421; M. AKEHURTS, *Custom as a Source of International Law*, in *British Yearbook of International Law*, 1975, 10; M. MENDELSON, *State Acts and Omissions as Explicit or Implicit Claims*, in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally*, Paris, 1991, 373; E. CANNIZZARO, *Diritto internazionale*, Torino, 2018, 130; FOCARELLI, *Diritto internazionale,* Milano, 2021, 129.

[43] Another part of the doctrine considers, on the contrary, that abstention cannot create customary rules, in this sense G. GIANNI, *La Coutume en Droit International*, Paris, 1931, 126; K. STRUPP, *Règles générales du droit de la paix*, in *Collected Courses of the Hague Academy of International Law*, 1934, vol. LXVII, 307; A. D'AMATO, *The Concept of Custom in International Law*, Ithaca-N.Y, 1971, 61-63, 88-89.

[44] Y. DINSTEIN, *op.cit*., 298.

[45] ILC, *Draft Conclusions*, 133.

In the present case it is not surprising that judges considered an omission for inferring a practice. The perplexity concerns the fact that the Court has not fulfil the condition needed in order to demonstrate the existence of a custom arising from an act of abstention by States, namely an evident *opinio iuris*.

In this judgement the Court failed to prove sufficiently the *opinio iuris* for the reasons already explained in the previous paragraph.

The reasoning which based the prove of *opinio iuris* in the acceptance of motives different from a sense of legal obligation, as well as on the extension for a long period of time of the practice, is extremely weak. This is even more accentuated if we consider that the *opinio iuris*, in this case, should have proved the existence of a prohibition. As expressed by the same Court in the *Gulf of Maine* case «the absence of an obligation to do something must not be confused with an obligation not to do it»[46].

Therefore, in the present decision, the problem is not the fact that the Court derived a custom from a negative behaviour but, rather, that the abstention was not counterbalanced by a strong prove of the *opinio iuris*.

5. Finally, the method used by the Court for deriving the existence of the custom deserves a reflection. The decision acknowledged that «this State practice may be seen as an expression of *opinio iuris* […] this element may be demonstrated by induction based on the analysis of a sufficiently extensive and convincing practice»

Traditionally the ICJ used two methods in order to infer the existence of a custom: the induction and the deduction. The induction infers the existence of a customary law from an empirical observation of States practice and *opinio iuris*. The deduction, at the opposite, infers the existence of a custom from an existing and generally accepted rule or principle.

In this specific case, the Court used the induction. The problem is related to the convenience of using the inductive method given the particular aspects of this case, where the practice consists into an abstention and may hardly be considered widespread and consistent, and the *opinion iuris* is not sufficiently proved.

Some authors correctly noted that there are some cases in which the application of inductive method is not possible. Between them, we find the case of conflicting or diverging practice and the case in which the *opinio iuris* cannot be established, especially if accompanied by a negative practice. In such situations the use of deductive method is to be preferred[47]. The rea-

[46] International Court of Justice, *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment of 12th October 1984, I.C.J. Reports 1984, 321.

[47] S. TALMON, *Determining Customary International Law: the ICJ's Methodology between Induction, Deduction and Assertion*, in *European Journal of International Law*, 2015, 422; A.I. BAKA, *The Logic of Absence in Customary International Law: an Open System Ap-*

son is logic. Acts of abstentions combined with an unclear *opinio iuris* are not phenomena which can be observed empirically in order to infer a specific rule from general instances. This is true also for the case of non-uniform practice, where it is not possible to observe a series of univocal acts repeated over time from which the existence of a rule can be inferred. As noted by a part of doctrine «whereas the absence of State practice and/or *opinio iuris* 'discourages' the effective application of the inductive method of reasoning as a tool for the ascertainment of customary international law, the new category of the so-called deductive customary international law allows for State silence to be interpreted on the basis of rules that are deduced from general principles such as the sovereign equality of States etc.»[48].

Therefore, someone might wonder whether the Court could have arrived at the same result through the use of deduction and weather, in that case, its reasoning could have been more convincing. Judges could have used, for example, the principle of sovereignty for deducing the existence of a prohibition related to the extension of the continental shelf when intruding into the 200 nautical miles of another States. This choice would not have been surprising, since the Court had already used this method in other cases inferring the existence of a custom from a general principle[49].

It is true that in the *Gulf of Maine* case, the ICJ affirmed that «presence in the *opinio iuris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas», but it also premised that «customary international law […] comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community». According to Tomuschat «the passages quoted confirm that to collect empirical evidence of the practice concerned can be dispensed with whenever a rule of conduct can be deduced from the constitutional premises of the existing international legal order»[50].

On the opportunity of using the deductive method the doctrine is not univocal. Some authors believe that the deductive method is useful in order to infer the existence of a practice from unwritten values governing interna-

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proach, in P. MERKOURIS, J. KAMMERHOFER, N. ARAJÄRVI (eds.), *The Theory, Practice, and Interpretation of Customary International Law*, Cambridge, 2022, 71.

