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The Application of Logic and Reason in CIL Identification and Interpretation

WILLIAM THOMAS WORSTER

1 Introduction

The process of identifying and interpreting norms of customary international law, while appearing to be primarily based on an inductive analysis of state practice and *opinio juris*, is sometimes a deductive exercise based on logic and reason. Logic permeates every decision in international law. Illogic might also be present as well, of course, but in terms of identifying, interpreting, and applying law, we tend to claim that we do it logically and, perhaps, even scientifically. Logic manifests itself inherently throughout the process and can be identified in all steps of reasoning in identifying, interpreting, and applying customary international law. Logic, however, can constitute the application of either an inductive or deductive inference. This chapter will focus on situations in which the International Court of Justice (ICJ) and Permanent Court of International Justice (PCIJ) applied a deductive approach, identifying or interpreting norms of customary international law without seeming to consult state practice and *opinio juris*. Specifically, it will consider whether norms that can be reasonably inferred or deduced from existing rules, or that are simply logical for the operation of the international legal system, can be identified as norms of customary international law under a complementary, supplementary, or distinctive interpretive approach.

One initial observation is necessary at the outset regarding proving customary international law. In customary international law, the process of constituting or prescribing a norm, while analytically distinct from proving the existence of the norm with evidence, is often blurred with it. That is to say, we usually claim that a norm of customary international law has been created when we can prove the existence of sufficient state practice and *opinio juris*. We might concede that the norm could have

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existed prior to our discovery of it, but we would likely still insist that the norm came into being when a critical mass of state practice and *opinio juris*, the evidence of the norm, coalesced. In addition, we do not usually distinguish between the ascertainment of the existence of a rule of customary international law and the interpretation of the rule's content. Generally, those operations are combined into one act of ascertaining the content of the rule through evidence at the level of its identification. In the International Law Commission (ILC) study on customary international law, the special rapporteur was careful to observe that the study was undertaken to state the rules on the *identification* of customary international law.[1] As will be discussed further, the ICJ as well, implicitly, distinguishes between these operations.[2] Thus, the proof of the norm and its creation, constitution, or prescription, as well as the development and identification of content, while they are casually unified into one act of discovery and confirmation through evidence, can be distinguished.

Part of the reason for mixing these questions into a casual unified approach is that we do not clearly state whether the state practice–*opinio juris* analytical framework is a question of law or a question of fact. Surely, it cannot be a question of fact, because we are not trying to establish acts that trigger the application of the law, but then why do we collect a sampling of evidence and consider its reliability and sufficiency, as if we were proving a fact? Surely, it is a question of law, but then why do we not simply allow the court to inform itself as it sees fit, *jura novit curia*? The difficulty is that it is law, but the content and existence of the law is established by facts. The ILC special rapporteur was well aware of this difficulty and was careful to note that he did not use the expression

[1] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10.

[2] See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v US)* (Judgment) [1984] ICJ Rep 246 [111]–[112] (after rejecting the existence of detailed rules under customary international law, suggesting that a better approach is to clarify the content of the existing rules: 'A body of detailed rules is not to be looked for in customary international law . . . It is therefore unrewarding . . . to look to general international law to provide a readymade set of rules . . . A more useful course is to seek a better formulation of the fundamental norm, on which the Parties were fortunate enough to be agreed, and whose existence in the legal convictions not only of the Parties to the present dispute, but of all States, is apparent from an examination of the realities of international legal relations. The Chamber therefore wishes to conclude this review of the rules of international law on the question to which the dispute between Canada and the United States relates by attempting a more complete and, in its opinion, more precise reformulation of the "fundamental norm" already mentioned.')

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'evidence' in the sense of establishing a fact.[3] But this conclusion also means that the court is perhaps freer to use various forms – perhaps conflicting forms – of logical inferences throughout the process of identifying customary international law than it might if it was establishing facts.

2 Forms of Logic and Reasoning

What does it mean to use 'logic' or 'reason' to identify customary international law? A fully detailed explanation of logic is outside the scope of this chapter,[4] but essentially it involves the process of drawing inferences, either through induction or deduction.[5]

Induction is usually described as drawing inferences from examples of empirical phenomena to create a general theory explaining those phenomena. The assumption is that a sample of instances will produce observable phenomena that will always be the case,[6] based on a statistical syllogism that the overall population of cases resembles the sample pool.[7] This inference to a theory will be more or less accurate depending on the quantity and quality of the evidence.[8] In terms of collecting evidence, the approach uses a sampling pool of data and generalization to an explanation.[9] However, the process of sampling and generalization is usually predicated on the sample pool being

[3] ibid, Conclusion 3, Comment (1), n 680 ('The term "evidence" is used here as a broad concept relating to all the materials that may be considered as a basis for the identification of customary international law, not in any technical sense as used by particular courts or in particular legal systems.')

[4] For a more detailed discussion of forms of logic, see W Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' (2014) 45 GJIL 445.

[5] cf the use of logic in treaty interpretation described in 'Appendix 4: Fiore's Draft Code' (1935) 29 AJIL Supp 1212, 1218–19, citing P Fiore, *International Law Codified and Its Legal Sanction* (Edwin M. Borchard tr, Baker Voorhis 1918) (identifying various logical interpretative techniques, including intent of the parties, context, systematicity, and teleology, which provide a means for an inference to meaning).

[6] G King, R Keohane, and S Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton University Press 1994) 8.

[7] ibid.

[8] See J Vickers, 'The Problem of Induction', *The Stanford Encyclopedia of Philosophy* (Winter edn 2022) <http://plato.stanford.edu/entries/induction-problem/> (accessed 10 September 2022); K Popper and D Miller, 'A Proof of the Impossibility of Inductive Probability' (1983) 302 Nature 687.

[9] A Giddens and others, *Essentials of Sociology* (WW Norton 2010) 28.

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random.[10] Of course, random sampling could include sampling with an equal probability of selecting a sample, sampling a number of cases from the same pool rather than a single instance (cluster sampling), or deliberately placing samples into certain subpools and randomly drawing from them (stratified sampling).[11]

Deduction, on the other hand, begins with premises, which are either established (themselves through induction or deduction) or presumed to be true, and then proceeds to infer a conclusion that must follow.[12] Its strength is that, again, if the premises are true, the conclusion is not subject to falsification.[13] It is not based on sampling instances or developing theories to explain those cases. There are many forms of deductive reasoning that could be characterized as logical, but several are relevant for this chapter. Talmon, for example, identified normative, functional, and analogical deductions in the case law of the ICJ.[14] These logical inferences are based on, respectively, deducing the content of rules from other rules or principles, the functions of an organization or actor, or by drawing an analogy from existing rules to a situation not initially covered by the rule.[15]

Having surveyed the basic forms and approaches of logic, this chapter will now turn to their application in identifying rules of customary international law.

3 The Use of Logic and Reasoning in the Analysis of Customary International Law

Traditionally, we say that the identification of customary international law is a process of inductive reasoning from manifestations of state practice and expressions of *opinio juris*,[16] but the various steps in customary international law analysis are also infused with a considerable

[10] C Sanders Peirce, *Philosophical Writings of Peirce* (Justus Buchler ed, Dover 1955) 152; Giddens and others (n 9) 28–30.

[11] See generally DS Yates and others, *The Practice of Statistics* (3rd edn, WH Freeman 2008).

[12] J Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 EJIL 523, 542.

[13] See E Adam, 'A Logic of Conditionals' (1965) 8 Inquiry 166.

