university of groningen

University Medical Center Groningen

University of Groningen

A Theory of Interpretation for Customary International Law

Mileva, Nina

DOI:
10.33612/diss.753301628

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2023

Link to publication in University of Groningen/UMCG research database

Citation for published version (APA):
Mileva, N. (2023). *A Theory of Interpretation for Customary International Law*. [Thesis fully internal (DIV), University of Groningen]. University of Groningen. https://doi.org/10.33612/diss.753301628

Copyright
Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the “Taverne” license. More information can be found on the University of Groningen website: https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment.

Take-down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): http://www.rug.nl/research/portal. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Download date: 31-10-2023

university of
groningen

A Theory of Interpretation for Customary International Law

PhD thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. J.M.A. Scherpen
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

Thursday 14 September 2023 at 16.15 hours

by

Nina Mileva

born on 16 September 1992
in Skopje, North Macedonia

Supervisor
Prof. P. Merkouris

Co-supervisor
Dr. A.J.J. de Hoogh

Assessment Committee
Prof. E. Lijnzaad
Prof. C. Ryngaert
Prof. M.M.T.A. Brus

A Theory of Interpretation for Customary International Law

Nina Mileva

Nina Mileva, A Theory of Interpretation for Customary International Law (PhD Dissertation, University of Groningen, 2023)

ISBN 978-94-6483-318-8

This contribution is based on research conducted in the context of the project 'The Rules of Interpretation of Customary International Law' ('TRICI-Law'). This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

Cover design Marija Jordeva Trkulja
Typesetting Ivo Tarik de Vries-Zou
Printing Ridderprint | www.ridderprint.nl

To my parents, the giants on whose shoulders I stand.

На моите родители, џиновите на чии рамења стојам.

Contents

Acknowledgments vii
Abbreviations ix

Introduction 1

I. The Subject, Research Question, and Methodology of this Thesis 3
II. The Core Argument 5
III. The Structure of the Thesis and Summary of Chapters 7

Chapter 1 · Customary International Law: The Mainstream View, its Problems, and Two Parallel Realities 11

I. Introduction 11
II. The Two-Element Approach to Customary International Law 16
III. Some Persistent Problems 28
i. Problems emerging from the incoherent application of the two-element doctrine 28
ii. Problems of CIL evolution and change 35
iii. Problems emerging from the larger systemic context of international law 42
IV. Two Parallel Realities 55

Chapter 2 · Reconciling the Irreconcilable: The Possibility of Interpretation of Customary International Law 57

I. Introduction 57
II. The Concept of Interpretation in International Law 60
i. Insights from treaty interpretation 61
ii. The nature of the interpretive exercise 71
III. Interpretation in the Context of Customary International Law 79
i. The unwritten character of CIL does not exclude the need for its interpretation 82
ii. The process of identification of CIL rules does not also automatically delineate their content 89

iii. Scholarly research thus far confirms the possibility of CIL interpretation 98
IV. The Position of Interpretation in the Life of a CIL Rule 103
i. The difference between interpretation and identification 103
ii. Interpretation as the "solution" to CIL's problems: a first view 109

CHAPTER 3 · THE INTERPRETATION OF CUSTOM BY NATIONAL COURTS: LESSONS ON PURPOSE AND METHOD 113

I. Introduction 113
II. Why the Focus on National Courts 115
i. National courts as agents in the international legal order 115
ii. National courts as a source of good practices 126
III. National Courts Interpreting Customary Law 129
i. Methodology of case collection and categorization 129
ii. Analysis of collected cases 134
a. Sovereign immunities 134
b. International humanitarian law 161
c. Law of the sea and maritime law 171
d. Domestic custom 174
IV. Lessons from National Courts for a Theory of CIL Interpretation 182

CHAPTER 4 · THE FUNCTIONS OF INTERPRETATION IN THE CONTEXT OF CUSTOMARY INTERNATIONAL LAW 189

I. Introduction 189
II. The Concretizing Function of Interpretation in CIL 191
i. Interpretation as specification 191
ii. Interpretation as scope determination 202
III. The Evolutive Function of Interpretation in CIL 211
IV. The Functions of Interpretation as Solutions to CIL's Perennial Problems: Possibilities and Limits 218

CHAPTER 5 · CONCLUSIONS 225

Bibliography 229
Tables of Cases 245
Tables of Treaties 255
Academische Samenvatting 257
Biography 263

Acknowledgments

Conventional wisdom tells us that it takes a village to raise a child. Over the past five years I have found that this is no less true of completing your PhD. To my village of dear colleagues, friends, and family, I am immensely grateful for each of their unique contributions to my PhD journey.

To my supervisor Panos Merkouris, for his mentorship, wit, and kindness, both at the office and outside of it. For having the vision to found TRICI-Law, and with it giving us TRICI-ers our very own academic origin story. For encouraging me to find my voice and to explore all kinds of rabbit holes, and for allowing me to go my own way even when we disagreed.

To my former mentor Seline Trevisanut, without whose encouragement I would have never even dared to apply for this PhD.

To my co-supervisor André de Hoogh, for his insightful feedback and stimulating conversations.

To my paranymphs Marina Fortuna and Tarik de Vries-Zou, for their friendship, intellectual stimulation, and for standing next to me as I bring this thesis into the world.

To Konrad Turnbull and Sotirios Ioannis Lekkas, for being part of the TRICI fellowship, for sharing the burden of spreading the CIL interpretation gospel, and for their humor in much needed times.

To my colleagues Mando Rachovitsa, Marlies Hesselmann, Adina Nistor, Katerina Tsampi, Hylke Jellema, Kostia Gorobets, Yulia Khyzhniak, Antenor Hallo de Wolf, Lottie Lane, Medes Malaiholo, and Maxine Ekelenburg for the many inspiring conversations, and for making the department of Transboundary Legal Studies feel like home. To Marcel

Brus and Pauline Westerman for their leadership of the TLS, and their wisdom that they share generously with all of us.

To my friends and sisters of my heart, Viktorija Stojcheva, Hester Bartelsman and Chiara Loiero, for coming to my aid in a difficult time, and inspiring me with their strong spirits. To our friends Ronja, Yanis, Emily, Audrey, Aimel, Tarik, David, and Ro, for bearing with me through it all, lending me a hand and a compassionate ear, and reminding me that there is more to life than international law.

To my cousin, Marija Jordeva Trkulja, for adding beauty to my work, and to our Eli for being the best sister either of us could have ever asked for.

To my brother Niko, whose stoicism and generosity of spirit continue to inspire me, and to our parents Nataša and Jonče, without whom none of this would have happened.

And last, but certainly not least, to my husband Murat, whose love, patience, and gentle spirit sustained me throughout the whole PhD journey.

Nina Mileva
Groningen, 2023

Abbreviations

AB	Appellate Body
AJIL	American Journal of International Law
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
ASIL	American Society of International Law
BVerfGE	Die Entscheidungen des Bundesverfassungsgerichts
BYBIL	British Yearbook of International Law
CIL	Customary International Law
CUP	Cambridge University Press
ECSI	European Convention on State Immunity
EIA	Environmental Impact Assessment
EJIL	European Journal of International Law
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDI	Institut de Droit International
IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
ILDC	International Law in Domestic Courts
ITLOS	International Tribunal for the Law of the Sea
MPEPIL	Max Planck Encyclopedia of Public International Law
MPIA	Multi-Party Interim Appeal Arbitration Arrangement
MST	Minimum Standard of Treatment
NIAC	Non-international Armed Conflict
NIEO	New International Economic Order
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
POW	POW Prisoner of War
RDC	Recueil des Cours (Abbreviation for collected courses of the Hague Academy, in references and bibliography)
ICJ Rep	ICJ Reports/CIJ Recueil
RIAA	Reports of International Arbitration Award
TRICI-Law	The Rules of Interpretation of Customary International Law
TWAIL	Third World Approaches to International Law

UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
VfGH	Verfassungsgerichtshof
WTO	World Trade Organization
WW II	World War II
YBILC	Yearbook of the International Law Commission
ZaöRV	Heidelberg Journal of International Law

Introduction

It has become somewhat customary – if the reader will excuse the pun – to acknowledge at the beginning of every longer exposition on the topic of customary international law (CIL) that it has already been the subject of many similar expositions by some of the greatest minds of international law.[1] This has even led one author to observe that 'at times, one may get the impression that the topic has been theorized to death'.[2] At the same time while scholarship has dealt extensively and diversely with custom as a source of international law, one aspect that has received less attention is CIL interpretation.[3]

---

[1] See indicatively Hersch Lauterpacht, *The Development of Law by the International Court* (Steven and Sons 1958) 368-93; Michael Virally, 'The Sources of International Law' in Max Sorensen (ed), Manual of Internationation Law (1968) 128-48; Michael Akehurst, 'Custom as a Source of International Law' (1974) 47 British Yearbook of International Law 1; Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971); Grigory Tunkin, 'Is General International Law Customary Law Only' (1993) 4 EJIL 534; Karol Wolfke, *Custom in Present International Law* (Martinus Nijhoff, 2nd ed., 1993); Maurice H Mendelson, 'The Formation of Customary International Law' (1998) 272 RDC 155, 171; Jack Goldsmith and Eric Posner, 'A Theory of Customary International Law' (1999) Chicago Working Paper in Law and Economics No. 63; Michael Byers, *Custom, Power and the Power of Rules* (CUP 1999); Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law' (2001) 95 AJIL 757; Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems' (2004) 13(3) EJIL 523; Andrew Guzman, 'Saving Customary International Law' (2005) 27 Michigan Journal of International Law 115; Brian Lepard, *Customary International Law – A New Theory with Practical Applications* (CUP 2010); Michael Sharf, 'Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change' (2010) 43 Cornell International Law Journal 439; Pierre-Hugues Verdier and Eric Voeten, 'Precedent, Compliance and Change in Customary International Law: An Explanatory Theory' (2014) 108 AJIL 389; Laszlo Blutman, 'Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail' (2014) 25(2) EJIL 529; Lando Kirchmair, 'What Came First: the Obligation or the Belief? A Rennaisance of Consensus Theory to Make the Normative Foundations of Customary International Law More Tangible' (2016) 59 German Yearbook of International Law 289; Niels Blokker, 'International Organizations and Customaru International Law – Is the International Law Commission Taking International Organizations Seriously?' (2017) 14 International Organizations Law Review 1; Michael Wood, The Evolution and Identification of the Customary International Law of Armed Conflict' (2018) 51 Vanderbilt Journal of Transnational Law 727; Hugh Thirlway, The Sources of International Law (OUP 2nd ed., 2019) 60-105.

[2] Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) EJIL 417, 429.

[3] The scholarship on CIL interpretation remains limited. See notably, Robert Kolb, *Interprétation et création du droit international: esquisses d'une herméneutique juridique moderne pour le droit international public* (Bruylant 2006) 219-231; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 496-511 Panos Merkouris, 'Interpreting the Customary Rules on Interpreta-

The question of CIL interpretation is a question about how we determine the scope and content of customary rules. Traditionally, scholarship has subsumed this question under the umbrella of identification, and the discussion of the two-element approach to CIL identification. This has led to a discussion of customary international law where it is either identification or nothing. Either CIL rules are identified by reference to state practice and *opinio juris*, or someone is doing something wrong. The narrow terms of this debate have led many scholars to disavow the two-element doctrine, proposing alternative approaches to the identification of CIL. Among these, many have put forth accurate and damning criticism of the way CIL rules are identified and operate in the mainstream practice of international law. For instance, it is said that courts are not consistent in their identification of custom, and often apply the two-element formula in an incoherent way.[4] It is further stipulated that CIL rules move at a glacial pace, and that the two-element formula does not give a satisfactory account of how they may evolve or change.[5] It is finally argued that the two-element formula consolidates problematic power dynamics in international law, and makes customary rules a tool of hegemony in the hands of a few powerful states.[6] As discussed in Chapter 1 below, these points of criticism are largely persuasive and warranted. And yet, the two-element approach to CIL identification is here to stay. It is the approach that dominates how international courts identify rules of customary law, and the approach that frames how states and other actors in the field formulate arguments about CIL.[7] Thus, beyond a mere formula for the identification of CIL rules, the two-element approach represents a larger paradigm that we are bound to operate in when thinking about or arguing on the basis of customary international law. This conflicted image of the CIL doctrine begs the question: where do we go from here?

---

tion' (2017) 19 International Community Law Review 126; Panos Merkouris, *Interpretation of Customary International Law: of Methods and Limits* (Brill Research Perspectives 2023 forthcoming) available at <https://tricilawofficial.files.wordpress.com/2022/12/merkouris-research-perspectives.pdf>.

[4] Curtis A Bradley, Customary International Law Adjudication as Common Law Adjudication in Curtis A. Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 51; Talmon (n 2) 418 et seq; Monica Hakimi, 'Making Sense of Customary International Law' (2020) 118(8) Michigan Law Review 1487.

[5] Brian D. Lepard, Customary International Law as a Dynamic Process in Curtis Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 62; Roberts (n 1) 758-781.

[6] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007) 198-209; J Patrick Kelly, 'Customary International Law in Historical Context: The Exercise of Power without General Acceptance' in Brian Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 47; B. S. Chimni, 'Customary International Law: A Third World Perspective' (2018) 112(1) AJIL 1; Joycelin Chinwe Okubuiro, 'Application of Hegemony to Customary International Law: An African Perspective' (2018) 7 Global Journal of Comparative Law 232.

[7] This conclusion is most-recently affirmed by the 2018 ILC Conclusions on Customary International Law. International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 122 (hereinafter 'ILC Conclusions on Customary International Law').

Building on the existing scholarship of customary international law, I propose that many of the problems related to CIL as a source of international law may be reframed and resolved on the level of interpretation. It is my contention that by introducing interpretation as a possible analytical framework in relation to the existence of CIL rules, we do not need to modify or dismiss the two-element approach to CIL identification. This is because many of the problems identified in CIL doctrine stem at least in part from the narrow framing of the discussion as identification or nothing. Thus, what might have for a lack of category been characterized as reasoning which is not CIL identification, and therefore somehow problematic, is actually CIL interpretation.

This thesis is dedicated to the development of a theory of interpretation for customary international law. In the four chapters that follow this introduction, I will attempt to demonstrate that the concept of interpretation can be extended to unwritten sources such as CIL, and that interpretation is a specific operation in the continuous existence of CIL rules, separate from their identification. Furthermore, I will argue that interpretation plays a crucial role in the operation of customary rules, and that accounting for interpretation is theoretically relevant and practically necessary.

I. The Subject, Research Question, and Methodology of this Thesis

The research for this thesis began with the broad theoretical question – *can rules of customary international law be interpreted*? Early into my research, I found that not only can CIL rules be interpreted, but that there are numerous examples of their interpretation in the practice of national and international courts. At the same time, pointing out these examples was not sufficient in and of itself to resolve the conceptual puzzle that is CIL interpretation. Questions remained about the theoretical implications of applying the framework of interpretation to an unwritten source, and the role that interpretation plays in the continuous existence of customary rules. This led to the expansion of the research question to now also ask - *what functions does interpretation perform in the context of customary international law*? It is this latter, expanded version of the research question that has shaped the focus and structure of the present thesis. Thus, the main research puzzle that this thesis deals with is:

What does the interpretation of customary international law entail, and what functions does interpretation perform in the continuous existence of customary rules?

To deal with this research puzzle, the research is divided into four sub-questions, each representing one step toward the final research outcome of this thesis – a theory of interpretation for customary international law. The first two sub-questions are aimed at delineating the foundational concepts that underlie this thesis, namely,

customary international law and interpretation. Thus, the research begins with the sub-questions: 1) *what is it we speak of when we speak of CIL*? and 2) *what is it we speak of when we speak of interpretation*? Answering these two questions enables the thesis to speak of CIL interpretation, as a specific and separate operation in the continuous existence of customary rules, different from identification. Having answered these two questions, the thesis is able to turn to a more detailed discussion of how the practice of CIL interpretation takes place in the practice of courts, with a view to ascertaining its role. Thus, the remaining two sub-questions are 3) *what can we learn from courts about the interpretation of custom*? and 4) *what are the theoretical implications of these findings*?

In answering these sub-questions, the thesis employs a qualitative doctrinal legal methodology, consisting of the collection and analysis of relevant primary and secondary sources.[8] The main findings of the thesis are based on the collection, categorization and in-depth study of caselaw from national courts of various states. The methodology of case collection and categorization with respect to the caselaw of national courts is described in detail in Chapter 3.[9] This is complemented by the collection and analysis of caselaw from the International Court of Justice (ICJ), as a representative of an international court on which the conclusions arrived at in Chapter 3 are "tested". The methodology of case collection of the ICJ is described in detail in Chapter 4.[10] The analysis of national and international caselaw is complemented by reliance on secondary sources, including: commentaries, encyclopedic entries, reports of the International Law Commission (ILC), International Law Association (ILA) and the Institut de Droit International (IDI), reports of various international organizations, and broader doctrinal works.

In terms of doctrinal commitments, the thesis approaches the research questions from the perspective of modern international legal positivism.[11] This entails the following basic premises.[12] Firstly, this thesis operates from the premise that rules of law are grounded in social facts, and that moral considerations do not play a role in the coming into existence of legal rules. In the context of international law, this corresponds to the position that normative propositions can be considered as rules of international law if they have come into existence through formally

[8] Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (2nd ed., Edinburgh University Press 2017) 18.

[9] See *infra* 129-134. [10] See *infra* 190.

[11] On the distinction between classical legal positivism and modern (international) legal positivism see Jörg Kammerhofer and Jean d'Aspremont, 'Introduction The future of international legal positivism' in Jörg Kammerhofer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 1, 3-7. See also Ingo Venzke, 'Post-modern Perspectives on Orthodox Positivism in Jörg Kammerhofer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 182.

[12] On the need to disclose the theoretical positionality that forms part of one's method, see Steven R. Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93(2) AJIL 291. See also Lassa Oppenhein, 'The Science of International Law: Its Task and Method' (1908) 2(2) AJIL 313.

accepted processes of lawmaking, i.e. the doctrine of sources. At the same time, international law is an open-ended legal system. While the rules of international law come about in a formally pre-determined way, the practice of international law is an argumentative one, influenced by the actors who take part in it and the discursive strategies that they adopt. In light of this, the other basic premise that this thesis operates from is that 'the interpretative act has a constitutive – or, at the very least, a normative – effect on the development of international law'.[13] This however does not mean that interpretation is wholly indeterminate or that it allows for indefinite choice.

II. The Core Argument

The main claim of this thesis is that customary rules can be subject to interpretation, and that interpretation is a specific and separate operation in the continued existence of customary rules, different from their identification. Furthermore, interpretation performs crucial functions in the continuous existence of customary rules, and accounting for interpretation is both theoretically relevant and practically necessary.

Without an account of interpretation, there is no persuasive explanation about what happens to a CIL rule after it has been identified. Once a CIL rule has been identified through an assessment of state practice and *opinio juris*, its existence is not confined to the moment and case where it was identified. Rather, it is a continuous one. When the same rule is invoked in subsequent cases before the same or a different judicial body, the judicial body does not usually go into the exercise of re-establishing that the rule in question is a customary one by reassessing state practice and *opinio juris*. Instead, the rule is *interpreted* within the given legal and factual context of the new case at hand. Moreover, outside of the dispute-settlement context, a customary rule does not only exist in the isolated moments when it is identified for the purposes of a particular case. Rather, its existence in the international legal complex is also a continuous one. In this sense, interpretation allows us to account for the continued existence and operation of a customary rule.

The interpretation of customary rules entails the clarification of their meaning, scope, and content. It performs two crucial functions in their continued existence, namely, the concretizing function and the evolutive function. The concretizing function refers to the fact that through interpretation the specific content of general customary rules is fleshed out and made more specific. This may entail the formulation of more specific sub-elements or sub-obligations of the general customary rule, or the construction of exceptions. The evolutive function refers to the fact that through interpretation older customary rules can be adapted to new

[13] Gleider Hernández, 'Interpretation' in Jörg Kammerhofer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 317.

developments of fact or law. This may entail the narrowing or broadening of the scope of a customary rule in light of other newer rules which are also applicable to the situation, or the broadening of the scope of application of an older customary rule to include new factual circumstances. The two functions that interpretation performs are not mutually exclusive, and in fact may often be perceived jointly at play when customary rules are being interpreted.

Accounting for interpretation enables us to better understand the way CIL rules function, and the way they are applied in the practice of international law. So far in the discipline of international law, the scholarly attention has been dominantly focused towards CIL identification, and the two-element approach as the method for determining the existence of a CIL rule. This has led to the identification of problems in the way the two-element approach functions or is applied, followed by calls to modify or abandon it. At the same time, these calls have not gained traction in the practice of international law, and the two-element approach remains. Thus, we find ourselves with a conflicted doctrine, made up of the one hand, a seemingly stable definition which is pervasive in practice (the two-element approach), and on the other hand strong and accurate criticism of this definition on levels of both theory and practice. This generates an image of two seemingly irreconcilable characteristics of CIL which nevertheless continue to coexist. I propose that the seemingly irreconcilable can be reconciled, if we account for interpretation as a stage in the continuous existence of a rule of customary international law.

It is important to point out that the argument presented in this thesis should not be construed as a "new" theory of CIL in the sense of a novel approach that would somehow modify or substitute the existing approach for the determination of the existence of a customary rule. A prominent feature of modern scholarship on CIL is the attempt to modify or abandon the two-element approach as the method of determining the existence of a CIL rule. In these attempts, the two-element approach is treated as the "traditional" or "mainstream" approach to CIL, and new alternative approaches are devised to compensate for its problems. However, in spite of the many problems inherent in it, the two-element approach remains the dominant paradigm that we are bound to operate in. It is the one most frequently, albeit not always consistently, relied on by courts, states, and other actors, to make claims about the existence of, or on the basis of, a rule of CIL. In light of this, attempts to modify or replace the two-element approach are bound to receive little traction in the practice of states and courts, and are subsequently most likely to operate on the theoretical margins. With this in mind, this thesis engages with alternative approaches to CIL as a source of discussions of the problems inherent in the traditional approach and with a view to presenting a more complete image of the existing scholarly debate. Nevertheless, the main argument remains anchored within the paradigm of the two-element approach.

III. The Structure of the Thesis and Summary of Chapters

The thesis is divided into four substantive chapters, followed by a general conclusion. Each chapter is dedicated to answering one of the sub-questions outlined above, thereby gradually building up the theory of interpretation for CIL presented by this thesis.

Chapters 1 and 2 are dedicated to answering the first two sub-questions, and laying down the foundations of the theory presented in the thesis. Thus, Chapter 1 is dedicated to the question: *what is it we speak of when we speak of CIL*? The aim of this chapter is to define the object of the study – customary international law, situate the thesis in the existing scholarship on CIL, and identify the lacuna that my research fills. Chapter 1 identifies a seemingly irreconcilable conflict in the doctrine of CIL. One the one hand, there is a definition which is pervasive in practice (the two-element approach), and on the other hand strong and accurate criticism of this definition on levels of both theory and practice. This generates an image of two seemingly irreconcilable characteristics of CIL which nevertheless continue to coexist. In response to this, I claim that we may in fact be able to reconcile these conflicting characteristics if we account for interpretation as a stage in the continuous existence of a rule of customary international law.

Against this background, the thesis moves to Chapter 2, which is dedicated to addressing the question: *what is it we speak of when we speak of interpretation*? The aim of this chapter is to delineate how the term 'interpretation' is conceptualized for the purposes of the thesis, and to show that there are no theoretical obstacles to applying this concept to rules of CIL. Thus, Chapter 2 defines interpretation as an operation concerned with determining the scope and content of legal rules, which also encompasses the clarification of meaning. While traditionally international legal scholarship has understood interpretation as the process of assigning meaning to written text, Chapter 2 demonstrates that arguments against the application of this concept to CIL are unpersuasive. Firstly, the unwritten character of CIL rules does not exclude the need for their interpretation. While indeed unwritten, customary rules are expressed in language and have a normative content. As such, the need may arise to clarify this content for the purpose of application in a given legal and factual context. Moreover, unwritten sources as opposed to written ones contain a higher degree of vagueness and generality as a result of their unwritten character. Thus, rather than not being subject to interpretation, unwritten sources seem to require precisely the exercise of interpretation in order to grasp their otherwise elusive content. Secondly, the process of identification of CIL rules does not also automatically delineate their content as well. The process of CIL identification entails the evaluation of state practice and *opinio juris* and results in one of two options – either a CIL rule is found to exist, or it is not. Identification yields a general CIL rule. The process of CIL interpretation on the other hand, takes place *after* a CIL rule has been identified, and entails the clarification of the mean-

ing, scope and content of the rule in the particular context at hand. It is guided by interpretive considerations such as the meaning and purpose of the rule, and may result in a number of different outcomes depending on the context at hand.

Having defined the foundational concepts of CIL and interpretation, and done away with arguments that interpretation is not possible in the context of CIL, the thesis moves on to Chapters 3 and 4 where the nature and functions of CIL interpretation are discussed. Chapter 3 is dedicated to addressing the question *what can we learn from courts about the interpretation of custom*, and answers this question with an in-depth study of national caselaw. Chapter 3 focuses on the practice of national courts for two reasons. Firstly, as agents in the international legal order, national courts contribute to international law both formally and informally, especially in areas where there are lacunae or the law is yet to be developed. Thus, the practice of national courts with respect to the interpretation of custom is a valuable source in our study and understanding of this developing field. Secondly, by turning to national courts we open the door to a wealth of cases which can provide us with examples and insight into the interpretation of custom. Depending on the legal system in place, national courts may be faced with the task of interpreting not only CIL but also domestic custom. Thus, national courts are uniquely positioned to provide insight into the methodology of interpreting custom as a source of law. The analysis in Chapter 3 illustrates that across national courts there are certain common methods and approaches that can be discerned when these courts interpret customary law. In light of this, Chapter 3 concludes with 3 main "lessons" that we may take from national courts for a theory of CIL interpretation. Firstly, when interpreting customary law (both CIL and domestic custom) courts rely on methods of interpretation similar to the ones employed in the interpretation of treaties. However, while these methods are familiar, there are also some peculiarities that emerge when they are applied to an unwritten rule. Thus, the need to adjust the way these methods operate in the context of custom must be acknowledged. Secondly, the analysis points to two crucial functions that interpretation performs in the continuous existence of customary rules. In particular, interpretation performs a concretizing function whereby the content of general customary rules is specified, and an evolutive function whereby older customary rules are "updated" in light of factual or legal developments in the broader legal system. Thirdly, while interpretation performs a central function in the operationalization and continuous existence of customary rules, a theory of interpretation must also account for limits to the interpretive process. In particular, the interpretation of customary rules should never lead to an outcome that is manifestly opposite to the purpose of the rule and should never lead to modification which is not supported by relevant practice. These limits to the interpretive exercise may be set by rules for interpretation.

Chapter 4, finally, is where the thesis develops the theoretical implications of the findings of Chapter 3, and "tests" these findings against examples from interna-

tional courts as well. Chapter 4 is thus dedicated to answering the question *what are the theoretical implications of the findings in Chapter 3 with respect to a theory of interpretation for CIL*? To answer this question, I rely on the findings in Chapter 3 concerning the concretizing and evolutive functions of interpretation, and the realization for the need of limits to the interpretive process. In Chapter 4, the discussion of the two functions is expanded to include a more in-depth characterization of each based on examples from international caselaw. This is followed by a reflection on the possibilities these functions present in resolving CIL's problems, as well as their limits. On the basis of the analysis in Chapter 4, I argue that the two functions of interpretation of CIL are not a peculiarity of the practice of interpretation of national courts, but may in fact also be seen in international practice. This reinforces the observation that these functions are an inherent trait of interpretation when it comes to CIL. Against this background, Chapter 4 brings the arguments of the thesis full circle, and discusses how the functions of interpretation address the problems of CIL outlined in Chapter 1.

Taken together, these four chapters represent the pieces of the argumentative whole that is the theory of interpretation for CIL presented in this thesis. They demonstrate that CIL rules can be interpreted, and that interpretation performs crucial functions in their continuous existence.

Chapter 1

Customary International Law: The Mainstream View, its Problems, and Two Parallel Realities

I. Introduction

The scholarly production on the subject of customary international law is vast and impressive. There are few stones left unturned when it comes to the study of CIL, and what is often left is reassessing some of the existing findings with a fresh pair of curious eyes. This is exactly what this chapter, in pursuit of the objectives described in the introduction above, intends to do.

This chapter is dedicated to addressing the question *what is it we speak of when we speak of CIL*? In answering this question, this chapter serves a dual purpose in relation to the arguments developed subsequently in the thesis. Firstly, it acts as what might otherwise be referred to as a "literature review". In this sense, the chapter engages with the existing literature on the topic of CIL and maps the wider scholarship of which this thesis is a part. This engagement with the literature reflects my reading and re-reading of various relevant texts – notably judicial decisions, works of the International Law Commission (ILC), and scholarly works – as part of the processes of first familiarizing myself with the subject of CIL and then returning to these texts with particular questions in mind. In this regard, it is the result of a purposeful reading of the relevant materials geared towards uncovering how references to CIL are used in international law, and what this term stands for in the international legal discourse.[14] Secondly, the chapter contains an overview of what I have identified as the "problems" of CIL and a proposal to re-evaluate these problems under an interpretation framework. This is the portion of the chapter that contributes novelty to the existing discourse on CIL, by examining the scholarly criticism of the theory and practice of CIL, distilling the various problems, and suggesting that we re-consider them with the possibility of interpretation in mind. More specifically, in this chapter I put forward an understanding of CIL as a concept made up of, on the one hand, a seemingly stable definition which is pervasive in practice (the two-element approach), and on the other hand strong and accurate criticism of this definition on levels of both theory and practice. This generates an image of two seemingly irreconcilable characteristics of CIL which nevertheless continue to coexist. Building on this paradox, I claim that we may in

[14] This approach is inspired by the method referred to as 'symptomatic reading'. See Ntina Tzouvala, *Capitalism as Civilisation* (CUP 2020) 9-14.

fact be able to reconcile these conflicting characteristics if we account for interpretation as a stage in the continuous existence of a rule of customary international law. In this regard, what the discussion in this chapter shows is that while scholarship has dealt extensively and diversely with the problems that plague custom as a source of international law, one aspect that has received very little attention is CIL interpretation. Consequently, scholarship has not yet realized the potential that an account of CIL interpretation holds for the resolution of problems which emerge in CIL theory and practice. Laying out the argument in this way, Chapter 1 sets the scene for Chapter 2, where the discussion turns to interpretation, and an account of interpretation as a reconciliation between seemingly irreconcilable characteristics of customary international law.

Before delving more deeply into a discussion of the ins and outs of custom, a few general remarks about the nature of CIL are in order. Customary international law, alongside treaties and general principles of law, is one of the three primary sources of international law. Rules of customary international law emerge from the conduct of states, and have as their purpose the regulation of inter-state and other international relations.[15] The process by which customary rules come into existence may be qualified as horizontal and informal, because these rules usually emerge without prior consultation or coordination among states.

Rules of customary international law are binding on all states, including states whose practice might not have contributed to the genesis of the specific rule in question.[16] This is only subject to the generally recognized exception of the persistent objector, whereby it is possible for a state to be exempted from a CIL rule because it has, by its conduct, persistently objected to that customary rule from the beginning of the formative process.[17] An early articulation of this so called "persistent objector doctrine" can be found in the 1951 *Norwegian Fisheries* judgment, where the International Court of Justice (ICJ) observed that a posited customary rule would be 'inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast'.[18] Interestingly, the Court in this case found that the posited rule had not in fact acquired the authority of a general customary rule.[19] Thus, the pronouncement that the rule would in any case not apply to Norway was more an obiter observation than an application of the persistent objector doctrine as a bar to the application of an existing customary rule.[20] In fact, this doctrine has received strong criticism in the scholarship, which will be discussed in more detail in Section III below. Nevertheless, it is nowadays

[15] Vladimir Degan, *Sources of International Law* (Martinus Nijhoff Publishers 1997) 142.
[16] Thirlway (n 1) 61.
[17] ILC Conclusions on Customary International Law (n 7) Conclusion 15; Thirlway (n 1) 99.
[18] *Fisheries Case (United Kingdom v Norway)* (Judgment) [1951] ICJ Rep. 116, 131.
[19] In particular, the Court found that '[. . .] the ten-mile rule has not acquired the authority of a general rule of international law'. *Fisheries Case* (n 18) 131.
[20] Patrick Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59(3) International and Comparative Law Quarterly 779.

generally accepted that the persistent objector status is the only exception to the otherwise universal bindingness of general customary rules.

Historically, customary law is considered one of the cornerstones of the international legal order, and the process through which most of the foundational rules of international law have come about.[21] Some of the "classical" realms of international law such as diplomatic privileges and immunities or the rules on the treatment of aliens abroad are governed by CIL.[22] Rules governing the use of common resources such as the oceans or the global environment, while nowadays heavily codified, also find their origin in customary law.[23] The rules on state responsibility, while now codified by an extensive project of the ILC, similarly find their origin in customary international law.[24] Moreover, CIL remains relevant as the basis for the binding character of relevant rules in cases where the codification outcome is highly authoritative but not binding (such as the ILC articles on state responsibility),[25] or as a sort of 'gap-filling' source of law for areas not covered by a codification treaty.[26] It has even been argued that existing CIL rules can be extended to new fields thus far unregulated by international law,[27] or otherwise that new CIL rules can emerge rapidly in response to new developments.[28]

Beyond particular regimes of international law which originate in CIL, customary rules also play what has been called a 'system-supporting' role in the international legal system.[29] In this role, customary rules are considered to provide a guarantee that there will always be some minimum rules of international law, because they are the product of state conduct and states will always engage in behavior that is conducive to certain rules.[30] In this context, customary rules operate

---

[21] Brian Lepard, 'Why Does Customary International Law Need Reexamining' in Brian Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 1

[22] David Bederman, *Custom as a Source of Law* (CUP 2010) 136; See also *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium) (Judgment) [2002] ICJ Rep 3 [52].

[23] Pierre-Marie Dupuy, Ginevra Le Moli and Jorge Vinuales, 'Customary International Law and the Environment' [2018] 2018-2 C-EENRG Working Papers, 3-4; Malcolm Shaw, *International Law* (CUP 7th ed, 2014) 402.

[24] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [385] [398] [420].

[25] Tulio Treves, 'The Expansion of International Law' (2015) 398 RdC 37, 139.

[26] See for example the preamble of UNCLOS which indicates that 'matters not regulated by this Convention continue to be governed by the rules of general international law'.

[27] See for example the arguments of Germany with regard to the international law regulating cyber operations in Germany, 'On the Application of International Law in Cyberspace – Position Paper' (Auswärtiges Amt, March 2021) available at <https://www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf> accessed 8 November 2021.

[28] See for example the argument concerning "instant custom" in the regulation of space exploration in Bin Cheng, 'United Nations Resolutions on Outer Space: 'Instant' International Customary Law?' in Studies in International Space Law (OSAIL, 1997) 125; See also Treves (n 25) 139.

[29] Jean d'Aspremont, *The Discourse on Customary International Law* (OUP 2020) 111-121.

[30] Ibid, 11-113.

as a sort of legal fallback, as a source of law which applies when perhaps no other type of legal rule would. Moreover, in scenarios where various international legal regimes might conflict or intersect, customary rules can provide a proverbial least common denominator of legal obligations.[31] Finally, since customary international law is the organic product of the interactions that take place in the international legal system, it is a source of law capable of evolving with the community in which it operates. In this sense, it is both the source of some of the oldest rules of international law, and a potential source of new rules which emerge as state conduct evolves. It is sufficient here to recall Maurice Mendelson's seminal lecture on the "Formation of Customary International Law", where he invites us to think about customary law through the imaginary society of a large island.[32] For Mendelson's islanders, many matters remain unregulated by written agreement and this gap is filled instead by customs.[33] How do these customs arise?

> Sometimes it was simply that, confronted by a new problem, some imaginative clan came up with a solution which was so attractive to the others that they simply followed suit. In other cases, new practices were instituted about which some were more skeptical, or even resistant, and it was only after a long process of mutual friction that a solution evolved that all could live with.[34]

Much like the islanders, states in their international relations engage in conduct which is generative of customary rules, and existing customary rules are sometimes adjusted or evolve to respond to the changing times. In this sense, rules of customary law are capable of responding to evolving circumstances and behavior in international law,[35] as well as to emerging knowledge or facts about various global problems. These characteristics of customary international law, and the concomitant role of interpretation, is discussed in more depth in the subsequent chapters of the thesis.

Custom is distinguishable from treaties by the fact that it is not a product of a deliberate legislative process[36] and it is usually unwritten.[37] This remains so even though there are some treaties that are said to be reflective of custom or to be

---

[31] On this point see Nina Mileva, 'The Role of Customary International Law Interpretation in the Balancing of Interests at Sea: The Example of Prevention' (2020) 010/2020 TRICI-Law Research Paper Series <https://tricilawofficial.files.wordpress.com/2021/06/mileva_rps-010-2020.pdf> accessed 6 December 2021.

[32] Mendelson (n 1) 165-168. [33] Ibid, 166. [34] Ibid, 167.

[35] On this point see Jean d'Aspremont, *Formalism and the Sources of International Law* (OUP 2011) 163-164; Andreas Hadjigeorgiou, 'Beyond Formalism: Reviving the Legacy of Sir Henry Maine for Customary International Law' in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds),, *The Theory, Practice, and Interpretation of Customary International Law* (CUP 2022) 183.

[36] See on this point Tomuschat who observes that 'it is the very essence of customary law that its emergence does not occur in a formalized procedure'. Christian Tomuschat, 'Obligations Arising for States Without or Against their Will' (1993) 241 RdC 195, 284.

[37] The term *usually* here is intended to flag the fact that in certain areas of international law there exist authoritative projects which have collected and written down customary rules but which are

codifications of it. Custom is distinguishable from general principles of law by the methodology employed to determine its existence and by the origin of the rules in each category.[38] General principles of international law originate in municipal legal systems or are formed within international law.[39] In order to establish the existence of a general principle originating from national legal systems, that principle needs to be found universally among municipal systems and be deemed transposable to international law;[40] in order to establish the existence of a general principle formed within international law, that principle needs to be deemed inherent in the basic features and fundamental requirements of the international legal system.[41] By contrast, customary rules find their origin in the conduct of states, or, in a limited manner, of certain non-state actors such as international organizations.[42] In order to establish the existence of a rule of customary international law, it is necessary to ascertain that there is a general practice accepted as law embodying that rule.

As the discussion in this chapter illustrates, there have been many attempts to define and re-define customary international law. In the contemporary scholarship of international law, the common starting point around which these attempts converge is Article 38 of the Statute of the International Court of Justice.[43] In particular, the majority of theorizing about CIL tends to go one of two ways – it either takes Article 38 of the ICJ Statute as an authoritative description/definition of customary international law,[44] or it criticizes this approach and subsequently develops a theory that reacts against it.[45] Section II discusses the approaches that espouse Article 38 as an accurate description/definition of CIL, including, most

---

not treaties, such as for instance the Customary IHL Database compiled by the International Committee of the Red Cross.

[38] Giorgio Gaja, 'The Protection of General Interests in the International Community' (2011) 364 RdC 1, 34-5.

[39] International Law Commission, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (27 April–5 June and 6 July–7 August 2020) UN Doc. A/CN.4/741, Draft Conclusion 3, 58.

[40] Ibid, Draft Conclusion 4, 58. [41] Ibid, Draft Conclusion 7, 59.

[42] ILC Conclusions on Customary International Law (n 7) Conclusion 4, 130-132.

[43] Kammerhofer (n 1) 541-42; Tomuschat (n 36) 278.

[44] See indicatively Michael Virally, *Manual of Public International Law* (St Martin's Press 1968) 130-135; Hugh Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Brill 1972) Degan (n 15) 143; Bederman (n 22) 135-136; Lando Kirchmair, 'What Came First: The Obligation or the Belief? A Rennaisance of Consensus Theory to Make the Normative Foundations of Customary International Law More Tangible [2017] 59 German Yearbook of International Law 289, 291; Thirlway (n 1); Jan Wouters, Cedric Ryngaert, Tom Ruys and Geert De Baere, *International Law: A European Perspective* (Hart Publishing 2018) 135-136.

[45] See indicatively D'Amato (n 1); Goldsmith and Posner (n 1); James Fry, 'Formation of Customary International Law Through Consensus in International Organizations' [2012] 17 Austrian Review of International and European Law 49, 51-5; Bradley (n 4) 34; Jean d'Aspremont, *International Law as a Belief System* (CUP 2017) 87-92.

recently, the approach of the International Law Commission (ILC) in its *Draft Conclusions on Identification of Customary International Law* (hereinafter 'ILC Conclusions on Customary International Law').[46] Section III then turns to some of the problems identified in these approaches, and the alternatives that have been developed to address them. Finally, Section IV brings these discussions together, and reflects on the seemingly irreconcilable realities that these various approaches create.

II. The Two-Element Approach to Customary International Law

As already indicated above, a common definitional starting point in the search for a definition of custom is Article 38 of the ICJ Statute. In particular, Article 38(1)(b) of the Statute which declares that:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [. . .] international custom, as evidence of a general practice accepted as law.

While applicable in terms only to the International Court of Justice as an applicable law clause for its deliberations, Article 38 of the ICJ Statute casts a long shadow.[47] Indeed, while at the time of its drafting Article 38 might not have been envisaged as a finite list of sources or an exclusive definition thereof, from a contemporary perspective it has acquired importance and meaning beyond what its drafters might have originally intended.[48] For instance, the fact that the ICJ Statute (and Article 38 as a part thereof) has been incorporated in the Charter of the United Nations (UN) has enhanced its importance and consolidated its position.[49] As almost all States in the world are also UN members and parties to the UN Charter, this gives Article 38 unprecedented universality. Furthermore, the fact that the Court's function is to decide disputes 'in accordance with international law' seems to suggest a reading of Article 38 as an authoritative list of where or how that international law might be found.

Article 38 finds its origin in its counterpart for the ICJ's predecessor, namely Article 38 of the Statute of the Permanent Court of International Justice (PCIJ).[50] The provision was drafted by Belgian senator and former minister Baron Descamps and put forward as a proposal concerning the applicable law by the PCIJ before

---

[46] ILC Conclusions on Customary International Law (n 7) 122. [47] Thirlway (n 1) 225.

[48] Malgosia Fitzmaurice, 'The History of Article 38 of the Statute of the International Court of Justice: The Journey from the past to the Present' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 179, 182.

[49] Ibid, 198.

[50] Alain Pellet, 'Article 38', in Andreas Zimmerman, Karin Oellers-Frahm, Christian Tomuschat, and Christian J. Tams (eds), *The Statute of the International Court of Justice. A Commentary* (OUP, 2nd ed. 2012) 731, 738-743.

the Advisory Committee of Jurists.[51] In its original formulation, the relevant portion of Article 38 PCIJ Statute defined CIL as: 'international custom, being practice between nations accepted by them as law'.[52] This formulation did not receive much opposition by the Advisory Committee, and in fact the majority of the discussion on the occasion of its debut was focused on other portions of Descamps' proposal (notably the definition of general principles).[53] In subsequent discussions the Advisory Committee considered minor alterations to the wording,[54] eventually settling on 'international custom, being the recognition of a general practice, accepted as law'.[55] This proposal was submitted to the Assembly of the League of Nations which subsequently accepted it with only minor further amendments. In this way, Baron Descamps' formulation became Article 38 of the PCIJ Statute, defining CIL as 'international custom, as evidence of a general practice accepted as law'.[56] During the elaboration of the ICJ Statute, Article 38 as originally drafted for the PCIJ Statute did not give rise to much controversy, and was reproduced in the Statute of the ICJ.[57] During the negotiations, it was noted that 'while Article 38 was not well drafted [. . .] the Court had operated very well under [it]' and therefore, 'time should not be spent in redrafting it'.[58] Traced historically this way, and considering its universal acceptance by states by virtue of its inclusion in the Charter of the United Nations, it can be argued that Article 38 itself reflects customary international law. Thus, we find ourselves with the peculiar conclusion that the definition of customary international law in Article 38 of the ICJ Statute is itself customary.

The definition of CIL as "evidence of a general practice accepted as law" has largely been taken to imply that two conditions need to be fulfilled in order for the existence of a rule of customary international law to be established – the existence of a "general practice" which is "accepted as law". Whether this means that two separate elements need to be ascertained and assessed individually, or it is rather a holistic process whereby practice is assessed in light of the "accepted as law" standard has been subject to some debate in scholarship.[59] For instance, in

[51] Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee (The Hague, 16-24 June 1920) 306.

[52] Ibid. [53] Ibid, 293-295. [54] Ibid, 351 ('Proposal presented by the President and Lord Phillimore, as amended by M. Ricci-Bussati').

[55] Ibid, 666.

[56] Statute of the Permanent Court of International Justice (adopted 16 December 1920, entered into force 8 October 1921) 6 LNTS 389.

[57] Pellet (n 50) 743. [58] Ibid.

[59] See for instance Bradley (n 4) 43-48; Wolfke (n 1) 1-8; Mendelson (n 1) 180-182; Christian J. Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making' (2015) 14 The Law and Practice of International Courts and Tribunals 51; Guzman (n 1) 116; Andrew T. Guzman and Timothy L. Meyer, 'Customary International Law in the 21st Century' [2007] UC Berkeley Public Law Research Paper No. 984581, 7; Michael P. Scharf, 'Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change' (2010) 43 Cornell International Law Journal 439.

a recent exposition on this subject, Jean d'Aspremont put forward a compelling argument that in fact the definition of custom found in the PCIJ and ICJ statutes originally envisaged a holistic evaluation, where these elements are not treated as two separate and individual requirements but rather one unitary one.[60] According to this line of argumentation, what in fact happened is that developments in the jurisprudence eventually solidified a dualist understanding of custom as made up of two separate elements, rather than a unitary (or in d'Aspremont's terminology – monolithic) understanding initially envisaged by the PCIJ drafters.[61] The jurisprudence does in fact paint a mixed picture on this point.

The earliest elaborations on the definition of CIL can be found in the 1927 *Lotus* case brought before the Permanent Court of International Justice. Here, the Court was faced with a submission by one of the parties (France) that a customary rule had developed concerning collision cases according to which such cases come exclusively within the jurisdiction of the state whose flag is flown. In support of its argument, France pointed to the absence of jurisdiction disputes in collision cases before national criminal courts, deducing from this that in practice prosecutions only occurred before the courts of the state whose flag is flown. This, France argued, is proof of tacit consent on the part of states, and consequently shows what positive international law is in collision cases.[62] The Court was thus essentially asked to make a finding that a customary rule exists on the basis of absence of conduct. The Court reasoned as follows:

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on *their being conscious of having a duty* to abstain would it be possible to speak of an international custom.[63]

What we see here is the Court articulating a requirement of 'being conscious of having a duty' in order to qualify certain state conduct as conducive to a rule of CIL. It is unclear whether already here the "consciousness of having a duty" is treated as an individual separate element of custom, and different readings on this exist in the scholarship.[64] Nevertheless, what is clear is that the *Lotus* reasoning

[60] Jean d'Aspremont, The Four Lives of Customary International Law (2019) 21 International Community Law Review 229, 231-232; d'Aspremont (n 29) 14-39.

[61] d'Aspremont (n 29) 22-27. For an earlier version of this argument focused on the contribution of the ICJ to the articulation of the two-element formula see Tams (n 59) 59.

[62] *Case of the SS Lotus (France v Turkey)* (Judgment) PCIJ Rep Series A. - No 10, 28.

[63] Ibid (emphasis added).

[64] For a reading of the *Lotus* reasoning as an articulation of two separate elements see Fitzmaurice (n 48) 184. For a reading that this distinction was not in fact raised to the level of generality that it attained in subsequent jurisprudence because it was only maintained for the purpose of establishing a customary duty to abstain from behavior see d'Aspremont (n 29) 23 and d'Aspremont (n 60).

stands at the beginning of a long-line of jurisprudence which thinks about CIL in terms of the two-element approach.

The next case in this line is the 1950 *Asylum* case brought before the ICJ. In this case, while explicating the conditions for the establishment of a potential particular custom applicable between the parties, the Court made the following observation:

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian government must prove that the rule invoked by it is in accordance with *a constant and uniform usage practiced by the States in question*, and that this usage is the *expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State*. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law".[65]

The Court here distinguished between two necessary conditions for the establishment of a customary rule, and anchored its distinction into a reading of Article 38 of the Statute. Thus, the Court clearly articulated a two-element approach to the ascertainment of a rule of customary international law. This articulation was soon reaffirmed in even stronger terms in the reasoning of the Court in the 1969 *North Sea Continental Shelf* cases. Here, when asked to assess whether the equidistance rule in the delimitation of continental shelves has achieved the status of a customary rule, the Court made several observations which have since shaped the way we think about customary international law.

Firstly, with respect to the requirement of practice, the Court observed:

> With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a *very widespread and representative* participation in the convention might suffice of itself, provided it included *that of States whose interests were specially affected*.[66]

Further, with respect to the required passage of time, the Court found that:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law [. . .] an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been *both extensive and virtually uniform* [. . .] and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[67]

---

[65] *Asylum Case* (Colombia v Peru) (Judgment) [1950] ICJ Rep. 266, 276-277 (emphasis added).

[66] *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment) [1969] ICJ Rep. 3 [73] (emphasis added).

[67] Ibid [74] (emphasis added).

Finally, reflecting the overall two-element approach, the Court made the following observation:

> The essential point in this connection – and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; – for, in order to achieve this result, two conditions must be fulfilled. *Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in 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 juris sive necessitatis*. *The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.* The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[68]

In its reasoning here the Court expanded significantly on the two-element approach, and released the now famous 'state practice + *opinio juris*' formula.[69] The *North Sea Continental Shelf* reasoning provides a very detailed definition of the two elements, and it is therefore no wonder that it is often referred to as the seminal case on this matter.[70] Moreover, the Court anchored its two-element reasoning in the earlier reasoning of the PCIJ in the *Lotus* case, thus giving the two-element approach what has been referred to as a 'prestigious pedigree'.[71]

What is particularly relevant for our discussion is that the description of the elements of state practice and *opinio juris* as seen in the *North Sea Continental Shelf* reasoning remains largely unchanged today. Subsequent case law of the ICJ has added to the reasoning on customary international law, but has not departed from this initial two-element formulation. For instance, in its later *Continental Shelf* judgment the Court noted that the two-element approach to custom is axiomatic, adding only that customary rules may also be recorded or developed in multilateral conventions.[72] Similarly, in its *Nicaragua* judgment, the Court affirmed the two-element approach by observing that 'The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice'.[73] Interestingly however,

---

[68] Ibid [77] (emphasis added).

[69] In the words of Christian Tams '[w]ith the benefit of hindsight, one can perhaps say that from then on, the two-element approach was set in stone'. Tams (n 59) 60.

[70] See for instance Mendelson (n 2) 204-220 who organizes his discussion of the elements of CIL around the requirements identified by the Court in *North Sea Continental Shelf*. The Court here also articulated the so-called specially affected states doctrine, which is discussed in more detail in section II below.

[71] d'Aspremont (n 60) 242-243.

[72] *Case Concerning the Continental Shelf* (Libyan Arab Jamahiriya/Malta) (Judgment) [1985] ICJ Rep. 13 [27].

[73] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of*

although the Court in *Nicaragua* affirmed the two-element approach by reference to the *North Sea Continental Shelf* case, it turned the assessment on its head. Namely, the Court found that the relevant practice should be assessed in the light of the "subjective element" i.e., *opinio juris*.[74] It then went on to observe 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. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that 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 a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[75]

By posing the assessment in this way – that practice should be assessed in light of the presence or not of *opinio juris* – the Court comes close to an early conception of *opinio juris* found in the writings of Francois Geny, where *opinio juris* seems to have a qualifying function in relation to practice rather than a standalone existence.[76] In this regard, the *Nicaragua* reasoning may be closer to a unitary understanding of the two-element approach, whereby the two elements of custom are not treated as two separate and individual requirements. This notwithstanding, the *Nicaragua* judgment supports the larger observation made throughout this chapter, that the two-element approach dominates the way customary international law is understood in international practice.

A similar understanding of *opinio juris* as the one found in the *Nicaragua* reasoning seems to emerge from the report of the International Law Association (ILA) Committee on the Formation of Customary International Law.[77] In this report, while the two-element approach is acknowledged and followed, the Committee does not readily accept a separate existence for state practice and *opinio juris* as standalone elements.[78] For instance, the working definition of CIL that the ILA Committee adopts is:

> A rule of customary international law is one which is created and sustained by the

America) (Merits Judgment) [1986] ICJ Rep. 14 [184].

[74] Ibid [185]. [75] Ibid [186].

[76] Francois Geny, Methode D'Interpretation et Sources en Droit Prive Positif, Vol. 1 (Librairie Generale de Droit & de Jurisprudence, 1919) 318-320 [110].

[77] International Law Association, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (Report of Sixty-Ninth Conference, London, 2000) (hereinafter 'ILA Report on Customary International Law').

[78] Ibid, 8.

> constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.[79]

In this context, the Committee further qualifies their understanding of the two-element approach by outlining that in the context of CIL formation the main function of the subjective element is to indicate what practice counts or does not count towards the formation of a customary rule.[80] The Committee reinforces this view in the section dedicated to the analysis of *opinio juris*, where it is observes that in practice states and tribunals do not seem to specifically look for evidence of *opinio juris* unless there is need to distinguish between practice which counts towards the formation of a CIL rule versus practice which does not.[81] Examples would include distinguishing between practice that gives rise to CIL and conduct of mere comity,[82] practice which might give rise to CIL save for an explicit understanding among states that it does not,[83] or ambiguous conduct.[84] Nonetheless, the report eventually remains acceptant of the two-element approach and indeed frames and structures the discussion throughout the report according to it. The ILA's understanding of the relationship between state practice and *opinio juris* might be described as the unitary (or 'monolithic') understanding of the two-element approach discussed above.[85]

While there are indeed different understandings even of the two-element approach, this does not affect the broader conclusion that the two-element approach remains the dominant paradigm of CIL in international law. Irrespective of whether one subscribes to the unitary or dualist understanding of the relationship between the two elements, this does not detract from the fact that the two-element approach has been consistently maintained. This observation finds further support in the reasoning of the ICJ in the *Nuclear Weapons* advisory opinion,[86] and the *Jurisdictional Immunities of the State* case.[87]

Beyond the jurisprudence of the ICJ, the two-element approach has found its way in other courts and tribunals as well. For instance, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its *Tadic* judgment engaged in an assessment of the state practice and *opinio juris* of various states to arrive at the conclusion that the *unus testis, nullus testis* rule is not a rule of customary international law.[88] Similarly, in the *Hadzihasanovic et al.* case, in its decision on interlocutory appeal challenging jurisdiction in relation to command responsibility, the ICTY Chamber acknowledged the two-element test,[89] although eventually it did not en-

---

[79] Ibid. [80] Ibid, 10. [81] Ibid, 34. [82] Ibid, 35. [83] Ibid. [84] Ibid, 36. [85] d'Aspremont (n 60).

[86] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226 [64-73].

[87] *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Judgment) [2012] ICJ Rep. 99 [55].

[88] *Prosecutor v. Dusko Tadic*, Opinion and Judgment [7 May 1997] IT-94-1-T, paras. 535-539.

[89] *Prosecutor v. Hadzihasanovic et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility [16 July 2003] IT-01-47-AR72 [12].

gage in a thorough examination of state practice and *opinio juris*.[90] This may be considered an example of what has been called 'paying lip-service' to the two-element approach rather than actually meaningfully engaging in it.[91]

In fact, research indicates that sometimes other international courts and tribunals, rather than engaging in their own analysis to establish the existence of a CIL rule, instead rely on the reasoning and findings of the ICJ with respect to that rule.[92] Examples of this may be found in the judgments of the International Tribunal for the Law of the Sea (ITLOS),[93] the International Criminal Tribunal for Rwanda (ICTR),[94] and the International Criminal Court (ICC).[95] These examples are brought up to show that the two-element approach persists across tribunals even in an indirect manner, since by relying on the ICJ's reasoning to find customary international law these tribunals are in essence relying on findings arrived at through the two-element approach. Moreover, even when the approach is merely mentioned rather than seriously undertaken (i.e. instances of paying lip-service) the performative element of referring to state practice and *opinio juris* reinforces the continued relevance of the two-element approach.

What this brief exposition on the jurisprudence shows us is that the two-element approach remains the dominant way in which customary international law is understood and spoken about by international courts. Whether the two-element approach implies a unitary or a dualist understanding is not central to the argument developed in this thesis, and subsequently this chapter is agnostic on this point. The more important takeaway here is that in either of these two manifestations, the two-element approach frames the way both international courts and states understand customary international law. In this way, the two-element approach, beyond merely postulating the conditions for the existence of a rule of CIL, is the larger paradigm in which we are bound to operate when thinking about or arguing on the basis of customary international law.

This conclusion is most-recently affirmed by the 2018 ILC Conclusions on Customary International Law. The ILC Conclusions are the result of a six-year study by the Commission (2012 – 2018) on the topic of CIL identification, under the

---

[90] Ibid [17-18]. [91] Roberts (n 1)758.

[92] Fitzmaurice (n 48) 189; Michael Wood, 'First report on formation and evidence of customary international law' [2013] Sixty-fifth Session of the International Law Commission A/CN.4/663, para 66; Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' [2017] 28(2) EJIL 357, 377.

[93] *Responsibilities and obligations of States with respect to activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10, 28 [57] (with respect to customary rules of interpretation of treaties) and [147] (with respect to the customary status of the obligation to conduct an environmental impact assessment).

[94] *Prosecutor v Akayesu*, Judgment [2 September 1998] ICTR-96-4-T [495] (with respect to the customary status of the definition of genocide found in the Genocide Convention).

[95] *Prosecutor v Omar Hassan Ahmad Al-Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir [6 July 2017] ICC-02/05-01/09 [68] (with respect to the customary rule on Heads of State immunity).

guidance of Sir Michael Wood as Special Rapporteur. The outcome is a set of sixteen conclusions with commentaries concerning the way in which the existence and content of rules of customary international law are to be determined.[96] The authoritativeness of the findings presented in the ILC Conclusions stems from several considerations. Firstly, the ILC is the official body tasked with the promotion of the progressive development of international law and its codification.[97] It has been aptly noted that while court judgments are authoritative but not systematic, and scholarly writings are systematic but not authoritative, the ILC with its mandate, membership, and methodology represents an ultimate balance between these two.[98] Moreover, the process of the 2018 ILC Draft Conclusions included the feedback of states at various points throughout the drafting, and the final outcome is a reflection of states' comments. It has been further observed that the choice of the term "conclusions" for the title is reflective of the rich basis of materials from which the findings are drawn, and is intended to convey the fact that they rest on a firm basis in international law and practice.[99] It is with these considerations in mind that the ILC's findings are considered particularly authoritative on the subject.

The portion of the ILC Draft Conclusions most pertinent to our present discussion is Part Two of the Draft Conclusions, containing conclusions 2 and 3. Conclusion 2 indicates that:

> To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (opinio juris).[100]

With this the Commission establishes, in unambiguous terms, the two-element approach as the dominant approach in the identification of CIL. The commentary to this conclusion further clarifies that:

> the identification of a rule of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice, and whether such general practice is accepted as law (that is, accompanied by opinio juris). In other words, one must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way. This methodology, the "two-element approach", underlies the draft conclusions and is widely supported by States, in case law, and in scholarly writings.[101]

---

[96] ILC Conclusions on Customary International Law (n 7) Conclusion 1.

[97] Statute of the International Law Commission, Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981, Article 1.

[98] Georg Nolte, 'How to Identify Customary International Law? On the Final Outcome of the Work of the International Law Commission (2018)' [2019] KFG Working Paper Series No. 37, 5.

[99] Ibid, 9. [100] ILC Draft Conclusions (n 19) p. 124 [101] Ibid, 125.

Two observations emerge in relation to this commentary. Firstly, by qualifying the inquiry into the two elements as "two distinct yet related questions" the ILC seems to thread the line between the so-called 'monolithic' and 'dualist' understanding of the two elements discussed above. Subsequently, the commentary notes that a CIL rule could not emerge if only one of the elements is present,[102] and this seems to come closer to a dualist understanding of the two elements as standalone requirements. At the same time, some scholars have read this to in-fact mean that the ILC espouses a unitary understanding of the two elements, thereby marking a full circle in the reasoning on CIL: from a unitary understating in the original discussions of the Advisory Committee, through a period of dualism in jurisprudence and scholarship, and to an eventual return to the unitary view in the latest work of the ILC.[103] Regardless of which of these two views one might subscribe to, the larger point here is that over a period of nearly 100 years, the dominant way of understanding customary international law has always harked back to the two-element approach.

Secondly, by indicating that the two-element approach underlies the conclusions and is supported by both practice and scholarly writings, the ILC Conclusions elevate the two-element approach to a level of generality which is to indicate that it permeates all aspects of international law. This, when read in light of the authoritativeness of the ILC's pronouncements as well as the vast and comprehensive materials used to reach these conclusions, shows us that the two-element approach should be understood as a broader paradigm which exists in international law and which delineates the parameters in which discussions about CIL take place. Thus, any approach that might be developed to address a perceived problem of CIL – including the approach I intend to develop in the subsequent chapters of this thesis – needs to remain mindful of the two-element approach as the dominant paradigm which informs our understanding of what it is we speak of when we speak of CIL.

What emerges from the analysis presented thus far is that the dominant understanding of CIL in international law remains firmly anchored in the two-element approach. This understanding is evident in the practice of states and international courts, the traditional scholarship on CIL, as well as two comprehensive reports by the ILA and the ILC. It was found that there is some variation within the two-element approach between unitary and dualist understandings of the relationship between the two elements, depending on whether they are understood as one compound requirement or two separate-but-related requirements. This distinction however is not particularly pertinent to the overall conclusion about the continued dominance of the two-element approach.

The conclusion presented here should not be misunderstood to imply that the two-element approach is problem free. Quite to the contrary, the two-element approach has significant issues (some of which hit at the very core of how we understand custom), and some of these problems will be addressed in more detail in

[102] Ibid, 126. [103] d'Aspremont (n 29) 32-39; d'Aspremont (n 60) 231-232.

Section II below. Rather, the point made here is simply that in spite of the many problems and criticism, it seems that the two-element approach is here to stay.[104] What is thus essentially argued is that more than a concrete formula for customary law ascertainment, the two-element approach represents a broader paradigm that shapes the way we think about and speak of customary international law. Moreover, by having this function, the two-element approach also delineates the parameters within which our discussions of CIL operate and the space within which we may put forward criticism and alternatives.

One possible way of thinking about this is understanding the two-element approach as part of the language we use to speak of customary international law. In his description of international law as a language spoken by a group of professionals, Martti Koskenniemi argues that there is a basic grammar of international law which is used to formulate and express valid international legal claims.[105] 'Grammar' in this account refers to the competence to devise and communicate a legal argument out of the raw 'vocabulary' of specific legal rules. Here, Koskenniemi relies on an analogy with the relationship between grammar and vocabulary with respect to the competence of learning and using a natural language. A language is not mastered by merely memorizing a large collection of words (vocabulary), but rather by learning how those words interact with each other to produce a sentence and convey meaning (grammar). Similarly, competence in the language of international law 'is not an ability to reproduce out of memory some number of rules, but a complex argumentative practice in which rules are connected with other rules at different levels of abstraction and communicated from one person or group of persons to another [. . .]. To be able to do this well, such connecting has to take place in formally determined ways'.[106] Using this description to contextualize his earlier argument that international legal discourse oscillates between formalism and normativity as between apology and utopia, Koskeniemi argues that accounting for a language or grammar of international law allows us to understand '[. . .] the fluidity and open-endedness of the discipline while also accounting for its formal rigor – the sense that arguments [have] to be presented strictly in accordance with the conventions of professional culture and tradition in order to be heard'.[107] In this sense, the grammar of international law is an account of what it is possible to say in the international law language.[108]

[104] See on this point Tams who argued (even before the ILC Draft Conclusions solidified the two-element approach) that 'And yet, the regime functions, if not like a well-oiled machine, then at least in the rudimentary manner that is characteristic of the process of international law-making in many of its decentralized fields: arguments about customary law are constantly made and assessed; some are rejected, others endorsed, still others are left un-answered and remain contested'. Tams (n 59) 54.

[105] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd ed., CUP 2006) 565-589.

[106] Ibid, 566. [107] Ibid, 565.

[108] Ibid, 581. For a similar take particularly with regard to customary international law see Tams (n 59) 55.

Using the analogy of language and grammar as our stepping stone, we begin to understand that the two-element approach operates in international law not merely as a method for the determination of rules of customary international law, but more broadly as the framework within which we express claims as to what constitutes rules of customary international law. Deploying this particular language enables us to legitimately claim that something is a customary rule, and mobilize the full argumentative force that that implies. It is perhaps useful to point out here, that language is an essential way in which we frame and relate to reality. In this regard, when we express a claim that something is a customary rule by relying on the two-element approach, we do not only categorize certain perceived regularities of conduct for our own comprehension, but our claim is also understood by other participants of the community who know what we are talking about, and who use this language in a similar way. In this sense, the two-element approach helps us anticipate what would be an acceptable or persuasive argument as to the existence of a customary rule.

Understood in this way, the two-element approach has two functions. Firstly, it instructs us on the formal style in which arguments about customary international law must be made in order to seem professionally plausible. It tells us which arguments about what a CIL rule is or what a CIL rule does would be accepted in the professional context of international law versus which would not. In this regard, it is a formal constraint to which thinking about customary international law, including critical takes, responds to.[109] Secondly, it is a framework which is both sufficiently "strict" to be able to provide a common formal understanding of CIL, and sufficiently "lenient" so as to enable us to develop new arguments that address the problems of CIL without needing to completely modify or abandon the common underlying structures.[110] Understanding this enables us to see that devising approaches which dismiss or replace the two-element approach are counterproductive and are not in fact sufficiently appreciating the function this approach plays in the larger international law discourse.

Having said this, I believe it is vital to reiterate that the problems and subsequent criticism of the two-element approach that scholars have identified is by no means unfounded. In fact, it is a crucial part of the collective scholarly effort to understand and improve the ways in which we rely on customary international law in the international legal discourse.[111] However, in light of the long and persistent history

[109] On this point see d'Aspremont (n 29) 14-39.

[110] For a similar take on the doctrine of sources more generally see Koskenniemi (n 105) 16-70; Hilary Charlesworth, 'Law-making and Sources' in James Crawford and Martti Koskenniemi (eds),, *The Cambridge Companion to International Law* (CUP 2012) 187; Sotirios-Ioannis Lekkas, 'The Hybridity of International Lawmaking: Impressions and Afterthoughts from the ESIL 2021 Stockholm Conference' (2022) 32(4) EJIL 1353, 1359; Martti Koskenniemi and Sarah Nouwen, 'The Politics of Global Lawmaking: A Conversation' (2022) 32(4) EJIL 1341, 1348.

[111] For a characterization of this process as a 'rejuvenation through self-destruction' of the doctrine of customary international law see d'Aspremont (n 29) 88-104.

of the two-element approach, critical takes of the two-element approach which end in a conclusion that we need to modify the approach or throw it out altogether are not likely to gain traction among the various practitioners of international law.[112] This is not only true of states and courts which are the practitioners that most often rely on the two-element approach, but also of practitioners who participate in the international legal discourse in other functions and are trying to make their arguments heard (such as for instance non-governmental entities or advocates). With this in mind, this chapter now turns to a discussion of the various problems identified with the two-element approach, and subsequently a discussion of how they might better be addressed under an interpretation framework.

