

Customary Law Assessment and Applications: Capital Punishment for Juvenile Offenders¹

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Although recent years have witnessed an increase in the number of international agreements, which would appear to suggest a decrease in the importance granted to customary law, most states and writers accept- and actual judicial practice clearly indicates- that this is not at all the case. Customary international law is still playing a huge role on the international law scene and its significance is far from being slighted. Consequently, debate on the determination criteria and the elements of the international custom rules continues to be seen as one of the hottest issues within the international legal field. In particular, determining the *usus* and assessing the existence of the *opinio iuris* are invariably referred to as the “hardcore” points of the topic. This paper provides a concise description of the actual position of the International Court of Justice with reference to the elements of international custom assessment.

Notwithstanding that the majority of the states have by now banned the death penalty, qualifying it as a cruel and inhuman castigation, the capital punishment is still applied in some places, providing a hot potato in international and criminal law in general, and in the international law of human rights, par excellence. The subject is particularly controversial when referred to people condemned to death for crimes committed when they were under the age of majority (almost universally accepted as 18), ordinarily known under the name of “child (or juvenile) offenders” in criminal law. We put forward an opinion relating to this practice on the basis of the criteria for the assessment of the rules of customary law.

The criteria used by the Court to generally determine the element of state practice

The Statute of the International Court of Justice (further referred to as the “ICJ” or the “Court”) acknowledges international custom as one of its primary sources of law. In this respect Art. 38(b) stipulates that the Court shall apply “international custom, as evidence of a general practice accepted as law”. Further specifying the “evidence” of customary law as general practice, we find as established doctrine, agreed on by states, international tribunals and most writers alike, that the main evidence of customary law is to be found in the actual practice of states and in their *opinio iuris*. And indeed, the ICJ reasoned in the *Continental Shelf* case (Libya v. Malta)² and restated in the *Nicaragua* case (Nicaragua v. USA)³ that “ the material of customary international law is to be looked for primarily in the actual practice and *opinio iuris* of the states”. With the *opinio iuris* element we will deal in the second section of

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² *Continental Shelf* case (Libyan Arab Jamahiriya/ Malta), ICJ Reports 1985, pp. 29-30, para. 27.

³ *Case Concerning Military and Paramilitary Activities In And Against Nicaragua (Nicaragua / United States of America)*, ICJ Reports 1986, p.14, para. 183

the paper and consequently we will focus here on the actual state practice element, or the so-called *usus*.

To get a rough idea of what is generally understood by actual state practice one can look in the published materials such as newspaper reports of actions taken by states, the statements made by government spokesmen, the state's laws and judicial decisions, the extracts published from the archive of the government, correspondence between states (usually unpublished), documentary sources produced by international organizations such as the United Nations, bilateral and multilateral treaties⁴; these are certainly only a few of the "evidentiary entities", to give them a group name. Since it is not our purpose to make an inventory or to thoroughly analyze these possible sources of state practice, we will not further insist on them. More stringent is to discuss what the actual criteria used by the ICJ in determining the existence of state practice are. But before jumping in deep waters, we ought to clarify a sensitive issue concerning the widely held belief that state practice consists only of what states do and not of what they say, if they do not actually enforce or take some action with regards to their claims. The later *Fisheries Jurisdiction* case (UK vs. Iceland)⁵ is pertinent in this respect, as the Court inferred the existence of customary rules from merely sustained claims, without considering whether they were enforced. Obviously we cannot postulate an absolute rule henceforth, but nevertheless, the better view nowadays appears to be that state practice consists not only of what states do, but also of what they claim to be entitled to do.

It must be kept in mind that assessing proper evidence of customary law needs to be separated from rules of procedure. To take only one example, it is certain that any state seeking to rely on a particular norm of international custom has- unless the custom is explicit and obvious- the burden of proving that the relevant state practice exists; still, "an international judge or arbitrator will not rely on procedural rules to decide whether a norm exists or not, but will rather make a value judgment" (Malanczuk: 41), taking into consideration the relevant existing criteria for state practice entailing customary law. We can divide these criteria with regard to the following points:

i) **constant usage:** Among the most valuable references, the judgment put forward by the ICJ in the *Nicaragua* case is cardinal in this respect. The Court held that "it is not to be expected that in the practice of States the application of the rules in question should have been perfect [...] The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. [...] The conduct of States should, in general (emphasis added), be consistent with such rules and instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of the new rule"⁶. In other words, minor inconsistencies do not prevent the creation of a customary rule. The view is important as it undermines the sometimes suggested belief that customary rule must be based on a 'constant and uniform usage', opinion also alleged by the ICJ in the controversial *Asylum* case⁷. It is regarded that the opinion of the Court at that time was however only specifically addressed to that case and after all what prevented the formation of a customary rule in the *Asylum* case was not the absence of repetition but the presence of major inconsistencies in the practice.