[14] S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417, 423–26.

[15] ibid.

[16] See G Schwarzenberger, *The Inductive Approach to International Law* (Stevens & Sons 1965) 22, 47, 51, 65–66, 71; G Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 Har L Rev 539.

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degree of deductive logic – including both the processes to discover secondary rules and those used to discover primary rules.[17] The chamber of the ICJ in the *Gulf of Maine* case stated that customary international law 'can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas'.[18]

But the ICJ does not necessarily follow a truly inductive process. We do not randomly identify states to examine. Instead, we select which states to sample based on a specially interested states analysis and/or a (geographic, historical, etc.) diversity of states. In either case, the states chosen are not selected by random draw, but are chosen for their 'representativity'. In addition, induction usually establishes a prior standard for determining when the sampled cases would be sufficient,[19] and sets the standard of proof accordingly,[20] yet the ICJ has not articulated a clear standard of proof for customary international law. More importantly, a truly inductive logical approach must find the rule negated by even one instance of contrary practice,[21] and yet, in the *Nicaragua* case, the ICJ was explicit that perfect conformity was not required.[22] And in the *Gulf of Maine* case cited above, the ICJ chamber added that, while induction is one approach to identifying customary international law, there was also 'a limited set of norms for ensuring the coexistence and vital cooperation of the members of the international community'.[23] For these reasons, and others, many scholars have argued that a 'modern'

[17] But see M Hakimi, 'Making Sense of Customary International Law' (2020) 118 Mich L Rev 1487, 1510 ('The lack of secondary rules in CIL does not mean that "anything goes". It means that what goes is not determined by secondary rules. The status of a given normative position within CIL depends instead on how global actors interact with it over time.').

[18] *Gulf of Maine* (n 2) [111]. See also *Continental Shelf (Libya/Malta)* (Judgment) [1985] ICJ Rep 13 [27].

[19] See R Rudner, 'The Scientist *qua* Scientist Makes Value Judgments' (1953) 20 Philos Sci 1, 2 ('since no hypothesis is ever completely verified, in accepting a hypothesis the scientist must make the decision that the evidence is *sufficiently* strong or that the probability is *sufficiently* high to warrant the acceptance of the hypothesis').

[20] See I Levi, *Hard Choices: Decision Making under Unresolved Conflict* (Cambridge University Press 1986) 43–46; F Plumpton Ramsey, 'Truth and Probability' in F Plumpton Ramsey and RB Braithwaite (eds), *The Foundations of Mathematics and Other Logical Essays* (Martino Fine Books 1931) 156.

[21] See eg K Popper, 'Science: Conjectures and Refutations' in JA Curd and M Cover (eds) *Philosophy of Science: The Central Issues* (WW Norton 1998) 3–10.

[22] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Judgment) [1986] ICJ Rep 14 [186].

[23] *Gulf of Maine* (n 2) [111]. See also *Continental Shelf (Libya/Malta)* (n 18) [27]. D Anzilotti, *Corso di diritto internazionale* (3rd edn, Athenaeum 1928) 67 (observing

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approach (or 'human rights approach') to customary international law in fact applies deductive logic.[24]

That being said, the actual logical reasoning applied by courts is often opaque. Sometimes it can appear that a court has deduced the existence of a rule when it may have applied an inductive approach. For example, in *Maclaine Watson*, the House of Lords (as per Lord Templeman) concluded that imposing liability on the states that constituted the International Tin Council when that organization dissolved would not be logical: 'An international law or a domestic law which imposed and enforced joint and several liability on 23 sovereign States without imposing and enforcing contribution between those States would be devoid of logic and justice.'[25] This sentence suggests a deductive approach. However, Templeman continued to explain that: 'No plausible evidence was produced of the existence of such a rule of international law before or at the time of the Sixth Agreement in 1982 or thereafter.'[26] Therefore, although it might at first appear that he was asserting a rule, he was in fact concluding that such a rule was not logical or just because it had not been proven to exist. Of course, it might be that rules of customary international law are logical, as deduced from certain values rather than induction from practice, but that the same rule would result from either deduction or induction, and deduction only buttresses the conclusion from induction.[27]

that that 'constructive rules' were simply logical and necessary in the international legal system) (English translation in G Gaja, 'Positivism and Dualism in Dionisio Anzilotti' (1992) 3 EJIL 123). Though Anzilotti acknowledged the existence of rules of this type, he linked them to general principles of law and distinguished them from treaty law or customary international law. See Anzilotti, *Corso* 67 ('Constructive rules and general principles of law are close concepts'). Therefore, Anzilotti's constructive rules would not fall within the category of logical customary international law described by the ICJ in the *Gulf of Maine case*.

[24] See J Wouters and C Ryngaert, 'The Impact on the Process of the Formation of Customary International Law' in MT Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009) 111; AE Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757, 758; ILA 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' (2000) Principle 19, Comment (a); MH Mendelson, 'The Formation of Customary International Law' (1998) 272 RdC 155; JI Charney, 'Universal International Law' (1993) 87 AJIL 529, 544–45; FL Kirgis Jr, 'Custom on a Sliding Scale' (1987) 81 AJIL 146.

[25] *Maclaine Watson v Department of Trade* [1989] 3 All ER 523 (HL) 529.

[26] ibid 554.

[27] The language that courts use to describe their logical steps is not always consistent; see eg *R v Bow St Metropolitan Stipendiary Magistrate*, *ex p Pinochet Ugarte* [*Pinochet III*] [1999] 2 WLR 827 (HL) [58] (describing an inductive step as deduction).

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3.1 The Foundations of Customary International Law as a Source of International Law

The very existence of customary international law as a source of international law is largely a result of a logical deduction. In the early jurisprudence of the PCIJ and other bodies, no effort was made to establish consistent state practice and *opinio juris* for the existence of custom as a source of law,[28] and instead the PCIJ and other authorities deduced the existence of custom.[29] Similarly, when the International Law Association sought to complete its study on customary international law, it acknowledged that it would draw on the practice of states to identify the rules of customary international law, though that was not simply an exercise in using custom to support the existence and rules of custom itself.[30] In the ILC study on customary international law, the special rapporteur relied almost exclusively on the case law of the ICJ, among other courts and tribunals, and cited to little state practice or *opinio juris* as expressed by states on point.[31] Of course, those cases that were cited might or might not have cited to state practice or *opinio juris* in turn. These approaches do not make the conclusions wrong; after all, reliance on prior judicial decisions is a valid subsidiary source for the content of any of the formal sources.[32] But such reliance on prior cases demonstrates that the identification of customary international law as a source of international law is not entirely established by state practice and *opinio juris* alone and is likely a logical deduction from the behaviour of states.

In turn, the very constitution of customary international law by state practice and *opinio juris* alone is also not clearly based on a logical inductive examination of state practice and *opinio juris*.[33] Instead, the requirement of state practice and *opinio juris* is primarily derived from

[28] See *The Case of the S.S. 'Lotus' (France v Turkey)* [1927] PCIJ Series A No 10; *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3, 42, 44; *Continental Shelf (Libya/Malta)* (n 18) [27]–[30]; *Jurisdictional Immunities of the State (Germany v Italy)* (Judgment) [2012] ICJ Rep 99 [55].

[29] *Lotus* (n 28) 28–30.

[30] ILA Committee on Formation of Customary (General) International Law, 'Final Report' (n 24) para 6.