III. Some Persistent Problems

While the two-element approach is the dominant and authoritative approach to custom determination, it is undeniable that it, and by extension the way the doctrine of CIL more generally operates in international law, is riddled with issues on the levels of theory and practice. In fact, a prominent feature of the scholarship on customary international law is precisely this focus on the problems of the two-element doctrine, followed at times by an attempt to modify the doctrine or argue for its rejection. This section will reflect on the problems and proposed alternative approaches with two objectives in mind: first to present a more complete picture of the scholarship on CIL and thus on the question 'what it is we speak of when we speak of CIL', and second to flag the problems of CIL that this thesis will subsequently argue are better addressed under an interpretation framework.

The discussion in this section is organized around three headings: i) problems emerging from the incoherent application of the two-element doctrine; ii) problems of CIL evolution and change; and iii) problems emerging from the larger systemic context of international law. This choice reflects my own reading and grouping of the problems of CIL, and is motivated by the need to break up the discussion and make it easier to follow. In this sense, the headings do not represent a strict classification but rather serve a pragmatic function.

i. Problems emerging from the incoherent application of the two-element doctrine

The problem of the incoherent application of the two-element doctrine refers to the claim that while formally we have the two-element approach as the dominant guideline on how CIL rules are to be identified, in practice often what takes place does not reflect this standard. In this sense, courts, states, and other relevant actors are said to rely on alternative and often unclear methodologies for ascertaining rules of CIL. Moreover, it is stipulated that the modes of reasoning employed for the purposes of CIL ascertainment are inconsistent.

[112] ILC Conclusions on Customary International Law (n 7) 126; Tams (n 59) 59-60.

One detailed account of this problem with respect to its manifestation in the jurisprudence of the ICJ is present in the recent work of Stefan Talmon. According to Talmon, the methodology of the ICJ with respect to the identification of CIL rules is not induction or deduction as maintained by earlier scholarship, but rather assertion. Moreover, not only is the Court's methodology of custom identification mainly assertion, but this method also plays a role in the development of custom more broadly.[113] In the context of CIL identification, induction refers to the inference of a general rule from a pattern of empirically observable individual instances of state practice and *opinio juris*; deduction on the other hand, refers to an inference of a specific rule from an existing and generally accepted rule or principle.[114] Historically, it has been contended that for the purpose of identifying or ascertaining legal rules in international law the appropriate method is induction,[115] and this has been maintained as the correct method for CIL identification more specifically as well.[116] In spite of this, in his analysis Talmon identifies four scenarios where CIL identification by induction might not be possible; these include i) state practice being non-existent because an issue is too new, ii) state practice being disparate or conflicting and thus inconclusive, iii) inability to establish *opinio juris*, or iv) there being a discrepancy between state practice and *opinio juris*.[117] In order for the Court to avoid a *non liquet* when such scenarios arise, it is suggested that the Court resorts to deductive reasoning to identify CIL. In this way, deduction is not an alternative to induction, but rather a complementary method which may be applied whenever the Court cannot ascertain a rule of CIL by means of induction. Following this line of argument, Talmon identifies three varieties of deductive reasoning by the Court, namely: i) normative deduction whereby new rules are inferred by deductive reasoning from existing CIL rules or from existing axiomatic principles; ii) functional deduction whereby the Court deduces CIL rules from general considerations concerning the function of a person or organization; and iii) analogical deduction whereby the rationale of an existing rule is extended to a situation that does not fall within the rule.[118] The main claim here is that overall the Court uses a mixture of induction, deduction and assertion, and that in fact the inductive and deductive methods are similarly subjective and unpredictable, while assertion comes dangerously close to judicial legislation.[119] A similar concern has been described among scholars as the danger of judicial legislation under the guise of CIL identification,[120] and relatedly the refusal by judges to ascertain a rule as

[113] Talmon (n 2) 418-419. [114] Ibid, 420.

[115] Georg Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60(4) Harvard Law Review 539, 569

[116] Yoram Dinstein, 'The Interaction between Customary International Law and Treaties' (2006) 322 RdC 243, 265; Mendelson (n 1) 181; Merkouris 2017 (n 3) 126.

[117] Talmon (n 2) 422. [118] Ibid, 423-427. [119] Ibid, 434-441.

[120] Georg Schwarzenberger, *The Inductive Approach to International Law* (Stevens and Sons, 1965) 115-164

CIL as a strategy for its modification.[121] Some authors have also argued that these blurred lines between law-identification and law-development are in fact a typical feature of CIL adjudication, and that judicial reasoning on CIL comprises both applying and simultaneously developing CIL rules.[122] Others have proposed a differentiation between different types or classes of customary rules, based on the method for their identification. For instance, in his 1993 Hague Academy lecture, Christian Tomuschat introduces the category of 'deductive customary law' to describe customary rules which can be deduced from the 'constitutional foundations of the international community' and require no additional corroboration by practice.[123] The constitutional foundations here refer to the principle of sovereign equality among states, and some examples of customary rules that are provide as a deduction of it include the prohibition on the use of force and the customary prohibition of transboundary harm.[124] Tomuschat maintains that the jurisprudence of the ICJ supports this differentiation of classes of customary rules, and similarly identifies case-law where the Court does not stick to the two-element approach in its identification of CIL.[125]

In response to the incoherent application of the two-element doctrine, various scholars have voiced criticism or advocated for a change in the traditional approach. Two works that stand out in this regard are Monica Hakimi's 'Making Sense of Customary International Law',[126] and Curtis Bradley's 'Customary International Law Adjudication as Common Law Adjudication'.[127] These works are singled out in our discussion because not only are they part of the critical chorus which has shed light on the issues that persist in the application of the two-element doctrine, but they are also advocating for an overall change of how we think about customary international law. In this sense, Hakimi's and Bradley's proposals pose a strong challenge to approaches like my own that decide to remain within the two-element doctrine. As such, they require a more detailed discussion in defense of my own theoretical choices. Furthermore, as will become evident throughout the subsequent discussion, I am much more inclined to agree with Hakimi's and Bradley's observations than I am to argue against them. The crucial point of divergence then is that unlike these approaches which find a solution for the identified problems in a complete dismissal of the two-element approach for CIL identification, I argue that in fact we need to shift the discussion to a later point in the timeline of the customary rule and address the identified problems under an interpretation framework instead.

Hakimi's 'Making Sense of Customary International Law' departs from the premise that the problem with our current dominant understanding of CIL 'lies less in the everyday practice of CIL than in the conceptual baggage that is brought

[121] Hersch Lauterpacht, *The Development of International Law by the International Court* (2nd ed., CUP 1982) 371-374.
[122] Bradley (n 4) 51. [123] Tomuschat (n 36) 307. [124] Ibid, 293-97. [125] Ibid, 298-300.
[126] Hakimi (n 4)1487. [127] Bradley (n 4) 34.

to bear on it'. The conceptual baggage is the so-called 'rulebook conception' of CIL, which is the presupposition that CIL manifests as a body of rules inherent in the two-element approach to identifying rules of CIL. 'In the rulebook conception, CIL consists entirely of rules; a given proposition can be CIL only if it applies more or less in the same way in all cases of a given type, rather than fluctuates without established criteria from one situation to the next'.[128] In contrast to this, Hakimi's alternative approach rests on the understanding that CIL does not function as a rulebook, and that in fact '[t]he normative material that global actors in the ordinary course recognize and treat as CIL does not derive from stable secondary rules and does not manifest only as primary rules. It emerges more enigmatically, and much of its content is more contingent than the rulebook allows'.[129] Hakimi's approach is intent on presenting a more practice-oriented account of CIL which is based on how relevant actors in the world of international law make claims based on CIL. The claim is that in the daily practice of international law, rather than relying on the two-element approach, actors actually engage in a messier and less clearly delineated exercise, and produce a lot of material that is a contender for CIL. 'Because this process is so messy, the normative material that it produces does not come only, or even primarily, in the form of rules. It often is contingent and variable. Put differently, although the CIL process sometimes produces norms that have the clarity and stability of rules, most of its normative output is more fragmentary—treated and accepted as CIL by some actors or in certain settings but not by or in others. This material cannot be CIL under the rulebook conception. But it routinely shapes how people understand and interact with CIL'.[130]

In light of this, Hakimi's alternative approach invites us to abandon both the two-element approach and the overall contention that CIL primary rules come about through the reliance on secondary rules for their determination. It is instead contended that the status of a given normative position within CIL depends on how global actors interact with it over time. A relevant question to assess this is *to what extent do actors invoke, regard, and use a certain position as CIL, rather than ignore or challenge it*? 'Thus, as a practical matter, those who want a position to have traction as CIL must find support for it. They must earn authority for the position from other participants in the CIL process. Insofar as global actors broadly accept and treat a position as CIL, it becomes entrenched. At some point, it might even garner enough support to operate like a conduct rule'.[131] Eventually, '[i]n the absence of secondary rules, the stickiness of a normative position—the extent to which it is stable, like a rule, or more transitory— depends on how it is used by the group of actors who participate in creating and applying it'.[132]

[128] Hakimi (n 4) 1490. [129] Ibid, 1491. [130] Ibid, 1504.

[131] Ibid, 1510-1515; Hakimi illustrates this approach through an analysis of various examples including the emergence of the customary rules on the continental shelf, the customary principle of distinction in international humanitarian law (IHL), and the precautionary principle in environmental law.

[132] Hakimi (n 4) 1517.

Overall, Hakimi offers a compelling account of the inherently informal and organic nature of CIL as a source of international law. It is indeed accurate that CIL emerges in a messy process among actors, and is often a product of the conduct and subsequent reactions of those actors. Furthermore, it is also indeed the case that relevant actors produce a lot of raw data in the form of conduct which is a contender for CIL, and there is a need for a methodology that adequately sifts through this raw data and determines what qualifies as CIL versus what does not.[133] However, it is somewhat difficult to grasp how Hakimi's account which purports to fully abandon the two-element approach would distinguish between these two. It has been observed for instance that Hakimi's theory remains equally dependent on secondary rules which would define how CIL emerges, but that simply in her approach these rules are fuzzier and less clear than the two-element approach.[134] I am inclined to agree. The argument that all normative positions that do not function as rules but are expressed through the CIL process should be characterized as customary simply because they are formulated within the CIL vocabulary[135] carries the potential for a lot more arbitrariness and inclarity than what we see with the two-element doctrine. In fact, that there is widespread practice of forwarding normative claims through the CIL framework for the purpose of arguing (sometimes successfully and sometimes not) that they are customary rules merely reinforces the function of and the need for a rulebook approach to this process. While it is indeed the case that the two-element approach brings with itself a lot of conceptual baggage, it is one that is embedded deeply into the practice of states and international courts, and it underlies the way we understand CIL and distinguish CIL from non-CIL. This is an important function that cannot be easily dismissed.[136] Moreover, even if we were to throw out the two-element doctrine as the particular rule that guides the identification of customary law, it is much more likely that it would simply be replaced with another 'rulebook' understanding rather than the context-dependent evaluation that Hakimi proposes.[137] This is because we would still need a way to sift through relevant conduct in order to determine which is conducive to a customary rule and which is not. Finally, and this is in fact my main point, when looking at some of the examples it seems that many of the issues raised with the rulebook conception can be better understood and resolved if we disentangle the identification of a general customary rule with

[133] Ibid, discussion at 1491-1493 and then again 1509-1510.

[134] Kevin John Heller, 'The Stubborn Tenacity of Secondary Rule' (*Opinio Juris*, 7 July 2020) < https://opiniojuris.org/2020/07/07/customary-international-law-symposium-the-primary-rules-of-cil-are-not-coming-to-save-us/> accessed 3 September 2020.

[135] Hakimi (n 4) 1512.

[136] See on this point Jutta Brunnee, 'Making Sense of Law as Practice (Or: Why Custom Doesn't Crystallize)' (*Opinio Juris*, 7 July 2020) <https://opiniojuris.org/2020/07/07/customary-international-law-symposium-making-sense-of-law-as-practice-or-why-custom-doesnt-crystallize/>

[137] For a discussion of this inevitability of a secondary rule for custom identification see also d'Aspremont (n 29) 140-145.

its subsequent interpretation. For instance, looking at the example of the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Interpretive Guidance) published by the International Committee of the Red Cross (ICRC), Hakimi argues that even though the ICRC did not claim that its findings represent CIL rules the findings in the Interpretive Guidance were treated as legally salient because of the ICRC's position and authority.[138] This is then treated as evidence against the validity of the rulebook conception. The first thing to note here is that neither the ICRC nor the states which have relied on the Interpretive Guidance treat the findings in the Interpretive Guidance as iterations of customary rules.[139] For instance, in *Yesh Din – Volunteers for Human Rights v. The IDF Chief of Staff* (one of the cases cited in support of Hakimi's conclusion), the Israeli Supreme Court is in fact relying on the Interpretive Guidance for the purpose of clarifying the content of the customary rule on direct participation in hostilities as expressed in the text of Article 51(3) of the First Additional Protocol to the Geneva Convention.[140] This leads me then to the second and more pertinent observation. On the example of the ICRC Interpretive Guidance Hakimi observes that '[t]o insist that they cannot be CIL, just because they do not operate as rules, is to obscure the various ways in which they are actually used and received as CIL in the practice of law.[141] I submit however that we do not need to attempt to classify the Interpretive Guidance as either CIL or not CIL in order to capture their relevance, and that instead the issue can be understood better if we account for CIL interpretation. Here then, the Interpretive Guidance is no longer an example of customary rules which defy the two-element approach, but is rather an aide in the interpretation of existing customary rules (such as for instance the customary rule on direct participation in hostilities). The question remains in what capacity is the Interpretive Guidance used for interpretation, and here I am inclined to agree with Hakimi that it is the ICRC's standing that gives the guidelines their legal salience.[142] This question will be revisited in more detail in Chapter 3 of this thesis, in a broader discussion on the methods and materials that are used for CIL interpretation. For now however, the main takeaway here is that a departure from the rulebook approach to CIL identification does not seem to offer a coherent solution to the problem of inconsistent CIL ascertainment, and

---

[138] Hakimi (n 4) 1513.

[139] This is explicitly mentioned in the introduction of the Interpretive Guidance where it is noted that 'the 10 recommendations made by the Interpretive Guidance, as well as the accompanying commentary, do not endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC's institutional position as to how existing IHL should be interpreted in light of the circumstances prevailing in contemporary armed conflicts'. International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 19. See also on this point Heller (n 134).

[140] *Yesh Din–Volunteers for Human Rights v. Chief of General Staff* (24 May 2018) Supreme Court of Israel HCJ 3003/18 [45].

[141] Hakimi (n 4) 1514. [142] Ibid, 1513.

may in fact bring more arbitrariness and theoretical inconsistency to the problem. Accounting for interpretation on the other hand allows us to re-evaluate some of the examples labeled as CIL identification outside of the rulebook, and may offer more descriptive accuracy as to their function in international law.

Turning now to Bradley's common law account of CIL adjudication, this approach departs from the observation that much of the theorizing about CIL and its problems fails to identify which institutional context it has in mind.[143] The argument here is that once a decision maker is hypothesized it becomes easier to address some of the difficulties surrounding CIL,[144] including problems concerning the evolution of CIL rules as well as the chronological paradox inherent in the traditional understanding of *opinio juris* as a belief of law. Bradley describes the common law account of CIL adjudication in the following way:

> Under this "common law" account, adjudicators look to past practice, just as adjudicators look to past decisions when developing the common law. But, as with common law adjudication, judges necessarily make choices about how to describe the practice, which baselines to apply in evaluating it, and whether and when to extend or analogize it to new situations. Furthermore, the choices that they make are informed by judgments about the perceived preferences of the regulated states, the likely consequences of adopting a particular formulation of the relevant international rule, and moral and ethical considerations. In other words, under a common law account, adjudicators are understood as developing CIL rather than merely finding it.[145]

The common law account is offered as an alternative to the two-element approach to CIL because it is argued that CIL adjudication involves both an element of law-making and of identification, and the two-element approach which treats CIL only as stemming from state practice and *opinio juris* does not adequately capture this reality.[146] I am inclined to agree that the two element approach on CIL identification does not fully capture how customary rules operate and continue to exist in international law. However, for many of the reasons already expressed above, I do not think that this shortcoming is addressed by expanding or diluting the standards for CIL identification, and trying to fit more activities under the 'identification' heading. Furthermore, what becomes apparent when reading the common law account of adjudication is that many of the activities described there sound very much like interpretation without being called by that name. For instance, the example used by Bradley of the customary rule of sovereign immunity as applied by the US Supreme Court in the *Schooner Exchange* case seems more like an example of applying a general CIL rule to new facts rather than generating a new customary rule altogether.[147] In this regard, it seems like here the court is reasoning by analogy from the customary rules on sovereign immunity and diplomatic

[143] Bradley (n 4) 48. [144] Ibid, 49. [145] Ibid, 49-50. [146] Ibid, 50.
[147] Ibid, 51 discussing *The Exchange v. McFaddon*, 11 U.S. 7 Cranch 116 116 (1812)

immunity to conclude that immunity should be extended to a foreign ship.[148] On a more general level, the activities that are described in the common law account such as judges deciding whether and when to extend or analogize a rule to a new situation, or choices being informed by previous judgments or by broader consideration of the international legal context, are considerations that take place at a later stage of deliberation after a relevant customary rule has been identified. Finally, treating custom identification as common-law adjudication does not correspond to the legal context of the international legal system. In international law, judicial lawmaking is an activity which is impermissible and highly problematic from the perspectives of legitimacy and judicial mandate. While Bradley is correct in implying that international judges sometimes develop the law, this is not done through acts of judicial legislation in areas where rules do not exist but rather through acts of interpretation where general rules are clarified or extended to different contexts. I am not suggesting here that we close our eyes to international judicial lawmaking and simply call it by another name. What I am rather saying is that accounting for interpretation in the continuous existence of customary rules plays a dual role in relation to the potential problem of judicial lawmaking. Firstly, it enables us to correctly label different instances of judicial reasoning and differentiate between interpretation which is a permissible and indeed necessary judicial activity versus misidentification or misinterpretation of CIL which is problematic.[149] Secondly, it enables us to adequately regulate the interpretive process – by for instance developing rules for CIL interpretation – thereby delineating the boundaries within which the interpretation of customary law operates.

The incoherence in the application of the two-element approach is a central problem in the application of customary international law, and as such does not lend itself to an easy fix. In this regard, the argument I am developing does not profess to address all the potential issues that may arise from the incoherent application of the two-element doctrine by courts, states, or other relevant actors. With that caveat in mind, I propose that accounting for interpretation as a stage in the continuous existence of CIL rules gives us the opportunity to better understand the way CIL rules function and the way they are deployed in the practice of international law. Consequently, accounting for interpretation allows us to see the problems associated with this source of law in a new light and find ways to address them that have previously not been considered. This argument is developed further in Chapter 4.

ii. Problems of CIL evolution and change

The problems of CIL evolution and change refer to the claim that CIL as understood through the traditional two-element paradigm does not seem well designed

[148] *The Exchange v McFaddon* (n 132) [96-106] and then [128-130].
[149] See on this point Merkouris 2023 (n 3) 50-68.

to allow for the evolution of CIL rules in reaction to societal changes. Furthermore, the two-element approach does not offer a clear account of how customary rules can evolve or be modified. This problem persists in the literature because the jurisprudence on this issue is sparce, and the ILC explicitly refrained from treating this problem in its most recent study.[150]

The problem can be roughly summarized as follows: since customary rules require the presence of sufficient practice and *opinio juris* in order to emerge, they are slow and take a long time to be formed. This makes them less relevant in practice because they are too slow or even completely unable to respond to rapid new developments in international law. While the ICJ has dispelled with the image that a long period of time is a necessary condition,[151] there is still a general sense that at least some time needs to pass in order for a CIL rule to form.[152] Even if we take the *North Sea Continental Shelf* dictum in consideration, few would argue that there is no need for at least some time to have passed before practice and *opinio juris* crystalize into a customary rule.[153] Moreover, even if we accept that no time is necessary, what of new problems on which no specific practice or *opinio juris* exists? Think for instance of problems related to climate change or cyber operations. Do we wait for state conduct to generate customary rules in this area, or do we analogize existing general customary rules to these particular contexts? There is certainly always the option for states to start negotiations on a new treaty, but as some have noted the treaty process can often be slow to start and even slower to come to a conclusion and bring about binding results.[154] Finally, even discounting this problem posed by new scenarios, the question of how customary rules evolve or change remains unanswered. Is new behavior by states in relation to some customary practice a breach of an existing rule, a sign that the rule is changing, or evidence of a new rule altogether?

The principal account of change in the traditional CIL framework seems to imply that for a CIL rule to be changed a state or states need to generate contrary practice which would initially be in breach of the existing rule and would then eventually substitute this rule after sufficient acquiescence from other states. This view is based largely on a reading of the ICJ's pronouncement in the *Nicaragua* case that '[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law'.[155] The Court's observation here is quite short

[150] ILC Conclusions on Customary International Law (n 7) 124.

[151] *North Sea Continental Shelf Cases* (n 66) [74].

[152] ILC Conclusions on Customary International Law (n 7) 138.

[153] The frequent use of the term 'crystalize' to denote the morphing of practice and opinio juris into a CIL rule is strongly illustrative of this sense that time needs to pass before we can speak of the existence of a rule.

[154] Treves (n 25) 139. Interestingly, Treves juxtaposes the slow treaty process to what he considers a much faster customary process which 'can produce rules in a timely and adequate manner'.

[155] Case concerning *Military and Paramilitary Activities in and against Nicaragua* (n 73) [207].

and unclear, and it seems to be an observation *in passim* rather than a focused examination of the matter. Moreover, even if we accept this account, scholars have rightly observed that it is problematic to base a central feature of a legal regime on widespread violation.[156]

While this presumption of violation as a drive for change has been dispelled in some writings,[157] a larger problematic implication remains. In particular, underlying this account is a presumption that CIL rules exist in a binary "all-or-nothing" fashion, where a CIL rule is either one (the old rule) or another (the new rule), but not anything in between. This does not allow for the possibility of a CIL rule to have a continuous existence as a rule whose content has a natural degree of flexibility and is able to evolve. This then relates to the second prong of this problem concerning the evolution of CIL rules. If we accept that it is difficult for CIL rules to evolve and adapt to contemporary developments, then there is a serious concern about CIL's "usefulness" – i.e. the ability of CIL rules to address or be relevant for pressing contemporary issues such as climate change, international financial stability, new security threats, and similar emerging problems which stem from new factual developments.[158] The view among critics here seems to be that the traditional approach makes it difficult for CIL to adapt to the fast pace with which both new global problems and new technologies arise.[159] Moreover, for some scholars the problem of evolution also manifests as an inability of CIL rules to adapt to what has been dubbed 'progressive trends in moral thinking'. Here the argument seems to be that the traditional approach impedes the speedy recognition of new morally desirable customary rules,[160] or the evolution or modification of existing CIL rules along these lines.[161]

An alternative account of CIL change might posit that it is not a violation in the form of contrary practice that is necessary to modify a customary rule. Rather, the rule may be modified by a change in the attitude of states, promulgated in a certain global forum, and supported by others states who align with this new position.[162] While this alternative account might sidestep the problem of basing CIL change on violation, it is similarly underscored by the assumption that an old CIL rule and a potentially modified offshoot of it have a separate existence with no continuity between them. While this may be correct in some instances of old customary rules which have fallen into disuse or been explicitly abrogated, this still does not account for a natural degree of evolution which necessarily occurs in old CIL rules which continue in operation for long periods of time. In such rules, a

---

[156] Bradley (n 4) 38. See also on this point Michael Akehurst (n 1) 1.

[157] Kammerhofer (n 1) 531-532. [158] Bradley (n 4) 37. [159] Lepard (n 5) 70.

[160] Lepard (n 5) 71; See also John Tasioulas, 'Customary International Law and the Quest for Global Justice' in Amanda Perreau-Saussine and James B. Murphy (eds), *The Nature of Customary International Law: Legal, Historical and Philosophical Perspectives* (CUP 2007) 307.

[161] Lepard (n 5) 71-72.

[162] For a discussion of this account of change see Tomuschat (n 36) 276-77; Antonio Cassese, *International Law in a Divided World* (OUP 1986) 183-85.

binary understanding of 'the old rule' versus 'the new rule' is simply not adequate. Moreover, as discussed in chapters 3 and 4 of the thesis, even in instances of modification by new or contrary subsequent practice, there is a degree of continuity between the older and newer rule.

Writing in response to the problems of evolution and change, scholars have devised various alternative approaches to CIL identification. A dominant strand of alternative scholarship has developed arguments questioning the need for a requirement of state practice in the identification of CIL rules, instead favoring an exclusive or at least increased emphasis on *opinio juris*.[163] Similarly, approaches have been developed advocating for a distinction to be made with respect to the amount of consistent practice that should be demanded as evidence of *opinio juris* based on the different types of CIL rules.[164] On this view, CIL norms are differentiated on the basis of the different problems they aim to solve. Consequently, there is a distinction to be made with respect to the amount of consistent practice that should be demanded for their identification. More specifically, norms that are designed to solve coordination problems might require more practice to evidence *opinio juris* as opposed to norms designed to uphold fundamental human rights.[165] However, these ideas have not received much traction in the practice surrounding CIL.[166] Moreover, the proposal to have different standards for the identification of customary rules depending on the issue they aim to address carries a significant risk of arbitrariness in the custom-identification process. While the two-element formula is by no means a guarantee that rules will be identified consistently,[167] it hardly seems a solution to add further variation to the process. Rather, as will be argued in Chapter 4 of this thesis, the problems of evolution and change of custom are in fact much better addressed under the interpretation framework.

A more moderate tendency seems to be exhibited in a strand of alternative scholarship that seeks to mediate between more traditional and more modern approaches. For instance, responding to similar concerns that CIL as understood in the traditional view does not adequately respond to contemporary issues in international law, Anthea Roberts develops the distinction of traditional versus modern custom. Within this distinction, traditional custom is the result of a gen-

[163] These include: the concept of instant custom developed in relation to the effect of United Nations resolutions on outer space by Bin Cheng (n 28) 138-139; the concept of customary rules on a 'sliding scale' developed by Frederick Kirgis. Frederick L. Kirgis, 'Custom on a Sliding Scale' (1987) 81 AJIL 146, 149; the concept of 'Grotian Moments' denoting a transformative development in which new rules and doctrines of CIL emerge with unusual rapidity and acceptance developed by Michael Scharf. Michael Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (CUP 2013) 8-9; Scharf (n 59) 442-450.

[164] See notably Lepard (n 5) 62 [165] Ibid, 83.

[166] For instance, the possibility for instant custom was most recently explicitly rejected by the ILC. ILC Conclusions on Customary International Law (n 7) 138. Similarly, judicial practice does not indicate a different standard being consciously and purposefully used for the identification of different CIL rules.

[167] See the discussion *supra* 28-35.

eral and consistent practice followed by states from a sense of legal obligation, and *opinio juris* is invoked to distinguish between legal and non-legal obligations. Furthermore, traditional custom is identified through an inductive process, whereby a rule of custom is derived from specific instances of state practice. On the other hand, modern custom is derived by a deductive process that begins with general statements of rules rather than particular instances of practice. Modern custom emphasizes *opinio juris* over practice, relies primarily on statements rather than actions, and it may develop quickly because it is deducible from multilateral treaties or declarations (such as for instance declarations adopted by the UN General Assembly).[168] Roberts places the two-element formula in the category of traditional custom and argues that its strength lies in its descriptive accuracy because CIL rules emerge from actual practice and are constructed by working from practice to theory. On the other hand, she places approaches which emphasize *opinio juris* over practice in the category of modern custom, and argues that modern custom's strength lies in its substantive normativity rather than descriptive accuracy.[169] It thus seems that the distinction rests on a notion of an older understanding of custom which is slow to evolve and is deeply rooted in past state practice versus a newer more forward-looking understanding which allows for custom to develop quickly and respond to new challenges. Roberts purports to reconcile this contrast with the development of an alternative approach dubbed 'Custom as a Reflective Interpretive Concept', which is meant to reconcile the inductive and deductive methodologies characterizing traditional and modern custom respectively.[170] The approach is said to provide guidelines for the reconciliation of practice and principles rather than allowing one element to override the other, and that it explains how the best interpretation of practice and principles may change over time in light of new data or theories.[171]

This distinction between traditional and modern custom hits at the core of the problem of CIL evolution. However, the proposed solution of custom as a reflective interpretive concept does not go far enough in accounting for the continuous existence of customary rules, and erroneously places the entire process under the heading of custom identification. To be more precise, let us reflect on the examples used to illustrate the approach, namely torture and prevention of transboundary harm. When looking at the disparate practice on torture, Roberts rightfully observes that two competing conclusions may be reached: 'first, torture is permitted, which explains instances of torture and the frequent lack of protests (acquiescence). [. . .] Second, torture is prohibited because many states refrain from torturing people out of a sense of obligation and most states have formally accepted that torture is illegal'. After considering that statements by states on the immorality of

---

[168] Roberts (n 1) 758. [169] Ibid, 762-63.

[170] Ibid, 767-775. This approach draws on earlier more general methodologies such as the 'reflective equilibrium' of John Rawls and the 'constructive interpretation' of Ronald Dworkin.

[171] Roberts (n 1) 781.

torture carry great weight in representing what they believe the law should be, and that practice to the contrary is usually backed by excuses, we can conclude that the most coherent explanation would be that torture is illegal.[172] While this approach might explain how the evaluation of state practice and *opinio juris* is weighed in order to establish whether a customary rule prohibiting torture exists, it does not actually account for how that general rule may be interpreted and applied subsequent to its identification. What happens to the customary rule against torture when it needs to be applied to specific situations of behavior in order to evaluate whether that behavior constitutes torture or not? Following the logic of custom as a reflective interpretive concept, it seems that each and every time a new case of potential torture arises, we would have to reestablish a customary norm prohibiting torture with regard to that specific behavior (for example a customary prohibition against sleep deprivation as an enhanced interrogation technique). A similar issue arises when examining the next example which is the customary rule of prevention. Once again when considering disparate practice and *opinio juris* by states Roberts rightfully observes that two competing conclusions emerge: '[f]irst, there is a customary norm prohibiting transboundary pollution, which explains why most states refrain from causing interstate pollution most of the time and why instances of pollution are often met with protests. Second, there is a permissive customary norm allowing transboundary pollution, which explains why pollutants regularly travel across international borders, provoking little or no reaction by other states'. After considering statements by states and non-binding instruments articulating the generally-accepted approach on prevention, the most likely conclusion is that there exists a prohibition on transboundary harm.[173] With this example, like with the one of torture, the question on the content of the customary rule of prevention remains unanswered. That we have reached a conclusion on the existence of the customary rule – transboundary harm is prohibited – does not help us determine what is the content of that rule – what actions constitute transboundary harm or what behavior is proscribed in order to avoid it? On the example of prevention Roberts concludes that the outcome of the reflective interpretive process is more finely balanced than in the example of torture, and this is why it might be contentious and open to change.[174] It is precisely in this last observation that I believe the incompleteness of this approach is most acutely visible. The reflective interpretive approach is very useful for the description of the reasoning that takes place in custom identification. Furthermore, it may also be very instructive when accounting for how an established customary rule is modified or terminated when conflicting practice arises. Where it is lacking however is in accounting for the continuous existence of established customary rules, their application to particular circumstances, or their evolution in light of new knowledge or new factual

[172] Ibid. For a similar analysis concerning the customary rule prohibiting torture see Rosalyn Higgins, *Problems and Process: International Law and How we Use It* (OUP 1994) 20-22.
[173] Roberts (n 1) 782. [174] Ibid.

developments. What is contentious and open to change in the case of prevention is not its status as a customary rule but rather the precise content of that rule over a prolonged period of time. This is well illustrated in the jurisprudence of the ICJ. Early elaborations of the customary rule of prevention can be found in the *Nuclear Weapons Advisory Opinion*[175] and the *Gabčikovo Nagymaros*[176] cases, where the Court established the existence of the general customary rule. In subsequent cases, the Court no longer engaged in evaluation of practice and *opinio juris* in order to establish whether the rule (still) exists or has changed, but rather engaged in interpreting the rule in order to flesh out its more specific content. Thus, in *Pulp Mills on the River Uruguay* the Court specified that prevention is a due diligence obligation, which involves a duty to inform and a duty to conduct an environmental impact assessment (EIA).[177] Subsequently, in *Certain Activities and Construction of a Road* the Court further elaborated the content of the rule by finding that a set of separate-but-related activities need to be undertaken in pursuance of prevention. First, the state needs to ascertain whether a planned activity has the potential to cause harm. If it does, the state needs to conduct an EIA. If the EIA confirms that there is a risk of significant harm, the state then needs to notify and consult the other concerned state in order to find appropriate measures to prevent or mitigate the harm.[178] In these examples, the Court did not evaluate practice and *opinio juris* in order to identify the existence or not of these sub-obligations, but rather resorted to methods of interpretive reasoning in order to determine the general rule's content.[179] The logic of the interpretive equilibrium approach does not capture this mode of reasoning with regard to established customary rules when it only accounts for custom identification. In this regard, it presents an incomplete picture of how established customary rules continue to exist and operate in the international legal system.

A common trend that emerges among the alternative approaches described under this heading is the concern with respect to the ability of existing CIL rules to fit into novel scenarios. It seems that a common perception among these authors is that CIL in its traditional understanding is too slow or otherwise unable to respond to rapid developments in international law, and thus an attempt is made to adjust the two-element requirements. Furthermore, in some of these approaches, CIL is understood to lack what is characterized as a democratic character, and again an attempt is made to revise it accordingly. While it is true that we need to find a way

[175] *Legality of the Threat or Use of Nuclear Weapons* (n 86) [29].

[176] *Case concerning the Gabčikovo Nagymaros Project* (Hungary/Slovakia) Judgment of 25 September 1997 [1997] ICJ Rep. 7 [140].

[177] *Case Concerning Pulp Mills on the River Uruguay* (Argentina v Uruguay) Judgment of 20 April 2010 [2010] ICJ Rep. 14 [101-102], [204].

[178] *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v Costa Rica) (Judgment) [2015] ICJ Rep. 665 [104].

[179] See Chapter 3 of this book for a detailed development of this argument.

for CIL to respond and adapt to normative or factual changes in the international system, the way to do this is not by changing or diluting the standards for CIL identification. Neither is the answer found in allowing for different standards to apply depending on the content of the purported customary rule. Rather, as will be argued throughout this thesis, the answer lies in reassessing these problems at a later stage of a customary rule's existence and under an interpretation framework.

iii. Problems emerging from the larger systemic context of international law

The problems of CIL emerging from the larger systemic context of international law originate in understandings of the international legal system as one built on power disparity and unequal relations. On this understanding, international law as a system reflects the interests of powerful states, and these interests are deployed through various legal doctrines including the doctrine of customary international law.[180] Here CIL is considered problematic both on the level of particular customary rules in force in the international legal system, and more generally as a category in the sources doctrine. As the discussion below illustrates, on the level of particular customary rules the problems of CIL are visible in various examples such as the rules on state succession and state responsibility,[181] the customary minimum standard of treatment,[182] or the *uti possidetis* rule.[183] In addition to these, as a general doctrine CIL is problematic with regard to power disparities in its emergence,[184] the persistent objector doctrine,[185] and the specially affected states doctrine.[186] These problems of CIL are set in the wider historical context which links the development of international law to the colonial encounter between European states and the violently colonized non-European world.[187] In this regard, critical scholarship considers that it is not only that the colonial context affected the original development of international law at a particular time, but that contemporary international law has internalized and thus constantly reproduces many of these problematic rationales.[188] The usual starting point for this criticism is the lack of

---

[180] I have developed this point elsewhere with regard to this criticism particularly from a TWAIL perspective. See Nina Mileva, 'The Under-representation of Third World States in Customary International Law: can interpretation bridge the gap?' (2019) 13(11) ESIL Conference Paper Series, Conference Paper No. 11/2019.

[181] Anghie (n 6) 198-209. [182] Kelly (n 6) 59-73; Anghie (n 6) 214. [183] Okubuiro (n 6) 243-245.

[184] Chimni (n 6) 4-12; George R. B. Gallindo and Cesar Yip, 'Customary International Law and the Third World: Do Not Step on the Grass' [2017] Chinese Journal of International Law 251.

[185] Kelly (n 6) 79; Gallindo and Yip (n 184) 267-268; Chimni (n 6) 24. [186] Chimni (n 6) 22-23.

[187] Anghie (n 6).

[188] See indicatively Anne Orford, *International Law and the Politics of History* (CUP 2021); Tzouvala (n 14); J Linarelli, ME Salomon and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018); Sundhya Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (CUP 2011); Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3 Trade, Law and Development 103; Anghie (n 6).

'democratic legitimacy' in the creation of customary rules, which refers to 'the extent to which nations and societies are members of, participate in, and influence the political community determining norms'.[189] This lack of democratic legitimacy concerns the historical under-representation of the practice and interests of Third World states[190] in the process of CIL creation and identification. Beyond this historical under-representation, the practice of exclusion is seen as extending to the contemporary context as well.[191]

Historically, the lack of democratic legitimacy of CIL stems from the fact that newly independent states were and continue to be bound by CIL rules in whose creation they did not participate. As a result, customary rules are biased in geographic, religious, economic, and political terms.[192] Early debates on this problem in CIL questioned whether new states were in fact bound by existing rules of CIL.[193] Arguments in the negative were premised on an understanding of international law as a system among equals, 'based on the real consent of states which had finally become sovereign and which were now in a position to assert principles of law which corresponded with their own interests'.[194] Already at the beginning of this debate such arguments were rejected by Western states, which maintained that new states' entrance and participation in the existing international system as sovereign states was premised on their acceptance of existing rules.[195] Most recently,

---

[189] Kelly (n 6) 49.

[190] The category of 'Third World states' (at times also referred to as the 'Global South') is used here as a juxtaposition to the category of 'Western states' (at times also referred to as the 'Global North' or less often 'powerful states'). These categories are not used as strict geographical indicators but rather as denominations that represent particular perspectives in the international legal discourse. This vocabulary is borrowed from the scholarship on Third World approaches to international law (TWAIL) which represents a perspective which is 'critical of the universalizing mission and occidental authority of Eurocentric international legal scholarship and practice'. James Thuo Gathii, 'The Agenda of Third World Approaches in International Law' in Jeffrey Dunoff and Mark Pollack (eds), *International Legal Theory: Foundations and Frontiers* (CUP forthcoming), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304767>. For an additional commentary on the geographical counterparts of these categories see Okubuiro (n 6) 236.

[191] See for instance Hanqin Xue 'Chinese Observations on International Law' [2007] Chinese Journal of International Law 83(6) 84, 85.

[192] Gallindo and Yip (n 184) 254.

[193] See for instance S. N. Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law' (1961) 55(4) AJIL 863; Charles H Alexandrowicz, 'The New States and International Law' (1974) reproduced in David Armitage and Jenifer Pitts (eds),, *The Law of Nations in Global History – C.H. Alexandrowicz* (OUP 2017) 404; See also Patrick Norton who finds that '[i]n the late 1950's and early 1960's, dozens of new states gained their independence and challenged customary international law. Many of these states refused to consider themselves bound by a law in whose formation they had not participated and which, they maintained, did not reflect their own cultural and legal traditions'. Patrick M. Norton, 'A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation (1991) 85 AJIL 474, 478.

[194] Anghie (n 6) 210.

[195] Richard Falk, 'The New States and International Legal Order' (1966) 118 RDC 1.

conclusions by the ILA and ILC have put this question to rest,[196] and scholars similarly contend that this is no longer an active debate.[197] While it would be easy to conclude on this formal note by simply stating that customary rules are universally binding and thus opposable to "old" and "new" states alike, the rationale operating behind this choice is unsettling. A historical study of CIL shows that various contemporary customary rules find their origin in natural law doctrines developed to legitimize the extension of the European colonial empires, and the subsequent exploitation of peoples and resources encountered in the process.[198] Many of the foundational doctrines of international law were forged in this colonial encounter and as such contain discursive structures that continually repeat themselves at different stages of the history of international law.[199] In this sense, while the formal process of decolonization got rid of colonial empires, legal doctrines formed in the colonial period survive today and perpetuate problematic rationales in the contemporary context of international law. Therefore, that new states were and continue to be bound by rules developed in a context that was detrimental to them creates an inherent asymmetry in the continuous operation of the international legal system. Where does the possibility of CIL interpretation figure in all of this?

One example of a customary rule with a problematic pedigree is the customary international minimum standard of treatment (MST), and its application particularly in the context of the protection of foreign investment. Critical scholars have traced the customary MST back to early natural law doctrines on the freedom of commerce and the rights to hospitality and sociability of Vittoria and Grotius, developed to legitimize the extension of the European colonial empires.[200] In the contemporary context, the customary MST is anchored to a 1910 address by the American Secretary of State Elihu Root[201] and a later pronouncement of the US-Mexico Claims Commission in its *Neer* award.[202] While in these earlier iterations

---

[196] The general commentary to the ILC Draft conclusions indicates that '[w]hereas *rules of customary international law are binding on all States*, Parts Six and Seven deal with two exceptional cases: the persistent objector; and particular customary international law'. ILC Conclusions on Customary International Law (n 7) 123 (emphasis added); Principle 14 of the ILA Report maintains that 'newly-independent States or those new to a particular activity are bound by existing rules of customary law'. ILA Report on Customary International Law (n 77) 24.

[197] Francisco Orrega Vicuña, 'Customary International Law in a Global Community: Tailor Made?' [2005] Estudios Internacionales No. 148, Instituto de Estudios Internacionales Universidad de Chile 21.27.

[198] Kelly for instance traces the customary rules on the international minimum standard of treatment and state responsibility to early natural law doctrines on the freedom of commerce and the rights to hospitality and sociability developed by Vittoria and Grotius, and taken up by later publicists and arbitral decisions. Kelly (n 6) 51-74.

[199] Anghie (n 6) 3. [200] Kelly (n 6) 51-74.

[201] Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proc 16, 21. 'There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world'.

[202] *USA (LFH Neer) v Mexico* (Award of 15 October 1926) 4 RIAA 60 [4]. See also *USA (Harry Roberts) v Mexico* (Award of 2 November 1926) 4 RIAA 77. '[. . .] the treatment of an alien, in order

the customary MST concerned broadly the treatment of aliens abroad, in the post-WW2 context there was a marked 'shift of the paradigm that the standard was meant to regulate', including now a focus on property and the personality of the foreign investor.[203] This focus on the protection of property rights and protection of foreign investment is the primary area of application of the MST today.[204] The assertion of the MST as a customary rule applicable to the treatment of foreign investment was met with widespread opposition among Third World states. In the Latin American context, explicit opposition was voiced in the form of alternative regional doctrines such as the Calvo doctrine. The Calvo doctrine maintained that aliens are not entitled to rights and privileges not accorded to nationals, and that foreign investors should settle disputes arising out of the investment under the national law of the home state.[205] This approach precluded the application of any international minimum standard of treatment for foreign investments, or of full compensation in cases of nationalization. Furthermore, many Latin American States inserted so-called Calvo clauses in their domestic statutes and constitutions,[206] thereby reiterating their stand on the matter. Nevertheless, this practice of Latin American States was largely neglected by their American and European counterparts and was not considered in arbitral cases of the time.[207] Similarly, in the post-colonial context of African and Asian states, opposition was voiced with proposals for an alternative national standard for the treatment of foreign investors and the compensation in case of nationalization.[208] With the failure of the New International Economic Order (NIEO) however, the proclamations made in various

to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency'; *France (Affaire Chevreau) v UK* (Award of 9 June 1931) 2 RIAA 1113; and *USA (Hopkins) v Mexico* (1926) 4 RIAA 41.

[203] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 64, 65-7. See also the discussion in the ILC on State responsibility, discussing also an international standard in relation to the protection of property of aliens. ILC, 'Summary Records of the 8th Session' (23 April-4 July 1956) [1956/1] YBILC 1, 233-8.

[204] Hollin Dickerson, 'Minimum Standards' [2013] MPEPIL [12-3].

[205] Patrick Juillard, 'Calvo Doctrine/Calvo Clause' [2007] MPEPIL.

[206] Kelly (n 6) 65; Julliard (n 205). [207] Kelly (n 6) 66-67.

[208] See indicatively UNGA Res 1803 (XVII) 'Permanent Sovereignty over Natural Resources' (14 December 1962) UND Doc A/RES/1803 (XVII), point 2 'Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law'; UNGA Res 3171 (XXVIII) 'Permanent Sovereignty over Natural Resources' (17 December 1973) UN Doc A/RES/3171 (XXVIII), point 2: 'Supports resolutely the efforts of the developing countries and of the peoples of the territories under colonial and racial domination and foreign occupation in their struggle to regain effective control over their natural resources', point 3: 'Affirms that the application of the principles of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that

UNGA Resolutions lost traction, and the international MST prevailed as the relevant standard for investment protection.[209] Its status has been entrenched through numerous arbitral awards, which begin from the premise that the MST is customary and applicable to the protection of foreign investment without considering state practice or entertaining alternative arguments.[210] Thus, criticism persists that in moments when the third world attempted to dispute existing structures in international law (such as with the NIEO), this was met with a response by the first world which claimed a universality of rules and values so as to discredit attempted alternatives.[211]

Yet another example of this problem can be found in the application of the customary rule of *uti possidetis* in the context of African decolonization.[212] *Uti possitedis* posits that states emerging from the dissolution of a larger entity inherit as their borders the administrative boundaries which were in place at the time of independence.[213] In the context of decolonization this implied the preservation of borders demarcated under the colonial regimes.[214] While the principle of *uti possidetis* originates in Roman Law and was initially limited to the context of post-colonial boundary delimitation in Latin America, it re-surfaced in the 20th century to delimit boundaries in the decolonization of African States.[215] One of the inherently problematic consequences of the application of this rule on post-colonial border delimitation is that it maintains borders which were drawn with no regard for local communities. The borders imposed by colonial powers saw the gathering of differ-

---

any disputes which might arise should be settled in accordance with the national legislation [. . .]'; UNGA Res 3281(XXIX) 'Charter of Economic Rights and Duties of States' (12 December 1974) A/RES/3281(XXIX), Article 2(2)(a): 'Each State has the right: To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment'.

[209] See however Bianchi who argues that the NIEO effort yielded changes in the international law--making process by introducing the notion of soft-law, and introducing a relative vision of normativity in this respect. Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 214.

[210] See indicatively *Azinian v Mexico* (Award of 1 November 1999) ICSID Case No ARB(AF)/97/2 [99-103]; *Pope & Talbot Inc v Canada* (Award in Respect of Damages of 31 May 2002) UNCITRAL [63]; *Mondev International Ltd v USA* (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2 [113-15]; *Loewen Group, Inc and Raymond L Loewen v USA* (Award of 26 June 2003) ICSID Case No ARB(AF)/98/3 [131-3]; *Waste Management, Inc v Mexico* ("Number 2") (Award of 30 April 2004) ICSID Case No ARB(AF)/00/3 [98]; *Bilcon v Canada* (Award on Jurisdiction and Liability of 17 March 2015) PCA Case No. 2009-04 [433-6]; *Windstream v Canada* (Award of 27 September 2016) PCA Case No 2013-22 [379]; *Eco Oro Minerals Corp v Colombia* (Decision on Jurisdiction, Liability and Directions on Quantum of 9 September 2021) ICSID Case No ARB/16/41 [805-21].

[211] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011) 102-71.

[212] Okubuiro (n 6) 243-45.

[213] James Crawford, *Brownlie's Principles of International Law* (9th ed., OUP 2019) 224.

[214] Ian Brownlie, *Principles of Public International Law* (5th ed., OUP 1998) 132.

[215] Giuseppe Nesi, 'Uti possidetis Doctrine' [2018] MPEPIL

ent African entities into larger groups pursuant to the Western model of statehood, often neglecting alternative forms of local political organization,[216] or cultural and geographical realities on the ground.[217] This then naturally gave rise to a significant amount of boundary disputes among neighboring states upon the achievement of political independence from colonial rule.[218] Insofar as these disputes did not lead to an armed conflict, they were resolved through dispute settlement, often before the ICJ and dominantly through reliance on *uti possidetis*.[219] Far from showing resistance, many of the post-colonial states accepted this model of delimitation, thereby maintaining a model of statehood which excluded the consideration of diverse local communities.[220] Scholars have criticized this acceptance of *uti possidetis* by African political elites precisely because of its consolidation of harmful colonial legacies.[221] *Uti possidetis* stands in contrast to earlier calls by Pan-Africanists to reject colonial borders,[222] and to proposals which suggest alternative methods of border delimitation.

The criticism of the individual CIL rules discussed above is situated in a larger line of critique which characterizes CIL doctrines as a form of hegemonic oppression. When found in scholarly work, the hegemony critique is most often based on Antonio Gramsci's notion which equates hegemony with domination, and argues that it arises when the interests of the dominant few are presented as if they are universal.[223] Crucially however, this domination is not exerted (only) through brute force, but rather through an ideological dominance perpetuated by social forces and organizations. Consequently, a social order which produces and reproduces the ideology of the dominant few is maintained through a network of institutions,

---

[216] Okubuiro (n 6) 243. See also Femi Adegbule, 'From Warrant Chiefs to Ezeship: A distortion of traditional Institution in Igboland?' (2001) 2 Afro Asian Journal of Social Sciences 1.

[217] See for instance Udombana who recounts the artificial division of members of the same nation into two or more states on opposing borders, or the colonial ignorance of local geography which sometimes led to the drawing of speculative and illogical borders. Ngongura J Udombana, 'The Ghost of Berlin still haunts Africa! The ICJ Judgement on the Land and Maritime Boundary Disputes between Cameroon and Nigeria' (2002) 10 *African Yearbook Of International Law* 13, 50-60.

[218] T. O. Elias, "The Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity" (1964) 40 British Yearbook of International Law 336.

[219] *Case Concerning the Frontier Dispute* (Burkina Faso/Republic of Mali) (Judgment) [1986] ICJ Rep. 554 [20-21]; *Case Concerning the Land and Maritime Boundary* (Cameroon v Nigeria: Equatorial Guinea intervening) (Judgment) [2002] ICJ Rep. 303; *Case Concerning the Frontier Dispute* (Benin/Niger) (Judgment) [2005] ICJ Rep. 90 [24]; *Frontier Dispute* (Burkina Faso/Niger) (Judgment) [2013] ICJ Rep. 44 [63].

[220] Okubuiro (n 6) 243.

[221] Ngongura J Udombana, 'The Ghost of Berlin still haunts Africa! The ICJ Judgement on the Land and Maritime Boundary Disputes between Cameroon and Nigeria' (2002) 10 African Yearbook of International Law 13, 56.

[222] Resolution of the All African People's Conference (Accra, 5-13 December 1958) reproduced in 37(215) Current History 41.

[223] Geoffrey Nowell-Smith and Quintin Hoare (eds), *Selections from the Prison Notebooks of Antonio Gramsci* (first published Lawrence & Wishart 1971, Electric Book Co. 2001); Okubuiro (n 6) 237; Chimni (n 6) 29.

social relations and ideas.[224] Extended to the international sphere and CIL, this argument maintains that powerful states do not sustain their domination in the international system through the exclusive use of raw power but also through the force of legal ideas and beliefs that come to be internalized by the subjects of domination.[225] These ideas include the claim that CIL reflects universal values,[226] and its more historic counterpart which claimed that CIL is based on common consent.[227]

The contrasting legal arguments of "new" and "old" states presented in the examples above reveal the deeper tension inherent in a legal system which attempts to obscure historically problematic doctrines by resorting to claims of legal objectivity and neutrality.[228] In this regard, interpretation may only play a limited role in addressing the problems of origin of particular customary rules. Nevertheless, insofar as the content of CIL rules is sensitive to changes in the broader normative and social environment of international law, interpretation can play a role. For instance, in his separate opinion to the *Frontier Dispute* (Burkina Faso/Niger) case, Judge Yusuf argued that in spite of assumptions to the contrary, *uti possidetis* is not equivalent to the principle of respect of boundaries existing on achievement of independence adopted by the Organization of African Unity (OAU)[229] in 1964.[230] In particular, he argued that the two are different with regard to their origin and purpose, their legal scope and content and their legal nature.[231] Thus, while Judge Yusuf agreed with the majority decision, he stressed the need for local historical and legal developments to be considered in the interpretation of the rel-

---

[224] Okubuiro (n 6) 238. [225] Chimni (n 6) 29. [226] Gallindo and Yip (n 184) 264 [227] Kelly (n 6) 56-59

[228] In its discussion of this problem for instance, after concluding that existing customary rules are opposable to new states, the ILA observed that much like longer-established states 'newcomers are [also] free to try and change the rules through contrary practice which obtains the acquiescence of others'. ILA Report on Customary International Law (n 77) 25. This claim which puts old and new states on an equal footing with regard to their formal ability to intervene in the international legal system neglects the historical context in which both the form of the doctrine and the content of the rules may in fact prevent meaningful intervention.

[229] Organization of African Unity, 'Border Dispute Among African States' (17-21 July 1964) AHG/Res. 16 (I). Later enshrined in Constitutive Act of the African Union (adopted 11 July 2000) Article 4.

[230] *Case concerning the Frontier Dispute* (Burkina Faso/Niger) (n 219) (Separate Opinion of Judge Yusuf) 134 [6]. 'It is my view that *uti possidetis juris* and the principle endorsed by the OAU in the Cairo Resolution, and later inscribed in the Constitutive Act of the AU, are neither identical nor equivalent. Although the Court, in the present Judgment (para. 63), has slightly moved away from the above-quoted dicta of the 1986 and 2005 Judgments equating uti possidetis juris to the Cairo Resolution and to Article 4 (b) of the Constitutive Act of the AU, I am still of the view that the difference between the two principles merits further elucidation so that they may not be similarly confounded in the future'.

[231] Ibid [10]. Notably, while *uti possidetis* (as applied particularly to the Latin American context) consolidates colonial administrative borders, the OAU principle of respect of boundaries places the boundaries existing at the time of independence in a "holding pattern", particularly to avoid armed conflict over territorial claims, until a satisfactory and peaceful solution is found by the Parties to a territorial dispute. Ibid [19].

evant rules.[232] Similarly, with respect to the customary MST, it has been argued that interpretation has significantly affected the content and scope of the rule, causing the rule to evolve in a particular direction.[233] While some of the problematic histories of CIL rules may only be resolved through processes of new law-making, interpretation can play a role with respect to existing CIL rules that are here to stay. In this sense, interpretation provides the opportunity for the scope and content of existing customary rules to be evaluated, as well as for the rules to be "updated" in light of new legal and societal developments. These aspects of interpretation are discussed in more details in Chapters 3 and 4.

In the context of contemporary customary law, criticism revolves around three elements of the current CIL doctrine, namely: i) the dominance of first world practice for the purpose of identification of CIL, ii) the development of the persistent objector doctrine, and iii) the appropriation of the specially affected states doctrine by states of the Global North. With respect to the dominance of first world practice for the purpose of CIL identification, in addition to the above-identified argument concerning CIL's undemocratic origins, authors maintain that even in the present practice of CIL formation and identification the practice of powerful states predominates.[234] This is ascribed to several factors. Firstly, it is related to the different degree of publicity and availability of evidence of state practice. There is a general lack of availability of state practice of Third World states,[235] and both international courts and scholars can more easily obtain documents attesting to the practice of states of the Global North as opposed to that of Third World states.[236] Beyond these practical realities, research indicates that international courts also select and consider practice in a skewed manner, often considering only the practice of a handful of powerful states of the Global North.[237] Thus for instance, in the *Arrest Warrant* case the ICJ considered the practice of only a couple of States (the

[232] Notably, Judge Yusuf opined that 'The Court could also have seized this opportunity to clear up the confusion between uti possidetis juris and the OAU/AU principle on the respect of existing boundaries upon which the 1987 Agreement between the Parties appears to be based'. Ibid [47].

[233] Johannes Hendrik Fahner, 'Maximising Investment Protection under the Minimum Standard: A Case Study of the Evolutive Interpretation and Application of Customary International Law in Investment Arbitration' (2023) 12(1) ESIL Reflections 1, 13.

[234] Gallindo and Yip (n 184) 258; Roberts (n 1) 768; Chimni (n 6) 21-24.

[235] Chimni (n 6) 22; See also 'International Law Commission, First Report on Formation and Evidence of Customary International Law by Sir Michael Wood, Special Rapporteur' (17 May 2013) UN Doc. A/CN.4/663, 127.

[236] Gallindo and Yip (n 184) 258. This is at least partially caused by practical limitations of human and material resources, as not all states can dedicate the same amount of resources to the collection and dissemination of legally relevant practice, or the maintenance of legal digests for this purpose. The issue is exacerbated by linguistic limitations which skew the pool in favor of the practice of a few powerful countries with easily accessible records in a commonly spoken language See on this Michael Byers, *Custom, Power and the Power of Rules* (CUP 1999) 153; Chimni (n 6) 21; Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008) 186; J Patrick Kelly, 'The Twilight of Customary International Law' (2000) 40 Virginia Journal of International Law 449, 473.

[237] Petersen (n 92) 377; Roberts (n 1) 768; Gallindo and Yip (n 184) 258.

UK and France) for the purpose of establishing whether there exists under CIL any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs.[238] A similar oversight has been observed in the context of CIL identification by national courts.[239]

A related line of criticism here is the one concerning the development of the persistent objector doctrine. While the 'persistent objector' has now been recognized as a part of the CIL doctrine by both the ILC[240] and the ILA,[241] a historical survey shows that the doctrine only emerged in jurisprudence as early as the 1950s,[242] and was taken up in scholarly work in the 1970s and 1980s.[243] This has led authors to argue that rather than being a legally sound element of CIL theory, the persistent objector doctrine emerged out of an anxiety among western states towards a potential decision-making majority made up of newly decolonized states in multilateral fora.[244] In this line of argument, the persistent objector doctrine is characterized as a tool of Western counter-reformation in response to the increasing participation of newly independent Third World states in international law.[245] Thus, while newly independent Third World states were bound by existing CIL, older states of the Global North could, by resorting to persistent objection, opt out of any new CIL rules.[246]

Similar criticism is deployed against the doctrine of specially affected states, as a further barrier to the meaningful contribution of Third World states towards the formation of customary rules. The doctrine of specially affected states was articulated by the ICJ in one of its *North Sea Continental Shelf* pronouncements, where it observed, with regard to the emergence of customary rules out of a convention, that

> it might be that, even without the passage of any considerable period of time, a very

---

[238] *Case concerning the Arrest Warrant of 1 April 2000* (n 22) [58].

[239] Ryan Scoville has found that in the example of US courts, while there is a general attitude that 'CIL depends upon the existence of both general and consistent state practice and *opinio juris* [. . .] citation patterns suggest that federal courts do not follow this doctrine. Courts depend heavily on portrayals of CIL in other U.S. government sources, rarely consider direct evidence of foreign state practice, focus almost exclusively on the advanced democracies of the West even when they do look abroad, and cite to Western academics who exhibit a similar tendency to focus on the laws and policies of the West'. Ryan M. Scoville, 'Finding Customary International Law' (2016) 101 Iowa Law Review 1893, 1948.

[240] ILC Conclusions on Customary International Law (n 7) Conclusion 15.

[241] ILA Report on Customary International Law (n 77) 27-29.

[242] *Asylum case* (n 65); *Fisheries case* (n 18). [243] Kelly (n 6) 78-79.

[244] Dumberry (n 20) 783; Curtis Bradley and Mitu Gulati, 'Withdrawing from International Custom' (2010) 120 Yale Law Journal 233; Gallindo and Yip (n 184) 267. See also Tomuschat who goes as far as describing this as an attempt by powerful states at covering up their violation of general customary rules: 'As a persistent objector a big power which fears to be overwhelmed by an assault of Lilliputian forces can at least pretend that, by going it alone, it is simply making use of its rights rather than violating generally applicable rules of international law'. Tomuschat (n 36) 289.

[245] Chimni (n 6) 24; Gallindo and Yip (n 184) 267-268. [246] Kelly (n 6) 79.

> widespread and representative participation in the convention might suffice of itself, provided it included that of *States whose interests were specially affected*. [emphasis added][247]

The ICJ did not elaborate what makes a state specially affected by a particular matter, and in fact, it did not develop this doctrine further in subsequent jurisprudence.[248] Nevertheless, scholarship widely treats the practice of specially affected states as a requirement for the establishment of a customary rule, and the ILC has included it as an 'indispensable factor' in the assessment of the generality of practice.[249] The lack of a clear indication of what constitutes a specially affected state has given rise to the concern that 'the notion of "specially affected" states may be used as a respectable disguise for "important" or "powerful" states which are always supposed to be "specially affected" by all or almost all political-legal developments within the international community'.[250] Scholars critical of the doctrine have voiced concern that even if the practice of Third World states is available, the doctrine of specially affected states undermines its significance.[251] The argument here is that the specially affected states doctrine would allow for states that are more powerful in geo-strategic and socio-economic terms to weigh in more dominantly in the formation of CIL.

If we look at the reference to specially affected states solely in *North Sea Continental Shelf*, it is not immediately clear that this doctrine is conducive to abuse by powerful states to the exclusion of practice from the Third World. In fact, an alternative reading of the Court's pronouncement is simply that states that are not affected by a particular area of international law by virtue of certain intrinsic features, cannot produce practice that is relevant for the development of that area of law. Or more specifically in this case – states that do not have a continental shelf as part of their geography cannot produce practice that is relevant for the sake of a customary rule applicable to the delimitation of a continental shelf.[252] This is relatively straightforward when we think about certain intrinsic features such as the geography of a state. However, what of more complicated international legal regimes such as the regime of nuclear weapons? Are states in this context specially affected if they own nuclear weapons (and would thus likely tend towards a rule that permits them to keep those weapons), or are they specially affected if they are vulnerable to being obliterated by nuclear weapons while not having an arsenal of their own (in which case they might tend towards a rule for disarmament)? It is in these latter, less clear-cut scenarios that the potential for abuse becomes more explicit. For instance, in a recent overview of how the doctrine of specially affected states has been deployed since its articulation, Heller persuasively demonstrates that the United States has

[247] *North Sea Continental Shelf Cases* (n 66) [73].
[248] Kevin Jon Heller, 'Specially Affected States and the Formation of Custom' (2018) 112(2) AJIL 191.
[249] ILC Conclusions on Customary International Law (n 7) 36; Heller (n 248) 191.
[250] Gennady Danilenko, *Law-Making in the International Community* (Martinus Nijhoff 1993) 96.
[251] Chimni (n 6) 6.
[252] For this argument see d'Aspremont (n 29) 77.

relied on this doctrine in the contexts of *jus ad bellum* and *jus in bello* in a way that limits specially affected status to powerful states in the Global North and gives specially affected states almost complete control over custom formation.[253] Perhaps even more worryingly, scholars and other states of the Global North have embraced the strategy of the US, putting forward a view that it is near impossible for a customary rule to form over the objections of specially affected states defined in this way.[254] In this vein, it is perhaps relevant to recall that the ILC has adopted a similar view that the practice of specially affected states is indispensable to the formation of a customary rule. While in its commentary on this point the ILC explicitly points out that 'the term "specially affected States" should not be taken to refer to the relative power of States',[255] it does not elaborate on potential ways in which this understanding of the term could be prevented. This has led scholars to observe that the recognition of the specially affected states category, coupled with the ILC's recognition of failure to react over time as evidence of *opinio juris*, 'may rekindle impressions of a geographically biased doctrine' of CIL.[256] Many states do not have the resources to keep appraised of international legal developments and to react or take a position accordingly. By failing to recognize this reality for many states outside of the Global North, and simultaneously putting the doctrine of specially affected states in a central position, the ILC has contributed to the ongoing criticism of prejudice in the mainstream doctrine of CIL.[257] In a persuasive twist of this analysis however, Heller convincingly illustrates that while there has indeed been an appropriation of the specially affected states doctrine by powerful states of the Global North (and in particular the US), this misuse of the doctrine is based on the erroneous views that engaging in a non-universal practice makes a state specially affected and that CIL cannot be formed over the objection of one specially affected state.[258] In fact, when the doctrine was first articulated by the ICJ, the criterion that determined what makes a state specially affected (geography) had nothing to do with power or importance. Thus, while there has been subsequent abuse by states of the Global North, there is a way to re-interpret the specially affected states doctrine in a formally neutral manner.[259]

Unlike with the problems described under points i) and ii) above, critics responding to the problems of CIL emerging from the larger systemic context of international law have focused more on uncovering systemic biases and less on proposing alternative approaches to CIL. This may be due to two reasons: i) the fact that

[253] Heller (n 248) 192. [254] Ibid. [255] ILC Conclusions on Customary International Law (n 7) 137. [256] d'Aspremont (n 29) 79. [257] Ibid, 80. [258] Heller (n 248) 227-240.

[259] Moreover, Heller argues that this doctrine has the potential to even privilege Third World states; firstly, because they outnumber states of the Global North in various lawmaking fora and as such can more easily gather representative participation in a CIL-conducive practice. Secondly, because in many international legal contexts (such as extraterritorial self-defense in unwilling or unable situations, or the regime of direct investment) Third World states form the majority of specially affected states in the proper understanding of that term and as such generate practice that is indispensable to the formation of CIL. Ibid, 242-43.

many of these accounts are radically critical of CIL and therefore prefer to dismiss CIL altogether rather than to propose ways to reform it;[260] or ii) the fact that some critical accounts may in fact prefer to remain within the traditional doctrinal parameters of CIL and attempt the proverbial change of the system from within.[261] Nevertheless, in a recent poignant critique of CIL from a TWAIL perspective, BS Chimni proposes a reform of the two-element doctrine that deserves mention.

Approaching the discussion from a decidedly TWAIL and Marxist perspective, Chimni criticizes the doctrine of CIL because of its role in facilitating the functioning of the global capitalist system.[262] In response to this, Chimni proposes a *postmodern approach to custom* – a reinvention of the CIL identification process modeled around the progressive ideas, beliefs, and practices of the global society and the common good. The postmodern approach is centered around an emphasis of deliberative reasoning, and an understanding of *opinio juris* as a universal juridical conscience.[263] In particular, this approach advocates for the formation of CIL to rest on the force of better argument or sounder claims advanced by both state and non-state actors. 'This would permit the international community to undertake reforms at least in those areas in which common interests are predominant, such as extreme poverty, gross violation of human rights, forced migration, environmental degradation, and possession, threat, or use of nuclear weapons'.[264] To this end, Chimni advocates for the inclusion of resolutions of international organizations and the practice of civil society in the pool of evidence that might contribute to the formation of customary rules. More specifically, under the postmodern doctrine, resolutions that are the outcome of extended negotiation and widespread consensus would yield rules of CIL, and progressive ideas, beliefs, and

[260] See indicatively Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes and Meier Publishers 1979); Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press 1986); Anthony Carty, 'Symposium on B.S. Chimni, "Customary International Law: A Third World Perspective": The Need to be Rid of the Idea of General Customary Law' (2018) 112 *AJIL Unbound* 319.

[261] See indicatively Anghie (n 6) 318-320; Vasuki Nesiah, 'Symposium on B.S. Chimni, "Customary International Law: A Third World Perspective": Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence' (2018) 112 *AJIL Unbound* 313. See also more generally on the reformative potential of international law Georges Abi-Saab, 'The Third World intellectual in praxis: confrontation, participation, or operation behind enemy lines?' (2016) 37 Third World Quarterly 1958.

[262] In particular, the CIL doctrine is criticized for filling crucial gaps in the international system, catering to either short-term interests of capitalist states (such as the exploitation of resources and peoples) or the systemic interests of the global capitalists system (such as the creation of rules that lend it stability and legitimacy). Chimni (n 6) 1-10.

[263] The reference to *opinio juris* as a universal juridical conscience is modeled on an earlier elaboration of this concept by Judge Cançado Trindade in his dissenting opinion in the *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* case. Chimni (n 6) 38-39; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshal Islands v. United Kingdom)* (Dissenting Opinion of Judge Cançado Trindade) [2016] ICJ Rep. 833, 907.

