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Some Reflections on Identifying  
Custom in Contemporary  
International Law

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## 1. The concept of customary international law and international case law.

Custom has long been considered as the main, if not the exclusive, source of general international law.<sup>1</sup> Since the earliest doctrinal reflections, custom has been conceived as an unconscious and involuntary way of law making that derives its effectiveness from the force of tradition.<sup>2</sup> This is a basic definition common to all periods and all areas of law, regardless of the legal system involved in the phenomenon in question. In the course of the 20<sup>th</sup> century, international law scholars have mostly discussed the monistic or dualistic nature of customary norms, the latter becoming the dominant vision. Indeed, it is possible to say that the almost totally prevailing view is that these facts are to be grouped in two elements, *i.e.* an objective one, the repeated behaviour of States (*diuturnitas*), and a subjective one, the belief that such behaviour depends on a legal obligation (*opinio juris sive necessitatis*).<sup>3</sup>

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<sup>1</sup> H. S. SCHRADER, *Custom and General Principles as Sources of International Law in American Federal Courts*, in *Columbia Law Review*, 1982, 751 ff.

<sup>2</sup> K. L. KUNZ, *The Nature of Customary International Law*, in *American Journal of International Law*, 1953, p. 662 ff.; F. PARISI, *Customary Law*, in [The Encyclopaedia of Public Choice](#), Heidelberg, pp. 460-463; P. M. DUPUY, *Formation of Customary International Law and General Principles*, in D. BODANSKY, J. BRUNNÉE, E. HEY, *The Oxford Handbook on International Environmental Law*, Oxford, 2008, p. 449 ff.

<sup>3</sup> T. TREVES, *Customary International Law*, in *Max Planck Encyclopaedia of Public International Law (online)*, 2010, par. 8. See also B. CONFORTI, *Diritto Internazionale, XI ed.* (edited by M. IOVANE), Naples, 2018, p. 39 ff. In this regard, it is worth noting that N. BOBBIO, *La consuetudine come fatto normativo*, Turin, 2010 (re-printed), *passim*. has underlined that, while in the private law framework (that is to say, in regulating relations between individuals) the extent of a certain behaviour over time and throughout the majority of the members of society is especially important, this

Indeed, widespread repetition of behaviours within a community is the necessary condition to distinguish an unwritten normative fact based on spontaneous practice (such as a custom) from a voluntary normative act,<sup>4</sup> a unilateral decision, or a practice which could later be quickly abandoned. Moreover, without regular repetition and wide dissemination of the practice we could no longer discern *opinio juris ac necessitatis* as evidence for the conviction by the community as a whole that the usage in question is respected as a legal rule.

In addition to the above, it should be noted that the identification of an international customary norm has never been a serious issue in the past.<sup>5</sup> As pre-modern commentators made clear, custom is manifest in concrete actions by the members of a society. The claims made and resistance opposing them, in the context of a specific dispute would therefore be the most convincing evidence for the existence or non-existence of a customary norm. This is also consistent with the nature of custom as a normative fact, gradually asserting itself in the reality of social behaviour as a rule of conduct.<sup>6</sup> According to this approach, statements or abstract normative acts that do not correspond to what happens in the reality of intersubjective relations cannot therefore be considered sufficient evidence.

With particular regard to international law, courts have traditionally looked to such practice as the official positions of the executive, protests and reactions to the alleged breach of a customary obligation, and acquiescence to the claims of others.<sup>7</sup>

This concept of customary law never posed any particular problem when international law was only a homogeneous group of unwritten rules, regulating the power of States to exclusively govern a certain territory. Indeed, such rules are rooted in ancient practice dating back to the late Middle Ages and giving rise to the first principles of public law in Europe, namely the rules of territorial sovereignty, diplomatic immunity, and limitations to reprisals. Lastly, it should be noted that the majority of disputes concerning

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condition is not decisive in the formation of unwritten rules between entities exercising normative powers, i.e. States or State organs. Such a statement, if true, would apply to constitutional and international customary rules.

<sup>4</sup> Acts whose normative force depends on an explicit or implicit manifestation of will, such as contracts, statutes, treaties, or resolutions of international organisations. They are distinguished from a custom because in the case of custom there is no express manifestation of willingness that can be identified at a certain period.

<sup>5</sup> [N. ARAJÄRVI](#), *The Requisite Rigour in the Identification of Customary International Law: A Look at the Reports of the Special Rapporteur of the International Law Commission*, in *International Community Law Review*, 2017, p. 9 ff.

<sup>6</sup> G. J. POSTEMA, *Custom, Normative Practice and the Law*, in *Duke Law Journal*, 2012, p. 707 ff.

<sup>7</sup> N. PETERSEN, *The International Court of Justice and the Judicial Politics of Identifying Customary International Law*, in *European Journal of International Law*, 2017, p. 357 ff.

the existence and/or interpretation of these norms were resolved, until recently, through direct negotiations between States, with arbitration often limited to the fair calculation of damages.<sup>8</sup>

As international law now covers a much wider range of topics, mostly in the field of the protection of individuals, such as human rights, foreign investments, and the environment, the above scenario has changed dramatically.<sup>9</sup> This phenomenon is also due to the related proliferation of international courts,<sup>10</sup> from which a large amount of international cases originate, in particular in those areas where individuals are entitled to sue States directly,<sup>11</sup> with the result that a greater numbers of courts has to ascertain the existence and the content of a given customary norm. This is causing a change in the methods and characteristics of norm creation in international law,<sup>12</sup> and is putting the traditional notion of customary international law into crisis. It is no coincidence that the International Law Commission has established a Working Group on the "Identification of customary international law" (previously "Formation and evidence of customary international law") under the direction of Sir Michael Wood.<sup>13</sup>

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<sup>8</sup> A. M. SLAUGHTER BURLEY, *International Law and International Relations Theory: A Dual Agenda*, in *American Journal of International Law*, 1993, p. 205 ff.; N. PETERSEN, *Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, in *American University International Law Review*, 2007, p. 275 ff.

<sup>9</sup> V. LOWE, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in M. BYERS (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, Oxford, 2010, p. 207 ff.

<sup>10</sup> Y. SHANY, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford, 2003, p. 1 ff.

<sup>11</sup> The reference applies in particular to international investment law, where a real explosion of the number of arbitration proceedings has taken place in the last decade. See S. A. ALEXANDROV, *The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals*, in *Journal of World Investment & Trade*, 2005, p. 387ff.

