

CUSTOM IN THE PRESENT INTERNATIONAL LAW OF THE SEA

CEZARY MIK*

INTRODUCTORY NOTE. METHODOLOGICAL REMARKS

Traditionally, it is believed that law of the sea is one of those areas of international law whose roots are embedded in the distant past and whose legal basis was designated for centuries by customary law¹. However, especially in the second half of the twentieth century, this area was covered by codification measures which led to adoption of treaties regulating a wide range of classic and more contemporary matters of the public law of the sea. In such situations a naturally occurring question is whether the current international law of the sea, understood as the law of the XX and XXI centuries, still has a place for customary law and, if so, then what role does it play in the law of the sea.

The opinions of doctrine on this issue are divided. Let us provide some examples. For instance, in a speech as a part of the Commission on Maritime Law of the Polish Academy of Sciences in Gdańsk delivered in the late 80s, an eminent scholar of customary international law, K. Wolfke found that despite codification, the role of the customary law of the sea is still undeniably significant. However, at the same time he noted that nowadays it is “increasingly difficult to find an example of a ‘clean’ treaty or customary rule, because in the continuous evolution of international law, various elements that determine the content and scope of the binding force of the law tend to accumulate”. According to the author, under these circumstances we should pay attention to the role of legislative practice of states or even its individual manifestations in the form of precedents. This component of customary law of the sea remains the most important - even more important than formal agreements².

More recently, D. R. Rothwell and T. Stephens decided in a more cautious manner that “Whilst the law of the sea was clearly dominated by state practice and customary international law up until approximately the mid-twentieth century, the ongoing impact of customary international law cannot be ignored, especially with respect to those areas of conventional law which are not clearly articulated in the existing treaties or in areas where state practice may have extended the application of

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* Professor, Department of International and European Law, Cardinal Stefan Wyszyński University, Warsaw, michal.kowalski@uj.edu.pl.

¹ DR Rothwell, T Stephens, *The International Law of the Sea* (2010) 22; R Barends, D Freestone, DM Ong, ‘The Law of the Sea: Progress and Prospects’ in D Freestone, R Barends, D M Ong (eds), *The Law of the Sea. Progress and Prospects* (2006) 13 note that: “At the start of the twentieth century the law of the sea was almost entirely customary international law”.

² K Wolfke, ‘Rola zwyczajów w prawie morza’ (1990) IV *Prawo Morskie* 13.

some of the treaty provisions”³. On the other hand, J. Symonides noted that the importance of customary law of the sea is undergoing significant diminishment. The author stated that “Although it is impossible to rule out the occasional formation of new customary rules, its role in the development of the law of the sea is rather limited. This is mainly due to far-reaching divisions and diverging interests. Indicating an area in which there is a chance for common practice is difficult. This implies the need to negotiate and seek compromise, which is possible [...] through negotiations related to the preparation of international agreements”⁴.

It is also worth noting that in some doctrinal statements appreciating the importance of customary law in the law of the sea (and beyond this field), some highly imprecise definitions can be found. For example, it is said that “many principles of the international law of the sea are of a customary nature”, or that the rules of the law of the sea are “largely reflected in customary international law”, that the rules of the law of the sea are “almost entirely customary international law” or that “the overwhelming majority of rules of the law of the sea are of a customary character”. Such vague, general, and sometimes even unproven claims testify to the fact that, sometimes, no precise arrangements for the nature of particular rules are made, especially for those contained within the treaties on the law of the sea. Doctrinal statements are often intuitive and can lead to recognition of the existence of customary rules parallel to treaties, even if in reality such rules do not exist. The doctrinal ambiguities are deepened by treaty provisions which are not always unambiguous.

Discrepancies and ambiguities regarding the importance of customary law in the international law of the sea raise doubts regarding its actual role and suggest the need to conduct more in-depth research in this matter. This study fits into the trend of those research investigations, although it does not pretend to be an exhaustive presentation of this issue or to determine which specific rules should be included in customary law.

The study of custom in the modern law of the sea is divided into two parts. The first one will cover both introductory and general issues. First, the framework for analyses will be defined. It will be designated by the concept of international law of the sea on the one hand, and the understanding of customary law in relation to the law of the sea on the other. Next, the relationship between customary law and treaties will be considered, followed by contemporary criticism of customary law and its regulatory capacities.

The second part will examine the following issues: 1) the importance of codification of the law of the sea for customary law of the sea; 2) the validity of the law of the sea treaty rules as customary rules of the law of the sea; 3) the development of customary rules under the provisions of the law of the sea treaties; 4) the importance of references to customary rules in provisions of the law of the sea treaties; 5) the issue of conflict of treaty and customary rules of the law of the sea; 6) the importance of customary law of the sea in the development of the law of the sea in areas not regulated by the law of the sea treaties and in new areas of the law of the sea.

³ DR Rothwell, T Stephens (n 1) 22. As an example of further action of customary law, the authors cite maritime boundary delimitation, stating that “Notwithstanding the latter development of the LOSC, these principles of maritime boundary delimitation as developed in custom, remain the relevant law in the field”.

⁴ J Symonides, ‘Konwencja Narodów Zjednoczonych o prawie morza – w 30 lat od jej przyjęcia’ (2012) XXVIII Prawo Morskie 30.

The issue of customary law of the sea can be analysed from different perspectives. However, the jurisprudential perspective, meaning searching for knowledge regarding the existence and scope of customary rules and their actions in the statements of international arbitration and courts is relatively the most natural. However, it has some specific conditions. We should first note that in the period before the First World War, only international arbitration was in effect; in the interwar period, the Permanent Court of International Justice was established, and following World War II the International Court of Justice and International Tribunal for the Law of the Sea were established. They all spoke on topics related to the sea, although the degree to which they referred to customary law varied.

As far as analysis of the importance of customary law in the international law of the sea is concerned, arbitration and court case-law has its advantages and disadvantages. The advantage is that jurisprudential statements, especially those of permanent international courts, benefit from significant authority (sometimes they are even considered to be precedents). It makes them influence the attitude of countries, not only those currently involved in a dispute; because of the continuation of ruling practice, they provide a sense of legal stability. The International Court of Justice plays a special role in this area, as its decisions affect the decisions of other courts and arbitrators. Judicial findings contribute to establishing the existence of customary rules and clarifying their content. Moreover, the case-law has been used on the one hand for codification of the law of the sea, and on the other it extends and supplements it.

The weakness of arbitration and international judiciary is the fact that their scope of action is always limited. This limitation has at three contexts. Firstly, because of their nature, it is virtually impossible for them to formulate statements of a more general nature. Formally, arbitration and the courts take positions on specific cases, and in the case of disputes, only in reference to specific entities. Generalizing the importance of their statements, which is repeatedly done by lawyers, always carries the risk of error, subjectivity, or arbitrariness. Secondly, they can only deal with those cases which are submitted to them for decision or opinion. As a result, they cannot respond to the existence and content of customary law in all branches of law of the sea. Thirdly, the one-off nature of rulings which are issued in a particular historical moment results in situations where the passage of time and changes in the factual and normative environment may sometimes erode their credibility and importance. In particular, this could be the case if an arbitration tribunal or court has demented the existence of a customary rule or determined its content in a restrictive manner. The passage of time and other changes can render such statements outdated.

It is also apparent from the practice of law that the issues arbitration panels and courts have dealt with to date are, to a degree, schematic. As the arbitration practice suggests, the subject of case-law were issues of fishing, delimitation of maritime zones, and marine environment protection⁵. In the ICJ case-law, sea-related issues appeared in judgments only. It is absent from advisory opinions. In disputed cases, the Court ruled on the public authority of states over the sea and its resources, delimitation of maritime zones, fishing and conservation of marine species⁶. On the

⁵ See the RIAA: <http://www.un.org/law/riaa/> and the PCA website on UNCLOS: <https://pca-cpa.org/en/services/arbitration-services/unclos/>

⁶ See the summary on the ICJ website: <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> See also the general review of ICJ's practice in the field of the law of the sea: B Sepúlveda Amor, 'The International Court of Justice and the Law of the Sea' (2012) *Anuario Mexicano de Derecho Internacional* 3; B Sepúlveda Amor, 'Contribution of the International Court of Justice to the

other hand, the International Tribunal for the Law of the Sea (ITLOS) issued two advisory opinions on the Area and fishing, as well as resolved disputes related to hot pursuit and, on a modest scale, delimitation of maritime zones⁷. Judging by the number of cases in international courts and arbitration, delimitation settlements constituted the largest group.

I. CUSTOMARY INTERNATIONAL LAW OF THE SEA: CONCEPTUAL ASPECTS

1. What is the international law of the sea?

The international law of the sea is one of the first areas of international law to be delineated. Its shape and designation was possible thanks to the clear focus of regulation that the sea and human activity associated with it have become. If considerations were to be limited to relationships governed by public law, one could consider the international law of the sea to be a group of norms of international law characterising and demarcating the public authority of countries on seas, regulating the use of this authority, the principles of cooperation with regard to the sea and settlement of maritime disputes. As a result, the international law of the sea determines the legal status of the sea by conventionally dividing it into a number of areas, determines the status of entities and objects at sea, at its bottom or underground (of ships, artificial islands, installations, cables and pipelines, etc.), regulates research and use of the sea, its resources and underground by states and entities possessing their nationality or international organizations, protects the sea and its resources against pollution or even destruction of its ecosystem, and determines means of peaceful settlement of maritime disputes between states.

The international law of the sea understood thusly is created primarily by the state. However, the processes of institutionalization of international relations and globalization processes also affect this classic field of international law. Consequently, although the state continues to play a fundamental legislative role, international organisations and non-state entities, including non-governmental organisations, economic entities involved in maritime traffic, and even individuals contribute to a certain degree to the law of the sea⁸.

The international law of the sea constitutes an inherent part of international law, understood as a broader, and to some extent internally differentiated system of law. Due to the specific, rather distinct subject matter, one can even say that the international law of the sea is a subsystem of international law. At the same time, it is not a self-sufficient regime. On the contrary, it can be assumed that an open catalogue of means of settling disputes and broadly defined applicable law invoked by the authorities concerned with settling disputes related to the sea testify to the fact that the

development of the international law of the sea' (2010) 1 Aegean Review of the Law of the Sea and Maritime Law 5.

⁷ See the summaries on the ITLOS website: <https://www.itlos.org/cases/contentious-cases/> and <https://www.itlos.org/cases/advisory-proceedings/>

⁸ On trends regarding the role of non-state actors in the development of customary law, see T Müller, 'Customary Transnational Law: Attacking the Last Resort of State Sovereignty' (2008) 15(1) Indiana Journal of Global Legal Studies 19.

international law of the sea is actually fused with the whole system of international law⁹.

2. Custom as a source of the international law of the sea

a) General remarks

Traditional approach to customary international law: two-element concept of customary law. The general nature of a customary rule.

In classical terms, international customary law is referred to as practice accepted as law. Article 38(2) of the PCIJ Statute, and currently, Article 38(1)(b) of the ICJ Statute refer to this understanding as well, although in a manner that is not particularly logical (“international custom, as evidence of a general practice accepted as law”)¹⁰. As such, proving the existence of customary rules requires demonstrating practice (*usus*) which is related to the belief that it expresses a legally binding rule, and not just the usual practice (*opinio juris sive necessitatis*). In this way, custom is co-determined by two, albeit co-occurring, elements.

The ICJ is quite clearly in favour of the two-element concept of customary law, which is also applied in the field of law of the sea. In its judgment in the *Continental Shelf* case (Libya v. Malta) of 03.06.1985¹¹, it stated: “It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States [...]”. Similarly, in arbitration case-law, we are dealing with references to the two-element concept. By way of example (although outside the scope of law of the sea), in the judgment in the *Texaco-Calasiatic v. Government of Libya* case of 19.01.1977¹², it was indicated that customary international law “est établi à la suite de pratiques concordantes considérées par la communauté internationale comme étant droit” (para. 59).

The two-element concept of customary law was also adopted by the UN International Law Commission in their latest works entitled *Identification of customary international law*, which resulted in the draft conclusions of 2016 (hereinafter: Draft ILC conclusions on CIL)¹³. The Commission stated explicitly (draft conclusion 2 [3]): “To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)”. In addition, the Drafting Committee concluded that in the process of assessing the existence of individual elements, “the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found” should be taken into account. It was also emphasized that each element must be assessed (proven) separately (draft conclusions 3 [4]).

⁹ M Jeżewski, ‘Konwencja o prawie morza w systemie prawa międzynarodowego’ in C Mik, K Marciniak (eds), *Konwencja NZ o prawie morza z 1982 r. W piętnastą rocznicę wejścia w życie* (2009) 47.

¹⁰ A Pellet, ‘Commentary on Article 38 of the Statute’ in A Zimmermann, Ch Tomuschat, K Oellers-Frahm (eds), *Statute of the International Court of Justice. A Commentary* (2006) 748. See the critique of the wording of Article 38 of the Statute, e.g. in K Wolfke, *Custom in the Present International Law* (2nd ed. 1993) 5-8 (“the present subparagraph 1(b) of Article 38 of the Statute of the new Court is still confusing and even unintelligible”, 8).

¹¹ *Continental Shelf case (Libya v Malta)* [1985] ICJ Rep. 13, 30, para 27.

¹² *Texaco-Calasiatic c. Gouvernement libyen*, sentence arbitrale au fond du 19 janvier 1977 in G Distefano, GP Buzzini, *Bréviaire de jurisprudence internationale. Les fondamentaux du droit international public* (2005) 1220.

¹³ Draft conclusions provisionally adopted by the Drafting Committee, ILC, 68 session, Geneva, 2 May – 10 June and 4 July – 12 August 2016, A/XN.4/L.869.

