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EDİTÖRDEN…/*FROM THE EDITOR…*

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Dergimizin yeni sayısının yayımlanmasının heyecanını sizlerle paylaşmaktan mutluluk duyuyoruz. Önceki sayılarımızda olduğu gibi, bu sayımızda da hukuk mesleğinin çeşitli sorunlarını derinlemesine irdeleyen, nedenlerini tartışan ve çözüm önerileri getiren ilgiyle okuyacağınızı düşündüğümüz makale ve görüşlere yer verilmiştir. Dergimizin bu sayısında Doç. Dr. Canan Küçükali'nin "*Eser Sahibinin Cayma Hakkı ve Caymaya İtiraz Davası*", Arş. Gör. Dr. Özüm Demirkol'un "*Fikri Mülkiyet Haklarına İlişkin Sözleşmelerde İşçi Buluşlarına Uygulanacak Hukuk*", Dr. Kübra Tunç'un "*Kripto Varlıkların Hırsızlık Suçu Bakımından Değerlendirilmesi*", Arş. Gör. Muratcan Gökdemir'in "*Determining the Customary International Law by the Court of Justice of the European Union*" başlıklı makaleleri ile Dr. Öğr. Üyesi Zühal Gizir, Prof. Dr. Emine Yılmaz Bolat ve Yrd. Doç. Dr. Muhammed Erdal'ın birlikte kaleme aldığı "*Öğretmen ve Ebeveynlerin Çocuk Hakları Konusundaki Bilgilerinin İncelenmesi*" başlıklı uzman görüşüne yer verilmiştir. Yazarlarımıza Hukuk ve Adalet Eleştirel Hukuk Dergisi'ne gösterdikleri ilgiden ve dergimize yapmış oldukları değerli katkılarından dolayı teşekkür ederiz.

Bu sayımızda da hem halihazırda bilimsel desteğini sürdüren hakemlerimizden hem de dergimize gönderilen çalışmaların konusu doğrultusunda seçilen yeni hakemlerimizden bilimsel görüş ve destek alınmıştır. Hakemlerimize emekleri ve yazıların kalitesini arttırmaya yönelik yapmış oldukları değerli bilimsel katkılarından dolayı teşekkürlerimizi sunarız.

Dergimizi yayımlama inceliği gösteren Legal Yayıncılığın sahibi Sayın Lütfürrahman Başöz'e ve derginin yayıma hazırlanması sürecini titizlikle üstlenen başta Av. Ece Önder olmak üzere Legal Yayıncılığın tüm çalışanlarına teşekkür eder ve değerli çalışmaları ile dergimize katkı sağlayacak siz değerli okurlarımızla sonraki sayılarımızda da buluşmayı dileriz.

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- Araştırma Makalesi -

[H] DETERMINING THE CUSTOMARY INTERNATIONAL LAW BY THE COURT OF JUSTICE OF THE EUROPEAN UNION[*]

(ULUSLARARASI TEAMÜL HUKUKUNUN AVRUPA BİRLİĞİ ADALET DİVANI TARAFINDAN BELİRLENMESİ)

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ABSTRACT

International courts and tribunals ascertain the rules of customary international law through the utilization of two methodological techniques: induction and deduction. By way of reasoning, induction proceeds from specific facts to a general conclusion, whereas deduction begins with a more general premise or set of premises from which a specific rule or conclusion must be deduced. Each of the advantages and disadvantages of the two techniques is presented to international tribunals and courts. The matter concerning the determination of customary norms has been the focus of firmly established case law at the International Court of Justice. As an important component in international adjudication, the Court of Justice of the European Union (CJEU) employs these methods as well, albeit with a predilection for the deductive approach. Conversely, the advocate generals of the CJEU maintain that a reexamination of the CJEU's decisions concerning the identification of a customary norm or determination of a customary international law rule in some special circumstances requires the application of the inductive

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method. Based on an analysis of the advantages and disadvantages of both techniques, this study suggests that the CJEU ought to strike a balance by employing a higher level of inductive reasoning.

Keywords: Deductive Method, Inductive Method, Customary International Law, The International Court of Justice, the Court of Justice of the European Union