<sup>12</sup> V. LOWE, fn. 11, pp. 207 and 213, where the author says, "the development [of international law] is taking the form of the emergence of normative concepts operating in the interstices between primary norms. These emergent concepts we may call 'interstitial norms' or 'modifying norms' or 'meta principles', because they do not themselves have a normative force of the traditional kind, but instead operate by modifying the normative effect of other, primary norms of international law". S. TALMON, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion*, in *European Journal of International Law*, 2015, p. 417 ff. in this regard stated that in the majority of the cases the ICJ simply asserted the rules that it applied. R. B. GINSBURG, *Bounded Discretion in International Judicial Law-making*, in *Virginia Journal of International Law*, 2005 p. 640, argues that it is "fair to characterize much customary international law as actually being declared by judicial bodies rather than arising from the explicit agreement of states". *Contra*, see A. ALVAREZ-JIMENEZ, *Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009*, in *International and Comparative Law Quarterly*, 2011, p.711 argued that the "flexible, deductive approach' has lost in importance in the recent jurisprudence of the International Court of Justice".

<sup>13</sup> For an update on the work of the Commission, see [http://legal.un.org/ilc/guide/1\\_13.shtml](http://legal.un.org/ilc/guide/1_13.shtml). In this regard, see, critically, L. GRADONI, *La Commissione del diritto internazionale riflette sulla rilevanza della consuetudine*, in *Rivista di diritto internazionale*, 2014, p. 667 ff.; SIENHO YEE, *Report on the ILC Project on "Identification of Customary International Law"*, in *Chinese Journal of International Law*, 2015, p. 375 ff. See also the reply to Sienho Yee by M. WOOD, *The present position within the ILC on the topic "Identification of customary international law": in partial response to Sienho Yee, Report on the ILC Project on "Identification of Customary International Law"*, in *Chinese Journal of International Law*, 2016, p. 3 f.; and the final reply by SIENHO YEE, *A Reply to Sir Michael Wood's Response to AALCOIEG's Work and My Report on the ILC Project on Identification of Customary International Law*, in *Chinese Journal of International Law*, 2016, p. 33 ff.



The goal of this paper is to examine the effects of judicialization on the traditional notion of international custom. In particular, we will try to demonstrate that international courts and tribunals are rendering it virtually impossible to distinguish between customary law, general principles, and judge-made law. Obviously, this phenomenon is most relevant to the norms more closely related to the intensification of international judicial activity, such as norms regarding the interpretation of treaties, the criteria for the attribution of international responsibility, and the discipline of international proceedings. However, the phenomenon in question extends to other areas, such as the possibility to invoke circumstances precluding wrongfulness, the criterion of global or effective control by a State over the acts of de facto organs, and the customary norms on the international due process of law.

Thus, in the next section, we will briefly outline the new methods currently used by international courts and tribunals to identify customary law. This working hypothesis will then be discussed and verified within the case law concerning the conditions for invoking the state of necessity, the attribution to a State of a conduct by a person or a group of persons effectively acting on the instructions, direction, or control of that State, as well as the rules on the international fair trial, and the doctrine of abuse of process as developed in international investment law. This reflection will conclude with an observation on the extent to which this judicial practice can produce effect in States not directly involved in a specific judicial solution.

## **2. The changing methods of identifying custom in international case law.**

The diversification of international rules and the growing number of international courts have profoundly changed the methods of identification, and the very concept, of customary international law.

Concerning the methods of identification, courts proceed to verify the existence of customary norms by calling upon normative references that are often disconnected from the actual practice of States. For this reason, they could be defined as practice of an abstract nature, as they do not correspond to behaviour actually observed by the States in their mutual relations, nor to claims made in relation to specific disputes.<sup>14</sup> Reference to diplomatic practice, for example, previously considered as the principal indicator of the *opinio juris* of States, has largely disappeared in the analysis of precedents carried out by international judges.

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<sup>14</sup> Please refer to fn. 12 above.

Conversely, the existence of customary norms has been affirmed or denied by making use of normative materials which, far from consisting in unconscious and spontaneous behaviour, are either a combined product of scholarship and institutions, such as the work and draft articles of the International Law Commission, or written and formally adopted sources such as multilateral treaties, recommendations of international organisations, declarations of the UN General Assembly, and national legislation. The ILC Draft Articles on State Responsibility and their commentaries, as well as the subsequent codification conventions, have practically constituted the sole basis for the assertion of certain customary norms concerning questions of the international responsibility of States and the interpretation of international treaties. Similarly, the provisions of the 1969 Vienna Convention on the Law of Treaties were considered equal to customary law regardless of their practical implementation by States.<sup>15</sup> However, generally speaking, treaty practice is used by international courts when selecting specific provisions outside their context and their interpretation in practice.

A similar approach also characterises the identification of customary norms on international proceedings and international criminal law, although in these specific areas the basic materials are not only international treaties, but also national legislations. Some uniformity of domestic norms disciplining aspects of international proceedings or criminal law has been considered indicative of the will to conform to an international customary norm, even though nothing could show that this was indeed the intention of national legislators.<sup>16</sup>

In carefully examining judicial practice, it is not difficult to discern the hermeneutical process through which courts excogitate these rules of international customary law. It will be clear from the description of this process that courts are looking for the authority of customary law elsewhere rather than in State practice. Judicial precedents, legal scholarship, and general principles of law are the most suitable candidates to take its place.

As a first step, international courts begin by inferring a sort of *opinio juris universalis* from the whole range of written, and therefore non-spontaneous, practice mentioned above. Lacking a firm grounding in actual State practice, this *opinio juris* does not establish any specific rights and obligations for States. In fact, it is formulated as a general principle of law<sup>17</sup>, namely a concise normative statement referring to abstract

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<sup>15</sup> Ibid. p. 69 ff.

<sup>16</sup> Ibid, pp. 39-48.

<sup>17</sup> See R. B. GINSBURG, fn. 12, p. 640 ff.

concepts rich in meaning. The due process of law, the restrictive interpretation of circumstances precluding wrongfulness, the recognition of the *de facto* organisation of a State, sustainable development, and human dignity, are some salient examples of such general principles.

This brings us to the second phase of law creating through judicial interpretation. Precisely because of their loose formulation, general principles lack an autonomous normative life and need further interpretative efforts by courts.<sup>18</sup> It is commonly affirmed that general principles exercise an auxiliary function in relation to norms. Instead of directly regulating a certain subject, they stimulate the courts' law-making activity in specific cases by suggesting a direction to be followed, a tendency to be respected, and a value that must be taken into consideration<sup>19</sup>. They give authority to a court when it wants to affirm a new, and more specific, customary norm that in reality has not yet emerged from actual State practice.

