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Different Strings of the Same Harp

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TRICI-Law

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THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

Paper No. 001/2020

*Different Strings of the Same Harp:
Interpretation of Customary International
Rules, their Identification and Treaty
Interpretation*

by Marina Fortuna



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Different Strings of the Same Heart: Interpretation of Customary International Rules, their Identification and Treaty Interpretation

by Marina Fortuna

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Marina Fortuna: Different Strings of the Same Harp: Interpretation of Customary International Rules, their Identification and Treaty Interpretation

Introduction

At the heart of all knowledge lies *difference* – the ability to distinguish one concept from another one.¹ From Heraclitus to Derrida and Deleuze, philosophers have grappled with issues of identity and difference and, though not settling on a *single* truth, have equipped humanity with a conceptual toolbox for purposes of categorization of human experience.² Differentiation between concepts and their objects is as important in law as it is in other disciplines and is one of the fundamental instruments in the toolbox of legal scholars in their pursuit to understand the workings of law.

Considering this, the present contribution is a reflection in broad brushstrokes on the differences between three interconnected judicial operations: interpretation of customary rules, identification of customary rules and treaty interpretation. While identification of customary rules and treaty interpretation have been explored in and out, interpretation of customary rules is a recent addition to the thread of under-researched and complex topics in international law. Until recently hardly anybody throughout the existence of international law has ever asked the question of whether customary international law could be or, for that matter, had been interpreted. Today, when the question has been asked, the community of international lawyers faces a difficult task. The difficulty of this task stems, firstly, from the fact that there is no agreement among scholars on the meaning of the concept of interpretation – a notion which is used in legal scholarship with various meanings. Interpretation is perceived both in its hermeneutic dimension (as the determination of the meaning and intention behind an act/words/behaviour), but also as a wider concept including within it legal construction. Secondly, hardly any theoretical account of customary international law can coherently explain what it is, how it emerges and how it develops, thus, occupying a sort of *sui generis* space among other sources. Thirdly, interpretation of customary rules seems to be difficult to distinguish, both in theory and in practice, from identification of customary rules and treaty interpretation, which owes, in a considerable way, to the first two reasons.

Interpretation of customary rules is not always appropriately distinguished from identification of customary rules because (1) customary rules are perceived as being equivalent with the elements of custom (State practice and *opinio juris*) and (2) because, according to some scholars, there is an inherent element of interpretation in identification. This linguistic

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¹ Wernon V. Cisney, ‘Differential Ontology’ Internet Encyclopedia of Philosophy <<https://www.iep.utm.edu/diff-ont/>> accessed 10 November 2019.

² *ibid.*

similarity, instead of leading to more clarity, contributes to a greater confusion between the two types of judicial acts.

The difference between interpretation of customary rules and treaty interpretation is another issue which is addressed in this paper. Unlike the distinction between interpretation of customary rules and their identification, the potential confusion that may arise from not distinguishing between the differences between these two judicial acts is not linked so much to terminology, as it is to practice. The fact that interpretation of customary rules and treaty interpretation are two different judicial acts (just like customary rules and treaty rules are two different sources of law) has been overlooked in some cases. Two examples are given where international judges engaged in an act of treaty interpretation to clarify the content of customary rules. This non-recognition of the distinction between the two may lead either to misapplication of the law or to solutions which do not accurately reflect the content of customary rules.

The working definition adopted in this paper of interpretation of customary rules is ‘the act of determining/construing the content of customary rules the existence of which is unchallenged’. This definition is inspired from a preliminary analysis of the case law on the subject and on the definition of interpretation of customary rules in the meaning used by Merkouris and Orakhelashvili (see *infra* Section 1(b)). Both legal scholars conducted an inquiry into the case law of international courts and tribunals and observed that, firstly, judges do not only gather State practice and *opinio juris* in order to determine the content of customary rules and secondly, that judges use methods of treaty interpretation or similar methods to establish the substance of customary rules. The fact that judges themselves refer to this latter process as interpretation and given the similarity (and sometimes even identity in the methods used) the scholars settled on the notion ‘interpretation of customary rules’ as the best description for this process.

This paper encourages further scholarly reflection on the distinction, both in theory and in practice, between these different judicial acts. While all three make up some sort of unity (especially in legal practice) and as strings of a harp work together to build the content and further the evolution of the content of customary international law, they remain distinct and should be, according to this author, recognized as such.

The contribution is structured along three Sections. Section 1 provides a contextual background by addressing the concept of interpretation and the arguments supporting the amenability of customary rules to interpretation. It is followed by Section 2 which examines the differences between interpretation of customary rules and their identification (in particular, interpretation in identification) and Section 3 which focuses on the distinction between interpretation of customary rules and treaty interpretation.

1. Interpretation of Customary Rules – The Concept

This section seeks to unravel the meaning of the concept of interpretation of customary rules, while at the same time demonstrating why interpretation of customary rules is not a contradiction in terms. This section starts off by describing the concept of interpretation of customary rules in legal scholarship (Section 1.1.) and the arguments against the interpretability of customary rules (Section 1.2.). It is followed by the argument concerning

the reasons why customary rules are amenable to interpretation (Section 1.3.) and the working definition of interpretation of customary rules (Section 1.4.).