The two-element concept of customary law is also quite widely approved within the doctrine of international law, however, understanding of its elements and their relationships are the subject of numerous controversies¹⁴. In this context, by way of example one can cite the traditional definition of custom (although formulated with regard to international humanitarian law) formulated by C. Bruderlein. He held that “custom is the widespread repetition, in a uniform way and over a long period, of a specific type of conduct (*repetitio facti*), in the belief that such conduct is obligatory (*opinio juris sive necessitatis*). It is a series of successive acts which gradually become common practice, observed in good faith and finally accepted by all”¹⁵.

The result of practice, which is considered as law, is establishing the existence of a customary rule. This rule is in fact rather general in terms of its content, which brings it closer to a general principle of law. Although it lacks a general character, and it defines the powers and obligations of its recipients, the regulatory capacity of a customary rule has its limitations. In this context, the ICJ judgment on the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* of 12.10.1984 (Canada v. United States of America)¹⁶ held that “A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community [...]”. Customary rules can regulate powers and procedures only to a very limited extent. By their very nature, they are not capable of establishing international institutions. These restrictions are certainly not insignificant to the law of the sea.

The basis of customary law

In international legal theory, the basis of the binding force of customary law is discussed. Two trends of thought can be discerned: voluntarism and objectivism¹⁷. According to the first of them, which draws its inspiration from the formula of generally rendering international law dependent on the consent of states expressed in the PCIJ judgement in the *S.S. “Lotus”* (France v. Turkey) case of 07.09.1927¹⁸, the basis of binding force is at the very least a silent consent to be bound by custom (*pactum tacitum*). As a result, on the one hand, a custom is consensual, but on the other hand there is no such thing as a common custom, only a particular one. The voluntarist theory directly corresponds with the two-element concept of customary law, and its current acceptance is quite broad. The weaknesses of this theory are the need to prove consent, and doubts regarding admissibility and scope of admissibility of tacit consent.

¹⁴ H Thirlway, *The Sources of International Law* (2014) 56. The doctrinal disagreements are emphasized by DP Fidler, ‘Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law’ (1996) 39 *German Yearbook of International Law* 201.

¹⁵ C. Bruderlein, ‘Custom in international humanitarian law’ (1991) 285 *International Review of the Red Cross* 581.

¹⁶ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)* [1984] ICJ Rep 246 (299), para. 111. In French version: “Il ne faut pas rechercher dans le droit international coutumier un corps de règles détaillées. Ce droit comprend en réalité un ensemble restreint de normes propres à assurer la coexistence et la coopération vitale des membres de la communauté internationale [...]”.

¹⁷ Synthetically: PM Dupuy, *Droit international public* (2006) 334-335.

¹⁸ According to the Court: “International law governs relations between independent States. 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 and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims”. PCIJ Publ. Series A, No 10, 3 (18).

The problem is also that consent is usually recognized *a posteriori*, which raises doubts as to whether it actually ever existed (even silent but conscious) when the practice was shaped.

The objectivist direction, drawing its inspiration from the thought of F. C. von Savigny, is based on the assumption that custom is a result of a social need felt by the members of the international community, inducing them to act in a certain manner. It is not necessary that it be unanimously held by the members of the international community, just enough for the reminding efforts to be sufficiently extensive. As a result, the will of individual countries can be subordinated to thus established customary law, which thereby achieves a universal scope. The objectivist theory only partially corresponds to the two-element concept of customary law. It may, however, support the efforts of contemporary reinterpretations of custom. Its weakness is ignoring the will of individual countries and weakening the significance of states' activity in the creation of customary law.

Methodology of reconstructing the custom

Customary law does not arise as a result of planned actions of specific countries. Unlike treaties, it is created to a large extent spontaneously, and, in a sense, even chaotically¹⁹, which does not mean that it is created in an entirely unconscious manner that does not correspond to the specific interests or needs of countries. Moreover, its existence (its components), validity and content are not determined in a systematic way, but most often in specific cases, in the event of an international dispute and, under these conditions, *a posteriori*, not *a priori*²⁰. It is difficult to conclude that customary law is created in a planned way²¹.

In the case of customary law, the issue is also whether determining the existence, validity and content of a customary rule can take place only by way of induction, i.e. on the basis of empirical analysis of the practice of legal entities and their attitude to this practice, or rather by way of deduction, i.e. on the basis of generalization of a single event or incidental practice, with – at the very least – tacit approval of countries which are not involved in a given case or practice as a rule in force, or maybe in an entirely different manner. The significance of this dispute is not purely theoretical. In some areas of international law, such as new areas of law, e.g. in international investment law, or those in which the participation of a larger group of countries is still not possible, e.g. due to technical and financial reasons, such as space law, practice may indeed be very limited. Additionally, if there are no treaties regarding a given area, or there is little acceptance for said treaties among the countries, then the problem of a kind of legal vacuum may arise, which can be detrimental to the international community. Then, the recognition of the existence of customary rules in a way other than by induction can have tremendous practical significance, but also raises different kinds of doubts.

¹⁹ PM Dupuy (n 17) 332.

²⁰ PM Dupuy (n 17) 339.

²¹ J Barberis emphasized that customary norms are not created according to legal rules, because as primary rules of international law they arise spontaneously, without a planned scenario in advance. For him, the two-element concept of customary law is not a procedure or a legal rule, but a simple technique for determining customary rules. See J Barberis, 'La coutume est-elle source de droit international?' in *Le droit international au service de la paix, de la justice et du développement. Mélanges Michel Virally* (1991) 48-52.

In an interesting study on the ICJ's case-law on customary law, S. Talmon²² argues that the Court uses three methods of reconstruction of customary law: induction, deduction, and assertion. Decisions concerning the law of the sea play a significant role in this characteristic. The author pointed out that although the ICJ cannot freely choose between induction and deduction, there are, however, four situations where the inductive method cannot be used: 1) "state practice is non-existent because a question is too new" (*Gulf of Maine Case*); 2) "state practice is conflicting or too disparate and thus inconclusive" (*Libya/Malta Continental Shelf Case*); 3) "opinio juris of states cannot be established" (*North Sea Continental Shelf and Qatar/Bahrain Cases*); 4) "there is a discrepancy between state practice and opinio juris" (*Nicaragua Case*). In such situations, the Court should declare *non liquet*, but it does not. It reaches for the deductive method.

Within deductive reasoning, S. Talmon distinguishes normative deduction, functional deduction and analogical deduction. The first one occurs when new rules are inferred from existing rules and principles of customary international law (e.g. in the *Gulf of Maine* case, "the Court inferred practical methods for the delimitation of a single maritime boundary from special international law rules"). Functional deduction occurs when the Court "deduces rules from general considerations concerning the function of a person or an organization". The author also noted that deduction can be used to confirm and strengthen inductive reasoning. Finally, analogical deduction is considered a reflection of "main forms of civilization and [...] the principal legal systems of the world" (*Libya/Malta Continental Shelf Case*).

S. Talmon also notes that the ICJ sometimes uses assertion as its method of reasoning. It occurs when the Court considers a specific custom notorious, and also when it rules as a legislator, without going into the analysis of traditional elements of a custom (*Corfu Channel Case*) or even contrary to them. The author points out that ICJ uses several assertion techniques. He includes among them: 1) reference to ILC works, without any verifications of their actual nature; 2) declaration *ex cathedra* that a certain provision is reflective of customary international law (UNCLOS-based assertion); 3) building customary rules or developing them upon its own assertions (extending the *uti possidetis* rule to offshore islands and historic bays in *Territorial and Maritime Dispute between Nicaragua and Honduras Case*).

In the summary of his paper S. Talmon says that "There is no greater danger of law creation in deduction than there is in induction". Deduction presupposes the existence of implied rules in a manner similar to implied powers. He believes that deduction is compatible with the consent principle. However, he makes the stipulation that "new rules of customary international law are deduced only from existing legal rules or principles and not from postulated values". He also stresses that "The deductive method finds its limits in the actual will of states, as expressed by their constant and uniform practice. Thus, in the event of a conflict between rules of customary international law arrived at by induction and those arrived at by deduction, the former will prevail". The author justifies the assertion method by stating that if inductive and deductive methods do not allow the Court to fulfil its judicial function, then the Court has to be able to use assertion.

However, while recognizing the complexity of methodological issues, one must note that deductive and assertion methods are difficult to reconcile with the two-

²² S. Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) *European Journal of International Law* 417.

element theory of customary law. One can also wonder whether they are legitimate. Deduction can indeed be understood as an interpretation of existing rules, putting more emphasis on functional or teleological interpretation, but whose limits are the content of these norms. It is also difficult to understand the situation of conflict between the results of induction and deduction, since deduction occurs when induction is not possible. In turn, Court actions based on assertion entail the risk of arbitrary actions and manufacturing customs where, in fact, they do not exist.

In the context of considering methods of reconstructing customary rules, it is worth mentioning the ICJ judgment in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States of America) case of 12.10.1984²³. The Court declared there that

A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the opinion juris of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas. It is therefore unrewarding, especially in a new and still unconsolidated field like that involving the quite recent extension of the claims of States to areas which were until yesterday zones of the high seas, to look to general international law to provide a ready made set of rules that can be used for solving any delimitation problems that arise. A more useful course is to seek a better formulation of the fundamental norm, on which the Parties were fortunate enough to be agreed, and whose existence in the legal convictions not only of the Parties to the present dispute, but of all States, is apparent from an examination of the realities of international legal relations.

Adoption of the inductive approach as a proper method of operation of arbitration tribunals and international courts is an important component in the legal security of states. It prevents recognizing incidental or even single actions of states as law. At the same time, this approach does not require the practice which is supposed to be the basis of customary law to be both widespread and very intense. It is enough for it to be “sufficiently extensive and convincing”. This applies particularly to areas which are “new and still unconsolidated”, as in the case of certain zones separated relatively recently from the open sea. The inductive approach is particularly important in the field of delimitation of boundaries of maritime zones between adjacent and opposing countries, where one-sided delimitation is impossible.

Evidencing customary law

In order to determine the existence, validity and content of a customary rule, both of its elements have to be evidenced. By 1950, the International Law Commission accepted that proving may take place in particular with the help of such aids as collections of treaties, international case-law collections, collections of national legislation and case-law, diplomatic correspondence, expertise of national legal advisors, and collections of practice of international organisations²⁴. Materials from

²³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* [1984] ICJ Rep 246 (299), para 111.

²⁴ See ‘Ways and means for making the evidence of customary international law more readily available’. Report of the International Law Commission 1950, Access: http://legal.un.org/docs/?path=../ilc/texts/instruments/english/reports/1_4_1950.pdf&lang=E

conferences are also of significance²⁵. All these materials are of significance in determining the duration and content of customary law of the sea rules.

Formally, because of the principles of sovereignty and equality of states, the practice of all countries in the world has the same value. However, we know that for various reasons, ascertaining the practice of some developing countries can be difficult. In the *Navigational and Related Rights* case (*Costa Rica v. Nicaragua*) of 13.07.2009, the ICJ also noted that situations in which “the practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record” may occur²⁶.

b) Practice as an element of customary law

Whose should be the practice?

Practice is considered a necessary part of the formation of a customary rule, its factual basis. Legally relevant facts are also applicable here. However, the question arises of whose practice it should be, what said practice should rely on, and what properties it should have to become the basis of a customary rule. The general approach is that it should be primarily the practice of states as primary subjects of international law and members of the international community²⁷.

In contemporary international law, on the grounds of sovereign equality (or, in fact, equal sovereignty), as a rule, states are formally equal. Accordingly, the practice of each of them has formally the same meaning and should essentially be treated the same. However, the rank of practice of great powers remains a concern. Formally, their practice does not enjoy a stronger position²⁸. In practice, however, great powers in general are active in numerous areas of international life, and quite intensely at that, which makes their practice emerge in numerous scopes of regulation of international customary law. It is also hard to imagine that any international body would ignore the practice of a great power which can be relevant in the case at hand, even when it would merely create a broader normative context²⁹.

Similarly to general international law, in the international law of the sea the practice of all countries has formally the same rank. However, in practice, that of coastal states, which naturally and to the fullest extent are involved in maritime traffic, or in a given case, that of particularly interested countries or countries whose interests are specially affected, e.g. by the delimitation of the continental shelf (as in the *North Sea Continental Shelf* case [*Germany v. Denmark and the Netherlands*] of

²⁵ K Wolfke stresses that the conference itself, statements made during it, and documents resulting from or prepared at the conference, as in the case of the third conference on the law of the sea, are neither an expression of practice nor *opinio juris*. It is the behaviour of states and reaction of others to those very behaviours that are important. K Wolfke (n 2) 12-13.

²⁶ *Navigational and Related Rights case (Costa Rica v Nicaragua)* [2009] ICJ Rep 213 (265), para 141.

²⁷ About the practice of States as an element of the customary law see more MH Mendelson, ‘The Formation of Customary International Law’ (1998) 272 RCADI 198.

²⁸ See MG Kohen, ‘La pratique et la théorie des sources du droit international’ in: SFDI, *La pratique et le droit international. Colloque de Genève* (2004) 87, who opposes conferring distinct importance to the practice of great powers (s’il y a un domaine dans lequel la seule puissance ne peut pas tout faire, c’est celui du droit). At the same time, the author points out that the powers have *capacité de nuisance*. They can thus hinder or even prevent the formation of a customary rule, especially in the region where they are located or on a wider scale (88).

²⁹ See also K Wolfke (n 10) 78-79.

20.02.1969)³⁰, or the exercise of fishing rights in economic zones, is particularly important. In certain regulatory areas, the practice of geographically disadvantaged states or archipelagic states may be of particular significance. The concept of interested countries, or those countries whose interests are specially affected, has to be assessed under the specific circumstances of a particular situation or case³¹.

