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## Customary International Law in the Reasoning of International Courts and Tribunals

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### 1 Introduction

A century ago, Baron Descamps, who presided over the work of the Committee of Jurists that drafted the Statute of the Permanent Court of International Justice (PCIJ), observed that custom has shaped ‘the development and establishment of the law of nations’.<sup>1</sup> The continuing relevance of custom as a source of international law is unquestionable to the present day. Despite efforts to codify rules and principles of customary international law (CIL) in multilateral conventions, often initiated by the International Law Commission (ILC), few of these instruments ‘have achieved universal or truly broad participation’.<sup>2</sup> Numerous recent decisions of international courts and tribunals confirm that custom is not condemned to disintegrate<sup>3</sup> and certainly does more than simply fill gaps left by the existing treaty regimes, as has been suggested elsewhere.<sup>4</sup> International law has always been and remains principally a customary law.<sup>5</sup>

It is perhaps unsurprising that custom, as a universal unwritten law binding upon sovereign states, has intrigued legal minds over the

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<sup>1</sup> Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee: June 16th–July 24th with Annexes* (Van Langenhuysen Brothers 1920) 322.

<sup>2</sup> P Tomka, ‘Custom and the International Court of Justice’ (2013) 12 LP ICT 195, 196.

<sup>3</sup> RJ Dupuy, ‘Coutume sage et coutume sauvage’, *Mélanges offerts à Charles Rousseau: La communauté internationale* (Pedone 1974) 76 (‘condamnée à l’éclatement’).

<sup>4</sup> C Chaumont, ‘Cours général de droit international public’ (1970) 129 RdC 333, 435.

<sup>5</sup> S Sur, *La coutume internationale* (Librairie Techniques 1990) 1; O Sender & M Wood, ‘Custom’s Bright Future: The Continuing Importance of Customary International Law’ in CA Bradley (ed), *Custom’s Future: International Law in a Changing World* (Cambridge University Press 2016) 360.

centuries, not least because it raises a host of fascinating and challenging theoretical and practical issues relating to the method and process of its formation.<sup>6</sup> To some observers it resembles ‘a riddle wrapped in a mystery inside an enigma’:<sup>7</sup> how can states act out of a sense of legal obligation in order to create a new customary norm, if the legal obligation does not exist until they have acted?<sup>8</sup> What is the balance of power in the married couple of state practice and *opinio juris sive necessitatis*? How does one go about ascertaining the required generality of practice in order to conclude the existence of custom? What role should be reserved to the practice of specially affected states, and how may these be identified? Many of these issues have been subject of or would merit a treatise on their own but, overall, they are indicative of what is often seen as the rather disorderly and chaotic nature of the process by which unwritten law develops in a horizontal and decentralised system of sovereign states which, whether we like it or not, remain the primary providers of custom.<sup>9</sup>

In 1988, at a colloquium entitled ‘Change and Stability in International Law-Making’, Jimenez de Aréchaga, the former president of the International Court of Justice (ICJ or the Court), spoke of CIL as being ‘spontaneous, unintentional, unconscious in its origin, disorderly, uncertain in its form, slow in its establishment’.<sup>10</sup> Similarly, Henkin described ‘the process of making customary law [a]s informal, haphazard, not deliberate, even partly unintentional and fortuitous ... unstructured

<sup>6</sup> For recent inquiries into CIL, see for example M Hakimi, ‘Making Sense of Customary International Law’ (2020) 118 *MichLRev* 1487; O Chasapis-Tassinis, ‘Customary International Law: Interpretation from Beginning to End’ (2020) 31 *EJIL* 235; J d’Aspremont, ‘The Four Lives of Customary International Law’ (2019) 21 *ICLR* 229; L Gradoni, ‘Un-Procedural Customary Law’ (2019) 10 *JIDS* 175.

<sup>7</sup> D Bodansky, ‘Does Custom Have a Source?’ (2014) 108 *AJIL Unbound* 179.

<sup>8</sup> *ibid* 182 (presenting this question as the ultimate paradox of CIL understood in line with the traditional methodology underlying its formation and identification).

<sup>9</sup> Dupuy (n 3) 76 (*les pourvoyeurs principaux du droit coutumier*); for recent scholarship examining the ways in which other actors, namely international organisations, may directly contribute to the formation of CIL see for example K Daugirdas, ‘International Organizations and the Creation of Customary International Law’ (2020) 31 *EJIL* 201; DM DeBartolo, ‘Identifying International Organizations’ Contributions to Custom’ (2014) 108 *AJIL Unbound* 174; compare ILC Study Group, ‘Draft Conclusions on the Identification of Customary International Law’ (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] *YBILC* 11 (hereinafter ‘ILC Conclusions’) Conclusion 12; see also M Wood, ‘Second Report on Identification of Customary International Law’ (2014) 2(1) *YBILC* 163, 183 [45].

<sup>10</sup> See A Cassese & JHH Weiler, *Change and Stability in International Law-Making* (Walter de Gruyter 1988) 1.

and slow'.<sup>11</sup> More recent inquiries into the method and process of CIL have called it 'chaotic, unstructured, and politically charged [in which] the participants make and respond to competing claims on the law as they advance their own agendas',<sup>12</sup> an 'inherently contingent and variable kind of law'<sup>13</sup> or even 'hopelessly indeterminate'.<sup>14</sup> Others have decried custom as being unfit to accompany the rapid pace of developments in international relations nowadays<sup>15</sup> and in a more heterogeneous international community.<sup>16</sup>

Accordingly, no effort has been spared at the international level to analyse the process of custom formation and methodology for its identification.<sup>17</sup> The detailed inquiry into the subject conducted by the ILC under the leadership of Sir Michael Wood is the most recent and authoritative of such efforts.<sup>18</sup> The outcome of its work, in the form of Conclusions on Identification of Customary International Law (ILC Conclusions), sought to provide greater certainty as to the process of identification of CIL and to provide therefore practical guidance to

<sup>11</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed, Columbia University Press 1979) 34.

<sup>12</sup> M. Hakimi, 'Custom's Method and Process: Lessons from Humanitarian Law' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 149.

<sup>13</sup> Hakimi (n 6) 1487.

<sup>14</sup> J. Tasioulas, 'Customary International Law: A Moral Judgment-Based Account' (2014) 108 AJIL Unbound 328, 332.

<sup>15</sup> P. Reuter, 'Principes de droit international public' (1961) 103 RdC 425, 466 ('*les règles coutumières ne sont pas adaptées au rythme rapide de l'évolution du monde moderne*'); see also C. de Visscher, 'Reflections on the Present Prospects of International Adjudication' (1956) 50 AJIL 467, 472 ('the traditional development of custom is ill suited to the present pace of international relations'); Chaumont (n 4) 434 (describing custom as a craft process, '*le procédé, artisanal sous sa forme ancienne*').

<sup>16</sup> GM Danilenko, *Law-Making in the International Community* (Martinus Nijhoff 1993) xiii.