However, the anticipation of customary norms is only one possible application of the law-producing capacity of general principles. Not only do courts draw new obligations on States from a general principle of law but also, and more often, they make use of this source in order to supplement indeterminate treaty norms, to consolidate universal consensus on a certain legal regime, and to justify the solution of a specific case not expressly disciplined in the relevant treaty.<sup>20</sup> In other words, general principles provide justification and legitimation to propose a different interpretation of already existing norms, be they customary or conventional. Further legitimation may stem from references to legal scholarship and to non-positivistic formulae such as the respect for “elementary considerations of humanity”.

Let us briefly turn now to the third and concluding phase of this process. Once the general principle and the ensuing norm have been identified, international courts seek confirmation of the existence and scope of this norm (or of an innovative interpretation of an existing one), by cross-referencing other relevant international decisions regarding similar matters<sup>21</sup>. In other words, they deduce the effectiveness of a

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<sup>18</sup> See S. TALMON, fn. 12, p. 417 ff.

<sup>19</sup> M. IOVANE, *Metodo costituzionalistico e ruolo dei giudici nella formulazione dei principi generali del diritto internazionale*, in *Ars Interpretandi*, 2008, p. 103 ff.; ID., *L'influence de la multiplication des juridictions internationales sur l'application du droit international*, in *Recueil des cours*, The Hague, 2017, p. 371 ff.

<sup>20</sup> V. LOWE, fn. 9, p. 213.

<sup>21</sup> The technique of judicial cross-referencing has sometimes been to some extent institutionalised in the form of the so-called “taking into account approach”, where the judge “is obliged to consider previous decisions but may disregard them where reasons of substantive justice, or the mere need to foster a proper development of the law, suggest doing so”, see F. M. PALOMBINO, *Fair and Equitable Treatment and the Fabric of General Principles*, Heidelberg, 2018, p. 143 ff. On the phenomenon of cross-fertilization among international courts and tribunals operating in different areas of international law, see G. ZARRA, *Orderliness and Coherence in International Investment Law and Arbitration: An Analysis through the Lens of State of Necessity*, in *Journal of International Arbitration*, 2017, p. 634 ff.

customary norm or principle by examining its application by other courts, rather than in State practice. As cross-referencing among international courts and tribunals intensifies, case law gradually clarifies the details of the legal regime of the envisaged regulation independently of any previous practice. This approach to law-making tends to blur the distinction between custom, general principles, and case law.

In the light of the above premises, we here describe this process of law-making in international law through the prism of various categories of rules where the general nature of the sources has been inferred from elements other than States' practice.

### **3. Testing our working hypothesis: A) Circumstances precluding the wrongfulness of an internationally wrongful act.**

The first topic to examine in verifying our working thesis concerns the alleged customary nature of the circumstances that precludes wrongfulness. As we have seen, the courts begin by identifying a general principle of law, in this case the general principle of the restrictive interpretation of all circumstances precluding wrongfulness, whereby the certainty of legal relations normally takes priority over any derogation from the legal obligations in force. As a second step, international courts have affirmed the customary nature of important aspects of the rules on the circumstances precluding wrongfulness in international law on the basis of a reading of the ILC draft articles, which they deem sufficient to the purpose.

The *Rainbow Warrior* judgment<sup>22</sup> rendered by an arbitration tribunal on 30 April 1990 may be seen as the first move towards this result. In this case, France had invoked force-majeure and distress, respectively disciplined under arts. 31 and 32 of the draft articles on State responsibility approved on first reading by the ILC<sup>23</sup>, to justify the repatriation of agents Mafart and Prieur from the island of Hao in violation of the agreement of 9 July 1986. The Tribunal seemed to tacitly admit that these provisions were justified under customary law and proceeded to check their possible application to the French action. With regard to force-majeure, the Court referred to the restrictive interpretation of art. 31, expressly highlighting passages in the report of the International Law Commission stating that the application of this circumstance is justified in the face of involuntary or unintentional acts and situations where there is no

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<sup>22</sup> *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair 30 April 1990*, in *Report of International Arbitral Awards*, Vol. XX pp. 215-284.

<sup>23</sup> See, on these articles, M. IOVANE, *L'influence*, fn. 19, p. 398.



physical ability to perform, and lastly recognized the merits of New Zealand's position<sup>24</sup>. As for distress, the Court stated that it must be caused by circumstances of extreme urgency involving elementary considerations of humanity capable of affecting the actions of an organ of State. Yet it denied that such circumstances existed in this case, even if France invoked the ill health of Mafart and another agent's need to visit his dying father.

More recent cases have gradually defined the state of necessity as a circumstance precluding wrongfulness as established by customary law. The basic line continues to be that any circumstance of exclusion must be exceptional, but case law has finally clarified the conditions for accepting a defence based on necessity.<sup>25</sup>

The 1997 ICJ judgment on the *Gabcikovo-Nagymaros Project*<sup>26</sup> is essential in this regard. Again, the starting point is the work of the ILC on State Responsibility, in particular draft art. 33 adopted on first reading, which later became art. 25 of the Draft Articles adopted in 2001<sup>27</sup>. This is the only reference to practice used by the Court to assert, at para. 51, that "necessity is a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation". In subsequent paragraphs, the Court also confirms the customary nature of the conditions for invoking this cause, which must anyway be grouped cumulatively. These are: a) the infringement of an essential interest, b) the absence of any other means to protect this interest, and c) the existence of a grave and imminent peril. The Court has no hesitation in recognising that environmental concerns may constitute an essential interest not only for a State, but also for the international community as a whole. However, it does not

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<sup>24</sup> Para. 78, referring to *Yearbook of the International Law Commission*, 1979, vol. II, para. 2, p. 133 ff.

<sup>25</sup> Beyond the cases mentioned below, it is possible to refer to various other ICSID decisions, including *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No ARB/01/8, Award of 12 May 2005, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No ARB/03/9, Award of 5 September 2008, *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic* (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), ICSID Case No ARB/01/3, Award of 22 May 2007; and Decision on the Application for Annulment of the Argentine Republic of 30 July 2010; *Sempra Energy International v. The Argentine Republic*, ICSID Case No ARB/02/16, Award of 28 September 2007; and Decision on the Argentine Republic's Application for Annulment of the Award of 29 June 2010. On these decisions see A. REINISCH, *Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases?*, in *Journal of World Investment & Trade*, 2007, p. 191 ff.