Despite the formal equality of states, taking the practice of some of them into account may be controversial, e.g. those with an aggressive policy and, in particular, those with totalitarian regimes. However, excluding practices of such countries should be done with great caution, based on serious and clearly demonstrated reasons. But in the case of the law of the sea, it is not so much the political acceptability of a state's practice, but chiefly the access to practice and its usefulness in the field of reconstruction of specific legal rules that is important. Due to the law of the sea being rooted in geography and the fact that customary law may also be both common, as well as particular in its character, then the situation of countries whose practice is to be the basis of the customary rules may be of particular significance (geographical proximity or similarity of the geographical situation). Sometimes, doubts whether a distributed or rare practice of countries in a similar geographical situation (e.g. coastal states) but located in different parts of the world may give rise to a common customary rule.

When we talk about the practice of states, we actually have in mind the practice of state bodies, especially those competent to act in the area of foreign policy, but also legislative, administrative and judicial bodies³². In the international law of the sea, in addition to the practice of authorities traditionally involved in international trade (head of state, head of government and government, foreign minister, diplomatic and consular service), it will be the practice of ministers specialized in maritime matters, maritime administration, customs, immigration, and border services operating in the maritime zones, and the navy that will be of particular importance.

In the era of institutionalization of international relations, the practice of international organisations, especially those which are active in the marine field (UN, IMO, marine protection organisations, fishing organisations) has gained some importance³³. The practice in question will mainly be that concerning resolutions, which may contribute to shaping practice. It is, however, unable to replace the practice of states. The practice of regional integration organisations will be of greater and more intrinsic importance, provided that these organisations are equipped from their member states with competences regarding maritime matters (they can adopt legally binding resolutions in matters covered by law of the sea), especially when operating

³⁰ *North Sea Continental Shelf (Federal Republic of Germany v Netherlands) (Federal Republic of Germany v Denmark)*, [1969] ICJ Rep 3(43), para 74.

³¹ H Thirlway (n 14) 65, draws attention to the vagueness of the term "states 'whose interests are specially affected'". The author notes: „The precise significance of the qualification as to States whose interests are specially affected is unclear. The Court was dealing with a rule of delimitation of maritime areas; the question again has to be asked: did that category of States therefore include only neighbouring coastal States, or all States possessing a coastline, and consequently with claims to such areas? Since, however, only these States could participate in a practice of delimitation, this would amount to saying that, in this particular domain, the practice had to be universal”.

³² See i.a. the ICJ's judgement in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 (24), para 58.

³³ The International Law Commission claims that it could take place "in certain cases". However, it did not clarify further which cases it had in mind. See draft conclusion 4 [5] point 2 of the 2016 Draft ILC conclusions on CIL.

in external maritime relations instead of or together with these states, concluding contracts in maritime matters or participating in international maritime organisations, including fishing or marine protection organisations (e.g. the European Union)³⁴.

In the era of globalization, significant mobilisation of non-state entities – multinational corporations, NGOs, and individuals – is often noted³⁵. The impact of these entities on primary actors in international relations (states, and even great powers) on the processes of creating, applying and monitoring compliance with international law, including customary law, is recognised³⁶. The question is, how important is their practice for emergence of customary rules of the law of the sea? If we accept such a definition of the international law of the sea as the one described in section 1 of this paper, the role of non-state actors in this regard is significantly reduced³⁷. However, in some areas of this field (e.g. for the determination of the content of customary rules on sea zones, e.g. the principles of using an economic zone or marine protection), the marine practice of non-state entities (e.g. fishing, commercial, non-governmental organisation practice) can have a stimulating influence on the maritime activity of states.

What does practice consist of?

Practice as the foundation of a customary rule is naturally associated with action. It concerns issuing legal acts, concluding international agreements, diplomatic practice, adopting law enforcement acts, and, finally, actual behaviour³⁸. The behaviour of states participating in customary practice should be characterized by a certain degree of repetition, substantive sameness of the case, and internal consistency. If the practice is legislative in character, acts should be consistent with their application. The same applies to the convergence between treaties and their application.

Acting in the field of law of the sea may consist of e.g. concluding sea treaties, issuing laws on sea zones, maritime administration, maritime affairs, issuing administrative decisions or judgments in maritime matters, taking actual action regarding sea ports, shipping lanes, delimitation of sea zones, exercise of territorial sea or island claims, building offshore installations, use of sea water and so on.

However, the question arises of whether failure to act (inaction, silence, negative practice) can also be the basis of customary law. The PCIJ, in the judgment in the SS “*Lotus*” case of 07.09.1927 (France v. Turkey), stated that merely refraining

³⁴ See M Wood, ‘Second report on identification of customary international law’, UN Doc A/CN.4/672, 22 May 2014, point 44.

³⁵ See e.g. C Focarelli, *International Law as Social Construct. The Struggle for Global Justice* (2012) 189.

³⁶ According to the ILC, “Conduct of other actors [than States and international organizations] is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice [...]” as a constituent element of customary international law (draft conclusion 4 [5], point 3). See also A Boyle, Ch Chinkin, *The Making of International Law* (2007) 41.

³⁷ For a negative opinion on the possibility of recognising the actions of non-state entities as practice for determination of customary rules, see M Wood (n 34) point 45.

³⁸ L Boisson de Chazournes, ‘Qu’est-ce que la pratique en droit international?’ in *La pratique et le droit international* (n 28) 32-34.

from action cannot be the basis of a custom. It is necessary that it be the result of an obligation of inaction³⁹.

Nowadays, a position generally approving practice involving failure to act was accepted by the International Law Commission in its works on the identification of customary international law. In the *2016 Draft Conclusions on CIL*, the Commission concluded that “Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction” (draft conclusion 6 [7], point 1). The Commission also emphasized that “There is no predetermined hierarchy among the various forms of practice” (point 3).

Special Rapporteur M. Wood pointed out in the third report⁴⁰ that a state’s failure to act may be considered practice if three conditions are fulfilled: 1) if the conduct of the other state calls for a response (*Pedra Branca Case*, Malaysia/Singapore), which in his opinion “implies that the relevant practice ought to be one that affects the interests or rights of the State failing or refusing to act”; 2) “a State whose inaction is sought to be relied upon in identifying whether a rule of customary international law has emerged must have had actual knowledge of the practice in question or the circumstances must have been such that the State concerned is deemed to have had such knowledge” (Fisheries Case); 3) the inaction should be maintained “over a sufficient period of time”. Therefore, acquiescence understood as qualified silence is relevant.

The approval of failure to act as a form of practice that can lead to a customary rule becomes much more problematic when tolerance is the only response to the actions of a single country or a small group of such countries. It is also debatable whether practice can solely rely on failure to act. In fact, a custom would then be reduced to one element: *opinio juris*.

What features should practice have?

For a practice to become the basis of customary law, it has to meet certain standards. They concern the quality and scope of practice. In the case of qualitative assessment of practice, it is indicated that it should be consistent, common, long-term, continuous and uninterrupted, efficient, and consistent with international law. The basis of a customary rule can only be such a practice which is carried out by states in a consistent and common manner. Heterogeneous, internally contradictory practice cannot be the basis of customary law. In principle, it is rather self-evident; the problem arises, however, when it comes to determining the required level of uniformity of practice. The doctrine indicates that at least two approaches are in competition with each other. According to one of them, the similarity of cases should be analysed in order to finally make a generalisation regarding what is valid. According to the second approach, only that which is common is left in the field of analysis, rejecting cases

³⁹ The Court concluded that “Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty [...]”. PCIJ Publ. Series A, No. 10, 3 (at 28).

⁴⁰ M. Wood, ‘Third report on identification of customary international law’, UN Doc A/CN.4/682, points 23-25.

which are even only partially divergent. The result is a minimum common denominator which serves as the basis of a customary rule⁴¹.

The problem may also occur at the level of determining what can and should be compared. Moreover, it may also be difficult to identify the minimum determinants which would be commonly applied in every field of international law. As part of international dispute settlement, establishing comparable elements of practice and a minimum level of practice will depend on the findings of the parties resolving the dispute.

Traditionally, it is pointed out that a practice which is to be the basis of customary law has to be age-old (lat. *vetustas usus*), and long-term (lat. *diuturnus usus*). Sometimes it is even indicated how many years must pass for a practice to become the basis of a customary rule. In the course of practice, acts questioning its current course should not occur (no acts questioning it; no lat. *acta contraria*). The requirement of a long-term, uninterrupted and unchallenged practice is not entirely alien to the contemporary international case-law. The judgment of the ICJ in the *Navigational and Related Rights Case (Costa Rica v. Nicaragua)* of 13.07.2009 is a good example⁴². Assessing the rights of Nicaragua, the Court held that it is particularly significant that Nicaragua did not contest a “practice which had continued undisturbed and unquestioned over a very long period”. At the same time, the Court refused to acknowledge that “the customary right extends to fishing from vessels on the river.” It stated that “There is only limited and recent evidence of such a practice. Moreover that evidence is principally of the rejection of such fishing by the Nicaraguan authorities”.

Today, both in the case-law and doctrine of international law, there is a tendency to reduce the importance of the temporal requirement of practice. Sometimes, a requirement of significant practice is introduced in its place⁴³. Therefore, a practice should last a certain significant (minimum necessary) period of time, and should also be uninterrupted, constant or continuous⁴⁴. Sometimes the criticism of the temporal requirement goes so far that the validity of rules is recognised even if such practice is only incidental. This was expressed in B. Cheng’s instant custom concept⁴⁵.

More recently, though with certain modifications, it was expressed in M. P. Scharf’s concept⁴⁶, according to which a new customary rule can arise where a “fundamental technological or social change and recognition that the rule acquired customary law status despite a dearth and short period of state practice” takes place. This situation is referred to as a Grotian Moment. According to the author, in the case of law of the sea, it is expressed by the Truman Proclamation of 28.09.1945 on governance over the continental shelf. M.P. Scharf points out that “with respect to the Truman Proclamation, we have seen that developments in offshore drilling, paired

⁴¹ R Kolb, *Réflexions de philosophie du droit international. Problèmes fondamentaux du droit international public: théorie et philosophie du droit international* (2003) 52-53.

⁴² *Navigational and Related Rights Case (Costa Rica v. Nicaragua)* [2009] ICJ Rep 213 (265-266), paras 141 and 143.

⁴³ See MG Kohen (n 28) 82-83.

⁴⁴ L Boisson de Chazournes (n 38) 16.

⁴⁵ This concept was formulated in the context of determining the legal status of outer space, due to the recognition that resolutions of international organisations, especially the UN General Assembly, bound to *opinio juris* as a main element of custom could play a custom-setting role. See more MH Mendelson (n 27) 370 et seq.

⁴⁶ MP Scharf, *Customary International Law in Times of Fundamental Changes. Recognizing Grotian Moments* (2013) 58-62.

with the great need for oil, gas, and other resources following World War II, set the stage for radical change in the customary law of the sea". The Proclamation began the intensive practice of extending the exercise of territorial claims over the continental shelf by various countries, which, in a very short period of time, resulted in the formation of customary rules, despite the fact that the very definition of 'shelf' was subject to further changes⁴⁷.

Reduction of the significance of temporal criterion may also contribute to deriving a customary rule directly from Treaty provisions. However, it appears that although special cases do sometimes exist (especially those of rare, and even ambiguous practice), it is the very essence of practice that it should last for some time. It can be assumed that the duration required is inversely proportional to the intensity and representativeness of, at least internally non-contradictory, unquestioned practice.

Generally, it is expected of practice to be effective (actual practice), and not merely declaratory or verbal⁴⁸. Such a position was taken by the ICJ in the *Continental Shelf* case in the dispute between Libya and Malta in its judgment of 03.06.1985⁴⁹. But how can one reconcile the inadmissibility of verbal practice with the acceptance of practice involving failure to act? What kind of practice (effective or declaratory) should one consider behaviour consisting exclusively in the ratification of various international treaties?

Practice should also be consistent with applicable international law, especially with mandatory rules. It is, however, debatable, whether a customary law contrary to treaties binding the states parties concerned could be formed. Theoretically speaking, such a possibility should not be inadmissible. Customary rule may in fact derogate a treaty rule. In principle, there is no hierarchical relation between them; however, there may be treaties to which the parties have attributed special importance in their relations, such as the statutes of international organizations, including the UN Charter and the statutes of regional integration organizations, human rights protection and humanitarian law treaties, or treaties in the field of environmental protection whose being undermined by customary law seems very difficult, although cannot be entirely excluded. It would, however, be expected that all states parties will accept the change resulting from practice contrary to treaties, and treaty provisions contrary to the usual practice shall not be invoked (see also point 5 in part II).

Geographical coverage of practice may vary. Therefore, the question arises whether any practice, regardless of its geographic coverage, may be the basis of a customary rule. The prevailing view in the doctrine of international law is that customary law is universal, and its being effective in a narrower circle of countries is an exception. *Prima facie* this position corresponds with international case-law, and ICJ jurisprudence in particular, the latter of which does not preclude the existence of particular customary rules in only a few of its decisions⁵⁰. However, if we assume that

⁴⁷ MP Scharf (n 46) 107 et seq, especially 121-122.

⁴⁸ MG Kohen (n 28) 89-90. DP Fidler (n 14) 202-203, indicates that within doctrine, some deny the importance of verbal practice, even if it would be subject to multiplication (K Wolfke), others are willing to accept it (I Brownlie), some others approve of it, but they think that its importance is less significant.

⁴⁹ *Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 13 (29), para 27. See also ICJ in the advisory opinion on *Legality of the threat or use of nuclear weapons* [1996] ICJ Rep 226 (253), para 64.

⁵⁰ See: the regional or local custom between some of Latin American States: *Asylum Case, (Colombia v Peru)* [1950] ICJ Rep 266 (277-280); local custom, including between two States: *Case concerning Right of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 6 (39).

custom is based on the two-element concept, and therefore the presence of both the practice of specific countries as well their consent is necessary, then logically it is difficult to accept that a custom will be common (universal) even in the majority of cases. Meanwhile, it is quite commonly believed in the doctrine that “if a practice has achieved a sufficient level of generality, it is binding on *all* States”, with the exception of persistent objectors⁵¹.