ÖZ

Uluslararası mahkemeler ve yargı organları, uluslararası teamül hukuku kurallarını iki metodolojik tekniğin kullanımı yoluyla belirler: tümevarım ve tümdengelim. Akıl yürütme yoluyla, tümevarım belirli olgulardan genel bir sonuca doğru ilerlerken, tümdengelim ise kendisinden belirli bir kuralın veya sonucun çıkarılması gereken daha genel bir öncül veya öncüller dizisiyle başlar. Her iki tekniğin avantaj ve dezavantajları uluslararası mahkemeler ve yargı organları için söz konusu olacaktır. Örf ve adet normlarının belirlenmesi hususu Uluslararası Adalet Divanı'nda yerleşmiş içtihat hukukunun odak noktası olagelmiştir. Uluslararası yargılama alanının önemli bir bileşeni olarak Avrupa Birliği Adalet Divanı (ABAD) da tümdengelimli yaklaşımı daha çok tercih etse de aynı iki yöntemi kullanmaktadır. Buna karşılık, hukuk sözcüleri (advocate generals), ABAD'ın bir teamül normunun tespitine ilişkin kararlarının yeniden incelenmesi için veya bazı özel durumlarda teamül hukuku kurallarının belirlenmesi için tümevarım yöntemine başvurulması gerektiğini ileri sürmektedir. Her iki tekniğin avantajları ve dezavantajlarının analizine dayanarak bu çalışma, ABAD'ın daha yüksek düzeyde tümevarımsal akıl yürütme tekniğini kullanarak uluslararası teamül hukukunun tespitinde bir denge kurması lüzumunu savunur.

Anahtar Kelimeler: *Tümdengelim, Tümevarım, Uluslararası Teamül Hukuku, Uluslararası Adalet Divanı, Avrupa Birliği Adalet Divanı*

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INTRODUCTION

The determination of customary norms may pose a challenge but this does not diminish their capacity to exert binding legal power. International courts employ certain methodologies to ascertain the existence of a customary norm. Understanding the approach of the Court of Justice of the European Union (CJEU) in these methods is crucial as it constitutes a significant component of international adjudication.

The present research scrutinizes the methodological framework employed by the Court of Justice of the European Union (CJEU) in determining customary international law. The study aims to evaluate the extent to which the CJEU's approach is balanced and coherent, taking into account the advantages and disadvantages of the methods employed. According to the study, the CJEU relies mainly on deductive reasoning and could potentially enhance its decision-making process by incorporating more inductive reasoning. This assertion will be substantiated through a comprehensive examination of certain methodologies employed in two international courts tasked with different objectives. Beyond the mere explication of the implementation of these two methodological approaches, an evaluation of the outcomes of their utilization will also be undertaken to elucidate the advantages and disadvantages for the jurisprudence of the Court of Justice of the European Union.

The initial chapter will explicate the techniques of deduction and induction within the context of international adjudication, with specific reference to pertinent case law from the International Court of Justice (ICJ). The induction will be the first inquiry of this chapter since it gives a clear understanding of the concept of customary norms. After examining the application of methods in international tribunals, this study will analyze the approach of the Court of Justice of the European Union (CJEU), concentrating initially on its predominant use of the deductive method. After evaluating the benefits and drawbacks of deduction, the final chapter will examine how the CJEU applies the inductive technique, and by comparing its benefits and drawbacks to those of the deductive method, the question of whether the CJEU must achieve equilibrium will be addressed.

1. METHODOLOGY IN DETERMINING THE CUSTOMARY INTERNATIONAL LAW

The conventional response to the query "Which arguments are valid?" is "arguments in which the conclusion follows logically from the premises", by the simplest definition, the process of legal reasoning enables jurists to assess the validity of arguments[1].

Given that law is an argumentative discipline, it would not be startling to hear a legal scholar assert that law means reason[2]. Consisting of the essence of legal thought, reasoning contributes not only to the discovery of the truth, but also, perhaps more importantly, to the persuasiveness of legal conclusions; consequently one of the primary functions of the judicial organs is to determine which of the parties' arguments is the most persuasive and to base its judgment on convincing legal reasons in order to explain its decision to both parties and, of course, to the society[3]. Moreover, at times, the judiciary plays a role in shaping a new "common legal sense"[4], particularly in newly developing areas of law, and in order to achieve this, court decisions must be founded on legal logic that is discernible and explicable to the general public. To summarize, the intellectual legitimacy of a court's authoritative nature is derived from the application of legal reasoning and adherence to logical principles[5]. Courts' determination of the customary norms of international law is a form of legal reasoning that enables judges to ascertain the existence of customary norms, to explain their reasoning to the actors of international law, and to even contribute to the development of common legal sense.

Since the ancient times of the founder of logic, Aristotle, human beings have used the same logical tools in reasoning to judge, to decide, or to arbitrate; these are essentially syllogism, or deduction, and induc-

[1] Jerzy Stelmach and Bartosz Brozek, Methods Of Legal Reasoning (Springer 2006) 17

[2] Wilson R. Huhn, 'The Use and Limits of Deductive Logic in Syllogistic Reasoning in Briefing Cases' (2002) 42(3) Santa Clara Law Review 813, 813

[3] Donald H. Hermann, 'Legal Reasoning as Argumentation' (1985) 12(3) Northern Kentucky Law Review 467, 507-509

[4] Baudouin Dupret, 'Legal Pluralism, Plurality of Laws, and Legal Practices' (2007) 1(1) European Journal of Legal Studies 1, 9

[5] Ruggero J. Aldisert, Logic For Lawyers: A Guide to Clear Legal Thinking, (3rd edn, National Institute for Trial Advocacy 2012) 31

tion[6]. Thereby, the following sections will examine the application of inductive and deductive methods in determining customary international law in international adjudication.