[31] Eg ibid fns 689–98 (discussing the 'Requirement of practice' with almost exclusive reference to ICJ case law and one reference to the practice of international financial organizations).

[32] See Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, art 38(1)(d).

[33] See eg PE Benson, 'François Gény's Doctrine on Customary Law' (1983) 20 Can YIL 267 (arguing that it was Gény who first articulated the elements of practice and *opinio juris*, based on principles of natural law).

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the PCIJ and ICJ Statutes, upheld by legal tradition and reaffirmed by, inter alia, the ICJ.[34] From the language of the Statutes, it is not completely clear that customary international law is formed by state practice and *opinio juris* as elements.[35] There is certainly space to argue that these aspects are factors or perhaps even evidentiary measures for custom.[36] In fact, the process of identifying rules of customary international law often treats state practice and *opinio juris* more like factors or evidence than truly as elements.[37] Nonetheless, they are commonly understood to be elements.[38]

3.2 The Deduction of Customary International Law without Resort to the Elements

Both the ICJ and PCIJ have suggested that some rules of customary international law might not be established by the elements of state practice and *opinio juris*.[39] As noted above, the ICJ chamber in the *Gulf of Maine* case took note of some norms in international law that were not proved through induction but by their role in 'ensuring . . . coexistence and vital cooperation'.[40] The ICJ seems to be saying that there are some rules that are established through an inductive inference from state practice and *opinio juris*, but that there are other rules that

[34] See eg *Lotus* (n 28); *North Sea Continental Shelf* (n 28) 44; *Continental Shelf (Libya/Malta)* (n 18) [27]–[30]; *Jurisdictional Immunities of the State* (n 28) [55]; ILC, 'Draft Conclusions' (n 1).

[35] Compare Statute of the International Court of Justice (n 32) art 38(1)(b) ('international custom, as evidence of a general practice accepted as law' merely evidenced by practice and *opinio juris*), *with* European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL) [2005] OJ C327/04 [7] ('Customary international law is formed by the practice of States which they accept as binding upon them.').

[36] See Case of the *S.S. 'Wimbledon' (UK, France, Italy and Japan v Germany)* [1923] PCIJ Series A No 1, 25 (inferring *opinio juris* from widespread and consistent practice); *Nottebohm (Liechtenstein v Guatemala) (second phase)* (Judgment) [1955] ICJ Rep 4, 22; *North Sea Continental Shelf* (n 28) Dissenting Opinion of Judge Lachs 231, Dissenting Opinion of Judge Sørensen 246–47.

[37] See Roberts (n 24) 758; ILA Committee on Formation of Customary (General) International Law, 'Final Report' (n 24) [10](c) ('undoubtedly it is often difficult or impossible to separate the two elements'); B Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 IJIL 23, 36 ('international customary law has in reality only one constitutive element, the *opinio juris*').

[38] See ILC, 'Draft Conclusions' (n 1), Conclusion 3(2): 'Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.'

[39] See also C Tomuschat, 'Obligations Arising for States without or against Their Will' (1993) 241 RdC 195, 292–304, 307.

[40] *Gulf of Maine* (n 2) [111].

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are not.[41] This approach is not isolated. In the *Corfu Channel* case, the ICJ relied on 'elementary considerations of humanity' to identify rules of customary international law.[42] We could interpret this passage in an alternate way: that some rules of customary international law, while constituted by state practice and *opinio juris*, can be proved to exist by simply being logical for coexistence, vital cooperation or principles of humanity. And yet, the ICJ has also held quite clearly that customary international law norms cannot simply be deduced from 'humanitarian considerations' or 'moral principles'.[43]

The ICJ takes several approaches to deducing the existence of customary international law. The first approach – what Talmon terms 'normative deduction' – is to infer the existence of a rule from other rules. For example, the ICJ has relied on the contents of treaties to prove the existence of customary international law.[44] While it identified the right of self-determination in the *Namibia* advisory opinion, it used the UN Charter to interpret the rule as applying for all peoples.[45] In a similar fashion, it has looked to UNGA resolutions to prove customary international rules.[46] However, in both instances one could argue that the ICJ

[41] See also E Benvenisti, 'Customary International Law as a Judicial Tool for Promoting Efficiency' in E Benvenisti and M Hirsch (eds), *The Impact of International Law on International Cooperation: Theoretical Perspectives* (Cambridge University Press 2004) 85, 86 ('The ICJ has, in fact, the authority to invent the custom.').

[42] *Corfu Channel (UK v Albania)* (Judgment) [1949] ICJ Rep 4, 83.

[43] *South West Africa (Liberia v South Africa)* (Judgment) [1966] ICJ Rep 6, 34, [49]–[50].

[44] See *Gulf of Maine* (n 2) [112] ('The Chamber [will] attempt a more complete and, in its opinion, more precise reformulation of the "fundamental norm" already mentioned. For this purpose it will, *inter alia*, draw also upon the definition of the "actual rules of law . . . which govern the delimitation of adjacent continental shelves – that is to say, rules binding upon States for all delimitations" which was given by the Court in its 1969 Judgment in the *North Sea Continental Shelf* cases') (citing *North Sea Continental Shelf* (n 28) 46–47 [85]); *Armed Activities on the Territory of the Congo (DR Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 [161]–[162], [213]–[214], [244] (finding customary international humanitarian law by relying on the role of the Hague Convention Respecting the Laws and Customs of Land Warfare, and customary international law on the 'principle of permanent sovereignty over natural resources' by relying on UNGA resolutions); *Jurisdictional Immunities of the State* (n 28) [54] (citing the European Convention on State Immunity (signed 16 May 1972, entered into force 11 June 1976, 4 October 1979 in UK) 1495 UNTS 182, and the UN Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) UN Doc A/59/508).

[45] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 31 [52] (regarding the right to self-determination).

[46] See *Military and Paramilitary Activities in and against Nicaragua* (n 22) [191]–[193], [264] (recognizing that the text of UNGA Resolution 2625 (XXV) (Friendly Relations

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was not identifying a new rule of customary international law, but was instead using the UN Charter and UNGA resolutions to clarify the content of a rule through systemic interpretation. In the *Territorial and Maritime Dispute*, Nicaragua and Colombia agreed that customary international law would apply to the case because Colombia was not a party to the UN Convention on the Law of the Sea (UNCLOS), and agreed that the provisions in UNCLOS regarding the baselines and entitlement to maritime zones, exclusive economic zone (EEZ), and continental shelf reflected customary international law,[47] though they disagreed over the content of the rules concerning the continental shelf beyond 200 nautical miles.[48] It is possible to argue that the ICJ was merely affirming that Nicaragua had an obligation toward the other states parties to UNCLOS to comply with Article 76 when it referred to the 'interrelated' nature of ocean space.[49] However, it did explicitly cite to obligations *inter partes* between states not parties to the dispute. In fact, it argued that UNCLOS created a new 'legal order', so Nicaragua was under this obligation in a dispute with a state not a party to UNCLOS.[50] Thus, the failure of Nicaragua to comply with the procedural requirements of UNCLOS meant it had not established its continental margin vis-à-vis Colombia, a state not a party to UNCLOS.[51] Judge Robinson criticized this conclusion, arguing that the procedural condition was not part of customary international law and could not be applied.[52] What is not entirely clear in these cases is whether the ICJ was using the existence and content of treaties to prove the existence of a custom or clarifying the content of the rule.[53]

Declaration) correctly stated customary international law); *Armed Activities on the Territory of the Congo* (n 44) [162] ('These provisions [of the Friendly Relations Declaration] are declaratory of customary international law.').