<sup>26</sup> *Case concerning the Gabcikovo-Nagymaros project (Hungary v. Slovakia)*, judgment of 25 September 1997.

<sup>27</sup> '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.'

consider that the alleged peril cited by Hungary was grave and imminent or that the State had no other way to address it. From there on, the judgment of the ICJ, and draft art. 33 would be cited in an increasing number of successive decisions. This case law has ended up replacing the spontaneous practice of States as evidence for the existence of customary law on the state of necessity.

A primary example is the judgment of the International Tribunal for the Law of the Sea of 1 July 1999 in the *Navire Saiga (No. 2)* case.<sup>28</sup> Quoting the relevant paragraphs from the *Gabcikovo* judgment and again art. 33 of the former draft, the Tribunal first referred to the ICJ's statement regarding the customary nature of the conditions for recognising grounds based on necessity. Secondly, it excluded that these conditions were met in the case in hand, as the interest of Guinea in maximising its sales of diesel is not admissible as a point of vital interest, nor could boarding the ship be considered the only way to address the problem.

In addition, the ICSID decision in *LG & E Energy Corp. v. Argentina* of 3 October 2006<sup>29</sup> aptly illustrates the trend in the previous international case law. This judgment concerns Argentina's violation of the bilateral investment agreement between Argentina and the United States of 14 November 1991. The alleged violation was committed during the economic crisis of the 80s and 90s and Argentina had expressly invoked the state of necessity to justify a series of restrictive measures, such as freezing gas prices, which the U.S. investors saw as discriminatory and contrary to the principle of fair and equitable treatment. We should also remember that this judgment is only one example among other ICSID decisions on the measures taken by Argentina in the same period. However, this is a particularly interesting judgment because it illustrates a case where the state of necessity defence was finally accepted. Indeed, the court should have decided the issue on the basis of art. XI of the bilateral investment treaty between Argentina and the United States, which specifically provides for the application of measures by Contracting States to maintain public order and the protection of their essential security interests. However, the court felt the need to confirm its conclusion on the conditions for the admissibility of the state of necessity on the basis of customary international law. It thus proceeded to ascertain this right by referring exclusively to art. 25 of the 2001 Draft Articles and commentaries, and concluded by asserting that all the conditions laid down therein are found in the case in hand.

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<sup>28</sup> *The M/V 'Saiga' (No.2) case (Saint Vincent and the Grenadines v. Guinea)*.

<sup>29</sup> *LG&E Energy Corp. LG&E Capital Corp. LG&E International Inc. v. Argentine Republic*, ICSID Case N° ARB/02/1.

In the *Suez, Sociedad de Aguas v. Argentina* judgment of 30 July 2010,<sup>30</sup> another ICSID Tribunal had the opportunity to rule on the customary international state of necessity regime. This time, the court did not uphold the Argentine claim, but it reached this conclusion by calling upon the notion of necessity as disciplined by customary international law. This notion has been completely redefined on the basis of the aforementioned art. 25 of the Draft and, once again, the *Gabcikovo* judgment of the ICJ.<sup>31</sup>

We cannot conclude the present examination of the practice on the state of necessity without mentioning the position taken by the ICJ in its advisory opinion of 9 July 2004 on the *Construction of a wall in the Occupied Palestinian Territory*.<sup>32</sup> The Court rejected Israel's allegations, confirming its conclusions in *Gabcikovo*. It recalled in particular that under customary international law, the state of necessity "can be admitted only in exceptional cases" and "that it can only be invoked under certain conditions which must be cumulatively satisfied", which was not the case regarding the construction of the wall in question.

The above examples clearly demonstrate that, although it is almost impossible to say that a custom exists, in the traditional sense, international courts and tribunals have had no difficulty in recognizing that state of necessity reflects general international law on the basis of a process of cross-referencing among international decisions based on relevant precedents.

***B) (follows) The attribution to a State of the acts of a group of persons in fact acting on the instruction or under the direction or control of that State.***

If the case law on state of necessity appears generally consistent, this is not the case of another issue concerning the law of international responsibility, namely the attribution to a State of the conduct of a group of persons acting under its direction or control. As is well known, Article 8 of the 2001 ILC Draft Articles states: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State, in carrying out the conduct". The first part of Article 8 deals with the more traditional and settled issues of private persons acting on the instructions of a State (probably covering also the hypothesis of the so-called *fonctionnaire de fait*). However, whether a norm attributing to a State the conduct of a group of persons acting under its direction and control can be considered customary is much more controversial.

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<sup>30</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19.

<sup>31</sup> The subject is debated in depth in G. ZARRA, fn. 21, pp. 658-661.

<sup>32</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004.

This criterion was first introduced by the ICJ in the “Case concerning Military and Paramilitary Activities in and Against Nicaragua” (*Nicaragua v. United States*) of 27 June 1986.<sup>33</sup> After the *Nicaragua* judgment, two further precedents have subsequently enriched the international practice on this problem: the decision of the Appeals Chamber of the ICTY of 15 July 1999 in *Prosecutor v. Dusko Tadic*,<sup>34</sup> and the ICJ judgment of 26 February 2007 in the *Case concerning the Application of the Convention on the Crime of Genocide*.<sup>35</sup>

Let us first observe that the ICJ introduced the criterion of effective control over groups of persons<sup>36</sup> to solve a problem of attribution that is, perhaps, specific to international law only. While similar principles govern the attribution to a State of persons acting in fact on its behalf in both domestic and international law, the “the direction and control” test addresses a new problem emerging in recent practice, namely the attribution of the conduct of paramilitary formations showing important factual links with a given State. Indeed, former Article 8 of the Draft adopted on first reading by the ILC in 1996 but written on the basis of the reports by R. Ago dating back to the nineteen-seventies and eighties,<sup>37</sup> did not even mention this criterion, citing only the classical hypothesis of private subjects acting *in fact* on *behalf* of the State.<sup>38</sup>

In the *Military and Paramilitary Activities in Nicaragua* judgment of 1986,<sup>39</sup> the Court had to answer the following question: is a State responsible for *all* the acts of an organised entity over which it exerts a degree of control on account of the financial, political and logistic support that it provides? It is worth stressing the difference between this peculiar problem and the traditional notion of *de facto* organs under public domestic law. Whereas the latter notion implies entrusting private persons and entities with *specific*

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<sup>33</sup> International Court of Justice, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, judgment of 27 June 1986.

