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THE METHODOLOGY OF THE ICJ

The methodology is a weaker area of the International Court of Justice or, of international law in general, hardly ever stating its methodology for determining the existence, content, and scope of the rules of applied customary international law. There are only isolated references in the Court's jurisprudence to the inductive and deductive method of law determination and comment from legal literature is sparse.

This article aims to refocus attention on the methodology used by the Court when determining the rules of customary international law that it applies, and it highlights the role played by the methodology in the development of customary international law.

It defines the terms 'induction' and 'deduction' and examines their use by the Court and explores the situations in which the Court uses inductive and deductive reasoning, the different forms and functions of deduction and the relationship between the two methods. Finally, challenging the various theories distinguishing between inductive and deductive custom. Concluding the main method employed by the Court is neither induction nor deduction but, instead, assertion.

Keywords: methodology, ICJ / International Court of Justice, induction, deduction, international law, assertion.

1. Introduction

The methodology is a weakness of the International Court of Justice (ICJ) or, indeed, of international law in general.¹ Unlike its approach to methods of treaty interpretation, the Court rarely stated its methodology for determining the existence, content, and scope of the rules of applied customary international law.² References in the ICJ's jurisprudence to the inductive and deductive method of law determination are few.³

It is not only the ICJ itself that has largely remained silent on its methodology for the determination of customary international law. The legal literature has also had little to say on this subject. In view of the fact that determining the law also always means developing and, ultimately, creating the law, it is surprising that the question of the Court's methodology has attracted such little interest. In the entire ten volumes of the *Max Planck Encyclopedia of Public International Law*, there is no mention at all of the 'inductive method' or the 'deductive method', not even in Martti Koskenniemi's entry on 'Methodology of International Law'.⁴

2. Defining 'induction' and 'deduction'

The methods of determining the rules of international law must be distinguished from the methods of application of these rules in a special case. The application of a rule of international law is the second step following its determination. It is with this narrower meaning that the terms 'induction' and 'deduction' usually are used. The concepts of induction and deduction have their origin in Aristotle's logic, which distinguished two forms of dialectical reasoning: syllogistic (or deductive) and inductive. For example, a judicial deduction is not the same as a logical deduction. The logic of judicial decisions is not the logic of the syllogism but, rather, the logic of the law – logical reasoning is replaced by legal reasoning, which has its basis in the traditions of the legal system.

¹ On the dearth of methodology in international law, see: Sauer, E. (1963). Zur Grundlegung völkerrechtlicher Methodologie. *Nordisk Tidsskrift for International Ret*, 33 (3-4), 121; Schüle, A. (1959). Methoden der Völkerrechtswissenschaft. *Berichte der Deutschen Gesellschaft für Völkerrecht*, 3, 1; Bos, M. (1984). *A Methodology of International Law*. Amsterdam, New York, Oxford: North-Holland; Kirchner, J. (1992). Thoughts about a Methodology of Customary International Law. *Austrian Journal of Public and International Law*, 43, 215.

² The determination of a rule and that of its content and scope are frequently one and the same.

³ See, e.g., *Judgment Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) 1962* (International Court of Justice). *I.C.J. Reports*, 1970, 3, 48, 94

⁴ Methodology of International Law, see Koskenniemi, in Rüdiger Wolfrum (2012). *The Max Planck Encyclopedia of Public International Law*, 7, 124.

The induction is a process of going from the specific to the general. It is a systematic process of observation and empirical generalization. The deductive method, on the other hand, may be defined as inference, by way of legal reasoning, of a specific rule from an existing and generally accepted (but not necessarily hierarchically superior) rule or principle. The deduction is a process of going from the general to the specific. In light of this terminological confusion, it is essential to look to what the Court actually does, rather than to what it says it does when examining its methodology.

3. Induction and requirements for deductive reasoning

There is widespread agreement that customary international law is, as a rule, ascertained by induction.¹ The reason for the use of the inductive method is not that all states have to comply with the rules of customary international law,² or that it is necessitated by the sovereign equality of states and the requirement of the unity of the international legal order,³ but, rather, due to the fact that the two elements of customary international law are, of necessity, gathered in an empirical and inductive way.