[47] *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624 [114].

[48] ibid [115].

[49] ibid 126. See also *Questions of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 100 [82].

[50] *Territorial and Maritime Dispute (Nicaragua v Colombia)* (n 47) [126].

[51] ibid [129].

[52] *Nicaragua v Colombia Delimitation of the Continental Shelf* (n 49) Declaration of Judge Robinson [16].

[53] See *Military and Paramilitary Activities in and against Nicaragua* (n 22) [218], [220]; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 257 [78]–[79]; *Maritime Delimitation and Territorial Question between Qatar and Bahrain (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 40 [185]; *Armed Activities on the Territory of the Congo* (n 44) [217]; *Territorial and Maritime Dispute between Nicaragua*

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The ICJ also deduces rules of customary international law from other customary international rules. In the *Burkina Faso/Mali Frontier Dispute*, it held that *uti possidetis* was customary international law because 'it is logically connected with the phenomenon of the obtaining of independence'.[54] While this phrase might even suggest deduction of the rule from facts, actually the ICJ was deducing the customary rule of *uti possidetis* from the other customary rules governing independence. In the *Qatar and Bahrain Maritime Delimitation*, the ICJ set aside evidence of practice as inconclusive and instead deduced that 'low-tide elevations cannot be equated with islands . . . or other land territory' as they are understood under prevailing rules on territorial sovereignty.[55] Thus, in these cases another norm of customary international law formed the framework for assessing the norm at issue. And while it is debatable whether the ICJ was identifying a new rule or clarifying an existing one, it appears to apply a teleological interpretation of other rules of customary international law. This approach should not be too shocking, because domestic courts sometimes take the same approach. In the case of *A* v. *Attorney-General*, the Swiss Federal Criminal Court held that the accused was covered by the same immunity enjoyed by a head of state because, as minister of defence, he was a member of the unusual collegiate body – the HCE, or Haut Comité d'État (High State Council) – that discharged presidential authority. The Federal Criminal Court did not examine state practice and *opinio juris* to determine whether a collegiate presidential council would enjoy the same immunities, but reasoned that logically it would, based on the purposes of head-of-state immunity.[56]

However, the ICJ has also deduced the existence of customary rules from other customary rules, not by logically deriving the rules from other rules but by analogy. In this approach, the ICJ is more clearly focused on applying customary international law rules that apply in other situations to a case where they clearly do not, and thus is more likely identifying a new rule rather than clarifying an existing one. For example, in the *Libya and Malta Continental Shelf* case, the ICJ identified a customary

and Honduras in the Caribbean Sea (Nicaragua v Honduras) (Judgment) [2007] ICJ Rep 661, 696 [113].

54 *Frontier Dispute (Burkina Faso/Mali)* (Judgment) [1986] ICJ Rep 554, 565–66 [20]–[23].

55 *Maritime Delimitation and Territorial Question between Qatar and Bahrain* (n 53) [204]–[208].

56 *A v Office of the Attorney General of Switzerland*, File no BB.2011.140 (25 July 2012) [5.3.1.]–[5.4.2] ('The HCE was created to replace the presidency and assume its duties') (translation by TRIAL, Track Impunity Always), reprinted in ILDC 1933 (CH 2012).

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rule permitting 200 nautical miles of continental shelf by drawing an analogy with the exclusive economic zone.[57] However, this approach is not without criticism. In the *Arrest Warrant* case, the ICJ deduced the existence of immunities from arrest for a foreign minster by considering the functions of the office.[58] Unlike the situation of a head of state mentioned above, which clearly benefitted from a rule of immunity and needed clarification, this case asked whether the official had any immunities at all. Judge Van den Wyngaert critiqued the approach of identifying the new rule by deduction, calling it 'a mere analogy with immunities for diplomatic agents and Heads of State' without proper reliance on evidence of state practice and *opinio juris*.[59]

The ICJ also deduces customary international law from legal principles. There are at least two versions of this approach. One possibility, a more conservative one, is to deduce the existence of certain principles from treaties or other customary law and then take one more step and deduce the existence of rules from those principles. This is the approach that Talmon terms 'triangular reasoning'.[60] For example, in the *Corfu Channel case*, the ICJ identified the principle underlying the Hague Convention VIII of 1907 (i.e. the obligation to notify ships of minefields).[61] The treaty did not specifically apply to the situation of peacetime, and yet the Court stated that such a duty also applied in peacetime.[62] Similar to the practice of deduction by analogy, this practice appears to be focused on identifying new rules of customary international law.

[57] *Continental Shelf (Libya/Malta)* (n 18) [34].

[58] *Arrest Warrant of 11 April 2000 (DR Congo v Belgium)* [2002] ICJ Rep 3, 20–22 [51]–[54].

[59] ibid, Dissenting Opinion of Judge van den Wyngaert 146 [14]. Talmon also notes a functional deduction from the functions of a person or organization; see Talmon (n 14) 423–26. However, the two cases he cites, *Reparations* and *South West Africa*, are not truly customary international law, but rather the functional interpretation of treaty instruments. See *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 180–85; *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 136, 159, 162, 172.

[60] See *Gulf of Maine* (n 2) [114] (identifying the approach to delimiting a single maritime boundary).

[61] *Corfu Channel* (n 42) 22; *Corfu Channel (UK v Albania)* Memorial of the UK (30 Sept 1947) 37–38 [63]–[65] <www.icj-cij.org/sites/default/files/case-related/1/1489.pdf> accessed 1 April 2022.

[62] *Corfu Channel* (n 42) 22 ('certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States').

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One method for reasoning the existence of customary international law from abstracted principles, themselves potentially drawn from other treaties and customary law, is the necessity of the rule. As the ICJ said in the *Gulf of Maine* case, some rules are 'vital' or 'ensur[e]' international cooperation and coexistence, and in the *Gabčikovo-Nagymaros Project* case the ICJ stated that the rule was 'require[d]'.[63] The ICJ has stated that the reason for this view is that it should be reluctant to find customary international law restraining state action '[w]hen the stakes are not as high',[64] – that is to say, when the rules would be less necessary. That being said, the ICJ has been willing to deduce rules that are not absolutely necessary. Some rules are merely 'important'[65] and perhaps even 'logically connected' to other principles.[66] In fact, some rules are simply reasonable expectations from other principles, such as the 'elementary considerations of humanity' cited in both the *Nicaragua* case[67] and the *Corfu Channel* case.[68]

The ICJ also occasionally applies an even more liberal approach, not necessarily identifying a treaty or customary law from which to draw legal principles before deducing the existence of customary international law. This is the case in *Jurisdictional Immunities*, where the ICJ noted the important principle of sovereignty and its derivatives sovereign equality and territorial sovereignty,[69] and in *Certain Documents*, when the ICJ took note of the principles protecting the integrity of legal proceedings.[70]

[63] *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7 [104] ('the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.')

[64] Kirgis (n 24) 148 ('When the stakes are not as high, international decision makers have not been as quick to find restrictive customary rules.') (citing *Fisheries Jurisdiction Case (UK v Iceland; Germany v Iceland)* (Merits) [1974] ICJ Rep 3, 175).

[65] *Jurisdictional Immunities of the State* (n 28) [57] ('The Court considers that the rule of State immunity occupies an important place in international law and international relations.')