1.1. Induction in International Adjudication

As is common knowledge, the traditional definition of rules of customary international law is based on two elements: the actual behavior of states or general state practice (material element) and the psychological or subjective belief that such behavior is in accordance with law (subjective element), also known as opinio juris[7]. To determine the existence of a rule of customary international law, it is known that "two constituent elements" must be examined and establish whether a general practice is recognized as law[8]. This is considered the method for identifying customary international law rules[9]. Briefly, induction in international adjudication is a method for determining customary international law by analyzing two factors: general state practice and opinio juris[10].

As per the ICJ, customary international law encompasses a restricted collection of principles that guarantee the coexistence and essential collaboration of international community members, additionally, it comprises a set of customary regulations that can be evaluated for their existence in the opinio juris of states through induction, based on the scrutiny of a sufficiently extensive and persuasive practice[11]. By investi-

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[6] Aristotle, Posterior Analytics, (Translated by Hugh Tredennick, Harvard University Press 1960), 25. Read in conjunction with: Clarence Wilfred Jenks, The Prospects of International Adjudication (Oceana Publications 1964), 646-647. Jenks argues that syllogism does not need to mean deduction, and that induction cannot be equated with the inductive method of an international court.

[7] Malcolm N. Shaw, International Law (9th edn, Cambridge University Press 2021) 62-63

[8] Draft Conclusions On Identification Of Customary International Law, 2018 (Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10), Conclusion 2

[9] Draft Conclusions On Identification Of Customary International Law, and Commentaries, 2018, A/73/10, 122

[10] North Sea Continental Shelf, Judgment (Federal Republic Of Germany v. Denmark; Federal Republic Of Germany v. Netherlands), I.C.J. Reports 1969, para. 77

[11] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), Judgment, I. C.J. Reports 1984, para. 111

gating the two elements, the ICJ has numerous examples of the inductive method in action. In order to identify an existing customary international norm, the ICJ searches for a rule that is supported by established and substantial practice[12]. During the examination of this legal character of state practice, one of the Court's evidence may be the state's declarations of will, in another sense, the state representative's statements[13].

To examine the general practice of states, the ICJ also utilizes the decisions of international organizations, most notably the resolutions of the United Nations General Assembly, but in an inductive manner that evaluates these resolutions as evidence from which the opinio juris of state practice can be derived. In order to examine the subjective element of a customary norm in resolutions of the General Assembly, the Court deems it necessary to assign if the opinio juris exists regarding a resolution's normative nature, by viewing negative votes and abstentions for instance, and alternately, whether a series of resolutions may demonstrate the gradual growth of the necessary opinio juris for establishing a customary rule[14]. The ICJ repeated its inductive method to inquire opinio juris of a state practice by examining a resolution of the UN General Assembly on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States[15].

In conclusion, in order for the ICJ to detect the existence of rules of customary international law, the inductive method can be defined as the inference of a general rule from a pattern of empirically observable instances of state practice and opinio juris, so the inductive method is the

[12] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986, para. 202

[13] Ibid, para 64

[14] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C.J. Reports 1996, paras. 70-71. It is crucial to note that the ICJ's method of referencing a UN resolution cannot be evaluated as a deduction when the purpose of focusing on a resolution is to provide proof of the psychological element of a customary norm that the resolution incorporates in its construction.

[15] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment. I.C.J. Reports 1986, para. 191

progression from the particular to the general and a methodical procedure of both empirical observation and generalization[16].

The ICJ employs both inductive and deductive reasoning. The subsequent section will investigate the deductive technique for application by the ICJ.

1.2. Deduction In International Adjudication

In comparison to treaty law, the primary shortcoming of customary norms of international law is that it can be difficult to determine whether and when a customary rule came into existence[17]. For this reason, the ICJ can use a method that allows it to derive customary norms from other norms, such as less contested generally accepted principles, treaties, or soft-law documents, and even its own case law. The deductive method consists of locating the rule in other norms, primarily written legal sources, and classifying it as a customary rule.

From the earliest international judicial decisions, deduction can be demonstrated. In the early stages of the development of international law, it is natural for international courts to lack sufficient written sources of binding law. In the absence of an applicable treaty provision, the Permanent Court of International Justice evaluated the legal force of a rule based on whether it was established by customary international law[18]. Again, in the absence of a treaty law or when an existing treaty law cannot be applied to the dispute, the ICJ declares that it can take generally accepted principles as a reference to determine new rules of international law[19]. In short, the ICJ can use the deductive method to determine a new customary international law rule by examining an existing customary norm that provides sufficient grounds for the new rule.