<sup>34</sup> *Prosecutor v. Dusko Tadic a/k/a "Dule"*, Decision on the defence motion for interlocutory appeal on jurisdiction.

<sup>35</sup> *Case concerning application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007.

<sup>36</sup> T. DANNENBAUM, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, in *Harvard International Law Journal*, 2010, p. 113 ff.; K. E. BOON, *Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines*, in *Melbourne Journal of International Law*, 2014, p. 1 ff.

<sup>37</sup> See the Reports by Prof. Roberto Ago available at [http://legal.un.org/ilc/guide/9\\_6.shtml](http://legal.un.org/ilc/guide/9_6.shtml).

<sup>38</sup> At that time Article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State) said that “[t]he conduct of a person or group of persons shall also be considered as an act of the State under international law if: (a) it is established that such person or group of persons was in fact acting on behalf of that State; or (b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of Authority”.

<sup>39</sup> Fn. 33 above.

governmental tasks, Nicaragua's application concerned responsibility for the entire activity of a well-structured *factual* entity. An entity of the kind the Appeals Chamber of the ICTY effectively defined as “an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels”.

In the Nicaragua/United States case, it was above all a matter of verifying the defendant's responsibility for the alleged violations of humanitarian law committed by the *Contras* forces. As the Court could not apply the Geneva Conventions and other multilateral conventions due to a limitation to its jurisdiction, Nicaragua asked it to ascertain whether the United States, in training, arming, equipping, financing and supplying the *Contras* forces had violated certain general principles of international humanitarian law, in particular the obligations not to kill, injure or remove Nicaraguan citizens. As the *Contras* did not of course have the legal status of an US organ, the Court engaged in a very careful analysis of the available documentation with a view to establishing the nature and extent of the links between the *Contras* and the Washington government.

It first took into account the possibility that the relationship “between the *contras* and the US Government were so marked by dependence (...) that it would be right to equate the *contras* with an organ of the USA”,<sup>40</sup> according to the traditional principles on attributing to States the conduct of its *de facto* organs. However, after examining the documents presented, it ruled that this condition had not been met.

Indeed, the mass of documentation showing military and economic relations between the two entities was, however, so vast that the Court felt compelled to make a further attempt. In particular, it wondered whether the responsibility of the U.S. could nevertheless be found by considering the degree of control over the *Contras* forces as a whole. At the end of this analysis, the Court reiterated the requirement that in order to attribute international responsibility, still further evidence was needed that the U.S. had specifically “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State”.<sup>41</sup> These acts, continued the Court, might well have been committed by members of the *Contras* forces outside the control of the United States. For the legal responsibility of the latter to be recognised, it should in principle be established that they had effective control of the military or paramilitary operations in which the violations in question were supposed to have occurred.<sup>42</sup>

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<sup>40</sup> Para. 109.

<sup>41</sup> Para. 108.

<sup>42</sup> Para. 242.

Since then, effective control has been considered in legal scholarship, and then codified by the ILC, as an independent general principle disciplining in detail the attribution of the conduct of a group of persons effectively acting under the direction or control of a State.<sup>43</sup> This was certainly an important step in clarifying the rules for attributing internationally wrongful acts. In this regard, the criteria codified in art. 8 referring to the 1986 judgment are undoubtedly a result, although so far it has never led to the specific attribution to a State of wrongful conduct by irregular foreign troops under its control.

This is but one more example where the existence of a customary rule is affirmed independently of any previous examination of State practice. This happened although it was certainly not the intention of the Court to create a new criterion for the attribution of an internationally wrongful act in 1986. In our opinion, the ICJ merely wanted to confirm traditional case-by-case assessment of the existence and intensity of existing factual links between the State and the material perpetrators of a particular action for it to be attributed to the State. Indeed, the Court has never spoken of effective control as a criterion of attribution under customary law in relation to the activities of organised entities like the *Contras*. It merely rejected Nicaragua's claim to attribute to the USA *en bloc* all the acts of a group of this kind, despite it being controlled and financed by the US. This conclusion was all the more inevitable, especially considering that, after all, no concrete episode of violations of humanitarian law had been brought before the Court, which would have made it possible to determine the degree of involvement of the United States, as Nicaragua was merely invoking some non-specific violations by the *Contras*.

In addition to the foregoing, it should be noted that *Contras'* general dependence on the U.S., which the Court was very well able to document for the purposes of its judgment, was not without legal consequences. Because of this dependence, and especially because of the dissemination of a guerrilla manual used by the *Contras*, the Court stated that the US was to some degree responsible for encouraging them to commit acts contrary to the general principles of humanitarian law. In reality, abetting violations of human rights were not clearly defined as an international wrongful act by the Court, but it could be considered an aspect of the breach of the obligation not to intervene in the affairs of another State, a violation that the Court expressly linked *to training and financial support for Contras activity*.

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<sup>43</sup> A. CASSESE, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, in *European Journal of International Law*, 2007, p. 649 ff.

If the existence of a customary law still appears uncertain in the 1986 judgment, it would appear to be more clearly inferred from the judgment of the ICJ itself of 26 February 2007 in the *Case concerning the Implementation of the Convention on the Crime of Genocide*.<sup>44</sup> The contention in this decision concerned the determination of Serbia's responsibility for acts of genocide in the Srebrenica area by the Republika Srpska (RS) and the VRS (the RS army), as well as various other paramilitary militia groups. Bosnia and Herzegovina declared, in effect, that all these entities, despite their apparent status, should be considered *de facto* organs of the Federal Republic of Yugoslavia. First, the Court discounted that the above entities were *de facto* agents, but it also rejected the hypothesis that they were acting on the instructions, or the guidelines, or under the control, of the respondent State. In this regard, the Court stated explicitly for the first time that the criterion of effective control, as codified in art. 8 of the ILC Draft, was now part of customary international law, based on virtually the only precedent, namely, the ICJ *Nicaragua v. United States* judgment.

It is nevertheless important to underline that the existence of well-documented links between the Federal Republic of Yugoslavia and the paramilitary entities responsible for the Srebrenica genocide was not inconsequential in the conclusions of the Court. If, in *Nicaragua v. USA*, the close relationships between the US and the *Contras* were used by the Court to denounce encouragement by the US in the violation of humanitarian law by the *Contras* and to assert the breach of the obligation of non-intervention in the internal affairs of Nicaragua, in the judgment in hand similar links with various paramilitary groups made it possible for the Court to affirm Yugoslavia's violation of the obligation to prevent genocide in Srebrenica by the militias in question.