1.1. The concept of interpretation of customary rules in legal scholarship

Judging by reference to the hundreds of years of existence of international law, the concept of interpretation of customary rules is quite novel. Arguably the first legal scholars who discussed interpretation of customary international law was Charles de Visscher. In *Problemes d'Interpretation Judiciaire en Droit International Public* de Visscher examined two dimensions of interpretation with respect to custom: interpretation as part of the customary process of law creation and interpretation of customary rules proper.³ As part of the development/formation of customary rules interpretation was perceived by de Visscher as a value judgment on the content of a customary rule made by a relevant agent subsequently to the observation of patterns of repeated State practice. These patterns of facts were to be evaluated in light of moral and social imperatives.⁴ Interpretation of customary rules, in contrast, was seen as an act of judicial elaboration or, more precisely, the adaptation of general customary norms to particular situations⁵ that marked the transition from the abstract norm to the concrete norm.⁶ De Visscher believed that there are two types of customary rules: customs the essential components of which make up a hard core and, thus, are rarely, if ever, subject to dispute and customs in the case of which a dispute may arise around its nucleus, where a fringe of indeterminacy always remained.⁷ The subject was taken over by Sur who, in line with the views expressed by de Visscher, advanced a tripartite classification of interpretation in relation to international custom: (1) interpretation that establishes the existence of a customary rule, (2) interpretation that establishes the content of a customary rule and (3) interpretation that establishes the scope of a customary rule.⁸ For both scholars interpretation is indispensable to all the stages of the existence and development of custom. This position on the omnipresence of interpretation in the life of custom taken as a whole is shared today by contemporary scholars like Alland and Tassinis (see *infra* Section 2).⁹

Around the same time that Sur wrote on the subject of interpretation of customary law a German legal scholar — Albert Bleckmann — published a paper on the identification and interpretation of customary international law. According to Bleckmann, customary rules were

³ De Visscher (n 9).

⁴ Ibid 221.

⁵ Ibid 235-236.

⁶ Ibid 236. On the difference between a general norm and a particular norm and an abstract versus a concrete norm see Morelli Gaetano, 'Cours General de Droit International Public' (1956) 89 *Collected Courses of the Hague Academy of International Law* 439, 475-476. He argues that norms are either general or particular depending on the subjects of the rule - if a subject is individualized then it is a particular rule, when the subject is general then the rule can apply to anyone (the subjects of law to whom it applies are not determined individually). The second subdivision is in abstract and concrete. The concrete rule is specific, whereas the abstract rule is capable of operating in relation to an unlimited number of factual situations. General rules are usually, according to Gaetano, abstract rules, whereas particular rules can be either abstract or concrete/specific.

See also Jacqué (n 15) 387.

⁷ Ibid 236.

⁸ Sur (n 9) 190 et seq. He reiterated his position in Serge Sur, 'La Créativité du Droit International Cours Général de Droit International Public' (2013) 363 *Collected Courses of the Hague Academy of International Law* 18, 295-296.

⁹ Orfeas Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 *EJIL* 235; Alland Denis Alland, 'L'interprétation du droit international public, 2013 (Volume 362)' in *Collected Courses of the Hague Academy of International Law* 45, 85.

to be determined by induction — the abstract legal principle being derived from practice — and applied to new factual situation through deduction, which may involve the interpretation of the abstract legal principle.¹⁰ Considering this, customary rules, as abstract legal principles, were subject to grammatical, systemic and teleological interpretation.¹¹ In support of this position Capotorti in his 1994 general course at the Hague Academy of International law stated that rules of interpretation enshrined in the Vienna Convention on the Law of Treaties (hereinafter ‘VCLT’) which have a customary basis also regulate the interpretation of international custom and that of other sources of law.¹² More recently, the same claim was made by Merkouris and Orakhelashvili.¹³ Both Merkouris and Orakhelashvili conducted an analysis into the case law of international courts and tribunals and have revealed a plethora of cases where judges either use the notion of interpretation with respect to customary rules, or without doing so, employ methods from treaty interpretation.¹⁴ This has led them to the conclusion that interpretation of customary international law is not only possible, but actually happens in the practice of international courts and tribunals. Since judges used the term ‘interpretation’ with respect to the determination of the content of customary rules in a way that is different from inquiring into State practice and *opinio juris* and due to the obvious

¹⁰ Albert Bleckmann, ‘Zur Feststellung und Auslegung von Völkergewohnheitsrecht’ (1977) ZaöRV 505.

¹¹ Ibid 526.

¹² Francesco Capotorti, ‘Cours Général de Droit International Public’ (1994) 248 *Collected Courses of the Hague Academy of International Law* 17, 121.

¹³ Panos Merkouris, ‘Interpreting the Customary Rules of Interpretation’ (2017) 19 *International Community Law Review* 127, 134-137; Panos Merkouris, *Article 31 (3) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato’s Cave* (Brill 2015) 231-300; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 496.

¹⁴ Other examples include: *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) [2016] ICJ Rep 833, Dissenting Opinion of Judge Trindade [70]; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422, Declaration of Judge Donogue [21]; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14 [216]; ‘ARA Libertad’ (*Argentina v Ghana*) (Provisional Measures, Order of 15 December 2012, Sep. Op. Wolfrum and Cot) ITLOS Reports 332 [7].

‘Interpretation’ was also a term used during the preparation of the ILC Draft Conclusions on the identification of customary international law. For instance, ‘interpretation’ was referred to by Mathias Forteau, who affirmed that the European Court of Human Rights has given ‘a slightly different interpretation of the customary law applicable to immunity’. Besides reference to interpretation of customary law, some ILC members have referred to interpretation of customary rules. Marie G. Jacobsson made a comment with respect to the practice of the European Union – ‘if an international court found that the European Union’s interpretation of a rule of customary international law in an area where it had exclusive competence accurately reflected customary international law, it would be difficult to maintain that the practice did not amount to State practice.’ In addition, Mahmoud D. Hmoud called for a clarification of the situations when acts of the State (esp. decisions of national courts) are either samples of State practice (otherwise said, ‘raw material’ for the purposes of identification of CIL) or show the *interpretation* given by the State to a particular rule of CIL. Outside of any reference to the practice of international courts and tribunals, ‘interpretation’ was mentioned by the representative of Slovenia, Ernest Petric, who contended that ‘unless codified, customary international law was unwritten law, and the consequences of that fact in terms of its identification and interpretation should also be considered’. His comment is important because it seems to imply that identification and interpretation are two different processes, since they are mentioned separately.