[264] Chimni (n 6) 38.

practices of global civil society would be included in CIL deliberations.[265] 'In sum, a postmodern doctrine [would] allow a source of international law to be created that facilitates the creation of norms that help deal with common problems confronting humankind. It may not be able to bring about radical changes in the global capitalist order. [. . .] But a more meaningful doctrine of CIL would help the international community to gradually work toward a more just world order'.[266]

Chimni's analysis is compelling insofar as it points to structural biases inherent in the CIL doctrine. As the broader debate above illustrates, there are indeed power biases and problematic ideologies inherent in the traditional CIL doctrine. Nevertheless, it is questionable whether a transformation of the CIL doctrine along the lines of this postmodern proposal would in fact achieve the aims that the theory professes. The postmodern doctrine seems to remain vulnerable to the very factors that Chimni criticizes in the more traditional variety of CIL, such as the hegemony of ideas and beliefs from the First World, and the power disparity inherent in a capitalist world order.[267] Chimni acknowledges as much with the observation that a postmodern doctrine alone would not be able to bring radical systemic changes. 'For this it would have to be accompanied by the transformation of social relations in the advanced capitalist states on the basis of sustained resistance of subaltern actors at the domestic and global levels'.[268] The modes of legal reasoning which pertain to CIL determination are only a small portion of the overall hegemonic structure of ideas operating in international law. The claim then that a postmodern doctrine that changes the way we treat CIL formation and identification would be capable of effecting changes in the larger systemic context of international law is tenuous. On this point, it has been argued for instance that a more fruitful avenue to pursue this change would be in the early stages of legal education, by targeting the production of ideas and beliefs about customary international law. The objective here would be to use the malleability of the CIL doctrine to empower scholars and practitioners of the periphery to develop persuasive subversive arguments.[269]

In a somewhat similar fashion, I would argue that we can indeed rely on the existing doctrine of CIL and utilize some of its inherent characteristics to address its problems. In particular, by accounting for interpretation as an operation in the continued existence of customary rules, we account for a "reasoning space" in which the problematic origin of a rule can be evaluated and scrutinized. For instance, the historical understanding of the way a particular CIL rule developed

[265] Ibid, 41-43. [266] Ibid, 43.

[267] See on this point J Patrick Kelly, 'Symposium on B.S. Chimni, "Customary International Law: A Third World Perspective": Revolution by Customary International Law' (2018) 112 *AJIL Unbound* 297.

[268] Chimni (n 6) 43.

[269] d'Aspremont (n 29) 84-87. In particular, d'Aspremont argues that '[i]nstead of striving to reinvent the doctrine of customary international law, we must invest in strategies that draw on the malleability and fluidity of the current doctrine of customary law and facilitate the types of argumentation that 'de-centre' the First World'.

can be taken in consideration when that rule is interpreted, in order to assess how it is to be applied in the contemporary context. Can certain past practices and rationalities withstand modern scrutiny when placed against contemporary knowledge and facts, or legal rules that have since emerged in the system? This is one of the central questions that may be asked when an older general customary rule is being interpreted in the modern context. In this sense, interpretation is the stage where this standoff can play out, and where relevant assessments can be made that help the customary rule in question evolve and continue forward in the modern legal context.

IV. Two Parallel Realities

Having examined the notion of CIL thus far, in both its traditional and alternative varieties, and with its continuous problems, we seem to arrive at an impasse. Essentially, two things seem to be simultaneously true. Firstly, that the traditional approach describing CIL as a product of the two elements of state practice and *opinio juris* is here to stay as far as thinking about CIL formation and identification is concerned. In this sense, the two-element approach seems to be the dominant paradigm that we are bound to operate in. Secondly, that while it is the dominant paradigm, it has been found time and again that the two-element approach suffers from deficiencies and poses problems for the theory and application of CIL. We are thus left with the task of reconciling two seemingly contradicting realities, so that we may go forward in our understanding of and reliance on customary international law. Moreover, we are faced with this task against the background awareness that CIL continues to play a fundamental role in the international legal system, as a source of positive international law in force.[270]

A recent commentary on this point leads with the observation that the doctrine of sources has always been uncertain and will likely always remain uncertain. This, it was said, stems partly from the need to adapt over time. Sources need to be both somewhat stable so as to generate legal rights and obligations, and also sufficiently flexible so as to be able to accommodate change.[271] This observation was made in the context of a larger discussion on the pressing need for international legal doctrine to 'come out of its own vacuum', in the sense of accounting for the larger political context in which many of its objects of study operate.[272] Although our present discussion is somewhat narrower, the observation remains relevant. Being aware that the sources doctrine in general, and the doctrine of custom in particular, contain an inherent degree of uncertainty does not diminish the value

[270] Omri Sender and Michael Wood, 'Custom's Bright Future: The Continuing Importance of Customary International La' in Curtis A. Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 360, 361.

[271] Jan Klabbers, 'The Cheshire Cat That is International Law' (2020) 31(1) EJIL 269, 278.

[272] Ibid, 270; 271-76.

of having such a framework in place. Importantly, it also does not provide cause to dismiss such a framework altogether, or to attempt to modify it by stretching or repackaging the familiar categories of sources.[273] In the alternative approaches discussed above we saw some attempts of throwing the proverbial baby out with the bath water, arguing either that the two-element framework needs to be significantly modified or replaced altogether with alternative paradigms. At the same time, we saw that while these approaches do put forth strong and relevant criticism, they do not always transition from the field of theory into the field of application.

Mindful of these considerations, and having identified both the persistent problems of CIL and the dominant analytical framework in which we may think about their "solutions", this thesis now turns to a discussion of an operation which has so far received little attention in the context of CIL – interpretation. It is the present author's contention that it is precisely through interpretation that we might be able to reframe and resolve many of the persistent issues of CIL. As I have argued in section III above, a lot of the alternative approaches discussed seem to at least in part correspond to what might in fact be more accurately reframed as interpretation. As such, the criticism from which they emerge might be addressed less by modifying or dismissing the two-element approach at the stage of CIL identification, and more by considering interpretation as an integral operation in the life of a CIL rule after its identification. Moreover, by introducing, or more accurately *realizing the presence of* interpretation in the continued existence of a CIL rule, we enable the discourse to both remain within the two-element approach framework and at the same time address the persistent problems of CIL with novel solutions. In this sense, developing an approach which reframes and resolves CIL problems on the level of interpretation has the ability to transition into the practice of international law, and thus bridge the gap between some of the more theoretical discussions of CIL and its practical application. Having set the scene thus, I now turn to a discussion of the second foundational question of this thesis: what it is we speak of when we speak of interpretation?

[273] Ibid, 276.

Chapter 2

Reconciling the Irreconcilable: The Possibility of Interpretation of Customary International Law

I. Introduction

In Chapter 1, we concluded with a finding that two seemingly irreconcilable realities exist in parallel to each other when it comes to the operation of CIL. On the one hand is the two-element formula which remains the dominant form used by states, courts, and international organizations to express claims as to the existence of CIL. On the other hand, are the problems of both theory and practice, which continue to plague the two-element formula and thus cannot be ignored. Against the background of these considerations, in the upcoming chapters I expand on the idea that accounting for interpretation as a separate operation in the continuous existence of customary rules may help us reconcile these two realities, and may in fact provide new avenues for addressing the problems outlined in Chapter 1. Making this argument requires several steps. Chapter 2 is the first of these, and is dedicated to a discussion of interpretation more generally in international law and more specifically in the context of CIL.

This chapter is dedicated to addressing the question *what is it we speak of when we speak of interpretation*? To answer this question, I first discuss the notion of interpretation more generally in international law, and then turn to interpretation specifically in the context of CIL. The aim is firstly to delineate the way the term 'interpretation' is conceptualized for the purposes of the thesis (Section II), and secondly to demonstrate that there is no theoretical obstacle to applying this concept of interpretation to CIL (Section III). As the discussion below demonstrates, the arguments from theory against the interpretability of CIL are not persuasive, and in fact, there is myriad examples of the interpretation of CIL that can be found in international judicial practice (Section III). That courts – however few or many – engage in the interpretation of CIL certainly shows that this can indeed be done.[274]

[274] See on this point Merkouris who aptly observes that: 'By arguing that 'CIL cannot be interpreted', one has to prove that for each and every situation CIL cannot and has not been interpreted. On the other hand, those, [. . .] who argue that 'CIL can be interpreted' have only to find one (only one) example of such an interpretation in order to disprove the original statement. The classical example is the so-called 'black swan' example. The statement 'all swans are white' is based on the premise, 'no swan can have any other colour other than white'. Every white swan discovered reinforces that statement, but cannot prove it. On the other hand, the discovery of just one black swan can completely disprove the first statement'. Merkouris 2017 (n 3) 143.

However, beyond the fact that international courts do in fact interpret custom, this chapter also demonstrates that it is theoretically necessary to account for interpretation as an integral operation in the continued existence of customary rules (Section IV).

Interpretation may broadly be described as the act of ascribing meaning to the things that we perceive. In this regard, interpretation is ubiquitous in our daily lives, as we are constantly perceiving acts, objects, or phenomena, and ascribing meaning to them for purposes of understanding and clarification. Our present discussion is concerned, somewhat more narrowly, with *legal* interpretation and what this process entails in the contexts of international law generally and customary international law specifically. This section is thus dedicated to unpacking the concept of interpretation in international law, with a view to describing how this term will be used subsequently throughout the thesis.

In his famous dictum concerning interpretation in the *Chorzow Factory* case, Judge Ehrlich observed that interpretation is the 'process [. . .] of determining the meaning of a rule'.[275] Seeing this broad definition, it might be tempting for international lawyers to treat legal interpretation as merely a "sub-species" of interpretation more generally, and approach it as a hermeneutic process of discovering the meaning of texts, of which legal text are one particular "genre". On this view, we would be tempted to conclude that '[w]hile legal interpretation is certainly shaped to a considerable extent by the culture and education of jurists and legal methodology, it is no more than what humans (jurists) do when they understand a legal text'.[276] As the discussion bellow illustrates however, in international law interpretation does not merely encompass the retrieval of meaning of legal texts; especially not when we consider the need to interpret unwritten sources such as CIL. While it might appeal to our desire for legal certainty to treat interpretation as the process of 'establishing a pre-existing meaning', it must be acknowledged that 'the interpretative process has a creative dimension. Creative elements flow from the necessary interconnection and balancing of relevant criteria, as well as from the selective focus on facts deemed relevant from the interpreter's point of view'.[277] Traditionally, these two positions tend to mobilize two radically different views on interpretation in international law, with strong determinist views anchored in a "retrieval of meaning" kind of approach on the one side versus skeptic indeterministic views of meaning on the other.[278] Increasingly however, there is a realization that these extremes might be more artificially maintained than reflective of all the elements

[275] *Factory At Chorzów (Germany v Poland)* (Jurisdiction) Judgment No 8 [1927] PCIJ Series A No 9, Dissenting Opinion by M Ehrlich 39.

[276] For a discussion of this understanding of interpretation see Jörg Kammerhofer, *International Investment Law and Legal Theory: Expropriation and the Fragmentation of Sources* (CUP 2021) 79.

[277] Matthias Herdegen, 'Interpretation in International Law'[2020] MPEPIL 723 [1].

[278] Andrea Bianchi, 'Textual Interpretation and (International) Law Reading: the Myth of Indeterminacy and the Genealogy of Meaning' in Pieter Bekker, Rudolf Dolzer and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy* (CUP 2010) 34, 35.

of the interpretive process. By elements here I refer broadly to considerations of the community of interpreters and broader context in which the interpretation is embedded,[279] as well as to the limits posed by the inner logic of the system in which we are interpreting.[280] In this regard, it seems that an accurate understanding of interpretation which also allows for this operation to extend beyond text – and therefore in the context of international law beyond treaties – must find the proverbial sweet spot between polarized opposing views on what interpretation is and what it does.

To this end, I begin with a discussion of interpretation in international law more generally, and reflect on how this operation is understood as well as who is meant to undertake it (Section II). I then turn to a discussion of interpretation specifically in the context of CIL (Section III). The discussion in this section is focused on two things – the scholarship on CIL interpretation produced thus far and examples of CIL interpretation in the jurisprudence. The objective here is twofold. Firstly, I consider scholarship that maintains that CIL is not amenable to interpretation or that the act of interpretation is not viable in the context of CIL, and demonstrate that these arguments are largely unpersuasive. These arguments are discussed because they pose a challenge to the claim for interpretability, and they need to be addressed before we push forward with a theory of CIL interpretation. In this sense, the discussion is aimed at demonstrating that the arguments against interpretability are problematic both from the perspective of theory and from the perspective of practice in international law. On this latter point, I rely on an illustrative overview of jurisprudence where examples of CIL interpretation may be found, demonstrating that the act of interpretation takes place in international practice and is in fact quite widespread among tribunals. While this jurisprudence will be revisited in more detail in Chapter 4 when we discuss the function of interpretation in the context of CIL, the discussion in the present chapter serves the purpose of already flagging the ubiquity of CIL interpretation in international legal practice. Secondly, I discuss scholarship that accepts the idea of CIL interpretation and has already contributed to the discussion of it. Here, the aim is to set my argument in the wider scholarship that is produced on this subject, and build on some of the existing findings. Finally, having set the scene thus, the chapter presents the customary international law timeline (CIL timeline) – an analytical tool developed to illustrate the need for interpretation in the life of a CIL rule as well as the need to account for this operation (Section IV).

---

[279] On this point see indicatively Bianchi (n 278); Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015)147; Andrea Bianchi, 'Epistemic Communities' in Jean d'Aspremont and Sahib Singh (eds), Concepts for International Law: Contributions to Disciplinary Thought (Edward Elgar 2019) 251, 257-260.

[280] On this point see indicatively Gleider Hernandez, 'Interpretative Authority and the International Judiciary' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 166, 170-173.

II. The Concept of Interpretation in International Law

Legal interpretation is an operation of reasoning concerned with determining the scope and content of rules, and encompasses (albeit not exhaustively) 'clarification'.[281] Interpretation is distinguishable from rule ascertainment or identification, which is an operation concerned with whether a rule exists.[282] Some authors have also distinguished between interpretation and application, arguing that the latter is concerned with bringing about the consequences of a rule to the facts, and may also take the form of conduct by which rights are exercised or obligations are complied with.[283] On this view, interpretation takes place before application, since before applying a legal rule, it must be determined whether it was meant to apply to the circumstances of the particular case.[284] In other words, before applying a legal rule we must determine its scope, and this is a task of interpretation. However, the line between interpretation and application is a porous one, and in practice reasoning of the one kind may seep into or overlap with the other. This is particularly so when we consider these two in the judicial context. Overall, across the divergent conceptions of interpretation, one common underlying idea is that interpretation is a process concerned with discerning or clarifying meaning,[285] and with determining the normative implications of that meaning. Put differently, it is an exercise of disambiguation.[286]

In international law, interpretation has traditionally been understood as the process of assigning meaning to text with the objective of establishing rights, obligations, or other consequences relevant in a legal context.[287] This has led to an almost exclusive focus on the study of interpretation of treaties, to the detriment of the study of this operation in the context of other sources such as CIL.[288] Beyond just

---

[281] Danae Azaria, 'Codification by Interpretation: The International Law Commission as an Interpreter of International Law' (2020) 31(1) EJIL 171, 176.

[282] Duncan B. Hollis, 'The Existential Function of Interpretation in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 78, 79; Azaria (n 281) 176.

[283] Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2(1) Journal of International Dispute Settlement 31; Azaria (n 281) 176. See also Judge Ehrlich who distinguishes between interpretation and application in the following manner: '[. . .] processes of which one, interpretation, is that of determining the meaning of a rule, while the other, application, is, in one sense, that of determining the consequences which the rule attaches to the occurrence of a given fact; in another sense, application is the action of bringing about the consequences which, according to a rule, should follow a fact'. *Factory At Chorzów* (n 275) 39.

[284] Harvard Law School, 'Article 19. Interpretation of Treaties' (1935) 29 American Journal of International Law, Supplement: Research in International Law 937, 938.

[285] Daniel Peat and Matthew Windsor, 'Playing the Game of Interpretation: On Meaning and Metaphor in International Law in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 3

[286] Panos Merkouris, 'Interpretation is a Science, is an Art, is a Science' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill, 2010) 1, 6.

[287] Herdegen (n 277) [1]. [288] Peat and Windsor (n 285) 3.

taking up the majority of scholarly space, the interpretation of treaties seems to have dominated the way we conceive of the notion of interpretation more generally in international law. This has in turn created a somewhat myopic understanding of what interpretation is and what functions it may perform. As will be discussed more in Section III below, this narrow understanding of interpretation may be one of the reasons behind the view that the operation of interpretation cannot be extended to CIL. Nevertheless, as treaty interpretation has been the main driver behind the extensive literature on interpretation in international law, this chapter now turns to a discussion of the insights we can draw from it.

i. Insights from treaty interpretation

For the present discussion, it may be useful to point out several traits of treaty interpretation that have come to inform our understanding of interpretation more generally. One is the focus on rules which guide the interpretative process. Influenced by the framework of interpretation contained in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT), interpretation in international law is dominantly understood as a rule-based exercise.[289] More than just providing rules on how treaties should be interpreted, these provisions of the VCLT have come to dominate how we think of interpretation more generally, and what we consider as relevant "questions" in the process of interpretation. In this sense, the rules of interpretation prescribed in the VCLT inform more generally the methods of interpretation employed in international law, both in the interpretation of treaties and in the interpretation of other sources of international law.[290]

The general rule of treaty interpretation contained in Article 31 VCLT provides that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. This rule designates the text of a legal provision as the starting point of the interpretive exercise, and rests on the presumption that the text is 'the authentic expression of the intentions of the parties'.[291] This approach

[289] Peat and Windsor (n 285) 8

[290] See for instance Principle 7 of the ILC Guiding Principles applicable to unilateral declarations, which stipulates '[. . .] In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration together with the context and the circumstances in which it was formulated'. ILC, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto (2006) II Yearbook of International Law Commission 159, 161. See also the *Kosovo Advisory Opinion* where the ICJ relied on the VCLT rules *mutatis mutandis* to interpret a resolution of the UN Security Council. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 [94]. Similarly, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep. 16 [114].

[291] ILC, Draft Articles on the Law of Treaties with Commentaries (1966) II Yearbook of International Law Commission 187, 220 [11] ('ILC Draft Articles on the Law of Treaties with Commentaries')

differs from earlier views on this matter, which put the purpose of a treaty at the center of interpretation.[292] At the same time, the text-oriented approach which is expressed in the VCLT does not in fact advocate for a separation of the text from the other 'elements' of a provision. As is evident by the formulation of Article 31 VCLT, the ordinary meaning of the terms is to be considered in their *context* and in light of the *object and purpose* of the treaty. Article 31 clarifies that for purposes of interpretation, the context comprises of the text, preamble, annexes, and agreements made between all the parties in connection with the conclusion of the treaty. Furthermore, subsequent agreement and practice, as well as other relevant rules applicable between the parties, can be taken into account together with the context. Thus, in spite of the order in which they appear in the provision, these elements are not in a hierarchical relation with each other. Rather, and considering that 'in the nature of things [they had] to be arranged in some order', they are arranged according to considerations of logic.[293] Thus, the interpretive process described in Article 31 VCLT is a unity, whereby the methods prescribed by the article form 'a single, closely integrated rule'.[294] Put differently, the exercise of interpretation is focused on recovering the ordinary meaning of the text in light of its object and purpose, which may in turn be traced back to the intention of the parties.[295] In addition to the general rule of interpretation contained in Article 31, Article 32 VCLT provides that recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion, as supplementary means of interpretation. The classification of these as supplementary indicates that there is a sequential order between the methods of interpretation provided in Article 31 and those in Article 32. In particular, Article 32 comes into the proverbial picture only to 'confirm the meaning resulting from the application of Article 31', or to aid the interpretation when applying Article 31 has left the meaning 'ambiguous or obscure' or would lead to a 'manifestly unreasonable' result.

Taken together, the VCLT rules sketch the methods most commonly used for interpretation in international law, being – textual, teleological, systemic, and historical interpretation.[296] At the same time, they are not an exhaustive list of interpretive methods, and in practice they are complemented by further 'canons' or

[292] American Society of International Law, Draft Convention on the Law of Treaties, with Commentary (1935) 29 American Journal of International Law, Supplement: Research in International Law 653, 939 ('Harvard Draft on the Law of Treaties').

[293] ILC Draft Articles on the Law of Treaties with Commentaries (n 291)220 [9].

[294] Ibid, 220 [8]. See also the Harvard Draft on the Law of Treaties, which although placed the purpose of a provision at the beginning of the interpretive exercise, had a similarly holistic view of interpretation. Harvard Draft on the Law of Treaties (292) 938.

[295] Peat and Windsor (n 285) 9.

[296] On this typology see Ammann who points out that '[t]he four methods of Art. 31 VCLT are the least disputed interpretative methods in international law'. Odile Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* (Brill Nijhoff 2019) 196.

'maxims' of interpretation.[297] The drafters of the VCLT themselves acknowledged this, and confined themselves to codifying 'the comparatively few general principles which appear to constitute *general* rules for the interpretation of treaties'.[298] Earlier attempts at the codification of the law of treaties make this point even more forcefully, and refer to 'factors' which should be 'given attention' in the course of interpretation rather than strict rules of interpretation.[299] Thus, in the practice of interpretation, various further methods often find their way into the interpretive process. Moreover, the VCLT rules themselves are recognized to implicitly encompass certain foundational principles of interpretation, such as the principle of effectiveness (*effet utile*).[300]

The strong pull of the VCLT rules on the overall understanding of interpretation in international law may be observed in the fact that sometimes international courts purport to apply VCLT rules for the interpretation of treaties concluded before the VCLT came into force,[301] or for the interpretation of treaties between states which are not parties to the VCLT.[302] While this is based on the view that the VCLT rules are reflective of customary rules of interpretation and as such have earlier pre-codified counterparts, scholars have demonstrated that the application of the VCLT on treaties preceding it is actually quite problematic from a rule of law perspective.[303] On the other hand, the reliance on pre-VCLT, but nonetheless VCLT-like customary rules of interpretation, could also be motivated by the fact that these methods of interpretation are a foundational element of this type of legal reasoning. In other words, certain methods or rules of interpretation may be inherent to the interpretative operation. On this point, Anzilloti for instance

---

[297] A recent comprehensive overview of these can be found in Joseph Klinger, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention* (Wolters Kluwer 2019).

[298] ILC Draft Articles on the Law of Treaties with Commentaries (n 291) 218 [5] (emphasis added).

[299] Harvard Draft on the Law of Treaties (n 292) 938. '[...] the function of interpretation is to discover and effectuate the purpose which a treaty is intended to serve, and that this is to be accomplished, not automatically by the mechanical and unvarying application of stereotyped formulae or "canons" to any and every text, but instead by giving considered attention to a number of factors which may reasonably be regarded as likely to yield reliable evidence of what that purpose is and how it may best be effectuated under prevailing circumstances'.

[300] ILC Draft Articles on the Law of Treaties with Commentaries (n 291) 219 [6]. '[...] in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 27, paragraph 1, which requires that a treaty shall be interpreted in *good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose*. When a treaty is open to two interpretation one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted'.

[301] Malgosia Fitzmaurice and Panos Merkouris, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (CUP 2020) 147-158.

[302] Alain Pellet, 'Canons of Interpretation under the Vienna Convention' in Joseph Klinger, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention* (Wolters Kluwer 2019) 1, 5.

[303] Fitzmaurice and Merkouris (n 301) 147.

speaks of so-called "constructive rules" inherent in the legal system. Constructive rules here refer to 'the logical premises and the necessary logical consequences' which are part of positive rules of international law, 'because the will to observe a norm or an ensemble of norms implies the will to observe all those norms without which the former ones would make no sense or which are logically included in them'.[304] While Anzilloti's "constructive rules" referred primarily to general principles in international law, his observations may also hint at a deeper structural feature of legal reasoning as an operation. In particular, on Anzilotti's reasoning, certain methods of interpretation as techniques which are relied on in the course of interpretive reasoning may be an inherent part of the interpretative operation, regardless of whether they are codified in a treaty or not. Following this thread then, it may be argued that while the discussion on methods of interpretation has so far taken place primarily with a focus on treaties, there is no reason why similar methods – as techniques of legal reasoning – cannot be extended to the interpretation of customary law too. In fact, among scholars who accept the interpretability of CIL, it is also accepted that the methods for interpreting customary rules will resemble those of treaties, with relevant adjustments.[305]

The appeal of the rules of interpretation seems to lie in the belief that they allow us to speak of a 'correct' interpretation by establishing the 'correct' meaning of a legal rule,[306] and this is in fact another trait of treaty interpretation that affects our understanding of interpretation more generally. The debate on the correct meaning relates to the way that the nature of the interpretive exercise is understood. On the one hand, there are views that understand interpretation as the process of retrieving or elucidating fixed meaning. Here, the object of interpretation (i.e. a rule) is considered to have an established meaning that the interpreter *discovers*. Traditionally, this meaning is considered to be fully present at the moment of the inception or creation of the rule, and the interpreter subsequently recovers it through interpretation. This approach to interpretation seems to be strongly anchored in the rule-based perspective. The contention here is that if uniform rules of interpretation are applied, the process of interpretation will yield one correct outcome, i.e. the correct legal interpretation of the rule in question.[307] On this

[304] Giorgo Gaja, 'Positivism and Dualism in Dionisio Anzilotti' (1992) 3 EJIL 123, 128 translating from Dionisio Anzilotti, *Corso di diritto internazionale* (Cedam, 3rd ed. 1955) 67; Jacopo Crivellaro, 'How did Anzilotti's Jurisprudential Conception Influence the Jurisprudence of the Permanent Court of International Justice?' (Jura Gentium, 2011) <https://www.juragentium.org/topics/thil/en/crivella.htm#38> accessed 30 January 2022.

[305] This point is discussed in more detail in Chapters 3 and 4. See indicatively Albert Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht' (1977) 37 ZaöRV 504, 526-28; Orakhelashvili (n 3) 498.

[306] Jörg Kammerhofer, 'Taking the Rules of Interpretation Seriously, but Not Literally? A Theoretical Reconstruction of Orthodox Dogma' [2017] 86 Nordic Journal of International Law 125, 126.

[307] See for instance Linderfalk who argues that 'The rules of interpretation laid down in international law contain a description of the way an applier shall be proceeding to determine the correct meaning of a treaty provision considered from the point of view of international law'. Ulf Linder-

view, the existence of rules of interpretation contributes not merely to the correct interpretation of a treaty, but also to legal certainty in the process of treaty drafting and in the international legal system more broadly.[308] On the other hand, there are the non-deterministic approaches, which are skeptical of stable meaning and treat interpretation as a fully constructive exercise. On this view, legal rules do not have a definite content and the outcome of the interpretive exercise can and does vary depending on the interpreter.[309] Here, the view is that interpretation contributes to the development of international norms,[310] and does not have only one correct outcome.

While scholarship continues to debate with great fervor the effect of the rules of interpretation on the "correctness" of the interpretative outcome, the drafters of the VCLT rules did not seem to have a categorical stance on this point. For instance, when describing the now well-known 'crucible' approach to interpretation, Special Rapporteur Waldock observed that '[a]ll the various elements, so far as they are present in any given case, would be thrown into the crucible and their interaction would then give the *legally relevant* interpretation'.[311] The reference to a 'legally relevant' rather than a "correct" interpretation can also be found in the final outcome of the Commission.[312] At the same time, when speaking about the possibility of divergent subsequent practice by the parties in the interpretation of a treaty which may affect the modification of that treaty, the Special Rapporteur noted that 'on the plane of interpretation the treaty has only one correct interpret-

---

falk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 29. See also the discussion on this at the Insitut de Droit International Sienna session of 1952. Insitut de Droit International 'VII — Les Sessions de l'Institut de Droit International' (1952) 44(II) AIDI 386.

[308] See on this point the comments by Roberto Ago during a meeting of the ILC: 'It had been said rather too glibly that interpretation was an art; the question was whether there were any rules for practicing that art [. . .] The reason why the United Nations had entrusted it with the codification of international law, and in particular the law of treaties, was that the main objective was certainty of the law ; and certainty of the law of treaties depended mainly on certainty of the rules of interpretation'. International Law Commission, 'Summary Record of 726th Meeting' (1964) UN Doc. A/CN.4/SR.726 reproduced in [1964/I] YBILC 20, [34]; See also the final ILC Draft which seems to echo this rationale by indicating that 'the establishment of some measure of agreement in regard to the basic rules of interpretation is important not only for the application but also for the drafting of treaties'. ILC Draft Articles on the Law of Treaties with Commentaries (n 291) 219 [6].

[309] See Dworkin's discussion of the influence of the interpreter's purpose on the interpretive process. Ronald Dworkin, *Law's Empire* 11th ed., Hart Publishing 2018) 49-53.

[310] See Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 16-71; Gleider Hernandez, 'Interpretation' in Jörg Kammerhofer and Jean d'Aspremont (eds),, *International Legal Positivism in a Post-modern World* (CUP 2014) 317; Waibel (n 279) 147; Koskenniemi (n 105) 530-532; Jan Klabbers, 'Virtuous Interpretation' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on*' (Brill 2010) 15.

[311] ILC, Sixth Report of the Special Rapporteur, Sir Humphrey Waldock (1966) II Yearbook of the International Law Commission 51, 95 [4] (emphasis added).

[312] ILC Draft Articles on the Law of Treaties with Commentaries (n 291) 219 [8].

ation'.[313] However, different rapporteurs took a different stance on this question, with differing degrees of conviction.[314] The language in the final outcome of the Commission – 'legally relevant' rather than 'correct' – seems to indicate a compromise which is agnostic on this point. Thus, it seems that when the drafters of the VCLT codified the rules of interpretation, their aim was less to prescribe one linear road to a correct interpretative outcome and more to simply furnish future interpreters with methodological guidelines.

A related consideration in this context is the question of who interprets, or rather who gets to interpret. Formally, international law does not allocate interpretive authority to a single entity. Depending on the circumstances, interpretive authority may lie with the parties, a court, a state, or even a non-governmental entity.[315] All these actors together formulate the epistemic community of international law, and as such contribute broadly to the way legal rules are interpreted.[316] Traditionally, international law gave primacy to the interpretation by the creators of the law – States, treating their interpretation as both the authentic and the authoritative pronouncement as to the meaning of the law.[317] Nowadays, we generally distinguish between authentic interpretation – the interpretation by the makers/parties – and authoritative interpretation. The latter refers to the 'legally conferred competence to establish a specific meaning of the law as binding'.[318] Examples of bodies that have a conferred competence to authoritatively interpret international law in respect of their relevant instrument(s) include the NAFTA Free Trade Commission[319] and the WTO Ministerial Conference.[320] While it may be argued that international courts are similarly positioned to authoritatively interpret interna-

[313] ILC, Sixth Report of the Special Rapporteur, Sir Humphrey Waldock (1966) II Yearbook of the International Law Commission 51, 90 [9].

[314] For and overview of the shifts in position among different rapporteurs see Daniel Peat, *Comparative Reasoning in International Courts and Tribunals* (CUP 2019) 15-48.

[315] Waibel (n 279) 147; Andrea Bianchi, 'The Game of Interpretation in International Law The Players, the Cards, and Why the Game is Worth the Candle' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 34, 39-43; See also Azaria who speaks of the interpretive authority of the ILC. Azaria (n 281) 171.

[316] See Bianchi (n 279) 251; Waibel (n 279) 147; Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12(2) Michigan Journal of International Law 371. See also Linderfalk who discusses the various interpreters through the distinction between operative interpretation (performed by national courts, civil servants, military officials, diplomatic personnel, international courts and arbitration tribunals, international organizations, and other authorities empowered to decide on issues concerning the application of international agreements) and doctrinal interpretation (performed by scholars). Linderfalk (n 307) 12.

[317] Ingo Venzke, 'Authoritative Interpretation' [2018] MPEPIL [2]. See also the pronouncement of the PCIJ in the *Jaworzina Advisory Opinion* that 'it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it'. *Question of Jaworzina (Polish-Czechoslovakian Frontier)* (Advisory Opinion) [1923] PCIJ Series B, No. 8, 37.

[318] Venzke (n 317) [3]. [319] This power is derived from Article 1131 of the NAFTA.

[320] This power is derived from Article IX(2) of the Agreement Establishing the WTO.

tional law when such a power is conferred upon them,[321] scholars have drawn some important differences. For instance, unlike the interpretation adopted by empowered bodies which is binding on all the parties to the instrument, the interpretation adopted by international courts in a particular case is only binding on the parties to the dispute. Relatedly, while international courts rely on the rules of interpretation to reach their interpretation, empowered bodies are not similarly constrained.[322] Nevertheless, judicial interpretation holds a prominent role in international law.[323] Thus, even within the definition of authoritative interpretation as described above, scholarship acknowledges a 'de facto' interpretive authority of international courts.[324] There are several factors that contribute to this. Firstly, the prominence of judicial interpretation in international law is reminiscent of the similar importance afforded to judicial interpretation in national law. Thus, the views of judicial interpretation as central to the legal system might have been carried over from national law.[325] Secondly, the centrality of judges in this context is also owed to the more fundamental nature of the judicial function, which is in large part focused on the interpretation and application of the law. This function extends beyond mere dispute settlement, to also contribute to the 'stabilization of normative expectations' in international law.[326] This refers to the fact that the international judicial function is not solely concentrated on dispute settlement, but also has a broader reach which includes supporting the law's normativity with its pronouncements, discouraging opposing interpretations, and stabilizing a particular meaning.[327] In this regard, international courts and tribunals are entrusted

---

[321] See on this George Schwarzenberger, *International Law, vol 1, International Law as Applied by International Courts and Tribunals* (Stevens and Sons 1957) 531.

[322] Venzke (n 317) [7].

[323] See for instance Ruth Mackenzie, Cesare Romano, and Yuval Shany (eds) *The Manual on International Courts and Tribunals* (2nd ed ,OUP 2010). For a recent critical assessment of this 'judge centredness' of international law see Fuad Zarbiyev, 'On the Judge Centredness of the International Legal Self' (2021) 32(4) EJIL 1139.

[324] 'International courts and tribunals exercise authority by way of their interpretations, not only over the parties but more generally by stabilizing and developing normative expectations [...] This authority of precedents in shaping the law does not come in the form of legal bindingness, but more as a constraint that may well be understood as a redistribution of argumentative burdens. In struggles over what the law means, international courts and tribunals have the capacity of establishing reference points that others can hardly escape'. Venzke (n 317) [8].

[325] Hernandez (n 280) 166. On this point see also Bianchi who ascribes the centrality of courts in international law to the so-called 'inferiority complex' that international law may suffer due to the traditional charge that it is not law properly so called when measured against the benchmark of national law. Bianchi (n 315) 41-42.

[326] This terminology is borrowed from the work of von Bogdandy and Venzke. See Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12(5) German Law Journal 979; Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 Leiden Journal of International Law 49.

[327] von Bogdandy and Venzke (2013) (n 326) 54-55.

with an authoritative interpretation of international law.[328] On this point, it has been aptly noted that '[i]nternational lawyers [. . .] tend to look at law and at legal interpretation from the perspective of the judicial function. Most of the time, the interpretive questions that are posed in the profession are related to the way in which a judge would interpret a certain legal provision and apply it to any given case'.[329] Finally, owing to the horizontal law-making process of international law, international courts and their interpretations often inadvertently have the effect of clarifying or centralizing the law on given issues.[330] On this point, it has been persuasively argued that while traditionally the role of international courts might have been limited to dispute settlement, this role has now evolved and diversified.[331]

In the subsequent discussion I focus primarily on judicial interpretation for two reasons. Firstly, because in the practice of international law, questions of interpretation tend to arise in the context of disputes and be formulated with a judge or arbitrator in mind.[332] On this it has been observed, for instance, that the bulk of the judicial role in international law consists of interpretation.[333] In this regard, and without prejudice to the interpretation of CIL by other actors, examples of CIL interpretation are most likely to be found in the jurisprudence of courts. Secondly, because in international law judicial decisions possess what has aptly been described as a 'centrifugal normative force'. The term is used here to denote the fact that other international legal actors tend to follow judicial reasoning, and that judicial decisions can be 'substantively constitutive' of international law.[334] 'That normative effect is exacerbated when dealing with *unwritten* sources of law, in particular customary international law [. . .]: there is no balancing between the text, its authors, and the interpreter in such situations, and the certainty of judicial reas-

[328] This conclusion of course has the caveat that the authority of international courts will depend on their mandate and the particular context of their work.

[329] Andrea Bianchi, 'The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 34, 41.

[330] See for instance Jennings who discusses this effect with respect to the ICJ. Robert Jennings, 'The Role of the International Court of Justice' (1997) 68(1) British Yearbook of International Law 1, 42-43. See also Peter Tomka, 'Customary International Law in the Jurisprudence of the World Court: The Increasing Relevance of Codification' in Liesbeth Lijnzaad and Council of Europe (eds), *The Judge and International Custom* (Brill Nijhoff 2016) 2, 6.

[331] See on this point von Bogdandy and Venzke who argue that the traditional understanding of international courts as solely dispute-settlement mechanism is unduly narrow and 'eclipses other important functions that many international courts do actually perform in contexts of global governance'. von Bogdandy and Venzke (2013) (n 326) 49.

[332] Bianchi (n 329) 41. [333] Hernandez (n 280) 167.

[334] Hernandez (n 280) 166; See also Andraž Zidar, 'Interpretation and the International Legal Profession: Between Duty and Aspiration in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 133, 134; Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 354-5; Tomka (n 330) 23.

oning holds an intrinsic appeal'.[335] Moreover, courts seem to be aware of their authoritative position in the interpretive process, and modulate their interpretation accordingly.[336]

A final consideration here is the consideration of the limits of the interpretive exercise. Limits in this context refer to the boundaries to which the interpretive exercise may extend without transgressing into what would constitute an impermissible interpretive outcome. These limits may be dictated by the nature of the legal system or the rule itself,[337] or may be set by the rules of interpretation applicable in the context.[338] Considering limits dictated by the nature of the legal system, these include the principle of non-retroactivity, *jus cogens*, and the limit of amendment or modification.[339] With respect to the principle of non-retroactivity, which is a basic legal principle underlying both national and international law, it is quite intuitive to assert that an interpretive outcome of a legal rule may not violate non-retroactivity.[340] Similarly, with regard to *jus cogens*, it emerges from the very definition of *jus cogens* rules as non-derogable that an interpretation of a legal rule should not lead to a contradiction with a *jus cogens* rule.[341] Finally, with regard to the limit of amendment or modification, it is a generally recognized limitation that the judicial interpretation of a legal rule may not amount to a modification

---

[335] Hernandez (n 280) 166. See also Waibel who discusses the centrality of judicial interpretation in international law with a particular focus on national courts as interpreters of international law. Waibel (n 285) 155-58.

[336] Anne van Aaken, 'Interests, Strategies and Veto Players: The Political Economy of Interpreting Customary International Law' (2022) 11(2) ESIL Reflections 1.

[337] Merkouris 2023 (n 3) 40-44; Azaria (n 281) 176.

[338] Owen Fiss, 'Objectivity and Interpretation' (1982) 34(4) Stanford Law Review 739; See also Bianchi who accepts the rules of interpretation as limits but posits that they allow for a wide margin of argumentation within them. Bianchi (n 329) 43-49.

[339] Merkouris 2023 (n 3) 40-44.

[340] See for instance the reasoning of the Arbitral Tribunal in *Mondev International LTD v. USA*: 'The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility'. *Mondev International Ltd. v United States of America*, Case No. ARB(AF)/99/2, Award (11 October 2002) [70]; However, with respect to treaties, see also caveat posed by Article 28 VCLT that this is the case '[u]nless a different intention appears from the treaty or is otherwise established'.

[341] See for instance Institut de Droit International, '7th Commission – Report: Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)? – Rapporteur M Arsanjani' (2021) 25, 30. See also the recent work of the ILC on peremptory norms of general international law, which explicitly recognized this point in Conclusion 20: 'Where it appears that there may be a conflict between a peremptory norm of general international law (jus cogens) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former'. ILC, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), with Commentaries' (2022) A/77/10 16, 79. The ILC clarified that an interpretation should strive as far as possible to harmonize the interpreted rule with a jus cogens rule, but that in this pursuit the bounds of interpretation may not

of that rule, as this would constitute an act of judicial legislation which is impermissible.[342] On this point, it is often emphasized that interpretation falls within the scope of the original rule while amendment or modification creates new law.[343] Consequently, in the context of treaties for instance, while modification after the conclusion of the treaty may be allowed to the parties or to a recognized authoritative body, this is not an activity which is permissible under the ambit of judicial interpretation. While in principle this is a well-recognized limit of interpretation, in practice it is sometimes difficult to delineate when a court is engaging in impermissible modification as opposed to a dynamic or evolutive interpretation of the rule.[344] This discussion of limits will be revisited in Chapter 4 of the thesis, in particular with regard to the role of interpretation in the evolution of customary rules. Considering the limits set by rules of interpretation, in international law these are dictated by the rules of interpretation set out in the VCLT and their customary counterparts. With respect to these, it has been aptly noted that '[t]here is no denying that these are the rules, criteria, and practices that are followed by the profession in the interpretation of treaties and even of other relevant legal texts. In other words, there is social consensus amongst the players that these are the instruments by which one plays the game of interpretation'.[345] As the discussion above demonstrated, while the VCLT rules and the methods prescribed therein apply to treaties, they have also been utilized to interpret other sources of international law.

Having considered the insights that we may draw from treaty interpretation for an understanding of interpretation more generally in international law, let me now briefly outline the way interpretation will be conceptualized and understood subsequently throughout the thesis.

---

be exceeded. 'In other words, the rule in question may not be given a meaning or content that does not flow from the normal application of the rules and methodology of interpretation in order to achieve consistency with peremptory norms of general international law (jus cogens).' Ibid, 80 [2]. Thus, if the rule cannot be interpreted in a way that does not stand in conflict with a jus cogens norm, the rule is to be invalidated. Ibid, 81 [6].

[342] See on this point *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Separate Opinion of Judge Bedjaoui) [1997] ICJ Rep. 120, [5]; *Case Concerning the Kasikili/Sedudu Island (Botswana/Namibia)* (Declaration of Judge Higgins) [1999] ICJ Rep 1113, [2].

[343] Azaria (n 281) 176.

[344] See on this point Markus Vordemayer, 'Gardening the Great Transformation: The Anthropocene Concept's Impact on International Environmental Law Doctrine' (2015) 25 Yearbook of International Environmental Law 79, 110–111; Hugh Thirlway, 'The Law and Procedure of The International Court of Justice 1960–1989 Supplement, 2006: Part Three' (2006) 77 *British Year Book of International Law* 1, 65–68; Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation; Variations and Explanations Across International Tribunals' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 445.

[345] Bianchi (n 329) 49.

ii. The nature of the interpretive exercise

In the discussion above, we saw that one central point in the debates surrounding legal interpretation relates to the "correctness" of the interpretation or the interpretive outcome. This is certainly an issue of importance, as it seems to pose a core question about the nature of the interpretive exercise. Is interpretation an exercise of retrieving pre-existent meaning, in which case there is one correct interpretive outcome? Or is interpretation an exercise of constructing meaning, in which case various outcomes, including conflicting ones, might go? At the same time, as the discussion above illustrated, while these questions mobilize strongly opposing theoretical views, the reality of interpretation in practice seems to reside in a strongly moderate middle. Aligning itself with this, this thesis takes the following view.

Insofar as it flags the relevance of limits to the interpretive process and legal certainty, the 'correct legal interpretation' view is persuasive. However, taking this view one step further to claim that there is only one single correct interpretation does not seem to fully correspond to how the interpretive process plays out in reality. An important thing to keep in mind here is what precisely we speak of when we speak of 'one correct interpretation'. It is one thing to speak of one objectively correct interpretation of the legal rule across the board, and another to speak of the correctness of the interpretation of the rule in a particular case. The claim of one objectively correct interpretation projects a fixedness of scope and content onto legal rules which is not reflective of how these rules operate in the legal system. This claim fails to recognize that the interpretation of a legal rule is always context dependent, and it is simply not possible to foresee all possible interpretations of this rule over time and across different disputes. Put differently, no legal rule accounts for all particular factual situations which may potentially fall under it.[346] Focusing on the correctness of the interpretation in a particular case on the other hand, lowers the proverbial bar, and more accurately accounts for the natural degrees of generality and flexibility that are inherent in legal rules. At its base, this view is informed by the fact that a legal dispute must be solved with one outcome, and that a case cannot end in multiple legal interpretations – it can only end in one definitive one.[347] This is further supplemented by the fact that most often, the opposing interpretations that lead to the existence of a dispute are such that they cannot both be sustained at the same time, and require a definitive interpretation (either one of the two conflicting ones, or a third option arrived at by the interpreter) as a resolution. The appropriateness of this definitive interpretation can be assessed by reference to the rules of interpretation applicable in the system and the limits to interpretation recognized in it.[348] Moreover, its value stems from the

[346] H.L.A Hart, *The Concept of Law* (Clarendon Press 2nd ed., 1994) 126-128.

[347] Paolo Palchetti, 'Dispute' [2018] MPEPIL; Asier Garrido-Muñoz, 'Dispute' [2018] MPEPIL.

[348] See on this point Allain Pellet who in his role as ILC Special Rapporteur on reservations to treaties observed: 'Interpretation remains an eminently subjective process and it is rare that a legal

fact that it has been reached by an interpreter endowed with the authority to interpret the law (e.g. a judge or arbitrator in a given case).[349] However, this does not mean that this was the only possible or only correct interpretation of the rule. The interpretative outcome may vary depending on the weight the interpreter assigns to different rationales which underlie the rule.[350] It may also vary across cases and over time.[351] This is perhaps easier to accept if we consider the above-mentioned functions of international courts which include, in addition to dispute settlement, the so-called 'stabilization of normative expectations'.[352] Thus, while the dispute settlement lens may lead us to believe that the need for one definitive interpretation implies also one correct interpretation, the consideration of the other functions of international courts allows us to see beyond this. Put differently, if we accept the broader functions of international courts, it is easier to accept that interpretative outcomes may vary and evolve. Consider for instance the interpretation of the law in advisory opinions, which do not emerge from a dispute but may still lead to the clarification and stabilization of the international law(s) on a particular issue. Here there are no two conflicting interpretations of which one must be chosen, and the interpretive exercise enjoys a certain bounded creativity. This is particularly so when the interpreter might need to consider various legal regimes which interact in a particular scenario, or might need to resolve a normative conflict which

---

provision, or a treaty as a whole, can be interpreted in only one way. [. . .] International law does not [. . .] provide any criterion allowing for a definitive determination of whether a given interpretation has merit. There are, of course, methods of interpretation (see, initially, articles 31 to 33 of the 1969 and 1986 Vienna Conventions), but they are only guidelines as to the ways of finding the "right" interpretation; they do not offer a final test of whether the interpretation has merit. [. . .] This specification is in no way a criterion for merit, and still less a condition for the validity of the interpretations of the treaty, but a means of deriving *one* interpretation. That is all'. ILC, 'Fourteenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur' (2009) A/CN.4/614 3, 28-29 [140, 143].

[349] ILC, 'Fourteenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur' (2009) A/CN.4/614 3, 29 [144].

[350] See on this point Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 8-10. See also Fiss (n 338) 747.

[351] See for instance Hart who discusses the so-called 'relative ignorance of fact' and 'relative indeterminacy of aim' inherent in legal rules at the time of their creation, which can lead to the need to make interpretive choices in the future which could not have been envisaged beforehand. Hart (n 346) 128-29.

[352] On this point, van Bogdandy and Venzke rely on the example of the *Nicaragua* case before the ICJ to demonstrate how the judicial function includes both dispute settlement and the stabilization of normative expectations in international law. 'It is doubtful whether the ICJ's *Nicaragua* judgment contributed to settling the dispute between Nicaragua and the United States. The decision in this case maybe even had a negative effect because it prompted the United States to withdraw its unilateral recognition of the court's jurisdiction. But if the decision is considered in light of the contribution it has made by stabilizing normative expectations – a second main function of international courts – then a different picture starts to emerge. The judgment reasserted the validity of one of international law's cardinal norms [. . .] in face of the contrary practice of the two superpowers at the time. Feeding into the general legal discourse, the decision affirmed international law as an order that promotes peace and does not bow to the powerful [. . .]'. von Bogdandy and Venzke (2013) (n 326) 54.

emerges from such an interaction. Moreover, even in the context of contentious cases where the dyadic nature of a dispute narrows down the interpretive exercise, it has been aptly noted that 'the contrast between international courts' majority and dissenting opinions readily makes clear that there can be quite plausible arguments about which meaning should be given to the law'.[353]

Contemporary takes on the 'one correct interpretation' discussion seem to reflect this more nuanced approach, by acknowledging that in fact an interpretation may consider various circumstances extrinsic to the rule or evolve over time, and yet remain correct.[354] Correctness thus seems to be more a reflection of the interpretive process following certain common rules and limits of interpretation, and less a reflection of the claim that only one single outcome is the correct one. One variation of this middle ground in the debate is the notion of correct interpretation as a 'set'.[355] On this view, certain rules may include within their scope various different factual circumstances. The interpretation of these rules might then engender the possibility to choose from a spectrum of different permitted acts. According to the set notion, what the interpreter in these scenarios in fact faces is 'a *set* (the correct interpretation), where the permitted acts (that should not be in conflict with each other) are elements within that set. Consequently, the correct interpretation remains the one, and the different permitted acts are just elements falling within that set'.[356]

I would push this take even further to argue that the common parameters which exists with respect to interpretation enable an interpreter to advance various different interpretations, as long as they are able to rationally justify them on the basis of the inner logic of the discipline,[357] and as long as none of the possible interpretations are in manifest conflict with one another. In this regard, I would be inclined to speak less of a *correct* interpretation, and more of a *permissible* or *plausible* one. An interpretation of a legal rule may be considered permissible or plausible when it complies with the parameters defined in the legal system, and is as such reasonable and justifiable in that context. That an interpreter remains within the rules and limits of interpretation does not imply that given the same rule and facts, multiple disconnected interpreters would always arrive at the same interpretation.[358]

---

[353] Venzke (n 317) [14].

[354] Panos Merkouris, 'The Correct Interpretation Premise in International Adjudication' in Kostiantyn Gorobets, Andreas Hadjigeorgiou and Pauline Westerman (eds), *Conceptual (Re)Constructions of International Law* (Edward Elgar 2022) 215; Merkouris (n 286) 1; Linderfalk (n 307) 372-75.

[355] Merkouris (2022) (n 354) 226-32; See also Kostiantyn Gorobets, 'Chasing the 'correct interpretation': Reply to Panos Merkouris' in Kostiantyn Gorobets, Andreas Hadjigeorgiou and Pauline Westerman (eds), *Conceptual (Re)Constructions of International Law* (Edward Elgar 2022) 234.

[356] Merkouris (2022) (n 354) 215.

[357] Ian Scobbie, 'Rhetoric, Persuasion and Interpretation in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 61; Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (OUP 2014) 251-2 and 272-74.

[358] See on this point Waibel who discusses the relevance of the broader interpretive community in which an interpretation process is settled for the process itself. 'International legal rules acquire

After all, legal rules are imbued with a 'fringe of vagueness' that may always justify either including a particular instance under their general scope or excluding that same instance from it.[359] Nevertheless, the existence of rules of interpretation, commonly-agreed limits to the interpretive process, as well as a commonly shared professional language and context, narrow down the pool of plausible interpretations substantially.[360] All these parameters demarcate the interpretive field, and serve as the outer limits of the interpretive process.

This view does not imply that in each and every case, there will always be several plausible interpretations, of which the interpreter will have to choose one. Sometimes, the relative straightforwardness of the facts coupled with the existences of rules for and limits to interpretation will lead an interpreter to only one interpretive outcome without alternative plausible interpretations arising in the process.[361] The implication is merely that in certain cases, the interaction of the rule and the factual situation may give rise to two or more plausible interpretations of which one definitive one will need to be chosen in order to settle the dispute. At first view, this approach may seem unsettling. How can we speak of legal certainty in the international legal system if we allow for the possibility of two or more interpretations, of which one is chosen? And what are the parameters that guide this choice?

An oft cited example which illustrates this conundrum is the practice relating to Article 17(6) of the WTO Antidumping Agreement. Pursuant to paragraph (ii) of this provision:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds

---

meaning only in the light of background norms common to particular interpretive communities'. Waibel (n 279) 149; See also Skouteris who notes that '[d]ifferent systems of knowledge determine what is true or not in their own way. As such, our understanding of the world is relatively contingent'. Thomas Skouteris, *The Notion of Progress in International Law Discourse* (T.M.C Asser Press 2010) 23.

[359] On this point, Hart famously noted that '[n]othing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules'. Hart (n 346)123.

[360] See once again Hart, who observes that faced with a choice whether a general rule is applicable to some combination of circumstances 'all that the person called upon to answer can do is to consider [...] whether the present case resembles the plain case 'sufficiently' in 'relevant' respects. The discretion thus left to him by language may be very wide; so that if he applies the rule, the conclusion [...] is in effect a choice. He chooses to add to a line of cases a new case because of resemblances which can reasonably be defended as both legally relevant and sufficiently close. In the case of legal rules, the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system and on the aims or purpose which may be attributed to the rule'. Hart (n 346) 127. See also Fiss who calls this the 'bounded objectivity' of legal interpretation. Fiss (n 338) 745.

[361] This is what Hart refers to as 'plain cases' and Dworkin refers to as 'easy cases'. See Hart (n 346)126; Dworkin (n 309) 350-54. See also Jonathan Crowe, 'Not-So-Easy Cases' (2019) 40(1) Statute Law Review 75.

> that *a relevant provision of the Agreement admits of more than one permissible interpretation*, the panel shall find the authorities' measure to be in conformity with the Agreement *if it rests upon one of those permissible interpretations* (emphasis added).

This provision has been criticized by scholarship for its implication that it is possible for a legal rule to admit of more than one interpretation. In particular, scholars have disputed the assumption that an interpreter who relies on the customary rules of treaty interpretation (i.e., rules of interpretation codified in Articles 31 and 32 VCLT) could ever reach the conclusion that a legal provision admits more than one interpretation.[362] Nevertheless, the application of Article 17(6)(ii) offers valuable insight into how the notion of permissible interpretations can operate in the practice of dispute settlement. In *EC Bed Linen* – one of the first cases where Article 17(6)(ii) was raised – the panel described the approach in the following way

> Panels are to consider the interpretation of the WTO Agreements, including the AD Agreement, in accordance with the principles set out in the Vienna Convention on the Law of Treaties (Vienna Convention). Thus, we look to the ordinary meaning of the provision in question, in its context, and in light of its object and purpose. Finally, we may consider the preparatory work (the negotiating history) of the provision, should this be necessary or appropriate in light of the conclusions we reach based on the text of the provision. We then evaluate whether the [. . .] interpretation is one that is "permissible" in light of the customary rules of interpretation of international law.[363]

It seems like here the panel is describing a process whereby it would interpret provisions of the Anti-Dumping agreement in accordance with the customary rules of interpretation, and then assess whether the interpretation put forward by the parties is 'permissible' pursuant to this. However, in *EC Bed Linen* after reaching its own interpretation of the relevant provision the panel judged the national measures inconsistent with it. The Appellate Body agreed with the approach taken by the panel.[364] Thus, while this case provides a description of how the notion of permissible interpretations could be operationalized, we do not in fact see it play out in practice, because neither the panel nor the Appellate Body considered more than one possible interpretation to exist. Similarly, in *US Hot Rolled Steel*, the Appellate Body outlined that pursuant to Article 17(6)(ii) 'application of the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention could give rise to, at least, two interpretations of some provisions of the Anti-Dumping Agreement,

---

[362] Steven P. Croley and John H. Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90(2) American Journal of International Law 193, 200-201; Matthias Oesch, Standards of Review in WTO Dispute Resolution (OUP 2003) 93-95.

[363] *European Communities—Anti- Dumping Duties on Imports of Cotton Type Bed Linen from India* (30 October 2000) WTO Panel Report WT/DS141/R [6.46].

[364] *European Communities—Anti- Dumping Duties on Imports of Cotton Type Bed Linen from India* (1 March 2001) Report of the Appellate Body WT/DS141/AB/R [65].

which, under that Convention, would both be "permissible interpretations" '.[365] However, here once again, the Appellate Body did not in fact consider various possible interpretations.[366]

One set of cases where the possibility of two permissible interpretations materialized is the *US Stainless Steel (Mexico)* and *US Continued Zeroing* cases. In *US Stainless Steel (Mexico)* a panel arrived at an interpretation of the Antidumping Agreement pursuant to which the practice of zeroing by the US was in conformity with relevant provisions of the Agreement.[367] This decision was overturned by the Appellate Body, which arrived at a different interpretation of the relevant provisions.[368] The US however continued its practice, and the issue arose again in the *US Continued Zeroing* case. The panel here expressed its agreement with the interpretation of the panel in the earlier *US Stainless Steel (Mexico)* case,[369] but decided to ultimately uphold the interpretation by the Appellate Body in that case due to systemic considerations of jurisprudential consistency.[370] In the appeal, the US argued that the panel had not applied Article 17(6)(ii) properly, because there existed one interpretation of the Antidumping Agreement (the interpretation of the panel in *US Stainless Steel (Mexico)*) with which the US practice had been consistent. Therefore, a proper application of Article 17(6)(ii) required that the practice of the US domestic authorities be upheld. The US thus essentially argued that the interpretation of the panel in *US Stainless Steel (Mexico)* represented one of two permissible interpretations under which the conduct of its domestic authorities was consistent with the relevant provisions of the Antidumping Agreement.[371] The Appellate

---

[365] *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (24 July 2001) Report of the Appellate Body WT/DS184/AB/R [59].

[366] Donald McRae, 'Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the WTO Antidumping Agreement' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 164, 172-73. McRae also finds more generally that '[t]he approach of the Appellate Body in the cases that followed was to admit the possibility that there might be two permissible interpretations of provisions of the Antidumping Agreement, but never to find them. Indeed, it can be argued that the Appellate Body had never in fact looked [. . .] Having established the interpretation of the provision in question, the Appellate Body would then conclude that alternative interpretations were not 'permissible' '.

[367] *United States - Final Anti-dumping Measures on Stainless Steel from Mexico* (20 December 2007) Report of the Panel WT/DS344/R [7.106 – 7.128]. See in particular [7.119] 'We are of the view that a good faith interpretation of the ordinary meaning of the texts of Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement, read in their context and in light of the object and purpose of the mentioned agreements, *does not exclude an interpretation that allows the concept of dumping to exist on a transaction-specific basis*. We recall that according to the standard of review that we have to follow in these proceedings (supra, paras. 7.1-7.2), *we are precluded from excluding an interpretation which we find permissible, even if there may be other permissible interpretations*' (emphasis added).

[368] *United States - Final Anti-dumping Measures on Stainless Steel from Mexico* (30 April 2008) Report of the Appellate Body WT/DS344/AB/R [133-36].

[369] *United States - Continued Existence and Application of Zeroing Methodology* (1 October 2008) Report of the Panel WT/DS350/R [7.162 -7.169]

[370] Ibid [7.170 – 7.182].

[371] *United States – Continued Existence and Application of Zeroing Methodology* (4 February 2009) Report of the Appellate Body WT/DS350/AB/R [265].

Body resolved the situation in the following way. Firstly, it outlined that Article 17(6)(ii) contemplates a 'sequential analysis' whereby an interpreter first interprets the provisions in accordance with customary rules of interpretation and then goes on to determine whether this yields various permissible interpretations.[372] Having clarified this, the Appellate Body pronounced that the second sentence of Article 17(6)(ii)

> allows for the possibility that the application of the rules of the Vienna Convention may give rise to an *interpretative range* and, if it does, *an interpretation falling within that range is permissible and must be given effect by holding the measure to be in conformity with the covered agreement*. The function of the second sentence is thus to give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within that range may prevail.[373]

Finally, the Appellate Body also pointed out that

> the rules and principles of the Vienna Convention *cannot contemplate interpretations with mutually contradictory results*. Instead, the enterprise of interpretation is intended to ascertain the proper meaning of a provision; one that fits harmoniously with the terms, context, and object and purpose of the treaty. The *purpose of such an exercise is therefore to narrow the range of interpretations, not to generate conflicting, competing interpretations*.[374]

The view that the Appellate Body is espousing here seems to resemble the idea of correct interpretation as a set discussed above. Essentially, pursuant to the Appellate Body, correct interpretation operates as a range within which various acts may be considered permissible. An important constraint on this range is that it may not encompass interpretations that are manifestly contradictory to each other. Within this range, it is possible that an interpreter is faced with two plausible interpretations that they have to choose from. A further constraint however is that an interpret must in fact choose one of those interpretations, in order to resolve the dispute. This point was made particularly poignantly in a concurring opinion that one member of the Division added to the Appellate Body's reasoning:

> There are arguments of substance made on both sides; but one issue is unavoidable. *In matters of adjudication, there must be an end to every great debate*. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing *it has spoken definitively*. [. . .] Whatever the difficulty of interpreting the meaning of "dumping", it cannot bear a meaning that is both exporter-specific and transaction-specific. [. . .] *The range of meanings that may constitute a permissible interpretation does not encompass meanings of such wide variability, and even contradiction, so as to accommodate two rival interpretations*. One must prevail. The Appellate Body has decided the matter. At a point in every debate, *there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past*. With respect to zeroing, that time has come.[375]

[372] Ibid [271]. [373] Ibid [272] (emphasis added). [374] Ibid [273] (emphasis added).
[375] Ibid [312] (emphasis added).

One might still wonder how this final choice between two permissible interpretations would be made. The reasoning of the Appellate Body in *US Continued Zeroing* does not offer concrete guidance on this point. However, if we recall the reasoning of the panel in *US Continued Zeroing*, it seems that one possible way to do this is to take in consideration factors that are extrinsic to the rule but intrinsic to the legal system in which the rule is being interpreted. What I mean here is the following. The panel in *US Continued Zeroing* expressed its agreement with the interpretation of the relevant provisions of the Antidumping Agreement put forward earlier by the panel in *US Stainless Steel (Mexico)*. However, the *US Continued Zeroing* panel eventually adopted the alternative interpretation put forward by the Appellate Body in *US Stainless Steel (Mexico)* because of considerations of jurisprudential consistency. Thus, it seems that the panel here made the final choice between the two permissible interpretations by considering the broader desirability for consistency in the jurisprudence.[376]

A recent pronouncement by the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) in *Colombia Frozen Fries* sheds further light on this issue. Here, the MPIA took the explicit stand that 'different treaty interpreters applying the same tools of the Vienna Convention may, in good faith and with solid arguments in support, reach different conclusions on the "correct" interpretation of a treaty provision'.[377] On the approach prescribed by Article 17.6(ii) of the Anti-Dumping Agreement, the MPIA observed that it is not their role to engage in a *de novo* interpretation of the treaty terms so as to arrive at a correct interpretation, but rather to examine whether an interpreter guided by the VCLT rules could have reached the interpretation by the party (in this case Colombia), even if the MPIA 'as de novo interpreters might have reached a different conclusion'.[378] Thus, the MPIA took their role to be 'to draw a line beyond which an interpretation is no longer "permissible" ', clarifying that

> the search for "permissible" interpretations differs from an attempt to find one's own – "final" and "correct" – interpretation. Rather, the question is whether someone else's interpretation is "permitted", "allowable", "acceptable", or "admissible" as an outcome resulting from a proper application of the interpretative process called for under the Vienna Convention. Obviously, not just any interpretation put forward by an authority can be accepted as "permissible". The interpretative process under the Vienna Convention sets out an *outer range beyond which meanings cannot be accepted*.[379]

[376] *United States - Continued Existence and Application of Zeroing Methodology* (1 October 2008) Report of the Panel WT/DS350/R [7.181-7.182]. 'Given the consistent adopted jurisprudence on the legal issues that are before us with respect to simple zeroing in periodic reviews, we consider that providing prompt resolution to this dispute in this manner will best serve the multiple goals of the DSU, and, on balance, is furthered by following the Appellate Body's adopted findings in this case'.

[377] *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands* (21 December 2022) Award of the Arbitrators WT/DS591/ARB25 [4.14].

[378] Ibid [4.13]. [379] Ibid [4.15] (emphasis added).

The examples of WTO caselaw discussed briefly here demonstrate that the notion of permissible interpretation can operate in the practice of international dispute settlement. Moreover, they offer insight into the nature of the interpretive exercise in international law as understood by this thesis. What the discussion illustrates is that on principle there can exist various permissible interpretations of a legal rule. This is in keeping with the natural degree of open texture inherent in all legal rules, which allows for the rules to evolve over time and include new particular instances within their scope. On this point, it has been aptly observed that 'allowing such 'breathing' of the rules is perhaps the essential (and unspoken) function of interpretation and is particularly important in international law, where it fills the absence of a specialized and centralized legislator'.[380] At the same time, when it comes to a particular dispute, the constraints of the nature of a dispute dictate a need that one final solution is reached. In the examples discussed above, the matter was settled by arriving at a definitive interpretation which in all likelihood will be the one followed in subsequent WTO jurisprudence.[381] Nevertheless, this does not exclude the possibility of another permissible interpretation arising in light of changes or new considerations.[382]

Having outlined the general outlook on interpretation that this thesis takes, let us now turn to a more focused discussion of what this means in the context of customary international law.

III. Interpretation in the Context of Customary International Law

Unlike treaty rules, whose interpretation is guided by relevant provisions of the Vienna Convention on the Law of Treaties (VCLT) and their customary counterparts, we currently have no rules or guidelines which regulate the interpretation of CIL. And yet, we regularly find examples in the jurisprudence where judges or arbitrators appear to engage in CIL interpretation, both on the international and domestic levels. For its part, scholarship is currently engaged in a debate whether

---

[380] Pellet (n 302) 3.

[381] See however McRae who criticizes the Appellate Body in *US Continued Zeroing* for not engaging in a rigorous analysis of the meaning of the term 'permissible' in Article 17(6)(ii). 'What is needed in the interpretation of Article 17(6)(ii) is for the Appellate Body to distinguish between process and result [. . .] although the method for going about the interpretation of the Antidumping Agreement is the same as that for interpreting any other WTO Agreement, in the case of the other agreements interpretation must reach a result. In the case of the Antidumping Agreement, the purpose of the interpretation is to determine whether there are two or more 'permissible' interpretations of a provision'. McRae (n 366) 180.

[382] On this point, McRae argues that 'permissible interpretation' in the context of Article 17(6)(ii) tasks the interpreter with determining 'at what point a proposed interpretation has the necessary degree of legitimacy so that deference should occur, even though that interpretation might not have been chosen by the Appellate Body itself if it had continued the interpretative process in order to reach a final result [. . .] Obviously there is a continuum between the competing arguments of the parties about the interpretation of a provision of the Agreement and the final result, but at some

a source like CIL could be subject to interpretation, and research is ongoing on the viability and function of interpretation in the context of CIL.