In the 2007 Judgment, the ICJ also strongly criticised the *Prosecutor v. Dusko Tadic* decision of the Appeals Chamber of the ICTY on 15 July 1999.<sup>45</sup> It especially criticised the introduction of the criterion of "overall control" as a substitute for the more stringent criterion of "effective control" to determine the attribution to a State of the conduct of irregular troops financed and supported by the State. This interjudicial conflict is one more sign that the customary nature of the "effective control" criterion of attribution is far from established.

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<sup>44</sup> *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*.

<sup>45</sup> Fn. 34 above. It should be recalled that the customary nature of the criterion of overall control was subsequently confirmed by the same Appeals Chamber judgment in the later *Aleksovski* case of 24th March 2000.

**C) (follows) The customary norms on the international fair trial.**

International case law, and particularly that of the international criminal courts, has stated or confirmed the existence of a number of customary rules of a procedural nature relating to the establishment and conduct of international proceedings.<sup>46</sup> These norms range from determining the criteria for the international fair trial, to clarifying the rule of *kompetenz-kompetenz*, and from the binding nature of provisional measures to the doctrine of inherent powers.

In this regard, it is worth taking a closer look at certain steps relating to the affirmation of the customary nature of the principles of the international fair trial, as it is an extension of the domestic fair trial regime. In this regard, as will be demonstrated below, the most significant contribution of international case law is the consolidation of the international fair trial regime where individuals appear as plaintiffs or defendants. We will limit, in this regard, our analysis to the case law of the Tribunal for the former Yugoslavia and the International Criminal Court.

In the area of international criminal law, the courts have formulated two general principles that have formed the basis for asserting the customary nature of a series of specific procedural rules.<sup>47</sup> These are the principles of the "right to an independent and impartial international criminal court" and "to a fair trial", sometimes also known as the principle of "the fair conduct of the proceedings".<sup>48</sup>

The first important step in this regard is certainly the decision handed down on 2 October 1995 by the ICTY Appeals Chamber on the preliminary objection to jurisdiction in the *Tadic* case.<sup>49</sup> The Appeals Chamber began by recognizing that the Tribunal for the Former Yugoslavia is a legitimate court since it is a court of justice constituted and operating in accordance with the rule of law. It then recalled that the Tribunal had indeed been set up in accordance with the relevant international norms and, what is more, offered all the guarantees of fairness, justice and impartiality required by internationally recognised human rights bodies. According to the Chamber, a tribunal established by law is a court set up by a competent body in accordance with the relevant legal procedures, and that observes the requirements of procedural

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<sup>46</sup> See J. THORMUNDSSON, *The Sources of International Criminal Law with Reference to the Human Rights Principles of Domestic Criminal Law*, available at <http://www.scandinavianlaw.se/pdf/39-17.pdf>, 2009, p. 388 ff. See also A. CASSESE, *The Statute of the International Criminal Court: Some Preliminary Reflections*, in *European Journal of International Law*, 1999, p. 144 ff.

<sup>47</sup> See L. VAN DEN HERIK, *The Decline of Customary International Law as a Source of International Criminal Law*, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2587622](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587622), 2015, p. 1 ff.

<sup>48</sup> See, in this regard, M. IOVANE, *L'influence*, fn. 19, p. 333 ff.

<sup>49</sup> Fn. 34 above.



fairness. Even if it did not yet speak explicitly about guarantees under customary international law, it certainly emerges from the context and the language used, that in the intention of the Chamber, these guarantees have universal value and are therefore a condition of legitimacy of domestic and international courts alike. The guarantees referred to by the Chamber are those listed in Art. 14 of the UN Covenant on Civil and Political Rights, which it expressly mentions in the judgment, and are, moreover, the same as those provided for in other international conventions on the protection of human rights, including the European Convention. The Chamber also tried to strengthen its position by citing the case law of the Human Rights Committee of the United Nations and the Inter-American Court of Human Rights, which have repeatedly considered the implementation of these safeguards as a condition of the legitimacy of any special or extraordinary court. It is implicit that in the opinion of the Chamber, this case extends to the institution and operation of the Tribunal for the former Yugoslavia as well as any other international court.<sup>50</sup>

The independent and impartial nature of the Tribunal for the former Yugoslavia was acknowledged by the ECHR in its *Natelic v. Croatia* decision of 4 May 2000<sup>51</sup>, declaring the applicant's case inadmissible. The applicant alleged that the Tribunal was not established by law as required by art. 6 of the ECHR and that extradition to the Netherlands would therefore infringe his entitlement to a fair trial. According to the European Court, the articles of the Statute of the Tribunal and its Rules of Procedure provide all the necessary safeguards to a fair trial, including guaranteeing impartiality and independence. The Court thus indirectly confirmed that these principles correspond to those of the European Convention and are therefore universal.

In *Prosecutor v. Delalic*,<sup>52</sup> the Tribunal began to draw specific principles from the general principle of the international fair trial. In its judgment of 28 April 1997, the Trial Chamber first stated that the norms of the Statute of the Tribunal must be interpreted in the light of international case law on a similar issue, thus confirming the general nature of the principles of the fair trial. Based on numerous citations from the ECHR and domestic case law, the Chamber went on to confirm that both the right of the accused to a public trial and the right of witnesses to benefit from protection measures in the interests of justice are international principles of the fair trial. The Chamber decided to conduct a case-by-case examination of the different situations in order to find a balance between the two opposing needs.

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<sup>50</sup> Paras. 45-47.

<sup>51</sup> European Court of Human Rights, Fourth Section, Decision as to the admissibility of Application no. 51891/99.

<sup>52</sup> *Prosecutor v. Zejnil Delalic*, Decision on the motions by the prosecution for protective measures for the prosecution witnesses pseudonymed "b" through to "m".