<sup>17</sup> See for example ILC, Committee on Formation of Customary (General) International Law, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law' (London Conference, 2000); JM Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law, Vol I (Rules), Vol II (Practice)* (Cambridge University Press 2005); see also IDI, 'The Elaboration of General Multilateral Conventions and of Non-contractual Instruments Having a Normative Function or Objective' (*IDI Resolution*, Session of Cairo, 1987), Conclusions 14, 20 & 22; IDI, 'Problems Arising from a Succession of Codification Conventions on a Particular Subject' (*IDI Resolution*, Session of Lisbon, 1995), Conclusions 2 & 5, 10–13.

<sup>18</sup> ILC Conclusions (n 9); for their endorsement by the UNGA see UNGA Res 73/203, 'Identification of Customary International Law' (11 January 2019) UN Doc A/RES/73/203 [4].

judges and lawyers called to apply such law. Some of the ILC Conclusions will be discussed below.

The focus of this chapter, however, will be on the reasoning of international courts and tribunals and the ways in which they have identified rules of CIL and their content. Four recent studies have already examined various aspects of this practice, with a particular focus on the ICJ. This is to be expected as the Court is the only mechanism of general jurisdiction, has had the greatest number and variety of cases among international courts and tribunals where it has had to ascertain the existence of CIL, and in light of the authority it enjoys as the principal judicial organ of the United Nations. Talmon concludes that beyond inductive or deductive reasoning, the ICJ usually proceeds by asserting the existence of rules of CIL, or combining 'a mixture of induction, deduction and assertion'.<sup>19</sup> Tams describes the role of the Court as clarifying the 'meta-law' on the identification of CIL, and has already identified similar 'argumentative shortcuts' to those that will be addressed in this chapter.<sup>20</sup> Choi and Gulati argue that the ICJ has completely ignored the traditional methodology.<sup>21</sup> Petersen helpfully sets out a detailed classification of the Court's approaches to CIL and factors that shape the ICJ's decision-making in that context.<sup>22</sup> This chapter builds on some of these findings, and its added value is intended to lie in providing an up-to-date analysis of the ICJ's practice as well as expanding the scope of the inquiry beyond the ICJ. In classifying the dominant shortcuts that courts and tribunals have adopted in their reasoning when identifying CIL, this chapter seeks to highlight the systemic issues they may raise in the foreseeable future.

The chapter proceeds as follows. Section 2 briefly sets out the traditional methodology for the identification of CIL as recognised in the jurisprudence of the ICJ and as reaffirmed in the ILC Conclusions. Section 3 analyses the recent practice of international courts and tribunals and specifically their use of a variety of shortcuts for the identification of CIL. Section 4 contains preliminary conclusions as to the challenges that employing such shortcuts in the reasoning of

<sup>19</sup> S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417, 441.

<sup>20</sup> CJ Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making' (2015) 14 LPICT 51, 69–78.

<sup>21</sup> SJ Choi & M Gulati, 'Customary International Law: How Do Courts Do It?' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 147.

<sup>22</sup> N Petersen, 'The International Court of Justice and the Judicial Process of Identifying Customary International Law' (2017) 28 EJIL 357.

international courts and tribunals poses to the continuing validity of the methodology for the identification of CIL, the authority of the decisions rendered, and the perception of the role of the international judge not only as an idle scribe of CIL but as a lawmaking agent.

## 2 The Traditional Methodology for the Identification of CIL

Much ink has been spilled on the methodology for the identification of 'international custom, as evidence of a general practice accepted as law'.<sup>23</sup> This perhaps not fully felicitous wording of Article 38(1)(b) of the Statute of the ICJ,<sup>24</sup> sets out two constituent elements of CIL, namely a general practice and its acceptance as law (also known as *opinio juris sive necessitatis* or *opinio juris*).<sup>25</sup> To borrow the words of one arbitral tribunal, these two elements are the 'guiding beacons' of CIL, a law which is not frozen in time but continues to evolve in accordance with the realities of the international community.<sup>26</sup>

As noted by the ILC, the process of identifying CIL 'is not always susceptible to exact formulations'.<sup>27</sup> Indeed, the end-product of the Commission's inquiry into the subject aimed to set out a 'clear guidance without being overly prescriptive'.<sup>28</sup> The ILC Conclusions and their commentaries contain a wealth of materials on almost every aspect of the two-element methodology, its theoretical and practical application.<sup>29</sup> This chapter does not aim to revisit the methodology for the identification of CIL, which by and large is well-established and accepted by

<sup>23</sup> Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993, art 38(1)(b).

<sup>24</sup> J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 RdC 9, 49–50.

<sup>25</sup> ILC Conclusions (n 9) Conclusion 2; but see P Hagggenmacher, 'La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale' (1986) 90 RGDIP 5, 31 (arguing that at their genesis these two elements formed a single unity: '*les deux "éléments" qu'on se plaît à y discerner se fondent en une unité indistincte*'); see similarly P Guggenheim, 'Les deux éléments de la coutume internationale', *La technique et les principes du droit public: Etudes en l'honneur de Georges Scelle, vol 1* (LGDJ 1950) 275.

<sup>26</sup> *Merrill & Ring Forestry LP v Canada* (Award of 31 March 2010) ICSID Case No UNCT/07/1 [193].

<sup>27</sup> ILC Conclusions (n 9) General Commentary [4].

<sup>28</sup> *ibid.*

<sup>29</sup> For the assessment of the ILC Conclusions see for example G Nolte, 'How to Identify Customary International Law? On the Outcome of the Work of the International Law Commission (2018)' (2019) 62 JYIL 251.

states,<sup>30</sup> if not ‘set in stone’.<sup>31</sup> This chapter only aims to show that the demonstration that this methodology has been followed is often missing in practice and is frequently replaced by shortcuts in the reasoning of international courts and tribunals. It is in this context that it may be worth briefly recalling the gist of the traditional methodology for the identification of CIL, as it will set the scene for the subsequent analysis of international jurisprudence.

The ICJ’s *North Sea Continental Shelf* judgment remains a central reference point for any inquiry into the processes of formation and identification of CIL. It represents the fundamental mark that has been left by the Court on ‘shaping the meta-law of custom’.<sup>32</sup> In that case, the Court had to determine whether the rule of equidistance, as set out in Article 6 of the 1958 Geneva Convention on the Continental Shelf, was binding on Germany under CIL as Germany was not a party to the Geneva Convention. In holding that this was not the case, the ICJ set out its methodology for the identification of CIL, outlining a range of criteria that may be relevant to that process. The Court held that ‘two conditions must be fulfilled’, namely the existence of ‘a settled practice’ as well as ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’.<sup>33</sup> In its more recent jurisprudence, the ICJ has reaffirmed that both elements of custom ‘are closely linked’.<sup>34</sup> Thus, in ascertaining the existence of custom, one must look at what states do or do not do, and whether their conduct reflects the sense of a legal obligation. This is the crux of the traditional ‘two-element approach’, which according to the ILC ‘serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exist’.<sup>35</sup>

<sup>30</sup> Wood (n 9) 169, 171–72 [3(a) & 21]; See also UNGA Res 73/203 (n 4) [4].

<sup>31</sup> Tams (n 20) 60; see *Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Judgment) [1985] ICJ Rep 13, 29 [27]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, 97 [183]; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 253–55 [64–73]; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, 122–23 [55].