Finally, Georg Nolte, when emphasising the interaction between customary international law and the general principles of law, noted that ‘it was thus conceivable for a customary rule to be *interpreted* in the light of a recognized general principle’. See ILC, ‘Provisional Summary Record of the 3338th Meeting from 2 May 2017’ UN Doc A/CN.4/SR.3338, 5; ILC, Yearbook of the International Law Commission 2012, Vol. I, ‘Summary Record of the 3150th Meeting’ UN Doc A/CN.4/SR.3150 [64]; ILC, Yearbook of the International Law Commission 2013, Vol. I, ‘Summary Record of the 3184th Meeting’ UN Doc A/CN.4/SR.3184 [53], 100; ILC, ‘Provisional Summary Record of the 3225th Meeting as of 18 September 2014’ UN Doc A/CN.4/SR.3225, 7; ILC, Yearbook of the International Law Commission 2013, Vol. I, ‘Summary Record of the 3183rd Meeting’ UN Doc [A/CN.4/SR.3183](#) [14] 92, [21], 93. See also ILC Draft Conclusions on Identification of Customary International Law, Comments and Observations by the Kingdom of the Netherlands [5]; Advisory Committee on Issues of Public International Law on the draft conclusions, 4-5: [https://cms.webbeat.net/ContentSuite/upload/cav/doc/Report_nr_29_-_Identification_of_customary_international_law_-_November_2017\(2\).PDF](https://cms.webbeat.net/ContentSuite/upload/cav/doc/Report_nr_29_-_Identification_of_customary_international_law_-_November_2017(2).PDF).

similarities with treaty interpretation, both scholars reached the conclusion that the process of content determination of previously established customary rules is none other than an interpretative act. Considering this, the definition advanced by Orakhelashvili (probably induced from the plethora of practice) is that interpretation of customary rules refers to the clarification of ‘the modes and details of applicability of customary rules to specific situations to which they are designed to apply due to their general scope’.¹⁵

1.2. Arguments against the amenability of customary rules to interpretation

Two main arguments have been forwarded against the amenability of customary international law to interpretation.¹⁶ Firstly, that the identification of customary rules is the only operation which establishes its content and, thus, any form of clarification of a customary rule would require a new stage of identification and, secondly, that the object of interpretation can only be written law and, since customary rules are unwritten, they cannot be subject to interpretation.¹⁷ These two arguments depend on (1) the understanding of what customary law is and (2) the definition given to interpretation. Essentially, a new cycle of identification is required each and every time only if international custom is equivalent to its constituent elements. Similarly, interpretation is only confined to written rules depending on the definition of interpretation one adopts.

1.3. Reasons in favour of the amenability of customary rules to interpretation

1.3.1. Customary Rules Distinguished From Elements of Custom

To address the first argument against the interpretability of customary international law, a distinction is made between customary rules and elements of custom.

Customary international law is, according to Article 38(1)(b) of the Statute of the International Court of Justice (hereinafter ICJ), one of the sources of law to be applied by the ICJ. In conformity with the provisions of this article, customary international law is ‘general practice accepted as law’, which, according to the case law of the ICJ, is comprised of two elements: State practice and *opinio juris*.¹⁸ Nonetheless, it is not its only meaning. Even a cursory glance at the discussions surrounding the conclusion of the Statute of the Permanent Court of International Justice reveals that ‘custom’ is also another name for the process of law development. In the words of the Chairman of the Drafting Committee, ‘[custom] is a very natural and extremely reliable method of development, since it results entirely from the constant expression of the legal convictions and of the needs of the nations in their mutual

¹⁵ Orakhelashvili (n 26) 496. Another important contribution concerning the topic was written by Staubach. See Peter G. Staubach, *The Rule of Unwritten International Law. Customary Law, General Principles, and World Order* (Routledge 2018). See also Duncan Hollis, ‘Interpretation’ in D’Aspremont and Singh, *Concepts for International Law. Contributions to Disciplinary Thought* 559-560.

¹⁶ Mathias Herdegen, ‘Interpretation in International Law’ MPEPIL 723 (March 2013) [61] accessed 15 June 2020; Tullio Treves, Customary International Law MPEPIL 1393 (November 2006) accessed 12 April 2020; Bos (n 7) (108); Rudolf Bernhardt, ‘Interpretation in International Law’ in Rudolf Bernhardt and Rudolf L. Bindschedler (eds), *Encyclopedia of Public International Law* (Vol. II, North-Holland 1992) 1417.

¹⁷ Gourgourinis (n 6) 36.

¹⁸ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Merits) [1969] ICJ Rep 3 [77]. See also *S.S. Lotus (France/Turkey)* (Merits) [1927] PCIJ Series A No. 10, p. 28; *Asylum Case (Colombia/Peru)* (Counter-claims) [1950] ICJ Rep 266, p. 276-277. For an analysis of the evolution of the elements custom see Jean d’Aspremont, ‘The Four Lives of Customary International Law’ (2019) 21 *International Community Law Review* 229.

intercourse'.¹⁹ Thus, one should distinguish between custom as process and custom as the product of this process.²⁰

At the same time, custom is also the name for the legal norm derived from general practice accepted as law. This meaning of custom is important to emphasize as some legal scholars oppose the possibility of interpretation of customary rules by reducing custom to its constituent elements. For instance, Bos rejects the amenability of customary international law to interpretation on the basis that the content of custom is determined simultaneously with its existence.²¹ But this argument would only hold true if custom was identical with its elements. That this is not the case is evidenced, firstly, by the language employed by the International Law Commission (hereinafter 'ILC') in its recent Draft Conclusions on the identification of customary international law²³ and, secondly, confirmed by the opinions of established international legal scholars, theorists of law and by the ICJ itself (see Section 2).

In its conclusions on identification of international custom the ILC has implicitly supported the division between constituent elements of custom and customary rules when it defined customary international law as 'unwritten law *deriving from* practice accepted as law'. The implication of this is that customary law (the rule itself) is not equivalent to State practice, as the act of deriving means obtaining something from something else – if there is identity between two things then one cannot derive something from itself; in other words, the act of deriving requires for two *different* things to be present. The logical consequence of this is that there is no identity between the unwritten rule of customary law and its elements (State practice and *opinio juris*).