The *Aleksovski* case before the Tribunal for the Former Yugoslavia is also interesting for our purposes.<sup>53</sup> In its judgment of 16 February 1999 on the Admissibility of elements of proof, the Trial Chamber stated that the principle of equality of arms is a well-established principle of international law<sup>54</sup> and that this principle applies to both the prosecution and the defence. In support of its position, it cited certain well-known ECHR judgments. In addition, in the later judgment of 24 March 2000, which we have already mentioned for other reasons, the Appeals Chamber added the right of the accused to “file an appeal to a court of second instance” to the various guarantees of a fair trial making up part of international customary law. “The right to appeal”, the Chamber stated verbatim, “is a component to a fair trial, which is itself a rule of customary international law”.<sup>55</sup> It is true, indeed, that the right of appeal is now effectively provided for by both the international systems for the protection of human rights and the international or internationalised criminal tribunals.

It is also important to note that the Chamber considered the right to appeal as part of the international human rights system, namely the right of the accused to legal certainty and predictability. Indeed, the realisation of this right presupposes a judicial system based on a single, unified, coherent, and rational corpus of law.

It is at this point that the Chamber introduced, perhaps for the first time with such clarity, the rule of binding precedent in international law. It introduced it with regard to the right of the accused to expect similar cases to be decided in the same way, a right that also obliges the lower courts to comply with the *ratio* of second instance judgments. In conclusion, the goal of the certainty of law cannot be achieved, according to the Appeals Chamber, if each Trial Chamber has the discretion not to comply with judgments previously rendered by the Appeals Chamber. These considerations on the principle of *stare decisis* as a guarantee for the accused of the predictability of law stem, of course, from the special regulation of the Statute of the Tribunal for the Former Yugoslavia. But the judgment ends up setting out a general principle which can also be extended to other international judicial systems.

In addition to the case law of the *ad hoc* criminal tribunals, an important example in this regard is provided by the decision of Trial Chamber I of the International Criminal Court of 31 March 2006 on the *Lubanga*

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<sup>53</sup> *Aleksovski* (IT-95-14/1).

<sup>54</sup> Para. 23.

<sup>55</sup> Para. 113.iii.

case.<sup>56</sup> From para. 34 of the decision, the International Criminal Court proceeds to formulate the right to a fair trial as a general principle of international law, citing a series of concordant provisions of international instruments on the protection of human rights, as well as art. 8 of the Universal Declaration of Human Rights. It also specifies that any application of the principle of the fair trial must respect the criterion of "balancing" because equity, as stated by the ICJ in its judgment of 24 February 1982 on the continental shelf between Tunisia and Libya, "comes directly from the idea of justice." According to the Court, balancing, as the main element of procedural fairness, includes the principle of equality of arms, the adversarial principle, as well as the duty to respect the authority of the public prosecution, the rights of the defence, and those of the victim. It then moves on to apply these general criteria to the specific problem that was put to it and concludes by saying that "the principle of procedural fairness applies not only to the stage of the case when a warrant of arrest or a summons to appear are issued, but also prior to the opening of the case and the preliminary stage of the proceedings before the Court".<sup>57</sup>

**D) (follows) The doctrine of abuse of process in international investment arbitration.**

A final example concerning the creation of rules of general international law from international case law regards the doctrine of abuse of process in international investment law.

The proliferation of international proceedings in the recent years, as is well known, has principally been in connection with investment arbitration, mainly due to the emergence of the concept of "arbitration without privity", according to which an investor may take advantage of an arbitration clause contained in a bilateral investment treaty (BIT) and commence arbitration against the host state even in the absence of an *ad hoc* contractual commitment to arbitrate between the investor and the host state.<sup>58</sup>

The possibility of investors starting arbitration proceedings against host states is usually subject to a nationality requirement set forth in the same BITs (and in the ICSID Convention), i.e., the investor must be a national of the other contracting state in the BIT. The investor (which may, of course, be a company), however, is not required to have a substantial link with the State where it is incorporated; as a consequence, it may well happen that a company is established in a country for the sole purpose of taking advantage of the protection established in a certain BIT. It may happen, for example, that a national of

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<sup>56</sup> Decision on the request of an attorney seeking leave to appeal the Chamber's decision of January 17, 2006.

<sup>57</sup> Para. 35 -36.

<sup>58</sup> A. GIARDINA, *L'arbitrato internazionale in materia di investimenti: impetuosi sviluppi e qualche problema*, in I *Rapporti economici internazionali e l'evoluzione del loro regime giuridico*, in R. LUZZATTO, N. BOSCHIERO (eds.), Naples 2008, p. 319-320; J. PAULSSON, *Arbitration Without Privity*, in *ICSID Review – Foreign Investment Law Journal*, 1995, 232- 233.

the host State incorporates a company in a foreign State just in order to render a dispute which was purely domestic (and that, as a consequence, was to be submitted before national courts of the host State) “international” – and, therefore, entitled to the protection of a certain BIT.

According to a literal interpretation of the usual wording of BITs (which just refers to the foreign nationality of the investor), an investment arbitral tribunal should, in such cases, assume jurisdiction. However, it is self-evident that this is a clear abuse of the mechanism of investment protection and investment arbitration and it is no coincidence that tribunals have looked at this practice with suspicion and started to search for mechanisms aimed at precluding the exercise of these abusive claims.<sup>59</sup>

On the other hand, there is no rule of international law (either general or conventional) allowing tribunals to decline jurisdiction or declare the claim inadmissible. Nevertheless, tribunals have not hesitated to say that *general international law precludes abuses of process* and have thus refused to exercise their jurisdiction in all the cases where it was evident that the claim was manifestly abusive, despite the lack of evidence for the existence of any of the elements of custom with regard to such a concept.<sup>60</sup>

This evolution has very recently taken place also with regard to the phenomenon of parallel proceedings in investment arbitration.<sup>61</sup> This phenomenon has arisen in three different scenarios: (1) the same party stipulates a contract and brings a treaty claim against the host State at the same time;<sup>62</sup> (2) various shareholders of the same company operating a foreign investment bring several parallel claims against the host State;<sup>63</sup> (3) different companies within the same group (forming a chain terminating with the corporation that actually owns the investment) bring parallel claims against the host State.<sup>64</sup> In all the above cases, even though investors exercise their rights arising from contracts and/or treaties when they start multiple claims, parallel proceedings are highly regrettable from the point of view of several policy considerations. These include the risk of undermining the reliability and legitimacy of the adjudication process, the lack of legal certainty, the prejudice generated to the principle of judicial economy and the

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<sup>59</sup> See H. ASCENSIO, *Abuse of Process of International Investment Arbitration*, in *Chinese Journal of International Law*, 2014, p. 763 ff.; E. DE BRABANDERE, ‘Good Faith’, ‘Abuse of Process’ and the Initiation of Investment Treaty Claims, in *Journal of International Dispute Settlement*, 2012, p. 609 ff. More generally on the doctrine of abuse of process see M. GESTRI, *Considerazioni sulla teoria dell’abuso del diritto nella prassi internazionale*, in *Rivista di diritto internazionale*, 1994, p. 5 ff.