<sup>32</sup> Tams (n 20) 51; J Kammerhofer, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems’ (2004) 15 EJIL 523, 524.

<sup>33</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* (Judgment) [1969] ICJ Rep 3, 44 [77]; see also *Jurisdictional Immunities of the State* (n 31) 122–23 [55].

<sup>34</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, 131 [149].

<sup>35</sup> ILC Conclusions (n 9) 125, Commentary to Conclusion 2 [1].

As far as the required evidence of each element of custom is concerned, ILC Conclusion 3 illustrates the level of scrutiny that is ordinarily required from an adjudicator pronouncing on the customary nature of a given rule:

### Conclusion 3

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found.
2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Two important aspects follow from this conclusion insofar as the practice of international courts and tribunals in identifying CIL is concerned. First, evidence of practice must be assessed considering the overall context, the nature of the rule and the circumstances in which the evidence is to be found. Second, there should be an independent demonstration of each of the two constituent elements in the reasoning of international courts and tribunals. In other words, two distinct inquiries must be carried out. On the one hand, the adjudicator must be satisfied that the relevant practice exists and is sufficiently widespread, representative and, most importantly, consistent.<sup>36</sup> On the other hand, the adjudicator must ascertain that that practice is accompanied by the sense of legal right or obligation. While this approach is commonly accepted and sound in theory, the actual practice of international courts and tribunals is sometimes a rather different reality.

Judges of international courts and tribunals have been described as ‘technician[s] of the application of international law’.<sup>37</sup> But it is no secret that they are much more than that, particularly when it comes to unwritten sources of international law. As the scribes of CIL, seeking to make sense of the unwritten practice of states in the reasoning of their decisions, judges speak with authority and expertise. They are certainly sophisticated scribes and not robots<sup>38</sup> for they do not follow a prescribed form of legal reasoning.

<sup>36</sup> *ibid* 135, Conclusion 8.

<sup>37</sup> M Bedjaoui, ‘L’opportunité dans les décisions de la Cour internationale de Justice’ in L Boisson de Chazournes & V Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality* (Kluwer 2001) 563 (‘*Le juge international est avant tout le technicien de l’application du droit international*’).

<sup>38</sup> *ibid* 564 (‘*en vérité nous sommes loin de la robotisation de “l’office du juge”, réduit à un comportement programmé dans l’ordre national, comme dans l’ordre international. Il est même à parier que la “machine à syllogismes”, la “machine à dire le droit”, la “machine*



It is thus unsurprising that every time an international court or tribunal, and especially the ICJ, renders a judgment or an advisory opinion, there is no shortage of opinions on what the Court did right or wrong (often beside the point of what was actually in dispute). Be that as it may, what a scholar expects from the reasoning in a judicial or arbitral decision is often quite different from what the parties to the case as well as judges, arbitrators or other external observers, including states, consider to be sufficient. In addition, a host of factors, many of which may not be visible to outside observers, influence the content of that reasoning. This may also explain why the content of such reasoning regarding the identification of CIL is so variable across different institutions and even from the same institution over time.

Institutional and practical constraints are particularly evident when a court or tribunal is called to pronounce on the existence and content of CIL. Institutionally, there is an expectation of efficiency and good administration of justice, which would not allow to undertake a comprehensive analysis of the practice and *opinio juris* of almost 200 states in every single case and in respect of every single rule of CIL that the parties may seek to rely on. In many instances, it would be a hopeless or non-manageable exercise; in others, there is simply no need to reinvent the wheel where the rule or principle in question is well-established. Practically, there are also several limitations that may prevent international courts and tribunals from making their legal reasoning and demonstration of CIL more comprehensive and consistent with the traditional two-element methodology, which are often overlooked in the existing scholarship. Three stand out in particular. First, a judgment or an advisory opinion is not an academic exercise; it aims to make the legal reasoning as succinct and clear as possible to dispose of the relevant issues. Second, it is not always feasible to arrive at a comprehensive and/or representative selection of state practice and *opinio juris* in the preparation of a decision. The issue of selectivity and unbalanced representation of practice (either because the practice of many states is simply unavailable, unreported or inaccessible) is often addressed by being less specific in order to secure a more convincing majority or bypass issues that could undermine the logical structure and coherence of a decision as a whole. Some courts and tribunals have expressly acknowledged these concerns as directly

*à juger*” *ne pourra pas voir le jour*’ (‘In truth, we are a long way from the robotisation of the “office of the judge”, reduced to a programmed behaviour in the domestic legal order, as well as the international one. It is even a safe bet that the “syllogism machine”, the “law-making machine”, the “judging machine” will never see the light of day’.)



impacting how they present their reasoning on CIL.<sup>39</sup> The third and final constraint, which applies to judges even more prominently than to academics, is that of language, and with it legal culture, and the influence it has on ‘how its speakers conceptualise, and therefore approach, legal reasoning’.<sup>40</sup>

Keeping the above constraints in mind, this chapter will demonstrate that there is a considerable variety of shortcuts in the reasoning of international courts and tribunals. These shortcuts show in turn that the methodology for the identification of CIL, as laid down in *North Sea Continental Shelf*, is often sacrificed for the sake of expediency. While it may be a matter of course in international adjudication, this may, in the long run, raise questions about the continuing validity of that methodology, the role that international judges play not only in the identification but also in the formation of CIL, and the coherence of CIL as a source of law made by states and for states.

### 3 Shortcuts in the Reasoning of International Courts and Tribunals on CIL

Having recalled the basic tenets of the traditional methodology for the identification of CIL and the challenges faced by international courts and tribunals, this section turns to their actual practice in recent years. It will quickly become apparent that international courts and tribunals have often found shortcuts in their reasoning to sidestep a full-fledged demonstration of the application of that methodology. The logic of ‘less is more’ is a unifying aspect of many of the decisions analysed below. This chapter will only discuss a few examples of cases without aspiring to be comprehensive. However, the set of cases analysed below is sufficiently representative to show that recourse to these shortcuts is on the rise. It is a phenomenon which is visible both across various international courts and tribunals, and within a single institution, as the example of the ICJ aptly demonstrates.

This review of the recent practice also shows that there is a variety of shortcuts that international courts and tribunals have followed when

<sup>39</sup> See for example *Cargill Incorporated v Mexico* (Award of 18 September 2009) ICSID Case No ARB(AF)/05/2 [274] (‘The Tribunal acknowledges, however, that surveys of State practice are difficult to undertake and particularly difficult in the case of norms such as “fair and equitable treatment” where developed examples of State practice may not be many or readily accessible’).

<sup>40</sup> PM Dupuy, ‘Introduction to Customary International Law’ in PM Dupuy (ed), *Customary International Law* (Elgar 2021) x.

identifying CIL. In this author's view, the following three approaches dominate, with apologies for the somewhat colloquial terminology: (1) 'Check the written materials to find CIL'; (2) 'It is CIL because the ICJ has said so'; and (3) 'It is CIL because the ILC has said so'.