In 2016, the International Law Commission in Draft ILC Conclusions on CIL clarified the concept of “general practice” not in the sense of the universality of the practice, but its prevalence, representativeness and cohesion: “The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent” (draft conclusion 8 [9], point 1). It did not identify the personal scope of being bound by a custom based on the general custom. It added, however, that if practice is general, then “no particular duration is required” (draft conclusion 8 [9], point 2), which is misleading, as in reality practice is not created in an instant, but is usually the result of a burgeoning process. Elsewhere, the Commission expressly admitted the existence of particular custom (“regional, local or other”; draft conclusion 16 [15]).

It is obvious that practice as a basis of a universally binding customary rule need not be universal. However, if one takes the view that it has to reach a sufficient level of generality, then under conditions of not always very intense (evaluation of the extensiveness of practice could also be relative) and sometimes diffuse practice, serious doubts as to when the threshold is exceeded may arise. One can also wonder whether such practice is still the basis of a particular custom or whether it is already the basis of a universal custom.

In the case of the law of the sea, the doctrine notes that customary law of the sea has a general, and even global range. It is always referred to as general international law⁵². Indeed, the global nature of oceans and seas related to them promotes perceiving customary law of the sea as a universal law. One cannot, however, rule out particular customs, especially when there are new or specific regulatory problems.

c) *Opinio juris* as an element of customary law

In addition to practice, *opinio juris* is also of major importance for proving the existence of a customary rule. There is no doubt that it is a necessary, but in itself not sufficient, component of customary law. However, the understanding of this structural element of customary law is also controversial. In simple terms, it can be assumed that there are two competing approaches in this matter: subjective and objective. According to the first of them, *opinio juris* means legal awareness of legal entities engaged in the customary practice, faith or belief of states that, in behaving the way they behave, they are acting in accordance with an actual rule of law, not custom⁵³. According to the second approach, it is the will of states expressed in an objective manner, i.e. as a clear, or more often implicit acceptance of a rule emerging from practice that is at stake⁵⁴.

⁵¹ MH Mendelson (n 27) 218-219.

⁵² A Boyle, ‘Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change’ in *The Law of the Sea* (n 1) 52.

⁵³ MH Mendelson (n 27) 245. PM Dupuy (n 17) 336, called *opinio juris* an intellectual or psychological element. Likewise P Daillier, M Forteau, A Pellet, *Droit international public* (2009) 361.

⁵⁴ K Wolfke (n 10) 44-52.

In draft conclusion 9 [10] in the 2016 Draft Conclusions on CIL, the International Law Commission defined *opinio juris* as acceptance of law, which means that “the practice in question must be undertaken with a sense of legal right or obligation”. The Commission understands that it allows to distinguish customary law from “mere usage or habit.” But, as explained by M. Wood in the second report on the works of the Commission, acceptance of law does not stand in opposition to psychological terms (a belief/feeling that the practice is obligatory)⁵⁵.

The *prima facie* requirement of *opinio juris* confirms a proactive concept of customary law in the sense that it will be effective if countries participating in a practice agree that it expresses an existing rule whose contents are consistently accepted. This consistent stance should accompany the whole period of formation of a customary rule. When a state involved in a practice presents a position that a given practice cannot be considered as a basis for customary rule or that it is opposed to declaring it binding, then such a state will not be linked to a possible customary rule. Such objection must be a persistent objection⁵⁶. The ILC provides for admissibility of persistent objection in draft conclusion 15 [16] from 2016 Draft Conclusions on CIL. According to the Commission, “The objection must be clearly expressed, made known to other States, and maintained persistently”. Persistent objection cannot challenge only those customary rules which protect the fundamental values of the international community.

Still, this clear picture of things is distorted. First, one has to realize that determination of customary rules usually happens *a posteriori*. In other words, the existence of this rule is mostly declared in the context of dispute settlements after a practice, which should be accompanied by the conviction that it expressed a legally binding rule, has taken place. In those circumstances, how can one know when to object and to what practice? In addition, *opinio juris* will be difficult to determine, especially if a practice is relatively rare and distant. The state may not realize that such practice will serve as a basis for custom and may choose not to raise an objection. Persistent objection would also be difficult to raise if the argument that the duration of practice should be significantly reduced, or if a customary rule were to be derived from legislative treaty provisions. Finally, the doctrine argues that external pressure may contribute to limiting persistent objection or its scope⁵⁷.

In the case of *opinio juris*, the important question is also whether it should rely on active, clear articulation of the position of the state (by its respective competent organs), or does tacit acceptance of the practice by all or at least some of the countries taking part in it, namely acquiescence, suffice. Some international dispute settlement bodies allow this. The PCIJ in the case of *S.S. “Lotus”* (France v. Turkey) of 07.09.1927⁵⁸ ruled:

⁵⁵ M Wood (n 34) points 60 and 67 (terminology used by the ICJ).

⁵⁶ The doctrine notes widespread acceptance of persistent objection. See MH Mendelson (n 27) 227-228. It shall be noted that the concept of persistent objection emerged in the XIX century in Western Europe. Later on, its acceptance spread to socialist and developing countries. See PM Dupuy (n 17) 340.

⁵⁷ PM Dupuy (n 17) 341.

⁵⁸ According to the Court: “International law governs relations between independent States. 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 and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims”. PCIJ Publ. Series A, No. 10, 3 (29).

[T]he Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia-Onclé-Joseph* case and the German Government in the *Ekbatana-West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.

The ILC does not exclude this possibility, although in contrast with practice, the Commission does not explicitly mention silent *opinio juris* as one of its possible forms (draft Conclusion 10 [11], point 1: “Evidence of acceptance as law (*opinio juris*) may take a wide range of forms”). However, in the third progress report on the works regarding identification of customary international law, M. Wood noted that “Inaction may also serve as evidence of acceptance as law (*opinio juris*) when it represents concurrence in a certain practice. [...] in essence, we are here concerned with the toleration by a State of a practice of another or other States, in circumstances that attest to the fact that the State choosing not to act considers such practice to be consistent with international law”. Such acquiescence, in the words of the Chamber of the International Court of Justice in *Gulf of Maine*, “is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent”⁵⁹. Also, certain representatives of the doctrine of international law accept this eventuality⁶⁰. What is more, sometimes it has been indicated that it may be presumed that consent is unanimous if such consent is expressed by the majority of states⁶¹. This means the admissibility of omitting active consent of some countries.

However, it seems that simple and unconditional acceptance of such an approach could, under certain circumstances, be very questionable and controversial. It could lead to arbitrary recognition of rules which are in fact not accepted by states (which is not unrealistic in a situation where a customary rule is reconstructed *a posteriori*). Firstly, it is difficult to approve tacit consent to customary rules in situations where it were to accompany practice involving failure to act or rare practice in this manner. Secondly, tacit consent should not include all states which participated in the practice. At least some of the states need to articulate such consent clearly. Thirdly, the approval of presumption of unanimous consent if the majority of countries expresses said consent also carries the risk of imposing a customary rule on states which have not accepted it although they did not articulate this view, e.g. thinking that a particular practice does not concern them. The risk of imposing would be lesser if great powers were concerned, but it is quite conceivable in the case of medium and small states.

⁵⁹ M. Wood (n 40) point 21.

⁶⁰ MG Kohen (n 28) 84.

⁶¹ PM Dupuy (n 17) 342.

d) The interplay between *usus* and *opinio juris*

From the point of view of reconstruction of customary rules, it is essential to determine the temporal relationship and the value between the two constitutive elements. In the first case, the question is whether *usus* and *opinio juris* must occur simultaneously or whether one of them can or should occur earlier. The doctrine sometimes suggests that in previous international law, it was believed that practice precedes *opinio juris*. More recently, the analysis begins with the verification of *opinio juris*⁶².

It should be noted that beginning the reconstruction of a customary rule with determining *opinio juris*, can, in fact, lead to fundamental changes in the assumptions of customary law. It causes the practice to be formed in a manner which aims to match a specific thesis (view). This is a very real prospect in various fields of international law, including law of the sea, when the practice is relatively rare, dispersed. However, it leads to arbitrariness.

Another issue is whether both these elements have the same value. It is indicated in the doctrine that nowadays practice is losing its evidential importance. As a result, there is doubt as to whether it is acceptable to reduce or waive the investigation of practice in cases where states clearly accept the existence of a customary rule⁶³. International courts seem to accept such a solution, including in the field of the law of the sea. However, this can also mean limiting the custom to one element.

3. Critical approaches to customary international law and their impact on the customary international law of the sea

a) One-element concepts of customary law

The traditional two-element concept of international customary law was and is subjected to criticism. Sometimes this criticism is only a reinterpretation of the classic understanding of the individual elements of custom⁶⁴. In other situations, it leads to undermining the two-element concept and replacing it with more or less definite one-element concepts. The latter take two forms: 1) they aim to merge *usus* and *opinio juris*, effectively limiting custom to practice; 2) they limit custom to *opinio juris*.

The first of these approaches appears especially in the older doctrine of international law. Some of its representatives took the view that practice and *opinio juris* are an indissoluble whole: two aspects of the same phenomenon. As a result, there is no need for separate proof⁶⁵. This approach, however, leads to depreciation of the importance of *opinio juris*. Currently, its expression is assigning merit to resolutions of organisations, which aims to correspond with *opinio juris* of countries participating in adopting them.

Today, it is more and more popular to reduce the importance of practice in favour of *opinio juris*. A mild form of this approach could be observed in relation to generating customary rules from treaty provisions. In particular, the ICJ in the 1986 Nicaraguan case admitted customary rules based on a “simplified” practice of states which were not parties to the treaty.

⁶² L Boisson de Chazournes (n 38) 20 (after P. Weil).

⁶³ MG. Kohen (n 28) 96, 85.

⁶⁴ See ia BD Leopard, *Customary International Law. A New Theory with Practical Applications* (2010) 47.

⁶⁵ BD Leopard (n 64) 93-95.

A more radical approach is sometimes adopted (it is not consistent) by international criminal courts⁶⁶. It arises mainly when a court is faced with the problem of establishing the existence of customary rules according to the traditional approach. They are then willing to fundamentally reinterpret the significance of practice or even ignore it. Without delving more deeply into this field of international law, we shall limit ourselves to two examples. The statements of the International Criminal Tribunal for the former Yugoslavia are particularly noteworthy.

See also the *Anto Furundzija* case of 10.12.1998⁶⁷: in justifying the transformation of the treaty provisions on the prohibition of torture in time of armed conflict to customary norms, the Court found that it is evidenced by the widespread acceptance of treaties prohibiting torture by states⁶⁸, the practice of states consisting in abandoning actions contradicting treaties, and the recognition of the formation of customary law in a more general scope by the ICJ. The ICTY stated:

First, these treaties and in particular the Geneva Conventions have been ratified by practically all States of the world. Admittedly those treaty provisions remain as such and any contracting party is formally entitled to relieve itself of its obligations by denouncing the treaty (an occurrence that seems extremely unlikely in reality); nevertheless the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture. In other words, this participation is highly indicative of the attitude of States to the prohibition of torture. Secondly, no State has ever claimed that it was authorised to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture. When a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition of this odious practice. Thirdly, the International Court of Justice has authoritatively, albeit not with express reference to torture, confirmed this custom-creating process: in the Nicaragua case it held that common article 3 of the 1949 Geneva Conventions, which inter alia prohibits torture against persons taking no active part in hostilities, is now well-established as belonging to the corpus of customary international law and is applicable both to international and internal armed conflicts.

In the *Kupreskić and others* case of 14.01.2000⁶⁹ the ICTY even went so far as to hold that if the practice was rare or controversial, a customary rule may arise under the influence of *opinio juris* itself. The Court held:

“[T]here does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely

⁶⁶ For more, see: B Schlütter, *Developments in Customary International Law. Theory and Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (2010) 175 et seq. As far as identification of customary rules by the ICTY is concerned, the author distinguishes the source-based approach, deductive/core-rights approach and mixed methodologies, and in the case of the ICTR, common sense approach and deductive approach.

⁶⁷ IT-95-17/1-T, para 138.

⁶⁸ Other international criminal courts attach importance to the attitude of countries towards international agreements. For example, Special Tribunal for Sierra Leone, Appeals Chamber, in the decision on preliminary motion based on lack of jurisdiction (child recruitment), in the Sam Hinga Norman case of 31.05.2004, even said that “all but six states had ratified the Convention on the Rights of the Child by 1996. This huge acceptance, the highest acceptance of all international conventions, clearly shows that the provisions of the CRC become international customary law almost at the time of the entry into force of the Convention”. Case No. SCSL-2004-14-AR72(E), para 19.

⁶⁹ Case No. IT-95-16-T, para 527.

usus or *diuturnitas* has taken shape. This is however an area where *opinio juris sive necessitates* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitates*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law²².

b) Criticism of the regulatory capacity of customary law

The criticism of traditional recognition of customary law also stems from the belief that custom, especially from the two-element point of view, when facing the dynamics of changes in international relations, in particular given the increasing problems of a global nature, has lost its regulatory ability, or in the very least that ability has been seriously undermined. In this situation, there are different approaches aimed at addressing this issue. D. P. Fidler lists three proposals for amendments⁷⁰. The first is the dinosaur concept, which is associated with resigning from custom or treating it as a primary source of international law, and replacing it with treaties and law-making activities of international institutions.

The second of them is connected with granting customary law a certain impetus by increasing the role of UN General Assembly resolutions. In this perspective, customary law becomes the main force of regulatory progress and innovation. Finally, the third proposal was described as a dangerous prospect. The author associates it with criticism of the two-element concept, particularly from a human rights perspective, warning against possible misuse. In particular, he indicates that a custom is based on moral imperatives rather than an analysis of necessary elements (e.g. prohibition of torture or use of force are considered customary norms, despite the practice looking rather different). The author also warns against reducing practice (*opinio juris*) to the attitude of parties towards treaties, in particular to whether they have been incorporated into national law. This would mean making customary law subject to national law.