[66] *Frontier Dispute (Burkina Faso/Mali)* (n 54) [20]–[23] (concluding that *uti possidetis* is customary international law because 'it is logically connected with the phenomenon of the obtaining of independence'); *Jurisdictional Immunities of the State* (n 28) [57] ('[the rule of State immunity] derives from the principle of sovereign equality of States').

[67] *Military and Paramilitary Activities in and against Nicaragua* (n 22) [215], [218] (beginning with 'elementary considerations of humanity' to arrive at the conclusion that Common Article 3 of the Geneva Conventions was customary international law).

[68] *Corfu Channel* (n 42) at 22.

[69] *Jurisdictional Immunities of the State* (n 28) [57]; *Asylum Case (Colombia/Peru)* (Judgment) [1950] ICJ Rep 266, 274–77.

[70] *Questions Related to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures, Order) [2014] ICJ Rep 147 [27].

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Such practice can even be identified in the *Lotus* case, where the ICJ stated that '[a] corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority, upon it, and no other State may do so',[71] and in the *Pulp Mills* case the ICJ observed that 'a precautionary approach may be relevant in the interpretation and application of the' treaty and then stated that the treaty 'has to be interpreted in accordance with [what] . . . may now be considered a requirement under general international law to undertake an environmental impact assessment'.[72] Perhaps the ICJ could have identified treaties and other custom that evidenced such principles as applicable, but that step was omitted.

In other cases, the ICJ does not deduce the existence and content of a customary rule from a treaty or other source of law, nor deduce principles from those sources, but instead deduces customary rules from the logic and reasoning, the underlying purpose, of the rule itself. As such, the particulars of the rule applicable in a given case might be merely characterized as explaining the content of the rule in more detail, rather than identifying an entirely new rule. In the *Western Sahara* and *Wall* advisory opinions, the ICJ deduced from the existence of the rule of self-determination under customary international law that its full scope of application was *erga omnes*,[73] again with little regard to state practice and *opinio juris*.

One the one hand, the ICJ appears to use deduction of rules quite often, yet, on the other hand, insists that it does not simply deduce rules.[74] A possible explanation is twofold. First, in many of these cases the ICJ is not necessarily deducing the existence of new rules but rather interpreting the content, scope, and application of existing rules. For example, in the *Arrest Warrant* case, one could characterize the rule as being immunity for certain high state officials, with head of state being a clearly established example and foreign minister a less clear example. The ICJ did not discover a new rule of immunity of foreign ministers, but

[71] *Lotus* (n 28) 25.

[72] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 13 [61], [160]–[164], [204].

[73] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 31 [55] (self-determination as a right of peoples); *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 102 [29] (interpreting the right of self-determination to have an *erga omnes* character); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 172 [88].

[74] See *South West Africa* (n 43) [49]–[50].

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instead clarified that the scope of high state official immunities covered them. State practice and *opinio juris* was not necessary for these narrow cases, because there was already well-established state practice and *opinio juris* for the functional category in which foreign ministers fall. In a similar manner, the extension of customary international humanitarian law to cyber operations might not call for supplementary evidence of state practice and *opinio juris*, because there is already solid evidence that these rules apply to armed conflict through whatever mode it is manifested.[75] This view can be justified by recalling the distinction between the identification and the interpretation of customary international law. Where the ICJ is identifying a new and distinct rule, perhaps it must locate state practice and *opinio juris*, but when it is merely interpreting the content of the rule, it is freer to use other legal interpretative techniques such as analogy and the context of other legal rules. That being said, the line between identifying a new rule and clarifying the content of the rule is so fine that the distinction is admittedly difficult to draw, potentially opening the door to more flexible interpretative techniques. Given the ICJ's affirmations of the state practice-*opinio juris* rule, we could conclude that when it applies deduction in this manner, it is presuming what state practice and *opinio juris* it would expect to find, had it looked.

Second, we can also recall the distinction between the formation of customary international law and evidence for the formation. Several authorities have argued for the use of deduction when determining whether there is sufficient evidence for customary international law. The ICJ could be deducing the probable existence of certain rules and then lowering the threshold of evidence to establish the rule (perhaps even reducing it to zero in clearly obvious cases), rather than deducing

[75] See eg M Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, Cambridge University Press 2017); German Federal Foreign Office, German Federal Ministry of Defence, and German Federal Ministry of the Interior, Building and Community, 'On the Application of International Law in Cyberspace' (Position paper, March 2021) <www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf> accessed 1 April 2022 (agreeing with the authors of *Tallinn Manual 2.0*, even though '[t]he fact that cyberspace as a domain of warfare was unknown at the time when the core treaties of IHL were drafted does not exempt the conduct of hostilities in cyberspace from the application of IHL'; and concluding that other rules of customary international law (eg the obligation of states not to allow their territory to be used for acts contrary to the rights of other states, rules on attribution of conduct) applied to cyber operations without the need to submit state practice and *opinio juris*).

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the existence of customary international without any regard to state practice and *opinio juris*. In essence, some norms are simply more obvious,[76] because they are logical or necessary for international cooperation. In his dissent in the *North Sea Continental Shelf* cases, Judge Lachs stated that deduction is an alternative to induction when the norms are difficult to prove.[77] Certainly, the ICJ appeared to take this approach in the *Asylum*,[78] *Nicaragua*,[79] and *Qatar/Bahrain Maritime Delimitation* cases.[80]

However, the ICJ does not confirm that either of these explanations is correct. More often, it dispenses with a lengthy explanation, or perhaps any explanation at all, of the evidence on which it based its decision, leaving obscurity over whether deduction was the sole basis for the rule, a supplementary basis, or a reduction in the burden of proof through inductive means.[81] For example, in the *Arrest Warrant* case the ICJ simply stated 'it is firmly established that'.[82] Use of the term 'established' can probably be assimilated to 'proved', although even if it was a synonym for 'constituted', the ICJ is still referencing confidence in its existence, which is an evidentiary matter. In the *Gulf of Maine* case, the ICJ expressly stated that there were two classes of rules of customary international law, proved by induction and by deduction.[83] In the *Corfu Channel* case, the ICJ quite clearly drew on considerations of humanity as the reason for its conclusion, not as a basis for deducing the scope of another rule of law.[84] If it truly was simply a lower evidentiary burden, one would expect the ICJ to use different phrasing to describe what it was doing. While we might attempt to overlook the *Corfu Channel* approach

[76] See Mendelson (n 24) 292.

[77] *North Sea Continental Shelf* (n 28) Dissenting Opinion of Judge Tanaka 179, also Dissenting Opinion of Judge Sørensen 246; *Legality of the Threat or Use of Nuclear Weapons* (n 53) Dissenting Opinion of Judge Higgins 591 [36]; *Corfu Channel* (n 42) Separate Opinion of Judge Azevedo 83.

[78] *Asylum Case* (n 69) 274–77, Dissenting Opinion of Caicedo Castilla 370 [17].

[79] *Military and Paramilitary Activities in and against Nicaragua* (n 22) [202], [206]–[207] (using deduction when there is inconsistent state practice and *opinio juris*).

[80] *Qatar v Bahrain Maritime Delimitation and Territorial Question* (n 53) [204]–[208].

[81] See T Treves, 'Customary International Law' (MPEPIL 2006) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1393>; Mendelson (n 24) 292 (arguing that *opinio juris* is not necessary in obvious cases).

[82] *Arrest Warrant* (n 58) [51], also Separate Opinion of Judge Koroma 61 [6]; *Questions Related to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, 457 [99].