Turning to legal scholarship, influential scholars such as de Visscher and Sur, who (while considering interpretation omnipresent in the life cycle of customary international law – a point we shall return to at a later point) explicitly talked about 'interpretation de la *regle*'.²⁴ In a similar vein, Kelsen upon his discussion of custom as a source of law made the observation that 'such is the nature of those particular facts which together constitute the existence of the 'custom', *creating the general rule* [...]'.²⁵ Needless to say that judgments of international courts and tribunals frequently refer to 'customary *rules*',²⁶ thus confirming the

¹⁹ Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, 16 June-24 July 1920, 322. Michael Byers, *Custom, Power and the Power of Rules* (CUP 2009) 129 et seq.; Hans Kelsen, *General Theory of Law and State* Transactions Publishers 2006 (1st ed 1949 Harvard University Press) 34.

²⁰ 'Customary International Law is the product of an age-old and worldwide and highly efficient system of law-making in which the subjects of the law make the law unconsciously and in which the common interest of society is secreted silently and organically.' in Philip Allott, 'Interpretation — An Exact Art' in Andrea Bianchi, Daniel Peat, Matthew Windsor (eds.) *Interpretation in International Law* (OUP 2015) 373, 385. Of course whether customary international law is indeed made unconsciously can be subject to debate, as it may contradict existence of the element of *opinio juris*.

²¹ Anastasios Gourgourinis, 'The Distinction Between Interpretation and Application of Norms in International Adjudication' (2011) 2(1) *Journal of International Dispute Settlement* 31.

²² Maarten Bos, *A Methodology of International Law* (North-Holland 1984) 108.

²³ Draft Conclusions on Identification of Customary International Law, With Commentaries ILC Report (A/73/10) on its Seventieth Session 123.

²⁴ Charles de Visscher, *Problèmes d'Interpretation Judiciaire en Droit International Public* (Ed. A. Pedone 1963) 221 et seq; Serge Sur in *L'interpretation en droit international public* (Librairie Générale de droit et de jurisprudence 1974) 190 et seq.

²⁵ Kelsen (n 4) 34.

²⁶ Indicatively *North Sea Continental Shelf* (n 3) [60], [62],[74],[76]; *Jurisdictional Immunities of the State, Germany v Italy* (Merits) [2012] ICJ Rep 99 [52],[93].

distinction between customary norms and State practice with *opinio juris*.²⁷ This distinction between State practice and *opinio juris* as elements of custom and customary *rules* is aptly portrayed in this volume by Gorobets by the container *versus* content metaphor.²⁸ Slightly adapting the metaphor, it is possible to argue that the elements of custom are the containers, whereas the customary norms are the content,²⁹ similarly to the distinction in treaty law between the treaty as *instrumentum* and the norms contained in the treaty.³⁰

1.3.2. Interpretation in PIL as Applicative Construction

The second criticism against the amenability of customary international law to interpretation rests implicitly on each author's understanding of the term 'interpretation' – which is examined in this subsection.

Black's Law Dictionary defines interpretation as 'the process of determining what something, esp. the law or a legal document, means; the ascertainment of meaning to be given to words or other manifestations of intention'.³¹ This definition is different from the ordinary meaning of interpretation/to interpret as 'the way in which someone explains or understands an event, information, someone's actions etc',³² 'to explain or tell the meaning of' or 'to conceive in light of individual belief, judgment, or circumstance',³³ 'an explanation or opinion of what something is'.³⁴ While interpretation more generally is tied to meaning,³⁵ which can be the meaning of any object that is meaningful, legal interpretation necessarily requires (as per its definition) that the object is a law or a legal document (and the words contained in it) or, in any event, a manifestation of a (legal) intention (it is presumed that the dictionary referred not to just any intention but legal intention), as in intention to enter/create legal relations/to produce legal consequences. While philosophers still debate on the meaning of interpretation and the space that intention occupies in it,³⁶ for the purposes of this inquiry it suffices to say that legal dictionaries are reflections of a certain consensus within the epistemic community/interpretative community in the discipline taken broadly. Therefore, in law more generally, interpretation is generally tied to some kind of manifestation of intention and is an act which unravels this intention.

²⁷ There may of course be other arguments supporting this distinction. For instance, if custom was treated in international law merely as patterns of behaviour accepted as law, they would have been applied by way of precedent and not in the capacity of self-standing rules.

²⁸ Kostiantyn Gorobets, 'Practical Reasoning and Interpretation of Customary International Law' 6, forthcoming in Panos Merkouris, Jörg Kammerhofer, Noora Arajärvi (eds.), Nina Mileva (ass. ed) *The Theory and Philosophy of Customary International Law and Its Interpretation* (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3578320 accessed 10 June 2020.

²⁹ Although I do not necessarily agree that it is the container that needs to be interpreted for the purposes of content, but rather the content itself.

³⁰ Jacqué, Jean-Paul, 'Acte et Norme en Droit International Public' (1991) 227 *Collected Courses of the Hague Academy of International Law* 385-386.

³¹ Bryan A. Garner (ed), *Black's Law Dictionary* (9th ed, WEST 2009).

³² Longman Dictionary at <<https://www.ldoceonline.com/dictionary/interpretation>> accessed 15 November 2020.

³³ Merriam Webster Dictionary at <<https://www.merriam-webster.com/dictionary/interpreting>> accessed 15 November 2020.

³⁴ Cambridge Dictionary at <<https://dictionary.cambridge.org/dictionary/english/interpretation>> accessed 15 November 2020.

³⁵ Endicott distinguishes between three types of meaning: the meaning of the object, what the author means by the object (meaning that) and what the object means to the interpreter (meaning for). See Timothy A. O. Endicott, 'Putting Interpretation in Its Place' (1994) 13 *Law and Philosophy* 451, 454.

³⁶ See Endicott (n 33); Andrei Marmor, 'Meaning and Interpretation' in Katjas Ziegler (ed) *Interpretation and Legal Theory* (Bloomsbury Publishing 2005). See also the distinction between interpretative and non-interpretative doctrines in Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005).