Unfortunately, the topic of interpretation was not examined in the latest ILC Conclusions on Customary International Law, and thus the debate of CIL's interpretability could not benefit too much from the ILC's findings. In fact, the report contains a somewhat mixed message on this point. On the one hand, the report seems to acknowledge (although only indirectly) a distinction between identification and interpretation of a customary rule. More specifically, in the commentary to Conclusion 1, the ILC observes that:

> [. . .] while often the need is to identify both the existence and the content of a rule, in some cases *it is accepted that the rule exists but its precise content is disputed*. This may be the case, for example, where the question arises as to whether a particular formulation (usually set out in texts such as treaties or resolutions) does in fact correspond precisely to an existing rule of customary international law, or whether there are exceptions to a recognized rule of customary international law.[383]

On the other hand, the report does not offer a further commentary on this subject, thereby seemingly siding with the view that all reasoning with respect to CIL rules takes place under the single umbrella of identification.[384] Moreover, throughout the report there are references to the identification of *the existence and content* (jointly), seemingly implying that there is no distinction between these two operations. While it is unfortunate that the report does not include a discussion of interpretation, it does not seem likely that this reflects a definitive position on the part of the ILC with regard to the question of interpretability. Rather, and given the main focus of the report on 'the methodological issue of how rules of customary international law are to be identified',[385] it seems that the ILC merely omitted a discussion of this issue. Moreover, as will be demonstrated throughout the discussion below, to group all reasoning related to CIL under the heading of identification is simply to offer an incomplete picture. This latter point is aptly captured in the comments of the government of the Netherlands to the ILC draft conclusions:

> The draft conclusions and the related commentary frequently refer to the identifica-

point along that continuum, one interpretation loses analytical support. The further it is from the final result, the less likely it is to be treated as 'permissible', but the greater the balance between the different approaches, the greater the likelihood that there can be said to be two permissible interpretations, even though if the process went further, one would be chosen. This may mean that 'permissible' interpretations will be discovered by application of Article 31 alone, without going further and applying the supplementary interpretative principles of Article 32'. McRae (n 366) 181.

[383] ILC Conclusions on Customary International Law (n 7) 124 [4] (emphasis added).

[384] See on this point also an earlier report by the Special Rapporteur observing that 'the questions of whether a rule of customary law exists, and how customary law is made, tend in practice to coalesce'. ILC, 'Second Report on Identification of Customary International Law, by Michael Wood, Special Rapporteur' (22 May 2014) UN Doc A/CN.4/672 [2].

[385] ILC Conclusion on Customary International Law (n 6) 124 [6].

> tion or determination of the 'existence and content' of customary international law. It does not become clear whether the process for identifying the existences of a rule is the same as the process for determining the content of that rule. In our view, this is not necessarily the case. For example, in the identification of the content of a particular rule, any underlying principles of international law may need to be taken into account in accordance with draft conclusion 3(1), whereas this may not be the case when identifying the existence of the rule. We suggest it would be helpful to make this explicit in the commentary.[386]

Some of the nuance advised by the Dutch comment seems to be incorporated in the commentary to Conclusion 1 cited above.[387] This notwithstanding, the ILC Conclusions on Customary International Law leave the wider discussion on the interpretability of CIL still very much open.

Before proceeding with the construction of a theory of interpretation for CIL, we must first address several arguments that challenge the very idea that customary rules can be interpreted or that interpretation is an operation that takes place in the context of CIL. Among scholars working on the topics of CIL and interpretation, there is currently disagreement on the question whether a source like CIL could be subject to interpretation at all. On the one hand, those who maintain that rules of CIL are not interpretable point to various inherent traits of the CIL process which are said to bar interpretation.[388] On the other hand, those who do accept interpretation point to both the need for and viability of interpretation in the context of CIL, as well as to numerous examples from the jurisprudence where this is in fact taking place.[389] Among the latter however, there is not always unanim-

[386] Netherlands, 'ILC Draft Conclusions on the Identification of Customary International Law – Comments and Observations by the Kingdom of the Netherlands' (*UN*, 2018) [5] <https://legal.un.org/ilc/sessions/70/pdfs/english/icil_netherlands.pdf> accessed 29 December 2021. In this comment the Netherlands seems to echo in brief a position advised earlier by its Advisory Committee on Issues of Public International Law (CAVV): 'It may be wondered, for example, whether the unity and coherence of the system of international law to which the ILC refers does not require that rules of customary international law be interpreted in their mutual context. [. . .] . In short, the Committee believes it would be desirable to make this distinction explicit or in any event to bear it in mind. There are various processes which are or could be applicable to determining the existence of a rule of customary international law on the one hand and its content on the other'. Advisory Committee on Issues of Public International Law (CAVV), 'Advisory Report on the Identification of Customary International Law' (*CAVV*, 2017) 4-5 <https://www.advisorycommitteeinternationallaw.nl/binaries/cavv-en/documents/advisory-reports/2017/11/01/the-identification-of-customary-international-law/The_identification_of_customary_international_law_CAVV-Advisory-report-29_201711.PDF> accessed 29 December 2021.

[387] ILC Conclusions on Customary International Law (n 7).

[388] See indicatively Maarten Bos, *A Methodology of International Law* (Elsevier Science Publisher, 1984) 106-110; Tulio Treves 'Customary International Law' [2006] MPEPIL 2; Gourgourinis (n 283) 35-36; Massimo Lando, 'Identification as the Process to Determine the Content of Customary International Law' (2022) XX Oxford Journal of Legal Studies 1.

[389] See indicatively Robert Kolb (n 3) 219-231; Carlos Fernandez, *Sovereignty and Interpretation of International Norms* (Springer, 2007) 85-105; Orakhelashvili (n 3) 496-511; Denis Alland, 'L' interprétation du droit international public' (2013) 362 RdC 1; Serge Sur, 'La créativité du droit international'

ity as to what exactly constitutes interpretation of CIL, and this point will be dully addressed in the discussion below. The arguments that CIL cannot be subject to interpretation are broadly developed along two lines. Firstly, scholars argue that CIL's unwritten character excludes the need for its interpretation. Secondly, it is posited that CIL rules do not require interpretation because the mere process of their identification delineates their content as well. I will now consider, and refute, these two lines of argument.

i. The unwritten character of CIL does not exclude the need for its interpretation

The claim that CIL is not interpretable because of its unwritten character is anchored both in the more obvious quality of CIL as *lex non scripta*, and a deeper underlying understanding of customary rules as norms which are not couched in words – *sine litteris*.[390] Concerning CIL's unwritten character, the argument is that '[e]ven though language is necessary to communicate their content, expression through language is not an indispensable element of customary international law rules. This irrelevance of linguistic expression excludes interpretation as a necessary operation in order to apply them'.[391] This reasoning is problematic. Firstly, it is not entirely clear why the absence of a written textual manifestation in the context of CIL rules would imply that a CIL rule should not be subject to interpretation. An absence of a written manifestation merely means that a rule is not codified; it does not however deprive this rule of other forms of linguistic expression (such as for instance oral expression) or of content, and subsequently of the need to clarify this content for the purpose of application in a given legal and factual context. On this point, it has been persuasively argued that in law 'the word "text" is not limited to a written text. For purposes of interpretation, any behavior that creates a legal norm is a "text" '.[392] Furthermore, in international law it is not at all uncommon to interpret unwritten rules, and there is no universal approach which dictates that the unwritten character of a particular source automatically precludes it from interpretation. For instance, in its "Guiding Principles applicable to Unilateral Declarations of States"[393] the ILC established that unilateral declarations, which may be formulated orally[394] and are thus sometimes unwritten, may be subject to interpretation if their content is unclear.[395] On this point, and taking a cue from the reasoning of the ICJ, the ILC clarified that the VCLT rules of interpretation may apply *mutatis mutandis* to the interpretation of unilateral

---

(2013) 363 RdC 9; Merkouris 2017 (n 3) 126; Orfeas Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' [2020] 31(1) EJIL 235; Merkouris 2023 (n 3) 18-38.

[390] On this expression see Kammerhofer (n 276) 76-77. [391] Treves (n 388) [1.2].

[392] Barak (n 350) 3.

[393] International Law Commission, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with commentaries thereto' (2006) Vol. II/Part Two Yearbook of the International Law Commission 161, 164.

[394] Ibid, 163 (Guiding principle 5). [395] Ibid, 164 (Guiding principle 7).

declarations as well.[396] Similarly, with respect to general principles of international law, which are also themselves unwritten,[397] scholars acknowledge (albeit in a more limited manner) that this source of law may be subject to interpretation.[398] Thus, the argument that CIL may not be subject to interpretation simply because it is unwritten is not persuasive. Moreover, it is reasonable to assume that unwritten sources as opposed to written ones contain a higher degree of vagueness and generality as a result of their unwritten character. This is certainly the case with CIL, where it is often acknowledged that CIL rules tend to be more general or that this source of law is inherently more abstract.[399] Thus, rather than not being subject to interpretation, unwritten sources seem to require precisely the exercise of interpretation in order to grasp their otherwise elusive content.[400] Let us consider a few examples from the jurisprudence of international courts and tribunals.

In the jurisprudence of the ICJ, an early notable example of CIL interpretation comes from the dissenting opinion of Judge Tanaka in the *North Sea Continental Shelf* case. While the main judgment in this case was largely concerned with ascertaining whether the equidistance principle was a binding rule of customary law (i.e., identification) and eventually found that it was not, in his dissenting opinion Judge Tanaka made the following observation:

> [. . .] the rule with regard to delimitation by means of the equidistance principle constitutes an integral part of the continental shelf as *a legal institution of teleological construction*. For the existence of the continental shelf as a legal institution presupposes delimitation between the adjacent continental shelves of coastal States. The delimitation itself is a logical consequence of the concept of the continental shelf that coastal States exercise sovereign rights over their own continental shelves. Next, the equidistance principle constitutes the method which is the result of the principle of proximity or natural continuation of land territory, which is inseparable from the concept of continental shelf. Delimitation itself and delimitation by the equidistance principle serve to realize *the aims and purposes of the continental shelf as a legal institution*. [. . .] As 1 have said above, the equidistance principle [. . .] is inherent in the concept of the continental shelf, in the

[396] Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with commentaries thereto (n 393) 165 [3].

[397] Allan Pellet and Daniel Muller, 'Article 38' in Andreas Zimmermann and Christian J. Tams (eds), The Statute of the International Court of Justice: A Commentary (3rd ed., OUP 2019) 924 [255].

[398] See indicatively Peter G. Staubach, *The Rule of Unwritten International Law: Customary Law, General Principles, and World Order* (Routledge, 2018) 155-199; Mahmoud Cherif Bassiouni, 'A Functional Approach to General Principles of International Law' (1990) 11 Michigan Journal of International Law 767, 771.

[399] ILA Report on Customary International Law (n 77) 2; Frederick Schauer, 'Pitfalls in the Interpretation of Customary Law' in Amanda Perreau-Saussine and James B. Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (CUP 2007) 13; Panos Merkouris, Article 31(3)(c) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato's Cave (Brill 2015) 233.

[400] See on this point Judge Higgings who noted '[i]t is exactly the judicial function to take principles of general application, to elaborate their meaning, and to apply them to specific situations'. *Legality of the Threat or Use of Nuclear Weapons* (n 86) (Dissenting Opinion of Judge Higgins) [32].

> sense that *without this provision the institution as a whole cannot attain its own end*.[401]

Judge Tanaka's reasoning seems to suggest that equidistance is a sub-element of the more general customary rule on the continental shelf. Thus, if one would engage in the teleological interpretation of the customary rule of the continental shelf one would inevitably arrive at the conclusion that equidistance is one of its elements. In this way, it seems to be suggested that the continental shelf and equidistance operate in a kind of a 'general rule – specific sub-element' relationship. This reading is further supported by the reasoning in the immediately following paragraph of the dissenting opinion, where it was contended that:

> Even if the Federal Republic recognizes the customary law character of only the fundamental concept incorporated in Articles 1-3 of the Convention, and denies it in respect of other matters, she cannot escape from the application of *what is derived as a logical conclusion from the fundamental concept*.[402] [emphasis added]

On the subject of appropriate methods for the interpretation of CIL, Judge Tanaka observed that:

> Customary law, *being vague and containing gaps* compared with written law, requires precision and completion about its content. This task, *in its nature being interpretative*, would be incumbent upon the Court. *The method of logical and teleological interpretation can be applied in the case of customary law* as in the case of written law.[403]

While this reasoning did not find its way in the main judgment of the case, judge Tanaka's observations make a strong point about the possibility to interpret CIL and the role of interpretation in this context. As I will argue in more detail in Chapter 4 of this thesis, interpretation plays a crucial role in the operationalization of general customary rules. This role is concretizing, in the sense that through the interpretation of general customary rules we may arrive at various more specific sub-elements of those rules. This understanding also finds support in the ICJ's reasoning in the *Gulf of Maine* case, where the Court observed that '[a] body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community'. A more useful course would be 'to seek a better formulation of the fundamental norm',[404] and the Court here seems to imply that this is to be done via interpretation.[405]

A similar example of delineating the more specific content of a general customary rule through interpretation can be found in the ICJ's reasoning in the *Arrest*

---

[401] *North Sea Continental Shelf Cases* (n 66) (Dissenting Opinion of Judge Tanaka) 183 (emphasis added).
[402] Ibid (emphasis added). [403] Ibid.
[404] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA)* (Merits) [184] ICJ Rep 246 [111].
[405] See on this point Merkouris 2023 (n 3) 13-14.

Warrant case. Here, the Court was tasked with considering the customary rule of immunity from criminal prosecution with respect to an incumbent minister of foreign affairs. After finding that the question before it is indeed one guided by customary law as opposed to treaty law,[406] the Court observed:

> In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but *to ensure the effective performance of their functions* on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first *consider the nature of the functions* exercised by a Minister for Foreign Affairs. [. . .] The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, *like the Head of State or the Head of Government*, he or she is recognized under international law as representative of the State solely by virtue of his or her office.[407]

It seems that here the Court is engaging in an assessment of the purpose of the customary rule of immunity. This is particularly evident from the observation made by the Court that immunity is granted in order to ensure the effective performance of duties. It is further evidenced in the analogy the Court drew between a head of state and a foreign minister, in order to assess similarities between the functions and decide whether the general customary rule on immunity applicable to heads of states could be extended to ministers of foreign affairs as well. On this point, the Court concluded that:

> [. . .] the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. *That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties*.[408]

Like in Judge Tanaka's dissenting opinion above, the Court here seems to be engaging in teleological interpretation of the customary rule of immunity. These examples show that the unwritten character of CIL rules does not preclude the possibility for their interpretation. In fact, the opposite seems to hold true – the fact that customary rules are unwritten invites interpretation as an operation through which these rules can be concretized and operationalized.

A more serious challenge to the claim for interpretability is posed by the second variety of the "linguistic irrelevance" argument, which perceives customary rules as norms *sine litteris*. On this view, customary rules are not only unwritten, but are more fundamentally norms which do not take the form of words.[409] Rather, they are introduced by usage which is not embodied either in writing or in words

406 *Case concerning the Arrest Warrant of 1 April 2000* (n 22) [52]. 407 Ibid [53].
408 Ibid [54] (emphasis added). 409 Kammerhofer (n 276) 76-77.

but in facts.[410] Furthermore, if we consider that customs form the content of a customary norm, then the content is formed by the regularity of behavior itself. 'It is not made by using language to describe that regularity [. . .] Customary law does not 'exist' as words, as language'.[411] Thus for example Kammerhofer uses this understanding of customary rules as norms *sine litteris* to argue that customary rules of interpretation cannot be identical to Articles 31-3 VCLT 'because they cannot have a content that is made up of words'.[412] This view threatens a blow to the claim for interpretability, and two observations are in order here.

Firstly, this view seems to operate on a somewhat radical understanding of custom as regularity of conduct, whereby such conduct may contribute to the formation of legal rules but may not be expressed linguistically in words for the purpose of pointing to the particular rule. It is difficult to grasp what exactly is the outcome of such an understanding, since in order to use customary rules, we must by necessity be able to express them linguistically. Moreover, the regularity of conduct which contributes to the customary rule and the customary rule are not one and the same.[413] The customary rule is a particular legal normative formulation which derives from the regularities of conduct,[414] and it necessarily comes couched in language. Any observation of regularities of behavior and a subsequent grouping of them in a prescriptive rule will involve the use of words to express the prescription emerging from this conduct. Kammerhofer acknowledges as much with the observation that '[c]ustomary international law is wordless; *only our (scholarly or judicial) reconstruction of its content is*, can be and has to be'.[415] This then leads me to my second observation. It may indeed be the case that it is the scholarly or judicial reconstruction which gives CIL rules their words and their expression in language. However, without this linguistic formulation there is no other way to express the rule and subsequently apply it.[416] Moreover, this is not merely scholars or judges putting descriptive words to a perceived regularity of conduct. Rather, when a customary rule is linguistically expressed pursuant to an analysis of practice and *opinio juris* this expression reflects for all intents and purposes *the customary rule*. Consequences flow

---

[410] Ibid, citing to an earlier version of this understanding of custom by Francisco Suárez. Francisco Suárez, *De legibus ac Deo legislatore* (1612) lib. 7 cap. 2, sect. 2.

[411] Kammerhofer (n 276) 77, and also 18-19. [412] Ibid.

[413] See Danilenko who argues that 'both from the theoretical and practical point of view, it is necessary to distinguish between custom as the process of creation of international legal rules and custom as the result of this process, *i.e.,* custom as a legally binding rule of conduct established by interstate practice'. Gennady M. Danilenko, 'The Theory of International Customary Law' (1988) 31 German Yearbook of International Law 9, 10.

[414] See on this point the ILC Draft Conclusions which specify that '[c]ustomary international law is unwritten law *deriving* from practice accepted as law'. ILC Conclusions on Customary International Law (n 7) 122 [3].

[415] Kammerhofer (n 276) 77 (emphasis added).

[416] See Danilenko who points out that if custom is to be treated as the usual or habitual course of action taken by states then a court cannot apply this to a specific case. 'The Court can only apply a legal norm created by custom'. Danilenko (n 413) 10.

from this formulation, and various conditions (such as the two-element formula) restrict the manner in which this formulation may be performed. This is particularly evident in the judicial context, when a dispute concerning the existence of a customary rule is resolved by a judicial proclamation that said rule either exists or does not. A proclamation that the rule exists is almost always followed by a formulation of that rule in language. Thus, for the purposes of that case this linguistic formulation is the rule. These formulations tend to be general, as customary rules are by their nature quite general and broad. Examples such as the customary prohibition on the use of force, the customary rule of prevention of transboundary harm, or the customary rule on state immunity illustrate this. Importantly, these formulations of the rule do not remain confined to the case in which they were first expressed. More often than not, when subsequent cases revolve on the same customary rule the subsequent judges will refer to past cases to establish the existence and formulation of the rule, and then proceed to apply and interpret it in the new context.[417] This happens both within international courts[418] and between them.[419] While this is perhaps most explicit in the judicial context, it is also evident when other actors attempt to formulate a claim as to the existence of a customary rule. For instance, when states express a claim that a customary rule exists this rule comes in a particular linguistic formulation which for all intents and purposes represents that rule. If the claim for this rule's customary status is undisputed that formulation will likely be taken on by other states thereby perpetuating the status of that particular linguistic formulation as *the rule*.[420] The argument here is simply that it is difficult to think of customary rules independently of any linguistic expression or so called 'lexical garment'.[421] Moreover, as has been persuasively ar-

---

[417] Rosalyn Higgins, 'The ICJ, the ECJ, and the Integrity of International Law' (2003) 52(1) The International and Comparative Law Quarterly 1, 7-9; Alberto Alvarez-Jimenez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000-2009' (2011) 60(3) The International and Comparative Law Quarterly 681, 683-85. See also Vladyslav Lanovoy, 'Customary International Law in the Reasoning of International Courts and Tribunals' in Panos Merkouris, Jörg Kammerhofer, and Noora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (CUP 2022) 231, 247-49.

[418] See indicatively the ICJ jurisprudence on the customary rule of prevention. *Legality of the Threat or Use of Nuclear Weapons* (n 86) [29]; *Case concerning the Gabčíkovo Nagymaros Project* (n 176) [140]; *Case Concerning Pulp Mills on the River Uruguay* (n 177) [101]; *Certain Activities and Construction of a Road* (n 178) [104].

[419] See for example the ITLOS Chamber referring to the ICJ's formulation of the customary rule of prevention in its Pulp Mills judgment. *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep. 2011, 10 [147-48].

[420] On this point see Adil Haque's discussion of the iterative quality of the customary process at the TRICI-Law workshop 'The Role of Interpretation in the Practice of Customary International Law'. Adil Haque, 'Panel 1: Interpretation as a Tool in the Construction of CIL rules' (5 November 2021) <https://www.youtube.com/watch?v=iG4IUuTAfyQ> last accessed 30 January 2022.

[421] Alland (n 389) 1; Sur (n 389) 83, and more generally 83-88. See also Lekkas who demonstrates that international courts and tribunals use ILC outputs as 'the written artefact' of customary rules. Sotirios Ioannis Lekkas, 'The Use of the Outputs of the International Law Commission in Interna-

gued on this point,[422] even if one accepts that all we ever interpret is a rendition of the customary rule in language (rather than the norm that the rule reflects) this would not offer a distinction between the interpretation of CIL and other types of law. 'If customary international law is itself never the object of interpretation because all we interpret is the statement through which custom's legal norms are communicated, the same can be said for other legal materials such as treaties and legislation'.[423]

Two further scholarly arguments deserve to be mentioned in opposition to the "linguistic irrelevance" argument. Firstly, although in international law interpretation has traditionally been linked to text, a closer inspection of the rules of interpretation demonstrates that text is only one out of a selection of elements that can be taken in consideration for the purposes of the interpretive exercise.[424] Rather, the so-called 'crucible approach' is taken, whereby text is considered together with other non-textual elements (object, purpose, intent of parties, other relevant rules etc.) without any pre-existing hierarchy.[425] If this is an acceptable approach to the interpretation of a codified textual source such as treaties, it should certainly also be an acceptable approach when it comes to CIL. Secondly, limiting interpretation only to codified textual rules creates an inconsistent understanding of this concept when we are faced with a rule that exists both as a customary and a treaty rule.[426] Namely, if the customary and treaty rules are identical, and interpretation is only accepted for codified textual rules, then only the treaty counterpart of the rule would be open to interpretation.

> In that rule's case the interpreter would be able to utilise the entire arsenal of interpretative tools in order to determine the content of the rule, [. . .] The CIL rule, on the other hand, would benefit from none or almost none of the above. In each and every case, it would have to be determined entirely on the basis of an evaluation of relevant State practice and *opinio juris*. This would lead to a situation, where despite the rules having the same starting point and content, the conventional rule would have the potential of being further refined as to its content through the process of interpretation, whereas the CIL rule would not. Similarly, whereas the conventional rule through a teleological or evolutive interpretation could adapt to new situations, the CIL rule would not unless very explicit and relevant State practice existed. *This seems to be an illogical result that ends treating legal rules of the same normative value differently for no apparent reason*.[427]

This view finds support in the ICJ's reasoning in the *Nicaragua* judgement. Here the Court, commenting on the eventuality of a treaty rule and a customary rule being identical in content, observed that:

---

tional Adjudication: Subsidiary Means or Artefacts of Rules?' (2022) 69 Netherlands International Law Review 327.

[422] Tassinis (n 389)245, ftn 36; 258-262. [423] Tassinis (n 389)245, ftn 36.

[424] Merkouris 2023 (n 3) 10.

[425] ILC Draft Articles on the Law of Treaties with Commentaries (n 291) 220 [8].

[426] Merkouris 2023 (n 3) 10-11. [427] Ibid, 10 (emphasis added).

> Rules which are identical in treaty law and in customary international law are also *distinguishable by reference to the methods of interpretation* and application. [emphasis added][428]

Overall, the claims that customary rules cannot be interpreted because of their lack of codification, or more fundamentally of linguistic expression, are unpersuasive. The above discussion illustrates that there are arguments from both theory and practice that strongly challenge these claims and demonstrate that CIL both can be and is being interpreted. More fundamentally, it also illustrates that interpretation is necessary in the context of customary rules as it is a crucial operation through which the content of general customary rules is concretized and operationalized.

ii. The process of identification of CIL rules does not also automatically delineate their content

The second line of reasoning that contests the interpretability of CIL posits that CIL rules do not require interpretation because the mere process of their identification delineates their content as well.[429] Here, the argument is that the content of the CIL rule is already determined in the course of identification via the evaluation of state practice and *opino juris*, and thus the processes of ascertaining content and ascertaining existence are merged.[430] Furthermore, it is argued that CIL cannot be subject to interpretation, because if an attempt is made to interpret an unwritten source such as CIL the interpretative reasoning will inevitably need to refer back to the elements of the lawmaking process and as such be circular.[431]

On the face of it, these arguments seem to pose a serious challenge to the idea of CIL interpretation. Nevertheless, at a closer look, they too prove to be unpersuasive. One of the more elaborate expositions of this line of arguments is presented in the theory of Maarten Bos. In his analysis of interpretation in international law, Bos departs from the premise that:

> There is [. . .] good reason not to subscribe to the usage extending the term [interpretation] to unwritten manifestations. The reason lies in the circumstance that technically speaking, the ascertainment of the meaning of unwritten manifestations is a procedure different from the one in which the message of a written manifestation is being determined.[432]

On this reasoning, Bos develops a scheme of interpretation meant to account for all acceptable manifestations of this process. This scheme consists of four elements, namely, (A) 'the facts to be put to the test of a treaty', (B) 'the factual aspects of the

[428] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (n 73) [178].
[429] Bos (n 388) 109.
[430] Ibid. See also Jean d'Aspremont, 'The Multidimensional Process of Interpretation' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 111, 118.
[431] Gourgourinis (n 283) 56. [432] Bos (n 388) 109.

treaty', (C) 'definitions of treaty' and (D) 'methods and 'rules of interpretation'.[433] Relying on this scheme, it is argued that while in the case of treaty interpretation we can easily observe the relationships between these points, in the case of CIL interpretation this is not the case:

> (A) represents the litigious facts. The question to be elucidated is whether these facts are or are not in conformity with [...] treaty (B). In order to know whether there is actually such a thing as a treaty called (B), a number of purely factual aspects are to be checked [...]: the authentication of its text, its signature, ratification, and entry into force [...] All this having been successfully performed, it then has to be examined whether the factual conglomerate (B) is a treaty. To that end, (B) is tested against (C), holding a definition of a treaty (Article 2 of the Vienna Convention). In the event of (B) corresponding to (C), the message as expressed in the symbols used in (B) still has to be deciphered [...] The ascertainment of (B)'s message takes place in the shape of an application to (B) of the methods and rules of interpretation (D). *Interpretation here is strictly limited to the latter operation: interpretation is finding out the message of B, not finding out whether B is a treaty*.[434]

While this is an apt description of the process of treaty interpretation, it is not entirely clear why this cannot also apply to CIL interpretation, or how it undermines the idea that CIL may be subject to interpretation. Bos' argument culminates in the observation that:

> Applying [this scheme] to custom instead of treaty, one will notice that the last phase in the operation – testing (B) against (D) – lapses. *Indeed, for a custom to exist one merely has to ascertain the existence of the alleged factual aspects of it (B) i.e. its material and psychological components, and to put these to the test of the definition of custom (C).* The message of (B) in this case does not have to be determined separately: *with regard to custom, content merges with existence*.[435]

This line of reasoning is unpersuasive. If we follow the steps described in Bos' scheme, it is not at all evident why these steps might not, *mutatis mutandis*, be applicable to the context of CIL interpretation as well. Firstly, because while indeed for a rule of CIL to exist 'one merely has to ascertain the existence of evidence of practice and *opinio juris* and then put these to the test of the definition of custom' (general practice accepted as law), this is not where the process ends. The testing of (B) against (C) in the context of custom will involve the evaluation of evidence of practice and *opinio juris* and will give us the answer to the question: does a customary rule exist? This will be a binary outcome in the sense that the answer will either be 'yes, a customary rule exists' or 'no, a customary rule does not exist'. This however will not tell us whether this customary rule is applicable to the case at hand, and if yes, how is it applicable? In other words, even after ascertaining whether a CIL rule exists through the evaluation of evidence of practice

[433] Ibid. [434] Ibid (emphasis added). [435] Ibid (emphasis added).

and *opinio juris*, we would still need to go to the step of "deciphering the message of (B)" through the use of certain "methods and rules of interpretation (D)". This is because the exercise of evaluating evidence of practice and *opinio juris* in order to discover whether they can be counted for the purpose of establishing a rule of CIL is not the same as applying and interpreting the CIL rule to the legal and factual context of a case. The former is an exercise of evaluating evidence, the latter is an exercise determining the scope and content of a legal rule in the particular context of a case. In the former we ask questions such as: 'does this piece of (state) conduct count as practice or *opinio juris*?', 'is this practice sufficiently widespread?', 'does this piece of evidence constitute a manifestation of *opinio juris*?', 'does this collection of practice and *opinio juris* point towards the existence of a rule?', etc. In the latter we ask questions such as 'can the present facts be included under the scope of the CIL rule?', 'how does this CIL rule play out in the present context?', 'what is the specific content of this general CIL rule?' etc.

While the exercise of CIL identification may in fact also contain interpretative reasoning, this is not the same type of interpretation as the one exercised over an already identified CIL rule.[436] In the case of the former, the interpretation is exercised over the pieces of evidence of practice and *opinio juris* in order to evaluate whether they can count towards the formation of a CIL rule, and if yes, how much weight should be given to them. In the latter, the interpretation is exercised over a legal rule. An analogy can be drawn here with the differentiation between the exercise of determining whether a document is a treaty or not pursuant to the definition contained in Article 2(1)(a) VCLT (treaty identification) and the separate subsequent exercise of treaty interpretation. In the process of treaty identification, courts examine the text and the language of a document in order to determine whether an intent to be bound can be discerned. 'This process has some interpretative features and undeniably leads to some rudimentary content determination, but no court has ever argued that this is legal interpretation in the strict sense. When they seek to interpret, they apply Arts. 31-33 VCLT, not Art. 2(1)(a)'.[437] In the case of CIL identification, it is similarly the case that the reasoning may contain some interpretive features leading to some rudimentary content determination. Nevertheless, this must be differentiated from the interpretation proper of the rule. Thus, it is not in fact the case that the operation of testing (B) against (D) lapses, or that in the context of CIL rules content merges with existence. Moreover, even if we were to concede that during CIL interpretation the interpreter may recall some of the evidence of state practice or *opinio juris* from the phase of identification, this would still not constitute a counter-argument to the overall claim that CIL rules are in fact interpretable.[438] This is because in this

---

[436] See *infra* section IV.

[437] Panos Merkouris and Nina Mileva, 'Introduction to the Series 'Customary Law Interpretation as a Tool' ' (2022) 11(1) ESIL Reflections 1, 5.

[438] This is also the argument forwarded by Gourgourinis, according to which an attempt at inter-

scenario, for the lack of a better analogy, this interpretative behavior could be likened to how sometimes in the interpretation of a treaty interpreters may rely on the preparatory texts to elucidate intent, object and purpose, or how they may look to subsequent practice to examine the application of the rule. Thus, an interpreter of a CIL rule might look back at evidence of state practice or *opinio juris* in the course of their interpretation of the rule, to answer some questions such as 'what prompted the formation of this customary rule?', 'what is the aim to be achieved with this rule?', or 'can we discern specific sub-elements of this rule if we look back to past behavior?'.

In light of these considerations, it must be concluded that the distinction that Bos' scheme tries to draw between the interpretation of treaties and CIL rules simply does not hold. It is also important to note that even if we accept the claim that treaty interpretation and CIL interpretation might differ both formally and in substance, this in no way implies that if we account for one we must necessarily discount the other. It seems that this type of reasoning is influenced at least in part by the fact that in international law our understanding of interpretation has largely or even exclusively been informed by the framework of treaty interpretation. Indeed, interpretation in international law has traditionally been understood as the process of assigning meaning to written texts, largely through the use of the methods enumerated in the VCLT.[439] If one conceives of interpretation in this restrictive paradigm where the interpretation of treaties is the guiding mold, then it is very likely that sources such as CIL would be considered not to fit. However, this kind of understanding of interpretation as an exercise applicable only to treaties is both unduly restrictive, and in fact not supported by international practice. Let us consider once again some examples from the jurisprudence.

In the jurisprudence of the ICJ, we find and example of the distinction between identification and interpretation in the *Certain Activities and Construction of a Road* judgment. Here, the Court began by reaffirming that prevention is an existing customary rule, by reference to earlier caselaw where this had been established.[440] By anchoring its analysis in earlier judgments where the rule had been identified, the Court sidestepped the need to re-engage in identification, and cleared the road for interpretation. It continued its reasoning by reaffirming the obligation to

pretation of a CIL rule would be circular because it would inevitably end back up at an evaluation of the elements. Gourgourinis (n 283) 56.

[439] Peat and Windsor (n 285) 3.

[440] 'As the Court has had occasion to emphasize in its Judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*: "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State." (*Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101.)'. *Certain Activities and Construction of a Road* (n 178) [104].

conduct an Environmental Impact Assesment (EIA) as an element of prevention, finding that this was not only narrowly applicable to the earlier *Pulp Mills* context but was rather a generally applicable obligation:

> Although the Court's statement in the *Pulp Mills* case refers to industrial activities, the underlying principle *applies generally* to proposed activities which may have a significant adverse impact in a transboundary context. Thus, *to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm*, a State *must*, before embarking on an activity [. . .] *ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment*.[441]

Moreover, the Court further observed that *if* the EIA confirms that there is a risk of significant transboundary harm, in order to comply with its due diligence obligation of prevention the state has to notify and consult with the potentially affected state.[442] With this pronouncement, it seems like the Court identified a sequential order in which the obligations need to be exercised in pursuance of prevention. First, the state needs to ascertain whether a planned activity has the potential to cause harm. If it does, the state needs to conduct an EIA. If the EIA confirms that there is a risk of significant harm, the state then needs to notify and consult the other concerned state in order to find appropriate measures to prevent or mitigate the harm. By reasoning in this way, the Court further clarified the customary obligation of prevention by interpreting it as a set of separate-but-related consecutive obligations.[443] This function of interpretation in the construction and concretization of customary rules is something that is examined in more detailed in Chapters 3 and 4 of the thesis.

Turning to an example from the ICTY, an interesting example of CIL interpretation comes from the partial dissenting opinion of Judge Shahabuddeen to the 'Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility' in the *Hadzihasanovic* case. Here, Judge Shahabuddeen began by ascertaining that 'the matter has to be determined by *interpreting* the existing principle of command responsibility and asking whether it applies to the case in hand.[444] He then proceeded to observe that:

> There is no question of the Tribunal having power to change customary international law, which depends on State practice and *opinio juris*. If State practice and opinio juris have thrown up a relevant principle of customary international law, the solution turns on the principle. *But that does not bar all forward movement: a principle may need to be interpreted before it is applied*. This is illustrated by acceptance by the jurisprudence of the Tribunal

[441] *Certain Activities and Construction of a Road* (n 178) [104] (emphasis added). [442] Ibid.

[443] For an earlier version of this argument see: Nina Mileva and Marina Fortuna, 'Environmental Protection as an Object of and Tool for Evolutionary Interpretation' in Georges Abi Saab, Kenneth Keith, Gabriele Marceau and Clement Marquet (eds), *Evolutionary Interpretation and International Law* (Hart Publishing 2019) 123.

[444] *Prosecutor v. Hadzihasanovic* (n 89) Partial Dissenting Opinion of Judge Shahabuddeen, 3.

> that the Tribunal may *clarify* the elements of a crime. In the process of clarification, the Tribunal has the competence, which any court of law inevitably has, to interpret an established principle of law and to consider whether, as so interpreted, the principle applies to the particular situation before it. This is so because a court called upon to apply a principle proceeds on the basis of a finding, express or implied, that the principle has a certain meaning, however self-evident that meaning may be [. . .].[445]
>
> In sum, the Tribunal has to take it that a principle of customary international law concerning command responsibility has been established by State practice and opinio juris. The particular question whether that responsibility extends to acts of a subordinate committed before the commander assumed duty has not fallen to be so far dealt with - at any rate, in any reported instance. *That, however, does not mean that such a situation is not capable of being governed by the established principle*. If it is capable of being governed by the established principle, that principle must be held to prevail. In acting accordingly, *the Appeals Chamber will not be changing customary international law but will be carrying out its true intent by interpreting and applying one of its existing principles*.[446]

Two observations can be made with regard to these excerpts. Firstly, the reasoning of Judge Shahabuddeen seems to confirm the concretizing role of interpretation in the context of CIL rules which are general and need to be made more specific. In the context of the customary rule of command responsibility discussed in these excerpts, this is evident in the acknowledgment that the general customary rule may be extended to particular more concrete situations through the act of interpretation. Secondly, and perhaps more interestingly, unlike the preceding examples from the ICJ on this subject, what seems to be happening in Judge Shahabuddeen's partial dissenting opinion is not so much the extrapolation of smaller constitutive elements from a general customary rule, but rather the extension of a general customary rule to a novel context. In this sense, one might be prompted to think about the role of interpretation in the evolution of customary rules and their adaptation and responsiveness to novel circumstances. The reader will recall here the earlier discussion of the 'problem of evolution' of CIL rules in Chapter 1. Indeed, it seems here that interpretation allows for a general customary rule to be extended to novel circumstances through what might be an instance of evolutive interpretation. This ability of interpretation to address the problem of evolution of CIL rules is explored in more detail in Chapters 3 and 4 of the thesis.

Examples of CIL interpretation as separate from identification may also be seen in investment awards rendered by the ICSID Tribunal. For instance, in the *Alex Genin* award, with respect to the customary standard of fair and equitable treatment, the Tribunal made the following observation:

> Under international law, this requirement is generally understood to "provide a basic and general standard which is detached from the host State's domestic law." *While the exact content of this standard is not clear*, the Tribunal understands it to require an "international minimum standard" that is separate from domestic law, but that is, indeed,

[445] Ibid [9] (emphasis added). [446] Ibid [10] (emphasis added).

> a minimum standard. Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.[447]

Thus, after indicating that the content of the standard is not clear, the Tribunal proceeds to interpret it and clarify its content by offering examples of what might constitute violations. Similarly, in the *Mondev International Ltd.* award, in clarifying the legal questions before it, the Tribunal observed that:

> Thus, the question is not that of a failure to show *opinio juris* or to amass sufficient evidence demonstrating it. The question rather is: *what is the content of customary international law* providing for fair and equitable treatment and full protection and security in investment treaties?[448]

Subsequently, the Tribunal proceeded to interpret the customary rule of fair and equitable treatment. First the Tribunal engaged in a comparative analysis of this standard as interpreted in previous jurisprudence,[449] and observed that the high threshold of what kind of conduct would amount to a violation established by earlier jurisprudence can no longer be maintained in contemporary times, due to (among others) the change of the role of the individual in international law.[450] This is an interesting approach taken by the Tribunal as it is comes close to what might seem like evolutive interpretation of a customary rule – i.e. the interpretation of a rule in the context of contemporary developments in fact or law.

These are only a few select international examples, and are in no way considered an exhaustive examination of the subject.[451] On the domestic level, examples of CIL interpretation separate from identification come from many different jurisdictions, and this body of cases will be examined in significant detail in Chapter 3 of this book. For now, what this brief overview of jurisprudence illustrates is that the argument against interpretability which maintains that CIL content is fully determined through the process of identification is not entirely realistic. More specifically, this line of argumentation assumes a degree of specificity in state practice and *opinio juris* that is simply not there.[452] Given the nature of the CIL process, the conduct that contributes to the creation of a customary rule is decentralized, rarely coordinated, and often stretched over a period of time. Naturally then, the rules that emerge from this process are often general and even vague. It is precisely in-

---

[447] *Arbitration between Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil and the Republic of Estonia*, Case No. ARB/99/2, Award (21 June 2001) [367] (emphasis added).

[448] *Mondev International Ltd. v United States of America*, Case No. ARB(AF)/99/2, Award (11 October 2002) [113] (emphasis added).

[449] Ibid [114-115]. [450] Ibid [116].

[451] For a detailed overview of the interpretation of CIL rules in the jurisprudence of international courts and tribunals see Marina Fortuna, *There is a Method to my Practice! Interpretation of Customary Rules in International Courts – Methods and Language Patterns* (PhD Thesis University of Groningen, forthcoming 2023, on file with author).

[452] Merkouris 2023 (n 3) 13.

terpretation that addresses this, as it allows for a general customary rule to become more concrete and operational.

A related problem in this regard is that if we maintain that the content of a customary rule is fully determined at the state of identification, we project a highly static image of customary rules. Contrary to the dynamic quality of customary rules which by their nature move with the legal community from which they emerged, this view ossifies customary rules and precludes the possibility for them to evolve and adapt to new circumstances through interpretation. In this sense, customary rules are denied an opportunity readily extended to treaties for instance to adapt to new legal or factual circumstances through evolutive interpretation.[453] Such a static view of CIL does not correspond with the very nature of custom as a source of law, and does not find support in the jurisprudence.[454] A potential counter-argument to my proposition here is the observation that this is not in fact a problem. It has recently been argued that through the custom identification exercise, courts simply 'take a snapshot of the content of a customary rule as it exists at a specific time. If that customary rule must be applied in later cases, determining its content would mean taking another snapshot of it, but as it exists at a different later point in time'.[455] On this view, because a CIL rule may continue to evolve after an international tribunal has formally ascertained its existence, 'determining their content is equivalent to ascertaining their existence at a specific point in time'.[456] Much like Bos' argument discussed above, this line of argument is also anchored in the belief that when it comes to CIL rules, content determination and identification overlap. In this sense, it similarly does not differentiate between the different "questions" that one asks at the stages of identification and interpretation, leading to different outcomes in both exercises. Moreover, understanding CIL identification as an act of taking 'snapshots' of the rule's content at different points in time creates a significant problem for the continuous existence of the rule. To say that every time a customary rule is invoked in a dispute the content of that rule is -reidentified at that point in time is to interrupt the continuous existence of the rule. This introduces a strong degree of legal uncertainty in the rule - if we subscribe to the view that the rule exists but that its content is identified every time anew, there is no way of knowing what the rule was in that period between two moments of identification. On the other hand, if we allow for interpretation, we acknowledge that there is a rule with a fixed general content that exists at all times, and then this rule is interpreted in particular cases to see how it applies to the situation at hand.[457]

On this point, it has been argued persuasively that if we do not allow for interpretation in the context of CIL, we do not have a way to adequately account

[453] On the subject of the clear possibility and permissibility of evolutive interpretation of treaties see Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 188-194.

[454] See *infra* Chapters 3 and 4. See also Merkouris 2023 (n 3) 13-37. [455] Lando (n 388)10. [456] Ibid.

[457] This is aptly illustrated by the reasoning of the ICJ in the *Frontier Dispute* case, where the Court

for the continued existence and operation of CIL rules.[458] This oversight relates at least partially to the above discussed perception of customary international law as a static source, and is certainly also at the center of the problem of evolution discussed in Chapter 1. Not recognizing interpretation as a stage of the continued existence of customary rules projects an image of customary rules as a set of still shots at different points in time, when those rules are being identified. The related implication is that customary rules need to be ascertained each and every time anew through the examination of state practice and *opinio juris*, rather than accepting the fact that once a CIL rule is identified it has a continued existence and is subsequently subject to interpretation. This kind of understanding 'goes against any notion of rules, be they treaty or customary in nature, changing and evolving through time, and having a certain degree of content-flexibility in order to adapt in a changing legal and societal landscape'.[459] While it certainly may happen that even once a customary rule is identified through an evaluation of state practice and *opinio juris* evidence of these two is evaluated again in subsequent instances, this will not be in order to re-stablish the already identified rule. Much more likely, it will be a check to evaluate whether certain practice is emerging that points to a modification of the rule or to its termination.[460] The point here is simply that accounting for interpretation allows us to realize the continued existence of customary rules, and adequately capture the various different operations of reasoning that take place in this regard.

Overall, the claims that interpretation is not possible or relevant in the CIL context because for customary rules 'content merges with existence' does not hold. This line of reasoning fails to differentiate between identification and content-determination, and is disproven by jurisprudence where these two operations take place separately. Moreover, these arguments project a level of specificity and fixedness onto customary rules which is simply not there. Finally, this line of reasoning fails to recognize that for customary rules, precisely due to certain inherent traits of the CIL process, interpretation is necessary in order to formulate a statement that

---

accepted the existence of a general customary rule of *uti possidetis* (tracing its origin to the decolonization of Spanish America) and then proceeded to apply and interpret this rule in the particular context of border delimitation between Burkina Faso and Mali. '[. . .] as soon as the phenomenon of decolonization characteristic of the situation in Spanish America in the 19th century subsequently appeared in Africa in the 20th century, the principle of *uti possidetis*, in the sense described above, fell to be applied. The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen *not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope*'. Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali) (n 219) [21] (emphasis added).

[458] Merkouris 2017 (n 3) 126. [459] Ibid, 135.

[460] See for instance the reasoning of the ICJ as to the continued validity of the effective control standard in the Bosnian Genocide case. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 24) [398-407].

specifies their content and meaning.[461] On this point, Alexander Orakhelashvili has persuasively demonstrated that custom interpretation relates to 'clarifying the modes and details of applicability of *general customary rules to specific situations* to which they are designed to apply due to their *general scope*'.[462]

iii. Scholarly research thus far confirms the possibility of CIL interpretation

Having examined and refuted arguments against the interpretability of CIL, let us now turn and examine some scholarship that accepts the possibility for CIL interpretation. A survey of older scholarship of international law indicates various works which acknowledge the possibility of CIL interpretation.[463] However, these works do not examine CIL interpretation in great detail, and it is only more recently that the question of interpretability has received more attention. Recent scholarly output on the topic of interpretation in international law increasingly recognizes that we need to widen our understanding of legal interpretation, and also account for this process in the context of sources other than treaties.[464] While the engagement with the subject of interpretation particularly in the context of customary rules is still at its scholarly beginnings, several authors have made contributions which are central to the project of a theory of interpretation for CIL.

The first among this is a taxonomy of possible scenarios that arise in the application of customary international law, developed by Robert Kolb.[465] According to this taxonomy, four scenarios may arise in the application of CIL. Firstly, a CIL rule may be identified without resort to interpretation. An example of this is the PCIJ's reasoning in the *Lotus* case, where the court 'analyzed and distilled the facts from various rare precedents' in order to determine the existence of a rule of customary law. 'The application of the law here seems to follow directly from the recognition of the existence of a rule, without the intermediate stage of preparation or concretization of the rule which manifests an interpretation of it'.[466] Put differently, the first scenario involves cases where the positive identification of a customary rule effectively resolves the dispute, and interpretation is not needed or will not occur. A second scenario arises if a court 'must establish a more complex rule, made up of a more contextual main proposition and possibly interspersed with a few exceptions'.[467] In Kolb's taxonomy, this is a scenario where the determ-

[461] Sur (n 389) 295. [462] Orakhelashvili (n 3) 496 (emphasis added).

[463] Carleton Kemp Allen, *Law in the Making* (6th ed, OUP 1958) 109-110; Charles de Visscher, *Problemes d'Interpretation Judiciaire en Droit International Public* (Pedone 1963); Richard Bilder, Oscar Schachter, Jonathan Charney and Maurice Mendelson, 'Disentangling Treaty and Customary International Law: Remarks' (1987) 81 ASIL Proceedings of the Annual Meeting 157, 159; Bleckmann (n 305) 521-528.

[464] Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015).

[465] Kolb (n 3) 219-231. [466] Ibid, 222-23 (unofficial translation of the original by author).

[467] Ibid, 223 (unofficial translation of the original by author).

ination of the existence of the rule is inextricably linked with interpretation. An example of this is the *North Sea Continental Shelf* case, where the ICJ had to determine the special circumstances which would constitute an exception to the application of the equidistance method for the delimitation of the continental shelf. Here, the court had to interpret the term "special circumstances" by looking at state practice in order to see where equidistance was not applied.[468] Thus, the second scenario is one when identification and interpretation take place jointly. The third scenario is one where identification and interpretation are two separate exercises, whereby interpretation follows the determination that a CIL rule exists. An example here is the *Nicaragua* case, where the ICJ first determined the existence of a customary prohibition on the use of force by reference to the UN Charter, and subsequently interpreted the prohibition to contain more specific elements.[469] The fourth and final scenario concerns cases where the court directly interprets the customary rule without previously engaging in identification. This scenario involves cases where the parties do not dispute the existence of a customary rule, but do not agree on its content. One example of this is the *Land, Island, and Maritime Frontier Dispute*,[470] where the existence of the customary rule of *uti possidetis* was undisputed. Rather, it was a question of applying the rule to the present case and determining its meaning and scope in the present context.[471] This taxonomy is based on the more foundational premises (which Kolb treats as given) that customary rules have a lexical garment (i.e., text)[472] and that there is a difference between the acts of identifying and interpreting a CIL rule.[473] These four scenarios greatly inform the discussion of CIL interpretation throughout this thesis.

A further contribution to a theory of CIL interpretation is found in the work of Panos Merkouris, and concerns the theorization of an important oversight in existing CIL scholarship, namely, the conflation of the interpretation of state practice as an element of CIL and the interpretation of CIL rules proper.[474] Oftentimes in the study of CIL the term 'interpretation' has been used to denote 'interpretation

[468] Ibid, 224-25. [469] Kolb (n 3) 225.

[470] *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) (Judgment) [1992] ICJ Rep. 351.

[471] Kolb (n 3) 226.

[472] 'The jurist who thinks of a customary norm formulates it automatically. He gives it a lexical garment in his mind by projecting before his inner eye, for example, the following rule [. . .]. It is this ability to be expressed in explicit terms that codifies the custom; once codified, the customary rule can be the object of interpretation like all other text'. Kolb (n 3) 221 (unofficial translation of the original by author).

[473] '[. . .] we can identify steps (1) and 2(2) of determining the existence and the scope of the rule. They are very close, although they do not coincide. Thus, a rule may be established in a certain area, for example the territorial sea, but the question may arise whether it also applies in the contiguous zone and possibly even in the exclusive economic zone, In this case, the existence of the rule is not in doubt, but its scope may require further investigation'. Kolb (n 3) 221 (unofficial translation of the original by author).

[474] Merkouris 2017 (n 3) 138-139. See also Merkouris 2023 (n 3) 13

of state practice' which is the process of evaluating evidence of state practice for the purposes of CIL identification; or to denote both this evaluation (interpretation) of state practice and the interpretation of CIL rules.[475] This in turn has led both to a conflation of these two substantively different operations, and to the faulty perception that in fact interpretation in the context of CIL is nothing new (referring here to the 'interpretation of state practice').[476] What is crucial here is to understand that in fact when we talk about the evaluation of state practice for the purposes of CIL identification, while we may use the term 'interpretation' in its extended sense, this is not interpretation strictly speaking. This is because this appraisal of state practice for the purposes of identification is merely a process of evaluating the evidence to assess whether and in what way they might contribute to the formation of a customary rule. Thus, while this might be called an 'interpretation' of state practice loosely speaking, this should in no way be equated to the interpretation of an extant legal rule (CIL rule).[477] By shedding light on this distinction, Merkouris' analysis makes a crucial point that underpins the understanding of CIL interpretation in the remainder of this thesis.

The second and related insight of Merkouris' scholarship on this subject is that various international treaties and conventions do in fact envisage the interpretation of customary rules as separate from their identification. For instance, Article 21 of the Rome Statute which delineates the applicable law of the International Criminal Court (ICC) posits that:

> 1. The Court shall apply:
> [. . .] (b) In the second place, where appropriate, applicable treaties and the principles and *rules of international law*, including the established principles of the international law of armed conflict;
> 2. The Court may apply principles and rules of law *as interpreted in its previous decisions*.[478]

Already at point (2) with the references to 'rules of law as interpreted in its previous decisions' it is made clear that it is possible for the court to interpret customary international law. An even more explicit confirmation of this is found in point (3) of the provision where it is outlined that:

> The application *and interpretation of law pursuant to this article* must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as [. . .][479].

[475] See Ammann (n 296); Nadia Banteka, 'A Theory of Constructive Interpretation for Customary International Law Identification' (2018) 39(3) Michigan Journal of International Law 301; Hollis (n 282) 78; Schauer (n 399) 13; Roberts (n 1) 757.
[476] Merkouris 2017 (n 3) 138. [477] Ibid, 138-139. [478] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Article 21(1)&(2) (emphasis added).
[479] Ibid, Article 21(3) (emphasis added).

On this latter part of the provision, it has been observed that 'Article 21(3) [. . .] not only allows for interpretation of customary international law, but would also seem to underscore and promote a systemic interpretation', by requiring that any interpretation of the law must be consistent with internationally recognized human rights.[480]

Another striking example comes from Article 36 of the ICJ Statute.[481] While the recognition of CIL interpretation is not explicit in the text of this provision, an examination of its preparatory works demonstrates that in fact the drafters of the Statute readily recognized the possibility for customary rules to be interpreted.[482] Article 36 of the ICJ Statute was an almost verbatim reproduction of its counterpart provision in the PCIJ Statute.[483] During the preparatory discussions for the ICJ Statute, the main focus was on the compulsory jurisdiction of the Court and not much attention was paid to the formulation of this article. For this reason, it is the preparatory discussions of the PCIJ Statute that are more instructive to our present point.

The wording of Article 36 PCIJ Statute is based on a draft prepared by Lord Philmore for the Advisory Committee of Jurists.[484] In the course of the discussion, an amendment to Lord Philmore's draft was proposed by M. Ricci-Busatti to the following effect:

> The Permanent Court of International Justice is competent to decide disputes between States concerning cases of a legal nature which deal with:
> a. the interpretation or application of a treaty;
> b. *the interpretation or application of a general rule of international law*.[485]

This proposal was put forth because Ricci-Busatti felt that the wording in Lord Philmore's draft was 'defective and should be amended'.[486] There was agreement on this point from other members of the Committee.[487] However, Lord Philmore pointed out that the Covenant of the League of Nations contained the same wording as his proposal, and that 'it would be unwise to abandon this basis'.[488] Following this, most of the discussants did not oppose Ricci-Busati's proposed amend-

---

480 Merkouris (n 399) 249.

481 Article 36 reads in pertinent part: '[. . .] 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law'.

482 Merkouris (n 399) 251-254.

483 See Article 36 PCIJ Statute which reads in pertinent part: 'The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, [. . .], declare that they recognize as compulsory [. . .], the jurisdiction of the Court in all or any of the classes of legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law'.

484 Advisory Committee of Jurists (n 51) 252. 485 Ibid, 275 (emphasis added). 486 Ibid, 265.

487 See for instance the agreement by M. Hagerup. Advisory Committee of Jurists (n 51) 264.

488 Advisory Committee of Jurists (n 51) 264.

ment, but felt that the proposal only concerned drafting.[489] In light of this, Lord Philmore's original formulation eventually remained. The important point here is that it seems that the Committee of Jurist did not have an issue with the content of the proposed amendment, and was merely concerned that the formulation is consistent with earlier instruments.[490] This is evident in the fact that none of the committee members raised substantive objection to the claim that 'a general rule of international law' (i.e., a customary rule) could be interpreted. The wording of 'any questions of international law' thus merely reflected a sort of inertia towards established wording, rather than a reluctance on or opposition to the interpretability of CIL.

The third and final insight from scholarship on the subject of CIL interpretation concerns certain inherent traits of CIL as a source of international law that have a direct bearing on the role of interpretation in the continued existence of this source. For instance, the scholarship of Orfeas Tassinis draws attention to the fact that 'our working theoretical models of custom tend to overlook how customary international law structurally differs from the types of legal materials, such as treaties or legislations, whose legal material can arguably be conceptualized in discrete terms'.[491] Two traits of CIL in particular come to the fore due to these considerations, namely, custom's 'inherent plasticity' and the 'difficulty of clearly individuating custom's legal rules'. Tassinis employs the term 'plasticity' to denote the ability of custom to be molded into different shapes and lead to rules of different scope, without the need to add new state practice and *opinio juris* to the pool of evidence each time. This elucidates the fact that CIL rules may come in different shapes and sizes concerning the extent of generality or specificity of the rule, the material scope of the rule, or the actors to which it is addressed.[492] Naturally then, interpretation plays a key role in the delineation of all these aspects. A good illustration of this point is the reasoning of the ICJ in the *Arrest Warrant* case,[493] or in the *Territorial and Maritime Dispute* case.[494] The reference to the 'difficulty of clearly individuating custom's legal rules' is used to raise questions about what marks the boundaries between two putative customary rules so that each of them

---

[489] The Procès Verbaux notes the following: 'After the President's speech, a discussion took place concerning the details of M Ricci-Busatti's amendments. It appeared that *the members were agreed concerning the fundamental questions dealt with in the text of the draft*, and that the amendments suggested by M. Ricci-Busatti affected rather the drafting. Advisory Committee of Jurists (n 51) 264 (emphasis added).

[490] Merkouris (n 399) 253. [491] Tassinis (n 389) 267. [492] Tassinis (n 389) 248-255.

[493] Where the Court extended immunity traditionally awarded to heads of states also to ministers of foreign affairs based on interpretive reasoning and without considering additional state practice or *opinio juris* on this point. *Case concerning the Arrest Warrant of 1 April 2000* (n 22) [54-55].

[494] Although it ended up not applying the customary rule of *uti possidetis juris* to the particular case, the Court observed that this rule which had previously been applied to the delimitation of land boundaries could also in principle 'in certain circumstances, such as in connection with historic bays and territorial seas, play a role in a maritime delimitation'. *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Carribean Sea* (Nicaragua v Honduras) (Judgment) [2007] ICJ Rep. 659 [232].

needs to be supported separately by state practice and *opinio juris*, and when is it that we identify a customary rule as a new rule as opposed to an interpretation of an existing rule.[495]

The main takeaway from the discussion in this preceding section is that arguments against the interpretability of CIL are not persuasive, and are not in fact supported by international jurisprudence and instruments. Moreover, scholarship that has engaged with this topic thus far has pointed to numerous examples of CIL interpretation, and has demonstrated the theoretical relevance of accounting for interpretation as an operation in the continued existence of CIL. That said, views on what precisely constitutes interpretation in the context of CIL differ. Therefore, and building on the work discussed thus far, I now turn to a description of "CIL interpretation" as the term will be understood and employed in the remainder of this thesis.

IV. The Position of Interpretation in the Life of a CIL Rule

The jurisprudence and scholarship examined thus far have showed us that beyond the identification of many examples where judges engage in the interpretation of CIL, accounting for the process of CIL interpretation bears a lot of theoretical relevance as well. In the absence of an interpretative process, there is no persuasive explanation about what happens to a CIL rule after it has been identified. This is because once a rule of CIL is identified for the first time through an assessment of state practice and *opinio juris*, its existence is not restricted to the moment where it was identified for the first time; rather it is a continuous one. When the same rule is invoked in subsequent cases before the same or a different judicial body, the judicial body does not usually go into the exercise of re-establishing that the rule in question is a customary one by reassessing state practice and *opinio juris*.[496] Instead, the rule is *interpreted* within the given legal and factual context of the new case at hand. Moreover, outside of the dispute-settlement context, a customary rule does not only exist in the isolated moments when it is identified for the purposes of a particular case. Rather, its existence in the complex of international legal relations is also a continuous one. In this sense, interpretation allows us to account for the continued existence and operation of a customary rule. But when exactly does interpretation happen?

i. The difference between interpretation and identification

This thesis situates the process of CIL interpretation in a timeline of continuous existence of CIL rules (CIL timeline).[497] The CIL timeline begins with the form-

[495] Tassinis (n 389) 256-258.
[496] Merkouris (n 225) 241. See also the discussion on this point in Section III.ii *supra* 89-98.
[497] For a similar discussion on the interpretation of CIL by reference to the CIL timeline see Nina

ation of a customary rule through the two constitutive elements of state practice and *opinio juris*. The formation period refers broadly to the period preceding a concrete invocation or identification of the customary rule. During this period there is no customary rule to speak of, and rather states engage in conduct which may be considered for the purposes of the identification of a concrete customary rule at a later moment. This period is followed by that of the emergence of the customary rule where the conduct of states converges around a putative customary norm. During the period of emergence, states are or become aware of each other's conduct surrounding a particular putative norm, respond to each other's conduct by acceptance or contestation, and may even make relevant pronouncements concerning a putative CIL rule. Once state practice and *opinio juris* have reached critical mass, their analysis can lead to the identification of a rule by a relevant authority, usually through an inductive evaluation of the two elements.[498] Identification yields a general rule of customary international law, based on an analysis of state practice and *opinio juris*.

I shall take a small detour here to reflect on an argument which has recently emerged in scholarship, as to the so-called 'custom-making moment' of customary international law. This argument is relevant to our present discussion insofar as it posits that, while in reality there is no exact law-making moment for custom, one is nevertheless presumed in order to be able to point to a moment in the past when practice and o*pinio juris* coalesce, and thus ground CIL in a form of social reality.[499] Furthermore, such a presumption of a custom-making moment is deemed necessary in order to be able to differentiate CIL identification from CIL interpretation. The implication here is that unless a custom-making moment is recognized, the distinction between CIL identification and CIL interpretation cannot be upheld.[500] This conclusion as to the necessity of a custom-making moment is unpersuasive. Firstly, while it is indeed the case that an exact custom-making

---

Mileva, 'The Role of Domestic Courts in the Interpretation of Customary International Law: How can we Learn from Domestic Interpretive Practices?' in Panos Merkouris, Jörg Kammerhoffer and Noora Arajärvi (eds), *The Theory and Philosophy of Customary International Law and its Interpretation* (CUP 2021) 453; Nina Mileva and Marina Fortuna, 'Emerging Voices: The Case for CIL Interpretation – An Argument from Theory and an Argument from Practice' (*Opinio Juris*, 23 August 2019) https://opiniojuris.org/2019/08/23/emerging-voices-the-case-for-cil-interpretation-an-argument-from-theory-and-an-argument-from-practice/ accessed 15 October 2020.

[498] Merkouris (n 215) 134-135.

[499] d'Aspremont (n 29) 48-58; Jean d'Aspremont, 'The Custom-Making Moment in Customary International Law' in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory and Philosophy of Customary International Law and its Interpretation* (CUP 2022) 29.

[500] d'Aspremont argues in particular: 'This is why those scholars that argue that the interpretation of the content of customary international law can be distinguished from the interpretation of its legal existence build on this two-dimensional temporality. In that sense, the current scholarly attempts to distinguish the interpretation of the making of the customary international law from the interpretation of its content can be seen as predicated on this presumption of the custom-making moment. d'Aspremont (n 29) 56-57.

moment can rarely (if ever) be identified for a particular customary rule, this does not mean that there is no such moment, or, more accurately, a custom-making period. Precisely because customary rules are grounded in social reality, it is usually the case that over the course of a certain period conduct converges and points to the existence of a customary rule. On this point it has been aptly argued that the custom formation process is somewhat similar to the *sorites* paradox.[501] Just because we cannot pinpoint the exact moment when the collection of grains of sand turns into a *heap*, that does not mean that the heap does not exist.[502] The point is similarly illustrated if we wonder when a balding person is considered to be bald? Would one hair on the head be sufficient to claim that the person is balding but not yet bald? The argument here is simply that although there might be a grey area where it will be difficult to determine whether a customary rule has emerged, on both sides of this grey area there will be others where the rule has clearly not emerged, and others where it has.[503] While this makes it indeed difficult to point to an exact moment in time when the rule was formed, in practice such an absence of a precise custom-making moment does not seem to be so relevant. For example, in the *Chagos Advisory Opinion* the ICJ did not find it necessary to point to an exact moment in time when the right to self-determination emerged, and was rather satisfied with establishing that the rule was formulated sometime in the period before the time in question.[504] This was in line with the arguments of some of the intervening states who similarly maintained that self-determination crystalized into a customary rule already before the events in question, without pinpointing an exact moment in time when this happened.[505] In light of this, it is not clear why an account which separates CIL identification from CIL interpretation would necessarily have to subscribe to the idea of a custom-making moment. While the identification of a customary rule represents a precise moment in time, this is not contingent upon a similarly precise moment in time when the rule was made. Moreover, the interpretation of a CIL rule identified in this manner, is similarly not dependent on a presumption of a custom-making moment.

---

[501] Merkouris (n 3) 14. See also Merkouris and Mileva (n 437) 5.

[502] See on this point Dominic Hyde and Diana Raffman, 'Sorites Paradox' (*Stanford Encyclopedia of Philosophy*, 26 March 2018) <https://plato.stanford.edu/entries/sorites-paradox/> last accessed 30 December 2021.

[503] Merkouris (n 3) 14.

[504] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep. 95, [140-162]. For a discussion of the implications of the Court's approach to question of inter-temporality see Stephen Allen, 'Self-determination, The Chagos Advisory Opinion and the Chagossians' (2020) 69(1) International and Comparative Law Quarterly 203, 208-210.

[505] See indicatively *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in* 1965 (n 504) (Written Statement submitted by the Government of the Republic of South Africa) [11 March 2018] 26 [62-63]; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in* 1965 (n 504) (Statement of Belize) [30 January 2018] 5 [2.2 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in* 1965 (n 504) (Written Statement of the Kingdom of the Netherlands) [27 February 2018] 5 [3.2-3.8].

Returning to our central discussion, it is important to note that a form of interpretive reasoning may also take place at the stage of identification, in the sense of assessment of the relevant practice and *opinio juris*. The identification exercise includes choices in the selection of certain custom-formative practices over others in order to infer the general rule, as well as choices in how we describe these practices which lead to the identification of the rule.[506] The reasoning employed in these choices and descriptions is by necessity interpretive. However, this is not interpretation of the customary rule because this rule has not been confirmed to exist yet. Rather, what happens at the stage of identification is an evaluation of the evidence of state practice and *opinio juris* in order to assess whether they qualify for the purposes of establishing a customary rule and whether they in fact point to the existence of a customary rule.[507] Interestingly, on this point, it has been argued that the custom-identification process includes a third consideration in addition to state practice and *opinio juris*, namely, a 'requirement that the standard whose customary status is tested be norm-creating'.[508] This requirement is traced back to the ICJ's reasoning in the *North Sea Continental Shelf* judgment, where the Court observed that in order to claim that a certain customary rule emerged out of a treaty provision, that provision should be 'of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'.[509] This pronouncement of the Court, the argument goes, should not be accepted only in the narrow case of treaty provisions giving rise to customary rules, but also in the broader identification of all customary rules. 'The requirement that the standard whose customary status is tested be norm-creating can also be construed as a very basic cognitive prerequisite that applies to any custom-identification. [...] Practice and *opinio juris* are constituted and observed through the postulation of a referent, that is a normative standard that takes the form of a *do* or a *don't*'.[510] The evaluation of state practice and *opinio juris* against this postulated norm-creating standard would be a form of interpretive reasoning employed for the purposes of CIL identification. In this sense as well, it may indeed be said that there is interpretation (or rather a form of interpretive reasoning) also at the stage of identification.