[16] Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) The European Journal of International Law 417, 420

[17] Jan Wouters, Cedric Ryngaert, Tom Ruys and Geert De Baere, International Law: A European Perspective (Hart Publishing 2021) 136

[18] The Case of "S.S. Lotus", Permanent Court of International Justice, Judgment, 7 September 1927, 21

[19] Corfu Channel Case, Judgment (United Kingdom of Great Britain and Northern Ireland v. Albania), I.C.J. Reports 1949, 22. for The ICJ's conclusion by deduction that in times of peace, a coastal state has no authority to prohibit passage through straits, unless otherwise stipulated in an international convention, See also Ibid, 28

For instance, the ICJ used the principle of sovereign equality of states to determine the customary norm on the delimitation of maritime boundaries[20].

The vast majority of the time, the ICJ derives customary international law norms from treaties. The reason behind this is the idea that it is generally acknowledged that treaties may serve as evidence of international custom[21]. The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, The Vienna Convention on The Law of Treaties are among the treaties that reflect customary international law, according to the ICJ[22]. The UN Charter can again serve as the source from which the ICJ derives a customary rule, as was the case when determining the UN's ability to initiate international claims[23]. The Court analyzed the rights and responsibilities of the United Nations in accordance with its founding Charter and pronounced the customary rule governing the international legal personality of international organizations[24].

Soft-law sources of international law can also provide the ICJ with a set of norms that reflect customary international law[25]. The work of the International Law Commission on Draft Articles on Responsibility of States for Internationally Wrongful Acts was declared by the Court, by its evaluations on state of necessity, as the reflective of customary international law[26].

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[20] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), Judgment, ICJ Reports 1984, 19

[21] Fernando Lusa Bordin, 'Reflections Of Customary International Law: The Authority Of Codification Conventions And ILC Draft Articles In International Law' (2014) 63(3) International and Comparative Law Quarterly 535, 537

[22] Arrest Warrant of April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, 52-53; Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008, para. 124; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, para. 100

[23] Reparation For Injuries Suffered In The Service Of The United Nations, Advisory Opinion, I.C. J. Reports 1949, 7

[24] Ibid, 12

[25] Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, 1. C. J. Reports 1997, para. 50

[26] Ibid, para. 52

The ICJ can also refer to internal sources, and its own case law, to derive a customary norm. The Court may cite its precedent determinations of customary rules in a previous case[27], for instance, the ICJ may declare, in a manner more definitive than in the case to which it referred, that a resolution of the UN General Assembly reflects customary international law[28].

The deductive method can be defined as the extraction of a particular rule from an existing and generally acknowledged rule or principle. Deduction is a process that proceeds from the general to the particular[29].

The two methods described above should not be acknowledged as contradictory, and even proponents of a particular method can concede that total renunciation of the other is impossible[30]. Therefore, it is not unexpected to encounter the intertwined use of these two methods in international adjudication. In the end, international courts and tribunals are not limited to using a particular method, but they may combine the advantages of two methods in their legal reasoning. The section that follows will examine the intertwined nature of these methodologies in ICJ decisions.

1.3. Intertwining of Methods

Until the narrative of the study, one might erroneously conclude that international courts and tribunals deliberately employ one of the inductive or deductive methods and use it to determine customary norms; however, the courts do not make a clear distinction between the two methods, and in some instances, it finds advantageous to employ two of them simultaneously.

In order to infer a customary norm from premises through induction, the ICJ must identify a widespread state practice. Due to the man-

[27] See supra note 15

[28] "General Assembly resolution 2625 (XXV) … which reflects customary international law"; See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, para. 80

[29] Talmon (n 16) 420

[30] See Georg Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60(4) Harvard Law Review 539, 566. Furthermore, it should be noted that induction may serve the function of establishing premises that are applicable in the context of deductive reasoning. See also Jenks (n 6) 629

datory conditions that may prohibit the generalization of any conceivable state practice, the Court may accept the fact that there is no observable data for the behavior of states[31]. Therefore, the Court can continue to legal reasoning with the deductive solution by consulting the written sources of law[32]. For this example, the inductive method involved accepting the absence of observable state practice, whereas the deductive method involved analyzing international agreements to identify a customary norm. The ICJ may also employ the intertwining of methods in which it first determines the existence of a customary norm by analyzing state practice and then confirms and bolsters its conclusion by deducing the same norm from international treaties[33].

Due to the need to evaluate the subsequent practice of states in order to identify any exceptions to the rule, further examples of combining the two approaches can be found[34]. After identifying customary norms through external treaty references in a deductive manner[35], the Court may feel compelled to examine the two constituent elements to determine the possibility of exceptions to the customary rule[36]. The ICJ's examination of UN General Assembly Resolution 1514 (XV) on 14 December 1960 is a similar instance of the use of inductive reasoning to test the viability of a deductive conclusion[37]. After having detected that the resolution reflects a customary norm[38], the Court had to prove its conclusion by analyzing the two elements of customary international law pertaining to the rule in question[39].

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[31] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, I. C. J. Reports 2001, para. 205

[32] Ibid, para. 208

[33] Arrest Warrant of April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J Reports 2002, para. 58

[34] Situations such as the exceptional behavior of specially affected states, regional customary norms, and persistent objectors can serve as examples.