Zooming into the discipline of public international law, the prototype of interpretation is interpretation of treaties, especially since the VCLT, which codified the rules of treaty interpretation. In an illuminating account of what interpretation is for the community of international lawyers, Kammerhofer noted that, as opposed to interpretation, strictly speaking, in public international law interpretation is the name for ‘an applicative construction of the law’s meaning’,³⁷ which involves both the extraction of legal meaning, but also ‘the concretisation of abstract general norms in individual instances’.³⁸ While in *some* domestic legal systems a distinction is made between interpretation, as clarification of semantic meaning of legal texts, and construction as the judicial activity of determining a rule’s scope of application and the resolution of gaps and contradictions,³⁹ this distinction was intentionally dismissed upon the drafting of the first Draft Convention on the law of treaties and, subsequently, of the VCLT.⁴⁰ Compared to the general legal definition offered by the Black’s Law Dictionary the definition of interpretation contained in the VCLT (as an authoritative document on the matter) is considerably wider and goes beyond the mere determination of intention and, therefore, it is reasonable to assume that the meaning in which judges use ‘interpretation’ is also wider than the stricter meaning of interpretation in law more generally. Thus, interpretation of customary rules is not a contradiction in terms or a misconception even if the analysis performed for the purpose to determine a rule’s content disregards intention and focuses on other reference points within the parameters of the language of our discipline. Similarly to treaties, customary rules can be subjected to interpretation in the sense of construing the content on the basis of considerations such as teleology, the interconnectedness of norms in the system of law etc. and, thus, interpretation of customary rules is not a contradiction in terms.

1.4. Interpretation of customary rules — a definition

Considering the aforementioned, the working definition of interpretation of customary rules ‘the act of determining/construing the content of customary rules the existence of which is unchallenged’. This is the definition which, as previously demonstrated, makes sense from a theoretical standpoint, but also best describes the instances of judicial practice in which the

³⁷ Jörg Kammerhofer, ‘Taking the Rules of Interpretation Seriously, but Not Literally: A Theoretical Reconstruction of the Orthodox Dogma (2017) 86 Nordic Journal of International Law 125, 131.

³⁸ *Ibid.* It should be noted here that interpretation is also closely linked to norms of conflict resolution. See ILC, Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions (A/CN. 4/L. 702) (18 July 2006) [26], [67], [83], [412].

³⁹ Lawrence B. Solum, ‘The Interpretation-Construction Distinction’ (2010) 27 Constitutional Commentary 95, 95-98.

⁴⁰ The argument used by the Harvard Research Group (the soundness of which is open to debate) was that there was no difference in kind, but rather in degree between the two operations. Draft Convention on the Law of Treaties, With Comment (1935) 29 The American Journal of International Law, Supplement: Research in International Law 653, 939). See also Tsune-Chi Yu, *Interpretation of Treaties* (Columbia University Press 1927) 40-43 and fn. 3.

The drafters of the VCLT have maintained the inclusion of the notion of construction within the concept of interpretation. The term construction was only mentioned in the ILC reports by reference to priority in conflicting treaties ‘— the Commission recognized that there is always a preliminary question of construction of the two treaties in order to determine the extent of their incompatibility and the intentions of the parties with respect to the maintenance in force of the earlier treaty’ Yearbook of the International Law Commission 1964 Vol II, Documents of the Sixteenth Session Including the Report of the Commission to the General Assembly, A/CN.4/SER.A/1964/ADD.1 35. On the reasons why the drafters of the VCLT opted for a holistic method for interpretation (which encompasses methods that do not fall under the narrow understanding of interpretation) see Rémi Bachand, *L’interprétation en droit international: une analyse par les contraintes*, Société européenne de droit international, 2007, available at: <https://esil-sedi.eu/wp-content/uploads/2018/04/Bachand.pdf> accessed 15 June 2020.

content of customary rules is determined differently than by looking at State practice and *opinio juris*.

2. Interpretation of Customary Rules *versus* Identification of Customary Rules

Having in mind the definition given to interpretation of customary rules, this contribution now turns to discussing the differences between interpretation of customary rules and their identification.

According to Merkouris, identification of customary international law is both a process of law-ascertainment and a process of content determination.⁴¹ It seeks, by examining evidence of State practice and *opinio juris*, to determine whether a customary rule exists and what its content is. Similar to identification, interpretation of customary international law is also a process of content determination. However, it is a process of content determination that takes place only after the customary rule has been first identified. This relationship between the two processes can be seen as mirroring (to a certain degree) what happens in treaty law. Firstly, the judge finds the relevant applicable rule (which, strictly speaking, is an act of law-ascertainment), which already has a content embodied in the text, and only then the adjudicator can proceed to the interpretation of the rule.

It is quite common to refer to the judicial act which happens at the stage of identification of a customary rule as interpretation. The term is used in three situations: to describe the conglomerate of State practice and *opinio juris*,⁴² to refer to the process of evaluating the mass of State practice and *opinio juris*,⁴³ to derive/infer the relevant customary rule from the mass of State practice⁴⁴ or to connote the analysis of a singular sample of State practice and the motivation behind it.

Firstly, unlike the somewhat ideal (and sterile) model which allegedly describes the process of identification of customary rules by way of spotting samples of State practice which are out there, identification of customary rules is argued to be rarely just about discretionary data collection and, more often than not, as involving some form of interpretation.⁴⁵

Secondly, interpretation is deemed necessary in situations where there is inconsistent State practice and *opinio juris*.⁴⁶ Such a problem occurs when there are simultaneously examples of State practice supporting the fact that a customary rule has emerged and equally compelling examples of contrary behaviour on behalf of other States. An example given in this sense is the prohibition of torture.⁴⁷ On the one hand, some States which do not engage in acts of torture, whereas, on the other hand, there are examples of States which torture individuals and do so without protest from other States. In such a case, the argument goes, there are two possible interpretations of State practice: (1) torture is permitted and (2) torture is prohibited,⁴⁸

⁴¹ Merkouris (2017) (n 26) 134-137.

⁴² Orfeas Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 EJIL 235, 242-244.