Some scholars do in fact employ the term "interpretation" to also refer to the reasoning that takes place at the stage of identification. For instance, in her reflective interpretive approach discussed above, Roberts speaks of multiple eligible *interpretations* of the evidence (state practice and *opinio juris*) which present themselves with respect to the existence or not of a customary rule. Relying on the example of the customary prevention of torture, Roberts argues that rather than being fixed considerations, state practice and *opinio juris* are open to "interpreta-

[506] Tassinis (n 389) 240-244.
[507] On this point see for more details ILC Conclusions on Customary International Law (n 7) Conclusion 6; Conclusion 10.
[508] d'Apsremont (n 15) 43-44. [509] *North Sea Continental Shelf Cases* (n 66) [72].
[510] d'Aspremont (n 29) 43.

tion". The reflective interpretive approach is aimed at balancing the evidence of the two elements in order to arrive at the most coherent explanation in the case of multiple eligible *interpretations*.[511] It is clear here that Roberts employs the term interpretation to speak of the reasoning exercised with respect to the elements of CIL, rather than the reasoning exercised with respect to a CIL rule. Similarly, Nadia Banteka employs the notion of 'constructive interpretation' to denote a process where state practice and *opinio juris* are evaluated as interwoven elements which jointly formulate a customary rule. The goal of Banteka's constructive interpretation is to contextualize a practice so as to arrive at an interpretative outcome which 'proposes the most value for the practice all other things being equal'.[512] Once again, here "interpretation" is used to refer to the reasoning which takes place at the stage of identification of a CIL rule, and the reasoning that is exercised with respect to the evaluation of state practice and *opinio juris* as elements of a CIL rule. In a similar vein, Duncan Hollis speaks of the concept of 'existential interpretation' which he describes as the process of deciding whether or not the subject of interpretation exists or has validity.[513] Hollis characterizes existential interpretation as an inherently binary inquiry whose structure assumes only one of two possible answers – either yes the subject exists and is valid for further interpretive processes, or no the subject does not exist and is excluded from further legal interpretation.[514] In the context of CIL, the existential inquiry asks if a particular act constitutes 'state practice' or not. The answer 'yes' legitimizes the evidence for purposes of further exposition (what does a particular example of state practice mean?) or relational analysis (what's the probative value of the evidence; how strong or weak is the evidence given other examples?). The answer 'no' means that the evidence cannot be given weight or relevance for the purposes of establishing a customary rule.[515] Hollis' account of interpretation clearly refers to the reasoning which takes place at the phase of identification, and which is employed to determine whether a CIL rule has come about. However, the way in which the notion of 'existential interpretation' is formulated in the context of CIL seems to also allow for a subsequent different form of interpretation of a CIL rule, by acknowledging that after the "yes or no" outcome of existential interpretation the material may go forward onto further legal interpretation. In fact, in his work Hollis also accounts for other forms of interpretation and differentiates them with respect to their function and possible outcomes.[516] In this sense, his account comes close to the argument put forth by Tassinis who also conceives of interpretation as a process which takes places in all the stages of genesis and existence of a CIL rule, and as such may play a different role at different stages.[517]

While we might call the reasoning that takes place at the phase of identification "interpretation", it would have to be borne in mind that this may only be done if we conceive of "interpretation" as a broad descriptive term rather than a term that de-

[511] Ibid. [512] Banteka (n 475) 304. [513] Hollis (n 282) 79. [514] Ibid, 87. [515] Ibid.
[516] Ibid, 85-86. [517] Tassinis (n 389) 235.

notes the interpretation of a legal rule *stricto sensu*.[518] More importantly, whichever term we choose for the evaluation of state practice and *opinio juris* for purposes of identification, the crucial point is that a distinction must be maintained between this and the interpretation of a CIL rule once it has been identified. This is because these two operations are substantively different with respect to both their content and their outcome. The reasoning employed at the stage of identification is concerned with questions about the relevance and weight to be given to evidence of state practice and *opinio juris*, and the final outcome of this reasoning is a binary one – a CIL rule is either determined to exist or it is not. The reasoning employed at the stage of interpretation is concerned with the determination of the content and scope of a legal rule (CIL rule) and how this rule applies to the case at hand, and this reasoning may have a variety of outcomes depending on the rule being interpreted and the legal and factual circumstances it is being interpreted in. Therefore, even if one would like to dub the evaluation of state practice and *opinio juris* for the purpose of identification as "interpretation" in the way this term is employed by Tassinis, Roberts and Banteka, or "existential interpretation" in the way this term is employed by Hollis, this must be distinguished from the interpretation of a formulated CIL rule which only takes place after identification.

It is only by distinguishing between these two ways of using the term "interpretation" (and preferably using "interpretation" only for the latter operation) that we may accurately account for the different types of reasoning that take place in each stage. Moreover, it is only by distinguishing between "CIL identification" and "CIL interpretation" that we accurately capture the fact that the interpretation of a CIL rule is a process which manifests in a different and separate way from the evaluation of state practice and *opinio juris* for purposes of identification, a process which is subject to a separate methodology, and a process which merits its own separate study. In light of these considerations, for the remainder of this book the reference to "CIL interpretation" will be used to denote the interpretation of an existing CIL rule.

The role of interpretation in the continuous existence of customary rules is unpacked in more detail in Chapters 3 and 4 of the thesis. Nevertheless, a couple of preliminary observations are in order here. Firstly, interpretation plays a concretizing role in customary rules, in that it is the process through which the content of customary rules is specified. Seen as customary rules are general by their nature, the act of interpretation is necessary in order to arrive at their more concrete formulation. In this sense, it is through interpretation that we may arrive at more specific sub-elements of a general customary rule, or more specific sub-obligations that flow from it. Secondly, and relatedly, interpretation is a crucial operation in the evolution of customary rules. In fact, interpretation is essential for a customary rule to be able to adjust to new developments of fact or law in the legal community

[518] Merkouris (n 215) 138.

of which it is a part. Contrary to some views, customary rules are not static rigid legal rules which have no place in modern legal systems. Rather, customary rules are by their nature dynamic because the move together with the community from whose conduct they emerge. As such, they require interpretation in order to be able to correspond to emerging new circumstances.[519]

A final phase in the continued existence of a CIL rule is the phase of modification. It is important to point out that this is not a necessary phase in the timeline of every CIL rule, and it may well happen that a CIL rule continues its existence without undergoing modification. Nonetheless, in cases where a customary rule goes through a phase of modification, interpretation will play a role. More specifically, when faced with a claim that a certain customary rule no longer has the same content because of a change in practice or the emergence of contrary conduct, a court will necessarily need to engage in interpretation in order to delineate the content of the existing rule and assess it against newly emergent (contrary) practice. It must be acknowledged that the line between evolution and modification is porous and difficult to draw in the context of custom, and this point is dully addressed in Chapters 3 and 4 of this thesis. Nevertheless, the topic of modification of customary rules strictly speaking is beyond the scope of the thesis, and will not be addressed further.

ii. Interpretation as the "solution" to CIL's problems: a first view

I would now like to draw the reader's attention back to the earlier discussion in Chapter 1, concerning some of the main problems which persist in the operation of CIL. In Chapter 1 above we saw that the two-element formula remains the dominant form with respect to CIL, and represents the formal language in which we may express claims as to the existence or not of customary rules. In this sense, the two-element formula serves two functions. Firstly, it instructs us on the formal style in which arguments about customary international law must be made in order to seem professionally plausible. Secondly, it is a framework which is both sufficiently "strict" to be able to provide a common formal understanding of CIL, and sufficiently "lenient" so as to enable us to develop new arguments with regard to CIL. At the same time, this conception of custom is plagued by various problems of theory and practice which cannot be ignored. In particular, Section III of Chapter 1 analyzed three broad categories of problems that persist with respect to CIL, namely, i) problems emerging from the incoherent application of the two-element doctrine; ii) problems of CIL evolution and change; and iii) problems emerging from the larger systemic context of international law.

The analysis of the enduring two-element formula on the one hand, and these persistent problems on the other, led us to the observation that two things seem

---

[519] See on this point Germany, 'On the Application of International Law in Cyberspace – Position Paper' (n 27) 16.

to be simultaneously true. Firstly, that the traditional approach describing CIL through the two-element formula is here to stay as far as thinking about CIL formation and identification is concerned. Secondly, that while it is the dominant paradigm, the two-element approach suffers from deficiencies and poses problems for the theory and application of CIL. These two parallel realities leave us with the task of reconciling two seemingly irreconcilable contradictions, so that we may go forward in our understanding of and reliance on customary international law. Moreover, we are faced with this task against the background awareness that customary rules continue to play a fundamental role in the international legal system.

Taking a break for a moment from the discussion of CIL and its problems, Chapter 2 turned to a discussion of interpretation in international law more generally, and then in the context of CIL more specifically. This was done with a view to examining whether the interpretation of CIL is possible, and what exactly are the implications of accounting for this operation in the context of CIL. Having examined all of these considerations, the main argument which emerged from this chapter is as follows. It is possible to address the identified problems of CIL without advocating for a modification or complete abandonment of the two-element formula, and this can be done by accounting for interpretation as an operation which is integral to the continued existence of customary rules. Accounting for interpretation in the continuous existence of CIL rules gives us the opportunity to better understand the way CIL rules function, and the way they are applied in the practice of international law. Consequently, accounting for interpretation allows us to see the problems associated with this source of law in a new light and find ways to address them that have previously not been considered. This is a worthwhile endeavor because it enables us to reconcile two seemingly irreconcilable realities with respect to the way CIL exists and operates in international law, without disputing or abandoning the common underlying structures. Beyond the appeal of harmony, this also enables us to put forward a renewed understanding of CIL which can gain traction in the practice of various relevant actors and affect the way this source is understood and relied upon in the practice of international law.

While the elements of this argument are elaborated in detail in the subsequent chapters of this thesis, several preliminary observations are already in order. Firstly, many of the instances considered as examples of problematic or incoherent identification of CIL rules may in fact be more adequately recast as instances of CIL interpretation (or misinterpretation). For instance, the concept of 'functional deduction' as an example of problematic CIL identification in the *Arrest Warrant* case,[520] may in fact better serve as an example of teleological interpretation of the custom-

[520] See on this Talmon who argues that in the *Arrest Warrant* case '[a]fter asserting without proof or reasoning that foreign ministers 'enjoy immunities from jurisdiction in other States', the ICJ then looked to customary international law to define the exact content of these immunities'. Talmon (n 2) 425. Talmon characterizes this as an instance of functional deduction in the identification of customary rules.

ary rule of immunity. Similarly, as discussed in detail in Chapter 4 of this thesis, the concept of 'normative deduction'[521] may in fact be better understood as the concretizing function of CIL interpretation. Overall, the argument here is that using the lens of interpretation allows us to analyze examples from the jurisprudence in a new and more accurate way. If we account for a process of interpretation, we are no longer pressed to fit all forms of judicial reasoning related to CIL in the category of identification, where inevitably many of them end up looking like problematic or flawed reasoning. This is an important realization because it shows us that in fact what might have for a lack of category been characterized simply as judicial reasoning which is not CIL identification (and therefore somehow problematic) is actually CIL interpretation. While recasting these forms of reasoning as interpretation comes with a similar risk, it is important to bear in mind that interpretation in international law does not mean that any and every argument goes. As discussed in Section II above, legal interpretation has various constraints which are commonly recognized in international law, and these constraints serve the purpose of delineating what is a permissible or defensible interpretation of a particular rule versus what is not. In light of this, the options with respect to CIL are not, or should not be, either identification or nothing. Many of the examples from Section III above show us that actually judges do engage in interpretation of CIL. These might have gone unrecognized in scholarship either because the author has not considered interpretation in the context of CIL, or does not subscribe to the view that CIL can be interpreted. However, we must allow for interpretation as an analytical lens here, because otherwise we fail to adequately capture what is in fact happening and end up analyzing reasoning in the narrow false duality of either identification or bad reasoning.

Secondly, accounting for interpretation enables us to understand that CIL rules have a continuous existence as legal rules, and as such are able to evolve over time and adapt to a changing legal and societal landscape. This goes to the core of the problems of CIL evolution, as well as the problems emerging from the larger systemic context of international law. By accounting for interpretation, we widen the field of analysis and we are able to conceive of "solutions" to these problems at the stage of interpretation. Thus, rather than attempting to solve these problems by re-theorizing the formation and identification of custom through a modification or dismissal of the two-element approach, we are able to address these issues at another stage. For example, it is at the stage of interpretation when we may (re)evaluate an older CIL rule in light of subsequently emerged fact or law, or in light of other relevant rules which exist in the contemporary legal system. Moreover, by accounting for interpretation and bringing it within our domain of analysis, we are able to recognize it, anticipate when it can happen, and regulate it through the development of rules or guidelines. With this, we are simultaneously

[521] Talmon defines normative deduction as 'new rules [being] inferred by deductive reasoning from existing rules and principles of customary international law'. Talmon (n 2) 423.

able to allow for a degree of flexibility for CIL rules to evolve and at the same time a degree of restrain which demarcates when and how this evolution may take place. Overall, the argument made here is that by looking at the problems identified in Chapter 1 through the lens of interpretation, and recasting our answers as 'solutions' on the interpretative level, we begin to systematically delineate a field of discussion which allows us to develop a new understanding of how CIL rules operate and how we may continue to rely on them in the practice of international law.

Chapter 3

The Interpretation of Custom by National Courts: Lessons on Purpose and Method

I. Introduction

In Chapters 1 and 2, I examined the foundational concepts which underpin the construction of a theory of CIL interpretation – namely, CIL and interpretation – from the perspective of international legal theory and practice. In doing so, I arrived at the answer to two foundational questions – what it is we speak of when we speak of CIL, and what it is we speak of when we speak of interpretation. In this way, the stage was set for speaking about the interpretation of CIL as a specific and separate operation in a rule's continued existence. It is now time to turn to a more detailed discussion of how the operation of interpretation takes place in the practice of courts and tribunals. The following two chapters (chapters 3 and 4) examine how interpretation operates in the practice of courts and what we can extrapolate from this for the purpose of formulating a theory of interpretation for CIL. Chapter 3 looks at the practice of national courts, and formulates observations about the methods they use, the reasons for these methodological choices, as well as the limits to the interpretive function. Based on these examinations, I arrive at the operative findings of the thesis with respect to the *functions* of interpretation in the context of CIL. The functions of interpretation are theorized in Chapter 4, where the findings are also tested against examples from the practice of international courts.

The present chapter is dedicated to addressing the question *what can we learn from national courts about the interpretation of custom*? It examines the interpretation of CIL as found in the practice of national courts. The focus on the case law of national courts is motivated by two reasons.[522] Firstly, scholarship on the role of national courts in the development of international law has persuasively demonstrated that national courts contribute to international law both formally and informally, especially in areas where there are lacunae or the law is yet to be developed. Thus, the practice of national courts with respect to the interpretation of custom is a valuable source in our study and understanding of this developing field. Secondly, by

[522] For some of the earlier research that led to the formulation of these claims see Mileva (497) 453. See also Cedric Ryngaert, 'Customary International Law Interpretation: The Role of Domestic Courts' in Panos Merkouris, Noora Arajärvi and Jörg Kammerhofer (eds), *The Theory Practice and Interpretation of Customary International Law* (CUP 2022) 481.

turning to national courts we open the door to a wealth of cases which can provide us with examples and insight into the interpretation of custom. Depending on the legal system in place, national courts may be faced with the task of interpreting not only CIL but also domestic custom. Thus, national courts are uniquely positioned to provide insight into the methodology of interpreting custom as a source of law. As the discussion below demonstrates, across national courts there are certain common methods and approaches that can be discerned when these courts interpret customary law. These commonalities enable us to draw general conclusions as to the function of interpretation, and may also lead to the identification of some general methods of interpretation for customary law. Bearing these considerations in mind, the chapter provides an overview of the way custom is interpreted by national courts, and formulates observations as to the purpose and method(s) of interpretation emerging from the sample of cases studied.

While this chapter discusses the approaches of various national courts to the interpretation of customary law, it is in no way meant as an exhaustive analysis on the subject. In this sense, the chapter does not delve into a detailed examination of the legal system and practice of each state whose national cases are mentioned, nor does it provide an exhaustive overview of domestic legal theories on the topic of customary law and interpretation. This is beyond the scope of the thesis, and is not necessary for the argument that is being developed. Rather, the analysis presented here is framed in terms of the more general relationship between national and international law, and in particular the way national courts as agents of the domestic system contribute to the development of international law. Consequently, the case law analyzed in this chapter is examined under the holistic heading of 'national cases', and the lessons drawn from this analysis are treated as ways that 'national courts' in general contribute to our understanding of CIL interpretation.[523] This notwithstanding, where relevant, peculiarities of each national system as to the role of CIL or domestic custom, as well as the position of international law more generally, are acknowledge and discussed.

Following this rationale, the argument proceeds as follows. In Section II, I expand on the role of domestic courts in the development of international law, both within and beyond the framework of sources. The discussion in this section considers the existing scholarship on the topic, and identifies the ways in which domestic courts affect the development of international law. The objective is to justify the reliance on decisions of national courts for lessons on the interpretation of custom, and to outline how these lessons can be learned or extrapolated into international law. Then, in Section III of the chapter, I turn to a discussion of examples of custom interpretation in the practice of national courts. Here, I examine cases of national courts collected from various databases, and I discuss the ways that national courts have engaged in the interpretation of both domestic custom

[523] See section III *infra* for a description of the sampling method employed in the collection and analysis of cases for this chapter.

and CIL rules. In particular, I focus on the methodologies of interpretation that national courts employ, as well as (where available) the rationale that the court provides for its reasoning or methodological choices. The aim here is to find not only which methods interpretation courts employ when faced with the task of interpreting customary rules, but also to understand why those choices were made. This then contributes to the main conclusions of this chapter as to the function of interpretation in the continued existence of customary rules.

II. Why the Focus on National Courts

Before embarking on an examination of the practice of national courts, it is necessary to explain the reasoning behind the choice to look at this body of jurisprudence. This section expands on the reasons for focusing on the work of national courts for the purpose of extrapolating lessons on the interpretation of customary law. In particular, I discuss the ways in which the practice of national courts affects the development of international law, and the value of national caselaw from the perspective of lessons learned. With respect to the first, I examine the ways that national courts may formally contribute to the development of international law within the framework of sources, as well as informally affect the development of international law beyond this framework. With respect to the latter, I discuss the fact that national courts provide a large pool of caselaw dealing with both domestic and international custom, and as such provide us with valuable insight into methods and approaches to custom interpretation.

i. National courts as agents in the international legal order

With the expansion of international rules covering numerous facets of daily life, national courts as organs of states have an increasing contribution in the application and enforcement of international law.[524] This observation is by no means unique to the time of writing. As early as 1932, Georges Scelle articulated the notion of *dedoublement fonctionnel*[525] to describe the dual role that organs of states, including national courts, play in the enforcement and development of international law.[526] Pursuant to this notion, organs of state act at once as agents of the state within their national system and agents of the international community within international

[524] Yuji Iwasawa, Domestic Application of International Law (2016) 378 RDC 15, 243.

[525] Georges Scelle, *Précis de droit des gens. Principes et systématique* (Vol. 1, Librairie du Recueil Sirey 1932) 43 et seq.

[526] Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dedoublement fonctionnel*) in International Law' (1990) 1 EJIL 210, 212-213; See also Paulus who speaks of the '*dedoublement fonctionnel* of the domestic judge, being adjudicator both of domestic law but also of international law'. Andreas Paulus, 'Customary Law before the Federal Constitutional Court of Germany' in Liesbeth Lijnzaad and Council of Europe (eds),, *The Judge and International Custom* (Brill Nijhoff 2016) 106, 119.

law. In this sense, with their actions they contribute to the making, implementation, application and enforcement of international law.[527] Since Scelle's seminal theory, the position of domestic courts in the spectrum between domestic and international law has become ever more dynamic. In studying their contribution to the development of international law, it is thus necessary to look both at their traditional role within the framework of sources and beyond it, in order to fully grasp their role.[528]

From the prism of sources of international law, domestic courts can formally contribute to the development of international law in broadly three ways: as evidence of state practice or *opinio juris* for the purpose of customary international law (CIL),[529] as a contribution to general principles of law,[530] or as relevant subsequent practice for the purposes of treaty interpretation.[531] Beyond the framework of sources, national courts can also exercise substantive informal influence, particularly so if their pronouncements are taken up and validated or endorsed by other actors.[532] Similarly, contestations or pushback by domestic courts in cases where they engage with international law can provoke an international reaction or adjustment of the law in response to the contestation.[533] In this sense, national courts may contribute to the normative development of international law through their acceptance or not of pronouncements by international courts. Here, the fate of pronouncements by international courts depends on their acceptance and recognition by other actors, and domestic courts are one of the actors that play this role.[534] Overall, domestic courts are curiously positioned on the continuum between national and international law, as they are at once both recipients of international law when they are called upon to apply it and uphold it in their case law, and contributors to it when they generate judicial practice. This relationship has aptly been described as 'inter-systemic interaction', wherein the sources of international law have a 'downstream' impact on municipal practice and municipal legal practice

[527] Ibid.

[528] Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources on International Law' in Malcolm Evans (ed), *International Law* (OUP 2018) 89.

[529] ILC Conclusions on Customary International Law (n 7) Conclusion 6 and Conclusion 10 respectively.

[530] As defined by Article 38(1)(c) of the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993. See also ILC, Report of the International Law Commission Seventy-second session (26 April-4 June and 5 July-6 August 2021) 150-164.

[531] As defined by Article 31(3)(b) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[532] Antonios Tzanakopoulos and Christian J Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 LJIL 531, 538.

[533] Matija Steinbruck Platiše, 'The Development of the Immunities of International Organisations in Response to Domestic Contestations' in Machiko Kanetake and Andre Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart 2016) 67.

[534] Andre Nollkaemper, 'Conversations among Courts: Domestic and International Adjudicators' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 524, 539-40.

has an 'upstream' impact on the formation of the content of the sources of international law.[535] In this sense, the application of international law by a domestic law-ascertaining agency such as a national court 'does not only serve the purpose of mechanically applying pre-existing international law, but also represents relevant State practice that feeds into the process of international law formation'.[536] The decisions of national courts may 'consolidate trends in state practice, solidify international principles that may have been controversial, or initiate trends that might (or might not) lead to changes in existing principles of international law'.[537] On this point, it has been persuasively argued that 'the traditional perspective, in which [decisions of national courts] are part of national law and as such "just" facts, co-exists with a newer perspective, in which the increasing independence and empowerment of national courts allows the international legal order to treat them to some extent as autonomous sources of authority'.[538] This makes the role of national courts in international law quite a dynamic one, and it is to a discussion of this that we now turn.

As indicated above, from the prism of sources, national courts can affect the development of international law in three ways. Firstly, the practice of national courts can contribute to the formation of a rule of CIL. Here, the decisions of a domestic court may be considered as evidence of state practice[539] or *opinio juris*[540] and thus count towards the formation of CIL. With respect to decisions of national courts counting as evidence of state practice, this is subject to the generally recognized requirements of that practice being widespread and consistent among states.[541] Thus for instance, in cases where practice derived from national courts of multiple states is disparate, this may lead to a conclusion that there is no customary rule to that effect.[542] In addition to this, the contribution of national courts towards CIL is also qualified by the fact that in order to contribute as state practice or *opinio juris* the decisions in question should in principle not be contradictory to practice of other organs of the state they yield from, and should not be rejected by the executive.[543] On this point, the ILC has observed that decisions of domestic courts would in

[535] Cedric Ryngaert, 'Sources of International Law in Domestic Law: Relationship between International and Municipal Law Sources' in Samantha Besson and Jean d'Aspremont (eds),, *The Oxford Handbook of the Sources of International Law* (OUP 2017) 1137, 1138.

[536] Ibid. [537] Andre Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 264.

[538] Ibid, 266. [539] ILC (n 8) 133, Conclusion 6 with commentary.

[540] Ibid 140, Conclusion 10 with commentary.

[541] This refers to the requirement for practice expressed in, among other, *North Sea Continental Shelf Cases* (n 66) [73-77].

[542] See for example the reasoning of the ICJ Appeal Chamber in *Erdemović*, which found that the practice of various national courts is too disparate in order to ascertain the existence of a customary rule regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings. *Prosecutor v Dražen Erdemović* (Appeal Chamber Judgment) [7 October 1997] ICTY IT-96-22-A [19] referencing the reasoning in the Joint Separate Opinion of Judge McDonald and Judge Vohrah [46-55].

[543] ILA Study Group on Principles of the Engagement of Domestic Courts with International Law, 'Final Report Mapping the Engagement of Domestic Courts with International Law' (2016) 4.

principle count less if they are reversed by the legislature or remain unenforced due to concerns of possible conflict with international law.[544] An interesting example here is the dispute that was at the center of the *Jurisdictional Immunities of the State* case before the ICJ, where Germany initiated a suit against Italy in relation to a judgment of the Italian Court of Cassation that the government of Italy itself did not support. Similarly, the ILA has asserted that '[i]n the ultimate analysis, since it is the executive which has primary responsibility for the conduct of foreign relations, that organ's formal position ought usually to be accorded more weight that conflicting positions of the [. . .] national courts'.[545] Somewhat contrary to this, it has been argued that at least when it comes to the assessment of *opinio juris* judicial decisions should carry more weight than the acts of other state organs, as they are usually based on legally relevant rather than other strategic reasons.[546] Even if one were to take this view however, the impact of national courts' practice on the development of CIL is limited. Judicial decisions are only one of the various forms of state practice that can be taken into account for the purposes of CIL identification. Moreover, for the purpose of CIL, the conduct of one single state and thus one single national court is not sufficient to create a customary rule. Rather, similar pronouncements should be shared across courts of multiple states, and satisfy the requirements of consistency and uniformity. Nevertheless, scholarship has found national courts to exert significant influence when it comes to the development of particular regimes of CIL. For instance, with respect to the law on state immunity, Anthea Roberts argues that the law was progressively developed by national courts which developed the general rule of absolute state immunity out of disparate immunities accorded to ambassadors, war ships and heads of states.[547] Subsequent to this, when other national courts began formulating a more restrictive theory of immunity distinguishing between public and private acts of state, the law on state immunity evolved accordingly.[548] This example leads Roberts to observe that international law does not only percolate down from the international to the domestic sphere, but also bubbles up in the opposite direction. 'In this process, national court decisions play a crucial role in developing international law, particularly in areas that tend to be tested by domestic courts'.[549] A similar dynamic can be observed in the so called 'feedback loop' between domestic courts

[544] ILC (n 8) Commentary to Conclusion 3, 128.
[545] ILA Report on Customary International Law (n 77) 18.
[546] Ammann (n 296) 151. See also Nollkaemper who argues that 'If, for instance, the executive takes the position that a formal state official of a foreign country enjoys immunity and the highest court of the state deny such immunity, that latter decision may well qualify as the final legal position of that state' and in any case that it might be wise to accord more weight to the decisions of national courts rather than to those of political branches, given the courts' professed impartiality and independence. Nollkaemper (n 537) 271.
[547] Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 ICLQ 57, 69-70.
[548] Ibid, 70-71. [549] Ibid, 69.

and international law, which describes the interaction by observing that 'domestic courts are at once organs of the state, and thus potential international law-makers, and judicial institutions applying and thus enforcing the law [. . .]'.[550] This indicates that domestic courts do not only passively implement international law but also, through their practice, contribute to the development of the law as well. For instance, while national court decisions are indeed only one out of various possible manifestations of state practice, in the determinations of international courts they often take a central role.[551] Conversely, when national courts contest a rule of CIL, this may lead to a gradual modification of the rule, as these contestations may count as contrary practice pointing to the modification or repeal of that customary rule. For our present inquiry, the contribution of national courts in the form of state practice for purposes of CIL is relevant insofar as it could serve as evidence towards the identification of customary rules of interpretation for customary law. As it has been established that the rules of treaty interpretation enshrined in the VCLT had also existed previously (and continue to exist) as customary rules, there is no reason to assume that the same is not true of rules for the interpretation of CIL. If an interpretive methodology can be identified across domestic courts when they interpret customary law, this may point to the existence of a customary rule(s) for the interpretation of CIL to that effect. Thus, for example if it emerges that multiple domestic courts resort to teleological interpretation in the interpretation of customary rules, this indicates a widespread practice which may point to the existence of a customary rule of teleological interpretation of customary law.

Secondly, decisions of national courts may be taken into account in the determination of general principles of international law as set out in Article 38(1)(c) of the ICJ Statute.[552] In international law, general principles tend to have a gap-filling function,[553] and may either be idiosyncratic to international law or originate from domestic legal systems.[554] Decisions of national courts contribute to the latter, and scholars have observed that the role of national courts in this sense is primarily to help determine their State's recognition of relevant general principles through their decisions.[555] The approach for the identification of general principles of law derived from national legal systems consists of a two-step analysis: firstly, determining the existence of a principle common to the principal legal systems of the world and secondly, ascertaining the transposition of it to the international legal

[550] Antonios Tzanakopoulos and Eleni Methymaki, 'Sources and the Enforcement of International Law: Domestic Courts-Another Brick in the Wall?' in S Besson and J d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 813, 820.

[551] See on this point Nollkaemper who catalogues examples from the ICJ and the international criminal courts. Nollkaemper (n 537) 267-270.

[552] Pellet and Muller (n 397) 925-31; Tzanakopoulos and Tams (n 532) 537.

[553] Thirlway (n 1) 106.

[554] ILC, Report of the International Law Commission Seventy-second session (26 April–4 June and 5 July–6 August 2021) A/76/10, 161-163; Ammann (n 296) 152.

[555] Ibid, 153.

system.[556] In this process, decisions of national courts contribute towards the first step.[557] In fact, decisions of national courts have been used as evidence pointing to the existence of a general principle both by international courts in their decisions,[558] and by states in their pleadings.[559] Generally, for a principle originating from domestic legal systems to find its way into international law there is a presumption that the principle in question is shared widely across domestic systems. On this point, the Special Rapporteur on the topic Marcelo Vázquez-Bermúdez has observed that '[w]hen there is no sufficient commonality across national legal systems, the obvious result is that a general principle of law in the sense of Article 38, paragraph 1 (c), [. . .] cannot be deemed to exist'.[560] However, the discussion as to what constitutes 'sufficient commonality' is still ongoing in the ILC, and differing attitudes on this question have been recorded among international courts.[561] For our present discussion, this means that in principle there might be some general principles of interpretation of CIL which, if shared widely among national systems,[562] could be transposed to international law. Moreover, as legal interpretation is a big part of the judicial function,[563] national courts are a likely domestic actor that generates practice relevant to principles of interpretation. Thus, it may be the case that when approaches to interpretation of CIL emerge repeatedly in national courts of various states, general principles of interpretation can be extrapolated from this practice. The transposability of these potential principles of interpretation would, of course, depend on them being compatible with the international legal system.[564]

[556] ILC, Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur (27 April–5 June and 6 July–7 August 2020) A/CN.4/741 [17].
[557] Ibid.
[558] See indicatively *Case Concerning the Factory at Chorzow* (Germany v Poland) (Jurisdiction) [1927] PCIJ Series A No. 9, 31; *Prosecutor v Duško Tadić* (Judgment) IT-94-1-A (15 July 1999) [225]; *Prosecutor v Zoran Kupreškič and Others* (Trial Judgment) IT-95-16-T (14 January 2000) [680]; See for further examples Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur (n 556) [37-39].
[559] See for instance the memorial of Mexico in the *Avena* case before the ICJ, where Mexico relied on, among other, decisions of various national courts to demonstrate the existence of the general principle of exclusion of evidence illegally obtained. *Case concerning Avena and Other Mexican Nationals* (Mexico v United States of America) (Memorial of Mexico) [2003] 159-60 [375-376]. See similarly the arguments of Lichtenstein with respect to the principle of unjust enrichment in the *Certain Property* case. *Case concerning Certain Property* (Liechtenstein v. Germany) (Memorial of the Principality of Liechtenstein) [2002] 145 [6.10-6.11].
[560] Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur (n 556) [65].
[561] Ibid [55].
[562] See on this point the observation by the ILC Special Rapporteur on this topic that 'The two-step analysis is a stringent test; the existence of a general principle of law cannot and should not be easily assumed'. Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur (n 556) [20].
[563] See on this point the discussion in Chapter 2, section II.i *supra* 66-69.
[564] On the requirement of compatibility see Draft Conclusion 6 of the ILC on this topic which

Finally, decisions of national courts may be considered as 'subsequent practice' in the sense of Article 31(3)(b) of the VCLT,[565] and as such contribute towards the agreed interpretation of a treaty.[566] In this sense, the pronouncement of national courts are relevant in two ways: (i) because domestic decisions may themselves be a form of subsequent practice in the application of the treaty, and (ii) because national courts may be tasked with properly assessing subsequent agreements and subsequent practice when they are called to interpret a treaty.[567] Transposing this to our discussion of CIL interpretation, this may affect the interpretation of CIL rules in two ways. Firstly, when it comes to instances of interpretation of a particular CIL rule by national courts, these may count as 'subsequent practice' establishing a common practice among states on the interpretation of that particular CIL rule. Put differently, they may serve as evidence of the understanding of states as to the meaning of the customary rule in question.[568] For these instances to count toward an agreed interpretation of the particular CIL rule, they should reflect a 'common understanding' among the parties that this is indeed an agreed interpretation of the rule in question.[569] They can then be taken in consideration by international courts in the interpretation of that rule. Secondly, when it comes to rules or principles of interpretation of CIL, instances of interpretation by national courts may count as 'subsequent practice' establishing the existence of rules of interpretation for customary international law. These two scenarios correspond to what the ILC has called subsequent practice 'in the narrow sense', meaning that while it is not necessary that *all* states (or courts of all states) have engaged in the practice attesting the common interpretation, there should be a shared practice to the effect of the common interpretation, and there should be awareness and

---

postulates that 'A principle common to the various legal systems of the world may be transposed to the international legal system in so far as it is compatible with that system'. ILC, Report of the International Law Commission on the work of its seventy-third session (18 April-3 June and 4 July-5 August 2022) A/77/10, 308.

[565] 'There shall be taken into account, together with the context: [. . .] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[566] ILC, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 11, 27-42 (Conclusions 4 and 5 with commentary).

[567] ILC, 'Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur' (2 May-10 June and 4 July-12 August 2016) A/CN.4/694 [96].

[568] This terminology is borrowed from the ILC Commentary to the Draft Articles on the Law of Treaties. ILC, Report of the International Law Commission on the work of its eighteenth session (4 May-19 July 1966) A/CN.4/191, 221 [15].

[569] ILC, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (n 566) 75-82 (Conclusion 10 with commentary).

acceptance among the states that this is the common interpretation.[570] Taking this kind of subsequent practice in consideration for the interpretation of a CIL rule could contribute to the clarification of the meaning of the CIL rule, which may lead to the widening or narrowing of the scope of that rule.[571] In addition to this, the practice of national courts may also count as subsequent practice in the so-called 'broad sense', in the sense of Article 32 of the VCLT as a supplementary means of interpretation.[572] The ILC juxtaposes this 'broad' meaning of subsequent practice to the 'narrow' meaning discussed above because practice in the sense of Article 32 has a lower threshold for being consulted in the process of interpretation.[573] Thus, here we may include the practice of only a few states, and there are no requirements of commonality or mutual awareness like in the case above. What this means for our present discussion is that even if a practice of interpretation of a particular CIL rule can only be found among one or a few national courts, it may still be taken in consideration by international courts in the interpretation of that rule. However, in this scenario its weight in the overall interpretation of the rule by an international court would be lower.

A fourth way in which national courts' practice can contribute to the development of international law from within the framework of sources is as subsidiary means for the determination of rules of law within the meaning of Article 38(1)(d) of the ICJ Statute.[574] This however greatly depends on one's reading of Article 38. The most recent commentary to the ICJ Statute for instance takes the view that, in spite of alternative views, Article 38(1)(d) does not include the decisions of

[570] On this criterion in the context of treaties, the ILC observed that 'For an agreement under article 31, paragraph 3 [. . .] (b) to be "common", it is sometimes sufficient that the parties reach the same understanding individually, but sometimes necessary that the parties have a mutual awareness of a shared understanding'. Ibid, 77 (8).

[571] On this point in the context of treaties the ILC has observed that 'Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties'. Ibid, 51 (Conclusion 7).

[572] Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[573] '[. . .] subsequent practice (in a narrow sense) is distinguishable from subsequent practice (in a broad sense) under article 32 of the 1969 Vienna Convention by one or more parties that does not establish the agreement of the parties, but which may nevertheless be relevant as a subsidiary means of interpretation'. ILC, 'Report of the International Law Commission Seventieth Session' (30 April–1 June and 2 July–10 August 2018) A/73/10, 31.

[574] Higgins (n 172) 208-9; Hugh Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning' (2002) 294 RDC 265, 276; Tzanakopoulos and Methymaki (n 550) 813; Roberts and Sivakumaran (n 528) 99.

national courts in its reference to 'judicial decisions'.[575] Interestingly, in her recent monograph on the role of national courts in the interpretation of international law, Ammann argues that the place of national judicial decisions in the sources of international law reflects the so called *amour impossible* between the orthodox doctrine of sources and the effect of judicial decisions in practice.[576] Thus, and again depending on one's reading of Article 38(1)(d) of the ICJ Statute, the decisions of national courts may be considered as subsidiary means for determining the rules for CIL interpretation. On this point, it has been persuasively argued that in fact rules of interpretation are largely the product of judicial law and when national courts interpret custom, they generate practice which can define the interpretive methods for customary law.[577] In this sense, it would seem that as subsidiary means for the determination of rules of international law, decisions of national courts walk the line between a more formal contribution to the development of international law from within the framework of source and an informal contribution beyond it.

While it may seem that the practice of national courts has various 'points of entry' in the formal development of international law, it must also be acknowledged that this influence is constrained by various factors. Namely, although the practice of national courts may feature in the formation of CIL or general principles, or the interpretation of treaties, their conduct can only meaningfully contribute to the development of international law if it is shared by other national courts across a multitude of states. For instance, for the purpose of CIL identification, the conduct of one single state is not sufficient to create a customary rule. Similarly, for the purpose of general principles, the implied threshold is that these principles are shared across most (if not all) nations.[578] Thus, while national courts are featured in the doctrine of sources and into processes of treaty interpretation, they are formally just one organ of one state and this limits their formal impact on the development of international law.[579] In this regard, in order to extrapolate rules or principles of interpretation for the interpretation of CIL from the practice of national courts, it seems like we would be faced with a high threshold requirement of practice. In other words, in order to claim that there are identifiable customary rules of interpretation for CIL, we would need to find uniform practice to that effect in multiple national courts coupled with a discernible *opinio juris* to the effect

[575] Pellet and Muller (n 398) 954 [323]. A similar observation can be found in the earlier version of the commentary, which notes that 'It has sometimes been asked whether judicial decisions of domestic courts were to be included among the jurisprudence as envisaged by Article 38, para. 1 (d). While eminent commentators sometimes answer in the affirmative, the present writers tend to share the view that these decisions should better be treated as elements of State practice in the customary process or, maybe, as being at the crossroads between evidence of practice and *opinio juris*'. Pellet (n 50) [321].

[576] Ammann (n 296) 154. [577] Ibid, 274.

[578] See for example the Trial Chamber's reasoning on this in *Prosecutor v Anto Furundzija* (Judgment) IT-95-17/1-T (10 December 1998) [178].

[579] Tzanakopoulos and Tams (n 532) 538.

that these are rules for the interpretation of CIL. Similarly, in order to extrapolate general principles of CIL interpretation from the practice of national courts, these would need to be shared widely across the legal systems of the world. Thus, the contribution of national courts in this sense seems to only be meaningful when it comes in high numbers.

A possible exception to this observation might be the position of national courts' pronouncements as subsequent practice "in the broad sense", as supplementary means of interpretation of customary international law. In order to count as instances of subsequent practice in this broad sense, it is enough that practices are found in only a handful of national courts or even only one or two national courts. Following this logic, how national courts interpret CIL rules may affect how this rule is subsequently interpreted by international courts, even if such interpretation is encountered in the courts of only a few states. Thus, even if no sufficient practice of national courts could be found to point to the existence of customary rules or general principles of interpretation for customary law, the practice of national courts might still contribute to how particular CIL rules are interpreted.

Beyond these entry points provided by the framework of source, decisions of national courts may also influence the development of international law more broadly and informally. For instance, Machiko Kanetake argues that beyond the traditional modes of interaction between national courts and international law provided for in the sources doctrine, national courts may contribute to international law through so-called normative or conceptual points of connection.[580] Normative points of connection occur in instances of inter-judicial communication across national courts of different states, when national courts refer to each other's decisions. In these instances, the communication 'may create norms which are yet to become part of formal international law but which affect the way international organizations and international judicial institutions render their decisions'.[581] What this means for our present inquiry is that interpretive methodologies of domestic courts, if shared or communicated across courts of various states, may informally contribute to the way CIL is interpreted by international judicial institutions by generating methods of interpretation that will be picked up by international judges. This kind of 'conversation among courts'[582] may take place both at the stage of identification or development of rules for CIL interpretation, and

[580] Kanetake refers to these points of connection as 'interfaces'. Machiko Kanetake, 'The Interfaces Between the National and International Rule of Law: A Framework Paper' in Machiko Kanetake and Andre Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart 2016) 13.

[581] Ibid 28.

[582] This terminology is borrowed from the work of Andre Nollkaemper. Nollkaemper (n 534) 539-40; This kind of cross-referencing between courts has also been described with the term 'cross-fertilization'. See indicatively Philippe Sands, 'Treaty, Custom and the Cross-fertilization of International Law' (1998) 1 Yale Human Rights and Development Law Journal 85; Anne Marie Slaughter, 'Judicial Globalization' (2000) 40 Virginia Journal of International Law 1103.

at a later stage when these rules are more established. Thus, even in the absence of sufficient practice that would point to the existence of, for instance, customary rules for the interpretation of CIL, the methods of national courts when they interpret custom may still be picked up as instances of common good practice. On this point, it has been aptly observed that there is no need for justification on the basis of sources of international law in order to benefit from the 'scientific value of the reasoning of other jurists'.[583] Furthermore, conceptual points of connection occur when domestic legal concepts are analogized into international law. In this context, interpretive methodologies of domestic judges may be introduced into international law or practice by means of analogy.[584] Traditionally, analogies from national law have been mostly limited to private law,[585] and cautioned by the consideration that concepts from national law should not be imported 'lock, stock, and barrel' into international law.[586] Nevertheless, analogical imports from national law are not uncommon in the international judicial practice, and may in fact be a useful starting point when a certain part of international law is silent or still in development. On this, it has been observed that while certain principles of international law which have been analogized from national law have eventually been emancipated and given an independent international existence, their national origin should not be forgotten.[587]

Normative and conceptual points of connection differ from the influence of national courts described through the framework of sources because they account for the potential influence of domestic judicial practice on the development of international law even when this judicial practice would not otherwise qualify as evidence of CIL or general principles. What is meant here is simply that while for the purpose of a customary rule or general principle of interpretation to be extrapolated from the practice of national courts this practice would have to meet the standards of being widespread, uniform and representative, in the context of normative or conceptual points of connection it seems that this threshold is lower. In light of this, as an analytical framework, they capture the informal ways in which domestic court practice may be taken in consideration by international judges or

[583] M. Shahabuddeen, 'Municipal Law Reasoning in International Law' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice Essays in Honor of Sir Robert Jennings* (CUP 1996) 90, 92.

[584] Kanetake (n 580) 28-29.

[585] See Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Longmans, Green and Co Ltd. 1927)

[586] *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 148 (Separate Opinion by Sir Arnold McNair).

[587] On this point Ryngaert observes that 'the pacta sunt servanda-based law of treaties developed out of the municipal law of contracts, and the law of territorial sovereignty and jurisdiction was based on the Roman concept of private property'. Ryngaert (n 535) 1141. See also Wiener who discusses the 'legal borrowing' of national legal concepts into international law in the context of climate change treaties. Jonathan Jonathan Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2000) 27 Ecology Law Quarterly 1295.

practitioners, and can register instances where only a handful of national courts or even one single national court has exerted a significant influence on the development of international law. In this sense, this framework allows us to examine the influence of domestic courts through a wider lens. For our present inquiry this signifies that even when an international court does not extrapolate a customary rule or a principle of interpretation for CIL from the practice of national courts, it may nonetheless 'borrow' the interpretive methodology on an ad-hoc basis.

ii. National courts as a source of good practices

Beyond the above-described (formal) role of national courts in the development of international law, I believe there is a broader point to be made as to why we *should* take the practice of national courts in consideration when developing a theory of interpretation for customary international law. National courts are not only actors whose practice features in international law through the sources doctrine, but they are also actors who often engage in solid judicial reasoning which can inform the development of theories and methodologies in international law. Writing in 1929, Hersch Lauterpacht observed that '[b]y not availing themselves to the full of the lessons of municipal decisions international lawyers have debarred themselves from access to a rich source of development of international law'.[588] While this "oversight" has largely been remedied in contemporary scholarship and practice, Lauterpacht's words should still serve us as caution. Not considering the lessons that may be taken from national courts' treatment of custom interpretation would inevitably lead to an incomplete image of this subject.[589] In light of this, I would outline three reasons why we should consider the practice of national courts in the development of a theory of interpretation for CIL.

Firstly, because the interpretation of CIL is currently an under-examined and unregulated sphere of international law. As demonstrated by Chapter 2, international legal theory and practice presently offer little discussion and guidance on the issue of CIL interpretation, and there are no uniform guidelines for the process of CIL interpretation. In some of the scholarly work discussed in Section II above such an existing gap in international law is considered to legitimately invite contributions from domestic law. For instance, scholars observe that national court decisions play a crucial role in developing international law in areas of the law that tend to come before domestic courts,[590] or in instances where there is a need

---

[588] Hersch Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 British Yearbook of International Law 65, 94.

[589] See on this point Paulus who observes that 'The application of many rules of customary international law depends on States and their courts. Domestic courts are thus very relevant actors for the development and implementation of customary law. The doctrine disregards this aspect at its peril'. Paulus (n 526) 120.

[590] See Steinbruck Platiše (n 533) 67; Roberts (n 1).

to plug legal gaps in international law.[591] Similarly, domestic courts are crucial in the normative development of international law insofar as they can confirm or not pronouncements by international courts.[592] Furthermore, learning from existing legal practices and approaches in domestic law for the purpose of CIL interpretation provides the benefit of already developed knowledge and practice. Seen as we are still only at the beginning of studying CIL interpretation and developing a comprehensive theory of it, interpretive practices of domestic courts which have dealt with the interpretation of custom offer the opportunity to benefit from the experience of already developed practices and knowledge. Moreover, existing scholarship demonstrates that international law is already in fact to a great extent relying on interpretive canons which originate in or are derived from domestic legal systems.[593] While interpretive canons originating in domestic legal systems have so far contributed primarily to the exercise of treaty interpretation, there is no reason why domestic interpretive practices, where relevant, should not be taken into account for the development of a theory of CIL interpretation as well.

Secondly, because national courts offer extensive examples of the interpretation of both CIL and domestic custom, and in this sense there is an ever-growing pool of relevant interpretive practice which can provide useful insight into the nature and purpose of interpretation as an operation in the context of customary law. As the analysis in Section III below demonstrates, the interpretation of custom is ubiquitous among national courts. This is a conclusion increasingly reached not only in the present thesis, but also by other contemporary scholarship which has examined this subject.[594] While scholars have primarily focused on the interpretation of CIL by national courts, what the present chapter demonstrates is that it is not at all uncommon for national courts to also interpret domestic custom. Moreover, there are seemingly no differences in the way national courts engage in the interpretation of domestic and international custom. This enables a broader conclusion to be drawn about the nature and function of interpretation in the context of customary rules, and such universalizing observations would not be possible without consideration of the practice of national courts.

[591] Harmen van der Wilt, 'National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals' (2010) 10 Int CLR 209, 241.

[592] See Nollkaemper (n 534).

[593] Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2019); see in particular Michael Waibel, 'The Origins of Interpretive Canons in Domestic Legal Systems' in Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2019) 25-46.

[594] Jorian Hamster, 'Customary International Law' in Andre Nollkaemper and August Reinisch (eds), *International Law in Domestic Courts. A Casebook* (OUP 2018) 243; Ammann (n 296) 272-319. On the more general engagement of domestic courts with CIL, see Cedric Ryngaert and Duco Hora Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 NILR 1, 3-4.

Finally, because by learning from domestic practices for the purpose of CIL interpretation, international law can then provide domestic judges with various familiar tools for their further engagement with CIL in the domestic context. If we take the cyclical interaction between domestic and international law in consideration, we will recall that the two legal orders interact both in the domestic-to-international and in the international-to-domestic directions. For instance, when domestic courts are faced with the need to ascertain or interpret CIL, they often turn to international case law or international legal scholars for guidance.[595] In this sense, the influence flows from the international to the domestic direction. However, as the discussion of the sources doctrine above illustrated, the influence frequently flows from the domestic to the international direction as well, when domestic courts generate practice that is constitutive of international law. At this point, it would be useful to recall the 'feedback loop' which tells us that domestic courts are both contributors to the development of international law in their various roles in (and beyond) the framework of sources, as well as judicial institutions which apply and enforce international law. What this means in our present context is that if domestic interpretive practices feed the development of rules for CIL interpretation in international law, the developed rules for interpretation will then find their way back to domestic courts in future cases where those courts will again be faced with the task to apply and interpret CIL. The benefit of this cycle is twofold. Firstly, it is beneficial for future domestic judicial practice, because it will provide domestic judges with a familiar and coherent blueprint which they can refer to when they need to interpret CIL in future cases. Secondly, it is indirectly beneficial for the further development of international law; since domestic judicial practice can contribute to international law, by providing domestic judges with familiar and coherent guidelines for CIL interpretation we ensure that subsequent domestic case law can contribute to international law in a coherent manner. Thus, learning from domestic practices promotes the achievement of an integrated system of international law which remains closely related to and aware of domestic law. Viewed like this, the 'feedback loop' illustrates that any theory that aspires to be a comprehensive account on the interpretation of CIL must consider domestic practice in the development of its arguments.

Overall, what the above discussion demonstrates is that national courts contribute to the development of international law in various meaningful ways. Be it as organs of state for purposes of state practice in the context of CIL and general principles, subsequent practice for the purpose of interpretation, or the various other modes of engagement with each other and with rules of international law, national courts are uniquely positioned on the spectrum between domestic and international law. In light of this, decisions by national courts present a significant source of practice in the study of international law. This is particularly so for

[595] Hamster (n 594) 245-6; Ryngaert and Hora Siccama (n 594) 17-21.

areas of international law that come often before domestic courts, or for areas of international law that are yet to be developed. The interpretation of customary international law can be said to fall under both of these scenarios. Against this wider background, the chapter now turns to an analysis of domestic judicial practice particularly in the field of interpretation of customary law.

III. National Courts Interpreting Customary Law

This section contains an overview and analysis of national courts interpreting both CIL and domestic custom. The choice to include both types of cases is motivated by two reasons. Firstly, by including both cases where domestic courts interpret CIL and where they interpret domestic custom, the pool of cases to analyse and draw from becomes bigger. This inevitably contributes to a more thorough study and enables us to arrive at more persuasive and generalizable conclusions. Secondly, there is no substantive difference in the way international law and domestic law treat custom as a source of law that would merit a separation of the two,[596] or a radically different treatment of the subject of their interpretation.[597] What I mean here is simply that in their form and genesis domestic and international custom operate in similar ways. There are certainly differences in the actors who contribute to the formation of custom in international law (states) versus the actors who contribute to the formation of custom domestically (various actors in the relevant legal system); as well as differences in the content of the customary rules which operate in international versus national law. However, neither of these two differences affects the way customary rules are interpreted.[598] Thus, for the purposes of developing a theory of CIL interpretation, we can draw conclusions from examples of interpretation of both domestic and international custom.

i. Methodology of case collection and categorization

Before delving into a discussion of the cases, a brief overview of the methodology of collection and categorization of cases is warranted. The cases discussed in this section were collected in two ways. Firstly, cases were collected in cooperation with national research teams in various jurisdictions, as part of an ongoing research cooperation between these teams and the TRICI-Law project.[599] National research teams were formed in various countries in the course between 2019 and 2021. Attention was paid to geographical representation and diversity of legal systems. Furthermore, special efforts were made to form national research teams in coun-

[596] Thirlway (n 1) 61.
[597] See on the point of similarity between interpretation in domestic law and interpretation in international law Ammann (n 296) 167-175.
[598] See discussion of cases *infra*.
[599] For more information see https://trici-law.com/nationalreports/.

tries whose caselaw had not been included in other major databases already available online. Thus, in the indicated period, national research teams were formed in Kenya, North Macedonia, Singapore, Indonesia, Philippines and China. These national research teams were all based in relevant local research institutions and undertook the research project on a *pro-bono* basis. The teams were tasked with the production of a 'National Report' containing a brief description of the national legal system, a list of domestic cases which dealt with the interpretation of CIL or domestic custom (where necessary, national teams also provided translations of the cases), and a bibliography.[600] The present chapter relied in particular on the lists of domestic cases provided in the national reports. All cases were read and analyzed, and cases where interpretation was established were included in this chapter.[601] Secondly, cases were collected from the *Oxford Reports on International Law in Domestic Courts* (ILDC).[602] Here, for the initial search and collection of cases keyword research was employed; relevant keywords were pre-determined and used to search the database.[603] Initially, the keyword 'customary international law' was combined with the keyword 'interpretation'. This yielded a total of 653 cases (at the time of writing). These cases were reviewed in order to discard instances where CIL is only mentioned *in passim*, or cases where it is referenced by commentators but not relied on by the court.[604] This revision was greatly facilitated by the fact that the ILDC highlights the searched term in the text, and thus it was easy to see where the terms appear and how they are used.[605] The search was fur-

[600] All reports are available on the TRICI-Law website https://trici-law.com/nationalreports/. Not all reports were completed before the completion of the present thesis. Notably, the reports from Indonesia and Philipines are still pending, and were therefore not consulted for the purposes of the thesis.

[601] For the overview of cases see https://trici-law.com/nationalreports/. The lists of cases are publicly available in the form of downloadable spreadsheets, accessible via the page of each National Team.

[602] Andre Nollkaemper and August Reinisch (eds), 'Oxford Reports on International Law in Domestic Courts' (Oxford Public International Law, 2021) <https://opil.ouplaw.com/page/212> last accessed 26 August 2021. I owe a special debt of gratitude to Konrad Turnbull who helped me in the collection and systematization of these cases.

[603] For a commentary on the benefits and drawbacks on keyword research see Odile Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (2018) 4 Swiss Review of International and European Law 489. See also Ryngaert and Hora Siccama (n 594) 1.

[604] See for instance *Belgium v Ms XX and Ms XX* (26 December 2018) Brussels Court of First Instance 2018/XX/C, ILD 3006 (BE 2018); *Slops, Marine Environmental Services MC and Environmental Protection Technical SA v International Oil Pollution Compensation Fund 1992* (16 February 2004) Piraeus Court of Appeal, Appeal Judgment No 103/2004, ILDC 855 (GR 2004); *Prosecutor v Paulov (Karl-Leonhard)* (21 March 2000) Supreme Court of Estonia, Cassation Judgment no 3-1-1-31-00 Official Gazette, Riigi Teataja-RT Part III 2000, 11, 118, ILDC 198 (EE 2000).

[605] While not all cases featured in the ILDC are in English, many of them are translated. Moreover, even when there is no translation, the summary and commentary are in English. Thus, even in cases where the judgment was appended only in its original language, it was possible to rely on the summary and commentary for locating where the relevant keyword appears.

ther refined by applying additional keywords to each case individually.[606] From the further search with specific keywords, it emerged that only a part of the identified cases contained the interpretation of customary law, and these cases are the ones included in the present chapter. The cases that were not included were discarded because they either engaged only in the identification of customary law but did not deal with its interpretation, or they were examples of what Ryngaert has aptly called 'false positives' – instances of reasoning which the court itself labels as interpretation but is in fact identification.[607] For instance, in some of the cases, while the term 'interpretation' or one of the auxiliary relevant terms appeared in the text, a detailed reading revealed that this referred to the evaluation of state practice and *opinio juris* rather than the interpretation of a crystalized customary rule.[608] Furthermore, as Ryngaert also finds,[609] a portion of the cases which refer to interpretation deal not with the interpretation of CIL but rather the interpretation of national law in light of CIL.[610] One important limitation that must be acknowledge here

[606] Variations of the term 'interpretation' ('interpret', 'interpreted'), variations of the term 'construction' ('construed'), and keywords which could denote methods of interpretation: 'teleological' ('object', 'purpose', 'objective'); 'evolutive' ('evolutionary', 'evolve'); 'analogy' ('analogical', 'analogously'); 'logical'; 'deduce' ('deduction', 'deductive').

[607] Ryngaert (n 522) 489.

[608] See for instance *Stationierung US-Amerikanischer Atomwaffen auf dem Fliegerhorst Büchel, K v Federal Republic of Germany* (15 March 2018) Constitutional Court of Germany, 2 BvR 1371/13, ILDC 2941 (DE 2018) [49-50]; *United States v Beyle and Abrar* (3 April 2015) 4th Circuit Court of Appeal of the United States 782 F3d 159, 169 (4th Cir), 136 S Ct 179 (2015) ILDC 2483 (US 2015) [33-36]; *United States v Bellaizac-Hurtado and ors* (6 November 2012) 11th Circuit Court of Appeal of the United States 700 F3d 1245 (11th Cir 2012), ILDC 1949 (US 2012) [16-20]; *United States v Salad and ors* (30 November 2012) District Court for the Eastern District of Virginia 908 F Supp 2d 730 (ED Va 2012), ILDC 2027 (US 2012) [9-13]; *Kiobel and ors (on behalf of Kiobel and Tusima) v Royal Dutch Petroleum Co and ors* (17 September 2010) 2nd Circuit Court of Appeals of the United States of America Docket No 06-4800-cv, Docket No 06-4876-cv, 623 F3d 111 (2d Cir2010), ILDC 1552 (US 2010) [10-15] [100]; *Guatemala Genocide case* (26 September 2005) Constitutional Court of Spain, Case No 237/2005, ILDC 137 (ES 2005) [6]; *R and United Nations High Commissioner for Refugees (intervening) (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* (9 December 2004) United Kingdom House of Lords UKHL 55, [2005] 2 AC 1, [2005] 2 WLR 1, [2005] 1 All ER 527, ILDC 110 (UK 2004) [46]; *Flores and ors v Southern Peru Copper Corporation* (29 August 2003) 2nd Circuit Court of Appeal of the United States of America Docket No 02-9008, 414 F.3d 233 (2d Cir. 2003), ILDC 303 (US 2003) [53-93]; *American Soda Ash Corporation and CHC Global (Pty) Limited v Competition Commission of South Africa and ors*. (25 October 2002) Competition Appeal Court of South Africa, Case 12/CAC/DEC01, ILDC 493 (ZA 2002) [15-21]; See also Ryngaert (n 522) 489-90.

[609] Ryngaert refers to this category of 'false positives' as examples of 'reverse consistent interpretation'. Ryngaert (n 522) 490-92.

[610] See for instance *Israel v Saidi and ors* (3 May 2010) Supreme Court of Israel, CA 9656/08, ILDC 2101 (IL 2008) [27]; *The Queen v Klassen* (19 December 2008) Supreme Court of Canada, Docket No 24292, 2008 BCSC 1762, 240 CCC (3d) 328, 63 CR (6th) 373, 182 CRR 291, ILDC 941 (CA 2008) [93]; *Hape v The Queen* (7 June 2007) Supreme Court of Canada Docket No 31125, 2007 SCC 26, [2007] 2 SCR 292, 280 DLR (4th) 385, 220 CCC (3d) 161, 47 CR (6th) 96, 160 CRR (2d) 1, 227 OAC 191, ILDC 758 (CA 2007); *Attorney-General v Zaoui and Inspector-General of Intelligence and Security and Human Rights Commission (intervening)* (21 June 2005) Supreme Court of New Zealand [2005] NZSC 38, (2006) 1 NZLR 289, (2005) 7 HRNZ 860, ILDC 81 (NZ 2005) [90]; *Parent and ors*

is that keyword-based search may lead to an incomplete picture, because the selection of keywords necessarily limits the scope of what will be found with them. Thus, for instance, this kind of search may have led to the omission of cases where courts refer to CIL with a different term such as 'general international law' or 'unwritten law'. This would have affected the initial set of cases that were selected on this basis, and which were further narrowed down with more concrete keywords. This limitation is relevant, but at the same time does not significantly prejudice the findings, as the pool of cases initially found was substantive. Thus, there is no reason to anticipate that drastically different findings would have emerged if more cases were included in the initial search. That said, this is an important limitation to keep in mind and potentially address in future research, which may replicate or build on the present work.

In addition to these two databases which were the main sources for cases, national cases were also drawn from the broader literature examined for the purposes of the thesis. Thus, when national cases were encountered in the literature that were not included in either the reports by national research teams or the ILDC, these cases were thoroughly read and analyzed.[611] The cases which contained examples of interpretation were also included in the discussion of this section.

Much consideration went into the decision of how to group the cases and organize the discussion. Before settling on the final categorization of cases by the rule being interpreted, I considered organizing the cases by the country from whose national courts they yielded, or by the method of interpretation that the court employed. I eventually decided against these for the following reasons. With respect to the option of organizing the cases by their country of origin, this approach proved unsatisfactory because it required additional discussion of the national legal system of each country, which often was not directly relevant to the main discussion of custom interpretation. Moreover, as this approach to categorization progressed, it became evident that often there are no national particularities which contributed to differences in the ways custom was interpreted between national courts of different states. Put differently, that a customary rule would be interpreted by a court of state A did not imply any immediate difference or peculiarity with respect to interpretation than if that same rule would have been interpreted by the court of another state B or C. Thus, the choice to organize the cases by country could not be justified. With respect to the option of organizing the cases by the method of interpretation that the court employed, this approach proved to be conducive

v Singapore Airlines Ltd and Civil Aeronautics Administration (22 October 2003) Superior Court of Quebec, 2003 IIJ Can 7285 (QC CS), ILDC 181 (CA 2003) [55-57]; *Canada Ltée (Spraytech, Société d'arrosage) and Services des espaces verts Ltée/ Chemlawn v Town of Hudson* (28 June 2001) Supreme Court of Canada, Docket No 26937, 2001 SCC 40, ILDC 185 (CA 2001) [30]; *Jorgic Case, Individual Constitutional Complaint* (12 December 2000) Constitutional Court Germany 2 BvR 1290/99, ILDC 132 (DE 2000) [27];

[611] The full dataset of cases considered for the purposes of the thesis is available as an excel spreadsheet, upon request.

to a lot of repetition. As the discussion below shows, often when a national court interprets a customary rule various methods of interpretation may be utilized at different points of the reasoning. In this regard, it seems that the choice of methodology when it comes to the interpretation of customary rules resembles very much the so called "crucible approach" we encounter in the context of treaty interpretation[612] – various methods of interpretation are used jointly so as to ensure a relevant and defensible interpretive outcome. Thus, to faithfully categorize cases by method of interpretation would have required that some cases are discussed multiple times throughout the section, thereby making the discussion repetitive.

In light of these considerations, the collected cases are organized and discussed by the customary rule which is being interpreted in the particular case. More precisely, the cases are organized in categories reflecting the regime from which the customary rule in question yields (e.g. the category 'international humanitarian law' includes cases which interpreted customary rules such as the rule of distinction, or the rule of direct participation in hostilities). This kind of categorization enabled the chapter to avoid the pitfalls of the alternative categorizations described above. Moreover, it allowed a "thematic" discussion which lent itself well to a comparative analysis of how the same customary rule, or rules of the same regime, are interpreted across the courts of different states. This enabled an analysis of similarities and differences in the methods used by national courts to interpret particular customary rules. In this way, one of the key aspects of CIL interpretation that the thesis focuses on – what methods are employed in the interpretation of CIL rules and why – was isolated. Moreover, it brought to the fore the role of judicial interpretation in the continuous existence and evolution of the rule in question. Thus, for instance, this categorization made it possible for the discussion to also flag how the reasoning of one national court might have influenced the reasoning of another in respect of the interpretation of the rule. This informed some of the conclusions reached in the chapter (Section IV) as to the concretizing and evolutive functions of interpretation on customary rules, as well as the limits of interpretation in this regard. Finally, this kind of categorization also eventually allowed for the discussion to conclude that there are no differences between the methods used for the interpretation of domestic and international customary rules, or between the methods used for the interpretation of customary rules of different regimes within international law. This contributes to the generalizability of the conclusions, thereby pointing to the possibility of one unified theory of interpretation for customary law.

In light of these considerations, the discussion below is organized in the following categories a) customary rules on sovereign immunities; b) customary rules of international humanitarian law; c) customary rules of law of the sea; and d) do-

---

[612] ILC Draft Articles on the Law of Treaties with Commentaries (n 291) 219-20. 'All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation'.

mestic customary rules. These categories were set up after the initial collection of the cases, because it emerged from the case law that among the reviewed cases these were the rules that most often came before domestic courts.

ii. Analysis of collected cases

a. Sovereign immunities

A significant portion of the domestic cases found in the research for this chapter relate to the customary rule on state immunity. This is certainly not surprising, as immunity is often invoked before national courts, and the law of sovereign immunities is still largely governed by customary international law.[613] Moreover, scholarship has by now recorded the influence of national courts as both enforces and makers of the customary rule of state immunity,[614] the so-called 'dialogue' between national courts when citing the decisions on state immunity by their colleagues across borders,[615] as well as the effect of national contestation on the overall content of the rule.[616] The analysis of the caselaw below is informed by all this scholarship and seeks to add to it by zooming in on the reasoning of the various national courts which have dealt with the customary rule on state immunity. In particular, the aim is to shed light on the interpretive reasoning of these courts, their choice of interpretive methods, and, where available, the reasons behind these interpretive choices.

The general customary rule on state immunity stipulates that a state enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another state.[617] Historically, this customary rule was taken to imply that states enjoy absolute immunity from the jurisdiction of the courts of another state, regardless of the nature of the act. However, developments in the past several decades have qualified this understanding, and narrowed down the scope of state immunity to cover sovereign acts (*acta jure imperii*) but not commercial ones (*acta jure gestionis*).[618]

---

[613] While there is now also the United Nations Convention on the Jurisdictional Immunities of States and Their Property (2004), this one is not yet in force. See also Ryngaert (n 522) 492; Ammann (n 296) 302.

[614] Rosalyn Higgins, 'The Changing Position of Domestic Courts in the International Legal Order: Speech Given at the First International Law in Domestic Courts Colloquium 27 March 2008' in Rosalyn Higgins, *Themes and Theories* (OUP 2009) 1340; Roberts (n 547) 57; Hazel Fox and Philippa Webb, The Law of State Immunity (3rd ed. OUP 2013) 102 et seq.

[615] Philippa Webb, 'Immunities and Human Rights: Dissecting the Dialogue in National and International Courts' in Ole Kristian Fauchald and Andre Nollkaemper (eds),, *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 245.

[616] Roberts (n 547) 64-71.

[617] See indicatively 'United Nations Convention on Jurisdictional Immunities of States and Their Property' (Adopted by the General Assembly of the United Nations on 2 December 2004. Not yet in force)

[618] For a historical overview of the legislative and judicial developments on this see Fox and Webb (n 614) 131-164.

This evolution of the customary rule on state immunity – from a wider absolute to a narrower restricted scope – itself occurred largely through the reasoning of national courts. It may in fact be argued that the narrowing down of the scope of customary state immunity occurred through interpretation, and in particular the interpretation of national courts.[619] These interpretive pronouncements were then sometimes followed by the introduction of national legislation which limits state immunity as well.[620]

An illustrative example in this regard is the reasoning of the Supreme Court of Israel in *Her Majesty the Queen in Right of Canada v Edelson and ors*. This case concerned the lease of a house in the Israeli city of Herzliya to Canada to serve as the ambassadorial residence, for a period of five years with the possibility of renewal. Upon the expiration of the 5-year lease, and due to a change in ownership of the property, the Canadian government was asked to vacate the premises. The Canadian government refused, claiming that it had the option to extend the lease.[621] This resulted in several proceedings in lower courts demanding payment of appropriate rent for the period following the termination of the lease, to which the Canadian government responded by invoking its state immunity. The various lower courts accepted Canada's immunity and dismissed the claims, leading to the case reaching the Supreme Court.[622] The Supreme Court confirmed that the case was governed by the customary rule of state immunity.[623] Having established this, the court went on to ask

> '[w]hat is the *scope* of state immunity? There has been a transition in customary international law in this regard. While [common law countries] continued to recognize comprehensive and "absolute" state immunity, their continental counterparts, on the other hand, recognized only restricted and "relative" state immunity.[624]

By posing the question in terms of the 'scope' of the rule, the court already hints at the fact that the 'transition' from the broader to the narrower scope of immunity might be one executed through interpretation. Continuing in this vein, the court observed that

> *This transition in customary international law stems, inter alia, from the evolution of state acts*. Indeed, the state increasingly performs acts, which are of a commercial, rather than

[619] See for instance the discussion of 'initiatives' taken by courts for the narrowing of the scope of immunity discussed by Fox and Webb. 'A third initiative was to *exclude State agencies from the definition* of the State. In the absolute immunity phase, courts resorted to the exclusion of trading agencies from the definition of the State so as to keep the conferment of immunities within reasonable bounds'. Fox and Webb (n 614) 139 (emphasis added). See also *Jurisdictional Immunities of the State* (n 87) Dissenting Opinion of Judge Yusuf [22].