Against this background, the author presents a liberal concept of customary law according to which the emphasis should be put on whose practice and *opinio juris* should be taken into account when reconstructing customary rules. To this end, liberal and illiberal countries have to be distinguished. As a result, the practice and *opinio juris* of all countries cannot be treated on a par. Only that which comes from liberal states should be taken into account. In turn, constant opposition should only apply in relations of liberal countries with illiberal ones.

⁷⁰ DP Fidler (n 14) 261 et seq.

II. CUSTOMARY INTERNATIONAL LAW OF THE SEA: BETWEEN THEORY AND PRACTICE

1. Codification and progressive development of the international law of the sea

For centuries, states have been concluding treaties whose subject matter involved various issues concerning governance and use of the sea. However, until very recent times, the basic rules of the law of the sea were designated by customary law. Multilateral treaties concerning the law of the sea appeared only in the twentieth century.⁷¹ They have become an instrument of codification and progressive development of the law of the sea. In the interwar period, the issue of sea ports was first addressed. On 09.12.1923, the Barcelona Convention and Statute on the International Régime of Maritime Ports⁷² was signed, although it gained very limited acceptance. It was an element of progressive development of the law of the sea rather than its codification. On 13.03.-12.04.1930, under the auspices of the League of Nations, a conference deliberated on, among others, the codification of rules governing the status of territorial waters, and, within this framework, sea straits within their borders and the territorial sea, which, however, did not produce any results⁷³. In this case, it is also difficult to claim that these discussed and disputed matters could be seen as customary law at the time.

Proper codification took place after Second World War II. It was done as part of the Law of the Sea Conference, with only the first conference, held on 24.02.-27.04.1958, and the third conference which lasted from 03.12.1973 to 10.12.1982 being fruitful. The second Law of the Sea Conference of 1960 yielded no results. As a result of the 1958 conference, four Geneva conventions on the law of the sea of 29.04.1958 were signed; the subjects of those conventions were territorial sea and contiguous zone⁷⁴, high seas⁷⁵, fishing and conservation of the living resources⁷⁶ and the continental shelf⁷⁷, respectively.

The result of the third conference of the law of the sea was the United Nations Convention on the Law of the Sea (UNCLOS) of 10.12.1982⁷⁸. The Convention regulates the legal status of sea zones, and also the status of straits and sea channels, archipelagic states, islands, enclosed and semi-enclosed seas, the legal situation of landlocked countries, seabed beyond the jurisdiction of states (the so-called Area), issues related to marine environment protection and marine research, and the basic ways of resolving maritime disputes. In the exercise of UNCLOS, the Agreement relating to the implementation of Part XI of the UNCLOS (28.07.1994)⁷⁹, as well as

⁷¹ See ia D Anderson, *Modern Law of the Sea. Selected Essays* (2008) 6 et seq.

⁷² 58 LNTS. The convention entered into force on 26.07.1926. Currently, 26 countries are parties to it.

⁷³ SN Nandan, Sh Rosenne (eds), *United Nations Convention on the Law of the Sea 1982. A Commentary*, vol. II, Articles 1 to 85, Annexes I and II, Final Act, Annex II (2002) 279-280.

⁷⁴ 516 UNTS 205. The convention entered into force on 10.09.1964 (52 pages).

⁷⁵ 450 UNTS 11. The convention entered into force on 30.09.1962 (63 pages).

⁷⁶ 559 UNTS 285. The convention entered into force on 20.03.1966 (39 pages).

⁷⁷ 499 UNTS 311. The convention entered into force on 10.06.1964 (58 pages).

⁷⁸ 1833 UNTS 3. The convention entered into force on 16.11.1994 (167 pages). On the nature of the Convention, see D Anderson (n 71) 57-59.

⁷⁹ 1836 UNTS 3. The agreement was applied provisionally from the date of its signature. It entered into force on 28.07.1996 (147 pages).

the Agreement for the Implementation of the Provisions of the UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (04.08.1995) were adopted⁸⁰.

Accepting a convention on the law of the sea, especially one as extensive as UNCLOS, was not an obvious step. It was pointed out that it will bind only those countries which will bind themselves to it. In contradiction to this line of argument, it was brought up that the Convention of 1982 “was, at least in its fundamental concepts, an accurate picture of the existing or evolving customary law of the sea”⁸¹.

As far as law of the sea is concerned, there is no complete agreement as to the scope of the codification of customary rules in conventions developed within the Law of the Sea Conference. Nevertheless, the doctrine indicates directionally that at the time of their conclusion they codified the customary law of the sea (existing at the time of signing) in relation to internal waters, territorial sea and contiguous zone, continental shelf, exclusive economic zone and the open sea. However, gradual development occurred in respect of archipelagic waters, the Area, and peaceful settlement of disputes. Regulation related to internal sea waters and historic bays was deemed fragmentary and not satisfying customary rules⁸². In addition, it can be assumed that a gradual development of the law of the sea in the area of marine environment protection and marine research occurred particularly through UNCLOS⁸³.

2. The 1958 Conventions, UNCLOS and customary law

The relations between the major conventions of the law of the sea (the Geneva Conventions, UNCLOS) and customary law were not clearly defined in those documents. This can be evaluated in at least three aspects: substantive, formal and conflict. Let us review each of them.

a) Substantive aspects of relations between the law of the sea conventions and customary law

General remarks

Substantive aspects of relations between the law of the sea conventions and customary law are a complex issue. With the aim of simplification and order, certain roles that substantive provisions of these conventions can play in relation to customary law can be spoken of. In this respect it is worth noting the statement of the ICJ contained in the judgment in the *Continental Shelf* case (Libya v. Malta) of 03.06.1985⁸⁴. The Court held here that “multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them”. In this way, the Court has defined three roles which multilateral treaties can assume in relation to custom: 1) a recording function; 2) a defining

⁸⁰ 2167 UNTS 3. The agreement entered into force on 11.12.2001 (82 pages).

⁸¹ T Treves, ‘The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention’ in AG Oude Elferink (ed) *Stability and Change in the Law of the Sea: the Role of the LOS Convention* (2006) 59.

⁸² J Gilas, ‘Status obszarów morskich’ in J Łopuski (ed), 1 *Prawo morskie* (1996) 316.

⁸³ Against the background of making a distinction between progressive development and codification of the law of the sea, K Wolfke pointed out that the International Law Commission had major problems with determining the character of individual provisions of the future Geneva Conventions. Although it initially tried to attribute a specific character to particular provisions, it finally abandoned it. K Wolfke, *Rozwój i kodyfikacja prawa międzynarodowego. Wybrane zagadnienia z praktyki ONZ* (1972) 30.

⁸⁴ *Continental Shelf (Libya v Malta)* [1985] ICJ Rep 13 (30), para 27.

function; 3) a developing function⁸⁵. The latter can indeed be understood both as generating customary norms, as well as contributing to the development of existing customary rules.

In turn, G. M. Danilenko pointed out that the temporal relations between customary law and treaties may be of prior, simultaneous or sequential nature⁸⁶. In the first case the treaty codifies customary law, usually contributing to its crystallization. The author pointed out that a customary rule does not disappear even after the codification, even in the relations between states parties⁸⁷. Treaties do not necessarily codify the customary law in full; sometimes, reservations regarding them can be expressed, thus modifying the parties' position on customary rules. Danilenko also pointed out, and rightly so, that customary law retains significance in relations between states parties: 1) in matters not covered by the treaties; 2) when the treaties refer to customary law; 3) if the treaty does not apply to some of the issues it generally regulates; 4) in cases governed by the treaty, but excluded as a result of objections to reservations. Codified customary rules will also continue to be in force between states parties and third countries, especially if not all the countries bound by customary law are parties to the codifying treaty⁸⁸. The relationship of simultaneity occurs when a treaty in relation to particular field is concluded, and at the same time, customary law is being formed. In particular, this applies to situations which are not covered by the treaty, the relations between the parties to the treaty and third countries and between the third countries themselves. Finally, sequential relation takes place when a treaty generates customary norms. This issue has taken an interesting turn in the case-law of the ICJ, as discussed below.

The International Law Commission, somewhat summarizing the case-law and doctrinal analysis on the relationship between treaties and customary law, accepted in its 2016 Draft Conclusions on CIL (draft Conclusion 11 [12]) that:

“[A] treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

⁸⁵ See MH Mendelson (n 27) 294 et seq.

⁸⁶ See GM Danilenko, *Law-Making in the International Community* (1993) 137-162.

⁸⁷ See also the ICJ in the case of *Military and paramilitary activities of the United States in and against Nicaragua (Nicaragua v. United States of America)* [1986] ICJ Rep. 14 (95), para. 178. The Court also pointed out the consequences of separate legal existence of *prima facie* identical standards: “There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability. [...] Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application. A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are customary rules or treaty rules”.

⁸⁸ GM Danilenko (n 86) 154, stresses that codification conventions cannot be considered “conclusive evidence of customary law”, as they merely reflect the positions of parties. As a result, the attitude towards customary law should be balanced by evidence of the existence of a custom in non-treaty conditions.

(b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law²².

The Commission also noted that a rule being repeated in various treaties is not necessarily the proof of existence of a customary rule.

The Commission's reasoning is not entirely accurate, because if a provision actually reflects a customary rule, then it cannot generate it at the same time. Similarly, although to a lesser extent, if a provision crystallises a rule which "had started to emerge prior to the Conclusion of the treaty", then at least at the time of the conclusion of the treaty, said customary rule is not yet formed. It was the treaty that led to specifying the content of a customary rule by clarifying it. Therefore, it can only reflect it as far as certain elements are concerned.

Notwithstanding, it must be noted that a clear demarcation of the three roles multilateral treaties may have in relation to customary law can sometimes be difficult. It is also contractual in nature to some extent. It may indeed prove that a particular provision of the convention contains elements which are codifying, crystallizing and generating or developing customary rules at the same time. In particular, a clear distinction between the case of codification and crystallization can be difficult, because codification always involves specifying and crystallizing customary rules. Therefore, in this study, these two roles of the treaty will be linked to each other.

Conventions on the law of the sea as codification and crystallization of customary law

Customary rules which are codified in treaties obtain the necessary level of precision. However, one has to remember that the basis of validity is parallel to and independent of treaties⁸⁹. A codifying treaty rule and a customary rule with identical content will apply alongside each other. Parties to the treaty will therefore be bound in parallel by a treaty rule and a corresponding customary rule. A potential loss of the binding force of a treaty will not necessarily mean the loss of binding force of a customary rule. Interesting functional dependencies may arise between a parallel treaty rule and a customary rule in force. In particular, the interpretation of a treaty rule may contribute to the development of content (clarification, supplementation, development, and even adjustment) of a parallel customary rule.

In a number of cases, international courts have recognised the applicability of customary rules corresponding to the provisions of the Convention, thus reaffirming their codifying nature⁹⁰. For example, in relation to the territorial sea the ICJ in the case of *Military and paramilitary activities of the United States in and against Nicaragua* (*Nicaragua v. United States of America*) of 27.06.1986⁹¹ stated that the rules relating

⁸⁹ Compare ICJ, *Military and paramilitary activities of the United States in and against Nicaragua* (*Nicaragua v. United States of America*) [1986] ICJ Rep 14 (94), para 176 with respect to Article 51 of the UN Charter.

⁹⁰ JA Roach, 'Today's Customary International Law of the Sea' (2014) 45(3) *Ocean Development and International Law* 239 et seq. The author points out which provisions of the Geneva Conventions and the Convention of Montego Bay are customary rules, and in which court decisions and arbitral awards the existence of customary rules applicable to maritime matters was recognized or denied.

⁹¹ *Military and paramilitary activities of the United States in and against Nicaragua* (*Nicaragua v. United States of America*) [1986] ICJ Rep. 14 (111), para 212.

to it contained in the conventions of 1958 and 1982 are of a customary character⁹². The Court held:

“[T]he 1944 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law²².

More specifically, the Court recognized the right of innocent passage through the territorial sea as a customary rule. It stated⁹³:

“[I]t is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; Article 18, paragraph I (b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point.”²²

The continental shelf is a relatively newly designated area in the law of the sea. However, its current understanding and the legal regime concerning it are considered matters of customary law. In the *North Sea Continental Shelf* case (Germany v. Denmark and the Netherlands) of 20.02.1969⁹⁴, the ICJ found that Articles 1-3 of the Geneva Convention on the Continental Shelf

were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the juridical character of the coastal State's entitlement; the nature of the rights exercisable; the kind of natural resources to which these relate; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent air-space.

On the other hand, in the Judgement in the *Territorial and maritime dispute* case (Nicaragua v. Colombia) of 19.11.2012⁹⁵ it stated that “the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary law”. A little further, following the approving parties to the dispute and its earlier case law, it stated that “the principles of maritime delimitation enshrined in Articles 74 and 83 [and so, concerning both the exclusive economic zone as well as the continental shelf] reflect customary international law [...]”⁹⁶.

⁹² See also DR Rothwell, T Stephens (n 1) 59 et seq.

⁹³ *Military and paramilitary activities of the United States in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep. 14, para 214. See also the judgements of the ICJ in the *case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v Bahrain)* [2001] ICJ Rep 40 (109-110), para 223, where the right of innocent passage as such was considered a customary rule, as well as in *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)* [1949] ICJ Rep 4 (28), where before the codification conferences, the Court recognized the customary nature of the right of innocent passage of warships in peacetime.

⁹⁴ *North Sea Continental Shelf case (Germany v Denmark/the Netherlands)* [1969] ICJ Rep 3 (39), para 63. See also the *Continental shelf Case (Libya v Tunisia)* [1982] ICJ Rep 75, para 101.