[35] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, para. 59

[36] Ibid. para. 77

[37] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, para. 150

[38] Ibid, para. 152

[39] Ibid, para. 160

Likewise, the Court of Justice of the European Union employs these two techniques to determine the rules of customary international law applicable within its jurisdiction. In light of this, the following chapter will be devoted to the CJEU's deductive reasoning.

2. DEDUCTION IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

The CJEU is responsible for navigating EU law, which is based on a complex network of legal principles, and for taking into consideration the relationship between EU institutions and member states[40]. The CJEU serves as an international court before which questions of public international law pertaining to the interpretation and application of EU law may be discussed[41].

The majority of the Court's conclusion regarding the existence of a customary rule is deductive, as will be demonstrated in the following section. This adherence to the deductive method by citing treaties and the ICJ case law is attributable to the CJEU's warnings in its own case law, which emphasize that customary international law norms lack the same degree of precision as provisions of international agreements[42] and are more complex[43].

2.1. Application of the Method

In accordance with the ICJ's case law[44] regarding the determination of customary norms, the CJEU recognizes the ability of written sources to reflect customary international law. The CJEU accepts that the provisions of numerous treaties, including even those that had not yet

[40] Francisco Pascual-Vives, 'The Identification of Customary International Law Before the Court of Justice of the European Union: A Flexible Consensualism', in Fernando Lusa Bordin, Andreas Th. Müller and Francisco Pascual-Vives (eds), European Union and The Customary International Law (Cambridge University Press 2022) 123, 145

[41] Ibid, 132

[42] C-366/10 - Air Transport Association of America and Others, Judgment of the Court (Grand Chamber) of 21 December 2011, para. 110

[43] C-162/96 - A. Racke GmbH & Co. v Hauptzollamt Mainz, Judgment of the Court of 16 June 1998, para. 52

[44] See supra notes, 25, 26

entered into force at that time of judgment, constitute the current status of customary international law[45].

The Court determines the principle of good faith in Article 31 of the Vienna Convention as a "rule of general international customary law"[46] and the right of self-determination as a "customary principle" derived from Article 1 of the UN Charter[47] in its judgment. Notably, the CJEU's identification of a customary norm in these treaties has the consequence that, despite the fact that neither the EU nor its Member States would be bound by the Vienna Convention as a whole, a number of its provisions would reflect the norms of customary international law that are binding on EU institutions and form part of the European legal order[48].

While the CJEU recognizes the binding legal force of a customary norm simply by determining its existence in a treaty, it also declares that certain rules of customary international law may be equivalent to or the natural consequence of a norm included in the EU legal order, as was the case when deriving the principle of good faith from the principle of protection of legitimate expectation[49].

As stated previously[50], by an example of the deductive method, inferences to customary norms can be drawn from references to soft-law sources of law[51], such as the publications of the International Law

[45] C-286/90 - Anklagemindigheden v Poulsen and Diva Navigation, Judgment of the Court of 24 November 1992, para. 10

[46] C-104/16 P - Council v. Front Polisario, Judgment of the Court (Grand Chamber) of 21 December 2016, para. 75; C-266/16 - Western Sahara Campaign UK, Judgment of the Court (Grand Chamber) of 27 February 2018, para. 58

[47] Ibid, para. 88

[48] C-386/08 – Brita, Judgment of the Court (Fourth Chamber), of 25 February 2010, para. 42; C-158/14 - A and Others, Judgment of the Court (Grand Chamber) of 14 March 2017, para. 87; By citing the judgment of the court of first instance which defines the binding force of "intransgressible principles of international customary law". See also Joined cases C-402/05 P and C-415/05 P – Kadi, Judgment of the Court (Grand Chamber) of 3 September 2008, para. 88/231

[49] Case T-115/94 – Opel Austria, Judgment of the Court of First Instance (Fourth Chamber) of 22 January 1997, para. 93

[50] See "Chapter 1.2." of this study.

[51] See supra notes, 25, 26

Commission and UN General Assembly Resolutions. So the CJEU also describes the legal character of those rules in soft-law sources as "which codify customary international law and are applicable to the Union"[52].

2.2. Advantages of the Method

According to one argument, international tribunals began to use deductive reasoning not to develop international law in a progressive manner, but rather in situations where the inductive method failed to produce results[53]. In addition, deductive reasoning, for instance, can be used to confirm and strengthen the results of induction[54].

However, maybe more than anything, the deductive method may be understood as a coordination technique of the CJEU[55]. Extrinsic references to the decisions of the ICJ, other international courts and tribunals, or ILC works also enable the CJEU to anchor its decision to an extant general consensus[56]. In determining customary norms by deduction from external references, especially to international courts, the CJEU unquestionably promotes "judicial cross-fertilization" and communication in international adjudication, thereby contributing to the development of a predictable, coherent, and consistent body of case law pertaining to the determination of customary norms[57].