[620] See the discussion of the British and Israeli examples by Fox and Webb. Fox and Webb (n 614) 139-143, 148.

[621] *Her Majesty the Queen in Right of Canada v Edelson and ors* (3 June 1997) Supreme Court of Israel, Final appeal judgment, PLA 7092/94, 51(1) PD 625, ILDC 577 (IL 1997) [1].

[622] Ibid [2-4]. [623] Ibid [13]. [624] Ibid [16] (emphasis added).

> sovereign, nature. In many cases, the modern state began to act as an individual would. *This change in behavior gave rise to a need*—in both the common law and continental traditions—*to limit state immunity, and restrict it to its sovereign aspect.*[625]

The court's reasoning here further reinforces the observation that the change in the rule on state immunity was effected through interpretation, as the description here seems to hint at evolutive interpretation of the scope of the rule in light of factual changes. Nevertheless, the court also engaged in a lengthy comparative overview of both the legislation and caselaw of other countries, thereby anchoring its analysis in state practice as well.[626] In this sense, interpretation here was complemented by identificatory reasoning as well. Having concluded that the current state of affairs regarding state immunity is that 'customary international law recognizes foreign state immunity, in its relative and restricted, rather than absolute form',[627] the court went on to further interpret and apply the rule within the parameters of this restricted scope.[628] In particular, the court focused on the difficulty of differentiating between *acta jure imperii* and *acta jure gestionis*, finding that this requires a balancing between two sets of opposing interests – 'the first relates to the individual's civil rights, the principle of equality under the law and to ensuring the rule of law. The other regards the foreign state's interest in fulfilling its political goals without being subject to another state's judicial supervision'.[629] The court observed that looking to the purpose of the act would in effect eliminate the distinction between *acta jure imperii* and *acta jure gestionis*, because under that approach most (if not all) acts would be considered *jure imperii*. Rather, it is the legal nature of the act that should be considered.[630] Eventually however, the court found that often both the purpose and the legal nature would need to be considered, as we cannot understand the legal nature of an act until we understand its purpose.

> The legal nature criterion is certainly a crucial one. *We cannot, however, rule out additional criteria. We must always investigate the context, which includes both form and content, in its entirety*. We must also remember that the topic as a whole is in its formative stage in many states. The state's functions, as well as its modes of action, are in constant flux. *We must ensure sufficient flexibility to allow for the law to adapt itself to the changing vicissitudes of life.*[631]

The court here seems to suggest that the application of the customary rule on state immunity will always require interpretation, and that in fact this interpretation may at time also be dynamic so as to allow the law to adapt.[632] As the discussion

---

[625] Ibid (emphasis added). [626] Ibid [17-20]. [627] Ibid [21].

[628] Ibid [22]. 'The assertion that state immunity is restricted under Israeli law requires that we determine this restriction's parameters. [. . .] *Indeed, while it is one thing to reject the absolute application of immunity, it is quite another to determine restricted immunity's scope*. The difficulty in delineating the scope of restricted immunity stems from the lack of clarity surrounding the very rationale underlying the doctrine of State immunity' (emphasis added).

[629] *Her Majesty the Queen in Right of Canada v Edelson and ors* (n 621) [24]. [630] Ibid [26-28]. [631] Ibid [30].

[632] See for similar reasoning *García de Borrisow v Embassy of Lebanon* (13 December 2007) Supreme

below illustrates, this is very much in keeping with the overall attitude that the Israeli Supreme Court has taken with respect to the role of interpretation in the continued existence of customary rules.[633] Nevertheless, in *Her Majesty the Queen in Right of Canada v Edelson and ors*, the court ended with a recommendation to the legislature to enact a law regarding state immunity which would replace customary rules,[634] and this was in fact followed by the enactment of the Israel Foreign States Immunity Law in 2008.[635]

A similar example comes from the UK Court of Appeal reasoning in *Trendtex Trading Corporation v Central Bank of Nigeria*. While this case revolved dominantly around the question as to how international law is to be incorporated in domestic law, the court made relevant proncouncement concerning the evolution of the customary rule on state immunity from absolute to restrictive. The issue at hand was whether the CIL rule of state immunity in international law could be incorporated in the UK system directly in this judgment, or whether, following the doctrine of transformation, the court should apply a domestic version of the rule from earlier UK precedent.[636] The difference would be that if the court would go with the international rule this would mean applying restrictive immunity, whereas if the court went with the rule as enunciated in older UK precedent it would mean applying absolute immunity.

Lord Denning MR framed the issue in the following way

> It is, I think, for the courts of this country to *define the rule* as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, *defining the rule in terms which are consonant with justice rather than adverse to it.*[637]
>
> [. . .]
>
> If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change — and apply the change in our English law — without waiting for the House of Lords to do it.[638]

To ascertain whether there was a change in the law of state immunity the court considered the decisions of various national courts where restrictive immunity had

---

Court of Justice of Colombia, Decision on Admissibility, Case No 32096, ILDC 1009 (CO 2007) [20-25].

[633] See also the reasoning in *Yosefov and ors v Egypt* where although the court upheld the immunity of the state in question (Egypt), it acknowledged that in light of an emerging trend the rule may need to be interpreted as containing an exception to immunity for states recognised as supporting terror. *Yosefov and ors v Egyp and Attorney General (joining)* (13 February 2011) Supreme Court of Israel, Motion to dismiss, CC (BS) 5006-08, ILDC 1771 (IL 2011).

[634] *Her Majesty the Queen in Right of Canada v Edelson and ors* (n 621) [35]. [635] Fox and Webb (n 614) 148.

[636] *Trendtex Trading Corporation v Central Bank of Nigeria* (13 January 1977) Appeal Court of the United Kingdom, Appeal Decision, QB 529 [1977] 1 All ER 881, [1977] 2 WLR 356, ILDC 1735 (UK 1977) [21].

[637] Ibid [20] (emphasis added). [638] Ibid [28].

been enacted, as well as the European Convention on State Immunity.[639] In this sense, the court engaged in an identificatory exercise, insofar as it was sampling state practice to trace the evolution of the rule of state immunity from absolute to restrictive. At the same time, the court did not feel that it was identifying an entirely new rule, but was rather "updating" the existing rule of state immunity in light of new practice. This is evident in the framing of the discussion as one of 'defining' the rule. The reasoning of Lord Denning MR brings this particularly to the fore, when he maintans that it is up for the courts to effect the evolution of the law, even when the legislature might be slow to follow.[640] It is further evident in his observation that it is the duty of national courts (referrring here more narrowly to the courts of the European Community) to 'bring the law as to sovereign immunity into harmony throughout the community'.[641]

Most aspects of state immunity in the UK are now dealt with the State Immunity Act of 1978 which espouses the restrictive approach,[642] and commentators have noted that had the Act been in place at the time *Trendtex* was being decided it is likely that the court would not have engaged in this lenghty discussion on immunity.[643] Nevertheless, the reasonig of the court provides insight into the role of interpretation in the evolution of customary rules. Much like the Israeli court in *Her Majesty the Queen in Right of Canada v Edelson and ors,* the UK court in *Trendtex* seems to combine identification with interpretation when faced with the need to give effect to evolution in the law. This is not surprising. When we think of the evolution of customary rules, it is intuitive that a court would combine identificatory and interpretative reasoning to capture this. Identificatory because often the evolution comes from new developments in society or in the law, which lead to changes in state conduct.[644] Interpretative because the decision to include or exclude certain facts under the rule is an inherently interpretative exercise, as it requires a delimitation of scope based on the underlying rationale of the rule. A similar approach can be seen in several other UK cases decided during this transition of state immunity from absolute to restrictive.[645]

A discussion of the full historical development of the customary rule on state immunity is beyond the scope of this chapter. The present discussion is concerned, rather, with more recent interpretations of the rule in its narrower manifestation, which is nowadays the settled approach. Nevertheless, as the discussion below il-

---

[639] Ibid [32-33]. [640] Ibid [34-38]. [641] Ibid [44].

[642] Lord Collins of Mapesbury and Tom Cross, 'The Law of International Custom in the Case Law of the House of Lords and the United Kingdom Supreme Court' in Liesbeth Lijnzaad and Council of Europe (eds) *The Judge and International Custom* (Brill Nijhoff 2018) 160, 168.

[643] *Trendtex Trading Corporation v Central Bank of Nigeria* (n 636) [A8].

[644] This is captured aptly in Lord Denning's description of the many new commercial activities undertaken by the state which led to a narrowing of the scope of state immunity. *Trendtex Trading Corporation v Central Bank of Nigeria* (n 636) [32].

[645] For a detailed discussion see Fox and Webb (n 614)131-143; See also Mapesbury and Cross (n 642) 168-172.

lustrates, the interpretation of the customary rule of state immunity by national courts continues to play a central role in the overall development of the rule. On this point more generally, it has been aptly noted that '[i]n practice, the identification of the character (lege ferenda or not) and scope of the norm will be matters discussed in court'.[646] Thus, the content of the general rule continues to be specified and evolve through interpretation, and at times national courts have even attempted to further limit the scope of the rule through interpretation.

The need, and at times difficulty, of distinguishing between *acta jure imperii* and *acta jure gestionis* can often be spotted in the caselaw, and national courts almost inevitably trace the distinction through interpretation. One example of this is the *Former consular employee at the Consulate General of Croatia in Stuttgart v Croatia* case, argued before the Higher Regional Court in Stuttgart. This case concerned a Croatian national with a main residence in Germany, who had been employed in the Consulate General of Croatia in Stuttgart. Croatia had issued her a diplomatic passport for her function as a consul of the first class, but had not notified the German Foreign Ministry of her appointment to a consular post.[647] The Croatian national held Croatian pension insurance and health plan, and additionally requested Croatia to enroll her in a German social security system based on a German-Croatian Agreement on Social Security. Croatia did not do this. As a consequence of not being enrolled in the system the Croatian national was not entitled to German unemployment benefits or pension, and she made a claim for damages against Croatia. Croatia on its part invoked state immunity on the basis of, among other, customary international law. The claim was rejected in full by a lower court, and the Croatian national appealed to the Higher Regional Court. The Higher Regional Court established that the relevant rule here was the customary rule on sovereign immunity, which is 'only applicable to sovereign acts of a state (acta iure imperii), but not to acts in the area of private law (acta iure gestionis)'.[648] To determine whether the nature of the act was of *jure imperii* or *jure gestionis* character, the court found it must examine 'the *sense and purpose* of state immunity'.[649] The court thus indicated that the determination of the nature of the act requires a teleological interpretation of the customary rule of state immunity. As the purpose of immunity, the Court identified the sovereign functions of the state, the prevention of conflict, and the proper functioning of the consulates.[650]

[646] Liesbeth Lijnzaad, 'Customary International Law before Dutch Courts: Nyugat and Beyond' in Liesbeth Lijnzaad and Council of Europe (eds) *The Judge and International Custom* (Brill Nijhoff 2018) 121,132.

[647] *Former consular employee at the Consulate General of Croatia in Stuttgart v Croatia* (23 October 2014) Higher Regional Court of Stuttgart, Second instance order, Case No 5 U 52/14, ILDC 2428 (DE 2014) 5 U 52/14, ILDC 2428 (DE 2014).

[648] Ibid [40] (unofficial translation by author).

[649] Ibid [43] (unofficial translation by author, emphasis added). 'Ferner hat sich die Qualifikation der Handlung am Sinn und Zweck der staatlichen Immunität zu orientieren'.

[650] Ibid [43]. 'This consists primarily of protecting the sovereign functions of the foreign state in the

In the present case, the Croatian national had been employed as a consul and performed tasks that a private person would not be able to perform. Thus, and bearing in mind the purpose of state immunity outlined above, the court found that although the applicant's employment contract was of a private nature, state immunity still applied.[651]

Similar teleological reasoning can be found in the appeal decision of jurisdiction by the Supreme Court of Latvia in the *VČ v Embassy of the Russian Federation to Latvia* case. This case concerned a private lease for accommodation between the applicant VČ and the Russian embassy to Latvia. At the end of the lease, the applicant found that damage and theft had occurred in the property, and brought a claim for compensation against the Russian embassy.[652] After the claim was dismissed by two lower courts, VČ turned to the Supreme Court of Latvia, seeking an annulment of the last judgment that would result in a reconsideration on the merits.[653] Thus, the Supreme Court did not itself need to pronounce on the merits, but rather to review the reasoning of the lower court. Nevertheless, it made an interesting observation in respect of the need to engage in teleological interpretation of the rule of state immunity. After affirming that the rule in question is the customary rule of state immunity, and in particular the restricted doctrine,[654] the supreme court found that in granting immunity to Russia the lower court did not adequately assess the nature of the activities in question,[655] in light of the overall aim of state immunity.[656] Thus, the court annulled the earlier judgment and referred the case for new consideration,[657] essentially pointing the lower court towards teleological interpretation.

In *Sawas v Saudi Arabia* the Brussels Labor Court looked to the *basis* of the customary rule of state immunity – being the reciprocal respect for the sovereignty of states – in order to determine whether the embassy of Saudi Arabia benefitted from immunity in a labor dispute with an employee.[658] The basis of the rule served the court as the guide in determining whether the acts in question should be considered as ones *jure imperii* or *jure gestionis*. Similarly, in *Bostadsrättsföreningen Villagatan 13 v Belgium* the Supreme Court of Sweden found that when assessing whether a state's actions belong to the category of *jure imperii* or *jure gestionis*, the court should

---

external area, and secondly of protecting the sovereignty and independence of the foreign state and of preventing international conflicts. The legal concept of the "ne impediatur legatio" is reflected in Art. 71 Para. 2 WÜK, which restricts the exercise of sovereignty by the receiving state vis-à-vis members of the consular post who are, for example, nationals of the state, to the effect that the performance of the tasks of the consulates are not unduly hindered' (unofficial translation by author).

[651] Ibid [44-47].

[652] *VČ v Embassy of the Russian Federation to Latvia* (12 December 2007) Supreme Court of Latvia, Appeal decision on Jurisdiction, Case No SKC-237, No 10 (514), ILDC 1063 (LV 2007) F1.

[653] Ibid, F2-F5. [654] Ibid [41]. [655] Ibid [42]. [656] Ibid [40]. [657] Ibid [43].

[658] *Sawas v Saudi Arabia* (11 January 2007) Brussels Labor Court, First Instance Judgment, Journal des Tribunaux 494, ILDC 1146 (BE 2007) [1] (unofficial translation by the author, emphasis added); For similar reasoning see *British Council v Dickinson* (8 March 2019) Court of Cassation of Italy, Final Appeal Judgment, No 6884/2019, ILDC 3010 (IT 2019).

make an overall assessment of the circumstances with due regard to the *purposes* of the right of immunity.[659]

In *Unidentified holders of Greek government bonds v Greece*, the German Federal Court of Justice relied on a teleological interpretation of the customary rule of state immunity, in order to qualify what would otherwise be a commercial act as a state act. Namely, the court decided that restructuring measures with respect to issued bonds, which is otherwise generally treated as a private commercial act, should be treated as an act *jure imperii* because otherwise it would lead to a situation where a German court is put in a position to review national legislative acts of the Greek state.[660] Such an outcome would run counter to the rationale underlying sovereign immunity, i.e. the principle of sovereign equality of states and the principle that states do not sit in court over one another.[661] Several years later, a factually similar case came up before the German Federal Constitutional Court,[662] but the court did not find reason to depart from the earlier reasoning on this subject and declared the case inadmissible.

The reliance on teleological interpretation by national courts raises two interrelated questions about how this method of interpretation might operate in the context of customary rules. Firstly, how exactly does teleological interpretation work when it comes to rules that emerge gradually and do not yield from an immediately identifiable group of "authors"? While we might be able to identify certain general aims that a customary rule is meant to serve, these are not readily available in the way they might be in the case of treaties. This then raises the question of how courts may go about (re)constructing the object and purpose of customary rules, and what materials can be used to this end. Secondly, and relatedly, how does the teleological interpretation of customary rules interact with the choice to interpret evolutively? In the context of treaty interpretation, teleological interpretation is anchored in the common intention of the parties. This intention may be evinced from a number of materials, including the text of the provisions themselves, the preamble of the treaty or the treaty's preparatory works. The intention of the parties may then also serve as indication whether provisions of the treaty should be given a static or a dynamic meaning, thereby also informing the choice to engage in evolutive interpretation. With customary rules however, we are once again faced with the question what indications can one rely on to justify going for a dynamic interpretation? These two qestions emerge not only with respect to the interpretation of the customary rule on state immunity, but also with respect to all

[659] *Bostadsrättsföreningen Villagatan 13 v Belgium* (30 December 2009) Supreme Court of Sweden, Judgment, Ö 2753-07, NJA 2009 s 95, ILDC 1672 (SE 2009) [11] (unofficial translation by the author with the help of a native speaker, emphasis added).

[660] *Unidentified holders of Greek government bonds v Greece* (19 December 2017) Federal Court of Justice of Germany, Appeal decision, XI ZR 796/16, ILDC 2881 (DE 2017) [18-26].

[661] Ibid [16].

[662] *A and B* (6 May 2020) Constitutional Court of Germany, Decision on admissibility of constitutional complaint, 2 BvR 331/18, ILDC 3159 (DE 2020) [18-20].

the other examples analysed throughout this chapter. Moreover, they come into particularly strong focus in respect of the following group of cases.

The following group of cases are examples of courts attempting to construct exceptions into the customary rule on state immunity through interpretation. In particular, these cases illustrate the attempt by national courts to construct an exception to customary state immunity for damages suffered due to acts committed by the armed forces of a state during a conflict. As the discussion below demonstrates, much like in the cases discussed thus far, the courts begin from the restrictive version of state immunity. They then engage in interpretation, in order to examine whether it is possible to read further restrictions of immunity into the customary rule. In this sense, these cases raise questions not only about the function of interpretation in the continued existence of customary rules, but also, potentially, about its limits.

The first in this line of cases is the case of *Germany v Prefecture of Voiotia* (*Voiotia 1*) decided by the Supreme Court of Greece. This case revolved around a massacre committed by Nazi German forces during World War II (WW II) on the civilian population of the Greek village of Distomo in the Prefecture of Voiotia. The massacre was performed in retaliation for acts of the Greek resistance against the German army. The Prefecture of Voiotia (on behalf of 118 claimants) brought a claim against Germany before a court of first instance, for damages arising from this massacre. Germany claimed immunity. The court of first instance held that a state cannot invoke immunity for acts which constitute *jus cogens* violations, and judged in favor of the claimants. In response to this judgment, Germany brought a petition for cassation before the Greek Supreme Court (Areios Pagos).[663] Germany argued that actions carried out by military personnel clearly constituted acts *jure imperii* and were therefore covered by state immunity. The Prefecture of Voiotia on the other hand argued that the acts in question violated peremptory norms of international law and were thus not covered by state immunity due to a tort liability exception from immunity for grave breaches of international law.[664] The court began the analysis with the view that there is an established customary rule of restricted state immunity, which distinguishes between *acta jure imperii* and *acta jure gestionis*, and only provides immunity for the former.[665] It then went on to catalogue recent developments which in the court's view indicated that there is a further limitation on state immunity even for acts *jure imperii*. In particular, the court looked at the European Convention on State Immunity, the case law of various states, the ILC draft articles on Jurisdictional Immunities of States and their Property (nowadays the UN Convention on Jurisdictional Immunities of States) and draft conclusions of the Institut de droit international.[666] Based on these materials the

[663] *Germany v Prefecture of Voiotia (Representing 118 persons from Distomo village)* (4 May 2000) Supreme Court of Greece, Petition on cassation against default, no 11/2000, (2000) 49 Nomiko Vima 212, ILDC 287 (GR 2000) (*Voiotia 1*) F1-F4.

[664] Ibid. [665] *Voiotia 1* [8]. [666] Ibid [8].

court concluded that there is now a recognized teritorial tort exception to the customary rule on state immunity even for acts *jure imperii*, which is dependent on a teritorial nexus to the forum state.[667]

Thus far, the court was engaging in custom identification, insofar as it was examining state practice and evaluating whether there is sufficient evidence to claim a change in the existing customary rule.[668] In the next step of its reasoning however, the court moved into the territory of interpretation. Following the examination of recent practice, the court formulated the exception in terms similar to the ones expressed in the European Convention on State Immunity (ECSI),[669] and the then draft articles on immunity by the ILC.[670] However, both of these instruments exclude military activities in the context of armed conflict from their ambit.[671] The court seems to recognize this when it observes that 'the exception from the rule of immunity does not cover claims for reparation of damages resulting from armed conflict [. . .] Such claims are regulated by the usual international agreements [concluded] after the war [. . .]'.[672] Nevertheles, for the purposes of the present case, the court found that

> The same, however, is not retained, i.e. the abovementioned exception from immunity is applied, in relation to claims for damages arising out of offences (usually crimes

[667] Ibid.

[668] It is interesting to note that in the dissenting opinion to this judgment, after examining the same materials that the majority considered, the dissenting judges arrived at the conclusion that there is no such exception to the customary rule. *Voiotia 1* (n 663) [9].

[669] In particular, the court relied on article 11 of the ECSI which stipulates that: 'A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred'.

[670] The relevant provision is captured in what is now Article 12 of the UN Convention on Jurisdictional Immunities, which stipulates that: 'Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission'.

[671] International Law Commission, Draft Articles on Jurisdictional Immunities of States and their Property, with commentaries (1991) II(2) Yearbook of International Law Commission 13, 46. See also Maria Gavouneli and Ilias Bantekas, 'Prefecture of Voiotia v. Federal Republic of Germany. Case No. 11/2000' (2001) 95 American Journal of International Law 198, 199-200. See also the reasoning of the Slovenian Constitutional Court, which upheld the immunity of Germany for acts emerging from the WW II factual background precisely on the reasoning that the ECSI and the ILC Draft Articles exclude military activities from their ambit. *Decision No. UP-13/99* (8 March 2001) Constitutional Court of the Republic of Slovenia, Selected Decisions 1991-2015, 354. Available at <https://www.us-rs.si/wp-content/uploads/2016/11/Selected-Decisions-of-the-Constitutional-Court-1991-2015.pdf>

[672] *Voiotia 1* (n 663) [10].

> against humanity) that strike, not unavoidably, non-combatant populations in general, as a reflecting result of warfare, but persons of a limited circle and specified place that have no relation to the armed conflict and take no part whatsoever, either directly or indirectly [. . .] in warfare operations.[673]

This is an interpretive leap, as the court did not anchor its conclusion in an examination of practice. Rather, it considered other relevant customary rules on warfare in order to qualify the relevant conduct as one that should not be covered by state immunity. In particular, the court looked at articles 43 and 50 of Hague Convention IV Regulations (which it considered to be customary) in order to conclude that

> In case of military occupation that is directly derived from an armed conflict and that [. . .] does not bring about a change in sovereignty or preclude the application of the laws of the occupied state, crimes carried out by organs of the occupying power in abuse of their sovereign power do not attract immunity when such acts are committed through abuse of the sovereign power thereof as reprisals against a specific and limited number of innocent and wholly uninvolved citizens for specific sabotage acts carried out by resistance groups.[674]

Here, the court is evaluating the customary rule on state immunity together with other relevant customary rules, essentially engaging in systemic interpretation. It further concluded that the act of the German military 'in any case runs contrary to the principle, generally acknowledged by civilised nations, according to which a person cannot be punished for the acts carried out by another', thereby seemingly also referencing an applicable general principle.[675] The court further observed that

> the torts in question (murders that also constitute crimes against humanity) were directed against specific persons limited in number who resided in a specific place, who had nothing to do with the resistance activity [. . .]the said homicides constituted hideous murders that objectively were not necessary in order to maintain the military occupation of the area or subdue the underground action, carried out in the territory of the forum by organs of the German Third Reich in an abuse of sovereign power.[676]

This seems like a continuation of the systemic interpretation exercise, as the court here is characterizing the acts of the German military as an 'abuse of sovereign power' as opposed to otherwise legitimate sovereign activities in an armed conflict. In light of this, the court held that these acts were not covered by state immunity.[677]

Overall, it seems that while the court arrived at the conclusion that there is a territorial tort exception to the rule on state immunity through identification, its final conclusion about this exception applying to certain types of sovereign activities (abuses, grave breaches) in armed conflict was a result of interpretation. The reasoning of the majority attracted strong disagreement from the dissenting minor-

[673] Ibid [10]. [674] Ibid. [675] Ibid. [676] Ibid [12]. [677] Ibid.

ity, which neither accepted that there is a territorial tort exception to immunity for *acta jure imperii* in an armed conflict, nor that the acts in question were abuses of sovereign power outside the limits of hostilities.[678] Commentators also qualified the court's reasoning as 'an acute case of judicial activism'.[679] Moreover, the court's decision was never executed as the German state was covered by immunity in that regard and the Greek Ministry of Justice did not grant the necessary permission.[680] Nevertheless, the court's reasoning gained some traction in subsequent decisions by other national courts.

In *Ferrini v Germany* before the Italian Supreme Court of Cassation (*Ferrini 1*), the court specifically referred to the reasoning from *Voiotia 1* to support a finding about the existence in customary law of a territorial tort exception to state immunity for violations of *jus cogens* norms.[681] This case concerned the forced deportation of the Italian citizen Ferrini by the German army during WW II. Mr Ferrini was arrested and deported to Germany, where he was detained in a forced labor/extermination camp, and forced to work for German companies.[682] Several decades later, he brought a civil claim for reparations against Germany before the Arezzo Tribunal. The Arezzo Tribunal declined jurisdiction due to Germany's immunity, and the appeal court in Florence upheld this decision. Mr. Ferrini then brought the case before the Italian Supreme Court of Cassation.[683]

The Court of Cassation observed that there is no doubt that the actions carried out by Germany were an expression of its sovereign power since they were conducted during war operations.

> However, the problem in question is to ascertain whether immunity from jurisdiction can be granted in the case of conduct which [. . .] is of an extremely serious nature, and which on the basis of customary international law constitutes an international crime in that it violates universal values that transcend the interests of individual states.[684]

In this regard, the court differentiated between the conduct in question which constituted international crimes, and conduct which consisted of legitimate actions of armed forces and was therefore 'unfailingly and ontologically *jure imperii*'.[685] The court then proceeded to examine other customary rules relevant to the factual situation at hand, including deportation and subjection to forced labor as war crimes,[686] as well as the related regime of state responsibility.[687] This led the court to observe that

---

678 Ibid [11], [13]. 679 Gavouneli and Bantekas (n 671) 204.

680 *Voiotia 1* (n 663) Related Development(s), 2.

681 *Ferrini v Germany* (11 March 2004) Supreme Court of Cassation of Italy, Appeal decision, Cass no 5044/04, ILDC 19 (IT 2004) ('*Ferrini 1*') [8].

682 Ibid, F1. 683 Ibid, F4-F5. 684 Ibid [7]. 685 Ibid [6-6.1]. 686 Ibid [7.2-7.4].

687 In particular, the Italian court here referred back to the reasoning of its Greek counterpart in *Voiotia 1* to observe that 'it is increasingly accepted that such serious violations must be met with a qualitatively different (and more severe) reaction than that established for other crimes, including in

> The recognition of immunity from jurisdiction for States that are responsible for such offences is in blatant contrast with the normative framework outlined above, since this recognition obstructs rather than protects such values, the protection of which is rather to be considered, in accordance with such norms and principles, essential for the entire international community, so that in the most serious cases it should justify mandatory forms of response.[688]

It seems that the Italian Court of Cassation is performing two interpretive moves here. Firstly, it is engaging in systemic interpretation, insofar as it analyses the customary rule on state immunity together with other relevant rules of the broader legal system.[689] Secondly, it is also engaging in teleological interpretation because it is referring to recognized values whose protection is 'to be considered [. . .] essential for the entire international community'. This is certainly not an explicit reference to the object and purpose of a rule that one might expect to find in teleological interpretation. Nevertheless, the court here is implicitly recognizing a purpose that the rules of the system are meant to serve, i.e. the protection of values essential for the international community. To arrive at this finding, the court had to examine other relevant rules, so as to evince these purported communal values. Thus, here the systemic and the teleological interpretive moves are necessarily connected. The court continued its construction by finding that

> There are no grounds for arguing that this derogation from the principle of immunity is not specifically provided by any law. [. . .] Respect for inviolable human rights has by now attained the status of a fundamental principle of the international legal system. [. . .] And *the emergence of this principle cannot but influence the scope of the other principles that traditionally inform this legal system*, particularly that of the "sovereign equality" of States, which constitutes the rationale for the recognition of state immunity from foreign civil jurisdiction.[690]

Here, another interpretive move enters the construction, namely, evolutive interpretation. By finding that the emergence of respect for human rights as a fundamental principle cannot but influence the scope of the principle of sovereign equality which underlies state immunity, the court is essentially acknowledging that the scope of older rules of the system may be affected (broadened or narrowed) by other legal rules which emerged later. This is once again a combination of two interpretive moves, as the choice to interpret dynamically is informed by

---

respect of States. In accordance with this trend, [. . .] States that were not involved in the crime have a duty not to recognise situations determined by its commission. And in the same sense, the Draft Articles on International Responsibility of States, cit., "forbids" States from providing any help or assistance for the maintenance of situations that originated from such violations and "obliges" them to use legitimate means to bring about the end of the illicit activities'. *Ferrini 1* (n 681) [9].

[688] Ibid [9.1].

[689] For a similar reading of the reasoning of the court see Andrea Bianchi, 'Ferrini v Federal Republic of Germany' (2005) 99(1) American Journal of International Law 242, 244.

[690] *Ferrini 1* (n 681) [9.2] (emphasis added).

reference to other (newer) relevant rules of the system. 'Indeed, legal rules should not be interpreted in isolation since they complement and integrate each other, and the application of one is dependent on the others'.[691]

The reasoning of the Italian Court of Cassation in this case is a welcome example of how various interpretive methods operate and interact when it comes to the interpretation of customary law. On this point, it has been observed that the *Ferrini 1* judgment is a valuable addition to the debate, not in the least for its richness in terms of cross-references to the case law of other courts (both national and international), as well as relevant rules and legislation.[692] At the same time, the reasoning of the court is at times difficult to untangle and seems to conflate legal points. For instance, the court does not fully distinguish between individual and state responsibility in international law, and also references cases concerning the removal of immunity of state officials for grave breaches such as torture.[693] Similarly, it is not entirely clear whether the court ultimately bases the exception to sovereign immunity on the territorial tort exception, or on universal jurisdiction.[694] Nevertheless, the judgment presents an example of how interpretive reasoning may serve as a tool to reconcile different regimes of international law, and harmonize them when they might seemingly lead to conflicting outcomes or inconsistencies.[695] Moreover, one final insight from the judgment that is particularly relevant to our discussion, is the court's matter-of-fact observation that it is 'unquestionably true' that similar criteria of interpretation as those for treaties apply to the interpretation of customary norms, 'which like the others are part of a system and therefore may only be correctly understood in relation to other norms that form an integral part of the same legal system'.[696]

In the aftermath of *Ferrini 1*, several cases emerging from a similar factual background – namely, actions of Germany during WW II – were brought before the Italian Supreme Court of Cassation for a ruling on the question of state immunity. In *Germany v Mantelli and ors*, the court found that customary state immunity coexists with 'the other parallel principle, of equal general scope, whereby international crimes "threaten all of humanity and undermine the very bases for coexistence between peoples" '.[697] According to the court, the undeniable conflict

---

[691] Ibid [9.2]. [692] Bianchi (n 689) 245. [693] *Ferrini 1* (n 681) [10.2-11]. [694] Ibid [12].

[695] See one commentator who observes that '[t]o hold that certain customary rules of international law lay down prohibitions applicable to all the "components" of the international community has the merit of stressing the need to uphold the underlying values of those norms and to avoid normative incongruities. For example, to uphold the immunity of foreign states while lifting that of their organs for the same violations calls into question the consistency of the whole normative system. By the same token, consideration of the legal consequences stemming, under the law of state responsibility, from a serious violation of a *jus cogens* rule may well lead, by way of interpretation, to the nonrecognition of a state's jurisdictional immunity'. Bianchi (n 689) 246-47.

[696] *Ferrini 1* (n 681) [9.2].

[697] *Germany v Mantelli and ors* (29 May 2008) Supreme Court of Cassation of Italy, Preliminary Order on Jurisdiction, Case No 14201/2008, (2008) Riv Dir Int 896, ILDC 1037 (IT 2008) [11].

between these two could not be solved otherwise 'on the systematic level' than by giving priority to the higher ranking norms.[698] The court defended its reasoning by both acknowledging its contribution towards an emerging rule of customary law and simultaneously considering such a rule to already be inherent in the international legal system'.[699] It is thus not entirely clear whether the court here perceived itself as interpreting an existing customary rule or not. Nevertheless, the court followed this up with the observation that

> it would be "incongruous" to say the least for civil jurisdiction to be asserted in respect of a foreign State in the case of violations of contractual obligations ascribable to it, and by contrast to be excluded in the case of much more serious violations, such as those which constitute crimes against humanity, which also mark the breaking point of the tolerable exercise of sovereignty.[700]

This reasoning here resembles an *a fortiori* construction, insofar as it finds that if immunity is not extended for "mere" contractual obligations, it should certainly not be extended for more serious actions such as ones that might constitute crimes against humanity. Finally, the court also briefly acknowledged the need for a territorial nexus.[701] Overall, it seems like the reasoning in *Germany v Mantelli and ors* can be characterized as systemic interpretation, insofar as the court assessed the scope of sovereign immunity in relation to other relevant rules. At the same time, the court itself is ambiguous on this when it refers to the territorial tort exception as both an emerging customary rule and as one already inherent in the legal system. The overall reliance in the decision on the 'precedent'[702] set by *Ferrini 1* seems to indicate that the court was engaging in an interpretive exercise, while simultaneously having the self-awareness that this interpretation is contributing to a growing trend on the subject.

Continuing this trend, in *Germany v Milde*, the Italian Court of Cassation once again followed the reasoning of *Ferrini 1*. Here, the court found that the question to be answered depends on the 'coexistence of different customary international standards, the different areas of application of which must be coordinated'. Thus, the court once again treated the question as one of systemic interpretation, wherein the customary rule on state immunity needs to be interpreted by reference to other relevant customary rules such as those 'formed to protect the freedom

---

[698] Ibid [11]. For this determination, the court referred to the *Al-Adsani v United Kingdom* decision of the European Court of Human Rights. *Al-Adsani v United Kingdom* 21 November 2001) (Judgment) European Court of Human Rights, App no 35763/97.

[699] *Germany v Mantelli and ors* (n 697) [11]. [700] Ibid [11].

[701] 'all of this confirms that the Federal Republic of Germany does not have the right to be recognised, in this dispute, as immune from the civil jurisdiction of the Italian Judge — which is therefore to be declared — *also by* virtue of the fact that the unlawful conduct partly occurred in Italy'. *Germany v Mantelli and ors* (n 697) [11] (emphasis added).

[702] Ibid [11].

and dignity of man'.[703] Having framed the inquiry in this way, the court found that coordination can be achieved on the basis of common values accepted in international law.[704] In this sense, the court made a similar interpretive move as in *Ferrini 1*, namely, combining systemic and teleological interpretation. An interesting aspect of the reasoning in *Germany v Milde* is that the court acknowledged that the existence of a certain amount of decisions that deny immunity is not a decisive factor here, since at any rate there were also decisions that granted immunity in factually similar circumstances.[705] Rather, the court found that the solution is an interpretive one, taking into account considerations such as the nature of existing customary rules, their reciprocal interrelations and their hierarchical position in the international order.[706] Furthermore, the court took the next interpretive step to also find that it would be inconsistent from a systemic point of view to proclaim the primacy of the fundamental rights of the person but then deny individuals access to court in case of violations.[707] In this regard, it seems the court engaged in effective interpretation, constructing the relationship between the competing customary rules in a way that would ensure the most coherent outcome.

From the analysis of the preceding cases it emerges that the Italian Court of Cassation constructed the exception to immunity for sovereign acts in times of war which constitute grave violations on two interrelated foundations. Firstly, the court built on the existing territorial tort exception for *acta jure imperii*, according to which immunity should not be granted with regard to pecuniary damages arising from acts that occurred on the territory of the forum state. The so-called territorial tort exception is what grounded the court's construction in existing law. The court found this foundation through custom identification. Secondly, and relatedly, the court extended this exception to acts committed by armed forces when these were considered to be grave violations of universal norms (jus cogens). To be able to perform this extension, the court had to interpret both systemically and teleologically. More specifically, the court had to rely on other relevant rules of the system in order to determine which actions of armed forces would constitute "regular" sovereign actions in times of conflict, and which would be grave breaches or international crimes. Having done this, the court then had to also rely on other relevant rules and principles in order to evince the broader values of the international community that ought to be protected and preserved. Based on this, the court was able to construct the argument that state immunity should not be extended to sovereign acts which constitute grave breaches of international law. At

[703] Germany v Milde (Max Josef) (13 January 2009) Supreme Court of Cassation of Italy, Appeal Judgment, Case no 1072/2009, (2009) 92 Riv Dir Int 618, ILDC 1224 (IT 2009)

[704] Ibid [6]. [705] Ibid [4]. [706] Ibid. See also summary and analysis in H4-H7.

[707] Ibid. 'it would make no sense to proclaim the primacy of the fundamental rights of the person and, then, contradictorily exclude the possibility of access to the judge by denying, in this way, individuals the possibility of using the means indispensable to ensure the effectiveness and pre-eminence of those fundamental rights that have been violated by the criminal action of a State' (unofficial translation by author).

the outset of the analysis, this section flagged the questions 'how does teleological interpretation work when it comes to CIL interpretation, and how may courts go about (re)constructing the object and purpose of customary rules'? What we now see is that often the teleological and the systemic moves go together, in the sense that courts (re)construct the purpose of the customary rule in question by referring to other rules operating in the regime or in the broader legal system.

It is by now well known that the reasoning of the Italian court was found to be in contradiction to international law by the ICJ in the *Jurisdictional Immunities of the State* case.[708] As that case was pending however, the Italian Court of Cassation made one last pronouncement in defense of the trend opened with *Ferrini 1*. After unsuccessful attempts to have the *Voiotia 1* judgment executed in Greece and Germany, the complainants from that case attempted to have it enforced in Italy. The court of first instance declared the decision enforceable, and Germany once again found itself challenging a case before the Italian Court of Cassation in *Germany v Prefecture of Vojotia* (*Voiotia 2*). In light of the pending dispute before the ICJ, Germany asked the court to stay the proceedings. Moreover, Germany reiterated its stance on state immunity for acts committed by its armed forces, and urged the Italian Court to reconsider its earlier jurisprudence.[709] The portion of reasoning relevant to our present discussion is the court's last attempt to defend the construction of an exception to immunity for sovereign acts which constituted grave breaches of international law. In *Voiotia 2*, the Italian Court of Cassation defended the existence of the exception both on the basis of its consistency with other national jurisprudence[710] and its necessity for the sake of a broader coherence between norms in international law.[711] In this sense, it did not deploy a new interpretive argument. Nevertheless, the court attempted to clarify some of the inconsistencies that could be found in the earlier judgments discussed above. To this end, the court recognized some flaws in the the earlier attempts to construct a normative hierarchical relationship between state immunity and grave breaches, acknowledging that this does not sit well with the prevalent notion that rules of international law are not in a hierarchical relationship with each other.[712] Rather, the court took the route of arguing that state immunity must be interpreted with a view to its function, and limited accordingly. For this, the court took a cue from the reasoning of the ICJ in the *Arrest Warrant* case, finding that '[t]his judgment was based on the recognition of a common State practice leading to the adoption of norms that facilitate the elaboration of a code of reciprocal conduct, whose broader aim is the good functioning of inter-State relations'.[713]

---

[708] *Jurisdictional Immunities of the State* (n 87) [107].

[709] *Germany v Prefecture of Vojotia representing 118 persons from Distomo village and Presidency of the Council of Ministers of Italy* (20 May 2011) Final appeal judgment (opposition to enforceability of a foreign ruling in Italy) No 11163/2011, ILDC 1815 (IT 2011) (*Voiotia 2*) F4-F7.

[710] Ibid [37-41]. [711] Ibid [46-49]. [712] Ibid [45]. [713] Ibid [46].

> In this perspective, norms are to be evaluated in light of their actual 'cogent' content, and not by their capacity to override an absolute customary principle of immunity. Furthermore, such an approach makes it possible to move beyond the obsolete distinction between acts *jure imperii* and acts *jure gestionis* as the criterion by which immunity from jurisdiction is ascertained. This distinction took shape at a time of intensification of commercial relations, and was aimed at avoiding interference with those relations in the international context. Clearly, such a distinction cannot be relevant for excluding the application of international *jus cogens* norms, which are *per se* binding on States. It would be absurd if such norms were held not to have such binding force in the case of international crimes inimical to fundamental values of the international legal system.[714]

While the reliance on the *Arrest Warrant* judgment is not fully apposite, the reasoning of the court here does a good job at clarifying the proverbial thought process that underlies its jurisprudence on this point. Essentially, the argument by the court combines systemic and teleological interpretation in order to reconcile customary rules – state immunity on the one hand and various rules prohibiting crimes against humanity on the other – which on their own seem to be at odds with each other. How can we reconcile the prohibition of grave breaches of international law with the seeming accountability gap posed by sovereign immunity? The court's construction from *Ferrini 1* onwards resolves this normative conflict by clarifying that certain acts performed by sovereign actors such as armed forces in times of war may not be protected by immunity when they are grave breaches or abuses of power. The court buttressed its reasoning with an additional observation on the evolution of international law,[715] thereby also reiterating the role that evolutive interpretation is to play when an interpreter is faced with older customary rules that continue to operate in the system.

The ICJ did not find the interpretive construction of the Italian Court of Cassation persuasive, and found the Italian state to be in breach of its obligations towards Germany. In particular, the ICJ found that the interpretive exercise as undertaken by the Italian Court of Cassation 'disregards the very nature of state immunity'.[716] This conclusion was in light of the ICJ's earlier finding that sovereign immunity is a procedural issue that needs to be decided at the outset before a consideration of

[714] Ibid [46]. While it seems like the court is proposing to do away with the jure imperii – jure gestionis distinction altogether, this was not the case, as the court concluded this paragraphs by saying that 'the jure imperii/jure gestionis distinction may continue to have a specific meaning in the application of practices adopted by States to ensure the performance of functions and activities in their mutual interests and in the interests of the international community. Thus, it seems that the court is adopting that distinction only in the limited context of *jus cogens* violations.

[715] Ibid [48-50].

[716] *Jurisdictional Immunities of the State* (n 87) [106]. 'In so far as the argument based on the combined effect of the circumstances is to be understood as meaning that the national court should balance the different factors, assessing the respective weight, on the one hand, of the various circumstances that might justify the exercise of its jurisdiction, and, on the other hand, of the interests attaching to the protection of immunity, such an approach would disregard the very nature of State immunity'.

the merits.[717] 'Immunity cannot, therefore, be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed'.[718] Thus, it seems that where the Italian Court of Cassation saw a normative conflict in international law which needs to be reconciled through interpretation, the ICJ rather saw a procedural differentiation between types of rules. In this sense, the ICJ did not consider that the existence of state immunity, even in cases of grave breaches by the armed forces of a state, stood in conflict with the prohibition of crimes against humanity. Moreover, the ICJ found that there is currently no indication in state practice which would point towards the recognition of an exception.[719] Thus, it seems that while the Italian Court of Cassation framed the inquiry dominantly in terms of interpretation, the ICJ framed it in terms of custom identification.

In the aftermath of the ICJ judgment, the Italian state adopted a law in which, among other things, it required Italian courts to comply with the ICJ judgment.[720] This was followed by several Italian courts upholding Germany's immunity in cases arising from the WW II factual background.[721] However, in 2014, the Italian Court of Cassation reversed course. In its *Simoncioni* judgment, the court found that the recognition of state immunity in cases of war crimes or crimes against humanity violated provisions of the Italian constitution.[722] In reaching this conclusion the court relied on the so-called 'counter-limits' doctrine.[723] In particular, the court found that when a customary rule of equal rank as a constitutional rule is inconsistent with a fundamental principle of the Italian constitution, that rule does not

[717] In particular, the ICJ observed that 'the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act *presents a logical problem*. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature'. *Jurisdictional Immunities of the State* (n 87) [82] (emphasis added).

[718] Ibid [106].

[719] Ibid [83-91] The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict [91].

[720] Law No. 5/2013 of 14 January 2013.

[721] See indicatively *Military Prosecutor v Albers and ors and Germany (joining)* (9 August 2012) Supreme Court of Cassation of Italy, Final appeal judgment No 32139/2012, ILDC 1921 (IT 2012); *Frascà v Germany and Giachini (guardian of Priebke) and Italy (joining)* (21 February 2013) Court of Cassation of Italy, Preliminary order on jurisdiction, No 4284/2013, ILDC 1998 (IT 2013); *Federal Republic of Germany v Ferrini and Ferrini* (21 January 2014) Supreme Court of Cassation of Italy, Appeal Judgment, No 1136, ILDC 2724 (IT 2014).

[722] *Simoncioni and ors v Germany and President of the Council of Ministers of the Italian Republic (intervening)* (22 October 2014) Constitutional Court of Italy, Constitutional review, Judgment No 238/2014, ILDC 2237 (IT 2014) [3.4].

[723] Ibid [3.2] [3.4]. 'Respect for fundamental principles and inviolable human rights, identifying elements of the constitutional order, is the limit that indicates the receptiveness of the Italian legal order to the international and supranational order (Articles 10 and 11 of the Constitution), as this Court has repeatedly upheld'. See also Benedetto Conforti, *Diritto Internazionale* (10th ed Editoriale Scientifica 2014) 348.

produce effect in the Italian legal system.[724] In view of this approach, the court reiterated its stance that state immunity cannot be granted for grave violations which cannot be considered to be an exercise of the sovereign function, and for which no redress would be available.[725] This is very much in line with its earlier interpretive reasoning, only now the court framed its inquiry as one of constitutional review.

In *Jurisdictional Immunities of the State* the ICJ asserted that there was no conflict between peremptory norms protecting human rights and the customary rule on state immunity, because the former were substantive and the latter procedural. However, subsequent cases before Italian courts illustrate that this is not a satisfactory solution in light of the "accountability gap" it potentially leaves. For instance, in *Allessi and ors v Germany*, the Florence Court of First Instance observed that 'a judge who is required to implement in full the fundamental rights of the human person cannot be satisfied with the Hague Court's claimed absence of conflicts between customary international law which recognizes that States are immune from jurisdiction and rules of *jus cogens*'.[726] This eventually led to the constitutional review approach taken in *Simoncioni*. Thus, it seems that in the face of opposition to its harmonizing interpretive approach pre-ICJ judgment, the Italian court simply took another route to arrive at the same destination.[727] Our present discussion is not concerned with the broader implications of judicial stand-offs like the one between the ICJ and the Italian Court of Cassation.[728] Rather, the questions that emerge from an analysis of these diverging approaches are: what is the role of interpretation in the evolution of customary rules, and what are its limits? By posing the discussion in terms of custom identification, the ICJ seems to implicitly suggest that one of the limits of the interpretive exercise is modification. Put differently,

---

[724] *Simoncioni* (n 722) [3.4] 'Furthermore, such a control is essential in light of Article 10, para. 1 of the Constitution, which requires that this Court ascertain whether the customary international norm of immunity from the jurisdiction of foreign States, as interpreted in the international legal order, can be incorporated into the constitutional order, as it does not conflict with fundamental principles and inviolable rights. [On the contrary], if there were a conflict, "the referral to the international norm [would] not operate" (Judgment No. 311/2009). Accordingly, the incorporation, and thus the application, of the international norm would inevitably be precluded, insofar as it conflicts with inviolable principles and rights. This is exactly what has happened in the present case'.

[725] Ibid [3.4].

[726] *Alessi and ors v Germany and Presidency of the Council of Ministers of the Italian Republic* (intervening) (21 January 2014) Florence Court of First Instance, Referral to the Constitutional Court, Order No 85/2014, ILDC 2725 (IT 2014) [22].

[727] See for instance *Toldo v Germany* (7 July 2020) Supreme Court of Cassation of Italy, Appeal judgment, No 20442, ILDC 3220 (IT 2020); *Mabrouk v Registro Italiano Navale SpA* (10 December 2020) Supreme Court of Cassation of Italy, Final appeal on a point of law, No 28180/2020, ILDC 3224 (IT 2020).

[728] On this point see Benedetto Conforti, 'The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity' (2011) 21 Italian Yearbook of International Law 135. See more generally ILA, 'Final Report of the Study Group on Principles on the Engagement of Domestic Courts with International Law: Mapping the Engagement of Domestic Courts with International Law' (2016) 16-26.

the ICJ's findings in *Jurisdictional Immunities of the State* seem to imply that an interpretive outcome such as the one reached by the Italian Court of Cassation cannot be reached unless the court can find support for its claims in the practice of states. At the same time, even in the aftermath of *Jurisdictional Immunities of the State*, national courts have struggled with issues of evolution of the rule of state immunity, and seem to have found interpretative rather than identificatory solutions.

For instance, in case *2016 Ga-Hap 505092*, the Seoul Central District Court found that 'the doctrine of state immunity is not permanent nor static. It continuously evolves in accordance with the changes in the international order'.[729] In this case, the court had to assess whether state immunity could be extended to Japan for crimes against humanity committed by the Japanese army during WW II. The case arose out of a claim brought by a group of Korean women who were forced into sexual slavery for the Japanese army. This was a part of a systematic policy of Imperial Japan of conscripting women into so-called "comfort stations" installed throughout the battlefront. The women kept in these stations were called "comfort women", and were kept in brutal conditions of sexual slavery from the moment of their conscription until the end of the conflict.[730]

After outlining the state of customary law on state immunity, the court acknowledged that the acts of the Japanese army could not be conceived as commercial or private acts as they had a clear link to the state both in terms of who committed them (several state agencies) and the purpose for which they were committed ("comforting" soldiers). Therefore, the acts were clearly categorizable as sovereign acts.[731] The Seoul court was thus faced with a similar conundrum as its Italian counterparts, in that it had to assess whether immunity can be extended to sovereign acts committed by the armed forces of a state during a conflict which constituted crimes against humanity. The court acknowledged both the ICJ judgment in *Jurisdictional Immunities of the State*, and the relevant national jurisprudence before and after that case.[732] It eventually reached the conclusion that although the acts in question in the present case were sovereign acts, state immunity cannot be applied.[733] In reaching this conclusion, the court took a clearly interpretive approach, combining insights from the relevant jurisprudence. Part of its reasoning was based on constitutional review of the customary rule in question, à la *Simoncioni*. In particular the Seoul court found that '[t]he right of access to courts is a basic right necessary to guarantee other basic rights, since it is the right to request remedy or prevention when basic rights are in danger of being infringed upon or

[729] *Case no.: 2016 Ga-Hap 505092 Compensation for Damage (Others)* (8 January 2021) Seoul Central District Courrt, 34th Civil Chamber, Judgment, 27 [3] < https://womenandwar.net/kr/wp-content/uploads/2021/02/ENG-2016_Ga_Hap_505092_23Feb2021.pdf?ckattempt=1> (unofficial translation by The Korean Council for Justice and Remembrance for the Issues of Military Sexual Slavery by Japan)

[730] Ibid, 3-10. [731] Ibid, 22. [732] Ibid, 23-25. [733] Ibid, 26.

violated'.[734] The court also gave a nod to the ICJ's conclusions, by acknowledging that state immunity is a procedural consideration as it relates to determining jurisdiction prior to assessing merits.

> 'However, adjective law ought to be construed to the effect that it best realizes the rights and status under substantive law. This is because the significance of adjective law lies in its role as a means to realize substantive legal order'.[735]

With this pronouncement, the Seoul court essentially found a proverbial way around the 'procedural v substantive' division of the ICJ, and opened a way for state immunity (as the procedural consideration) to be interpreted in light of the substantive law. The court then pronounced the following

> When interpreting and applying law, the results should be considered and *if the interpretation leads to an unreasonable or unjust conclusion*, measures should be taken to seek ways to exclude such interpretations. To do so, several interpretative methods such as logical and systematic interpretation, historical interpretation, and purposive interpretation are utilized. [. . .]
>
> Interpreting that the Defendant is exempt from jurisdiction in a civil suit that was choosen as a forum of last resort in a case where the Defendant state destroyed universal values of the international community and inflicted severe damages upon victims *would result in unreasonable and unjust results*.[736]

The court is making two interpretive moves here. Firstly, it is interpreting systemically in that it is considering other relevant rules in the system, and loooking at how they interact with state immunity. This is particularly evident in its consideration of the relationship between immunity and the rights of remedy and access to court as between 'adjective and substantive law'. Secondly, and perhaps more interestingly, it is framing its interpretation in terms of the effectiveness of the outcome. According to the court, interpreting state immunity to not contain an exception for grave violations of international law would result in unreasonable or unjust results. Therefore, the rule must be interpreted to contain such an exception, so as to avoid an unreasonable outcome. The overall construction here may be characterised as an *ut res magis valeat* construction or effective interpretation.[737] However, in order to assess what constitutes a reasonable or unreasonable outcome, the court must also engage in systemic and teleological interpretation. Teleological because the reasonableness of the outcome can only be judged by reference to the proffessed

---

[734] Ibid, 26. The court here was referring to domestic legal rules which guaranteed access to court and the right to a remedy. For a discussion of this aspect of the reasoning see Eleonora Branca, ' 'Yet it moves . . . ': The Dynamic Evolution of State immunity in the 'Comfort Women' case' (*EJIL: Talk!*, 7 April 2021) <https://www.ejiltalk.org/yet-it-moves-the-dynamic-evolution-of-state-immunity-in-the-comfort-women-case/> accessed 12 February 2022.

[735] *2016 Ga-Hap 505092* (n 729) 27. [736] Ibid, 28 (emphasis added).

[737] For the same characterisation of the court's reasoning see Merkouris 2023 (n 3) 36.

objective of the rule,[738] and systemic because this reasonableness also hinges on the extent to which the scope of applicability of other relevant rules may be limited by the outcome. The court further supported its reasoning by reiterating that if immunity is extended to the acts in question, the victims would be deprived of a remedy and of their constitutionally guaranteed rights.[739] Moreover, the court also considered the fact that the plaintiffs were individuals who do not have negotiation or political power, and thus do not have measures available to receive reparations other than this lawsuit.[740] This was amplified by the fact that earlier agreements on this issue between Japan and South Korea 'failed to include reparations for individuals who have suffered damages'.[741] Scenarios like these may imply that the ICJ's proposal to pursue diplomatic rather than legal avenues in cases barred by state immunity[742] is not (always) an adequate solution. By way of conclusion on this point, the court observed that

> The significance of the theory of state immunity shall be found in its respect for sovereign states and not obeying the jurisdiction of other states. It must not have been formed to allow states that violated peremptory norms (international *jus cogens*) and inflicted severe damages upon individuals of other states to evade reparations and compensation behind such theory. Thus, in such cases, exceptions should be allowed in the interpretation regarding customary international law on state immunity.[743]

It is clear both from this conclusion and the details discussed above, that the Seoul court approached the issue at hand as one of interpretation, and proceeded to construct an exception to the rule of sovereign immunity through various different interpretive moves. The judgment in *2016 Ga-Hap 505092* has not been appealed by the parties and is now final.[744] However, in a separate case emerging from the same factual background – *2016 Ga-Hap 580239*[745] – another chamber of the Seoul District Court reached a different conclusion, and upheld Japan's immunity.[746] At the time of writing, an appeal against this second judgment is ongoing.[747]

---

[738] For a discussion of this relationship between effective and teleological interpretation see Celine Braumann and August Reinisch, 'Effet Utile' in Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds),, *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2019) 47.
[739] *2016 Ga-Hap 505092* (n 729) 29. [740] Ibid, 29. [741] Ibid, 29.
[742] *Jurisdictional Immunities of the State* (n 87) [104].
[743] *2016 Ga-Hap 505092* (729) 29-30. [744] Branca (n 734)
[745] At the time of writing, there is no English-language translation of the judgment. All of the information about the judgment were found through secondary sources.
[746] Ethan Hee-Seok Shin and Stephanie Minyoung Lee, 'Japan Cannot Claim Sovereign Immunity and also Insist that WWII Sexual Slavery was Private Contractual Acts' (*Just Security*, 20 July 2021) <https://www.justsecurity.org/77492/japan-cannot-claim-sovereign-immunity-and-also-insist-that-wwii-sexual-slavery-was-private-contractual-acts/> accessed 5 February 2022.
[747] Riccardo Pavoni, 'Germany versus Italy reloaded: Whither a human rights limitation to State immunity?' (*Questions of International Law*, 31 July 2022) <http://www.qil-qdi.org/germany-versus-italy-reloaded-whither-a-human-rights-limitation-to-state-immunity/#_ftnref60> accessed 5 February 2022.

The role of interpretation in the examples discussed thus far is a particularly interesting one, because it illustrates how exceptions to customary rules can be constructed through interpretation. Thus, in addition to the questions which emerge from the incidence of teleological and effective interpretation – how can we (re)construct the object and purpose of a customary rule, or assess the effectiveness of an interpretive outcome – these examples also raise the question of the limits of interpretation. In the preceding examples, we saw courts attempting to interpret an exception into a customary rule, so as to reconcile the seeming conflict that emerges from the co-existence of the rule of state immunity and other relevant rules regulating crimes against humanity. This reconciliation was performed variously by recourse to systemic, teleological, evolutive or effective interpretation. While the interpretive methods varied, what remained the same is the sense of interpretation as a tool that either reconciles normative conflicts in the legal system, or enables other customary rules to move forward with the times. If one follows the reasoning of the ICJ in *Jurisdictional Immunities of the State*, one would be tempted to conclude that there is neither a conflict between rules, nor a need to reconcile it through interpretation. In the same vein, there is no need to "update" the customary rule in question, since if states wished to change it they would act like it, and currently there is no practice indicating such a change. The ICJ's answer is temptingly formal and clear. However, the aftermath of the judgment indicates that this formal answer was not satisfactory to national courts which were once again faced with the need to apply sovereign immunity in difficult cases.

The aim of the present discussion is not to argue whether the ICJ or the national courts discussed above were correct, nor to pass judgment on the content of their reasoning. Rather, what I am suggesting is to take this practice at face value and attempt to understand what role interpretation plays in the continuous existence of customary rules, including, in the context of the discussion thus far, the construction of exceptions to the rule. As discussed in Chapters 1 and 2, while it might be tempting to categorise every reasoning which is not identification as "bad reasoning" and exclude it from consideration, what this gets us is an incomplete image of how CIL rules continue to operate in the international legal system. As the example of state immunity demonstrates, and the other examples discussed below confirm, interpretation performs various crucial functions in the continuous existence of customary rules. Capturing and adequately describing these functions gives us a fuller understanding of the way custom operates, and underscores the continuous relevance of customary rules in the operation of international law.

Similar interpretive moves as the ones discussed thus far, can be noticed when examining cases which deal with the immunities of state officials after they step down or are removed from office. For instance, in *A v Swiss Federal Prosecutor*, the Swiss Federal Court observed that

> it would be contradictory and futile if, on the one hand, we claimed to want to fight

> against serious violations of the fundamental values of humanity, and, on the other hand, we accepted a broad interpretation of the rules of functional immunity (ratione materiae) which could benefit former [. . .] officials whose concrete result would prevent, ab initio, any opening of an investigation.[748]

In this case, the court had to decide whether A. – a former Defence Minister of Algeria and general of the Algerian army – could benefit from immunity for crimes against humanity and torture allegedly committed during his time in office. Recent international and domestic judicial practice was pointing to a growing number of exceptions to the immunity of heads of states and high ranking officials in the case of alleged serious violations of international law.[749] The court also acknowledged the ongoing debate on the immunity of state officials in the ILC, and in particular 'the need to strike an acceptable balance between the need to ensure the stability of international relations and the need to avoid impunity for perpetrators of serious crimes under international law'.[750] Finally, the court also acknowledged Swiss legislator's commitment to ensuring the unfailing repression of genocide, crimes against humanity and war crimes.[751] In light of these considerations, the court found that A. could not benefit from immunity *ratione materiae*, because if immunity were granted 'it would become difficult to accept that conduct which infringed the fundamental values of the international legal order could be protected by rules of that same legal order'.[752] The reasoning of the Swiss court here resembles effective interpretation, insofar as the court is attempting to construct the most reasonable interpretive outcome with respect to immunity given the other relevant rules and aims that need to be considered. Moreover, to the extent that it is considering other relevant rules such as the prohibition of genocide, crimes against humanity and war crimes, it is also engaging in systemic interpretation.

In a recent case concerning the functional immunity of two former commanders of the Israeli army brought before the Hague District Court, the Dutch court found that there is no exception to the customary rule of functional immunity. The court observed that

> If individual responsibility and dual attribution is a rule of customary international law [. . .] this rule would only apply to the prosecution of incumbent or former office holders before international courts. National courts take a fundamentally different position than international courts. National courts are organs of sovereign States which when prosecuting subjects of foreign states *function in the horizontal relationship between States,*

[748] *A v Swiss Federal Public Prosecutor and ors* (25 July 2012) Federal Criminal Court of Switzerland, Final appeal judgment BB. 2011.140, TPF 2012 97 ILDC 1933 (CH 2012) [5.4.3] (unofficial translation by author).

[749] Ibid [5.3.4]

[750] Ibid [5.3.6], referencing Roman Anatolevich Kolodkin, Special Rapporteur, 'Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction' (29 May 2008) A/CN.4/601.

[751] Ibid [5.4.3]. [752] Ibid [5.4.3].

> *with the applicable customary international-law principle of equality of States*. State immunity and the derivative personal and functional immunity from jurisdiction therefore are the starting points for national courts.[753]

This is an interesting finding because the court here approached the discussion of immunity from the traditional perspective of the sovereign equality of states which underlies the customary rule. This led the court to find that while there might be an exception to immunity when it comes to proceedings before international courts, when it comes to national proceedings, immunity must be upheld. In contrast, the various other courts discussed above approached the discussion from the perspective of preventing grave breaches of international law or preventing impunity, and this led them to a different outcome. While the Dutch court framed part of its discussion in terms of CIL identification,[754] the fact that courts have ruled differently with respect to an exception to immunity depending on which rationale they examined lends support to the observation that the construction of an exception to a customary rule is primarily an interpretive act. The decision of the Hague District Court was upheld on appeal, and the Hague Appeal Court maintained that former state officials enjoy functional immunity in civil proceedings.[755] The appeal court largely followed the reasoning of the district court, while at the same time expanding on a few relevant points. In particular, the appeal court dedicated more time to the distinction between functional immunity in criminal and civil proceedings, limiting its pronouncements only to the latter context.[756] Furthermore, it linked functional immunity of officials directly to state immunity, relying heavily on the *Jurisdictional Immunities of the State* judgment in order to conclude that no exception to functional immunity exists. On this point, the court observed that

> The rationale behind functional immunity is therefore the same as the rationale behind the immunity of the State itself, namely that the courts of one State should not adjudicate on the conduct of another State (par in parem non habet imperium). Against this background, it is difficult to see why, now that there is no exception to the immunity from jurisdiction for the State itself in civil proceedings for – in short – war crimes (see the Jurisdictional Immunities case), such an exception would apply to the (former) officials of that State.[757]

This is interpretive reasoning, as the appeal court here is essentially engaging in

---

[753] *Claimant v Defendant I and Defendant II* (29 January 2020) The Hague District Court, Judgment, Case No C-09-554385-HA ZA 18-647, ECLI:NL:RBDHA:2020:559, ECLI:NL:RBDHA:2020:667, ILDC 3131 (NL 2020) [4.25].

[754] Ibid [4.36-4.48]. See similarly *The Queen (on the Application of The Freedom and Justice Party and ors, Yehia Hamed), Amnesty International (intervening) and Redress (intervening) v Secretary of State for Foreign and Commonwealth Affairs and Director of Public Prosecutions* (19 July 2018) Court of Appeal of United Kingdom Civil Division, Appeal Judgment, [2018] EWCA Civ 1719, ILDC 3055 (UK 2018).

[755] *Appellant v Respondent 1 and Respondent 2* (7 December 2021) Gerechtshof Den Haag, Zaaknummer C/09/554385/HA ZA 18/647, ECLI:NL:GHDHA:2021:2374

[756] Ibid [3.16-3.21]. [757] Ibid [3.7].

a fortiori construction – reasoning from the stronger proposition that there are no exceptions to sovereign immunity to the milder proposition that there are no exceptions to functional immunity.[758] Nevertheless, the court also surveyed relevant practice on this issue, in order to conclude that there is currently no exception to functional immunity in civil cases under customary law.[759] Interestingly, in its reasoning on this point, the Hague Appeal Court noted that '[f]or the *interpretation* of customary international law, what matters in the first place is what judges decide in practice'.[760]

The tension between identification and interpretation in the construction of exceptions is also illustrated in the *Abu Omar* case before the Italian Court of Cassation, where the court had to assess the functional immunity of US officials who participated in an extraordinary rendition executed via Italy. On the state of the customary law with respect to functional immunity for state officials, the court made the following observation

> The problem therefore consists of checking whether there effectively exists a customary law regulation under international law that also guarantees criminal immunity to the individual entity of a sovereign State, even when it does not involve Diplomatic and/or Consular officials and high appointments of State.
>
> On this point, jurisprudence is divided, because alongside those authorities that recognise the existence of a customary law regulation of this kind, there are others that recognise this only in respect of the activities authorised by the foreign country where these take place, while there are still others that maintain that the benefit of immunity is recognised according to specific regulations only to certain categories of entities in exercising the functions that are typical of their office.[761]

Thus far, it seems that the court is attempting to ascertain the existence of an exception to functional immunity through identification. However, in the immediately following paragraph, the court found that 'this last *interpretation* is the more correct one, because it takes into account the developments in international relations'.[762] Thus, the court here seems to be of the view that it is engaging in an interpretive exercise. This is further confirmed by the court's reference to developments in international relations, which could be considered an indication of contextual interpretation.[763]

---

[758] For a discussion of a fortiori reasoning in legal interpretation see Alina Miron, Per Argumentum a Fortiori in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds),, *Between the Lines of the Vienna Convention?: Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluver 2018) 197.

[759] *Appellant v Respondent 1 and Respondent* 2 (n 755) [3.8-3.16].

[760] Ibid [3.17]. 'Voor de interpretatie van het internationaal gewoonterecht is in de eerste plaats van belang wat rechters in de praktijk beslissen'.

[761] *'Abu Omar' case, General Prosecutor at the Court of Appeals of Milan v Adler and ors* (29 November 2012) Supreme Court of Cassation of Italy, Final appeal judgment, No 46340/2012, ILDC 1960 (IT 2012) [23.7].

[762] Ibid [23.7] (emphasis added). [763] Ryngaert (n 522) 497.

Overall, the caselaw discussed thus far indicates that when it comes to customary rules, one of the functions of interpretation might be the construction of exceptions. That sometimes courts ended up finding an exception while sometimes they did not, lends further support to this overall observation. The same is true of the fact that courts arrived at different interpretive outcomes depending on the underlying rationale of the relevant rules that they chose to follow. At the same time, the cases discussed above raise relevant question about the implication and limits of the interpretive exercise on CIL. While courts seem to comfortably use familiar methods of interpretation, it remains necessary to delineate how exactly these methods work when applied to CIL. For instance, scholarship has noted that examples of systemic interpretation where international rules are assessed in light of relevant domestic rules poses a methodological problem, because the content determination of CIL must take place on the basis of rules emerging from the same system i.e., international law.[764] Put differently, when we speak of systemic interpretation of CIL rules, the correct application of that method entails consulting other relevant rules from international law, but not from domestic law.[765] In this sense, systemic interpretation of CIL by reference to rules of national law may be considered an undue alteration of the content of the international rule by reference to national law. On the other hand, in some cases national courts may be considering rules of mixed pedigree in their systemic interpretation. For instance, commentators to *2016 Ga-Hap 505092* have argued that in its consideration of the victims' right to access to court under the Korean constitution, the Seoul court was considering a consubstantial norm which exists in both national and international law.[766] On this reasoning, 'as constitutionally protected fundamental rights often qualify as internationally protected human rights, domestic courts, when rejecting State immunity on fundamental rights grounds, may in fact further the international rule of law, which in a thick version of the concept also consists of international human rights norms'.[767] What these different observations indicate is that attention needs to be paid to how familiar methods of interpretation are applied to the interpretation of CIL, and what the limits may be to this.

b. International humanitarian law

Similarly to the rules on sovereign immunity, many rules of international humanitarian law (IHL), while heavily codified nowadays, find their origin in customary international law. It emerges from the examples below, that national courts continue to rely on customary IHL rules when the codified counterpart is not applic-

[764] Merkouris 2023 (n 3) 67. [765] Ibid.