⁴ The treaties (especially the multilateral ones) are a special category of evidence for customary law. Many authors consider them a separate group of entities for evidence of customary law. However, as commonly agreed, in the end they also amount to evidence for actual state practice, hence we treated them here together with the usual means of assessing this evidence.

⁵ Fisheries Jurisdiction Case (United Kingdom / Iceland), ICJ Reports 1974, 3, at. 47

⁶ Ibidem 2, para. 186

⁷ Asylum case, ICJ Reports 1950, 266-389, at. 277

ii) **time factor:** The ICJ has clarified in the *North Sea Continental Shelf* cases⁸ that customary law may emerge even within a relatively short passage of time. Nonetheless, if we look at the exact wording of the judgment there, the ICJ held: “it might be that, even without the passage of any considerable period of time, a very widespread and representative participation [...] might suffice of itself, provided it included that of States whose interests were specially affected”. Stated otherwise, the reduction of the time-element should be, if at all, “carefully balanced with a stronger emphasis on the scope and nature of the state practice”(Malanczuk: 46). This clarification is extremely important for the disputed possibility of the “diritto spontaneo” or “instant customary law”, according to which the time element (and thus implicitly the actual state practice) is completely ignored and the existence of customary law is solely based on the *opinio iuris*. To already anticipate the position of the Court, although it is more significant for the discussion on the *opinio iuris* element, the ICJ was very much clear in this respect by stating in the *Nicaragua* case that “ [...] the Court must satisfy itself that the existence of the rule in *opinio iuris* of States is confirmed by practice” Hence, instant custom is not officially taken into consideration, at least for the present time.

iii) **general acceptance:** The concept depends very much on the circumstances and on the rule in question, but in principle, we can agree that a ‘general practice’ “should include the conforming conduct of all States, which can participate in the formulation of the rule or the interests of which are specially affected” (Malanczuk: 42). In particular, the distinction between general and universal and the discussion on the degree of generality, is attained in the *Restatement*⁹: “A practice can be general even if it is not universally accepted; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity”. This requirement is seen in its full power when associated with the problem of the “persisting objector” States. Thus, it is certain that general practice does not require the unanimous practice of all states, implicitly meaning that a state could be bound by the general practice of other states even against its wishes; the most habitual way encountered in practice, of proving that the rule is binding on the defendant state, is by showing that the rule is accepted by (all) other states. In these circumstances the rule in question is binding on the defendant state, unless the defendant state can show that it had expressly and consistently rejected the rule since the earliest days of the rule’s existence (persistent objector). We will not tackle here the diverse problems relating to the persistent objectors as it is beyond our purpose.

The Court’s description of the *opinio iuris* element

With some of the important aspects concerning the *opinio iuris* already explained in the previous section, we can now get directly to the essence of the so-called, in full terms, *opinio iuris sive necessitatis*. It is generally accepted that in determining whether a certain norm is a rule of customary law or not, state practice alone is not sufficient: “it must be shown that it is accompanied by the conviction that it reflects a legal obligation” (Malanczuk: 44). In other words, when inferring rules of customary law from the conduct of states we are not only interested in what states do, but also why they do it. Perhaps the most notable authority in this sense is the ICJ in the *North Sea Continental Shelf* cases: “not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in a such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio iuris sive necessitatis*. The States concerned must

⁸ The North Sea Continental Shelf Cases (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands), ICJ Reports 1969, p. 4, para. 73

⁹ The Restatement (Third), Vol 1, para. 102, 25

therefore feel that they are conforming to what amounts to a legal obligation”¹⁰. The outcome of the judgment in the *North Sea Continental Shelf* cases exactly reflected this wording. The ICJ stated in this respect¹¹: “There is no evidence that they [the States desiring customary rule] so acted because they felt legally compelled [...] by reason of a rule of customary law obliging them to do so-especially considering that they might have been motivated by other obvious factors”¹².