If induction were the only method for ascertaining the rules of customary international law, the Court would have to pronounce a *non liquet* whenever the inductive method was practically impossible to apply (and treaty rules or general principles were inapplicable). It is suggested that the Court resorts to deductive reasoning in order to avoid a *non liquet*. The deductive method is not an alternative to the inductive method but, rather, is complementary to it and may be applied whenever the Court cannot ascertain any rules of customary international law by way of induction.⁴

4. Methods of deduction

The ICJ does not employ one single method of deduction but resorts to at least three different methods: normative, functional and analogical deduction. Firstly, there is a normative deduction. New rules are inferred by deductive reasoning from existing rules and principles of customary international law. The ICJ employed a triangular method of legal reasoning familiar in common law systems. In cases where a precedent is similar to the case at bar in some important respects, but dissimilar in others, the Court identifies the general principle or rationale underlying the precedent and then decides whether this principle or rationale furnishes a suitable ground for deciding the case.

Secondly, there is a functional deduction. The ICJ deduces rules from general considerations concerning the function of a person or an organization.

Thirdly, there is an ‘analogical deduction’. Analogical deduction from the Quran (‘Q’iyas’) is one of the major methods of reasoning in Islamic law.⁵ The use of this method by the ICJ may be a reflection of ‘the main forms of civilization and ... the principal legal systems of the world’ being represented on its bench.⁶ By way of analogical deduction, the rationale of an existing rule is extended to a situation that does not fall within the wording of that rule. It requires a common cause or link between the two situations. Analogical deduction allows for the determination of a new rule for the new situation and thus differs from the application, by analogy, of an existing rule or precedent to the new situation in Western legal tradition. The deductive process in its various forms is a convenient and, in fact, routine legal technique for developing rules of customary international law.

5. Deductive reasoning is multi-functional

The use of the deductive method is not limited to identifying rules of customary international law. It may also serve other purposes. Deductive reasoning, for example, may be employed to confirm and strengthen results reached by induction. However, the use of deductive reasoning can also mean that the Court wants to make up for a less than comprehensive or conclusive inductive process.

¹ De Visscher, C. (1963). *Problèmes d'interprétation judiciaire en droit international public*, Paris: Pedone, 16; Bleckmann, A. (1977). ‘Zur Feststellung und Auslegung von Völkergewohnheitsrecht’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 37, 504, 505.

² Alvarez-Jiménez, A. (2011). Methods for the Identification of Customary International Law, in the International Court of Justice’s Jurisprudence: 2000–2009. *International and Comparative Law Quarterly*, 60, 3, 681, 686.

³ Bleckmann, A. (1995). *Allgemeine Staats- und Völkerrechtslehre*. Köln: Heymann, 520.

⁴ the main proponent of the inductive approach to international law, was not advocating a complete renunciation of the deductive method, Schwarzenberger, G. (1957). *The International Law*. London: Stevens & Sons Limited, 9, 38.

⁵ Mohammed Abed al-Jabri (2011). *The Formation of Arab Reason: Text, Tradition and the Construction of Modernity in the Arab World*. London: I.B.Tauris & Co Ltd 148–149; Noel, J.C. (1974). *A History of Islamic Law*. New York: Syracuse University Press, 59–60.

⁶ International Court of Justice (1954). *Statute of the International Court of Justice*, 1 UNTS 993, Art. 9.

Where a rule of customary international law is logical, because it can be deduced from an existing underlying principle, the burden of proving the rule by way of inductive reasoning is proportionally diminished. In essence, a logical rule requires a smaller pool of state practice and *opinio juris*.¹ The deduction can thus be used to lower the standard of inductive evidence.

In cases where state practice and *opinio juris* are contradictory or inconclusive, the imposition of a burden of proof is necessary for the inductive method to achieve a result. The burden of proof can be established by deduction.

6. The old versus the new

With rare exceptions, the theories on custom ‘have not only failed to improve the quality of thought but have deflected lawyers from the application of ordinary methods of legal analysis’.² It has been argued that there are different categories of customary international law – ‘traditional custom’ and ‘modern custom’.³

One argument is that modern custom is related to new and important moral values and global challenges, such as peace, human rights, and the environment, where the actual practice of states has been characterized by too many violations to serve as a sound basis for induction. In these areas, there is also an urgent need to create new rules and fill existing gaps; traditional custom is ill-suited to do this, being both too burdensome and slow to develop.