[766] Cedric Ryngaert and Hye-Min Kim, 'Justice for World War II's 'Comfort Women': Lessons from the Seoul District Court's rejection of Japan's State Immunity' (*UCALL Blog*, 23 February 2021) <https://ucallblog.sites.uu.nl/2021/02/23/justice-for-world-war-iis-comfort-women-lessons-from-the-seoul-district-courts-rejection-of-japans-state-immunity/> last accessed 15 December 2021.

[767] Ibid.

able, either because of the lack of direct effect in the national system or because the state is not a party to the relevant convention. The first example of this can be found in the case of *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors.,* brought before the Israel Supreme Court. In this case, the core question put before the Court was whether the policy of targeted killings employed by Israel against members of Palestinian "terrorist" organizations was legal under international law. Overall, the Court found that it cannot be determined in advance that every targeted killing is either permissible or prohibited according to CIL. Rather, the legality of each individual targeted killing is to be decided according to its particular circumstances.[768]

The Court began its analysis by observing that the 'geometric location of our issue is in customary international law dealing with armed conflict'.[769] This is relevant because, as we will see in the subsequent analysis, the Court took the text of Article 51(3) of *Protocol Additional to the Geneva Conventions of 12 August 1949* (AP I) as a verbatim statement of the relevant CIL rule, and applied it to the case not as a treaty provision but as a rule of CIL. This was done because i) Israel is not party to AP I, and ii) even if it was, 'the international law entrenched in international conventions which is not part of CIL is not part of the internal law of the State of Israel'.[770] Thus, although the Court made constant reference to the wording of Article 51(3), when doing so it was not interpreting a treaty provision but was interpreting the customary rule reflected in that provision.

The Court first went through the categories of 'combatants' and 'civilians' as defined by CIL, to conclude that members of "terrorist" organisations do not belong to either of these categories. Instead, the Court turned to the category of 'civilian taking direct part in hostilities' as the more apposite description.[771] The Israeli state had asked the court to recognise a legal category of 'unlawful combatants'. 'These are people who take active and continuous part in an armed conflict, and therefore should be treated as combatants, in the sense that they are legitimate targets of attack, and they do not enjoy the protections granted to civilians. However, they are not entitled to the rights and privileges of combatants, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war. Thus, for example, they are not entitled to the status of prisoners of war'.[772] Relying on 'extensive literature on the subject' the Court found that presently the category of 'unlawful combatants' proposed by the Israeli state is not recognised in CIL. However, the Court continued,

> new reality at times requires new interpretation. Rules developed against the background of a reality which has changed must take on dynamic interpretation which

[768] *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors* (13 December 2006) Supreme Court of Israel, HCJ 769/02 [60].
[769] Ibid [19]. [770] Ibid. [771] Ibid [24-6]. [772] Ibid [27].

> adapts them, in the framework of accepted interpretational rules, to the new reality.[773]

With this statement the Court introduced in no uncertain terms the possibility, and indeed its intention, to interpret the customary rule pertaining to civilians taking direct part in hostilities evolutively.[774] The relevant customary rule was identified by reference to Article 51(3) of AP I which states that 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities'. This formulation was found by the Court to express CIL in its entirety.[775] From here the Court embarked on an assessment of what it observed to be the three constitutive parts of this customary rule: i) taking part in 'hostilities' ii) taking 'direct' part and iii) 'for such time'.[776]

With regard to the definition of 'hostilities', the Court relied on a Commentary to the Additional Protocols by the Red Cross to find that hostilities are acts which by nature and objective are intended to cause damage to the army. Next, the Court expanded this definition by stating that '[i]t seems that acts which by nature and objective are intended to cause damage to civilians should be added to that definition'.[777] Reading this passage alone, it may seem unclear how the Court arrived at the finding that acts which are intended to cause damage to civilians should be added to the definition of hostilities. In the passage itself the Court relied on a scholarly analysis but did not elaborate on this reference. However, reading this passage in the context of the Court's earlier statement, it becomes evident that here the Court is "updating" the definition of 'hostilities' to correspond to the new factual reality of the conflict, or, in other words, is interpreting the customary concept of hostilities evolutively. Turning next to the definition of 'direct', the Court catalogued commentaries, scholarly work and judgments of international tribunals to conclude that there is no uniform definition of direct participation in hostilities. 'In that state of affairs, and without a comprehensive and agreed upon customary standard, *there is no escaping going case by case*, while narrowing the area of disagreement'.[778] In order to find an appropriate definition of 'direct' for the context of justified targeted killings the Court examined the objective to be achieved with the interpretive exercise:

> On the one hand, the desire to protect innocent civilians leads, in the hard cases, to a narrow interpretation of the term "direct" part in hostilities. [. . .] On the other hand, it can be said that the desire to protect combatants and the desire to protect innocent civilians leads, in the hard cases, to a wide interpretation of the "direct" character of the hostilities, as thus civilians are encouraged to stay away from the hostilities to the extent possible.[779]

---

[773] Ibid [28].

[774] For a discussion on evolutive interpretation see Bjorge (n 453) 1-22. See also Mileva and Fortuna (n 443) 123 et seq.

[775] *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors* (n 768) [30].

[776] Ibid [32]. [777] Ibid [33]. [778] Ibid [34] (emphasis added). [779] Ibid [35].

On this reasoning, the Court opted for a wider interpretation, and enumerated a wide spectrum of behavior that should be considered 'direct' participation.[780] Moreover, the Court also enumerated actions that constitute indirect participation, and pointed out that if persons engaged in indirect participation are injured 'the State is likely not to be liable for it, if it falls into the framework of collateral or incidental damage'.[781] This reference to indirect participation was not in big focus during the present case, but returned in the jurisprudence of the Israeli Supreme Court in later cases.[782] With respect to the definition of 'for such time', the Court found that there is currently no consensus on the meaning and thus it must be examined on a case by case basis. For the case of targeted killings, the Court identified four general principles that should be borne in mind in the assessment.[783]

A similar question arose before the German Higher Administrative Court of North Rhine-Westphalia in the *Use of Ramstein Air Base* case, and in fact, this court explicitly referenced the reasoning of the Israeli Court in *Public Committee against Torture* next to its own.[784] However, unlike the Israeli Supreme Court, the German Court of North Rhine Westphalia interpreted the rule on direct participation much more restrictively. In this case, the Administrative Court was asked a broader legal question on the obligations of Germany to protect the right to life from third-state interference in the context of a non-international armed conflict.

---

[780] Ibid [35]. 'the following cases should also be included in the definition of taking a "direct part" in hostilities: a person who collects intelligence on the army, whether on issues regarding the hostilities [. . .] or beyond those issues a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. All those persons are performing the function of combatants. The function determines the directness of the part taken in the hostilities [. . .].

[781] Ibid [35]. '[. . .] a person who sells food or medicine to an unlawful combatant is not taking a direct part, rather an indirect part in the hostilities. The same is the case regarding a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid. The same is the case regarding a person who distributes propaganda supporting those unlawful combatants'.

[782] See discussion bellow in respect of the case *A and B v Israel*.

[783] ibid [39-40]. 'In that context, the following four things should be said: first, well based information is needed before categorizing a civilian as falling into one of the discussed categories[. . .] Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities [. . .] The burden of proof on the attacking army is heavy [. . .] Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed [. . .] Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively) [. . .] Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test.

[784] *Prevention of the use of Ramstein Air Base for United States armed drone strikes in Yemen, Yemini citizen living in Sana'a and ors v Germany* (19 March 2019) German Higher Administrative Court of North Rhine-Westphalia, Appeal, 4 A 1361/15, ILDC 3059 (DE 2019) [217].

The court looked to customary international law in only one part of the dispute, with respect to the principles of proportionality and distinction.[785] It did so in order to determine whether persons in Yemen targeted by US drone strikes transmitted via the Ramstein Air Base were legitimate targets based on their status – civilian or combatant. The court thus found itself, similarly to the Israeli court, faced with the need to discuss the extent of protection afforded to civilians directly participating in hostilities.[786] The German court had to consider rules of CIL, because the case at hand concerned a non-international armed conflict (NIAC),[787] and the US as one of the parties to the conflict had not ratified either of the Additional Protocols to the Geneva Conventions.[788]

On a general note, the Administrative Court observed that a restrictive determination of the group of people who do not enjoy the protected status of a civilian is in keeping with the aim of humanitarian law to protect civilians effectively.[789] Thus, the court essentially argued for a teleological interpretation of the customary rule, by reference to the overall purpose of IHL. The court went on to find that

> There is no generally accepted definition of what constitutes "direct" participation. Ultimately, *a case-related assessment is required*, which must take into account the protection of the civilian population on the one hand and military necessities on the other.[790]

What the court is saying here is that the customary rule on direct participation in hostilities will always require interpretation, and include a balancing exercise between the competing rationales of civilian protection and military neccessity. This is similar to what the Israel Supreme Court found as well, with its observation that 'there is no escaping going case by case' recorded above.[791] In *Use of Ramstein Air Base*, the court discussed various modalities of conduct that would qualify a person either as a civilian or as someone directly participating in hostilities,[792] and eventually settled on the finding that 'persons who are permanently integrated into an organized armed group fulfill a continuous combat function at least when they are involved in the preparation, execution or direction of armed or other violent actions. [...] In contrast, some recruiters, financiers, or propagandists fulfill no ongoing combat function as long as they confine themselves to these roles'.[793]

---

[785] Ibid [207-208]. [786] Ibid [211-212].

[787] Ibid [207]. 'To protect civilians and civilian objects, international humanitarian law prohibits indiscriminate attacks. For international armed conflicts, this prohibition is laid down and specified in Art. 51 Para. 4 and 5 ZP I. It also applies to non-international armed conflicts as customary international law' (unofficial translation by author).

[788] See Court's reasoning on this in [192-204]. [789] Ibid [212].

[790] Ibid [217] (unofficial translation from the original German by the author, emphasis added).

[791] *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors* (n 768) [34].

[792] *Use of Ramstein Air Base* (n 748) [214-216].

[793] Ibid [218-219] (unofficial translation from the original German by the author).

Overall, three observations about CIL interpretation can be made in light of these examples. Firstly, in *Public Committee against Torture* the court took a treaty rule as the codified version of a CIL rule, and used this text for its subsequent interpretation. Similarly, in *Use of Ramstein Air Base* the court took the text of Article 51 of AP I as an expression of the corresponding customary rule.[794] While this conflation of a customary rule with its codified counterpart may be considered problematic because it opens a discussion on the relationship between CIL and treaties, it may also be argued that in doing this the courts engaged in systemic interpretation of CIL. Namely, when the content of a CIL rule is examined by reference to its codified counterpart, this is done because the two rules are taken as relevant to each other due to their identical content. Thus, what is in fact happening is that the CIL rule is interpreted by taking into account the treaty rule that codifies it, or in other words is interpreted according to the principle of systemic integration.[795] This is even more pronounced in examples such as *Use of Ramstein Air Base*, because here the Court relied on a codification of a rule in an instrument dedicated to international armed conflict (IAC) and considered this for purposes of a customary rule applicable in NIAC. Secondly, it seems that two interpretive methodologies may be discerned in the courts' reasoning. First, in *Public Committee against Torture* the court's overall interpretation was evolutive, in that the customary rule on direct participation in hostilities was "updated" with new modalities of behavior which should be considered as coming under the scope of the rule in light of the new factual situation of the conflict. Moreover, the court elaborated new standards which should be considered when assessing whether a civilian is taking direct participation in hostilities for the purposes of deciding whether they can legitimately be a target of targeted killings. However, while the court interpreted the overall customary rule evolutively, in its interpretation of the individual elements of the rule it also engaged in teleological interpretation. In particular, when assessing the element of 'direct' the court inquired what objective is to be achieved with the rule, and opted for a wider interpretation in order to ensure the protection of combatants and innocent civilians and to encourage civilians to stay away from the hostilities. Similar to this, the court in *Use of Ramstein Air Base* found that the interpretation of the rule on direct participation of hostilities is a balancing exercise between the purpose of civilian protection on the one hand and military neccessity on the other. The German court went for a narrower interpretation accordingly. That the two courts arrived at different outcomes as to the scope of the rule further supports the observation that these were interpretive exercises. Finally, in the grander scheme of things, the Court's reliance on evolutive interpretation in *Public Committee against Torture* raises the question of the role of interpretation in the life of a CIL rule. What we can see in this case is that through evolutive interpretation the Court ended up "updating" and specifying the content of the customary

[794] Ibid [208]. [795] Merkouris (n 6) 264-5.

rule in question, thus arguably transforming it for those who may rely on it in the future. This raises the question of what is the role of evolutive interpretation in the modification of existing CIL rules, and how does this method of interpretation play into our understanding of the continued existence of customary rules. In fact, this last point came into strong focus in a subsequent case before the Israeli Supreme Court, namely the case of *A and B v Israel*.

The reasoning of the Israeli Supreme Court from *Public Committee against Torture* was explicitly referenced in the later case of *A and B v Israel*.[796] This was a case where the 'Internment of Unlawful Combatants Law' (IUC Law) passed by the Israeli state was assessed in light of, among other, CIL rules that Israel was bound by. In particular, the court was asked to determine whether and under which conditions would administrative detentions of so-called 'unlawful combatants' pursuant to the IUC Law be incompatible with international law. Here, the Israeli Supreme court reiterated its finding that ' 'unlawful combatants' are members of the category of 'civilians' from the viewpoint of international law' but that 'international humanitarian law does not grant 'unlawful combatants' the same degree of protection to which innocent civilians are entitled. In this respect there is a difference from the viewpoint of the rules of international law between 'civilians' who are not 'unlawful combatants' and 'civilians' who are 'unlawful combatants' '.[797] The court further noted that the IUC Law had a purpose clause according to which the law was expressly 'intended to regulate the status of 'unlawful combatants' in a manner that is consistent with the rules of international humanitarian law'. Taking this and its previous reasoning from *Public Committee against Torture* in consideration, the court concluded that

> 'unlawful combatants' constitute a subcategory of 'civilians' under international law, [and] it is possible to determine that, contrary to the appellants' claim, the law does not create a new reference group from the viewpoint of international law, but it merely determines special provisions for the detention of 'civilians' (according to the meaning of this term in international humanitarian law) who are 'unlawful combatants'.[798]

While the reasoning in *A and B v Israel* is relevant as yet another example of CIL interpretation which confirms the overal claim to intepretability made throughout this thesis, the case has further relevance because it also raises questions about the limits to the interpretive exercise. What we see here is a court which reads a subcategory into the customary rule of distinction. Namely, next to the recognized categories of civilian and combatant, the court adds the third category of 'unlawful combatants' created by the national IUC Law as a sub-category of 'civilians'.

---

[796] *A and B v Israel* (11 June 2008) Israel Supreme Court, Appeal Decision, CrimA 6659/06, 1757/07, 8228/07, 3261/08, ILDC 1069 (IL 2008) [12].
[797] Ibid [13]. [798] Ibid [14].

While this might seem as an evolutive interpretation of the customary rule,[799] it may equally be argued that it is in fact an impermissible modification of the rule through interpretation. How might we spot the difference? It could be argued that this is an impermissible modification of the customary rule through interpretation, because the court is sidesteping the purpose of the customary rule in question in order to reach what seems like a politically desirable outcome. As discussed in Chapter 2, evolutive interpretation is not a standalone method of interpretation, but is rather an umbrella approach which may be taken when the circumstances call for a dynamic interpretation of particular rules. However, evolutive interpretation is not a boundless assesment aimed at modifying old rules, but is rather limited by considerations such as the context in which the rule emerged, and its object and purpose. The purpose of the customary rule of distinction is to differentiate the status of various persons implicated in hostilities and to apportion rights and protection accordingly. This purpose is informed, among other, by one of the broader aims of IHL rules to protect the civilian population in times of conflict. The Israel Supreme Court acknolwedges as much when it confirms that '[. . .] in an armed conflict or a state of occupation, every person who finds himself in the hands of the opposing party is entitled to a certain status under international humanitarian law'.[800] Nevertheles, by accepting a category of 'unlawful combatants' which is a sub-category of civilians, the court is creating an in-between normative space in which persons designated as 'unlawful combatants' can neither benefit from the protection afforded by civilian status, nor enjoy the rights of combatants (such as POW status). Furthermore, what protection is to be afforded to them is left ambiguos. This is clearly against the purpose of customary rules of IHL which are otherwise aimed at clarity of status and the provision of rights and protection accordingly. Although the IUC Law contains a definition of an 'unlawful combatant',[801] the court interprets this definition very broadly,[802] thereby effectively

[799] The Court seems to take a position that it is indeed interpreting evolutively. See in particular *A and B v Israel* (n 796) [9]. '[. . .] when we approach the task of interpreting provisions of the statute in a manner consistent with the accepted norms of international law, we cannot ignore the fact that the provisions of international law that exist today have not been adapted to changing realities and the phenomenon of terrorism that is changing the form and characteristics of armed conflicts and those who participate in them [. . .] In view of this, we should do our best in order to interpret the existing laws in a manner that is consistent with new realities and the principles of international humanitarian law'.

[800] *A and B v Israel* (n 796) [12].

[801] Ibid [11]. ''Unlawful combatant' — a person who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel, who does not satisfy the conditions granting a prisoner of war status under international humanitarian law, as set out in article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War'.

[802] Ibid [11]. 'It is therefore possible to summarize the matter by saying that an 'unlawful combatant' under section 2 of the law is a foreign party who belongs to a terrorist organization that operates against the security of the State of Israel. This definition may include residents of a foreign country that maintains a state of hostilities against the State of Israel, who belong to a terrorist

enabling any detention of a person to be justified on the basis of their status as 'unlawful combatant'.[803] Such an interpretative outcome is at odds with the purpose of the customary rule of distinction.

It is not the aim of this short analysis to make further evaluative claims about the reasoning of the court. Rather, I flag this tension that arises from the court's reasoning because I believe it puts into strong focus the need for limits to the interpretative exerrcise. While evolutive interpretation plays a central role in the continuous existence of customary rules by "updating" their content in light of changes in fact or law, we must acknowledge the need for boundaries. The interpretive exercise should not trespass into modification, nor should it modify the law to fit desired outcomes. Although it is difficult to pinpoint the exact boundaries, examples such as this one give us an indication. Namely, when the outcome of evolutive interpretation would run counter to the purpose of the rule, this should be taken as an indication that such interpretation is not permissible or defensible. In this sense, the object and purpose of the rule would play a disciplining role and restrict the interpretive outcome accordingly.

Similar considerations of limits arose in the *Horgan v Ireland* case argued before the High Court of Ireland. In this case, Edward Horgan sought declaratory relief in the Irish High Court that the decision of Ireland to facilitate US military movement over Irish territory en-route to the Iraq war was in violation of Ireland's obligations as a neutral state.[804] In particular, Mr Horgan argued that Ireland was in breach of customary law as reflected in Articles 1, 2 and 5 of the Hague Convention V, stipulating that the territory of the neutral power is inviolable and that a neutral power must not allow the movement of beligerent troops or supplies across its territory.[805] The state of Ireland on the other hand argued that

> 'there was no clear law of neutrality in international law. It was not sufficient, [...] for the plaintiff to establish that neutrality, as such, is a recognised concept, even with some level of agreement as to the elements of its content. The plaintiff [...] must go further and establish as a generally recognised principle of international law the proposition that on the outbreak of hostilities, all nonbelligerent States are obliged (and not merely permitted) as a matter of international law to adhere to the strict impartiality contemplated by the Hague Convention.

organization that operates against the security of the state and who satisfy the other conditions of the statutory definition of 'unlawful combatant.' This definition may also include inhabitants of the Gaza Strip which today is no longer held under belligerent occupation'.

[803] Ibid [12]. 'For the purposes of detention under the law, it is not necessary that the 'unlawful combatant' will take a direct part in the hostilities, nor is it essential that his detention will take place during the period of time when he is taking part in hostilities; all that is required is that the conditions of the definition of 'unlawful combatant' in section 2 of the law are proved'.

[804] *Horgan v Ireland and ors* (28 April 2003) Ireland High Court, Application for declaratory relief 2003 No 3739P, [2003] IEHC 64, (2003) 2 IR 468, ILDC 486 (IE 2003).

[805] Ibid [49].

Furthermore, the Irish state maintained that in its history it had adopted a 'qualified or nuanced form of neurality arising as a consequence of its diplomatic relations with particular States'.[806] Moreover, Ireland maintained that since 1945, 'strict' neutrality as captured in the Hague Convention V has been *adapted* by contrary state practice as well as the UN Charter.[807]

The arguments by Ireland here essentially raise the point of the modification of customary rules by subsequent practice. While the Irish state does not spell out the argument explicitly in this manner, its claims about 'qualified neutrality' and the adaptation of custom by latter practice and treaties amount to an argument to that effect. This then raises the question whether this modification of the customary rule is something that can be captured with interpretation, or whether Ireland is in fact arguing that an entirely new customary rule has arisen on this subject. The Irish state is not explicit on this point, and the court similarly does not address this in too much detail. On this particular argument, the court observed that

> The defendants have argued that a more qualified or nuanced form of neutrality also exists, being one which has been practised by this State for many years, and indeed throughout the Second World War. However, *it does not appear to me that even that form of neutrality is to be seen as including the notion that the granting of passage over its territory by a neutral State for large numbers of troops and munitions from one belligerent State only en route to a theatre of war with another is compatible with the status of neutrality in international law*. No authority has been offered to the court by the defendants to support such a view. Nor can it be an answer to say that a small number of other states have done the same thing in recent times. Different questions and considerations may well arise where measures of collective security are carried out or led by the UN in conformity with the Charter [...]
>
> The court is prepared to hold therefore that there is an identifiable rule of customary law in relation to the status of neutrality where under a neutral state may not permit the movement of large numbers of troops or munitions of one belligerent State through its territory en route to a theatre of war with another.[808]

It seems that the court here is approaching the matter as if it is one of CIL interpretation and not of new CIL identification. This emerges from the court's consideration of the more particular content and scope of the general rule of neutrality, and in particular the court's rejection of the 'qualified neutrality' argument in the first paragraph, and its attempt to delineate what type of behavior would amount to a breach in the second. Eventually however, the court finds that it cannot pronounce on this matter because the decision of Ireland on how it would exercise its neutrality vis-à-vis other states is a question of foreign policy.[809] It is a pity that

[806] Ibid [88].
[807] To support this claim, Ireland cited scholarly writings which maintained that the 'traditional concept of neutrality' has been 'modified but not totally superseded by the UN Charter'. *Horgan v Ireland and ors* (n 804) [89].
[808] Ibid [124-125] (emphasis added). [809] Ibid [153-155] [161-163].

the court does not go further in its reasoning, as this might have shed some light on the bigger question concerning the role of interpretation in CIL modification. At the same time, as the central argument in this case was particularly whether a court could intervene in what is arguably a decision of foreign policy, it is understandable why the court refrained from further elaboration.

c. Law of the sea and maritime law

Much like the regime of IHL, the Law of the Sea regime is one which while nowadays largely codified, finds its origins in customary law. Moreover, for many of the central multilateral treaties in this regime – such as the United Nations Convention on the Law of the Sea (UNCLOS)[810] – it is maintained that they codify rules which previously existed as CIL. Thus, it is not uncommon that these written rules are taken as the relevant written manifestation of their customary counterpart.

In the *Sea Shepherd* case, the US Court of Appeal took the definition of piracy as expressed in UNCLOS to be an accurate reflection of how piracy is construed under the law of nations, i.e., customary international law.[811] Reviewing an earlier decision by a district court, the court of appeal accepted the definition of piracy in Article 101 of UNCLOS[812] as a verbatim reflection of CIL and proceeded to interpret its terms. In particular, it looked at the term "private ends", with a focus on the meaning of "private". The court relied on the customary counterpart of Article 101 UNCLOS because the US is not a party to the Convention. Relying on the Webster's New International Dictionary, the appeal court found that the term "private" is used as an antonym to the term "public", that it's 'common understanding' is broader than what the district court had found, and that it 'often refers to matters of a personal nature that are not necessarily connected to finance'.[813] Two interpretive methods seem to be at play here. Firstly, the court is engaging in textual interpretation, insofar as it is examining the terms of the definition in their ordinary meaning and even having recourse to a dictionary. This is further evident when the court interprets the word "violence" by reference to the dictionary definition of the term.[814] Secondly, seen as the court here is analyzing a customary rule which is purportedly reflected in other relevant written documents,

---

[810] United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

[811] *Institute of Cetacean Research and ors v Sea Shepherd Conservation Society and Watson* (24 May 2013) United States Court of Appeals 9th Circuit, Appeal judgment, 725 F3d 940 (9th Cir) ILDC 2176 (US 2013) [4].

[812] In particular, the Court indicated that 'The UNCLOS defines "piracy" as "illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship ... and directed ... on the high seas, against another ship ... or against persons or property on board such ship." UNCLOS art. 101'. *Institute of Cetacean Research and ors v Sea Shepherd Conservation Society and Watson* (n 811) [4].

[813] Ibid [5]. [814] Ibid [7].

the court is also engaging in systemic interpretation. Furthermore, the court observed that

> We give words their ordinary meaning unless the context requires otherwise [. . .]. The context here is provided by the rich history of piracy law, which defines acts taken for private ends as those not taken on behalf of a state [. . .]. Belgian courts, perhaps the only ones to have previously considered the issue, have held that environmental activism qualifies as a private end. We conclude that "private ends" include those pursued on personal, moral or philosophical grounds, such as Sea Shepherd's professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public.[815]

It seems like the court here is continuing down the list of interpretation methods available for treaties, and simply applying them to the customary rule in question. This matter-of-fact extension of interpretation to CIL certainly lends further support to the overall claim of interpretability made throughout the thesis. If courts are not even thinking twice before extending familiar methods of interpretation to CIL, then interpretation is as endemic to the practice of applying customary law as it is to treaties. At the same time, when done without adjustments, the transposition of treaty interpretation methods onto the interpretation of custom can also lead to issues. For instance, as the ILDC commentator notes with regard to the reasoning of the court in *Sea Shepherd*, the deference to the Belgian court's interpretation of piracy in the *Castle John* case may seem like the US court is taking into consideration the 'subsequent agreement of the parties regarding the interpretation of the treaty' within the meaning of Article 31 VCLT.[816] However, the Belgian court in *Castle John* was interpreting the High Seas convention.[817] Thus, it is not clear if the US court is considering the pronouncement of the Belgian court as subsequent practice in the application of the High Seas convention (to which the US is a party), or is consulting it as part of the broader context for the purpose of interpreting the customary rule. Scholarship has also noted that this kind of 'by proxy textual' interpretation of custom may lead to methodological issues when too much of the textual document's context (such as drafting history for example) is transposed onto the interpretation of the counterpart customary rule.[818] While in *Sea Shepherd* the US court did not consider the drafting history of UNCLOS, it did rely very closely on the treaty's text. For instance, when interpreting the term "violence" the court maintained that not including violence against ships and equipment in its scope would 'run afoul of the UNCLOS itself'.[819] Overall, it is not truly surprising that the US court relied both on UNCLOS and on the *Castle John* reasoning, as these are both central resources in the discussion

[815] Ibid [6]. [816] Ibid, A3.
[817] *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin* (1986) Court of Cassation, Belgium 77 ILR 537, 540.
[818] Merkouris 2023 (n 3) 31
[819] *Institute of Cetacean Research and ors v Sea Shepherd Conservation Society and Watson* (n 811) [7].

of eco-activism as piracy.[820] Nevertheless, it is always more desirable that courts clarify their interpretive choices as best they can, so as to ensure methodological coherence. This is all the more relevant when national courts consistently rely on codified counterparts as expressions of CIL.[821]

A similar reliance on textual provisions as expressions of CIL can be found in the reasoning of the Haifa District Court in the *Israel v 'Estelle'* case. However, unlike the US court, which relied on treaty provisions as textual counterparts for CIL, the Haifa District Court relied on provisions of the non-binding San Remo Manual on International Law Applicable to Armed Conflict. The Court found the San Remo Manual to be reflective of CIL, and extrapolated the authority to confiscate a vessel (at issue in the case) from it.[822] It then proceeded to apply and arguably interpret the rules set down in the San Remo Manual, by reference to the practice on confiscation in other states,[823] as well as the relevant procedural requirements on confiscation in Israeli law.[824] The reasoning of the Israeli court in this case has led one commentator to observe that 'interpreters may consider CIL norms that have been laid down in authoritative non-binding documents to lead a relatively stable existence, and thus be amenable to interpretation'.[825] Similarly, it has been argued that when legal experts restate customary rules in authoritative written texts (such as the San Remo Manual) these restatements transform customary rules and open new opportunities to read and interpret them.[826] When it comes to the San Remo Manual, it has been pointed out that 'in a field where rules are difficult to find, or appear to be old-fashioned, it is particularly practical if rules are collected, re-edited, and brushed-up to look like contemporary rules'.[827] Thus, while the San Remo Manual itself is certainly not binding, its provisions

---

[820] See for instance Arron Honniball, 'Private Political Activists and the International Law Definition of Piracy: Acting for 'Private Ends' (2015) 36(2) Adelaide Law Review 279.

[821] See for instance *United State v Dire and ors* (23 May 2012) United States Court of Appeal 4th Circuit, Appeal Judgment 80 F3d 446 (4th Cir 2012), ILDC 1985 (US 2012) [65]; United State v Hasan and ors (29 October 2010) District Court for the Eastern District of Virginia, Decision on motion to dismiss, No 2:10cr56, ILDC 1586 (US 2010) [46-47].

[822] *Israel v 'Estelle'* (31 August 2014) Haifa District Court, Original petition, Claim in Rem 26861-08-13, ILDC 2299 (IL 2014) [42-43].

[823] Ibid [48-49]. The authority for confiscating a vessel derived from customary international law. Most states required legal adjudication for such an act; they also required a speedy court procedure'.

[824] Ibid [67-68]. 'The San Remo Manual specifically required that every seizure of a vessel, especially a neutral vessel, had to be adjudicated as soon as possible. While this requirement was subject to the detaining state's procedure, it was a mandatory international obligation. Further, this requirement was also codified in Israeli domestic law.'

[825] Ryngaert (n 522) 504.

[826] Wouter G. Werner, 'Custom as Rewritten Law – The Text and Paratext of Restatement Reports' (2022) 11(3) ESIL Reflections, 2.

[827] Liesbeth Lijnzaad, The San Remo Manual on the Law of Naval Warfare – from Restatement to Development?' in Natalie Klein (ed) Unconventional Lawmaking in the Law of the Sea (OUP 2022) 21, 31.

may lend themselves as 'written artefacts'[828] or 'textual proxies'[829] for the purposes of interpretation of customary rules. In this vein, it has been argued that these kind of written manifestation of custom endow CIL rules with 'textual markers', and transform the way the rules are perceived.[830]

d. Domestic custom

A final set of cases considered for the purposes of this chapter is cases where national courts interpret domestic customary rules. The cases discussed in this subsection were collected by the National Research Teams and presented as part of the National Reports. In this sense, they represent a limited sample, as they come from the legal systems of only two states.[831] Nevertheless, they are relevant to the broader conclusions reached in the present chapter, as they provide examples of how interpretive reasoning operates in the context of domestic customary rules.

The first set of examples of national courts interpreting domestic custom yield from the national courts of North Macedonia, and concern the interpretation of "good business customs". In the Macedonian legal system, domestic customary rules are not a common source of law, and are in fact only found in the regime of "Obligations".[832] This is a regime contained primarily in the "Law of Obligations", which is a law governing contracts and damages in the area of civil law.[833] Pursuant to this law, all legal agreements between parties need to comply with the Constitution, the laws, and good customs.[834] Furthermore, legal agreements which do not comply with the Constitution, the laws, and good customs are con-

[828] This terminology is borrowed from the work of Lekkas, who uses this term to describe the use of ILC outputs as 'written artefacts of rules of unwritten international law'. Lekkas (n 421) 327.

[829] This terminology is borrowed from the work of Merkouris, who uses this term to describe the reliance on codified counterparts of CIL rules for the interpretation of the customary rule. Merkouris 2023 (n 3) 26.

[830] Werner argues that textual restatements 'transform the nature of customary law' and in light of this 'it is incorrect to treat customary law as a form of unwritten law only. By now, customary law is often identified and interpreted through references to written restatements, which are (re)presented as part of a larger system'. Werner (n 826) 8.

[831] While National Teams were formed in seven states, only three reports (Kenya, North Macedonia and Singapore) were finished by the time of writing, and therefore only the cases from those reports were considered for the purposes of the thesis. Of these three, cases coming from the jurisdiction of Singapore did not include examples of interpretation, and are therefore not analysed further in this section. See Diego Mejia Lemos, 'Customary International Law in the Legal System of Singapore' (29 March 2021) TRICI-Law National Report Series.

[832] Elena Mujoska Trpevska and Konstantin Bitrakov, 'The Legal System of the Republic of North Macedonia and Application of Customary Law by the National Courts' (31 March 2020) TRICI-Law National Report Series.

[833] *Law of Obligations*, Official Gazette of R Macedonia No 18 of 5 March 2001 <http://www.gazibaba.gov.mk/business/media/pdf/zakonska_regulativa/pravni_raboti/obligacioni_odnosi/1-obligacioni-odnosi.pdf> accessed 1 March 2021.

[834] Article 3 of the 'Law of Obligations' reads: 'The parties engaged in legal transactions are free to regulate their obligation relations in accordance with the Constitution, laws, and good customs and usages.'; Article 15(1) of the 'Law of Obligations' reads: 'The participants of obligational relations

sidered null and void.[835] Thus, "good business customs" in this legal system is a more general term which refers to a collection of customary rules applicable in the regime of Obligations.[836]

In the *TC1.6p.7613* case argued before the Veles Court of First Instance the court was asked to review a penalty stipulated in a written agreement between the plaintiff and respondent. The two had concluded an 'Agreement regulating the payment of penalties which might arise in the case of non-compliance with two previously concluded sales contracts' (Agreement), and the Agreement was governed by the 'Law of Obligations'. Thus, in this case the Court had to evaluate whether the penalty for breach of contract stipulated in the Agreement between the parties was in keeping with, among others, the applicable business customs. It is important to recall that in the Macedonian legal regime of Obligations custom has a secondary role behind the Constitution and other written rules, and is only considered in cases where the written law is silent or there is a gap.[837] In light of this, in *TC1.6p.7613* the Court considered customary law only briefly, and ultimately made its decision on a combined consideration of written law and customary rules. Nevertheless, in doing so, it made some relevant observations with respect to the interpretation of custom.

In the present case, the Agreement between the parties stipulated that in case of delay in the provision of construction services, a penalty of 1% of the overall value of the product would be imposed for every day of delay. So calculated, the final penalty eventually reached an amount higher than the overall value of the contract.[838] In light of this, the applicant asked the court to intervene and lower the penalty;[839] this is possible in light of Article 263 of the Law of Obligations which stipulates that '[t]he court may, at the request of a debtor, lower a contractual penalty, if it finds that the penalty is disproportionately high in relation to the value of the object of the obligation'.[840] In assessing the penalty, the Court referred to the general obligation that 'a penalty should be in keeping with good business customs'. It then went on to observe that

> In circumstances when we are dealing with a contractual penalty, that penalty needs

have a duty to observe the good business customs in their legal relations' (the law has not been translated in English, and this is an unofficial translation of the relevant provision by the author).

[835] Article 95 of the 'Law of Obligations' reads in pertinent part: '(1) A contract which is not in keeping with the Constitution, laws and good customs is considered null [. . .] (the law has not been translated into English and this is an unofficial translation of the relevant provision by the author).

[836] Gale Galev and Jadranka Dabovikj-Anastasovska, *Obligaciono Pravo (Bachelor Studies)* (University of St. Cyril and Methodius Skopje 2021) 55.

[837] Gale Galev and Jadranka Dabovikj-Anastasovska, *Obligaciono Pravo* (3rd ed, University of St. Cyril and Methodius Skopje 2012) 32-3.

[838] *TC1.6p.7613* (2013) Veles Court of First Instance, North Macedonia, 20. [839] Ibid, 17.

[840] Article 263, *Law of Obligations*, Official Gazette of R Macedonia No 18 of 5 March 2001 <http://www.gazibaba.gov.mk/business/media/pdf/zakonska_regulativa/pravni_raboti/obligacioni_odnosi/1-obligacioni-odnosi.pdf> accessed 1 March 2021 (the law has not been translated into English and this is an unofficial translation of the relevant provision by the author).

> to remain within the limits of the good business customs and serve the purpose of strengthening the discipline of the parties in their timely fulfillment of contractual obligations, and not to serve as a source of unjust enrichment contrary to the principles of conscientiousness and honesty. This is because the objective of a contractual penalty does not allow for the penalty to be excessive and disproportionate to the obligation for whose protection it is stipulated.[841]

This observation by the court requires some unpacking. Firstly, the court seems to be engaging in teleological interpretation of custom, insofar as it stipulates that a penalty should remain within the limits of good business customs and serve the *purpose* of strengthening the discipline of the parties in their fulfillment of the contractual obligation. This observation is further reinforced by the court's conclusion that the objective of a penalty does not allow for the penalty to be excessive and disproportionate. The implication here seems to be that a penalty which is within the boundaries of custom would not be excessive or contrary to the purpose it is meant to serve. At the same time, the reference to 'good business customs' is quite general, and it is difficult to pinpoint whether the Court is in fact interpreting a particular customary rule or the more generic requirement for a penalty to be in keeping with 'good business customs'. Earlier in its reasoning the court indicates that 'both the court and the parties are familiar with the fact that in the field of construction contracts the penalties for delay generally remain within 5% of the overall value'.[842] This may be an indication of a more specific customary rule for these kinds of contracts,[843] but the court does not clarify this. The court sheds further light on this portion of its reasoning when it indicates that a 'contractual penalty should be proportionate to the value of the object of the obligation for whose protection it is instated'.[844] This formulation is similar to a written provision of the 'Law of Obligations' which stipulates that '[t]he court may, at the request of a debtor, lower a contractual penalty, if it finds that the penalty is disproportionately high in relation to the value of the object of the obligation'.[845] Similarly, the reference to principles of conscientiousness and honesty can be found in Article 5 of the 'Law of Obligations', as general principles which ought to be followed in the formulation of contractual relations. Thus, insofar as it is referring to general 'good business customs' the court seems to be determining their more specific content by referring to other written rules applicable in the relations between the parties. This is similar to what we saw in the discussion above, with respect to both the interpretation of state immunity and the interpretation of various IHL rules.

---

[841] *TC1.бр.7613* (n 838) 21 (unofficial translation of the original passage by the author).

[842] Ibid, 7 (unofficial translation of the original passage by the author).

[843] See for a discussion of this Galev and Dabovikj-Anastasovska (n 836) 54-55.

[844] *TC1.бр.7613* (n 838) Veles Court of First Instance, North Macedonia, 21 (unofficial translation of the original passage by the author).

[845] Article 263, *Law of Obligations*, Official Gazette of R Macedonia No 18 of 5 March 2001 <http://www.gazibaba.gov.mk/business/media/pdf/zakonska_regulativa/pravni_raboti/obligacioni_odnosi/1-obligacioni-odnosi.pdf> accessed 1 March 2021.

A second interesting example from this jurisdiction comes from the case *Рев2.бр.111/2016* argued before the Supreme Court of the Republic of North Macedonia. In this case, the Supreme Court was tasked with reviewing a verdict by the Court of Appeal of Skopje concerning the nullity of a contract regulating the handover of shares from one member of a publicly traded company to another.[846] In its verdict, the Court of Appeal found the relevant contract null due to, among other, the contract being in contravention to the good business customs as prescribed by Article 95(1)[847] of the Law of Obligations. The Supreme Court however reversed the decision on the following reasoning:

> In this Court's view, the request for revision is founded because the lower courts did not justify their finding that in the present case the conditions for nullity are fulfilled. [. . .] Given the manner and consequences of establishing nullity pursuant to Article 95 of the Law of Obligations, a restricted approach is warranted in the determination of conditions in which nullity can be established, those conditions being incompatibility of the contract with the Constitution, the law, and the good customs. In this sense, the provision [Article 95] is not in itself a basis for nullity, but it needs to be correlated with a provision from the Constitution, the laws, or the good customs with which the relevant agreement is incompatible [. . .]. In the present case, the lower courts were of the view that Articles 3 and 5 of the [relevant contract] were contrary to the good customs, without however elaborating what is the content of the incompatibility, i.e., without establishing with certainty which customs were violated [. . .].[848]

What the Supreme Court essentially finds is that the lower courts merely declared incompatibility of the contract with customary law, without actually identifying the relevant customary laws and subsequently interpreting them in order to determine the content of the violation. While the Supreme Court here is not itself engaging in the interpretation of customary rules, it is pointing to a fault in the lower courts' reasoning insofar as that court did not adequately interpret customary law. This is relevant to our discussion because the Supreme Court is acknowledging the need for interpretation in cases where a court relies on customary law to establish a breach of legal obligation, and is in fact identifying interpretation as a necessary exercise for the adequate application of customary law.

The final example coming from the Macedonian courts is *Решение У.бр.230/2005* from the Constitutional Court of the Republic of North Macedonia. In this case, the Constitutional Court was called upon to assess the constitutionality of various provisions of the Law on Obligations. The applicant of this case submitted an application to assess the constitutionality of the reference to "good customs" in

[846] *Рев2.бр.111/2016*, Supreme Court of the Republic of Macedonia (2016) 3.

[847] Article 95 of the "Law of Obligations" stipulates that 'A contract that is not in keeping with the Constitution, the laws and good customs is null and void, unless the object of the violated rule does not indicate a different penalty' (the law has not been translated into English and this is an unofficial translation of the relevant provision by the author).

[848] *Рев2.бр.111/2016* (n 846) 3-4.

various provisions of the Law on Obligations, claiming that this reliance on good customs is not consistent with the Constitution. In particular, the applicant submitted that while the Constitution obliges everyone in the country to respect 'the Constitution' and 'the laws', it does not contain an obligation to respect 'good customs'.[849] In light of this, references to obligations to respect customs in the Law of Obligations should be deemed unconstitutional. In the Macedonian legal system, constitutional revision is a two-step procedure, whereby first the Constitutional Court assesses whether there is sufficient grounds to accept an application to assess the constitutionally of a given legal provision(s) (something akin to an admissibility phase). If sufficient grounds are identified, the Court proceeds to consider the application on its merits.[850] *Решение У.бр.230/2005* did not go past the first step, because the Court found there is no sufficient grounds to accept the application and proceed to assess the constitutionality of the Law on Obligations.[851] Nevertheless, the Court made various relevant observations with respect to the interpretation of custom.

Firstly, the Court observed that:

> Certainly, good custom is not a precisely defined category, but it is widely familiar in the legal terminology and *as a rule it acquires its content for a particular time and space*.[852]

While not explicitly referring to it, I would argue that what the Court is describing here is in fact interpretation. One of the functions of interpretation in the context of customary rules is precisely to determine the specific content of a general customary rule for the purposes of the case at hand. In the example of *TC1.бр.7613* above we saw this play out in respect of the general rule that a contractual penalty should remain within the limits of good business customs. The court in that case specified the content of this general obligation by reference to other rules applicable between the parties, as well as by reference to recognized practice in the particular field (construction contracts). In this sense, the Constitutional Court in *Решение У.бр.230/2005* is plainly affirming the role that interpretation plays in the continuous existence of customary rules.

The second set of examples of national courts interpreting domestic custom yield from the national courts of Kenya, and concern the interpretation of various domestic customary rules from the regimes of family law and inheritance. While there is a long history in Kenya of customary rules regulating both civil and criminal conduct, the role of customary law in the contemporary legal landscape is sig-

---

[849] *Решение У.бр.230/2005*, Constitutional Court of the Republic of Macedonia (31 May 2006) [2].

[850] Constitutional Court of the Republic of North Macedonia, 'Procedure' (Constitutional Court of the Republic of North Macedonia, 2021) < http://ustavensud.mk/?page_id=4607> accessed 1 June 2021.

[851] *Решение У.бр.230/2005* (n 849) [1]. [852] Ibid [4].

nificantly limited.[853] Presently, the role of domestic customary law in the Kenyan legal system is enabled by virtue of a provision in the Judicature Act, and limited by a so-called "repugnancy clause" which allows for the application of customary law 'so far as it is applicable and not repugnant to justice and morality and is not inconsistent with any written law'.[854] The presence of this provision and its 'repugnancy' limitation already signals a likelihood that cases interpreting domestic custom will be found in the jurisprudence of Kenyan national courts. After all, in order to determine whether a particular customary rule is repugnant to justice and morality, or is (in)consistent with written law, one would have to interpret this rule and determine its scope and content.

In the case of *Mary Rono v. Jane Rono & another* the Court of Appeal was asked to review a judgment of the High Court of Kenya related to the distribution of inheritance. In the disputed decision, the High Court arrived at a distribution of the inheritance based on both customary law and statutory laws on succession.[855] In particular, the High Court found that according to the relevant customary law the distribution of inheritance was by reference to the house of each wife irrespective of the number of children, and that daughters received no inheritance. On the other hand, taking statutory law and the will of the parties in consideration, the High Court found that the daughters should also be entitled to a share of the inheritance. However, because they are likely to marry, they were apportioned a lower share of the inheritance than the male children.[856]

In its review of this judgment, the Court of Appeal considered both customary law and statutory law, as well as relevant international law.[857] While the Court eventually made its decision primarily on the basis of the written law, it nonetheless dedicated considerable space in the judgment on the interpretation of African customary law.

> The manner in which courts apply the law in this country is spelt out in section 3 of the Judicature Act Chapter 8, Laws of Kenya. The application of African Customary Laws takes pride of place in section 3(2) but is circumscribed thus: "... so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law ...".[858]

Having outlined this, the Court of Appeal went on to discuss whether the customary rules on distribution of inheritance could be considered 'repugnant to justice and morality'. In particular, the Court considered the prohibition of discrimination contained in Kenya's Constitution,[859] and the international human rights

853 Allan Mukuki et al., 'Customary Law in the Legal System of the Republic of Kenya' (31 March 2020) TRICI-Law National Report Series, 13 <https://tricilawofficial.files.wordpress.com/2022/02/kenya-final-report_2022.pdf> accessed 20 October 2022.

854 Ibid, referencing Article 3 of the Judicature Act of Kenya.

855 *Mary Rono v Jane Rono & Another* (29 April 2005) Kenyan Court of Appeal at Eldoret, Civil Appeal No 66 of 2002, 4.

856 Ibid. 857 Ibid 7. 858 Ibid. 859 Ibid 7-8.

treaties and CIL applicable in Kenya,[860] as indicators of what might be considered for the purposes of the repugnancy test. On this, the court clarified that

> [. . .] in this matter the central issue relating to discrimination which this appeal raises, cannot be fully addressed by reference to domestic legislation alone. The relevant international laws which Kenya has ratified, will also inform my decision.[861]

Here, the Court signals its intention to interpret the relevant domestic customary rules systemically, by considering both other domestic (written) law and international law. After examining these other relevant rules, the Court concluded that 'the estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions',[862] and decided on a re-distribution of the inheritance.

The reasoning of the court in this case offers insight into how the 'repugnant to justice and morality'[863] caveat to the application of African Customary Law operates in practice. Two observations can be made in this regard. Firstly, this caveat implies that the application of African customary law in Kenya will often require systemic interpretation in order to asses whether the customary rule is (not) repugnant to justice and morality. This might not always be the case, as a judge may sometimes make this assessment by reference to extra-legal considerations of morality or justice. However, if the reasoning in *Mary Rono v. Jane Rono & another* is any indication, often this assessment will be performed by reference to other applicable legal rules. Secondly, this caveat implies that when a rule of African customary law is invoked before a Kenyan court, this rule will need to be assessed against the justice and morality standards prevalent in Kenyan society at that point in time. If those standards change or evolve with time, the customary rule will need to evolve with them or fall into disuse. Thus, this provision of the Kenyan constitution is in fact allowing for the evolutive interpretation of African customary law.

This observation is further supported by the reasoning of the High Court of Kenya in the case of *Katet Nchoe and Nalangu Sekut v. Republic*. In this case, the High Court of Kenya was asked to review a 10-year prison sentence handed down by a lower criminal court for the crime of manslaughter. The crime occurred during a

---

[860] Ibid 8. On this point, see also the reasoning of the High Court in the *Andrew Manunzyu Musyoka* case. *Andrew Manunzyu Musyoka* (15 December 2005) High Court of Kenya at Machakos, Succession Cause 303 of 1998, 5-6.

[861] *Mary Rono v Jane Rono & Another* (n 855) 9. [862] Ibid, 10.

[863] The full provision reads: 'The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay'. Judicature Act, 2012 rev KLR CAP 8, 5. <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/JudicatureAct_Cap8.pdf> accessed 1 March 2021.

procedure of female genital mutilation (FGM) which went wrong and resulted in the death of a 16-year-old girl. Counsel for the appellants argued that the prison sentence was harsh and excessive, and stressed that the offence for which the appellants were charged, convicted and sentenced arouse out of an old customary practice of circumcision.[864] The Court accepted that this is indeed an old customary practice, and proceeded in the following manner:

> Section 3 of the Judicature Act [. . .] enjoins the High Court [. . .] to apply customary law where such custom is not repugnant to justice and morality. The repugnancy clause evokes a lot of anger and discussion among students of law, whose justice, and whose morality, I do not think it is the justice of the colonialist, or the judge or the court. It is the justice of all the surrounding circumstances of the custom in point. There is no more justice in this custom if ever there was any. [. . .]
>
> [. . .] In our case, female genital mutilation is certainly harmful to the physical and no doubt the psychological and sound well-being of the victim. [. . .] That kind of custom could truly be well discarded and buried in the annuals of history.[865]

On this reasoning, the High Court upheld the decision to sentence the two appellants, but lowered their sentence to 2 years and mandated subsequent seminars on the eradication of FGM for both.[866]

The final example in this context comes from the case of *Martha Wanjiru Kimata & another v Dorcas Wanjiru & another*. In this case, the High Court of Kenya was asked to consider which member(s) of family have the right to make decisions concerning a person's burial. The Court found that the law applicable to a burial decision is customary law.[867] The Court then went on to observe that

> Customary law like all laws is dynamic. It is especially so because it is not codified. Its application is left to the good sense of the judges who are called to apply it. It is worded the way it is to allow the consideration of individual circumstances of each case.[868]

This pronouncement of the High Court indicates that as custom is dynamic and unwritten, its application will vary depending on the factual context of the case. Moreover, the observation that custom is worded flexibly to allow the consideration of the individual circumstances of each case seems to indicate that custom might always require interpretation when it needs to be applied in a particular case. What I mean here is that it seems that the general nature of customary rules will almost always require their interpretation in order to operationalize them for the purposes of the particular circumstances. This is precisely what happened in the present case.

---

[864] *Katet Nchoe & Another v Republic* (11 February 2011) High Court of Kenya, Criminal Appeal No 115 of 2010, 3.

[865] Ibid, 4. [866] Ibid, 5.

[867] *Martha Wanjiru Kimata & another v Dorcas Wanjiru & Another* (24 February 2015) High Court of Kenya, Civil Appeal No 94 of 2014 [14].

[868] Ibid.

In *Martha Wanjiru Kimata & another v Dorcas Wanjiru & another*, the High Court had to consider competing claims as to who has the right to bury a member of the family – applicant or respondent. Both persons had a plausible claim under custom, as the customary norm broadly prescribed that a deceased's clan was in charge of burial decisions and a wife was considered part of a husband's clan for that purpose.[869] The court had to make its decision on the basis of the particular context of the case, and assess who – applicant or respondent – had a stronger claim in relation to the family life of the deceased. The court considered the circumstances of cohabitation between the deceased and applicant and defendant respectively, and eventually found that the defendant had a more persuasive claim to marriage with the deceased and was in this sense closer to him, thereby entitling her to make the final burial decisions.[870]

The sample of cases dealing with domestic custom examined in this section is limited, and any conclusions that emerge from them are limited accordingly. Nevertheless, they are relevant to the broader findings of this chapter, insofar as they point to similar patterns of reasoning as we saw in the earlier examples of CIL interpretation. As the discussion of these cases illustrates, when interpreting domestic customary rules, national courts rely on similar interpretive methods as the ones discussed thus far with respect to the interpretation of CIL. This lends further support to the overall conclusions of both this chapter and the thesis, as it shows that when it comes to customary law interpretation operates similarly regardless of what legal system the customary rules come from.

IV. Lessons from National Courts for a Theory of CIL Interpretation

The cases examined in this chapter demonstrate that the interpretation of customary law is ubiquitous in the practice of national courts. Moreover, the discussion offers insight into three crucial aspects of interpretation as an operation in the context of customary law. Firstly, it emerges from the cases discussed above that when interpreting customary law (both CIL and domestic custom) courts rely on methods of interpretation similar to the ones employed in the interpretation of treaties. However, while these methods are familiar, there are also some peculiarities that emerge when they are applied to an unwritten rule. Thus, the need to adjust the way these methods operate in the context of custom must be acknowledged. Secondly, the analysis points to two crucial functions that interpretation performs in the continuous existence of customary rules. In particular, interpretation performs a concretizing function whereby the content of general customary rules is specified, and an evolutive function whereby older customary rules are "updated" in light of factual or legal developments in the broader legal system. Thirdly, while the discussion above demonstrates that interpretation performs a

[869] Ibid [13-14]. [870] Ibid [15-18].

central function in the operationalization and continuous existence of customary rules, it also points to the need for limits to the interpretive process. In this sense, some of the cases found in the research for this chapter indicate that a theory of interpretation for customary law must clearly delineate the boundaries of the interpretive process. In particular, the interpretation of customary rules should never lead to an outcome that is manifestly opposite to the purpose of the rule and should never lead to modification which is not supported by relevant practice. These limits to the interpretive exercise may be set by rules for interpretation.

With respect to the methods of interpretation, it emerges from the discussion above that national courts rely mainly on teleological, systemic, and textual interpretation when they interpret customary rules. Moreover, they often also rely on evolutive interpretation, as an overall interpretive attitude in combination with one or several of the indicated methods. Insofar as these methods are familiar from the practice of treaty interpretation, there is nothing surprising in the fact that national courts employ them for the interpretation of customary rules as well. However, given the particularities of custom, each of these methods manifests somewhat differently when employed in the interpretation of custom than when employed in the interpretation of treaties.

Considering firstly teleological interpretation, we saw that this is one of the methods that national courts employ very frequently in the interpretation of custom. This is evident from the courts' reliance on the underlying rationale of the customary rules in question,[871] the reference to the purpose of the rules,[872] or the invocation of common values that should be preserved when the rules are applied.[873] This reliance on teleological interpretation by the courts raises two questions. Firstly, how exactly does teleological interpretation operate when it comes to customary rules? Teleological interpretation posits that a rule should be interpreted in light of its object and purpose. In the context of treaties, teleological interpretation is anchored in the common intention of the parties. This intention may be evinced from a number of materials, including the text of the provisions themselves, the preamble of the treaty or the treaty as a whole, or the treaty's preparatory works. With customary rules on the other hand, identifying the object and purpose of the rule is challenging. This is certainly in part owed to the fact that custom does not flow directly from identifiable intentions of the states. There is rarely (if ever) an identifiable moment in time to which the making of a customary rule can be traced, at least in the way that this can be done for treaties. This has even led some scholars to argue that the lack of a custom-making moment is one reason why cus-

[871] See indicatively *Unidentified holders of Greek government bonds v Greece* (n 660) [16]; *A and B* [18-20].

[872] See indicatively *Former consular employee at the Consulate General of Croatia in Stuttgart v Croatia* (n 647) [43]; *VČ v Embassy of the Russian Federation to Latvia* (n 652) [40]; *Bostadsrättsföreningen Villagatan 13 v Belgium* (n 659) [11].

[873] See indicatively *Ferrini 1* (n 681) [9.1]; *Germany v Milde* (n 703) [4].

tomary rules are not amenable to interpretation.[874] However, as we see from the practice of national courts, this has not in fact prevented them from engaging in the teleological interpretation of customary rules. Secondly, and relatedly, how does the teleological interpretation of customary rules interact with the choice to interpret evolutively? In the context of treaty interpretation the teleology of a rule may inform the choice to interpret that rule dynamically. However, with customary rules we are once again faced with the question where can an interpreter look to justify going for a dynamic interpretation of the rule.

What we see from the cases analysed above, is that when courts refer to the object and purpose of a customary rule, they often evince this purpose from the broader legal regime in which the rule is situated. This may involve a reference to broader objectives pursued in the particular legal regime, or a reference to other relevant rules or principles in the legal system. Thus, for sovereign immunity, courts considered the general principles of sovereign equality and *par in parem non habet imperium*, as well as the broader aims of maintaining equality and stability in the legal system.[875] At times, courts also engaged in effective interpretation, by refering to the overal purpose of the rule and proceeding to interpret in a way that would not be unreasonable or inoperable in light of this purpose.[876] This focus on effectiveness corresponds to expectations articulated in earlier scholarship on CIL interpretation, which anticipated teleological interpretation of custom to revolve around outcomes that 'best suit the objectives of the legal norm'.[877] For the customary rule on direct participation in hostilities, courts looked at the overal purpose of the IHL regime,[878] or the narrower rationale of the principle of distinction.[879] Furthermore, in some of the cases, courts looked at 'recognized values' of the international community that should be protected in the application of the rule.[880] Finally, courts also looked at subsequent state practice in the application of the rule in order to see what aims were pursued by the courts of other states when apllying the customary rule.[881] This latter technique was particularly relevant in the construction of exceptions. Overall, it seems that when courts interpret customary law teleologically, they consult *mutatis mutandis* similar materials as they would when interpreting treaties. What I mean here is that where in treates we

[874] See the discussion on this in Chapter 2, Section IV.i *supra* 104-105.
[875] See indicatively *Voiotia 2* (n 709) [46].
[876] See indicatively *2016 Ga-Hap 505092* (n 729) 28; *A v Swiss Federal Public Prosecutor and ors* (n 748) [5.4.3].
[877] Bleckmann (n 305) 528.
[878] See indicatively *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors.* (n 768) [35]; *Prevention of the use of Ramstein Air Base for United States armed drone strikes in Yemen, Yemini citizen living in Sana'a and ors v Germany* [212].
[879] See indicatively *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors.* (n 768).
[880] See indicatively *Ferrini 1* (n 681) [7]. See also *TC1.6p.7613* (n 838), 21 for a similar reference to broader values in the context of the domestic legal system.
[881] See indicatively *'Abu Omar' case* [23.7].

would look for the object and purpose of the rule in the intention of the parties as manifested in the preamble of a treaty or the text of the rule, in custom courts look for the purpose of the rule as manifested in the professed objectives of the legal regime the rule is a part of. These objectives are found by looking to the rationales that underlie the legal regime (e.g. sovereign equality in the interpretation of state imunity); to other rules or principles that are part of the regime (e.g. the principle of distinction in the interpretation of the customary rule of direct participation in hostilities); or to the attitudes of states professed in their practice (e.g. the reasoning of other national courts concerning the definition of piracy in the interpretation of the customary prohibition of piracy). Taken together these materials demonstrate what De Vries-Zou aptly describes as 'the common conviction' of states.[882] In the interpretation of domestic customary rules, we observe comparable patters. The courts (re)construct the purpose of customary rules by reference to broader rationales that underlie the legal regime (e.g. conscientiousness and honesty in the interpretation of business customs) and other rules or principles that are part of the regime (e.g. requirement of proportionality of contractual penalties in the interpretation of business customs). This transmutation of the means of teleological interpretation to fit the particularities of custom is intuitively sound. After all, the origin and nature of the object to be interpreted should dictate how methods of interpretation are applied to it.[883]

A similar trend can be observed with the application of the other methods as well. Thus, in the employment of systemic interpretation, courts primarily considered other relevant customary rules applicable to the relations between the parties. For instance, in the interpretation of the customary rule of direct participation in hostilities, courts had regard to other relevant IHL rules applicable between the parties in the context. Systemic interpretation was also crucial in the construction of exceptions to a customary rule. When constructing the teritorial tort exception to the customary rule of sovereign immunity for acts commited by the armed forces of a state, courts had recourse to other relevant customary rules applicable between the parties in order to assess which conduct of armed forces constituted a grave breach of international law and therefore should not be covered by sovereign immunity. Here, systemic interpretation was deployed in combination with teleological in order to overcome a perceived conflict between customary rules, and the outcome was the construction of an exception to one of the rules. In this sense, systemic interpretation also served a harmonizing role.[884] This was particularly the case when national courts were interpreting domestic custom, and relying on systemic interpretation in order to harmonize older customary rules with other newer legal

[882] Ivo Tarik de Vries-Zou, 'Common Convictions and the Interpretation of Custom' (2022) 11(4) ESIL Reflections 1.

[883] Ibid, 2-4. See also *Fisheries Jurisdiction Case (Spain v Canada)* (Jurisdiction of the Court) [1998] ICJ Rep. 432 [46-49].

[884] On this potential harmonizing role of systemic interpretation in CIL see Bleckmann who ar-

rules in the system.[885] One peculiarity of the application of systemic interpretation to customary rules is that sometimes national courts relied on the codified counterpart of a customary rule, thereby looking to treaties in order to interpret the customary rule.[886] At times, the reliance on the codified counterpart was so heavy that in fact the courts were also engaging in textual interpretation. In particular, courts took the codified counterpart of the rule as a verbatim reflection of the customary rule, and proceeded to interpret the words in their ordinary meaning.[887] Sometimes, courts even took the provisions in non-binding instruments as an authoritative textual expression of a customary rule and proceeded to interpret this textual proxy.[888] This latter practice has led commentators to observe that some authoritative written restatemens of customary rules may give customary rules a stable existence to such an extent that it makes them amenable to interpretation.[889] In a similar vein, earlier scholarship on CIL interpretation has argued that the 'grammatical interpretation of general legal propositions of customary international law can lead to the definition of a core of the terms used'.[890]

While national courts demonstrate extensive skill and creativity in the interpretation of custom, their practice also indicates that the interpretive process needs to have clearly demarcated limits. In particular, the need for limits that emerges from the analysis of the caselaw in this chapter revolves around two points. Firstly, the interpretation of customary law should never lead to an outcome that is manifestly contrary to the purpose of the rule being interpreted, and secondly, interpretation should never lead to modification which is not supported by relevant practice. A third limit that emerges from the literature is the so-called 'misinterpretation' of custom.[891]

The need for limits manifests particularly strongly if we consider the functions that interpretation performs in the continuous existence and operation of CIL rules. As indicated above, when observing the way courts interpret customary law, two functions of interpretation can be discerned –a concretizing and an evolutive function. The concretizing function refers to the fact that through interpretation the specific content of general customary rules is fleshed out and made more spe-

gues that '[t]he second aim of systematic interpretation is to avoid contradictions within the legal system; this function also intervenes in customary international law. If the legal propositions contradict each other, an interpretation of both legal propositions must be found that eliminates these contradictions.' Bleckmann (n 305) 528.

[885] See for instance *Mary Rono v Jane Rono & Another* [7]; *Katet Nchoe & Another v Republic* [4].

[886] See for instance *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors* (n 768) [19]; *A and B v Israel* [12].

[887] See for instance *Institute of Cetacean Research and ors v Sea Shepherd Conservation Society and Watson* (n 811) [6].

[888] See *Israel v 'Estelle'* (n 822).

[889] Werner (n 826) 2. See also Ryngaert (n 522) 504.

[890] Bleckmann (n 305) 526.

[891] Noora Arajärvi, 'Misinterpreting Customary International Law: Corrupt Pedigree or Self-Fulfilling Prophecy?' in Panos Merkouris, Noora Arajärvi and Jörg Kammerhofer (eds), *The Theory Practice and Interpretation of Customary International Law* (CUP 2022) 40; Merkouris 2023 (n 3) 50-68.

cific. In this sense, interpretation is central to the operationalization of customary rules. Customary rules are by their nature more general and vague. When they are brought to bear upon specific situations, it is through interpretation that their content is made more concrete and applied to the circumstances at hand. Concretization in this sense may include the identification of specific sub-elements of a general rule, including sub-obligations or sub-categories that emerge from the rule.[892] Notably, this concretizing function also includes the construction of exceptions.[893] While the concretization that is achieved through interpretation is crucial for a customary rule to be operationalised, it may only be exercised within limits. One limit is that the interpretive outcome cannot be manifestly contrary to the purpose of the rule being interpreted. We saw an example demonstrating the need for this limit in the *A and B v Israel* case, where the outcome of interpreting the customary rule on direct participation in hostilities was manifestly opposed both to the narrower purpose of the rule and to the broader purpose of the principle of distinction which is central to the IHL regime. It is difficult to theorize this limit in the abstract, and to forsee when exactly an interpretive outcome might go against the purpose of a rule. Consequently, it is also difficult to operationalise checks and balances which might ensure the interpretive exercise does not exceed it. One possible avenue for this would be the systematization of rules of interpretation for customary law. Much like the case of treaty interpretation, which became more coherent after rules of treaty interpretation were identified and agreed upon, so can this be done in the context of customary law. In this sense, rules would have a guiding and disciplining effect on the interpretive process.

Another limit to be considered with respect to the concretizing function is that the interpretive outcome should not lead to a modification of the customary rule being interpreted. This is particularly relevant when we consider the role of interpretation in the construction of exceptions. It may seem like the construction of an exception itself is already an impermissible modification of the customary rule. However, as the discussion around the territorial tort exception to the rule of sovereign immunity shows, it is also possible to legitimately arrive at an exception to the rule through interpretation. In particular, when it emerges that two equally applicable rules are in potential conflict, this conflict can be resolved through interpretation which harmonizes the rules by constructing an exception. The choice as to which rule's scope is restricted by an exception will depend on the circumstances, and may be arrived at by employing various interpretive methods. In the sovereign immunity example, courts relied on a combination of teleological, systemic and effective interpretation, in order to arrive at the finding of an exception to the rule. That the limit of modification is not transgressed can once again be ensured with the proper application of rules of interpretation.[894] Similarly, an in-

[892] See the discussion in sections III.ii.b and III.ii.c *supra* 161-174.
[893] See the discussion in section III.ii.a *supra* 142-157.
[894] See on this point Merkouris' discussion of the correct application of systemic interpretation.

terpreter can refer to subsequent conduct by states in relation to the customary rule, in order to discern whether their particular interpretation find support in practice.

Modification as a limit also figures strongly when it comes to the evolutive function of interpretation. The evolutive function refers to the fact that through interpretation older customary rules can be adapted to new developments of fact or law. This adaptation can include the narrowing or broadeing of the scope of a customary rule in light of other newer rules which are also applicable to the situation, or the broadening of the scope of application of an older customary rule to include new factual circumstances. This latter "extension" of a customary rule to cover new scenarios may also happen by means of analogical reasoning or expansive interpretation. The evolutive function that interpretation performs enables a customary rule to have a continuous existence, and to retain relevance. Much like in the interpration of treaties, when it comes to the interpretation of custom it is difficult to delineate a boundary between (evolutive) interpretation and the impermissible modification of a rule. On the level of theory, it can be said that interpretation accounts for scenarios where a rule is adapted to new circumstances all the while remaining in the limits posed by the rule. What constitutes the limits of the rule might be discerned by the purpose or underlying rationale of the rule, by looking at the relevant practice that consitituted the rule, or by looking at the subsequent practice of how the rule was applied. Modification on the other hand goes beyond this, and reads into the rule content that cannot be defended on the basis of any of these indicators.