2.3. Disadvantages of the Method

The deductive method has its disadvantages as well as advantages, and the CJEU's use of deduction to determine customary international law may be the subject of criticism. Given that the inductive method required substantial data to analyze the two elements of customary international law, one could argue that the deductive approach was necessary

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[52] C-66/18 - Commission v Hungary (Enseignement supérieur), Judgment of the Court (Grand Chamber) of 6 October 2020, para. 88

[53] Talmon (n 16), 430-431. In situations where an international court lacks evidence of state practice or any other data that allows it to examine the two elements of customary rule in order to apply the inductive method, the deductive method may appear as the only logical tool of legal reasoning available

[54] Ibid, 427

[55] Pascual-Vives (n 40) 128

[56] Ibid, 146

[57] Ibid, 129

for international law at the beginning of its development, however, it is not current as of today[58]. On the contrary, another may argue that the deductive method cannot be considered part of the distant past of the Court's interactions with customary international law because it is still in use[59].

One of the criticisms of the deductive method is that it does not provide cogent legal reasoning; rather, reasoning by deduction reduces the relevant custom to a template[60]. The Court was also criticized for frequently concluding that a particular ILC-adopted draft article reflects customary international law without examining two elements of customary norms, or, in another sense, without providing a legal justification[61].

This method's ability to permit analogically deduced principles is a second criticism that can be leveled against it[62]. When an international court cannot locate a customary norm pertinent to a dispute in written sources or in well-established rules of customary international law, it may create a new customary norm by analogy. For instance, the ICJ found a connection between the continental shelf and the exclusive economic zone due to the fact that the rights over the seabed within the exclusive economic zone are defined by reference to the regime of the continental shelf[63]. The Court declared as such a customary rule that it deduced from a rule of customary international law which had been previously determined[64].

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[58] Schwarzenberger (n 30) 541

[59] Alberto Alvarez-Jiménez, 'Methods For The Identification Of Customary International Law In The International Court Of Justice's Jurisprudence: 2000–2009', (2011) 60(3) International and Comparative Law Quarterly 681, 708

[60] Robert Kolb, 'Selected Problems In The Theory Of Customary International Law' (2003) 50(2) Netherlands International Law Review, 119, 129

[61] See Talmon (n 16) 437, footnote 142

[62] For a counterargument claiming that an international justice must avoid non liquet and "fill the gaps as a punctual legislator" See Kolb (n 60) 141, footnote 72

[63] Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment, I. C.J. Reports 1985, para. 34

[64] Analogically determined customary norms may pose questions regarding the International Court of Justice's legal powers. Since, according to common knowledge, Article 38/1 of the Statute of the International Court of Justice lists the sources of interna-

In its case law, the CJEU is careful to avoid deducing customary international law norms from analogies, in contrast to the ICJ with which it has established a substantial degree of coordination in determining international customs. In a judgment, for instance, the CJEU found that there was not enough evidence to show that the principle of customary international law that a ship on the high seas is only governed by the law of its flag[65] also applies to aircraft flying over the high seas[66].

3. INDUCTION IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

3.1. Application of the Method

The components of the CJEU clearly understand and state that Article 38/1(b) of the Statute of the ICJ says that customary international law is one of the sources of international law, there must be a settled practice on the part of the subjects of international law (an objective element) that is recognized as a rule of law (a subjective element)[67]. Thence, it may indicate that the CJEU can and will consider these two factors when determining customary rules through induction.

In a judgment of the CJEU, after citing Article 34(1) of the Vienna Convention on Succession of States in Respect of Treaties which expresses the principle of continuity in situations such as the one at issue in the main proceedings, it declared that this principle is consistent with customary international law[68]. Further, the Court concluded that the principle of the continuity of treaties is a customary norm of international law and that its application in the international practice of the law of treaties would be completely consistent with international law[69]. Contrary to this

tional law, judicial decisions are included as a subordinate means of determination. Alternatively, if the ICJ employs the deductive method suitable for declaring customary norms by analogy, it will elevate international judicial decisions to the primary sources of international law, contrary to The Statute.

[65] See C-286/90 - Anklagemindigheden v Poulsen and Diva Navigation, Judgment of the Court of 24 November 1992, para. 22

[66] C-366/10 - Air Transport Association of America and Others, Judgment of the Court (Grand Chamber) of 21 December 2011, para. 106

[67] C-366/10 - Air Transport Association Of America And Others, Opinion Of Advocate General Kokott Delivered On 6 October 2011, para. 115

[68] C-216/01 - Budějovický Budvar, Judgment of the Court of 18 November 2003, para. 125

[69] Ibid, para. 154

simple example of the CJEU's deductive method, Advocate General TIZZANO was not prima facie persuaded of the customary nature of the principle in question, so he resorted to the inductive method to assess this demonstration. As the source of the customary norm in this dispute, Advocate General TIZZANO examined the number of state signatories to the Vienna Convention, in order to test the existence of such an international custom[70]. He further showed that from approximately 160 states in existence at the time, only seventy were represented at the diplomatic conference where the Convention was adopted, and only twenty states of those seventy signed[71]. We can also see that AG TIZZANO inquired about the disputing states' intentions in order to determine whether intention could designate them as persistent objectors in order to prevent this customary norm from applying[72].