<sup>60</sup> See, in this regard, *inter alia*, *Phoenix Action Ltd. v. the Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009.

<sup>61</sup> G. ZARRA, *Parallel Proceedings in Investment Arbitration*, Turin – The Hague, 2017, p. 1 ff.

<sup>62</sup> *Ibid.* p. 3 ff.

<sup>63</sup> *Ibid.* p. 7 ff.

<sup>64</sup> *Ibid.* p. 13 ff.

lack of an ultimate goal.<sup>65</sup> As originally proposed by some authors,<sup>66</sup> after an initially different approach, arbitral tribunals started referring to the principle of abuse of process also in order to avoid the phenomenon of parallel proceedings. It is worth noting, in this regard, the very recent award in *Orascom v. Algeria*,<sup>67</sup> where the tribunal said, “[i]t is true that tribunals in the past have adopted different approaches in relation to constellations that may show some similarities with the present case. In particular, the tribunals in *CME v. Czech Republic*<sup>68</sup> and *Lauder v. Czech Republic*<sup>69</sup> allowed the claims under different investment treaties to proceed, despite the fact that both sets of proceedings were based on the same facts and sought reparation for the same harm. The tribunals then reached contradicting outcomes, which was one of the reasons these decisions attracted wide criticism. These cases should therefore be placed in the context of their procedural history, as the respondent had refused several offers to consolidate or otherwise coordinate proceedings. *Moreover, it cannot be denied that in the fifteen years that have followed those cases, the investment treaty jurisprudence has evolved, including the application of the principle of abuse of rights (or abuse of process) (...). The resort to such principle has allowed tribunals to apply investment treaties in such a manner as to avoid consequences unforeseen by their drafters and at odds with the very purposes underlying the conclusion of those treaties*” (emphasis added).

As for the examples cited above, the Tribunal referred neither to State practice nor to domestic case law, nor did it clarify what kind of principle the doctrine of abuse of process is in international law (i.e. a custom, a general principle of international law, or a general principle recognized by civilized nations) but based its decision on previous investment awards referring to such a source of law.

This is a further and very recent demonstration of the changing process of norm creation in international law.

#### 4. Conclusions.

This paper argues that, due to the proliferation of international courts and tribunals, as well as the growing case law (in particular in areas where individuals are entitled to sue States directly), the classical methods of identifying the existence of a rule of customary law are now proving inadequate. In particular, it seems that international courts are not considering concrete State behaviour as the most important evidence in

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<sup>65</sup> Ibid., pp. 37-47.

<sup>66</sup> Ibid., p. 128 ff.; E. DE BRABANDERE, fn. 59, p. 609 ss.

<sup>67</sup> *Orascom TMT Investments S.à r.l. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award of 31 May 2017, paras. 547-548.

<sup>68</sup> *CME v. Czech Republic*, UNCITRAL, Final Award 14 March 2003, para. 412,

<sup>69</sup> *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001.

the process of creating unwritten rules. They are rather looking for a sort of universal consensus by examining written and abstract legal material (treaty provisions, resolution of international organisations, draft articles and commentaries of the ILC) that do not automatically reflect the *opinio juris* of the majority of States. This law-creating process has been illustrated by several examples dealing with the state of necessity, the attribution to States of the acts of *de facto* organs, the principle of fair trial and the doctrine of abuse of process in investment arbitration. The direct consequence of the above is that the traditional sources of general international law (i.e., custom and general principles) are now going to be used interchangeably in some way, as both of them draw on international case law rather than what States have actually done or claimed.

What is, ultimately, the place of this international case law in the system of the sources of international law? How does it relate to the methods of consolidating customary law where jurisprudence is just one among many aspects of the relevant international practice? Given the absence of a centralised international judicial system, it would seem unlikely that case law will completely replace State practice in the formation of customary norms. On the other hand, one cannot fail to recognise that international tribunals are building up an increasingly consistent system of precedents supported by different authorities and sources of legitimation.

The expanding law-making power of international courts is parallel to a similar attitude among domestic courts, even in civil law judicial systems where the principle of *stare decisis* is not applied institutionally. Furthermore, the reasons for this phenomenon are almost identical in both domestic and international law, namely the unclear and convoluted wording of many written sources, underlying political compromise, and the lack of regulation of delicate issue, due to the time necessary to adopt an innovative solution by national parliaments or international law-makers.

However, granting the courts a margin of discretion does not mean that they can hand down arbitrary decisions unconnected to the reality of international relations and in violation of all the procedural constraints and limitations established by their statute. They would risk pronouncing illegitimate judgments, which would have no impact whatsoever on the development of international law. The interesting thing about the recent proliferation of international courts is the possibility to assess the growing case law using strict theoretical parameters and the ethical considerations suggested by the different schools on legal interpretation. The chances of an individual decision becoming an established practice and producing effective changes in international law depend very much on the grounds of the



decision itself. Indeed, an international decision purporting to affirm the existence of customary norms in the absence of State practice or to impose an evolutive interpretation in spite of the wording must have a truly solid basis. Courts must explain in a satisfactory way the different steps of their reasoning. This is why international decisions are looking more and more like the common law model, characterised by lengthy justifications. They do not rely solely on the judicial syllogism, which consists in stating the applicable law pertaining to the given facts. In the cases examined here, we can see that courts attempt to discern the applicable law from general principles, calling upon external references such as scholarship, preambles of treaties, private codifications, general considerations of fairness, and so on. This then appears to constitute an attempt to establish a solution that can be used not only to conclude the case in hand, but also similar future cases. In fact, the courts' aim is to hand down decisions that reflect the changing spirit of the times, moving beyond the constraints of existing rules.

The future of this judicial practice will mostly depend on the reaction of other international courts and the majority of States. Indeed, if the findings are carefully set out and comply with all the formal requirements, a decision may become a precedent consequently observed by other international tribunals, thus becoming a sort of *usus fori*. On the other hand, a precedent that affirms, modifies, or interprets existing norms in an evolutionary way could be followed spontaneously by the members of the international community as a whole and thus achieve the status of customary norm. This is certainly the case, for example, of judicial practice on the circumstances precluding wrongfulness and some principles of the international fair trial.