[48] A.I. BAKA, *op. cit.*., 72.

[49] Judges inferred the rule of State immunity from the principle of sovereign equality between States, see International Court of Justice, *Jurisdictional Immunities of the State*, cit., 123; the Court deduced the obligation of a coastal State in times of peace to warn the existence of a minefield in its territorial sea from principles such as considerations of humanity, the freedom of maritime communications and the obligation not to allow the uses of the territory for acts contrary to the rights of other States, International Court of Justice, *Corfu Channel* (*United Kingdom v Albania*), Judgment of 9th April 1949, ICJ Reports 1949, 22.

[50] C. TOMUSCHAT, *Obligations Arising for States without or against Their Will*, in *Collected Courses of the Hague Academy of International Law*, 1993, vol. CCXLI, 299.

tional community[51], others strongly oppose to this idea considering such method a sort of «judicial legislation»[52].

The ILC expressed clearly that the two-element approach does not preclude the use of deduction as an aid «In particular when considering possible rule of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law, or when concluding that possible rules of international law from part of an 'indivisible regime'»[53].

Therefore, maybe, the use of deductive method could have better fitted to the present case.

6. Summarizing what already expressed in previous paragraphs, this decision surely represents an important occasion for a reflection on an extremely theoretical issue. The present judgment faces several aspects of customary law: the notion of *opinio iuris* and its assessment; the notion of "generality" and the forms of practice; the methodology for inferring a custom.

It seems that the Court did a sort of reverse procedure to prove the existence of the customary rule: instead of starting from practice and *opinio iuris* in order to deduce the custom, it started from the rule modelling the practice and the *opinio iuris* in the most congenial way to support its thesis.

With regard to the subjective element, the judgment seriously undermines the role of the *opinio iuris*, denying the requirement of the acceptance as law (in contrast with the same notion of *opinio iuris sive necessitatis*) and allowing an assessment based on an extension for a long period of time of the practice. The risk is twofold. From one hand, it represents a precedent that the subsequent jurisprudence may recall in order to justify the existence of a customary rule in absence of the acceptance as law; on the other hand, the assessment based mainly on practice risks to cause the loss of autonomy of the *opinio iuris*.

As concern the objective element, the outcome is a distorted use of practice which is evident both for the selection of acts and behaviours to consider (leaving aside a wide practice expressing in the opposite way) and for the interpretation of a negative behaviour as a prohibition but in absence of a convincing prove of *opinio iuris*. Even in this case there are two risks: the first is that the Court may decide to operate a "selection" of practice for inferring a custom, the second is that whatsoever abstention may be interpreted as a rule of customary law forbidding certain conduct.

With regard to the inductive method, having in mind the criticalities related to practice and *opinio iuris*, its use is not appropriate. As underlined in

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[51] *Ibidem*.

[52] G. SCHWARZENBERGER, *op. cit*., 539-570; J.P. KELLY, *The Twilight of Customary International Law*, in *Virginia Journal of International Law*, 2000, 526.

[53] ILC, *Draft Conclusions*, cit., 126.

the dissenting opinion of judge Tomka, the method used by judges is more similar to a simple assertion of the customary rule[54]. It is not a certainty, but perhaps the use of the deductive method starting from the principle of sovereignty could have favoured a more linear reasoning by the Court.

Finally, the present judgment fails to convince of the existence of an international custom which prohibits the extension of the continental beyond the 200 nautical miles when intruding into another State's 200 nautical miles. As expressed by Tomka «The Judgment is not based on the application of international law but on a rule that the Court simply 'invented'. The Judgment does not provide any serious analysis of State practice nor the required *opinio iuris*»[55].

ABSTRACT

Recent Developments in ICJ's Jurisprudence on the Identification of Customary Law

Customary law is one of the main sources of international law, but its identification remains complex. Over the years, doctrine and jurisprudence have tried to solve problems concerning the assessment of its constitutive elements, the process of its birth, the methodology for the deduction of its existence.

A recent ICJ's judgment, in a dispute between Nicaragua and Colombia, reopened a debate on these issues.

As concerns *opinio iuris*, the Court stated that it can be inferred from a constant and uniform practice and that it is met even if States's behaviour was justified by extra-juridical reasons.

With regard to practice, the Court only considered a part of it, omitting to take into account States' behaviour in a variety of situations and occasion and, moreover, failing to prove States's abstention was carried out with a sense of legal obligation.

For these reasons, the judgment challenged many aspects regarding the assessment of practice and *opinio iuris*, as well as the methodology to deduce the existence of a custom, contrasting with its previous jurisprudence and the main doctrine on the matter.

[54] Dissenting opinion of judge Tomka, 1. For a detailed explanation of the assertion used by the ICJ for inferring a customary rule, see S. TALMON, cit., 434-440.

[55] *Ibidem*.