⁹⁵ *Territorial and maritime dispute case (Nicaragua v Colombia)* [2002] ICJ Rep 624 (666), para 118.

⁹⁶ *Territorial and maritime dispute case (Nicaragua v Colombia)* [2002] ICJ Rep 674, para 139. See also the ICJ judgments on *Maritime Delimitation in the Area between Greenland and Jan Mayen*

UNCLOS imposes an obligation to negotiate delimitation agreements regarding the exclusive economic zone and continental shelf (Articles 74 and 83). In its ruling in *the delimitation of the exclusive economic zone and the continental shelf* case between Barbados and Trinidad Tobago of 11.4.2006⁹⁷, the arbitral tribunal found that the parties had negotiated an agreement for a reasonable period of time, but it was not reached. In this context it held that:

The existence of a dispute is similarly not precluded by the fact that negotiations could theoretically continue. Where there is an obligation to negotiate it is well established as a matter of general international law that obligation does not require the Parties to continue with negotiations which in advance show every sign of being unproductive. Nor does the fact that a further round of negotiations had been fixed for February 2004 preclude Barbados from reasonably taking the view that negotiations to delimit the Parties' common maritime boundaries had already lasted long enough without a settlement having been reached, and that it was now appropriate to move to the initiation of the procedures of Part XV as required by Articles 74(2) and 83(2) of UNCLOS – provisions which, it is to be noted, subject the continuation of negotiations only to the temporal condition that an agreement be reached “within a reasonable period of time”.

In conclusion, the court found that the parties were under no obligation to continue negotiating the agreement.

An interesting example of application of customary rules codified in UNCLOS is provided in the judgment in the *Maritime Delimitation in the Area between Greenland and Jan Mayen* case (*Denmark v. Norway*) of 14.06.1993⁹⁸. In this case, the parties were in a dispute regarding the border between their fishing zones (they had not established exclusive economic zones as of that moment). Both sides were merely signatories to the Convention, and therefore were not bound by it. Under these conditions, the ICJ wondered about the possibility of application of international law to fishing zones. It held that in Article 55 of UNCLOS, codification of a customary rule, which also applies as such, had occurred. As a result, the exclusive economic zone regime should apply to delimitation of fishing zones. The Court found that such delimitation is subject to “the law governing the boundary of the exclusive economic zone, which is customary law”.

The ICJ in the judgement in the *Territorial and maritime dispute* case (*Nicaragua v. Colombia*) of 19.11.2012⁹⁹ stated that the provision providing the definition and legal status of the islands located in different sea zones is regulated by the rule of customary law reflected in Article 121 of UNCLOS¹⁰⁰. It also considered Article 13 of UNCLOS concerning low-tide elevations as a customary rule¹⁰¹.

Developing customary law through conventions on the law of the sea

The law of the sea conventions also generated new customary rules. Moreover, ICJ in its case-law described the conditions required for making it possible

(*Denmark v Norway*) [1993] ICJ Rep 38 (59), para 48, and between Peru and Chile - *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3 (65), para 179.

⁹⁷ XXVII RIAA 147 (205-206), paras 199-202.

⁹⁸ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38 (59), para 47.

⁹⁹ *Territorial and maritime dispute case (Nicaragua v Colombia)* [2012] ICJ Rep 624 (666), para 118.

¹⁰⁰ *Territorial and maritime dispute case (Nicaragua v Colombia)* [2012] ICJ Rep 624 (674), para 139.

¹⁰¹ *Territorial and maritime dispute case (Nicaragua v Colombia)* [2012] ICJ Rep 624 (693), para 182.

to conclude the formation of new customary rules. In this regard, the ICJ judgment in the *North Sea Continental Shelf* case (Germany v. Denmark / Netherlands) of 20.02.1969 deserves special attention¹⁰². In it, the Court pointed out that the provisions of multilateral conventions (it considered here the equidistance principle of Article 6 of the Geneva Convention on the Continental Shelf) may be considered customary norms, as long as they “at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law”. Moreover, the ICJ ruled that a treaty norm could become a customary norm “even without the passage of any considerable period of time” if we are dealing with “a very widespread and representative participation in the convention”, “provided it included that of States whose interests were specially affected”. At the same time, the Court noted that:

“[A]lthough the passage of only short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved”.

The Court thus formulated the three conditions that must be met for a standard treaty to be able to generate a parallel and, as a rule, identical in content, customary rule. He included among them: 1) the treaty rule intended to be the model for customary rules should have a rule-setting potential, understood as the ability to be the basis of a general rule (it is interesting that the Court did not state directly that the rule should codify existing customary law); 2) the parties to the treaty containing legislative provisions are to be a widespread and representative group of states, including specially affected states; according to the ICJ, this criterion exempts from meeting the temporal requirement, even in the form of a considerable period of time; 3) the elements of a customary rule should comply with additional requirements: a) the practice should be both extensive and potentially homogeneous (uniform) with the instituted provision; b) such a practice should be accompanied by a general (common) recognition that a legal rule or obligation is coming into being.

In its judgment in the *Military and paramilitary activities of the United States in and against Nicaragua* (Nicaragua v. United States of America) case of 27.06.1986¹⁰³, the ICJ went a step further. It pointed out that customary practice generated under the influence of a multilateral treaty does not necessarily reflect the content of a treaty rule. Its general compliance with the treaty provisions and a belief that cases of conduct not compliant with a rule constitute an infringement, rather than a recognition of a new rule, should suffice. It held:

It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as

¹⁰² *North Sea Continental Shelf (Germany v Denmark/the Netherlands)* [1969] ICJ Rep 3 (41-43), paras 72-74.

¹⁰³ *Military and paramilitary activities of the United States in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 (98), para 186.

customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

In the context of generating customary rules from multilateral treaty provisions, it is worth considering the impact of making reservations, and, to a lesser extent, interpretative declarations to provisions, which would form the basis of a given rule on the formation of customary rules. The issues of reservations and interpretative declarations were dealt with by the UN International Law Commission. In its Guide to Practice on Reservations to Treaties of the International Law Commission of 2011¹⁰⁴, it stated first that “The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision” (rule 3.1.5.3.). It added that “A reservation to a treaty provision which reflects a rule of customary international law does not of itself affect the rights and obligations under that rule, which shall continue to apply as such between the reserving State or organization and other States or international organizations which are bound by that rule” (rule 4.4.2.). Therefore, according to the ILC, a reservation does not diminish the existence of a customary rule between the parties to a treaty and third parties. However, one may wonder whether such reservations should not be treated as a kind of persistent objection. Although the bases of treaty provisions and customary rules are different, a reservation refers to the content of a provision which codifies a customary rule. One can also have serious doubts as to whether a treaty provision to which a reservation has been entered (especially more than one) can be the basis of new customary rules between parties entering such reservations and third countries.

b) Formal relations between conventions on the law of the sea and customary law

Convention referrals to customary rules: general remarks

The customary law can play a certain regulatory role in a particular field of international law as a set of rules which refer to the provisions of treaties regulating this field. Reference can rely on resigning from direct regulation and formally granting customary law a role which is complementary to the convention system. Then the convention provisions and customary rules will co-regulate, each in its own scope, a particular matter. Reference may, however, also rely on the fact that the convention provisions will be used in accordance with or under the conditions established on the basis of customary rules. Finally, we have to deal with exclusionary reference, i.e. a situation when we will use the convention provisions, unless customary rules state otherwise. The reference in question goes beyond a systemic interpretation of Article 31.3(c) of the Vienna Convention on the Law of Treaties, according to which, when interpreting a treaty, one should consult “any relevant rules of international law

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Access:
http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_8_2011.pdf&lang=EF

applicable in the relations between the parties”. When it comes to references, it is a matter of direct application of customary rules in addition to or instead of treaty provisions or as sources of criteria or conditions for applying treaty rules.

From a formal point of view, references may take various forms. These references can be either direct or indirect. Direct references may be explicit or hidden. Direct references guide those applying the law directly to customary rules. They can, however, do this explicitly or through wider formulas in which applicable customary rules could be discovered. For example, other rules of international law can be such a formula. In turn, indirect reference is when a treaty provision refers to different treaty provisions from which the obligation to apply customary rules results, provided they are applicable in a given case.

In respect of the Geneva Conventions on the Law of the Sea of 1958, only in two of them (in the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the High Seas) are there general references (hidden references) to “other rules of international law”. In the Convention on the Territorial Sea they are found in the context of the exercise of sovereignty over the territorial sea of Article 1(2), innocent passage through this sea - Article 14(4), Article 17, Article 22(2), and also in the Convention on the High Seas in the context of the exercise of freedom of the seas - Article 2. Direct references to customary rules are nowhere to be found.

The situation with UNCLOS and related agreements is not much better. The only clear link with customary law is in Article 221(1) of UNCLOS, concerning measures to avoid pollution arising from maritime casualties. It provides that:

Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

The customary law appears unambiguously in the interpretative declarations submitted by the States Parties to UNCLOS, especially in the context of the right of innocent passage (Belgium, Ecuador, Iran, Serbia, Italy), the contiguous zone (Serbia), the exclusive economic zone, including the rights of geographically disadvantaged countries (Slovenia)¹⁰⁵.

In the UNCLOS, indirect reference can also be incidentally found. It appears in the context of determining convention rules for the delimitation of the continental shelf and exclusive economic zone. According to these articles (Article 74(1) and Article 83(1)), delimitation is to be effected “between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”.

Therefore, the International Tribunal for the Law of the Sea in its judgment in the case concerning *Delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh v. Myanmar) of 14.03.2012¹⁰⁶ stated that:

¹⁰⁵ Access: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mdsg_no=XXI-6&chapter=21&Temp=mdsg3&lang=en

¹⁰⁶ Case No. 16, 61. Access: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf

183. Although article 74, paragraph 1, and article 83, paragraph 1, of the Convention explicitly address delimitation agreements, they also apply to judicial and arbitral delimitation decisions. These paragraphs state that delimitation must be effected “on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”. Customary international law is one of the sources identified in article 38. Accordingly, the law applicable under the Convention with regard to delimitation of the exclusive economic zone and the continental shelf includes rules of customary international law. It follows that the application of such rules in the context of articles 74 and 83 of the Convention requires the achievement of an equitable solution, as this is the goal of delimitation prescribed by these articles.

184. Decisions of international courts and tribunals, referred to in article 38 of the Statute of the ICJ, are also of particular importance in determining the content of the law applicable to maritime delimitation under articles 74 and 83 of the Convention. In this regard, the Tribunal concurs with the statement in the Arbitral Award of 11 April 2006 that: “In a matter that has so significantly evolved over the last 60 years, customary law also has a particular role that, together with judicial and arbitral decisions, helps to shape the considerations that apply to any process of delimitation” (*Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA, Vol. XXVII, p. 147, at pp. 210-211, para. 223*).

UNCLOS referrals to other rules of international law and customary law of the sea

A number of references to “other rules of international law” can be found within UNCLOS. They appear in the following provisions: Article 2(3) – status of maritime sea, Article 19(1), Article 21(1) – right of innocent passage, Article 31 – responsibility for any loss or damage to a coastal State resulting from non-compliance with rules of innocent passage, Article 34(2) – international status of straits, Article 58 – rights and duties of third States in EEZ, Article 87 – the principle of freedom of the high seas, Article 138 – general conduct of States in relation to the Area, Article 139 – liability for damages caused by the failure to carry out responsibilities concerning the Area, Article 293 – applicable law in maritime disputes, Article 297(1) – limitations on applicability of compulsory procedures, Article 303(4) – archaeological and historical objects found at sea, Article 21(1) of the Annex III (Area).

Before we move on to consider whether and to what extent “other rules of international law” mean customary rules, we should first note that in the mentioned UNCLOS provisions, in most cases the reference is intended to ensure the application of these provisions “subject to”, “under conditions laid down” or “in accordance with” other rules of international law. This means that other rules of international law define the evaluation criteria and limits of applicability of the convention provisions (conditions for the exercise of laws, performance of duties regulated by these provisions). A completely different situation may also occur, namely, that other rules of international law are applicable “in so far as they are not incompatible with” the provisions of the Convention (Article 58(1)). There are also references pursuant to which the provisions of UNCLOS apply “without prejudice to” other rules of international law (Articles 139, 303). This can be considered as admission of parallel,

and to some degree, disjunct application of the Convention and other rules of international law.

Other rules of international law are certainly not necessarily identical with customary rules, although they can include them. In present circumstances, however, in certain areas “other rules of international law” may not include customary rules or include them to a limited extent (e.g. in relation to the Area). “Other standards” may comprise in particular provisions of other treaties (e.g. the UNESCO Convention on the protection of the underwater cultural heritage of 02.11.2001 in connection with Article 303 (4) of UNCLOS¹⁰⁷), rules contained in the binding resolutions of relevant international organizations (e.g. those concerned with fishing, marine protection, or the IMO), and even general principles of law.

Other rules of international law may refer not only to the rules in force, but also to the development of other rules. ITLOS tackled this issue in its advisory opinion on Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area z 1.2.2011¹⁰⁸, where it held that:

[A]rticle 304 of the Convention refers not only to existing international law rules on responsibility and liability, but also to the development of further rules. The regime of international law on responsibility and liability is not considered to be static. Article 304 of the Convention thus opens the liability regime for deep seabed mining to new developments in international law. Such rules may either be developed in the context of the deep seabed mining regime or in conventional or customary international law.

This means that a reference to other rules of international law should be considered as dynamic reference whose content may evolve, even in different directions. In the context of customary rules as “other rules”, it can be understood as the admissibility of the inclusion of new customary rules which arose after signing the Convention or the Convention giving force to “other rules”, regardless of whether they were in any degree generated by the Convention or not, and regardless of whether they are a rule of law of the sea or belong to other branches of international law, as long as they apply to the case. This may also mean rules of another treaty codifying new customary rules.