Modern custom, on the other hand, can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the United Nations General Assembly (UNGA), which can declare existing customs, crystallize emerging customs and generate new customs. For these reasons, it is claimed, international human rights law, international humanitarian law, international criminal law and the international environmental law should be arrived at by deduction.⁴

The methods employed by the Court for the determination of rules of customary international law do not depend on the nature or content of these rules or on whether they respond to moral issues and global challenges.⁵ Induction and deduction as methods of legal reasoning are value neutral. The Court employed deductive reasoning not to develop international law progressively but to develop it in situations where the inductive method could not yield any result.⁶

The use of the terms ‘traditional’ and ‘modern’ suggests a chronological sequence and implies a change of methodology in determining custom over time. Thus, it has been said that there was ‘a movement from the inductive to the deductive method of ascertaining custom’.⁷

Modern custom has been associated with the progressive development of international law, and the deductive method has been equated with ‘quasi-legislation’. Traditional inductive custom, on the other hand, is said to be conservative, positivistic and characterized by descriptive accuracy. The inductive method is, however, just as subjective, unpredictable and prone to law creation by the Court as the deductive method.⁸ Traditional custom is to be established by examining the practice and *opinio juris* of states. This is not a mathematical exercise of simply counting state behaviour but, rather, a process prone to subjectivity and selectivity.⁹ It is practically impossible for the Court to examine the practice and *opinio*

¹ Worster, W.T. (2013). The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches. *SSRN Electronic Journal*, January, 6, 43.

² Macdonald, S.J., Johnson, D.M. (eds.) (1983). *The Structure and Process of International Law, Essays in Legal Philosophy, Doctrine and Theory*, Leiden: Martinus Nijhoff Publishers, 627.

³ Posner, E.A., Goldsmith, J.L. (2000). Understanding the Resemblance between Modern and Traditional Customary International Law, *Virginia Journal of International Law (VJIL)*, 40, 639.

⁴ Kolb, R. (2003). Selected Problems in the Theory of Customary International Law, *Netherlands International Law Review*, 50, 2, 119-150.

⁵ Collected Courses of the Hague Academy of International Law (1999). *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, Tomuscha, 281 RCD 9, 334.

⁶ Schlütter, B. (2010). *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*, Leiden: Martinus Nijhoff Publishers, 326, 328, 329.

⁷ Collected Courses of the Hague Academy of International Law (2003). *International Law in the Age of Human Rights: General Course on Public International Law*, 301 RCD 9, 378.

⁸ Kolb, R. (2003). Selected Problems in the Theory of Customary International Law, *Netherlands International Law Review*, 50, 2, 130–133.

⁹ ‘Uncertainty in the: Kammerhofer, J. (2004). Formal Sources of International Law: Customary International Law and Some of Its Problems, *European Journal of International Law*, 15, 3, 524–536;

juris of almost 200 states. Thus, any customary rule will, by necessity, be based on a selection of state practice – a selection made by the Court. The Court could thus engage in a self-fulfilling collection of state practice – that is, a selective collection of practice that is supportive of a preconceived rule of customary law.¹

It is also for the ICJ to decide what counts as state practice, whether practice is extensive, consistent and uniform (enough) and how to deal with inconsistent patterns of practice. The acceptance of certain patterns of conduct as customary law is more than the mere observation and recording of regularities of behaviour.

Value judgments are always implicit in the recognition of practice as custom.² The Court may interpret inconsistent state practice as a breach of an existing custom, the beginning of a new custom or no custom at all. It is for the Court to weigh inconsistent state practice.

The uncertainties inherent in the inductive method are, however, not only limited to the collection, selection and assessment of state practice but also cover the process of rule determination.³ It is the Court that formulates the rule that is inferred from a particular practice. This rule may be broad or narrow, abstract or specific, with or without exceptions. Every induction is based on a number of premises and conceptions that are rarely laid open but, rather, are defined by the Court. And as if all this were not enough, there are still the subjectivities immanent in the process of determining the psychological element of customary international law – the *opinio juris* of states – which is often arrived at by deduction rather than by induction.⁴ In sum, if the Court is eager to be ‘creative’ and progressively develop rules of customary international law, it does not need to resort to a ‘modern deductive custom’.⁵