In addition to these three shortcuts which will be analysed in greater detail, there are also other ways of sidestepping the full-fledged demonstration of the traditional methodology.<sup>41</sup> Some of them have already been studied, at least in respect of the ICJ. There are several examples of mere assertions of CIL without any demonstration at all, but this phenomenon is not limited to the ICJ.<sup>42</sup> In some cases, the Court states that it has carefully examined the existing state practice and *opinio juris*, without however making any demonstration thereof.<sup>43</sup> 'Homework done but not demonstrated' so to speak. It is open to question whether these relatively common instances of declaring that a given rule is or is not part of CIL constitute a shortcut to the existing methodology, or rather simply a way of presenting the conclusions without demonstrating the exact elements in support of those conclusions.<sup>44</sup> Either way, these examples are methodologically unsatisfactory, because in law, just like in mathematics, the result, even a correct one, may not always withstand scrutiny without adequate demonstration.

Similarly, on several occasions the ICJ appears to have accepted the existence of an agreement of the parties to a dispute on the CIL status of a given rule as instrumental in reaching its conclusion on the subject, without any additional inquiry into state practice or *opinio juris* beyond those two states.<sup>45</sup> There are instances of other international courts and

<sup>41</sup> See for example Petersen (n 22) 368.

<sup>42</sup> See for example *Iran v USA* (Award of 2 July 2014) Award No 602-A15(IV)/A24-FT (IUSCT) [283]; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/ Côte d'Ivoire)* (Judgment) [2017] ITLOS Rep 4, 151–52 [558]; *Responsibilities and Obligations of States with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10, 28 [57].

<sup>43</sup> See for example *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, 24 [58]; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [2007] ICJ Rep 582, 615 [89–90].

<sup>44</sup> See O Sender & M Wood, 'The International Court of Justice and Customary International Law: A Reply to Stefan Talmon' [2015] EJIL: Talk! <<https://bit.ly/3xKvWOd>> (arguing that '[u]nlike induction and deduction, assertion is self-evidently not a methodology for determining the existence of a rule of customary international law. It is essentially a way of drafting a judgment, a way of stating a conclusion familiar to lawyers working in certain national systems').

<sup>45</sup> See for example *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624, 666 [114–18]; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* 29 [26]; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar*

tribunals taking the same shortcut.<sup>46</sup> While such an approach may be justifiable in cases of local or regional custom, it is unclear as to why or how the purported agreement of the parties to a given dispute sheds light on the existence or absence of a particular rule of CIL on a universal scale. Although scholars have considered that this approach may allow the ICJ to signal impartiality due to the institutional constraints it faces,<sup>47</sup> it may equally lead to expansive and not adequately supported conclusions.<sup>48</sup>

Other shortcuts are not sufficiently widespread to merit an in-depth discussion given the limited scope of this chapter. For instance, one decision has been identified where an investor-state arbitral tribunal held that it had to determine the content of a rule of CIL by looking into indirect evidence, such as judicial decisions or scholarly writings, because otherwise it would be compelled to declare *non liquet*.<sup>49</sup> Customary international law thus conceived would be nothing but a means available to the adjudicator to fill the gaps of international law. Be that as it may, what all these and other approaches have in common is that they fuel this and other authors' concerns about departing from any, even if minimal, demonstration of the application of the methodology for the identification of CIL and the impact it may have on the certainty and predictability of international law.

### 3.1 'Check the Written Materials to Find CIL'

The relationship between treaties and custom is longstanding and intertwined.<sup>50</sup> It is widely accepted that treaties may: (i) reflect pre-existing rules of CIL; (ii) generate a new rule and serve as evidence of the customary character of that rule; or (iii) have a crystallising effect for an emerging rule of

*v Bahrain*) (Merits) [2001] ICJ Rep 40 [167, 175]; compare *Military and Paramilitary Activities in and against Nicaragua* (n 31) [184] ('the shared view of the Parties as to the content of what they regard as the rule [of CIL] is not enough'); see also Petersen (n 22) 369–72; T Abe, 'ICJ Practice in Determining the Existence of Customary International Law' (2019) 62 JYIL 274.

<sup>46</sup> *The Loewen Group Inc and Raymond L Loewen v United States* (Final Award of 26 June 2003) ICSID Case No ARB(AF)/98/3 [129].

<sup>47</sup> Petersen (n 22) 369–72.

<sup>48</sup> See for example *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) [2015] ICJ Rep 665, 707–08 [106].

<sup>49</sup> *Windstream Energy LLC v Canada* (Award of 27 September 2016) UNCITRAL/NAFTA, PCA Case No 2013–22 [351].

<sup>50</sup> See for example BB Jia, 'The Relations between Treaties and Custom' (2010) 9 *Chin/JntLaw* 81; RR Baxter, 'Treaties and Custom' (1970) 129 *RdC* 27.

CIL.<sup>51</sup> The ICJ has long recognised that ‘multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them’.<sup>52</sup>

At the same time, CIL has an ‘existence of its own’ even where an identical or similar rule may find expression in a treaty.<sup>53</sup> As such, it is perhaps surprising to see how often international courts and tribunals resort to treaties or other written materials to identify CIL. The practice is particularly prominent in the ICJ’s jurisprudence.<sup>54</sup> There are numerous examples in which the Court has, with little or no additional analysis, recognised the customary status of certain treaty provisions.<sup>55</sup> The examples below of two recent decisions rendered by the ICJ and one by an arbitral tribunal demonstrate some of the potential problems with this shortcut. In all three cases, in identifying CIL, recourse was had to written materials, namely treaties that were not even in force between the parties to the dispute, or resolutions of the General Assembly (GA).

In the *Jurisdictional Immunities of the State* case, the Court had to determine whether the so-called territorial tort exception to state immunity existed under CIL.<sup>56</sup> While the Court attempted to demonstrate the application of the two-element methodology in its reasoning, it focused its analysis rather disproportionately on Article 11 of the 1972 European Convention on State Immunity and Article 12 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property.<sup>57</sup> Having acknowledged that neither convention was actually in force between Germany and Italy, the Court stressed that these instruments were therefore ‘relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law’.<sup>58</sup> However, the Court appeared

<sup>51</sup> *North Sea Continental Shelf Cases* (n 33) 41–43 [71–74]; see ILC Conclusions (n 9) Conclusion 11.

<sup>52</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)* 29–30 [27].

<sup>53</sup> *Military and Paramilitary Activities in and against Nicaragua* 94–96 (n 31) [177–78].

<sup>54</sup> Petersen (n 22) 372–75.

<sup>55</sup> See for example *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, 243 [217]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) [2004] ICJ Rep 136, 172 [89]; *United States Diplomatic and Consular Staff in Tehran (USA v Iran)* (Judgment) [1980] ICJ Rep 3, 24 [45]; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)* (Judgment) [1992] ICJ Rep 351, 588 [383]; for many other cases proving the point see Tams (n 20) 71–73.

<sup>56</sup> *Jurisdictional Immunities of the State* (n 31) 126–35 [62–79].

<sup>57</sup> *ibid* 128–30 [66–69].

<sup>58</sup> *ibid* 128 [66].

to ascribe much weight to these instruments amidst its analysis of other aspects of the relevant state practice, including case law and legislation of various states, as well as in identifying *opinio juris*.<sup>59</sup> It would thus seem that this was a conscious shortcut on the part of the Court in the process of identifying CIL.