Referral to customary rules as law applicable to disputes concerning law of the sea

UNCLOS relatively broadly regulates the issues related to settlement of sea-related disputes¹⁰⁹. Among others, compulsory procedures entailing binding decisions were established; the Convention defined in Article 293 the law applicable to the competent arbitration body or court in relation to those procedures. Paragraph 1 of this provision states that they “apply this Convention and other rules of international law

¹⁰⁷ See T Scovazzi, ‘The Protection of Underwater Cultural Heritage: Article 303 and the UNESCO Convention’ in D. Freestone, R Barends, DM Ong (eds) (n 1) 120 et seq. The author points out that UNCLOS did not regulate the status of underwater cultural heritage in the continental shelf area (between the contiguous zone and the Area). In his opinion, there was a legal vacuum (124-125), which was filled by the UNESCO Convention, which he defined as “a major step forward in the progressive development of international law” (134).

¹⁰⁸ ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Advisory Opinion), 66, para 211.

¹⁰⁹ See i.a. DR Rothwell, T Stephens (n 1) 445 et seq; R Churchill, ‘Some reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade’ in D Freestone, R Barends, DM Ong (eds) (n 1) 388 et seq.

not incompatible with this Convention”¹¹⁰. This means that, at least when it comes to binding marine dispute settlement: 1) arbitration bodies and courts can and are even obliged to use non-Convention rules of international law, which may include applicable customary rules; 2) application of other rules of international law is not limited to law of the sea rules, which means that in maritime disputes they can and should be used if it is appropriate to do so - this also applies to customary rules belonging to other areas of international law; 3) the limit of application of other rules of international law, including customary rules, is their consistency with the Convention. The third of these findings should not be interpreted as an order to ensure the priority of the Convention before any other rule of international law, but as an order to refer to other rules whose limit is their contradiction with the Convention. At the same time, this situation does not occur if the Convention itself gives priority to other rules of international law.

The importance of customary rules in the context of Article 293 of UNCLOS was highlighted in the arbitration award in the *delimitation of the maritime boundary between Guyana and Suriname* case of 17.09.2007¹¹¹. The arbitral tribunal found that its jurisdiction with regard to the breach of obligations to settle disputes by peaceful means in the form of using of armed force is included within other rules of international law, as referred to in Article 293(1) of UNCLOS, the provisions of the UN Charter, and general (customary) international law.

Other rules of international law and customary rules not belonging to the law of the sea

Other rules of international law do not necessarily mean the rules of the law of the sea. At the same time, both customary rules regarding the bases of international law, such as treaties and responsibility for the breach of obligations, as well as referring to the other branches of material international law may come into play. The case-law of the International Tribunal for the Law of the Sea provides us with a number of examples proving the above.

Within the first group, it is worth noting several decisions in which customary rules regarding state responsibility were applied. Thus, in its Judgment in the *M/S Saiga* Case (St. Vincent and Grenadines v. Guinea) of 1.7.1999¹¹², the ITLOS considered whether the wrongful application of its customs laws to the exclusive economic zone by Guinea could be justified under general international law by invoking a state of necessity. For this purpose, the Court recalled the ICJ judgment in the *Gabčíkovo-Nagymaros Project* case of 1997, which approved the conditions that must be met to be able to rely on state of necessity, as well as Article 33(1) of the ILC’s Draft Articles on State Responsibility of 2001, where the state of necessity was regulated. The court pointed out that the conditions relating to the state of necessity must be applied together, and that they are a reflection of customary international law.

¹¹⁰ See also art. 30 (5) of the Straddling Stocks Agreement and other agreements which adopted the UNCLOS dispute settlement mechanism. See T. Treves, ‘A System for Law of the Sea Dispute Settlement’ in D Freestone, R Barens, DM Ong (eds) (n 1) 418-420, 426-428.

¹¹¹ XXX RIAA 1 (112-113), paras 402-406.

¹¹² *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v Guinea)* Case No 2, [1999] ITLOS Rep 37, paras 132-134.

A more general statement of the Court can be found in the advisory opinion on Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area of 01.02.2011.¹¹³ The ITLOS established here that:

Since article 139, paragraph 2, and article 304 of the Convention refer, respectively, to the “rules of international law” and to “the application of existing rules and the development of further rules regarding responsibility and liability under international law”, account will have to be taken of such rules under customary law, especially in light of the ILC Articles on State Responsibility. Several of these articles are considered to reflect customary international law. Some of them, even in earlier versions, have been invoked as such by the Tribunal (*The M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, at paragraph 171) as well as by the ICJ (for example, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168, at paragraph 160).

A more precise view on this issue was formulated by the ITLOS in the advisory opinion *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) of 02.04.2015*¹¹⁴. The ITLOS pointed out that as far as the responsibility of the state for IUU fishing activities conducted by vessels sailing under its flag is concerned, the usual rules of state responsibility apply. Referring to Article 293 of UNCLOS, which requires that the court seized be guided by “relevant rules of international law on responsibility of States for internationally wrongful acts”, the Court counted among them:

In light of international jurisprudence, including its own, the Tribunal finds that the following rules reflected in the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (hereinafter “the ILC Draft Articles on State Responsibility”) are the rules of general international law relevant to the second question:

(i) Every internationally wrongful act of a State entails the international responsibility of that State (article 1 of the ILC Draft Articles on State Responsibility);

(ii) There is an internationally wrongful act of a State when conduct consisting of an action or omission (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State (article 2 of the ILC Draft Articles on State Responsibility); and

(iii) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act (article 31, paragraph 1, of the ILC Draft Articles on State Responsibility).

In the *M/V Virginia G (Panama v. Guinea-Bissau)* of 14.04.2014¹¹⁵ ITLOS was concerned about the nature of Panama’s claims. Therefore, it appealed to the customary rule of exhaustion of national measures in the event of use of diplomatic protection by a state. The Court declared:

¹¹³ Case No 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)* [2011] ITLOS Rep 10 (56), para 169. See also paras 178, 194, 208-210 (58, 62, 65-66).

¹¹⁴ Case No 21, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)* [2015] ITLOS Rep 41, paras 143 and 144.

¹¹⁵ Case No 19, *The M/V “Virginia G” Case (Panama v Guinea-Bissau)* [2014] ITLOS Rep 49, paras. 152-154.

[A] well-established principle of customary international law that the exhaustion of local remedies is a prerequisite for the exercise of diplomatic protection. This principle is reflected in article 14, paragraph 1, of the Draft Articles on Diplomatic Protection adopted by the International Law Commission in 2006, which provides that “[a] State may not present an international claim in respect of an injury to a national... before the injured person has... exhausted all local remedies”. It is also established in international law that the exhaustion of local remedies rule does not apply where the claimant State is directly injured by the wrongful act of another State.

Finally, the Court has held that said customary rule does not apply because Panama directly suffered the damage.

“Other rules of international law” may also include such customary rules that regulate issues at the interface of law of the sea and other areas, or can be applied to them for other reasons. In particular, ITLOS “imported” in this manner the principles of international environmental law in the advisory opinion on Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area of 01.02.2011¹¹⁶ to the customary law of the sea. The court counted among them the precautionary principle, which, originally expressed in principle 15 of the Rio Declaration on Environment and Development of 1992, has gradually become a rule of customary law¹¹⁷.

The court further held that “the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law”. It also added that “in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to “resource deposits in the Area which lie across limits of national jurisdiction”. However, it stipulated after the ICJ that “general international law does not specify the scope and content of an environmental impact assessment” (paragraph 205 of the Judgment in Pulp Mills on the River Uruguay)¹¹⁸.

c) Conflicts between the rules of the law of the sea conventions and the customary law

The Geneva Conventions of 1958 generally do not address the issue of conflict of rules. In turn, the Convention of Montego Bay of 1982 regulated in Article 311 the issue of the attitude of UNCLOS to other, both earlier and subsequent treaties, whose scope overlaps with that of the Convention. At the same time, the overall attitude of

¹¹⁶ Case No 17, (n 113) [2011] ITLOS Rep 10.

¹¹⁷ Case No 17 (n 113) [2011] ITLOS 47, para 135: “This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the “standard clause” contained in Annex 4, section 5.1, of the Sulphides Regulations. So does the following statement in paragraph 164 of the ICJ Judgment in Pulp Mills on the River Uruguay that “a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute” (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties)”. However, the status of this rule is controversial in doctrine. See M Markowski, *International Law of EEZ Fisheries. Principles and Implementation* (2010) 46-49 clearly classified a precautionary approach to fisheries conservation and management as a general principle of law a relatively short time before the release of the advisory opinion. In turn, A. Boyle (n 52) 51, even went so far as to say that the Rio Declaration led to the reinterpretation of UNCLOS and that “it is neither necessary nor useful to attempt to turn the precautionary principle into a ‘rule’ of customary international law [...]”.

¹¹⁸ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 50 and 51, paras 145 and 149.

the Convention to earlier or subsequent customary law which could be in conflict with that Convention was not specified. After all, those provisions of the convention where the application of “subject to” or “in accordance with” other rules of international law is allowed could be considered detailed conflict-of-law solutions. Following the conclusions of the International Law Commission on the fragmentation of international law, it can be assumed that efforts should be made to ensure that rules of different origins which are also applicable to a given case be interpreted as broadly as possible in a harmonious, consistent and coherent manner (“so as to give rise to a single set of compatible obligations”)¹¹⁹. However, if it is impossible, in such cases “other rules of international law” should have precedence over convention provisions, customary rules included (if relevant). Only in the case referred to in Article 58 of UNCLOS (exclusive economic zone), would other rules, including customary rules, have to give way before the provisions of the Convention.

Regardless of these observations, one should submit that, theoretically speaking, the contradiction of a customary rule by the law of the sea conventions does not automatically mean that it loses its basis and lapses. It can be terminated only in relations between the parties, if and to the extent that the parties do not make reservations or interpretative declarations concerning it. A convention provision contrary to an existing customary rule should itself be regarded as an expression of the progressive development of international law. The customary rule will continue to exist between third countries and sometimes between them and states parties.

On the other hand, if, after the Convention has entered into force, a customary rule which is inconsistent to a certain extent with the provisions of the Convention were to develop (as an *actus contrarius*), it could lead to actual loss of binding force of the provisions of the Convention in relations between the participants of a new custom or a change in said provisions. That hypothetical possibility is clearly acknowledged by the arbitral tribunal in a dispute concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, 30.06.1977 - 14.03.1978¹²⁰, where it stated:

The Court recognises both the importance of the evolution of the law of the sea which is now in progress and the possibility that a development in customary law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights and obligations. But the Continental Shelf Convention of 1958 entered into force as between the Parties little more than a decade ago. Moreover, the information before the Court contains references by the French Republic and the United Kingdom, as well as by other States, to the Convention as an existing treaty in force which are of quite recent date. Consequently, only the most conclusive indications of the intention of the parties to the 1958 Convention to regard it as terminated could warrant this Court in treating it as obsolete and inapplicable as between the French Republic and the United Kingdom in the present matter. In the opinion of the Court, however, neither the records of the Third United Nations Conference on the Law of the Sea nor the practice of States outside the Conference provide any such conclusive indication that the Continental

¹¹⁹ International Law Commission in its work on the fragmentation of international law, defined it as the principle of harmonization. See Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006, point 4. Access: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf

¹²⁰ XVIII RIAA 3, para 47.

Shelf Convention of 1958 is today considered by its parties to be already obsolete and no longer applicable as a treaty in force.

More effectively, such a situation occurred in relation to the definition of the open sea in the Convention of 1958, which was modified by the subsequent practice of the formation of fishing zones and exclusive economic zones, to be finally codified in the UNCLOS in this modified form. It is believed here that replacing or modifying the provisions of the treaty can occur only when a new rule may be clearly established and it employs “a high degree of support, comparable, for example, to that enjoyed by the new rule of customary law permitting coastal States to claim a zone of exclusive fisheries jurisdiction up to 200 nautical miles that emerged in the late 70s”. Modifying the Convention through regional¹²¹ or even two-way custom is not excluded. At the same time, we must admit that the “nascent practice distinct from the conventional regulation can be considered as a source of uncertainty as to the meaning and even the application of these provisions, and can lead to disputes or formulating objections to the new practice¹²²”.

d) Customary rules and the development of the law of the sea: the non-conventional perspective

Customary international law as a supplementary means of regulation of the maritime questions

The Geneva Conventions and the Convention of Montego Bay are comprehensive sets of Treaty rules of the law of the sea. Therefore, a question arises regarding those rules of customary law which would not be codified, crystallised, or generated by the treaty: what role can they play? It seems that one can look at this problem from both a subjective and objective standpoint. In the first case, we may adopt the position that there will be a place for customary rules as long as all the countries using the sea are not parties to those treaties (in particular, the Convention of 1982)¹²³. But by stopping here, one would have to second the remark that an increase in the number of parties to the Convention, and UNCLOS in particular, reduces the importance of customary rules.

In this context it should be noted that the United States, which is one of the most important naval powers, as well as a number of coastal states from different continents, such as Colombia, Ethiopia, Iran, Libya, and Cambodia, are not among the parties to the Convention of Montego Bay¹²⁴. The influence of the US on the customary law of the sea is immeasurable¹²⁵. In addition, many countries have made

¹²¹ RR Churchill, ‘The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention’ in AG Oude Elferink (ed) (n 81) 96-99.

¹²² RR Churchill (n 121) 103.

¹²³ For example, ICJ in the *Territorial and maritime dispute case between Nicaragua and Colombia*, settled by judgment of 19.11.2012, [2012] ICJ Rep 624 (666), where “The Court notes that Colombia is not a State party to UNCLOS and that, therefore, the law applicable in the case is customary international law” (para 118).

¹²⁴ As for the reasons for not acceding to UNCLOS see D Anderson (n 71) 90.