[83] *Gulf of Maine* (n 2) [111].

[84] *Corfu Channel* (n 42) 42.

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because it emerged during an era when international law might not have been well developed, the *Gulf of Maine* case was decided in 1984.

Most likely, the best explanation is that, in principle, state practice and *opinio juris* are required in all cases. However, when a norm is necessary (or at least logical or sensible) for the international legal system, or a parallel treaty is in place that governs the parties, or the question is really just a clarification of the scope of an already existing general rule of customary international law, then the ICJ can deduce that it is safe to presume state practice and *opinio juris*, and an inductive analysis with evidence is not necessary. The rule is simply very obvious in such cases. Other, more novel, situations demand stronger evidence of state practice and *opinio juris*. While the distinction between these two approaches is more likely a spectral one, reducing the need for compelling evidence in proportion to the reasonableness that the rule exists, the ICJ in *Gulf of Maine* identifies the two ends of the spectrum. Thus, the ICJ is not necessarily inventing customary international law from whole cloth by pure deduction, assertion, or arbitrariness, but instead identifying rules that are more likely than not to exist, and more likely than not to have certain content, when operating within an environment of other rules of international law.

3.3 Deduction of Customary International Law within the Application of the Elements

Of course, this analysis means that the ICJ still makes use of inductive reasoning. In many cases, it does apply state practice and *opinio juris* as elements that are used to identify legal rules. Following from Section 3.2, where logic and reason could be justifications for an abridged inductive analysis, this section discusses the assessment of evidence for customary international law in the inductive process, and again we find the use of logic throughout the process.

Initially, it could be that the states disputing a matter might simply agree on the existence of a rule of customary international law.[85] If they stipulated this rule, then it would govern the dispute and, especially if

[85] See *Jurisdictional Immunities of the State* (n 28) [57] (Germany did not object to Italy's characterization of the acts of the German armed forces in World War II as constituting violations of international law); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177 [112] (neither France nor Djibouti objected to the application of the Vienna Convention on the Law of Treaties as a matter of customary international law, even though neither was a party to the convention).

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used as the basis for a decision by the ICJ, would control the outcome. This outcome would stand, even if the norm of customary international law later appeared to be unfounded in state practice or *opinio juris*. After all, some of the votes of the ICJ on questions of the existence of a rule of customary international law have been rather close.[86] For its part, the European Court of Justice has also taken the position that the parties must contest the existence of a customary international law rule or it can be presumed to exist.[87] Pellet and Gaja have both argued that acceptance of a rule of customary international law is not required by states, so whether states accept the existence of such a rule in a dispute between them is not a requirement.[88] The question in this chapter, however, is the reverse. While acceptance is not a prerequisite for the existence and application of the rule, in the sense that refusal could block creation and application of the norm, acceptance does appear to be constitutive of the norm, at least insofar as the norm is applied in the dispute and serves as precedent for disputes that follow. Pellet argues that acceptance is not constitutive, but instead merely eases the burden of establishing the existence of the rule in the dispute.[89] Here again, the distinction between the existence of a rule and the evidence of a rule appears.

In a similar fashion, for some states the views of their foreign ministry might preclude any ascertainment of customary international law. A state's internal determination by its foreign ministry on the existence of the customary rule might be determinative that a rule exists under customary international law, be it in operationalizing its foreign policy or for settling a dispute of international character within its domestic legal system.[90] Again, such a determination might not be supported by adequate state practice and *opinio juris*. Such a decision by a domestic court might in turn be used elsewhere as evidence of the existence of the norm. The ILA concluded that the differing views of the executive or

[86] See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 24–25 (seven judges voting in favour of the norm, five voting against), also Joint Dissenting Opinion of Judges Guerrero, McNair, Read and Hsu Mo 32.

[87] See Case C-366/10 *Air Transport Association of America and ors v Secretary of State for Energy and Climate Change* [2011] EU:C:2011:864 [105]–[106].

[88] See A Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1989) 12 Aus YIL 3, 37; G Gaja in A Cassese and JHH Weiler (eds), *Change and Stability in International Law-Making* (De Gruyter 1989) pt I, ch I ('Custom and Treaties) 16.

[89] See Pellet (n 88).

[90] See eg *R v Bottrill, ex p Kuechenmeister* [1947] 1 KB 41 (Court of Appeal, England and Wales).

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legislature on a customary international law norm would have different weight, but that neither was necessarily excluded.[91] However, when the question of the norm is raised within a domestic situation, the executive's position might be binding on a court.

When states disagree over the existence of a rule, then the ICJ may take a more scientific inductive approach, but this approach should not blind us to the use of deductive logic within the application of induction. The dispute serves to frame the question about the rule and, as such, already impacts the form of the rule, as states suggest competing hypotheses and the decision-maker needs to adopt one or the other hypothesis.[92] Important to note, however, is that the competing hypotheses are themselves not necessarily the outcome of inductive logic but could be based on deduction from other principles or aims. Evidence of state practice and *opinio juris* that does not support one or the other hypothesis can be disregarded.[93] In this regard, Judge Van den Wyngaert's dissent in the *Arrest Warrant case* is important, for there she challenged the framing of the hypothesis by the ICJ:

> In technical terms, the dispute was about an arrest warrant against an incumbent Foreign Minister . . . In a more principled way . . . [i]t was about the question what international law requires or allows States to do as 'agents' of the international community . . .
>
> The Court has not addressed the dispute from this perspective and has instead focused on the very narrow question of immunities . . .[94]

Whether there is any presumption in favour of or against the formation of a rule of customary international law is also deduced logically. In principle, we might apply the *Lotus* presumption against states binding themselves, but the ICJ has suggested that UNGA resolutions on point can create a presumption in favour of customary

[91] ILA Committee on Formation of Customary (General) International Law, 'Final Report' (n 24) Principle 9, Comment (e) ('It can happen, particularly in countries where there is a separation of powers, that the position of the judiciary (or of the legislature) conflicts with that of the executive. This is a matter of what *weight* is to be attached to the various instances of the State's practice.').

[92] See *Jurisdictional Immunities of the State* (n 28) [62]–[63].

[93] See *Jurisdictional Immunities of the State (Germany v Italy)* Memorial of the Federal Republic of Germany (12 June 2009) <www.icj-cij.org/sites/default/files/case-related/143/16644.pdf> accessed 10 April 2022 [55], Counter-Memorial of Italy (22 December 2009) <www.icj-cij.org/sites/default/files/case-related/143/16648.pdf> accessed 10 April 2022 [4.3], Rejoinder of Italy (10 January 2011) <www.icj-cij.org/sites/default/files/case-related/143/16652.pdf> accessed 10 April 2022 [4.19].

[94] *Arrest Warrant* (n 58) Dissenting Opinion of Judge ad hoc Van den Wyngaert [5]–[6].

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international law.[95] Instead of a presumption, it might simply be that UNGA resolutions are weighty evidence.[96] Also consider in the *Navigational and Related Rights* case, where the ICJ found the existence of particular customary international law because Nicaragua failed to object to a long-undisturbed practice.[97] It is difficult to understand how the ICJ believed a *Lotus* presumption against custom had been overcome in *Navigational and Related Rights* with such weak *opinio juris* and – as it admits – not well-substantiated practice. In essence, the ICJ used logic to interpret the meaning of silence.