Similarly, the *Enrica Lexie* arbitral tribunal recently adopted the same shortcut in examining whether the ‘territorial tort’ exception to immunity from criminal jurisdiction was recognised under CIL. The tribunal noted that even though national courts in a relatively significant number of states look at the 2004 UN Convention on Jurisdictional Immunities of States and Their Property as a reflection of CIL, the ‘states that consider that there is immunity for foreign states before other states’ national courts do not accept the provisions of this convention, including Article 12.<sup>60</sup> It went on, however, to analyse the criteria set out in Article 12 of that convention to conclude that ‘even if a “territorial tort” exception were recognised under CIL, the exception would not apply’ in the circumstances of that case, as the marines were on board the *Enrica Lexie*, and not on Indian territory.<sup>61</sup> Even though the arbitral tribunal ultimately did not rule on whether such an exception exists under CIL, it is telling that its reasoning relied exclusively on an unratified treaty instrument rather than on any inquiry into the relevant state practice and *opinio juris*.

In the *Chagos* Advisory Opinion, the ICJ had to determine whether the right to self-determination existed as a customary norm at the time of events, that is, in the period between 1965 when the UK excised the Chagos archipelago from Mauritius, then a non-self-governing territory administered by the UK, and 1968 when Mauritius attained independence.<sup>62</sup> In determining whether the right to self-determination was part of CIL at the time, the Court held that ‘State practice and *opinio juris* . . . are consolidated and confirmed gradually over time’,<sup>63</sup> and highlighted the ‘progressive consolidation of the law on self-determination’.<sup>64</sup>

<sup>59</sup> *ibid* 135 [77].

<sup>60</sup> *The ‘Enrica Lexie’ Incident (Italy v India)* (Award of 21 May 2020) PCA Case No 2015–28 [866].

<sup>61</sup> *ibid* [871].

<sup>62</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (n 34) 134–35 [161].

<sup>63</sup> *ibid* 130 [142].

<sup>64</sup> *ibid* 135 [161].

It is noteworthy that in identifying the existence, content and scope of the right to self-determination under CIL, the Court placed much emphasis on the GA resolution 1514 (XV) of 14 December 1960, and the circumstances in which it was adopted.<sup>65</sup> The Court saw a clear correlation between the acceleration of the decolonisation process (with eighteen countries in 1960 and additional twenty-eight non-self-governing territories during the 1960s exercising the right to self-determination) and the adoption of resolution 1514 (XV) which ‘clarifie[d] the content and scope’ of that right.<sup>66</sup> It considered the adoption of this resolution to be ‘a defining moment in the consolidation of State practice on decolonization’.<sup>67</sup> The weight that the Court ascribed to this and other resolutions of the GA in reaching its conclusion on the right to self-determination and its content under CIL<sup>68</sup> was more significant when compared to its earlier jurisprudence, which had taken account of resolutions as evidence of *opinio juris*.<sup>69</sup> It also allowed the Court to effectively dispose of the issue of an allegedly inconsistent practice underlying the obligation incumbent on administering powers to respect the boundaries of the non-self-governing territory.<sup>70</sup> That said, in the particular circumstances of this case, the Court’s reliance on the relevant resolutions as a shortcut for identifying CIL might be said to be justified by the conditions in which these resolutions were adopted, their normative value, and the absence of any genuine opposition among states to the existence and content of the right to self-determination.<sup>71</sup>

Beyond these and many other examples of this shortcut to the traditional methodology in practice, one area of increasing interaction between custom and treaty law has been in the context of investor-state arbitration. Several investor-state arbitral tribunals have resisted the temptation of automatically relying on hundreds of bilateral investment treaties (BITs) to inform their task of ascertaining whether certain

<sup>65</sup> *ibid* 132 [150, 152].

<sup>66</sup> *ibid* [150].

<sup>67</sup> *ibid* [150].

<sup>68</sup> *ibid* 132–33 [151–55].

<sup>69</sup> See for example *Military and Paramilitary Activities in and against Nicaragua* (n 31) 99–100 [188]; *Legality of the Threat or Use of Nuclear Weapons* (n 31) 254–55 [70]; compare *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 55) 225–26 [161–62].

<sup>70</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (n 34) 134 [160].

<sup>71</sup> See *ibid* 132–34 [152–53, 160]; compare *Legality of the Threat or Use of Nuclear Weapons* (n 31) 255 [71] (emphasising that several resolutions under consideration were ‘adopted with substantial numbers of negative votes and abstentions’).

standards of protection find expression in CIL. For example, in *Glamis Gold*, the tribunal rightly rejected the contention that Article 1105 of the North American Free Trade Agreement (NAFTA) was merely a 'shorthand reference to customary international law',<sup>72</sup> having emphasised that the task of seeking a treaty interpretation of a given standard is fundamentally different from that of ascertaining CIL.<sup>73</sup> The tribunal held that 'arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom'.<sup>74</sup>

As a result, the tribunal rejected the claimant's so-called convergence theory between CIL and specific treaty provisions in BITs, ruling that while 'it is possible that some BITs converge with the requirements established by customary international law; there are, however, numerous BITs that have been interpreted as going beyond customary international law, and thereby requiring more than that to which the NAFTA State Parties have agreed'.<sup>75</sup> Similarly, the *Cargill* tribunal considered that 'significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom'.<sup>76</sup>

Other investor-state tribunals have however reached their conclusions on the content of CIL by relying on specific treaty provisions.<sup>77</sup> The temptation of adjudicators to rely on written materials is strong, particularly where these are the culmination of a codification process or seem to crystallise an emerging rule of CIL.<sup>78</sup> However, investment treaty context is a particularly salient example of an organic mismatch between customary and treaty law. This is the case, for instance, of the evolution of

<sup>72</sup> *Glamis Gold Ltd v United States* (Final Award of 8 June 2009) UNCITRAL/NAFTA <[www.italaw.com/sites/default/files/case-documents/ita0378.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf)> [608].

<sup>73</sup> *ibid* [20].

<sup>74</sup> *ibid* [608].

<sup>75</sup> *ibid* [609]; see similarly ILC Conclusions (n 9) Conclusion 11(2).

<sup>76</sup> *Cargill Incorporated v Mexico* [276].

<sup>77</sup> See for example *Mondev International Ltd v United States* (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2 [117, 125]; *CME Czech Republic BV v Czech Republic* (Final Award of 14 March 2003) UNCITRAL [497–98]; *Generation Ukraine Inc v Ukraine* (Final Award of 16 September 2003) ICSID Case No ARB/00/9 [11.3].