A good attempt to define the *opinio iuris* is done by Malanczuk (Malanczuk: 44). He defines the *opinio iuris* by making a distinction between the rules imposing duties upon states and rules permitting states to act in a particular way. As far as rules imposing duties are concerned, the *opinio iuris* element entails “a conviction felt by states that a certain form of conduct is required by international law”. On the other hand, when about the permissive rules, *opinio iuris* means “a conviction felt by states that a certain form of conduct is permitted by international law”. The distinction comes from practice, the fundamental example here being the *Lotus* case (PCIJ; Turkey/ France)¹³, and obviously makes a lot of sense when having to actually prove the existence of the element. Concretely, permissive rules can be proved by showing that some states have acted in a particular way or claimed to be entitled to act in a certain way¹⁴ and provided that there are no persistent objectors (see the last criterion in assessing the actual state practice in the previous section). In the case of the rules imposing duties, on the other hand, the requirements requested above are not sufficient. In addition it needs to be proved that states regard the action as obligatory. And this requirement can be proved by either “pointing to an express acknowledgment of the states concerned, or by showing that failure to act in the manner required by the alleged rule has been condemned as illegal by other states whose interests were affected” (Malanczuk: 44).

To put it simply, *opinio iuris* can be interpreted such as the states having to consider¹⁵ that something is already law before it can become a law. In other words “if some states claim that something is law and other states do not challenge that claim, a new rule will come into being, even though all the states concerned may realize that it is a departure from pre-existing rules” (Malanczuk: 45). It might be categorized as almost a paradoxical and even naïve explanation (How can a law exist before it can become a law?), but it is the simplest formulation that one can find when addressing the *opinio iuris*.

To finish our analysis on the *opinio iuris sive necessitatis*, as stated already in the previous section when analyzing the time factor requirement for *usus*, the pure inference of a customary law solely based on the *opinio iuris* is clearly dismissed by the Court in the *Nicaragua* case (see section A1 above); thus the so-called instant customary law does not exist. However, as a reminder, valid for both *usus* and *opinio iuris* assessment, reality seems to show that where there is no practice which goes against an alleged rule of customary law (hence, no inconsistencies), then a “small amount of practice [and the existence of *opinio iuris*] is sufficient to create a customary rule, even though the practice involves only a small number of states and has lasted for only a short time” (Malanczuk: 42)

¹⁰ Ibidem 7, para. 77

¹¹ We are only interested here in the reasoning for determining the *opinio iuris*; in particular the *usus* was not fulfilled either, the “general acceptance” criterion being defective (the number of states actually applying the state practice was far smaller than the total number of states concerned).

¹² Ibidem, para. 78

¹³ Lotus case (Turkey / France), under the PCIJ, series A, no.10, 28 et seq.

¹⁴ “Acted in a particular way or claimed to be entitled to act in a particular way”; distinction between what states say and what they do; the problem was discussed in the first section of this paper.

¹⁵ We chose the word “consider”, as more neutral than “believe”, which was attacked by Malanczuk and replaced by “say” (Malanczuk: 45). We think that “consider” might be a better term in this context. On the other hand we acknowledge that interpreted in an extreme way, “consider” might also lead to confusion.

On the applicability of the death penalty to child offenders

In order to put forward an opinion with regard to the issue at stake, we need to have an overview of the actual state practice concerning this subject. We first briefly attain the situation concerning death penalty in general, which is a bit simpler, as far as international custom goes, than the death penalty applied to child offenders. According to Amnesty International current figures¹⁶, the death penalty has been abolished *de jure* or *de facto* in over half of the countries in the world. Out of these, 75 countries have abolished death penalty for all crimes and 30 of them did this since 1990. A few other countries (13) have abolished the death penalty for all but exceptional crimes, for instance war crimes. These two categories mentioned above are the countries that have abolished capital punishment *de jure*, thus in the law. A number of 20 other countries are presently considered abolitionist in practice, in other words they retain the death penalty in law but have not carried out any executions for the past decade or even more. All the other countries have retained the death penalty and used it but only a few of them carried out more than one execution per year. The most important international agreement that asks for abolition of the death penalty is the *International Covenant for Civil and Political Rights* (ICCPR), with its *Second Optional Protocol*. By now this *Second Optional Protocol* has been ratified by 43 states, 6 other states having signed it. In addition to this universal instrument, we have the regional conventions: the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) with its *Protocol No. 6 Providing for Abolishment of Death Penalty in peacetime*¹⁷ and the *Protocol to the American Convention of Human Rights to Abolish the Death Penalty* (ACHR).