⁴³ Anthea E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 Am J Int'l L 757. Nadia Banteka, 'A Theory of Constructive Interpretation for Customary International Law Identification' (2018) 39(3) Michigan Journal of International Law 301.

⁴⁴ Tassinis (n 42) 241-242.

⁴⁵ Ibid 242-244.

⁴⁶ Roberts (n 43) 781.

⁴⁷ Ibid 781.

⁴⁸ Yet, it ignores the third possibility: that there is neither a prohibition, nor a permission to torture.

and the decision should ultimately be made on the basis of considerations of morality as an implementation of the Rawlsian theory of reflective equilibrium.⁴⁹

Thirdly, at the stage of deriving norms from patterns of State practice there is also some measure of interpretation as ‘the same set of data can support indefinite series of statements as to what the content of the law is’.⁵⁰ This is connected to the previous use of ‘interpretation’ with the difference that in this case it is argued that interpretation is always present, even if there is no inconsistent practice as such. In this case, ‘interpretation’ means ‘formulations of logical propositions describing the norm that we might infer from such conduct’.⁵¹

Finally, ‘interpretation’ is used as a synonym for the process of assessing the motivation of a State behind a specific behaviour, such as allowing another State’s warship to enter its port without authorisation.⁵² Such an interpretative act then contributes to the understanding of whether *opinio juris*, understood as a collective agreement on a rule, as opposed to the singular motivation of each State, is present. Yet the analysis, as opposed to the first case, is made at the level of a singular specimen of practice, not at the level of the whole *mass* of State practice.

Qualitatively these types of ‘interpretation’ are different from interpretation of customary rules. Firstly, they are different by reference to their object as they are concerned with the elements of custom, as opposed to the customary rule itself. Secondly, all of them are concerned with what is not yet law and, therefore, do not squarely fit into the notion of legal interpretation. For instance, interpretation in describing State practice and *opinio juris* is a form of perceptual evaluation,⁵³ and is focused on the cognitive dimension (understanding) as opposed to legal interpretation. What is labelled as interpretation in the case of inconsistent State practice is, although similar to legal interpretation (in the sense that it requires a judgment/decision to be made on alternative propositions) it is primarily a process of law-ascertainment and not an interpretation of a law the existence of which was previously acknowledged. Additionally, the act itself is more an exercise in judging than it is in interpretation, understood in its legal sense. The same can be said of “interpretation” at the stage of deriving a customary norm from legal practice. Finally, the assessment of the motivation behind an instance of State practice, while similar to interpretation in the sense of an act concerned with deciphering legal intention, is, again, part of an exercise in law-ascertainment, as opposed to legal interpretation because it is an interpretation of the meaning of facts and not of the meaning of existing law.

Even if these acts could be described as interpretative in nature by reference to the ordinary meaning (which is also very general) of interpretation, it is still more beneficial to have them distinguished terminologically. Using interpretation at both stages may create confusion and already does, given the complex nature of customary international law, balancing between fact and law. Since the VCLT already codifies (implicitly) an authoritative meaning of interpretation, using it with the same meaning with respect to rules of customary international law will contribute to linguistic consistency within the discipline. In other words, since interpretation as a notion in international law when used with respect to sources of law means,

⁴⁹ Roberts (n 43) 781.

⁵⁰ Tassinis (n 42) 242.

⁵¹ Ibid.

⁵² Martti Koskenniemi, *From Apology to Utopia: the structure of international legal argument* (CUP 2005) 435.

⁵³ John R. Searle, *The Construction of Social Reality* (The Free Press 1995) 133-34.

essentially, a blend between what in some domestic jurisdictions is distinguished between interpretation and construction, and it has an already established and specialized meaning in treaty interpretation, it is better to confine the notion of ‘interpretation of customary international law’ to the posterior content determination of customary rules in a way that mirrors treaty interpretation and brings more unity to the system as a whole.

Another argument in favour of using the notion of interpretation only with respect to the content determination of customary rules (as opposed to determinations on State practice and *opinio juris*) is the difference in the aims of the two judicial acts. The initial content determination process seeks to find the customary rule itself and initially determine its content – to make the inductive generalisation out of a collection of State practice, which, even if requiring some kind of interpretative reasoning as method, does not undermine the fact that it is an exercise of law-ascertainment. The subsequent act of content determination is concerned not with law-ascertainment, but rather with construing the relevant norm in a way that contributes to the solution of a dispute. Thus, it is the position of this author that the different aims of the two judicial acts should be reflected in the name of these processes. This is best done by confining the notion of interpretation solely to the subsequent act of content determination.

3. Interpretation of Customary Rules *versus* Treaty Interpretation

Another difference worth reflecting upon is the one between interpretation of customary rules and treaty interpretation. What Merkouris and Orakhelashvili noticed was that there was a similarity in the method that the judges used when determining the content of a rule past the identification stage.⁵⁴ For instance, judges have referenced the technique of interpretation by reference to ordinary meaning in *Hadzihasanović*.⁵⁵ Two legal issues were raised in this decision: (1) whether the principle of command responsibility applicable to international armed conflict is also applicable to non-international armed conflict and (2) whether a superior can be punished under the principle of command responsibility for acts committed by subordinates prior to the assumption of command. Having found no specific State practice and *opinio juris* on the principle of command responsibility for acts committed in *non-international* armed conflict, the Tribunal argued that ‘where a principle can be shown to have been so established [on the basis of State practice and *opinio juris*], it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle’.⁵⁶ The interesting part was that in order to support this argument, the Appeals Chamber of the ICTY relied on the prohibitions contained in common Article 3 of the Geneva Conventions and reasoned that ‘in the absence of anything to the contrary, it is the task of a court to interpret the underlying State practice and *opinio juris* [...] as bearing its *normal meaning* that military organization implies responsible command and that responsible command in turn implies command responsibility’.⁵⁷ Leaving aside the convoluted language and possible concerns regarding the strength of the Court’s argument, as well as the reference to State practice and *opinio juris*, in

⁵⁴ See fn. 26.