In another CJEU case, applicants argued that Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples[73] establishes a rule of customary international law with which the EU must comply in the exercise of its powers[74]. AG KOKOTT first recalled the two constituent elements of the customary international law, by referring to the various cases of the ICJ. As is in compliance with KOKOTT's previous expressions[75], it was declared that consideration must be given to an established practice that is recognized as a rule of law[76]. Hence, AG KOKOTT, in a manner comparable to AG TIZZANO's assessment[77], investigated the states' intent as indicated by their votes and abs-

[70] Case C-216/01 - Budějovický Budvar, Opinion Of Advocate General Tizzano delivered on 22 May 2003, para. 119

[71] Ibid, footnote 44

[72] Ibid, para. 143

[73] United Nations Declaration on the Rights of Indigenous Peoples, Resolution adopted by the General Assembly on 13 September 2007, [without reference to a Main Committee (A/61/L.67 and Add.1)], 61/295

[74] Case C-398/13 P - Inuit Tapiriit Kanatami and Others v Commission, Judgment Of The Court (Fifth Chamber) of 3 September 2015, para. 50

[75] See supra note, 68

[76] Case C-398/13 P - Inuit Tapiriit Kanatami and Others, Opinion Of Advocate General Kokott delivered on 19 March 2015, para. 90, footnote 57

[77] See supra note, 73

tentions on the contested Declaration[78]. AG KOKOTT's special attention to the votes and abstentions of "significant states in which indigenous communities live" in order to highlight their practice is a central aspect of this analysis[79]. Thereby, this is evidence of the rigorous application of inductive methods in determining international customary standards by the CJEU.

It should be emphasized that the use of induction in determining customary principles might be seen as a reaction to the conclusions reached by the deductive method. It is also crucial that the well-formed application of induction in determining customary international law norms for disputes in the CJEU belongs to the advocate generals, as they acted in a complementary role with their conformity to formulations of the inductive method. This may prompt us to contemplate the advantages of induction.

3.2. Advantages of the Method

From the perspective of legal logic, one may suggest that the inductive method appears to have overpowered deduction, indeed, humans learn either from generics or by induction from particulars, and it is impossible to acquire a view of generics without induction, according to the founder of logical reasoning[80]. Therefore, the first advantage of this method is its logically followable progression from the elements of a rule to the rule itself.

Moreover, the legal weight of a customary norm derives from its widespread acceptance as an indicator of legality, so it can be argued that to demonstrate the social power of a rule of customary international law, we must focus on its material and subjective elements as evidence of its acceptance, by applying the inductive method[81].

It can be argued that the inductive method is superior to the deduction because it requires a thorough examination of the sufficiently exten-

[78] Case C-398/13 P - Inuit Tapiriit Kanatami and Others, Opinion Of Advocate General Kokott delivered on 19 March 2015, para. 90

[79] Ibid, para. 90, footnote. 58

[80] Aristotle (n 6) 107, See also Ibid, p. 109; cf Jenks (n 6) 628-629

[81] Luigi Condorelli, 'Customary International Law: The Yesterday, Today and Tomorrow of General International Law', Chapter 12, in Antonio Cassese (ed), Realizing Utopia: The Future of International Law (Oxford University Press 2012) 150-151

sive and cogent practice of subjects of public international law, as opposed to mere deduction from preconceived notions[82].

As described in this study, Advocate Generals of the CJEU used the method's benefits to formulate a structured legal argument to examine the exact will of international law subjects in a specific timeline, which could change the content or existence of a customary norm[83]. Inductive legal reasoning can additionally be viewed as more adaptable to changing conditions by being able to comprehend the "trends" in the practice of states towards a principle[84].

3.3. Disadvantages of the Method

Two criticisms of induction may be summed up. First, as mentioned above, the inductive technique may not apply to every scenario particularly when there is no sufficient data[85]. Second, relevant data may be chosen selectively within an induction-based legal argument. In favor of a state or a policy of international organization for instance, this type of relevant data selection may be viewed as an attempt to reach a predetermined conclusion at the outset of the judicial process[86]. On the contrary, one could easily argue that the tendencies or political concerns of an international judicial organ are an independent problem. In addition, it should not be overlooked that even if the introductive method teaches the means of legal reasoning to reach biased or prejudiced judgments, it also contains the same system to detect a tainted judgment and construct a clean one. In addition, this aspect of the method that has been criticized may also prove flexible for an international court that must identify

[82] See Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), Judgment, 1984, para. 111

[83] See supra notes, 72, 78

[84] e.g. Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, para. 24, 45, 48

[85] See supra note, 32. As mentioned above, the inductive approach may not be applicable to all disputes. However, one could argue that inductive methods are required even to demonstrate that there is insufficient data to define a customary norm. To demonstrate the impossibility of the inductive method, one must employ the same inductive techniques until reaching such a conclusion.