7. ICJ’s assertion

Examinations of the ICJ’s methodology usually focus on the dichotomy of induction versus deduction.⁶ This dichotomy, however, presents an incomplete or even distorted picture. The main method employed by the Court is not induction or deduction but assertion. In the large majority of cases, the Court does not offer any (inductive or deductive) reasoning but simply asserts the law as it sees it. Of course, one would not expect the Court to examine state practice and *opinio juris*, or employ a process of deductive reasoning, in order to establish long and well-recognized rules of customary international law, such as the inviolability of diplomatic agents.⁷ The Court has not only asserted positive rules, but it has also denied the existence of (alleged) rules of customary international law simply by stating that there is no ‘uniform and widespread State practice’ without providing any support for this assertion.⁸

The ICJ has developed several techniques of assertion. Reference to the International Law Commission (ILC) is a favourite shortcut in establishing rules of customary international law. Thus, the Court referred to the work of the ILC and the Commission’s statement that ‘the notion of state of necessity is ... deeply rooted in general legal thinking’ before asserting that ‘the state of necessity is a ground recognized by customary international law’.⁹ The Court also frequently holds that a certain (draft) article

¹ Pavoni, R. (2011). An American Anomaly? On the ICJ’s Selective Reading of United States Practice in Jurisdictional Immunities of the State. *Italian Yearbook of International Law*, XXI, 143-159.

² De Visscher, C. (1982). *Theory and Reality in Public International Law*, Princeton: PRINCETON UNIVERSITY PRESS, 96.

³ Bleckmann, A. (1995). *Allgemeine Staats- und Völkerrechtslehre*. Köln: Heymann, 505.

⁴ Kelsen, H. (1939). Théorie du droit international coutumier, 1 *Revue internationale de le théorie du droit* [new series] (1939) 253, at 266.

⁵ D’Amato, A. (1966). The Inductive Approach Revisited’, *Indian Journal of International Law*, 6, 509, 512.

⁶ Alvarez-Jiménez, A. (2011). Methods for the Identification of Customary International Law, in the International Court of Justice’s Jurisprudence: 2000–2009. *International and Comparative Law Quarterly*, 60, 3, 686;

Koskenniemi, M. (2005). *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge: Cambridge University Press, 562-617. DOI: <http://dx.doi.org/10.1017/CBO9780511493713.011>; Worster, W.T.

(2013). The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches. *SSRN Electronic Journal*, January, 6, 70.

⁷ *Vienna Convention on Diplomatic Relations 1961*, 29 (UNTS). *UN International Law Page* <http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf> (21, August, 2018).

⁸ *Judgment Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) 2007* (International Court of Justice). *ICJ Reports*. <<https://www.icj-cij.org/en/case/103>> (21, August, 2018).

⁹ *Nagymaros Project (Hungary/Slovakia), Gabčíkovo 1997* (International Court of Justice). *ICJ Reports*. <<https://www.icj-cij.org/en/case/92>> (21, August, 2018).

adopted by the ILC ‘reflects’ customary international law without engaging in an examination of state practice or *opinio juris* itself.¹ In light of the ILC’s extensive review of state practice and *opinio juris* in its reports and commentaries, this simply may be an example of the Court outsourcing the inductive process to the Commission. But the ILC’s task is not limited to the codification of existing rules of customary international law.² In none of the cases where the Court has found a (draft) article of the ILC to reflect customary international law did it enquire whether the Commission was actually codifying international law or whether it was not perhaps progressively developing international law. In all cases, the ILC has served as a kind of pseudo-witness for a rule having acquired the status of customary international law.

Another method of assertion is for the ICJ simply to observe *ex cathedra* that a certain treaty provision is reflective of customary international law.³ This method has allowed it to hold that several provisions of the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations,⁴ the United Nations Convention on the Law of the Sea,⁵ the four Geneva Conventions of 1949,⁶ and Hague Convention IV on Respecting the Laws and Customs of War on Land and the Regulation Concerning the Laws and Customs of War on Land were part of customary international law. Such assertions of customary international law status of certain treaty provisions are all the more noteworthy since state practice has not always been in conformity with these provisions.