⁵⁵ *Prosecutor v Hadzihasanović et. al*, ICTY, Case no. IT-01-47-AR72 Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility of 16 July 2003.

⁵⁶ *Ibid* [12].

⁵⁷ *Ibid* [17].

order to make the argument concerning the meaning of a previously established customary rule, the Court borrows the language of treaty interpretation.

In the *Orić* case, where the *ratio decidendi* in *Hadzihasanović* was the object of contention⁵⁸ Judge Schomburg, as one of the dissenting judges, argued that the customary principle of command responsibility must be interpreted by giving ‘consideration to the *purpose* of a superior’s obligation to effectively make his subordinates criminally accountable for breaches of the law of armed conflict’.⁵⁹ He then emphasized that ‘considering thus the *purpose* of superior responsibility, it is arbitrary – and contrary to the *spirit* of international humanitarian law – to require for a superior’s individual criminal responsibility that the subordinate’s conduct took place only when he was placed under the superior’s effective control’.⁶⁰

In *Furundžija*⁶¹ the Court faced a question concerning the definition of rape and the forms of behaviour that fall under this offence (in particular, whether oral penetration can qualify as rape). The Trial Chamber, firstly, stated that the prohibition of rape in armed conflict has evolved into a norm of customary international law,⁶² yet found that international law (either treaty or custom) contains no definition of rape.⁶³ Then, it scrutinised national legislation and found major discrepancies between the criminal laws of various countries as to the definition of rape and whether oral penetration qualifies as rape or a different type of sexual assault.⁶⁴ Lastly, it resorted to the principle of respect for human dignity to interpret the crime of rape. The Trial Chamber noted ‘it is consonant with this principle [principle of protection of human dignity] that such an extremely serious sexual outrage as forced oral penetration should be classified as rape’.⁶⁵ As the statement reveals, the Trial Chamber did not *apply* the principle of protection of human dignity to the case directly,⁶⁶ but it determined the definition of rape in consonance with this principle.⁶⁷ This example can be taken as a form of interpretation similar to systemic interpretation in treaty interpretation.

What runs like a red thread through these examples are the arguments typically resorted to for the purposes of treaty interpretation (it would not be far fetched even to argue that judges apply the same interpretative techniques by analogy). Depending on the interpretative method used, some cases raise important questions concerning the relationship between interpretation of customary rules and treaty interpretation. For example, in the previously mentioned *Hadzihasanović* case one of the Appeal Chamber judges appended a dissenting opinion where he noted that ‘any interpretation [of the customary rule] can be made by reference to the object and purpose of the provisions laying down the doctrine’.⁶⁸ By the same token, in the *North Sea Continental Shelf* case, in his dissenting opinion, Judge Sørensen observed:

⁵⁸ *Prosecutor v. Orić*, ICTY, Case no. IT-03-68-A Appeals Chamber Judgement of 3 July 2008.

⁵⁹ *Prosecutor v. Orić* (n 12) Dissenting Opinion of Judge Schomburg [16] emphasis added.

⁶⁰ *Ibid* [17] emphasis added.

⁶¹ *Prosecutor v. Furundžija*, ICTY, Case no. IT-95-17/1-T Trial Chamber Judgment of 10 December 1998.

⁶² *Ibid* [168].

⁶³ *Ibid* [174].

⁶⁴ *Ibid* [178]-[182].

⁶⁵ *Ibid* [183] Emphasis added.

⁶⁶ On the differences between ‘interpretation’ and ‘application’ see Gourgourinis (n 6).

⁶⁷ For a different opinion see Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (Routledge 2014).

⁶⁸ *Prosecutor v. Hadzihasanović* (n 61) Dissenting Opinion Judge Shahabudeen [11]. Judge Shahabudeen refers to the provisions of Additional Protocol I to the Geneva Conventions.

‘If the provisions of a given convention are recognized as generally accepted rules of law, this is likely to have an important bearing upon any problem of interpretation which may arise. In the absence of a convention of this nature, any question as to the exact scope and implications of a customary rule must be answered on the basis of a detailed analysis of the State practice out of which the customary rule has emerged. If, on the other hand, the provisions of the convention serve as evidence of generally accepted rules of law, it is legitimate, or even necessary, to have recourse to ordinary principles of treaty interpretation, including, if the circumstances so require, an examination of *travaux préparatoires*.’⁶⁹

In legal scholarship these and other similar examples have been frowned upon either as a failure to distinguish between treaty interpretation and identification of custom⁷⁰ or as a disregard for the fact that customary rules possess an independent rationale and should be assessed by reference to it, rather than by reference to a treaty’s object and purpose.⁷¹ The main point behind these criticism is the need to keep interpretation (or identification) of customary rules separate from treaty interpretation. The danger is that using reference points related to the treaty counterpart of the customary rule may lead to a misapplication of the law – the application of a treaty rule which is not clearly established as a customary rule or the usage of considerations which are related to the treaty, but not, as such, connected to the customary rule.

According to this author, the answer should be nuanced depending on the type of customary rule involved – a question which ties to the relationship between customary rules and treaty rules more generally. Generally speaking, the relationship between custom and treaties is a multifaceted one. On the one hand, treaties may codify, crystallize or lead to the creation of customary rules. On the other hand, treaties may be used to confirm the existence of a customary rule in the process of identification. According to the empirical study conducted by Choi and Gulati, treaties are the dominant form of evidence in the ascertainment of customary rules.⁷² Not only the existence, but also the content of customary rules may be determined by reference to treaty provisions, which includes the situation when the content of a customary rule is determined posterior to the acknowledgment of its existence. Otherwise said, treaties can be an important reference point in the interpretation of customary rules. According to the ICJ itself — ‘multilateral conventions may have an important role to play in recording and *defining* rules deriving from custom’.⁷³ In a similar vein to what Bleckmann (one of the forefronters of the concept of interpretation of customary rules) argued with respect to using State documents for the purposes of grammatical interpretation of custom, treaties can be used to define concepts contained in customary international law, when their meaning is disputed. Moreover, just as customary rules have been used for the purposes of treaty interpretation under Article 31(3)(c), treaties (and general principles of law) can be used for interpreting customary rules as a form of systemic interpretation. For the purposes of interpretation of customary rules, judges may use both codification treaties which contain provisions with content similar to that of the customary rule or on the same subject matter, or,

⁶⁹ *North Sea Continental Shelf Case* (n 3) Dissenting Opinion Judge Sørensen [13].