¹²⁵ According to DR Rothwell, “As to the role and influence of the State practice of non-parties to the LOS Convention, considerable care needs to be taken in assessing their impact. In the over 20 years since Convention’s adoption and the decade since its entry into force the objections towards it from various States have gradually diminished and many have now sought to ratify or accede. Some still remain outside of the Convention, and here inevitably the State practice of the United States falls under the spotlight. Whilst the US still formally remains outside of the Convention, it is clear that it has in many areas warmly embraced its provisions if not de jure then certainly de facto. The State practice of

reservations or interpretative declarations which modify some of their treaty obligations. Thus, in reserved areas, customary rules more or less in line with the UNCLOS can form. The view that despite concluded treaties, customary rules of the law of the sea remain in force between states parties, especially within the scope to which they only refer, or do not regulate or do not regulate in full, has to be approved as well. This brings us to the second issue.

None of the international conventions, even as extensive as the Convention of 1982, are exhaustive. There are matters which they do not regulate or regulate only in a limited scope. The paragraphs of the preamble to UNCLOS and the 1995 Agreement became an expression of this belief. It is stated therein that “matters not regulated by the Convention or by this Agreement continue to be governed by the rules and principles of general international law”. Although general international law does not necessarily include the rules of customary law, this is often the case.

There are various ways to ensure the independence of customary law. One of them is a clear exclusion of a particular matter from the Convention regulation and leaving it to customary law. Within the Geneva Convention on the Territorial Sea and UNCLOS, historic bays are a classic example (Art. 7 (6) of the Convention of 1958, Art. 10 (6) of the 1982 Convention). When in the *Continental shelf* case of 24.02.1982 (Libya v. Tunisia)¹²⁶, there was an attempt to apply the customary principles on the continental shelf to historic waters, the ICJ stated that the concept of historic waters/historic bays is governed by customary law, different from the customary law regulating the continental shelf (and codified in 1958, or at the very least in 1982). The regime concerning historic waters is based on “acquisition and occupation”, while the other is based on “the existence of rights ipso facto and ab initio” (shelf as a natural extension of the land territory of a country).

Another possibility is tacit admission of the formation and development of customary rules in areas in which, despite efforts, it was impossible to negotiate treaty solutions. We encounter this situation in the *Fisheries Jurisdiction* (FRG v. Iceland) judgement of 25.07.1974¹²⁷, where the ICJ stated that since the Law of the Sea Conference of 1958 - and despite the failure of the Conference of 1960 - the two concepts of customary law regarding the width of the territorial sea and the scope of the fishing rights, which were not been settled by treaties, had crystallized. According to the Court:

44. The 1960 Conference failed by one vote to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery rights. However, after that Conference the law evolved through the practice of States on the basis of the debates and near-agreements at the Conference. Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that Conference. The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be

the US cannot be seen as akin to a persistent objector but rather as a supporter and accordingly should be given certain weight in any analysis of whether the Parts of the Convention have passed into customary international law. This is particularly case with respect to the navigational provisions of the LOS Convention which have been of great strategic importance to the US”. See DR Rothwell, *The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention: A Commentary* in AG Oude Elferink (ed) (n 81) 147.

¹²⁶ [1982] ICJ Rep 74-75, para 100.

¹²⁷ *Fisheries Jurisdiction (FRG v Iceland)* [1974] ICJ Rep 175 (191-192, 195).

generally accepted. The second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries, this preference operating in regard to other States concerned in the exploitation of the same fisheries, and to be implemented in the way indicated in paragraph 49 below.

50. State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal States, particularly in favour of countries or territories in a situation of special dependence on coastal fisheries. Both the 1958 Resolution and the 1960 joint amendment concerning preferential rights were approved by a large majority of the Conferences, thus showing overwhelming support for the idea that in certain special situations it was fair to recognize that the coastal State had preferential fishing rights. After these Conferences, the preferential rights of the coastal State were recognized in various bilateral and multilateral international agreements.

The regulation provided by the Treaty need not necessarily be full. Then a customary rule can complement a treaty rule even in relations between the parties. See also the arbitral tribunal in the ruling on *the delimitation of the exclusive economic zone and the continental shelf* between Barbados and Trinidad Tobago, 11.4.2006¹²⁸, where it stated:

“As noted above, both Barbados and Trinidad and Tobago are parties to UNCLOS, the principal multilateral convention concerning not only questions of delimitation strictly speaking but also the role of a number of other factors that might have relevance in effecting the delimitation. Bilateral treaties between the parties and between each party and third States might also have a degree of influence in the delimitation. In a matter that has so significantly evolved over the last 60 years, customary law also has a particular role that, together with judicial and arbitral decisions, helps to shape the considerations that apply to any process of delimitation”.

Customary rules can also form as rules for different scopes of specific treaty regulations, serving to unify them or highlight the most important rules of conduct. In this situation, they will be rules horizontally permeating the treaty provisions. In this manner, M. Markowski mentions that at least three environmental law rules applicable in the field of law of the sea are of a customary character: 1) the sovereign rights of states over their natural resources; 2) the duty to prevent, reduce, and control imminent and serious environmental harm; 3) the procedural duty between states to cooperate in mitigating environmental risks and emergencies¹²⁹. In turn, K. M. Gjerde argued with respect to fishing on the high seas that “As some scholars have noted, States are already bound under customary law to apply the basic principles embodied in the UNFSA [1995 Agreement implementing UNCLOS] and the [FAO] Compliance Agreement”¹³⁰.

Finally, customary rules may complement convention regulations or help them take practical form in cases when the convention rules are not entirely clear. One can encounter such situations in respect of delimitation of the economic zone and the continental shelf. In general terms, within the meaning of Article 6 of the Geneva Convention on the Continental Shelf (shelf delimitation rules), the arbitral tribunal

¹²⁸ XXVII RIAA 147 (210), para 223.

¹²⁹ M. Markowski (n 117) 19.

¹³⁰ KM Gjerde, ‘High Sea Fisheries Management under the Convention on the Law of the Sea’ in D Freestone, R Barends, DM Ong (eds) (n 1) 302.

took a position in the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* case of 30.06.1977 - 14.03.1978¹³¹. It held that “the rules of customary law are a relevant and even essential means both for interpreting and completing the provisions of Article 6”.

In turn, codifying treaty rules can be interpreted in the light of customary rules. In the ICJ judgment on the *Delimitation of Maritime Boundary in the Gulf of Maine Area* case (Canada v. United States of America) of 12.10.1984¹³², it ruled that:

“So far as conventions are concerned, only "general conventions", including, inter alia, the conventions codifying the law of the sea to which the two States are parties, can be considered. This is not merely because no particular conventions bearing on the matter at issue (apart from the Special Agreement of 29 March 1979) are in force between the Parties to the present dispute, but mainly because it is in codifying conventions that principles and rules of general application can be identified. Such conventions must, moreover, be seen against the background of customary international law and interpreted in its light.”²²

In turn, with regard to the delimitation of both sea zones, the UNCLOS requires that in relations “between States with opposite or adjacent coasts”, the delimitation took place “by agreement on the basis of international law [...] in order to achieve an equitable solution” (Article 74(1), Article 83(1) of the Convention). Going beyond a simple interpretation of provisions, the ICJ has developed in this regard the concept of equity, recognizing it as “the legal concept”, which is “a general principle directly applicable as law”¹³³. At the same time, in the judgment in the *North Sea Continental Shelf* case of 1969, the ICJ indicated under the Truman Declaration of 28.09.1945 that delimitation should be carried out according to equitable principles or equitable criteria, the use of which is to lead to an equitable result¹³⁴. The status of these rules is, however, not definite.

In the *Delimitation of Maritime Boundary in the Gulf of Maine Area* (Canada v. United States of America) of 12.10.1984¹³⁵, the ICJ ruled that proving the customary nature of these rules is incorrect. It stated:

110. Each Party's reasoning is in fact based on a false premise. The error lies precisely in searching general international law for, as it were, a set of rules which are not there. This observation applies particularly to certain "principles" advanced by the Parties as constituting well-established rules of law, e.g., the idea advocated by Canada that a single maritime boundary should ensure the preservation of existing fishing patterns which are vital to the coastal communities in the area concerned, or the idea advocated by the United States that such a boundary should make it possible to ensure the optimum conservation and management of living resources and at the same time reduce the potential for future disputes between the Parties. One could add to these the ideas of "non-encroachment" upon the coasts of another State or of "no-cutting-off" of the seaward projection of the coasts of another State, and others which the Parties put forward in turn, which may in given circumstances constitute equitable criteria, provided, however, that no attempt is made to raise them to the status of established rules endorsed by customary international law.

¹³¹ XVIII RIAA 3 et seq, para 75.

¹³² [1984] ICJ Rep 246 (299), para 83.

¹³³ See *Continental shelf (Libya v Tunisia)* [1982] ICJ Rep 60, para 71.

¹³⁴ See the *North Sea Continental Shelf Case* [1969] ICJ Rep 3 (33), para 47.

¹³⁵ *Delimitation of Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* [1984] ICJ Rep 246 (298-300).

At the same time, the Court held that certain rules can be regarded as customary in the case of any maritime delimitation between neighbouring countries. Among them were the following principles:

113. [...]

(1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.

(2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.

Furthermore, the Court stressed that:

114. On the basis of the conclusions already reached, the Chamber has found that general customary international law is not the proper place in which to seek rules specifically prescribing the application of any particular equitable criteria, or the use of any particular practical methods, for a delimitation of the kind requested in the present case. As already noted, customary international law merely contains a general requirement of the application of equitable criteria and the utilization of practical methods capable of implementing them. It is therefore special international law that must be looked to, in order to ascertain whether that law, as at present in force between the Parties to this case, does or does not include some rule specifically requiring the Parties, and consequently the Chamber, to apply certain criteria or certain specific practical methods to the delimitation that is requested.

New maritime issues and the regulatory capacity of the customary international law of the sea

In the field of interest of the law of the sea, new issues sometimes arise (e.g. new aspects of exploration and exploitation of the Area, development of artificial islands), and sometimes they emerge at the point of convergence of the law of the sea and other areas of international law, e.g. environmental law (among others, new forms of marine pollution, the impact of climate change on seas, protection of the genetic resources of the seas), or new forms of old phenomena or practices (e.g. overfishing, *de facto* piracy on territorial waters, *de jure* piracy and robbery). The question is whether, in relation to this matter, customary rules may still arise, and whether they would pass the test as an effective regulatory measure.

The answer to this question is not clear. Surely one cannot rule out the formation of states' practice associated with various new challenges and issues related to the sea, and, accordingly, acceptance of this practice as customary law. This may be especially true if we accept the formation of custom in an accelerated manner. However, certain reservations have to be made with regard to this issue. The first of these is associated with a natural tendency to seek normalisation, which could be applied to new issues, treaties and binding instruments of international organizations. So before these parties or international bodies examining the case at hand call upon the custom as a possible, but yet unproven reservoir of rules, they will attempt to use available methods of interpretation or certain provisions of written law. In this case,

the country not being bound by the treaty or resolution of an organisation may be an obstacle.

Another reservation is connected with the nature of customary rules. They probably will not arise in situations involving a detailed regulation of technical standards, which is important for certain aspects of exploration and exploitation of the Area and protecting the seas from pollution. The formation of custom in terms of management of fishing resources of the seas and their protection can also be difficult. In addition to general principles that could become customary law, there is a need for specific regulation of an administrative nature. They are provided by regional fishing organisations or marine protection organisations.

An obstacle in the formation of customary rules (and to some extent treaty rules as well) can be the rapid and variable dynamics of a particular field, as is the case with the impact of climate change on the seas. In this case, multilateral agreements or even resolutions of international organisations can be a better regulatory measure.

Political considerations can also act against the formation of new customary rules. It can be assumed that if a new issue involves aspects which are either military or related to state security (e.g. the question of naval warfare or armament), the acceptance of customary rules may be significantly hindered. It may also occur with certain problems if a new issue substantially violates the fundamental principles defining an international status quo, which is the case with the so-called Somali piracy¹³⁶.

CONCLUSIONS

As a rule, customary law in the international law of the sea is based on the traditional two-element concept, although various contemporary challenges are contributing both to reinterpreting practice as well as to its acceptance as law. Reinterpretative aspirations should, however, have their limits and should not be associated with depreciation of the significance of any element of custom, which sometimes manifests itself in the international settlement of maritime disputes for fear of *non liquet*. One cannot forget that the ends cannot justify the means at all costs. Custom cannot be degenerated in a manner that leads to a complete paradigm shift, and consequently, even to denying the rule of law, which after all involves a certain predictability and legal certainty. Therefore, one should strive to establish clear exceptions to the two-element concept of custom and precise conditions for recourse to such exceptions. Perhaps expanding the catalogue of sources of international law to natural (moral) law rules, reflecting the core values of the international community and humanity, would be a better way than shattering the concept of custom.

In the field of the law of the sea, customary law in its basic body is closely related to maritime treaties, particularly the Geneva Conventions and UNCLOS. Although it has been codified and well-defined in these treaties to a significant extent, it has not disappeared. While it does not play a key regulatory role, it is not marginalized. To some extent, evolution has proceeded from customary law to treaty

¹³⁶ See the UN General Assembly resolution named 'Oceans and the law of the sea' of 29.12.2014, point 112, UN Doc A/RES/69/245. See also C. Mik, 'The Role of Regional State Integration Organisations in Combating Piracy between Africa and Asia' (2013) 2(1) Polish Review of International and European Law 69 et seq.

law, and back again to customary law, which is generated by treaty rules; but on the other hand, it develops, complements and clarifies these rules. In addition, customary law is still in force between the parties to the sea conventions, between them and third countries, and between third countries themselves. In the case of new marine challenges, the importance of customary rules is limited, which largely stems from the inherent properties of customary rules.

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