Logical deduction is also largely the basis for determining the types and forms of evidence that the ICJ and other authorities accept for the purpose of identifying customary international law. As a preliminary matter, the limitation of practice to acts of states, rather than international organizations or other actors, is largely traditional. The ILC special rapporteur cited little actual practice of states to support his conclusion that international organizations contribute to customary international law '[i]n certain cases' and that we should approach the question with 'caution'.[98] In addition, whether actors within a state engage the state's role in constituting customary international law is often assessed by analogy to either the Draft Articles on State Responsibility rules on attribution[99] or the Vienna Convention on the

[95] *Legality of the Threat or Use of Nuclear Weapons* (n 53) [70]–[71] ('[UNGA resolutions] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.'); ILA Committee on Formation of Customary (General) International Law, 'Final Report' (n 24) [6], Principle 29 ('Resolutions of the General Assembly expressly or impliedly asserting that a customary rule exists constitute rebuttable evidence that such is the case.'). But see *Voting Procedure on Questions Related to Reports and Petitions Concerning the Territory of South West Africa* (Advisory Opinion) [1955] ICJ Rep 84, Separate Opinion of Judge Klaestad, Separate Opinion of Judge Lauterpacht.

[96] See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 [80]; *Armed Activities on the Territory of the Congo* (n 44) Separate Opinion of Judge Elaraby 331 [16], Separate Opinion of Judge Kooijmans 322 [63].

[97] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213 [140]–[141].

[98] ILC, 'Draft Conclusions' o (n 1), Conclusion 4(2), also Comments (4), (6), (7), (8). Note that the special rapporteur did not cite to the *Reservations to the Genocide Convention* case for the role of UN Secretary-General practice as depositary, which would have been a natural reference, though the ICJ did not rely on state practice or *opinio juris* for this secondary rule. See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 24–25.

[99] See ILC, 'Draft Conclusions' (n 1) Conclusion 5, Comment (2) n 699 (citing ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with

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Law of Treaties rules on capacity to bind the state.[100] There is no clear classification of which acts are 'practice',[101] and states often suggest which acts qualify as practice in yearbooks or digests on practice.[102] Indeed, sometimes the ICJ appears to reduce the evidentiary burden for proving customary international law by invoking strong, convincing authorities such as the ILC.[103] One would imagine that a state would need to bring quite compelling evidence to convince the ICJ to determine that a provision in the Draft Articles on State Responsibility was not customary international law. Beyond these basic conditions, the ICJ and other authorities do not perform any inductive analyses of the secondary rules on the nature and quality of the practice being 'sufficiently widespread and representative, as well as consistent'.[104] Again, we can note

Commentaries' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, arts 5–6). See also ILA Committee on Formation of Customary (General) International Law, 'Final Report' (n 24) Principles 7, 8, 9.

[100] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[101] See ILC, 'Draft Conclusions' (n 1); ILC, 'Report to the United Nations General Assembly' pt II 'Ways and Means for Making the Evidence of Customary International Law More Readily Available' (1950) YILC II 368–72 [31]: 'Evidence of the practice of States is to be sought in a variety of materials. The reference in article 24 of the Statute of the Commission to "documents concerning State practice" (*documents établissant la pratique des États*) supplies no criteria for judging the nature of such "documents". Nor is it practicable to list all the numerous types of materials which reveal State practice on each of the many problems arising in international relations.'

[102] See eg UNGA Res 2099(XX) 'Technical Assistance to Promote the Teaching, Study, Dissemination and Wider Appreciation of International Law' (20 December 1965) UN Doc A/RES/2099(XX); CoE Committee of Ministers Res (68)17, 'Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law' (June 28, 1968), as amended by Recommendation 97(11).

[103] See *Gabčikovo-Nagymaros Project* (n 63) [51]–[53] (referring to the work of the ILC); *Difference Related to Immunities from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, 87 [62]; *Wall Advisory Opinion* (n 73) [140]; *Diallo Case (Guinea v DR Congo)* (Judgment) [2007] ICJ Rep 582, 599 [39]; *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 47, 202, 209 [385], [401]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2008] ICJ Rep 413, 459 [127]. It is here that Hakimi's argument (see Hakimi (n 17) 1510) might be reconsidered within the framework of secondary rules, rather than refuting secondary rules.

[104] See ILC, 'Draft Conclusions' (n 1), Conclusions 7, 8(1). See also *North Sea Continental Shelf* (n 28) 42–43; *Military and Paramilitary Activities in and against Nicaragua* (n 22) [186]; *Fisheries Jurisdiction Case (UK v Iceland; Germany v Iceland)* (n 64) 116, 131, 138; *Asylum Case* (n 69) 277–78.

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the lack of inductive analysis also on the part of the ILC special rapporteur in reaching his conclusions on these points.[105]

After offering competing hypotheses, the ICJ must weigh the evidence. There does not appear to be any inductive analysis on the burden of proof or weight of evidence for customary international law.[106] The ICJ has only issued very vague statements that evidence is weighed and contradicted.[107] The Special Tribunal for Lebanon used the expression 'beyond any shadow of doubt' when considering whether a customary rule had been proven, though it did not indicate whether this was the burden of proof it applied or whether this was merely a rhetorical flourish.[108]

Having produced a final pool of data on the basis of all of these logical steps, the ICJ will perform an inductive inference to identify the applicable rules (or least says that it will). The usual approach, in line with an inductive logic, is to employ a sampling survey. The actual sampling conducted by the ICJ is not random or following typical scientific approaches for induction.[109] For example, the practice is not simply

[105] ILC, 'Draft Conclusions' (n 1) Conclusion 8, Comment (3) n 714 (citing *Ure v The Commonwealth of Australia* (Federal Court of Australia, 4 February 2016) FCAFC 8 [37]); ILC, 'Draft Conclusions' (n 1) Conclusion 8, Comment (7) (citing *Military and Paramilitary Activities in and against Nicaragua* (n 22) [186]).

[106] See ILA Committee on Formation of Customary (General) International Law, 'Final Report' (24) Principle 3, Comment ('What is suggested here is something analogous to (but not the same as) the well-known distinction in the law of evidence between the admissibility of evidence and its weight (convincingness).'); *Fisheries Case (UK v Norway)* (Judgment) [1951] ICJ Rep 116, Dissenting Opinion of Judge Reed 191.

[107] See *Jurisdictional Immunities of the State* (n 28) [72]; *Prosecutor v Ayyash and ors*, STL-11-01/I (Interlocutory Decision on the Applicable Law, 16 February 2011) [91]; *Lotus* (n 28) 26 ('In the Court's opinion, the existence of such a rule has not been conclusively proved.'); *Air Transport Association of America* (n 87) [106] ('insufficient evidence exists to establish . . . the principle of customary international law'); *Van v Public Prosecutor* (Singapore Court of Appeal, 20 October 2004) SGCA 47 [88] ('Any customary international law rule must be clearly and firmly established before its adoption by the courts', yet relying on only one report:, 'Question of the Death Penalty: Report of the Secretary-General' (2 July 2012) UN Doc A/HRC/21/29. See also AM Weisburd, 'Customary International Law: The Problem of Treaties' (1988) 21 VJIL 1; A D'Amato, 'Custom and Treaty: A Response to Professor Weisburd' (1988) 21 VJIL 459, 473; A D'Amato, 'A Brief Rejoinder' (1988) 21 VJIL 489.

[108] *Prosecutor v Ayyash* (n 107) [86] ('However significant these judicial pronouncements may be as an expression of the legal view of the courts of different States, to establish beyond any shadow of doubt whether a customary rule of international law has crystallised one must also delve into other elements.').