⁷⁰ See Birgit Schlütter, *Developments in Customary International Law. Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff 2010) 254-259.

⁷¹ See Orakhelashvili (n 26).

⁷² See Stephen J. Choi, Mitu Gulati, ‘Customary International Law: How Do Courts Do It?’ in Curtis A. Bradley (ed), *Custom’s Future. International Law in a Changing World* (CUP 2016).

⁷³ *Continental Shelf (Libyan Arab Jamahiriya/Malta)* Merits [1985] ICJ Reports 1985 13 [27].

equally, treaties that are neither codifications of customary rules or belong to a different (albeit, possibly related) subject matter. A relevant example in this sense is Judge Guillaume's suggestion in the *Advisory Opinion on Nuclear Weapons* that rules of *jus ad bellum* may aid the clarification of the rules of the *jus in bello*. However, the problem arises at the level of argumentative reference points such as ordinary meaning of the words, context, *travaux préparatoires*, intention of the parties or object and purpose and the answer as to whether each one of these reference points may be used for the purpose of a customary rule's content determination should depend on the type of customary rule involved. As rightfully pointed out by Judge Jennings in his Dissenting Opinion to the *Nicaragua* case:

'[t]o indulge the treaty interpretation process, in order to determine the content of a posited customary rule, must raise a suspicion that it is in reality the treaty itself that is being applied under another name. Of course this way of going about things may be justified where the treaty text was, from the beginning, designed to be a codification of custom; or where the treaty is itself the origin of a customary law rule'⁷⁴

When a treaty is a codification of customary rules, either completely or preponderantly it could be imagined that the judge heavily relies on the text of the treaty, as having a text as a reference point allows for a more straightforward interpretation of a rule, which might be more acceptable to the subjects of law because of its predictability (achieved through the written/codified nature of the rule). However, ideally, this should only be permissible provided that there are no indications that the customary rule has evolved posterior to its codification.⁷⁵ In the case of crystallized rules or rules which passed into customary international law from treaties the same considerations apply.

With regard to other reference points, such as context or *travaux préparatoires* matters are slightly different. For instance, in the case of a customary rule codified in a treaty a contextual interpretation may use the context of the treaty if other rules are also a codification of customary international law. It is more likely to admit an interpretation which uses the context of the treaty as a reference point in customary rules crystallized or which evolved into a rule of custom from a treaty, as the treaty serves as their springboard. Also, it is doubtful whether it is possible to use the context of the treaty (esp. other provisions of the same treaty) when the customary rules (either codified, crystallized or evolved from a treaty) do not form an organic unity or unity of origin with the other provisions. Such a unity may be created by the fact that two norms belong to the same sub-branch of international law. A multilateral treaty which contains provisions from different fields of international law and which does not contain other customary rules except the one which is under scrutiny will be an unlikely candidate as a reference point for interpreting the customary rule in question. This is unless these other types of rules are used as a form of systemic interpretation justified by the fact that they are somehow related to the dispute and, thus, to the customary rule which is interpreted.

Travaux préparatoires may be used for the purposes of analysing the content of customary rules crystallized from or evolved from treaties as they may aid in determining the precise meaning and, thus, scope of a customary rule, again, unless there is evidence that the content

⁷⁴ *Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States*, Merits [1986] ICJ Rep 14 Dissenting Opinion of Judge Jennings, 532-533.

⁷⁵ Antonio D'Amato, 'Trashing Customary International Law' (1987) Vol. 81 No. 1 *The American Journal of International Law* 101, 103-105; Bing Bing Jia, 'The Relations Between Treaties and Custom' (2010) Vol. 9 *Chinese Journal of International Law* 81, 92.

of the customary rule has changed through time. As for object and purpose, the treaty's rationale can hardly be a valid reference point, unless the treaty as a whole is a codification and there is some kind of organic unity in its provisions. This is because the object and purpose of the treaty may be much wider than the subject matter to which the customary rule refers to. For instance, the object and purpose of a regional treaty between a handful of States which declares in the Preamble that its aim is the maintenance of friendly relations between the Parties can hardly be used as an interpretative reference point to interpret a customary rule on environmental protection (even if it has emerged from this treaty) as it does not add aid in clarifying the content of this rule.

In any event, automatic application of reference points from treaties to customary international law is not advised and alertness should always be present when a treaty is used to aid the interpretation of customary rules.

Conclusion

This contribution was a reflection on the differences between, on the one hand, interpretation of customary rules and their identification, and interpretation of customary rules and treaty interpretation, on the other. Section 1 examined the concept of interpretation of customary rules by firstly distinguishing between elements of custom and customary rules proper and, secondly, by presenting the different meanings that the term interpretation may have. While the general definition of interpretation is 'understanding', the legal definition is limited to the determination of meaning of words or other manifestations of intention. Even more importantly, in public international law the term 'interpretation' is not limited to its hermeneutical dimension but can better be described as a form of applicative construction.

Section 2 examined the difference between interpretation of customary rules and their identification. Firstly, there is a difference in the object of the analysis and, secondly, there is a qualitative difference in the process, which, while possible to be regarded as 'interpretation' in its ordinary meaning, does not fall within the notion of 'legal interpretation'.

Section 3 discussed the differences between interpretation of customary rules and treaty interpretation. While the methods of interpretation may be similar, using reference points from treaty interpretation will not always be a sensible solution and judges should remain alert at the differences between the two sources of law.

Taking the points made in this paper as a whole, the crux of the matter is that the processes that have been analysed are part of the same palette that judges use when giving a solution on a case. Nonetheless, these operations are in meaningful ways different from each other, just like different strings of the same harp, and it is important to remain alert to these differences, both in theory and in practice.