<sup>78</sup> See P Tomka, 'Customary International Law in the Jurisprudence of the World Court: The Increasing Relevance of Codification' in L Lijnzaad & Council of Europe (eds), *The Judge and International Custom* (Brill Nijhoff 2016) 2–24.



the minimum standard of protection of aliens and their property, as opposed to the evolution of the standard of fair and equitable treatment in the treaty practices over the last couple of decades.<sup>79</sup> Hasty attempts at converging the two, albeit perhaps desirable in the interest of a greater and more uniform protection to be accorded to investors and investments, are not justifiable through the lenses of a proper methodology for the identification of CIL.<sup>80</sup>

The above examples show how in identifying CIL international courts and tribunals have used written materials, including treaties that are not in force between the parties or GA resolutions. They have done so, at least in part, to circumvent the practical difficulties that may arise in demonstrating the two elements of custom. As such, the existence of codification in a particular area of law allows the courts and tribunals to consider whether the instances of practice support the written rule rather than induce that rule from specific instances of practice. Some authors have seen in such increasing reliance on written law in identifying CIL a departure from 'traditional' towards 'modern' custom, from a predominantly 'inductive' towards a 'deductive' process, from the examination of particular instances of practice towards general statements.<sup>81</sup> While there is nothing per se problematic with such a shortcut,<sup>82</sup> the absence of any detailed discussion on the actual evidence of state practice and *opinio juris* beyond the written materials themselves may lead to unconvincing or incomplete reasoning, which could have been easily remedied with an even minimal attempt at applying the traditional methodology for the identification of CIL.

<sup>79</sup> P Dumberry, 'Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?' (2017) 8 JIDS 155 (arguing that the standard of fair and equitable treatment is not part of CIL); see generally M Paporinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2013).

<sup>80</sup> In two relatively recent cases, the ICJ has discarded the developments in the context of specific investment treaty provisions as capable of affecting the state of CIL. See for example *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (n 43) 615 [89–90]; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Judgment) [2018] ICJ Rep 507, 559 [162].

<sup>81</sup> A Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757, 758.

<sup>82</sup> See for example GP Buzzini, 'La théorie des sources face au droit international général: Réflexions sur l'émergence du droit objectif dans l'ordre juridique international' (2002) 106 RGDIP 581, 609–12.

### 3.2 'It Is CIL Because the ICJ Has Said So'

Another frequently used shortcut for identifying CIL is that of relying on previous decisions of the ICJ. This shortcut poses several normative issues.

First, it suggests that the dispute settlement mechanism has adopted a de facto system of binding precedent, whereby earlier decisions constitute authoritative pronouncements on CIL, even if that law may be susceptible to change over time. This is visible, for instance, in *Jones et al v. United Kingdom*, where the European Court of Human Rights, when addressing the so-called *jus cogens* exception to state immunity, turned directly to the ICJ judgment in the *Jurisdictional Immunities of the State*, considering it to be 'authoritative as regards the content of customary international law' and that no such exception had yet crystallised in CIL.<sup>83</sup> It did so without any additional demonstration in support of its conclusion. Similarly, in cases where the World Trade Organization (WTO) Appellate Body could identify an earlier decision of the ICJ on a particular rule, it automatically accepted the customary law character thereof.<sup>84</sup> The issue lies in the assumption that the ICJ's decision is dispositive on the question whether or not a given rule is part of CIL.

Second, this shortcut quite often leads to improper generalisations of the scope of earlier judicial pronouncements on CIL. The *Territorial and Maritime Dispute* serves as a perfect example of this phenomenon. In that case, the ICJ recalled its previous jurisprudence, namely *Qatar v. Bahrain*, in which it had recognised that the principles of maritime delimitation in Articles 74 and 83 of the UN Convention on the Law of the Sea reflect CIL, and so too does Article 121, paragraphs 1 and 2 thereof.<sup>85</sup> However, in *Qatar v. Bahrain*, the Court 'did not specifically address paragraph 3 of Article 121', which qualifies maritime entitlements of a rock as opposed to those of an island. Despite that, the Court merely observed in the *Territorial and Maritime Dispute* that 'the legal régime of islands set out in UNCLOS Article 121 forms an indivisible régime, all of which (as Colombia and Nicaragua recognise) has the status

<sup>83</sup> *Jones et al v United Kingdom* ECtHR App Nos 34356/06 and 40528/06 (14 January 2014) [198] see also [88–94].

<sup>84</sup> See for example WTO, *US – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Appellate Body Report (15 February 2002) WT/DS202/AB/R [259].

<sup>85</sup> *Territorial and Maritime Dispute (Nicaragua v Colombia)* (n 45) 674 [139]; see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (n 45) [167] [185] [195].

of customary international law'.<sup>86</sup> This approach is methodologically questionable. The Court makes no attempt at demonstrating the State practice or *opinio juris* in respect of the rule expressed in that treaty provision. Instead, it merely cross-references its earlier judgment, while recognising that that judgment contained no demonstration whatsoever as to the customary law character of the above-mentioned provision.

Perhaps a more worrying example can be found in the *Certain Activities* case, where the Court directly transposed the taxonomy of substantive and procedural obligations from a specific treaty regime as applied in its earlier case law, namely the 1975 Statute on the River Uruguay in the *Pulp Mills* case, to its analysis of the state of CIL in the context of transboundary environmental harm.<sup>87</sup> The Court went on to consider that substantive and procedural obligations with similar content apply as a matter of CIL to any non-industrial activities.<sup>88</sup> It did so without examining in any detail State practice or *opinio juris*.<sup>89</sup> The trend of generalising the scope of previous decisions on CIL is, of course, not limited to the ICJ's practice. For instance, in its 2011 Advisory Opinion, the Seabed Disputes Chamber noted that both the International Tribunal for the Law of the Sea (ITLOS) and the ICJ had considered some of the specific provisions of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) as reflecting CIL and appeared to apply that conclusion to the ARSIWA more widely.<sup>90</sup>

Third, the opposite side of this shortcut consists in simply not pronouncing on whether a given rule is part of CIL, in the absence of a pre-existing decision by international courts or tribunals on the subject. In principle, there is nothing improper in refraining from pronouncing on whether a given rule is or is not customary or the scope thereof, particularly when such determination is unnecessary for the court or tribunal to dispose of the issues before it.<sup>91</sup> Indeed, it is in line with the common

<sup>86</sup> *Territorial and Maritime Dispute (Nicaragua v Colombia)* (n 45) 674 [139].

<sup>87</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (n 48) 706–07 and 711–12 [104] [118].

<sup>88</sup> *ibid* 706 [104] ff.

<sup>89</sup> *ibid* 785, Separate Opinion of Judge Donoghue [10].

<sup>90</sup> *Responsibilities and Obligations of States with Respect to Activities in the Area* 56 [169]; see also *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (Advisory Opinion)* [2015] ITLOS Rep 4, 44 [144].

<sup>91</sup> There are numerous examples in practice. For some recent ones, see for example *Jadhav (India v Pakistan)* (Judgment) [2019] ICJ Rep 418, 442 [89–90]; *US – Definitive Anti-Dumping*

judicial avoidance techniques and may be justified in the interests of economy of means.<sup>92</sup> However, the absence of an authoritative decision of the ICJ or any other court or tribunal as a reason not to pronounce on the customary law character of a given rule shows a complete misunderstanding insofar as the authority of any judicial or arbitral decision is concerned. A perfect illustration can be found in the *EC – Hormones* Report of the Appellate Body<sup>93</sup> or the subsequent *EC – Biotech* WTO Panel Report,<sup>94</sup> both avoiding pronouncing on the customary law status of the precautionary principle in the absence of an ‘authoritative decision by an international court or tribunal which recognises the precautionary principle as a principle of general or customary international law’.<sup>95</sup> Other convincing reasons may certainly explain the reluctance of the WTO Appellate Body and Panel to pronounce on the question whether the precautionary principle is part of CIL. However, it is certainly striking that the basis relied on, first and foremost, is the absence of an authoritative decision by an international court or tribunal recognising the principle as such.