[86] See Georg Schwarzenberger, 'The Province of the Doctrine of International Law' (1956) 9(1) Current Legal Problems 235, 240-241

"specifically affected states" such as AG KOKOTT did in his opinion[87], or a persistent objector[88] such as AG TIZZANO investigated, or a regional customary norm[89].

CONCLUSION

The aim of this study was to explain the methodology used by the CJEU to determine customary norms of international law and to address the question of whether the Court's application of these two methodologies is balanced and consistent. The study concludes that the CJEU predominantly employs deductive reasoning. Regarding the advantages and disadvantages of these two methods, the components of the CJEU feel compelled to reconsider the judgments by using inductive methods.

The methods used by the CJEU can be called deduction and induction, which is in line with the ICJ[90]. The inductive method is the process of moving from the specific to the general. It is an orderly way to both observe and infer. On the other hand, the deductive method[91] is the process of getting a specific rule from a general rule or principle that is alre-

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[87] Case C-398/13 P - Inuit Tapiriit Kanatami and Others, Opinion Of Advocate General Kokott, 19 March 2015, para. 90, and footnote 58

[88] Case C-216/01 - Budějovický Budvar, Opinion Of Advocate General Tizzano, 22 May 2003, para. 143

[89] See Case concerning Right of Passage over Indian Territory (Portugal v. India), Judgment of 12 April 1960, I.C.J. Reports 1960; Colombian-Peruvian Asylum Case (Colombia v. Peru), Judgment of November, I.C. J. Reports 1950

[90] cf Talmon (n 16), 441. It is argued that the ICJ's methodology should be divided into deduction, induction, and assertion. Talmon concludes that the ICJ establishes customary norms by asserting them. However, the evidence presented in his study does not permit the consideration of a distinct methodological system apart from deduction. Therefore, “assertion” may also be viewed as an application of the deductive method to determine unwritten customary norms from existing principles or rules of customary international law.

[91] Talmon classifies the three categories of deduction as normative, functional, and analogical. The method utilized by the International Court of Justice in "Reparation for Injuries Suffered in the Service of the United Nations" serves as an illustration of functional deduction according to his study. On the contrary, even though he argues that the ICJ establishes the international legal capacity of international organizations based on their functional characteristics, one could argue that the ICJ's method was limited to scrutinizing the UN Charter and therefore cannot serve as an example of a distinct form of deductive method.

ady known. Deduction is the process of going from the generic to the specific. These two methods may be applied as intertwined in international judication.

In determining the principles of customary international law, the CJEU employs both inductive and deductive methodologies, but largely the latter. By frequently citing ICJ case law in its decisions on customary norms, the CJEU demonstrates a high level of coordination with ICJ's acquis. Consequently, it can be said that the CJEU embraces the course of international law and closely follows its evolution. In addition, the CJEU and ICJ have different approaches to the applicability of deduction[92].

The CJEU rarely utilizes the inductive technique. The most well-known examples of the CJEU's use of induction to determine customary international law belong to the advocate generals of the Court. One could contend that advocate generals who utilized the inductive method did so in a complementary fashion. Until now, opinions employing the inductive method have sought to confirm the CJEU in a different way, but with a stronger legal argument, as well as to identify the exceptions for determining an applicable customary norm, such as the practice of "specifically affected states" or the status of a "persistent objector."

Both deduction and induction have advantages and disadvantages, so the CJEU must employ them in a more balanced and coherent manner. In the current situation, it is easy to contend that the inductive method is nearly disregarded if the advocate generals do not provide complementary reasoning. Not equating the frequency of their application is what this study suggests, but rather balancing. If the CJEU does not apply these two methods in a balanced manner, its decisions will be deprived of the benefits of inductive methods. Therefore, The CJEU's legal

[92] Even though the ICJ admits deduction by analogy, the CJEU avoids determining the customary norms analogically. The stance of the CJEU is more accurate than that of the ICJ because the determination of customary norms should not entail the creation of new rules from recognized principles and/or customary norms in order just to prevent the non liquet. Article 38/2 of the ICJ Statute provides the normative framework for international adjudication to decide on ex aequo et bono, fortunately this principle should be applied to the parties to the dispute rather than establishing international customs with binding force. For a contrary opinion, cf Talmon (n 16), 426. Talmon accepts the deduction by analogy to avoid the possibility of non liquet.

reasoning may become ambiguous, eroding its intellectual authority. The CJEU may also overlook the aforementioned exceptions when determining accurately the customary norms of international law. Further, it may remain a mere observer of the development of customary international law, rather than a developer of it.

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