[109] Consider, for example, the discussion of the representativity of states selected for sampling: *North Sea Continental Shelf* (n 28) Dissenting Opinion of Judge Lachs 227; ICRC, JM Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press 2005) vol 2, xliv–xlv, li; Treves (n 81) [35].

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quantified based on the number of states in alignment, but certain acts by certain states might be weighted more heavily.[110] For example, the judges in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion disagreed, not about the methodology but about relative significance of the practice.[111] In both situations, the judges are applying logic to the value of practice.

Some cases will result in insufficient or inconsistent evidence. Talmon has observed that in such cases the ICJ might simply deduce the existence of the rule. He reads the *Gulf of Maine* case to say that the lack of evidence could lead the ICJ to rely on a deductive approach.[112] The present author, however, considers that the chamber in the *Gulf of Maine* case might have only identified a certain class of norms that are reasonable as to their content and, as a result, imposed a lower burden of proof.[113] That is to say that the determination of the content of the rule preceded the identification of method,[114] whereas Talmon reads the chamber judgment as holding that the method of proof came first, and that only when it failed was an alternate method adopted.

Lastly, although it is agreed that, in principle, one applies inductive reasoning to infer the existence of a rule from examples of practice and *opinio juris*, the precise form of the inference remains somewhat unclear. The inference could be an enumeration of cases and inverse inference, concluding that the frequency of a certain characteristic in the sampled population is the same as in the general population.[115] The inference

[110] See *Military and Paramilitary Activities in and against Nicaragua* (n 22) [186]; Treves (n 81) para 30 ('Particularly significant are manifestations of practice that go against the interest of the State from which they come, or that entail for them significant costs in political, military, economic or other terms, as it is less likely that they reflect reasons of political opportunity, courtesy etc.').

[111] *Legality of the Threat or Use of Nuclear Weapons* (n 53) Dissenting Opinion of Judge Schwebel [78], Dissenting Opinion of Judge Higgins 583 [9]–[10].

[112] Talmon (n 14) 421–24. He also cites the *Reparations* case for support when practice is limited or nonexistent: *Reparations Advisory Opinion* (n 59) 182, Opinion of Judge Alvarez 190, Dissenting Opinion of Judge Krylov 218; and other ICJ cases for support when practice is too inconsistent: *Continental Shelf (Libya/Malta)* (n 18) [44]; *North Sea Continental Shelf* (n 28) 45; *Maritime Delimitation and Territorial Question between Qatar and Bahrain* (n 53) [205].

[113] Anzilotti (n 23) 67.

[114] See B Schlütter, *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* (Brill 2010) 326–29; R Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 NILR 129.

[115] See generally R Carnap, *The Continuum of Inductive Methods* (Chicago University Press 1952); J Williamson, 'Inductive Influence' (2007) 58 BJPhS 689; HE Kyburg Jr, 'Belief,

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might instead be a predictive inference. This approach attempts to use past examples of actions to predict likely behaviour in the future,[116] or uses past practice to identify an underlying characteristic that gives cause to the behaviour and predicts behaviour when that characteristic is present.[117] Or, in a similar approach, the investigator could engage in universal (hypothetical) inference, proposing a rule that applies to the general population, due to it being exhibited in the sample pool.[118] In the usual adversarial approach, a court practices Bayesian confirmation, where it identifies which of the hypotheses is the better explanation for the evidence,[119] though it is certainly possible that a court or other authority could develop its own hypothesis. Some language from the ICJ suggests that it is applying Bayesian confirmation of a universal inference. For example, in examining the evidence in *Jurisdictional Immunities* case, the ICJ merely observed that practice had not been contradicted with other evidence of practice.[120] In any event, one cannot use the sample pool merely to describe the likely state practice exhibited and *opinio juris* held by states; it must identify what custom has been prescribed.[121] These inductive approaches can only result in descriptive outcomes, and one must still make a normative inference from the descriptive outcome.

4 Conclusion

This chapter has analysed the presence of logic and reasoning throughout the ICJ's approach to customary international law. Logical reasoning takes several forms, primarily deductive or inductive. While the ICJ argues that it applies inductive reasoning, the reality is that at multiple

Evidence, and Conditioning' (2006) 73 Philos Sci 42; P Maher, 'A Conception of Inductive Logic' (2006) 73 Philos Sci 513; T Seidenfeld, 'Direct Inference and Inverse Inference' (1978) 75 J Philos 709–30.

116 See R Carnap, *Logical Foundations of Probability* (Chicago University Press 1950) 207.

117 See generally C Howson, *Hume's Problem: Induction and the Justification of Belief* (Oxford University Press 2000); Carnap (n 115); S Okasha, 'What Did Hume Really Show About Induction?' (2001) 51 Philos Q 27.

118 See Carnap (n 115); E Eells & B Fitelson, 'Measuring Confirmation and Evidence' (2000) 97 J Philos 663; D Christensen, 'Measuring Confirmation' (1999) 96 J Philos 437; Kyburg (n 115).

119 See generally P Horwich, *Probability and Evidence* (Cambridge University Press 1982); RD Rosenkrantz, 'Does the Philosophy of Induction Rest on a Mistake?' (1982) 79 J Philos 78, 78–97; P Teller, 'Goodman's Theory of Projection' (1969) 20 BJPhS 219, 219–38.

120 *Jurisdictional Immunities of the State* (n 28) [72].

121 See Kammerhofer (n 12) 544–45.

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steps in its analysis it also applies deductive reasoning. This approach is clearly apparent when the ICJ assesses the fundamental rules of customary international law, such as the existence and nature of the state practice and *opinio juris* elements. The ICJ does appear, at least in some cases, to deduce the existence of customary international law as a logical or necessary conclusion from other treaty or customary norms, or by analogy to similar norms, or even perhaps from legal principles. But the ICJ also uses deductive logic when it applies the (primarily) inductive approach. It determines how the elements will be evidenced, evaluated, and weighted.

However, the ICJ is also not very transparent in the logical reasoning it applies. While we might be tempted to conclude that customary international law has no secondary rules at all aside from appeals to deductive logic, the ICJ continues to affirm its adherence to the two-element, inductive approach. A possible solution is to distinguish between the existence and constitution of customary international law from its evidence. And it might also be helpful to observe that the ICJ is, after all, not proving facts, but law, where courts traditionally have more freedom with less demanding standards of evidence. These deductive steps might simply be methods for establishing some fundamental secondary rules but also lowering the threshold for inductive analysis when certain primary rules would make logical sense.

Ultimately, we return to the question posed at the outset of this chapter – that is, whether the identification and interpretation of customary international law is a question of fact or law. If it is a question of law, which seems reasonable, then the ICJ has a much more flexible guide in informing itself of the law, *jura novit curia*. Talmon concludes that this amounts to an 'assertion' of customary international law,[122] and Hakimi has even argued that there are no secondary rules at all.[123] But the analysis of the ICJ discussed above is not completely untethered from the logic of state practice–*opinio juris* and the various interpretive techniques meant to give content to rules generally. Thus, it is too extreme to say that the ICJ merely asserts rules on the basis of no secondary rules. Instead, it draws on and is constrained by an argumentative framework where it must identify rules with reference to what states do and what they think as a basis, and can give content those rules through deductions and analogies.

[122] Talmon (n 14) 423–26.
[123] Hakimi (n 17) 1510.

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