### 3.3 ‘It Is CIL Because the ILC Has Said So’

Finally, one of the most common shortcuts is to refer to the ILC work as direct evidence of the state of CIL. As noted by the Commission itself, the ‘weight to be given to [its] determinations depends, however, on various factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States’ reception of its output’.<sup>96</sup> Functionally, this shortcut is understandable to the extent that the ILC is tasked with codification and progressive development of international law. In the eyes of international courts and tribunals, the ILC’s work is rightly ‘most valuable, primarily due to the thoroughness of the

*and Countervailing Duties on Certain Products from China*, Appellate Body Report (11 March 2011) WT/DS379/AB/R [311]; *The South China Sea Arbitration* (Philippines v China) (Award of 12 July 2016) PCA Case No 2013–19, 471–72 [812].

<sup>92</sup> For an interesting categorisation of avoidance techniques in the practice of the ICJ, namely merits-avoidance, issues-avoidance and deferential standards of review see F Fouchard, ‘Allowing “Leeway to Expediency, Without Abandoning Principle”? The International Court of Justice’s Use of Avoidance Techniques’ (2020) 33 LJIL 767.

<sup>93</sup> WTO, *EC – Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R [123].

<sup>94</sup> WTO, *EC – Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report (21 November 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R [7.88–7.89].

<sup>95</sup> *ibid* [7.88].

<sup>96</sup> ILC Conclusions (n 9) 142, Commentary to Part Five [2].

procedures utilized by [it]'.<sup>97</sup> This is particularly the case where a given set of guidelines or articles produced by the ILC is rooted in a thorough survey of state practice and has garnered widespread support among states at the UN Sixth Legal Committee. In such circumstances, it is understandable that there are numerous examples where the ICJ, for instance, has 'referred to provisions of the ILC's codification work as customary with no or little further comment'.<sup>98</sup>

However, at times, the reasoning of international courts and tribunals jumps too quickly to the conclusion that a given ILC end-product reflects the state of CIL. More fundamentally, the reasoning in respect of one particular provision tends to be almost automatically generalised to one or the other provision of the same end-product or, even worse, to the end-product of the ILC as a whole, without any inquiry as to whether that finds support in state practice and *opinio juris*. On many occasions, such generalising techniques may be harmless, but at times they may also forestall the development of the law, which might have purposefully been left in an open-ended texture to be refined by subsequent state practice and *opinio juris*.

For instance, the ICJ has often rubber-stamped statements of the ILC as representative of CIL. It has done so, even when such conclusions were only temporary or provisional, without the final product having been yet adopted. For example, the Court famously did so in the *Gabčíkovo-Nagymaros Project* with respect to the state of necessity, without much of a probing inquiry,<sup>99</sup> even if earlier tribunals had failed to recognise it as a circumstance precluding wrongfulness under CIL.<sup>100</sup> Subsequently, courts and tribunals have simply embraced with approval the ICJ's finding as to the customary law character of what were to become

<sup>97</sup> Tomka (n 2) 202.

<sup>98</sup> *ibid* 203; see also A Pellet, 'L'adaptation du droit international aux besoins changeants de la société internationale' (2007) 329 RdC 9, 42 (suggesting that the ICJ finds refuge in the ILC's work: 'la Cour s'abrit[e] derrière les travaux de la [CDI] pour établir l'existence d'une règle juridique lorsque ceci lui paraît opportun' ('the Court takes refuge behind the work of the [ILC] to establish the existence of a legal rule where this seems appropriate')); Talmon (n 19) 437 (presenting the trend as 'outsourcing the inductive process to the Commission').

<sup>99</sup> *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, 39–40 & 46 [50–51, 58]; see also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, 87 [62]; *The M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment) [1999] ITLOS Rep 10, 65 [171].

<sup>100</sup> *Rainbow Warrior Affair* (Decision, 30 April 1990) 20 RIAA 215, 254.

Article 25 ARSIWA.<sup>101</sup> In a similar vein of almost blindly approving the work-product of the ILC, the Court in the *Application of the Convention of Genocide* case had recourse by analogy to Article 16 ARSIWA, which it considered to reflect CIL and which informed the Court's analysis whether Serbia breached Article III(e) of the Genocide Convention.<sup>102</sup> In doing so, the Court applied and interpreted restrictively the requirements set out in Article 16 ARSIWA, even if there are serious doubts as to whether some of those requirements adequately reflect the existing state practice and *opinio juris*.<sup>103</sup>

The use of the ILC's work as a reflection of CIL has been part of judicial reasoning for years. It has indeed become a sort of 'ping-pong'<sup>104</sup> or a 'normative Ponzi scheme',<sup>105</sup> whereby the Court heavily draws on and consolidates the work of the Commission, which in turn looks up to the ICJ's case law for authoritative recognition of the rules or principles it seeks to codify. That is understandable on many levels, considering 'a special vantage and authority' that the ILC enjoys as a result of its close relationship with states.<sup>106</sup> Although some have argued that that special position makes 'its pronouncements less tentative, and more conservative, in character',<sup>107</sup> the reality is that in many areas of international law the ILC is the only mechanism through which the views of states may be directly ascertained and made known in a systematic way. In this sense, the ILC seeks to 'adopt a real-world approach and provide drafts that will hopefully prove useful and acceptable to the international community'.<sup>108</sup> However, more often

<sup>101</sup> *The M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (n 99) 56 [133]; *CMS Gas Transmission Company v Argentina* (Award, 12 May 2005) ICSID Case No ARB/01/8 [315]; *Enron Corporation and Ponderosa Assets v Argentina* (Award, 22 May 2007) ICSID Case No ARB/01/3 [303]; *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina* (Decision on Liability, 30 July 2010) ICSID Case No ARB/03/19 [258].

<sup>102</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, 217 [420].

<sup>103</sup> See V Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (Hart 2016) 162–260, 339.

<sup>104</sup> Tams (n 20) 74.

<sup>105</sup> S Villalpando, 'On the International Court of Justice and the Determination of Rules of Law' (2013) 26 LJIL 243, 248.

<sup>106</sup> ET Swaine, 'Identifying Customary International Law: First Thoughts on the ILC's First Steps' (2014) 108 AJIL Unbound 184.

<sup>107</sup> *ibid.*

<sup>108</sup> M Wood & O Sender, 'Identifying the Rules for Identifying Customary International Law: Response from Michael Wood and Omri Sender' (2014) 108 AJIL Unbound 198.

than not, its drafts are a combination of elements of codification proper and progressive development of international law. This means that a thorough analysis may be required when an international court or tribunal later has to determine whether a given article, guideline, or rule, as presented by the ILC, reflects CIL.