8. Conclusion

In practice, when determining the rules of customary international law, the ICJ does not use one single methodology but, instead, uses a mixture of induction, deduction and assertion.⁷

There is no greater danger of law creation in deduction than there is in induction. Indeed, it could be argued that rules arrived at by deduction are not ‘created’ by the Court at all.⁸ Like implied powers or implied (contract) terms, there are ‘implied rules’ – that is, rules that are already contained in existing rules or principles and that may be arrived at by deductive reasoning. These implied rules may be regarded as ‘direct and inevitable consequences’ of existing rules.⁹ Thus, the deductive method is also compatible with the consent principle in international law. The implied rules are covered by states’ consent to the existing rules or principles from which they are deduced. In this sense, the deduction is the logically consistent extrapolation of the established body of customary international law. It is, however, important that new rules of customary international law are deduced only from existing legal rules or principles and not from postulated values. Otherwise, the Court would simply emulate the classical theorists with their

¹ *Judgment Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) 2007* (International Court of Justice). *ICJ Reports*. <<https://www.icj-cij.org/en/case/103>> (21, August, 2018); *Judgment Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) 2007*, 385, 401 (International Court of Justice). *ICJ Reports*. <<http://www.worldlii.org/int/cases/ICJ/2007/2.html>> (21, August, 2018); *Judgment Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) 2008*, 127 (International Court of Justice). *ICJ Reports*. <<https://www.icj-cij.org/en/case/118/judgments>> (21, August, 2018).

² *Charter of the United Nations 1945 13 (1)* (United Nations). *UN Homepage*. <<http://www.un.org/en/charter-united-nations/>> (21, August, 2018).

³ Koskeniemi, M. (2005). *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge: Cambridge University Press, 562-617. DOI: <http://dx.doi.org/10.1017/CBO9780511493713.011>; Kearney, R.D. (1976). Sources of Law and the International Court of Justice. *The Future of the International Court of Justice*, 2, 649.

⁴ *Vienna Convention on Diplomatic Relations 1961*, 29 (UNTS). *UN International Law Page* <http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf> (21, August, 2018).

⁵ *Judgment Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) 2007*, 113 (International Court of Justice). *ICJ Reports*. <<https://www.icj-cij.org/en/case/120>> (21, August, 2018).; *Judgment Maritime Delimitation between Qatar and Bahrain 1991*, 185 (International Court of Justice). *ICJ Reports*. <<https://www.icj-cij.org/en/case/87>> (21, August, 2018).

⁶ Meron, T. (2003). *International Law in the Age of Human Rights: General Course on Public International Law. Collected Courses of the Hague Academy of International Law*, 301, RCD 9, 357–358.

⁷ Schlütter, B. (2010). *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*, Leiden: Martinus Nijhoff Publishers, 70.

⁸ Kelly, J.P. (2000). The Twilight of Customary International Law. *Virginia Journal of International Law*, 40, 2, 526.

⁹ *Judgment, North Sea Continental Shelf 1968, Dissenting Opinion of Judge Koretsky* (International Court of Justice). *ICJ Reports*. <<https://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-07-EN.pdf>> (21, August, 2018).

naturalistic and self-assured deductions.¹ The deductive method finds its limits in the actual will of states, as expressed by their constant and uniform practice.² 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. In addition, any result reached by deductive reasoning must not be contrary to existing norms of *jus cogens*.

The gateway for judicial legislation is neither induction nor deduction but, rather, the ICJ's use of assertion as a method to determine the rules of customary international law. No matter what it may say on the subject, in a majority of cases the Court has not examined the practice and *opinio juris* of states but, instead, has simply asserted the rules that it applies.

However, assertion is not always merely a convenient methodological shortcut. There are situations where the inductive and deductive methods will not allow the Court to fulfill its normal judicial function of determining the applicable rules of customary international law because induction is virtually impossible or because there are no relevant general rules or principles from which to deduce the applicable law. Judicial assertion is the price states have to pay for the Court not to declare an epistemological *non liquet*.³ It must be careful, however, not to overstep the limits of the method of assertion. If the Court's assertions do not convince its clients, States may simply stay away from the Court.

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¹ D'Amato, A. (1966). The Inductive Approach Revisited', *Indian Journal of International Law*, 6, 511.

² *supra* note, Schlütter, B. (2010). *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*, Leiden: Martinus Nijhoff Publishers, 70.

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