In the light of these figures, although the world tendency is in favor of abrogation, we **cannot infer any customary law with reference to the abrogation of the death penalty** as such because the *usus* lacks in the general agreement criterion (the *opinio iuris* in this case is clearly present as the abolitionist countries strongly rejected and banned the capital punishment as an offense to international norms of human rights): there still are a lot of countries that retain the death penalty both *de jure* and *de facto* (87, after Amnesty figures) and moreover there are a few persistent objectors, out of which the notorious one is the United States of America, which always objected to the abrogation of the death penalty and refused to ratify the Second Optional Protocol; furthermore the *usus* is not perfect with regards to the first criterion either, as 4 of the countries that abolished death penalty previously, have reintroduced it in the interval since 1985 and 1 of them, the Philippines, resumed the executions in practice, so there were moves to reintroduce the death penalty. This would not only show some major inconsistencies in the alleged rule as such, but would also threaten the time factor criteria. But the failure of the general acceptance criterion is the fundamental and sufficient factor for the clear rejection of the abolishment of the capital punishment as rule of customary law.

Yet, this was the case of the death penalty as a whole. Let us now turn to the actual state practice and the *opinio iuris* with regard to the capital punishment inflicted on juvenile offenders, which was our main subject. All international human rights treaties addressing the issue prohibit anyone under 18 years old at the time of the crime, being sentenced to death. The ICCPR, the ACHR and the *Convention on the Rights of the Child* (CRC) all have provisions to this effect. We will only quote from the ICCPR in this sense; the relevant provision is Article 5 (5): “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women”. Accordingly, more than 110 countries, whose laws still provide for the death penalty for at

¹⁶ The statistics is dated from 8 February 2001, thus very recent. Amnesty International updates its site at least twice per month, thus the information therein can be considered a very valuable source for research

¹⁷ Protocol no 6 to the ECHR providing for abolishment of death penalty only refers to abrogation of the capital punishment in the peacetime, while the other 2 instruments ask for abrogation in all times, with the possibility of eventual re-enactment of death penalty in case of war crimes (in exceptional circumstances)

least some offences, have laws specifically excluding the execution of child offenders or may be presumed to exclude such executions by being parties to one or another of the above treaties. If we start assessing the customary law elements, we would be very surprised at the first findings: the *opinio iuris* is there without any further comment, as the states abolishing death penalty for child offenders are clearly and definitely against this practice and they felt compelled to abrogate it. Within the *usus*, the first two criteria are met without too much effort. There were no movements back and forth once the decision was taken (so constant usage) and the time period is present. Can we say we have a rule of customary law? Not yet, as we have not taken into account the third criterion of the actual state practice. Although almost all states in the world have abolished the capital punishment applied to child offenders and universality is not necessarily required as we determined in the previous section of this paper, we have not looked for persistent objectors.

According to the Amnesty International figures, to date a number of 6 countries since 1990 are known to have executed prisoners who were under 18 years old at the time of the crime - Iran, Nigeria, Pakistan, Saudi Arabia, USA and Yemen. The country, which carried out the greatest number of known executions of child offenders, was the USA (13 executions since 1990). The question on whether these 6 states should be bound by the eventual rule of customary law boils down to identifying whether they can be considered persistent objectors or not. In particular if any of these states is a party or signed the ICCPR, ACHR or CRC (mentioned above), without making a reservation to the provision on the banning of the death penalty for child offenders, it cannot be considered a persistent objector. The author was only in possession of the practice with regards to this subject for the USA, but this is sufficient for the context. Indeed, the United States, although having ratified the ICCPR, have made a perfectly valid and effective reservation to Article 5 (5) (quoted above). Hence, as regards the abrogation of death penalty for juvenile offenders, same as concerning death penalty as a whole, USA should be seen as a persistent objector. Therefore no rule of international customary law can be applied in this respect to USA. Furthermore it is logical to think that also the other countries in this small list above can be regarded as at least not signatories (but probably most of them are clear persistent objectors) of any of the mentioned instruments providing for abrogation of capital punishment applied to juvenile offenders, as otherwise they would be conflicting with international law in the form of the respective multilateral treaties. One clear persistent objector would have already been enough.

To conclude, **we cannot infer the existence of a rule of customary law with regards to the abrogation of the death penalty applied to child offenders**. Thus a state that is not bound in this respect by a treaty in force is in conformity with international law and does not violate a rule of international customary law when applying the capital punishment to persons less than 18 years old.

Bibliography and References

Malanczuk, Peter: Akehurst's Modern Introduction to International Law (Seventh Revised Edition), Routledge, New York & London, 1997

EIR: Elementair Internationaal Recht, T.M.C. Asser Press, Den Haag, 1999

The Amnesty International Website Against the Death Penalty: <http://www.amnesty.org/>