As the examples above (and many more could be cited) demonstrate,<sup>109</sup> the relationship between international courts and tribunals and the ILC has grown increasingly symbiotic over time. One is thus left under the impression that judges do not scratch beneath the surface when making relatively bold pronouncements on rules that until their adoption by the ILC had an uncertain status in international law and were so regarded by states, including in their views as expressed at the UN Sixth Legal Committee. More fundamentally, the tendency to generalise conclusions as to the customary character in respect of one specific provision to other provisions, or to the entirety of projects under consideration, shows the over-reliance by courts and tribunals on the work of the ILC, without always adequately probing into the underlying evidence of state practice and *opinio juris*.

#### 4 Conclusion

This chapter has shown that international courts and tribunals employ various shortcuts to the methodology for CIL identification. In their decisions, international courts and tribunals have often sidestepped an inductive analysis of the two elements, and have found comfort in indirect evidence such as written materials, prior judicial or arbitral decisions, or the work of the ILC. This is telling of the fact that beyond the dichotomy of 'traditional' and 'modern' CIL, as it has been discussed in scholarship, perhaps the time is ripe to speak of 'postmodern' approaches of international courts and tribunals to the identification of CIL. While these approaches do not expressly reject the traditional methodology, the reasoning employed is terser, more assertive, and often fails to provide any demonstration of state practice or *opinio*

<sup>109</sup> See for example *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) [2008] ICJ Rep 412, 459 [127]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* 195 [140]; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, 430 [265].



*juris*, in whichever order or form. Thus, such ‘shortcuts are just too appealing not to be taken’.<sup>110</sup>

Of course, some of these shortcuts may be more or less justified in light of various factors, including the particular circumstances of the case, the subject-matter in which such determinations are being made, the level of institutional integration of the dispute settlement mechanism, the authority with which it is endowed, and the considerations of efficiency and economy of means. Incidentally, these approaches may preserve ‘the inherently flexible nature of this source of international law’.<sup>111</sup> They may also be instrumental in obviating inherent concerns about selectivity or political expediency when embarking upon a more thorough demonstration of relevant state practice and *opinio juris* in the reasoning of any court or tribunal. As noted by Judge Tomka, former president of the ICJ, ‘the Court has never found it necessary to undertake such an inquiry for every rule claimed to be customary in a particular case and instead has made use of the best and most expedient evidence available to determine whether a customary rule of this sort exists’.<sup>112</sup>

However, as the decisions referred to in this chapter show, the fundamental issue is that the legal analysis undertaken by international courts and tribunals too often fails in demonstrating even a minimal inquiry into those material elements of custom. Thus, although in principle many of the shortcuts could be justified in light of the various institutional and practical constraints referred to in the introduction, these shortcuts become a serious issue when they are the sole or the dominant element in the reasoning underlying the identification of CIL.

In the long run, the summary and flexible approach according to which the ICJ and other international courts and tribunals have gone about identifying CIL may lead to systemic issues. This author sees the potential for at least three. First, the more frequent use of shortcuts brings with it an increased risk that conclusions are being reached that are not fully supported by the practice of states and *opinio juris*, thus departing from or undermining the traditional methodology for the identification of CIL.<sup>113</sup>

<sup>110</sup> Tams (n 20) 78.

<sup>111</sup> Wood and Sender (n 108) 197.

<sup>112</sup> Tomka (n 2) 197–98.

<sup>113</sup> J Verhoeven, ‘Considérations sur ce qui est commun: Cours général de droit international public’ (2008) 334 RdC 9, 115 (arguing that there is no credible alternative to the two-element methodology). For the continuing benefits of the two-element methodology see FL Bordin, ‘A Glass Half Full? The Character, Function and Value of the Two-Element Approach to Identifying Customary International Law’ (2019) 21 ICLR 283.

Second, and relatedly, judicial declarations of CIL may determine the direction of further development of state practice or, even worse, hamper the development of the law in a given area. The power of the court or tribunal to identify, or not, a given norm as part of CIL has an immeasurable impact on developing or, conversely, arresting ‘processes of growth without which the law will be atrophied’.<sup>114</sup> Once an international court or tribunal, particularly the ICJ, declares that a rule is part of CIL, states rarely if ever question the validity of that finding in their subsequent practice.<sup>115</sup> The same holds true for other international courts and tribunals, which rarely if ever question the validity of findings on CIL made by their international peers.<sup>116</sup> Domestic courts follow suit, and their restatements based on the pronouncements made by their international peers become the relevant state practice, thereby generating a vicious circle as far as the development of CIL is concerned.<sup>117</sup> In such circumstances, pronouncements by international courts and tribunals on CIL often are just short of a self-fulfilling prophecy of CIL, and domestic courts simply materialise that prophecy. Third, the increasing use of shortcuts in the identification of CIL may definitively cast doubt on a legal fiction, according to which ‘judges merely state, but never create – the law’.<sup>118</sup> This would have important flow-on consequences for the distribution of powers in the existing lawmaking framework in the international legal order, however imperfect and unsatisfactory it may be.

These potential systemic issues are not to be dismissed lightly. At the same time, they are not insurmountable, as there are several examples in the jurisprudence of much more satisfactory efforts, even if perhaps not perfectly comprehensive, at demonstrating the process and the evidence on the basis of which CIL is identified. The ILC Conclusions are certainly

<sup>114</sup> W Jenks, ‘The Challenge of Universality’ (1959) 53 ASIL PROC 85, 95.

<sup>115</sup> DP O’Connell, *International Law, Vol 1* (2nd ed, Stevens 1970) 32 (speaking of the ‘truly astonishing deference’ accorded to the ICJ decisions).

<sup>116</sup> A Alvarez-Jiménez, ‘Methods for the Identification of Customary International Law in the International Court of Justice’s Jurisprudence: 2000–2009’ (2011) 60 ICLQ 681, 684.

<sup>117</sup> For the illustration of this phenomenon in respect of Article 16 ARSIWA see for example *Al-Saadoon & Ors v Secretary of State for Defence* (17 March 2015) High Court of England & Wales [2015] EWHC 715 (Admin) [192–98]; *Al-M* (5 November 2003) German Constitutional Court, 2 BvR 1506/03 [47]; for further examples of widespread deference by domestic courts to the findings of their international peers on CIL, subject to a few limited exceptions, see C Ryngaert & D Hora Siccama, ‘Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts’ (2018) 65 NILR 1, 17–22; see also C Miles, ‘Thoughts on Domestic Adjudication and the Identification and Formation of Customary International Law’ (2017) 27 IYIL 133.

<sup>118</sup> Dupuy (n 40) xiii.

a useful reminder for judges and arbitrators to follow in ascertaining CIL.<sup>119</sup> In the interests of legal certainty and predictability, it is hoped that greater methodological rigour and formalism will prevail over the expediency offered by shortcuts in the reasoning of international courts and tribunals on CIL.

<sup>119</sup> For its immediate usefulness in the practice of domestic courts see for example *The Freedom and Justice Party & Ors R (on the Application of) v The Secretary of State for Foreign and Commonwealth Affairs & Anor* [2018] Court of Appeal of England & Wales, EWCA Civ 1719 [18].