The two functions that interpretation performs are not mutually exclusive, and in fact may often be perceived jointly at play when customary rules are being interpreted. Having sketched the functions of interpretation and the limits that they must observe in these broad strokes, let me now turn to a more detailed discussion of them. Chapter 4 of this thesis – as the final step in the construction of a theory of interpretation for customary international law – will look at the two functions of interpretation, their limits, and what they signify for the continuous existence and operaton of customary international law.

Merkouris 2023 (n 3) 62-69.

CHAPTER 4

THE FUNCTIONS OF INTERPRETATION IN THE CONTEXT OF CUSTOMARY INTERNATIONAL LAW

Since the law cannot speak, it is the practice of interpretation that brings it to life.[895]

I. Introduction

In Chapter 1, this thesis began by painting a picture of CIL as a concept made up of, on the one hand, a seemingly stable definition which is pervasive in practice (the two-element approach), and, on the other hand, strong and accurate criticism of this definition on levels of both theory and practice. This criticism pointed to various problems which continue to plague the application of customary rules, and generated an image of two seemingly irreconcilable characteristics of CIL. I proposed however that what seemed irreconcilable may in fact be reconciled if we account for interpretation as a stage in the continuous existence of a rule of customary international law. This argument required several steps to be completed. Thus, in Chapter 2, I first defined the term 'interpretation' and demonstrated that there is no theoretical obstacle to applying this concept to rules of customary international law. Put differently, CIL is interpretable. Moreover, what Chapter 2 demonstrated is that, not only are there no theoretical obstacles to applying the concept of interpretation to CIL, but that in fact, international judicial practice offers relevant examples of customary rules being interpreted as distinct from their identification. This was further discussed in Chapter 3, this time with a focus on national courts. The examination of cases from various national courts showed that judges regularly interpret both CIL rules and (where applicable) rules of domestic custom. Chapter 3 led to three main findings that can be taken as lessons from national courts for the interpretation of custom. The time has now come to "theorize" these findings, and take the final step in the construction of the argument of this thesis.

This chapter is dedicated to addressing the question: *what are the theoretical implications of the findings in Chapter 3 with respect to a theory of interpretation for CIL*? To answer this question, I rely on the findings in Chapter 3 concerning the concretizing and evolutive functions of interpretation. In the present chapter, the discussion of these

[895] Venzke (n 317) [1].

two functions is expanded to include a more in-depth characterization of each, followed by a reflection on the possibilities these functions present in resolving CIL's problems, as well as their limits. Section II is dedicated to the concretizing function and Section III is dedicated to the evolutive function, respectively. Finally, Section IV brings the argument together, with a discussion of how each of these functions addresses the problems of CIL theory and practice identified in Chapter 1.

While the idea of the two functions emerged out of the examination of cases from national courts (Chapter 3), the discussion of the two functions in the present chapter is expanded with examples from international courts as well. These examples serve a complementary role in the thesis, in the sense that they are used to reinforce the conclusions reached based on the sample of cases from national courts (Chapter 3). In light of this, no separate large-scale examination of cases was conducted for the purpose of Chapter 4 in the manner that this was done for Chapter 3. Instead, I focused on the caselaw of one international court – the ICJ.

The choice to look at the caselaw of the ICJ was motivated by the following considerations. Firstly, the ICJ is a court of general jurisdiction, which can hear cases on a variety of public international law issues. In light of this, a high frequency of cases where CIL appears and may need to be applied and interpreted is likely. A related consideration here was the fact that unlike the ICJ, courts of limited jurisdiction ordinarily address the interpretation of treaties, and in their jurisprudence rules of CIL are invoked and applied less frequently. Furthermore, the cases in the Court's jurisprudence touch on most regimes of public international law, therefore providing a variety in the sample. Secondly, the caselaw of the ICJ is publicly available via the website of the court, therefore enabling access to the relevant caselaw without delays or restrictions. Finally, the choice to focus on the ICJ to the exclusion of other international judicial and quasi-judicial bodies was motivated by limitations of scope and time. Relying on these examples, I argue that the two functions of interpretation of CIL are not a peculiarity of the practice of interpretation of national courts, but may in fact also be seen in international practice. This reinforces the observation that these functions are an inherent trait of interpretation when it comes to CIL.

The fact that this chapter "tests" its conclusions on cases from only one international court, limits the scope of these conclusions accordingly. However, parallel research conducted in the scope of the broader research project that this thesis is a part of indicates that the two function of interpretation can also be observed more widely in the practice of international courts and quasi-judicial bodies.[896] In light of this, the arguments made in Section IV are not prejudiced by the narrower caselaw focus of the present chapter.

[896] See indicatively Merkouris 2023 (n 3); Marina Fortuna, 'Different Strings of the Same Harp: Interpretation of Rules of Customary International Law, Their Identification and Treaty Interpretation' in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (CUP 2022) 393; Lekkas (n 421) 327; Fortuna (n 451).

II. The Concretizing Function of Interpretation in CIL

The concretizing function of interpretation refers to the role of interpretation in making the content of CIL rules more specific and concrete. Customary rules are general by their nature, and the act of interpretation is necessary to formulate them more concretely. As such, it is through interpretation that the content of general customary rules is fleshed out and made more specific, that we arrive at more specific sub-elements of a general customary rule, or that we delineate the scope of the rule. Put differently, it is through interpretation that the content of general CIL rules is distilled into particular prescriptions. On this point, it has been aptly noted that interpretation in the context of CIL is 'negentropic' – it reduces entropy because it 'constantly nourishes and updates' custom.[897]

The concretizing function of interpretation manifests in two ways. Firstly, it manifests in instances of interpretation that make the content of a general customary rule more specific by fleshing out sub-obligations that flow from the general rule. Secondly, it manifests in the delineation of the scope of a customary rule through the inclusion or exclusion of specific instances from the scope of the general rule, including the construction of exceptions. Let us consider each of these scenarios in turn.

i. Interpretation as specification

The first manifestation of the concretizing function – as an act of specification, refers to scenarios where more specific sub-elements or sub-obligations are fleshed out of general customary rules through interpretation. This aspect of the concretizing function of interpretation is owed to the 'inherent plasticity' of CIL rules.[898] Customary rules are identified in terms of general rules, which may apply to a variety of contexts. Interpretation is then necessary in order to formulate a statement that specifies their content and meaning.[899]

Relying on an analogy from the field of quantum mechanics, Merkouris has referred to this as the 'collapsive' function of interpretation.[900] This terminology is borrowed from the Copenhagen interpretation of quantum mechanics, according to which a quantum particle is not considered to exist in one state or another, but in

---

[897] Sur contrasts this trait of CIL interpretation from that of treaty interpretation which he characterizes as 'entropic'. 'The interpretation of custom is creative or negentropic, because it constantly nourishes and updates it, softening the distinction between formation and application. That of written norms is, on the other hand, entropic. The more one interprets a treatise, for example, the more it takes on additional, false or deviant meanings in relation to its initial text, or even to previous interpretations, the more its normative content becomes complicated, the more time exhausts it and disguises it, [. . .] Treaties grow old where custom remains forever young'. Sur (n 389) 295.

[898] Tassinis (n 389) 235. [899] Sur (n 389) 294.

[900] Panos Merkouris and Nina Mileva, Introduction to the Series: Customary Law Interpretation as a Tool (2022) 11(1) ESIL Reflections 1, 6.

all of its possible states at the same time. Observation is needed to *collapse* the wave function and see the reality of the state.[901] On this view, interpretation performs much the same 'collapsive' function when it comes to customary rules. Following this analogy, we may say that the identification of CIL delimits the space in which the rule dwells as a general prescription. The outcome of identification is a rule expressed in general terms. Interpretation on the other hand collapses the general rule in a particular moment when the rule is applied (observed) in a particular case. Thus, interpretation provides for specific utterances of the rule's content (specific elements or sub-obligations) within the general scope provided by identification.

In the caselaw of national courts examined in Chapter 3, we saw this function play out in various cases, and this discussion is summarized in Section 3.IV above. In the caselaw of the ICJ, the view of CIL interpretation as concretization finds support in the *Gulf of Maine* pronouncement that

> [a] body of detailed rules is not to be looked for in customary international law [. . .] It is therefore unrewarding, especially in a new and still unconsolidated field [. . .] to look to general international law to provide a readymade set of rules that can be used for solving any delimitation problems that arise. *A more useful course is to seek a better formulation of the fundamental norm on which the Parties were fortunate enough to be agreed*.[902]

This last observation by the Court seems like a clear allusion to interpretation.[903] Examples of the ICJ engaging in interpretation as concretization can be observed in a number of cases. For instance, in the *Chagos Advisory Opinion* we see this function play out with respect to the customary rule of self-determination. Here, the Court had to examine whether the process of decolonization of Mauritius was lawfully completed when Mauritius was granted independence, following the separation of the Chagos Archipelago from Mauritius. In particular, the Court had to consider the nature, content and scope of the customary rule of self-determination applicable to the process of decolonization of Mauritius.[904] Firstly, what was at issue was whether the customary rule of self-determination had crystalized at the time of the relevant conduct. The Court addressed this by way of CIL identification.[905] Relying on General Assembly (GA) Resolutions as evidence of state practice and *opinio*

---

[901] Jan Faye, 'Copenhagen Interpretation of Quantum Mechanics' (*Stanford Encyclopedia of Philosophy*, 6 December 2019) <https://plato.stanford.edu/entries/qm-copenhagen/#MeaProClaQuaDis> accessed 4 January 2023. See also Don Lincoln, 'Copenhagen Interpretation of Quantum Mechanics' (*Wondrium Daily*, 18 December 2020) <https://www.wondriumdaily.com/copenhagen-interpretation-of-quantum-mechanics> accessed 4 January 2023.

[902] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (n 404) [111] (emphasis added).

[903] On this reasoning, the ICJ first formulated the fundamental CIL norm governing maritime delimitation in general terms and then proceeded to 'consider [the] equitable criteria and the practical methods which are in principle applicable in the actual delimitation process.' *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (n 404) 246 [113].

[904] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in* 1965 (n 504) [144]

[905] Ibid [145-152].

juris, the Court formulated the customary rule as: 'all peoples have the right to self-determination'.[906] Furthermore, the Court clarified that 'the *nature and scope of the right* to self-determination of peoples' includes respect for the national unity and territorial integrity.[907] While this point has an interpretive flavor to it (nature and scope are interpretive questions), the Court anchored its reasoning in the text of GA Resolutions, thereby essentially arriving at this view through identification. In this regard, this portion of the Court's reasoning may be considered an example of what Kolb, in his taxonomy of CIL application, has classified as a scenario where identification and interpretation occur jointly.[908]

This was an important aspect of the reasoning because some states had argued that customary self-determination did not entail an obligation to implement the right as defined by the Court within the boundaries of the non-self-governing territory.[909] The Court addressed this point by stressing that the right to self-determination is defined by reference to the entirety of a non-self-governing territory and that the right to territorial integrity of a non-self-governing territory is a '*corollary* of the right to self-determination'.[910] This was based on the text of GA Resolution 1514 (XV) as well as on the fact that no examples had been 'brought to the attention of the Court in which, following the adoption of resolution 1514 (XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering Power of part of a non-self-governing territory, for the purpose of maintaining it under its colonial rule'.[911] Here, once again, we see an interplay of interpretive and identificatory reasoning. In particular, the Court here did not engage in a de-novo identification of a customary rule to the effect that territorial integrity is an aspect of self-determination, but rather combined interpretive reasoning with references to state practice and *opinio juris*. On this latter point, the Court also noted that 'States have consistently emphasized that respect for the territorial integrity of a non-self-governing territory *is a key element of the exercise of the right to self- determination* under international law'.[912] Finally, the Court found that

> the peoples of non-self-governing territories are entitled to exercise their right to self-determination *in relation to their territory as a whole, the integrity of which must be respected* by the administering Power. It follows that any detachment by the administering Power of part of a non-self-governing territory, *unless based on the freely expressed and genuine will of the people of the territory concerned*, is contrary to the right to self-determination.[913]

What we see here is the Court making the content of the general right to self-determination more specific. In particular, two concrete elements are fleshed out

[906] Ibid [153]. This wording was taken directly from Resolution 1514 (XV).
[907] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in* 1965 (n 504) [155].
[908] Kolb (n 3) 224-25.
[909] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in* 1965 (n 504) [159].
[910] Ibid [160]. [911] Ibid. [912] Ibid (emphasis added). [913] Ibid.

of the rule: i) that the rule is to be exercised in relation to the whole territory whose integrity must be respected and that ii) detachment of parts of that territory may not happen unless based on the freely expressed and genuine will of the people.

The reader will recall that some opponents to the idea of CIL interpretation have rejected interpretability on the view that any attempt at interpretation would revert back to identification.[914] The reasoning of the ICJ in *Chagos* illustrates that this understanding is incomplete and unpersuasive. What we see in this case is that indeed there might be some reference to state practice also at the stage of interpretation. However, this is not a reversion to identification, as the Court here is not identifying a separate rule, nor really engaging in identification proper. Rather, what we see here is a perusal of practice in order to confirm a particular interpretation. Recalling our discussion in Chapter 3 with respect to similar reasoning of national courts, this kind of reasoning can more adequately be tagged as interpretation by reference to subsequent practice.

Another prominent example of CIL interpretation as specification can be observed in a string of ICJ cases concerning the customary rule on the prevention of transboundary harm in the context of environmental protection. Early elaborations of prevention as a rule of customary international environmental law can be found in the *Nuclear Weapons Advisory Opinion* and the *Gabčikovo Nagymaros* cases. In the *Nuclear Weapons Advisory Opinion*, the Court expressed the view that '[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is *now part of the corpus of international law relating to the environment*'.[915] The Court arrived at this finding by means of identification, deriving this general obligation from various treaties and soft law instruments widely supported by states.[916] Similarly, in *Gabčikovo Nagymaros*, the Court observed that 'vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage'.[917] While the Court did not anchor this observation in concrete instances of practice, it continued with the general observation that

> [o]wing to new scientific insights and to a growing awareness of the risks for mankind [. . .], new norms and standards have been developed, *set forth in a great number of instruments during the last two decades*. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.[918]

[914] See discussion of this in Chapter 2, Section III.ii *supra* 89-97.
[915] *Legality of the Threat or Use of Nuclear Weapons* (n 86) [29].
[916] Ibid [27-32]. See in particular paragraph 31 where the Court observes that 'taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage [. . .]'.
[917] *Case concerning the Gabčikovo Nagymaros Project* (n 176) [140]. [918] Ibid (emphasis added).

Here, once again the Court seems to be engaging in identificatory reasoning. In both the *Nuclear Weapons Advisory Opinion* and *Gabčikovo Nagymaros*, prevention as a rule of customary international environmental law is formulated in broad and general terms. The content of the rule has been delineated much more concretely in subsequent caselaw of the ICJ, beginning with the *Pulp Mills* case. Here, the Court unambiguously recognized that prevention is a customary rule, and made the following observation:

> The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" [. . .] A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation "is now part of the corpus of international law relating to the environment" [. . .].[919]

In making this pronouncement, the Court relied on its earlier reasoning in the *Nuclear Weapons Advisory Opinion*, thus sidestepping the need to re-identify the customary rule. Instead, the road was open for the Court to interpret the rule in the circumstances of the present case.

It is important to note that in *Pulp Mills*, the Court made its pronouncement on the customary nature of prevention in the context of discussing obligations between the parties under a bilateral treaty. Thus, its reasoning with respect to the customary rule in this case was woven into its reasoning concerning the treaty obligations between the parties. For instance, pursuant to the treaty, the parties had an obligation to notify a jointly established commission (CARU) in cases where a planned activity might cause damage to the other party.[920] Commenting on this specific treaty obligation, the Court observed that cooperation between the parties is also an element which is necessary in order to fulfil the obligation of prevention:

> In the view of the Court, the obligation to inform CARU allows for the initiation of co-operation between the Parties which is necessary in order to fulfil the obligation of prevention [. . .][921]

At this point of the reasoning, it is not clear whether the Court was using the treaty obligation to interpret the customary obligation of prevention, or whether the customary rule was used to strengthen the Court's reasoning with respect to the interpretation of the treaty.[922] Similarly, when making its seminal pronouncement that the duty to conduct an environmental impact assessment (EIA) is part of cus-

---

[919] *Case Concerning Pulp Mills on the River Uruguay* (n 177) [101]. [920] Ibid [103]. [921] Ibid [102].

[922] The Court concluded its reasoning on this point by finding that Uruguay failed to comply with its obligations to notify under the treaty. This is an indication that this reasoning primarily concerned the interpretation of the treaty in question. *Case Concerning Pulp Mills on the River Uruguay* (n 177) [122].

tomary international law, it is not entirely clear whether the Court is interpreting the treaty obligation to that effect, or making pronouncement on the customary rule.[923] Nevertheless, on the duty to conduct an EIA, the Court observed that

> *due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised*, if a party planning works liable to affect the régime of the river or the quality of its waters *did not undertake an environmental impact assessment* on the potential effects of such works.[924]

By framing the analysis in these terms, it seems that the Court is treating the duty to conduct an EIA as a particular sub-obligation of the general obligation of prevention. Thus, while the interpretive reasoning of the court in this case is tangled in both treaty and customary law, it seems to articulate the general customary obligation of prevention as a due diligence obligation,[925] consisting of the sub-obligations to inform and to conduct EIA. Put differently, it seems that through interpretation the Court arrives at several more specific sub-obligations which are constituents of the general rule. On this point, scholarship has argued that the ICJ's reasoning in *Pulp Mills* has in fact developed the content of prevention.[926]

This aspect of interpretation is even more strongly evident in the Court's judgment in the *Certain Activities and Construction of a Road* judgment, where the Court had to once again pronounce on the content of the customary obligation of prevention. Here, the Court first reaffirmed the obligation to conduct an EIA as an element of prevention, finding that this was not only narrowly applicable to the *Pulp Mills* context but was rather a generally applicable obligation:

> Although the Court's statement in the *Pulp Mills* case refers to industrial activities, the underlying principle *applies generally* to proposed activities which may have a significant adverse impact in a transboundary context. Thus, *to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm*, a State *must*, before embarking on an activity [. . .] *ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment*.[927]

Secondly, and more interestingly, the Court further observed that *if* the EIA con-

[923] 'In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource'. *Case Concerning Pulp Mills on the River Uruguay* (n 177) [204].

[924] Ibid [204] (emphasis added).

[925] For a similar analysis on this point see Ilias Plakokefalos, 'Current Legal Developments International Court of Justice: The Pulp Mills Case' (2011) 26(1) The International Journal of Marine and Coastal Law 169, 173-179.

[926] Leslie-Anne Duvic Paoli and Jorge Viñuales, 'Principle 2: Prevention' in Jorge Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015) 107, 127.

[927] *Certain Activities and Construction of a Road* (n 178) [104] (emphasis added).

firms that there is a risk of significant transboundary harm, in order to comply with its due diligence obligation of prevention the state has to notify and consult with the potentially affected state.[928]

It seems like here the Court is establishing a sequential order in which the obligations need to be exercised in pursuance of prevention. First, the state needs to ascertain whether a planned activity has the potential to cause harm. If the activity has this potential, the state needs to conduct an EIA. If the EIA confirms that there is a risk of significant harm, the state then needs to notify and consult the other concerned state in order to find appropriate measures to prevent or mitigate the harm. In this sense, the Court here specified the content of the customary obligation of prevention by interpreting it as a set of separate-but-related consecutive obligations.[929] In particular, the ICJ interpreted the general rule of prevention as consisting of the more specific sub-duties to conduct an EIA, to notify and consult, and to cooperate.

Most recently, the Court took a similar interpretive approach in the *Dispute over the Status and Use of the Waters of the Silala*. In particular, the Court made two interpretive pronouncements that inform our present discussion. Firstly, with respect to the customary rules which may apply to international watercourses, the Court made the more general observation that

> the concept of an international watercourse in customary international law does not prevent the particular characteristics of each international watercourse being taken into consideration when applying customary principles. *The particular characteristics of each watercourse [. . .] form part of the "relevant factors and circumstances" that must be taken into account* in determining and assessing what constitutes equitable and reasonable use of an international watercourse under customary international law.[930]

While the Court here does not explicitly mention interpretation, the reference to 'particular characteristics of each international watercourse' as 'factors and circumstances to be taken into account' when determining the customary obligations clearly points to interpretation.

Secondly, and this is where the similarities with its earlier approach are most pronounced, the Court fleshed out particular sub-elements of the general customary obligation of prevention through interpretation. The point of departure for this portion of the Court's reasoning was that

---

[928] '*If* the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, *to notify and consult in good* faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk' *Certain Activities* and *Construction of a Road* (n 178) [104].

[929] For an earlier version of this argument see Mileva and Fortuna (n 443) 123 et seq.

[930] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia)* (Judgment) <https://www.icj-cij.org/sites/default/files/case-related/162/162-20221201-JUD-01-00-EN.pdf> accessed 5 January 2023 [95] (emphasis added).

> under customary international law, the Parties are both entitled to an equitable and reasonable use of the waters of the Silala as an international watercourse *and obliged, in utilizing the international watercourse, to take all appropriate measures to prevent the causing of significant harm to the other Party*.[931]

Thus, the focus of discussion was squarely within the customary obligation of prevention. This point is reinforced by the Court's reliance on a string of its earlier caselaw, for the formulation of the general customary obligation of prevention.[932] After formulating prevention in general terms, the Court also recalled that the general obligations are accompanied and complemented by 'narrower and more specific procedural obligations, which facilitate the implementation of the substantive obligations incumbent on riparian states under customary international law'.[933] This formulation of the relationship between prevention and the narrower procedural obligations as one between general and specific, supports the reading of prevention as a general rule made up of several particular sub-obligations articulated earlier in this chapter. Put differently, the reasoning of the ICJ in *Dispute over the Status and Use of the Waters of the Silala* confirms the concretizing function of interpretation hypothesized in the present thesis. This observation is reinforced by the following observation of the Court:

> The Court reaffirms that the Parties do not disagree about the customary nature of the above-mentioned substantive obligations or their application to the Silala. Their disagreement relates to *the scope of the procedural obligations and their applicability in the circumstances of the present case*.[934]

This is a clear indication that in the present case, the Court approached the customary obligation of prevention with the lens of interpretation.

Before continuing into the Court's interpretive reasoning, one side-observation is worth making. In the present case, it was not only the Court that relied on its earlier interpretation of the customary obligation of prevention, but the earlier interpretive reasoning also figured in the arguments of the parties. In particular, on the nature and scope of the obligation to notify and consult, Bolivia argued that

---

[931] Ibid [97].

[932] 'The Court recalls that in general international law it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). "A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" in a transboundary context, and in particular as regards a shared resource (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 55-56, para. 101, citing *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 706, para. 104)'. *Dispute over the Status and Use of the Waters of the Silala* (n 930) [99].

[933] Ibid [100]. [934] Ibid [102].

'if the activity in question does not give rise to a risk of significant transboundary harm, the State concerned is not under an obligation to conduct an environmental impact assessment or to notify and consult the other riparian States'.[935] Thus, here, Bolivia was in essence reproducing the interpretive findings of the ICJ from the earlier *Construction of a Road* case, where prevention was interpreted as a set of separate-but-related steps.[936] This goes towards an observation made earlier, in Chapter 2 of the thesis, that the identification and interpretation of CIL by courts feeds into the customary process by, among other, figuring in subsequent claims made by states.[937] This then further reinforces the broader claim made in the thesis concerning the concretizing role of interpretation and its effect on the continued existence of customary rules.

Returning to our main discussion, the Court had to consider a proposition made by the parties that a provision of a bilateral treaty concerning procedural obligations under the scope of prevention reflects customary law. The Court noted that 'while both Parties consider that this provision reflects customary international law, they disagree about its *interpretation*'.[938] This is a notable example of the ICJ explicitly recognizing the interpretability of CIL. More to the point of our present discussion however, the Court followed this up by observing that

> the content of this Article corresponds to a large extent to its own jurisprudence on the *procedural obligations incumbent on States under customary international law as regards transboundary harm*, including in the context of the management of shared resources. Indeed, in its jurisprudence the Court has confirmed the existence, in certain circumstances, of an obligation to notify and consult other riparian States concerned. It has emphasized that this customary obligation applies when "there is a risk of significant transboundary harm" [. . .] The Court recalls that, in that judgment, *it specified the steps and the approach to be taken* by a State planning to undertake an activity on or around a shared resource or generally capable of having a significant transboundary effect.[939]

In the present case, what was at issue was the threshold for the application of the obligation to notify and consult.[940] The Court found that the provision of the Convention does not reflect a CIL rule that is more rigorous than the one articulated in the Court's own jurisprudence,[941] finding therefore that under CIL 'each riparian State is required [. . .] to notify and consult the other riparian State with regard to any planned activity that poses a risk of significant harm to that State'.[942] The Court proceeded to evaluate the state's compliance with 'the procedural obliga-

[935] Ibid [108]. See also [123] 'Bolivia [. . .] contends that customary international law limits the obligation to notify and consult to situations where an environmental impact assessment confirms that there is a risk of significant transboundary harm. Bolivia asserts that the activities in question gave rise to no risk or significant harm and that, consequently, it had no obligation to notify or consult Chile'.

[936] See discussion *supra* 196-197. [937] See discussion in Chapter 2, Section III.i *supra* 87.

[938] *Dispute over the Status and Use of the Waters of the Silala* (n 930) [113] (emphasis added).

[939] Ibid [114] (emphasis added). [940] Ibid [116]. [941] Ibid [117]. [942] Ibid [118].

tion to notify and consult in light of the foregoing conclusion on *the content of that customary obligation and the threshold for its application*'.[943]

Overall, in *Dispute over the Status and Use of the Waters of the Silala* the ICJ significantly clarified the content of prevention as a customary rule, and confirmed its earlier interpretation of it as a general obligation consisting of several specific procedural sub-obligations. This is relevant because it lends further support to the claim presented in this chapter on the concretizing role of interpretation. However, it is also relevant on a more fundamental level, as it illustrates the key role that interpretation plays in operationalizing customary rules. What we see from this string of cases is that there is really no other way to give meaning to the general obligation of prevention other than by breaking it down in specific steps and sub-obligations. Thus, it may be argued that interpretation is integral to the continued function of customary rules.

A final case that merits mention under this heading, is *North Sea Continental Shelf*. While we often take this case as the seminal judgment on CIL identification, in fact, the reasoning around the case also offers insight into CIL interpretation.[944] In particular, in his dissenting opinion to the judgment, Judge Tanaka put forward the view that delimitation by reference to the method of equidistance is a sub-element of the more general customary rule on the continental shelf, arrived at through teleological construction.[945] Similarly, in his dissenting opinion to the same judgment, Judge Morelli put forward the view that while it is possible to speak of 'a rule concerning the apportionment of the continental shelf [. . .]' this rule 'is not an independent rule but rather an integral part of the same rule which confers upon different States rights over the continental shelf'.[946] On this reasoning, Judge Morelli argued that the equidistance method is an integral part of the rule on the continental shelf, and there is no need to ascertain a separate rule on this point by reference to state practice.[947] While these dissenting opinions did not

[943] Ibid [125]. [944] Kolb (n 3) 224-225; Merkouris (n 3) 21.

[945] 'the rule with regard to delimitation by means of the equidistance principle constitutes an integral part of the continental shelf as *a legal institution of teleological construction*. For the existence of the continental shelf as a legal institution presupposes delimitation between the adjacent continental shelves of coastal States. The delimitation itself is a logical consequence of the concept of the continental shelf that coastal States exercise sovereign rights over their own continental shelves. Next, the equidistance principle constitutes the method which is the result of the principle of proximity or natural continuation of land territory, which is inseparable from the concept of continental shelf. Delimitation itself and delimitation by the equidistance principle serve to realize *the aims and purposes of the continental shelf as a legal institution*. [. . .] As I have said above, the equidistance principle [. . .] is inherent in the concept of the continental shelf, in the sense that *without this provision the institution as a whole cannot attain its own end*'. *North Sea Continental Shelf Cases* (n 66) (Dissenting Opinion of Judge Tanaka) 183 (emphasis added). See also the discussion of this portion of Judge Tanaka's reasoning in Chapter 2 *supra* 83-84.

[946] *North Sea Continental Shelf Cases* (n 66) 201-202.

[947] '[. . .] I am of the view that a criterion for apportionment is really provided by the law: as will be seen, it is a criterion which it is possible to deduce from the very rule which confers on different States certain rights over the continental shelf. The rule, or more concretely, the criterion

make it in the main judgment, and have received some scholarly criticism on the content of the reasoning,[948] they both offer insight into how the concretizing function of CIL interpretation may operate in practice. Judges Tanaka and Morelli are both making interpretive arguments about the content of the rule on the continental shelf, essentially arguing that the equidistance method is the more concrete logical emanation of the more general rule. That their views did not make it to the main judgment raises the question as to how far the concretizing function of interpretation can go, or, put differently, what the limits of the interpretive exercise are.[949]

While the caselaw of other international courts was not systematically examined for the purposes of this chapter, it is worth noting that the idea of the concretizing function of CIL interpretation also finds some support in the jurisprudence of the ITLOS[950] and of international arbitral tribunals.[951] Finally, as indicated above, other contemporary research on the subject of CIL interpretation in the work of international courts and tribunals seems to support this idea as well.[952] Thus, it

---

for apportionment, can only be a rule or criterion which operates automatically, [. . .]'. *North Sea Continental Shelf Cases* (n 66) (Dissenting Opinion of Judge Morelli) 201.

[948] Orakhelashvili (n 3) 499-500. While Orakhelashvili criticizes the content of the legal reasoning of Judge Morelli, he nevertheless accepts this as an example of CIL interpretation: 'the defect in the interpretative outcome of Judge Morelli's reasoning does not affect the correctness and inherent utility of the *principles of interpretation* developed in his Dissenting Opinion. These principles are indispensable for the interpretative exercise in the field of customary law'.

[949] For instance, on the dissenting opinion of Judge Morelli, Orakhelashvili has commented that '[a]s the Court's view in *North Sea* and other subsequent delimitation cases confirm, the fundamental rule on the continental shelf does not provide a specific ready-made delimitation rule for the very reason that States cannot agree on it. The existing rule, under this approach, cannot by implication include legal regulation on which it does not expressly pronounce and on which moreover there is no consensus in the community of nations [. . .] Nevertheless, the defect in the interpretative outcome of Judge Morelli's reasoning does not affect the correctness and inherent utility of the *principles of interpretation* developed in his Dissenting Opinion. These principles are indispensable for the interpretative exercise in the field of customary law'. Orakhelashvili (n 3) 500 (emphasis added).

[950] See indicatively *MOX Plant* (Ireland v United Kingdom) (Order of 3 December 2001) [2001] ITLOS Rep. 95 [84-89]; *MOX Plant* (Ireland v United Kingdom) (Order of 3 December 2001) [2001] Separate Opinion of Judge Wolfrum 131, 135; *MOX Plant* (Ireland v United Kingdom) (Order of 3 December 2001) [2001] Separate Opinion of Judge Anderson 124, 126; *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v Singapore) (Order of 8 October 2003) [2003] ITLOS Rep. 10 [99].

[951] See indicatively *Azinian v Mexico* (Award of 1 November 1999) ICSID Case No ARB(AF)/97/2 [99-103]; *Mondev International Ltd v USA* (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2 [113-15]; *Loewen Group, Inc and Raymond L Loewen v USA* (Award of 26 June 2003) ICSID Case No ARB(AF)/98/3 [131-3]; *Waste Management, Inc v Mexico* ("Number 2") (Award of 30 April 2004) ICSID Case No ARB(AF)/00/3 [98]. On this point see also Nina Mileva, A TWAIL Engagement with Customary International Investment Law: Some Strategies for Interpretation in Panos Merkouris, Andreas Kulick, Jose Alvarez-Zarrate, Maciej Zenkiewicz (eds), *Custom and its Interpretation in International Investment Law* (CUP 2023).

[952] Fortuna (n 451).

emerges from the discussions in both Chapter 3 and the present section, that interpretation in the context of CIL performs one of its crucial functions of concretizing the content of a customary rule, by allowing for more specific sub-elements or sub-obligations to be fleshed out of the general rule.

ii. Interpretation as scope determination

The second manifestation of the concretizing function – as an act of scope determination, refers to scenarios where the scope of a customary rule is delimited in light of particularities of the case at hand that affect the applicability of the rule in the specific circumstances. Scope determination in this context refers to both the inclusion of certain instances under the scope of the rule and the exclusion of certain instances from it. Thus, interpretation as scope determination may result in either the expansion or the narrowing down of the scope of the rule. In this sense, interpretation entails the clarification of 'the modes and details of applicability of general customary rules to specific situations to which they are designed to apply due to their general scope'.[953] Where relevant, this may also entail the construction of exceptions.

With respect to interpretation as an act of expanding the scope of the rule, we may find examples of this in the *Frontier Dispute (Burkina Faso/Mali)* and *Territorial and Maritime Dispute (Nicaragua v Honduras)* cases, which revolved around the interpretation of the *uti possidetis* rule. Historically, *uti possidetis* was considered to be a regional customary rule for the delimitation of borders in Latina America.[954] Pursuant to it, newly decolonized states in the region adopted the administrative delimitations traced by colonial authorities as the international boundaries of their new state.[955] However, in the *Frontier Dispute* case, when considering the issue of border delimitation between Burkina Faso and Mali, the ICJ observed that

> [. . .] Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is l*ogically connected with the phenomenon of the obtaining of independence*, wherever it occurs. Its obvious *purpose* is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.[956]

Here we clearly observe the expansion of the geographical scope of the rule through interpretation.[957] In particular, the Court here seems to be relying on the teleology

---

[953] Orakhelashvili (n 3) 496. See also p 504 where Orakhelashvili aptly notes that 'the generality and imprecision of customary rules cannot prevent the rule from having its effect, or from applying to specific situations covered by its content'.
[954] Guiseppe Nessi, 'Uti possidetis Doctrine' [2018] MPEPIL [3]. [955] Ibid.
[956] *Case Concerning the Frontier Dispute* (Burkina Faso/Republic of Mali) (n 219) [20] (emphasis added).
[957] See also Tassinis for a similar reading of the Court's reasoning. Tassinis (n 389) 254-255.

of the rule, being the preservation of stability. That the Court in this case was engaging in interpretation is further reinforced by its observation that

> The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen *not as a mere practice contributing to the gradua1 emergence of a principle of customary international law*, limited in its impact to the African continent as it had previously been to Spanish America, *but as the application in Africa of a rule of general scope*.[958]

In this case, the Court also confirmed its reasoning by reference to practice among African states,[959] thereby also seemingly engaging in interpretation by reference to subsequent practice. That this was interpretation rather than identification is once more witnessed in the Court's pronouncement that *uti possidetis* applied to the case at hand even though at the time the two parties achieved independence there were no explicit acknowledgments of *uti possidetis* in the practice of African states.[960] Subsequent to this case, *uti possidetis* continued being applied as a customary rule relevant to the delimitation of borders among African states.[961]

Traditionally, *uti possidetis* concerned primarily territorial delimitation and thus land borders.[962] However, in the *Territorial and Maritime Dispute* between Nicaragua and Honduras, the ICJ observed that *uti possidetis* 'might in certain circumstances, such as in connection with historic bays and territorial seas, play a role in a maritime delimitation'.[963] While in this case the Court did not end up applying *uti possidetis* to the dispute at hand, it has been argued that this observation constituted an expansion of the material scope of the rule.[964] Among scholars who agree with the expansion of the scope of *uti possidetis* to also include the delimitation of maritime borders, the view is that this is acceptable because of the purpose of the rule,[965] thus pointing to an interpretive rationale. The expansion of the scope of customary rules may also happen as a result of evolutive interpretation, and this will be discussed in more detail in Section III below.

With respect to interpretation as an act of narrowing down the scope of the rule, in Chapter 3 above we saw this play out in a string of national cases concerning exceptions to the customary rule of state immunity.[966] Furthermore, as the discussion in Chapter 3 pointed out, the scope of the rule of state immunity had historically already been narrowed down from absolute to restricted, and this move also oc-

---

958 *Case Concerning the Frontier Dispute* (Burkina Faso/Republic of Mali) (n 219) [21]. 959 Ibid [22-25].

960 In the light of the foregoing remarks, it is clear that the applicability of *uti possidetis* in the present case cannot be challenged merely because in 1960, the year when Mali and Burkina Faso achieved independence, the Organization of African Unity which was to proclaim this principle did not yet exist, and the above-mentioned resolution calling for respect for the pre-existing frontiers dates only from 1964. *Case Concerning the Frontier Dispute* (Burkina Faso/Mali) (n 219) [26].

961 *Case Concerning the Frontier Dispute* (Benin/Niger) (n 219) [23-24]. 962 Nessi (n 954) [7].

963 *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras) [2007] ICJ Rep. 659 [232].

964 Tassinis (n 389) 255. 965 Nessi (n 954) [8]. 966 See Chapter 3, Section III.ii.a *supra* 142-157.

curred at least in part through interpretation. On this latter point, the caselaw analyzed in Chapter 3 indicates that the scope of state immunity was narrowed down from absolute to restrictive through a combined exercise of identification and interpretation,[967] and there is not much to be added to this discussion in the present chapter. The focus here turns to the more controversial aspect of scope delimitation which entails the construction of exceptions, and which requires a deeper reflection on the role of interpretation in this regard.

Exceptions can be broadly characterized as instances where a rule that would otherwise apply to a case is not applied due to the particular circumstances of the case.[968] In a similar vein, exceptions are understood as legal norms that allow for a deviation from a rule in specific circumstances.[969] Recent research into this subject has endeavored to systematize the reasons for exceptions, arriving at three scenarios of exceptions. 'The first is when a rule should not be applied when its application would not serve its proper purpose [Scenario 1]. The second is when a rule should not be applied when its application would conflict with another rule within the same legal system (which is given priority) [Scenario 2]. And the third is when a rule should not be applied when its application would conflict with a value (or 'principle') within the same legal system or even (at least until incorporated) outside that legal system [Scenario 3]'.[970] However, in scholarship there are differing views as to how exceptions come into being and how they operate. These include the view that an exception is contextually determined based on the situation at hand,[971] the view that rules and their exceptions are two standalone rules that apply differentially depending on the situation at hand,[972] and the view that rules and exceptions can be conceptualized as one composite rule.[973] Furthermore, some scholars also differentiate various techniques of constructing exceptions, in-

---

[967] See Chapter 3, Section III.ii.a *supra* 135-138.

[968] Jaap Hage, Antonia Waltermann and Gustavo Arosemena, 'Exception in International Law' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (OUP 2020) 11. See also Lorand Bartels and Federica Paddeu, 'Introduction' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (OUP 2020) 1, 2.

[969] Valentin Jeutner, 'Both the Rule and the Exception: The Concept of a Legal Dilemma and the Survival of the State' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (OUP 2020) 242.

[970] Bartels and Paddeu (n 968) 2, referring also to the findings of Hage et al in the same volume. Hage, Waltermann, and Arosemena (n 968) 19.

[971] See for instance Jeutner (n 969) 242.

[972] See for instance Methymaki and Tzanakopoulos who discuss the "rule-exception" relationship between state immunity and jurisdiction. Eleni Methymaki and Antonios Tzanakopoulos, 'Freedom with their Exception' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (OUP 2020) 226.

[973] See for instance Hage et al. who coin the term 'derived rule' to refer to rules derived from the joint interpretation of two rules which are in a rule-exception relationship. The example here is the rule that 'the use of force is prohibited unless authorized by the United Nations Security Council', which is the result of interpreting Articles 2(4) and 42 of the UN Charter jointly. Hage, Waltermann, and Arosemena (n 968) 30.

cluding 'scope delimitation, carve outs, flexibilities, derogations, exceptions *stricto sensu*, excuses, and circumstances precluding wrongfulness'.[974] As the discussion below illustrates, this chapter is not concerned with all possible manifestations of exceptions, but rather with the more narrow view of how CIL interpretation may lead to the construction of exceptions to customary rules.

In the context of customary international law, the ILC Draft Conclusions address the possibility of exceptions only briefly in the commentary to Conclusion 1, where it is clarified that

> The reference to determining the "existence and content" of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise content is disputed. This may be the case, for example, where the question arises as to whether a particular formulation [. . .] does in fact correspond precisely to an existing rule of customary international law, *or whether there are exceptions to a recognized rule of customary international law*.[975]

Looking at this passage, it seems that the ILC's proposed approach to the question of exceptions to CIL rules is to deal with it as a question of identification. This stems from the broader professed focus of the ILC's study as one 'dealing with the identification of rules of customary international law'.[976] At the same time, as argued in Chapter 2 of the present thesis, it is precisely this quoted paragraph that sends a somewhat mixed message when it comes to the position of the ILC on the question of interpretation.[977]

In his fifth report, Special Rapporteur Wood briefly addressed the issue of exceptions, in relation to Draft Conclusion 3 dedicated to the assessment of evidence of the two constituent elements. This Conclusion provides that

> '[i]n assessing evidence for the purpose of ascertaining whether there is general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found'.[978]

---

[974] Jorge E. Viñuales, 'Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (OUP 2020) 65, 66.

[975] ILC Conclusions on Customary International Law (n 7) 124 [4] (emphasis added).

[976] Ibid, (n 7) 124 [5]. For scholarship that similarly frames the discussion of exceptions in terms of identification see Mariangela La Manna, 'The Standards for the Identification of Exceptions to Customary Law' (2018) 27(1) Italian Yearbook of International Law 151.

[977] See discussion in Chapter 2, Section III *supra* 80.

[978] ILC Conclusions on Customary International Law (n 7) 126. The formulation reproduced in the fifth report is slightly different, namely, 'any analysis as to the existence of a rule of customary international law ought to take account of the overall context, the nature of the rule, and the particular circumstances in which the evidence is to be found'. ILC, 'Fifth report on identification of customary international law, by Michael Wood, Special Rapporteur' (30 April-1 June 2018, 2 July-10 August 2018) A/CN.4/717, 13 [31].

While the Special Rapporteur did not make suggestions for the amendment of this conclusion,[979] he made some more detailed observations than those found in the final conclusions. In particular, the Special Rapporteur clarified that the reference to "the nature of the rule" which should be taken into account pursuant to Draft Conclusion 3 may also concern rules 'such as those that represent an exception to a more general rule'.[980] Thus, here it seems that the question of exceptions is more explicitly tagged as a question of identification.

The approach articulated by Special Rapporteur Wood seems to concern scenarios where the customary rule and its exception are two standalone rules which operate in a relationship of rule-exception but also exist as individual independent rules. An example of this would be the relationship between the customary prohibition of the use of force and the rule on self-defense, which are both standalone customary rules and rules which exist in a relationship of 'rule-exception'.[981] In such scenarios, it is reasonable to require a separate identification process for each rule, so that both rules may be properly established to exist. However, what of customary rules whose exceptions are not standalone rules, but may still arise in a particular case scenario?

Among scholars who have engaged more extensively with the idea of CIL interpretation, there seems to be acceptance of the idea that the construction of exceptions can occur at the stage of interpretation rather than (only at) the stage identification. In his taxonomy of scenarios which arise in the application of CIL, Kolb discusses exceptions under the second scenario, where the determination of a CIL rule is inextricably linked with interpretation. This concerns cases where a court 'must establish a more complex rule, made up of a more contextual main proposition and possibly interspersed with a few exceptions'.[982] As an example of this, Kolb offers the *North Sea Continental Shelf* case, where the question as to whether the equidistance rule was a rule of CIL was inextricably linked with an examination of special circumstances that would constitute an exception to the rule.[983] Another variety of exceptions that scholarship treats under the umbrella of interpretation concern the question of how an established customary rule can 'apply to circumstances which fall within its ambit, yet are of such an exceptional nature as to make its application difficult if not impossible'.[984] As an example of this, Orakhelashvili offers the *Fisheries* case, where the ICJ had to make an exception to the rule on territorial sea delimitation due to the unique nature of the Norwegian coast.[985]

---

[979] Ibid, 14 [33]. [980] Ibid.

[981] See on this example André de Hoogh, 'The Compelling Law of *Jus Cogens* and Exceptions to Peremptory Norms, To Derogate or Not to Derogate, That is the Question!' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (OUP 2020) 128, 134-37; Ian Scobbie, 'Exceptions: Self-defence as an Exception to the Prohibition on the Use of Force' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (OUP 2020) 149.

[982] Kolb (n 3) 223. [983] Ibid, 224. [984] Orakhelashvili (n 3) 500.

[985] Ibid, 501. See also Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, Volume 1 (Grotius Publications Limited 1986)152-154.

In the present thesis, the main string of cases that provoked the consideration of the role of interpretation in the construction of exceptions revolved around the rule of state immunity. Let us consider firstly the example of restructuring financial measures, which was at issue in *Unidentified holders of Greek government bonds v Greece*, in relation to the rule of state immunity. In this case, the German Federal Court of Justice had to consider whether the adoption of restructuring measures by Greece with respect to issued bonds was covered by state immunity or not. The rule in question (state immunity) stipulates that commercial acts are not covered by immunity, and restructuring measures were considered by the court to be commercial acts.[986] In the present case, this would have meant that immunity does not apply.[987] However, the German court decided that these acts should be treated as sovereign acts, because otherwise it would lead to a situation where a German court is put in a position to review national legislative acts of the Greek state.[988] The court considered that such an outcome would run counter to the rationale underlying sovereign immunity.[989] In this case, what we see is a court arriving at an exception to the rule through teleological interpretation. This exception is not the result of one standalone rule which presents an exception to another, nor does it give rise to a new customary rule which would now assume an independent existence. Rather, it is the result of circumstances in the particular case that led to a particular interpretation of the rule. Considering the scenarios of exceptions discussed above, this case would fall under scenario 1 – when a rule should not be applied because its application would not serve the rule's purpose.[990]

The other example in this context concerns the so-called territorial tort exception to the customary rule of state immunity. In a string of cases, Greek and Italian national courts arrived at the conclusion that the rule of state immunity does not

[986] On this point, the Court reasoned in the following manner: 'The distinction between sovereign and non-sovereign state activity is not based on their motive or purpose. Nor can it be carried out according to whether the activity is in a recognizable connection with sovereign tasks of the state. [. . .] Rather, the nature of the state action or the legal relationship that has arisen is decisive for the distinction. It depends on whether the foreign state acted in the exercise of its sovereign powers and thus under public law or as a private person, i.e. under private law. In the absence of distinguishing features under international law, the delimitation is to be assessed in principle according to the law of the deciding court [. . .] in this case according to German law. The use of national regulations to differentiate sovereign state action from non-sovereign state action only reaches its limit where the area of sovereign activity generally recognized among states is affected'. *Unidentified holders of Greek government bonds v Greece* (n 660) [17-18].

[987] See on this point the analysis of the case commentator, who compared the reasoning of the German Court in this case with the reasoning in factually similar cases before German and Austrian courts. *Unidentified holders of Greek government bonds v Greece* (n 660) A4-A5.

[988] *Unidentified holders of Greek government bonds v Greece* [18-26]. See in particular [18] where the Court observed that 'in this respect, it may be necessary *in exceptional cases* to qualify an activity of a foreign state that is to be classified under national law as private law as an act iure imperii subject to state immunity if this is to be counted as part of the core area of state authority recognized under international law' (emphasis added).

[989] Ibid [24-26]. [990] Hage, Waltermann and Arosemena (n 968) 19.

apply to acts of armed forces that constitute grave breaches of human rights or *jus cogens* violations. In these cases, the courts did not deny that acts of armed forces are sovereign acts and therefore should be covered by the customary rule on state immunity. However, due to particularities of the sovereign acts in question (grave breaches) the courts decided not to uphold state immunity, thereby arriving at an exception. Unlike in the case of *Unidentified holders of Greek government bonds*, the courts in these cases looked beyond the customary rule of state immunity itself in their construction of exceptions. In particular, they looked at other customary rules applicable to the case (such as the prohibition of crimes against humanity),[991] or 'values, the protection of which is to be considered [. . .] essential for the entire international community'.[992] Recalling the scenarios of exceptions delineated by scholarship above, we may consider these cases either as examples of scenario 2 – a rule should not be applied when its application would conflict with another rule within the same legal system, or scenario 3 – a rule should not be applied when its application would conflict with a value (or 'principle') within the same legal system.

It seems like in these cases, courts arrived at an exception as a way to appease normative conflict and harmonize the customary rules applicable to the situation. Taking *Ferrini 1* as one example, the Italian Court in this case perceived a normative conflict between the rule of state immunity and the various rules prohibiting crimes against humanity. The Court's solution was to construct the rule of state immunity in such a way that would appease this conflict – i.e. to limit the scope of the rule. The limitation of the scope of the rule was such that it constituted an exception – the rule (state immunity for *acta jure imperii*) would have applied, had the acts in question not been crimes against humanity. Similar reasoning can be found in *Germany v Milde*, where the Italian Court of Cassation framed the issue as one of coordination between co-existing customary rules.[993] This line of reasoning was even more pronounced in *Voiotia 2*, where the Italian Court defended the construction of an exception on the basis of the need for coherence between norms of international law.[994]

The construction of an exception as a way of resolving normative conflict[995] between two rules was recognized by the ILC Study Group on Fragmentation.[996]

---

[991] *Ferrini 1* (n 681) [9].
[992] Ibid [9.1].
[993] See discussion in Chapter 3, Section III.ii.a *supra* 148-149.
[994] See discussion in Chapter 3, Section III.ii.a *supra* 150-151.
[995] The Study Group adopted a wide notion of conflict as 'a situation where two rules or principles suggest different way of dealing with a problem'. One of the examples used to illustrate this was precisely the possible conflict between the law of state immunity and the law of human rights. ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi' (13 April 2006) A/CN.4/L.682 and Add. 1 [24-25].
[996] Ibid [103-107].

On this point, the Study Group clarified that an exception does not produce a change in the law, but an occasional deviation from it which is owed to the particular circumstances at hand.[997] As to the role of interpretation in all this, in one its draft conclusions, the Study Group emphasized the principle of harmonization as a 'generally accepted principle that when several norms bear on a single issue *they should, to the extent possible, be interpreted so as giving rise to a single set of compatible obligations*'.[998]

As discussed in Chapter 3 above, the majority judgment in the *Jurisdictional Immunities* case rejected this idea of a normative conflict between the rules on state immunity and the rules on crimes against humanity and human rights. However, among the dissenting judges, several agreed with the view that there is a conflict, and that this conflict could be resolved through interpretation. In his dissenting opinion, judge Yusuf observed that

> although State immunity is important to the conduct of harmonious and friendly relations between States, it is not a rule of law whose coverage is well defined for all circumstances or whose consistency and stability is unimpaired. *There is indeed considerable divergence in the manner in which the scope and extent of such immunity is interpreted and applied in the practice of States*, and particularly in the judicial decisions of their courts. It is not therefore very persuasive to characterize some of the exceptions to immunity as part of customary international law, despite the continued existence of conflicting domestic judicial decisions on their application, while interpreting other exceptions, similarly based on divergent domestic courts' decisions, as supporting the nonexistence of customary norms.[999]

Judge Yusuf took issue with the overall approach of the Court to treat the question of exceptions as one of custom identification, and put forward the view that this may be more adequately addressed under the heading of interpretation. This is particularly evident in his observation that uncertainties about the state of the law of immunity 'cannot adequately be resolved [. . .] through a formalistic exercise of surveying conflicting judicial decisions of domestic courts [. . .] and counting those in favour of applying immunity and those against it. [. . .] State immunity from jurisdiction cannot be *interpreted in an abstract manner or applied in a vacuum*. The specific features and circumstances of each case, and the factors underlying it, have to be fully taken into account'.[1000] On this view, judge Yusuf observed that

> Immunity is not an immutable value in international law. Its adjustability to the evolution of the international society, and its flexibility, are evidenced by the number of *exceptions built gradually into it over the past century*, most of which reflect the growing normative weight attached to the protection of the rights of the individual against the State,

[997] Ibid [105]. [998] Ibid, 105 [4] (emphasis added). See also 108 [43].
[999] *Jurisdictional Immunities of the State* (n 87) (Dissenting Opinion of Judge Yusuf) [23] (emphasis added).
[1000] Ibid [27] (emphasis added).

> be that as a private party to commercial transactions with the State or as a victim of tortious acts by State officials.[1001]

What emerges from these observations is that in the course of interpretation of the rule on state immunity, one may arrive at an exception if faced with the need to consider other applicable rules with which the rule is in conflict. This is all the more persuasive, if we consider that the exception discussed in the above cases was not put forward as a permanent modification of the rule, but rather emerged as a result of the particular context of the case(s).

If we recall the definition of exceptions articulated in scholarship, exceptions are instances where a rule would apply had it not been for particular circumstances in the given case that militate against its application. In the context of customary rules, this definition is broad enough to capture both rules whose exceptions are other standalone rules (such as the example of use of force and self-defense) and rules whose exceptions are limited to the particular context of the case (such as the example of state immunity and restructuring measures discussed in the case of *Unidentified holders of Greek government bonds* above). In light of this, the argument presented in this thesis that interpretation may lead to the construction of exceptions to customary rules is not incompatible with the view that some exceptions to customary rules need to be arrived at through identification. Put differently, the theory of CIL interpretation presented here recognizes both modalities of exceptions, and is only more narrowly concerned with the former.

Earlier in this thesis, I committed to the position that modification represents a limit to the judicial interpretation of CIL. Put differently, the judicial interpretation of CIL may not result in the modification of the rule in question.[1002] However, as that discussion acknowledged, while this limit can be posited in theory, it is difficult to delineate it in practice. One broad indication that the thesis subscribed to is that judicial interpretation cannot result in a modification of the rule that is not supported by relevant practice.[1003] This issue comes in strong focus as we discuss the construction of exceptions. The examples discussed above illustrate the construction of exceptions through interpretation both in instances where the exception emerged due to particularities of the case (*Unidentified holders of Greek government bonds*) but does not necessarily repeat in subsequent caselaw, and in instances where the exception is repeated in subsequent cases that are factually similar (the series of cases with respect to the territorial tort exception to state immunity). With respect to the first scenario, which may be considered an example of "incidental" exceptions, this does not pose a threat of modification as it is limited to the particular case at hand. This is further strengthened by the reliance on interpretive reasoning and methodology (such as the reference to the *purpose* of the customary rule).

However, the question of modification as a limit to interpretation does emerge

---

[1001] Ibid [35]. [1002] See discussion *supra* 69-70; 108-109. [1003] See discussion *supra* 186-188.

with respect to the latter-type scenarios, as it is here that a strand of jurisprudence has the potential to lead to the modification of a CIL rule on the long term. When an exception is repeatedly ascertained in similar cases, it may well be that at one point the exception becomes "built into" the rule in a way that essentially alters the rule's content. This is particularly the case if the exception is ascertained by domestic courts, whose pronouncements may be considered a form of subsequent practice in the interpretation of the rule.[1004] If this subsequent practice is considered in the interpretation of the rule by international courts they may similarly ascertain an exception on the basis of this practice, thereby confirming the exception as part of the rule's content.[1005] Perceiving this accretion of practice over time and its acceptance into the interpretive process, may lead to the conclusion that the rule's content has changed. Within the position taken by this thesis, this would not be considered problematic or impermissible modification as long as it would find support in relevant practice. Thus, rather than representing a modification, it would more adequately be described as a gradual evolution of the rule in light of subsequent practice. At the same time, it must be acknowledged that this is an area where the interpretation, modification, and potentially identification, intersect. The key considerations here are the passage of time, as well as the source of the changes being the practice of states rather than judicial pronouncements.[1006]

III. The Evolutive Function of Interpretation in CIL

The evolutive function of CIL interpretation refers to the fact that through interpretation older customary rules can be adapted to new developments of fact or

[1004] See discussion in Chapter 3 *supra* 122-123.

[1005] This type of gradual evolution over time seems to be what Judge Yusuf foresees in his dissenting opinion to the *Jurisdictional Immunities* case. See *Jurisdictional Immunities of the State* (n 87) (Dissenting Opinion of Judge Yusuf) [23].

[1006] This is not dissimilar to what may happen when subsequent practice is considered in the interpretation of treaties. On the interpretation of treaties by reference to subsequent practice, the ILC has maintained that this should not lead to the modification of a treaty provision, while at the same time acknowledging that it is difficult to draw a decisive line. Discussing this point with respect to the practice of the ICJ, the ILC has observed that 'while leaving open the possibility that a treaty might be modified by the subsequent practice of the parties, the International Court of Justice has so far not explicitly recognized that such an effect has actually been produced in a specific case. Rather, *the Court has reached interpretations that were difficult to reconcile with the ordinary meaning of the text of the treaty, but which were in line with the identified practice of the parties*'. ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries (n 566) 61 [31] (emphasis added). On the point of interpretation v. modification more generally, the ILC concluded that while for treaties that have an official amendment procedure it is easier to draw the line, '[t]he situation is more complicated in the case of treaties for which such indications do not exist. No clear residual rule for such cases can be discerned from the jurisprudence of the International Court of Justice. The conclusion could perhaps be drawn, however, that the Court, while finding that the possibility of a modification of a treaty by subsequent practice of the parties "cannot be wholly precluded as a possibility in law", considered that finding such a modification should

law. This adaptation can include the narrowing or broadening of the scope of a customary rule in light of other newer rules which are also applicable to the situation, or the broadening of the scope of application of an older customary rule to include new factual circumstances. This latter "extension" of a customary rule to cover new scenarios may also happen by means of analogical reasoning or expansive interpretation. The evolutive function that interpretation performs enables a customary rule to have a continuous existence, and to retain relevance.

It is important to recall at the outset that the two functions that interpretation performs are not mutually exclusive, and in fact may often be perceived jointly at play when customary rules are being interpreted. The evolutive function of interpretation is thus not something that happens separately or independently from the concretizing function described above. Rather, what we can observe is that evolutive interpretation functions as an umbrella approach under which "regular" interpretaiton takes place, only in this case the rule is interpreted dynamically. In Chapter 3, we saw this play out in the *Public Committee against Torture in Israel* case, where the Israeli Supreme Court took on a 'dynamic interpretation' of the rule in question, while at the same time engaging in teleological interpretation of the individual terms of the rule. The court did this because 'new reality at times requires new interpretation'.[1007] Thus, the evolutive approach served as a general attitude under which the interpretation took place. A similar thing could be observed in *Her Majesty the Queen in Right of Canada v Edelson and ors* and *Ferrini 1*, where the respective courts engaged in teleological interpretation of the customary rule, while simultaneously employing an evolutive approach.[1008]

In the practice of the ICJ, one case that raises the potential for evolutive interpretation of CIL is the *Nuclear Weapons Advisory Opinion*. In particular, when considering whether existing customary rules of international humanitarian law would apply to nuclear weapons as well, the Court observed that existing customary and conventional humanitarian law applies to nuclear weapons even though most nuclear weapons 'were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence'.[1009] In the Court's view, this was because a conclusion that existing rules of humanitarian law do not apply to nuclear weapons 'would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, *those of the past, those of the present and those of the future*'.[1010] The Court supported this finding with similar views expressed by states. For instance, the UK had expressed

be avoided, if at all possible. Instead, the Court seems to prefer to accept broad interpretations of the ordinary meaning of the terms of the treaty'. Ibid, 62 [36].

[1007] *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors* (n 768) [28].

[1008] See discussion in Chapter 3, Section III.ii.a *supra* 136-137; 146-147.

[1009] *Legality of the Threat or Use of Nuclear Weapons (n 86)* [86]. [1010] Ibid (emphasis added).

the view that '[s]o far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the *jus in bello*'.[1011] What we can see here is a confirmation that older customary rules can be extended to new situations which fall under their scope without the need for new more specific rules on the matter. Put differently, there would be no need for the identification of new customary rules specific to the use of nucleart weapons. Thus, for instance, with respect to customary rules which regulate or prohibit the use of certain types of weapons these may also be interpreted for the purposes of regulating the use of nuclear weapons. The ICJ seems to be doing precisely this when it discusses existing rules on indiscriminate weapons.[1012] At the same time, the Court did not categorically pronounce whether the use of nuclear weapons is prohibited or allowed under the existing rules,[1013] thereby leaving the interpretation of the relevant CIL rules open. Nevertheless, the observations of the Court provide insight into the rationale that might motivate the evolutive interpretation of CIL rules, namely, the nature of the rules themselves as well as changes in the factual situations that they are meant to regulate.

Beyond this, reference to the evolutive interpretation of CIL can be found dominantly in dissenting and separate opinions. Thus, for instance, in his separate opinion to the *Jurisdictional Immunities* case, Judge Bennouna observed that

> One would have expected the International Court of Justice to follow that approach, which in recent decades has *enabled the legal régime governing jurisdictional immunity to evolve* in a way which strikes an equal balance between State sovereignties and the considerations of justice and equity operating within such sovereignties. [. . .]
>
> That evolution is in part reflected in the International Law Commission's work to codify the subject, and in the United Nations Convention on Jurisdictional Immunities of States and Their Property [. . .], but that is not to say that it is now frozen for evermore. *That is why it falls to the Court, when considering the cases submitted to it, to revisit the concepts and norms debated before it and to indicate, if appropriate, any emerging new trends in their interpretation and in the determination of their scope.* [1014]

With these observation, judge Bennouna is explicitly flagging the role of interpretation in the evolution of a customary rule. We see this in particular in the last portion of the cited paragraph, where he insissts that the Court should indicate emerging new trends in *the interpretation and scope determination* of norms and concepts that it is tasked to consider. Above we discussed the dissenting opinion of judge Yusuf in the same case, where he similarly flagged the capability of customary state immunity to evolve through interpretation.[1015] This dissenting opinion is also a good illustration of how the two functions – concretizing and evolutive –

[1011] Ibid. [1012] Ibid [77-78]. [1013] Ibid [90-95].

[1014] *Jurisdictional Immunities of the State* (n 87) (Separate Opinion of Judge Bennouna) (emphasis added) [18-19].

[1015] 'The decisions of the Italian courts, as well as the Distomo decision in Greece, *may be viewed as part of a broader evolutionary process*, in the context of judicial decisions by domestic courts, which has given

can go hand in hand. Judge Yusuf argued for the construction of an exception to the rule on state immunity based on the view that immunity is not immutable and that it is *adjustable to the evolution of the international society*.[1016]

In a join separate opinion to the *Arrest Warrant* case, judges Higgins, Koojimans and Buergenthal made the following observation:

> An example is the evolution the concept of State immunity in civil law matters has undergone over time. The original concept of absolute immunity, based on status (*par in parem non habet imperium*) has been replaced by that of restrictive immunity; within the latter a distinction was made between *acta jure imperii* and *acta jure gestionis* but immunity is granted only for the former. *The meaning of these two notions is not carved in stone, however; it is subject to a continuously changing interpretation which varies with time reflecting the changing priorities of society*.[1017]

It seems that here judges Higgins, Koojimans and Buergenthal are arguing that the two elements of state immunity – *acta jure imperii* and *acta jure gestionis* – are not static legal concepts but rather need to be interpreted evolutively across time. Crucially, the reason for this in the judges' argument are the changing priorities of society, that need to be captured in the interpretation of the legal terms.

A reference to the evolutive interpretation of CIL can also be found in the statements of states, notably, the position paper of Germany 'On the Application of International Law in Cyberspace'. In this position paper, the German state expressed its conviction that existing international law, including relevant customary rules, 'applies without reservation in the context of cyberspace'.[1018] With respect to international humanitarian law, Germany pointed out that '[t]he basic principles governing the conduct of hostilities, including by cyber means, such as the principles of distinction, proportionality, precautions in attack and the prohibition of unnecessary suffering and superfluous injury, apply to cyber attacks in international as well as in non-international armed conflicts'.[1019] On this point, and discussing the principle of distinction in particular, Germany observed that 'civilians operating in cyberspace can be considered as taking direct part in hostilities with the result of losing their protection from attack [. . .] *Following the same logic*, a civilian object like a computer, computer networks, and cyber infrastructure, or even data stocks, can become a military target'.[1020] Similarly, Germany indicated

---

rise to a number of exceptions to the jurisdictional immunity of States, such as the tort exception, the employment exception and the intellectual property exception' (emphasis added). *Jurisdictional Immunities of the State* (n 87) (Dissenting Opinion of Judge Yusuf) [44]. See also [35-36].

[1016] Ibid [27].

[1017] *Case concerning the Arrest Warrant of 1 April 2000* (n 22) (Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal) (emphasis added) [72].

[1018] Germany, 'On the Application of International Law in Cyberspace – Position Paper' (n 27) 1.

[1019] Ibid, 7-8.

[1020] Ibid, 8 (emphasis added). The analysis continues to note that 'However, in cases of doubt, the determination that a civilian computer is in fact used to make an effective contribution to military action may only be made after a careful assessment [. . .] The benchmark for the application of the

that it 'applies the relevant customary rules on state responsibility also to acts in cyberspace',[1021] clarifying how it would interpret relevant terms and activities for this purpose. For instance, with respect to 'aid and assistance' that would lead to a state's responsibility for particular acts, Germany clarified that this would apply to a forum state that 'actively and knowingly provides the acting State with access to its cyber infrastructure and thereby facilitates malicious cyber operations by the other State'.[1022] The extension of these rules to the cyberspace context may be considered an instance of analogical reasoning, whereby Germany is expanding the scope of the rules to also cover new factual scenarios heretofore not regulated by these legal regimes. This in itself is not necessarily interpretation.[1023] However, the way Germany construes the thus-extended rules is. In particular, what we see above is existing customary rules such as the principle of distinction being interpreted evolutively. Terms that are elements of this rule – like military target – are interpreted to also include objects that did not exist at the time the rule came into force – like computers or data stocks. The interpretation is motivated by the 'logic' of the rule. This is further reinforced by Germany's concluding observations that 'uncertainties as to how international law might be applied in the cyber context can and must be addressed by having recourse to the *established methods of interpretation of international law*'.[1024]

What emerges from all of these examples is that evolutive interpretation of CIL rules is undertaken in order to capture an apparent change in the rule itself or in the (normative) environment where the rule operates. The reason for evolutive interpretation is thus that there is an evolution in the field to which the rule is applicable that affects the scope of the legal rule, and needs to be reflected in the rule's scope and content. This may be an evolution of law (for instance the emergence of new rules that interact with the older rule, or shape the broader legal landscape) or an evolution of fact (for instance new technological developments). On this point, scholarship has distinguished between 'endogenous' and 'exogenous' changes, the former referring to changes in the text of the norm and the latter referring to changes in the environmental surroundings of the normative proposition.[1025] On this view, endogenous changes may include evolutions in the

principle of distinction is the effect caused by a cyber attack, irrespective of whether it is exercised in an offensive or a defensive context. Thus, computer viruses designed to spread their harmful effects uncontrollably cannot distinguish properly between military and civilian computer systems as is required under IHL and their use is therefore prohibited as an indiscriminate attack. In contrast, malware that spreads widely into civilian systems but damages only a specific military target does not violate the principle of distinction.

[1021] Ibid, 9. [1022] Ibid, 10.

[1023] For a discussion of analogies in international law see Silja Vöneky, 'Analogy in International Law' [2008] MPEPIL.

[1024] Germany, 'On the Application of International Law in Cyberspace – Position Paper' (n 27) 16 (emphasis added).

[1025] Robert Kolb, Evolutionary Interpretation in International Law: Some Short and Less than

ordinary meaning of the term ('aerial engines' may include both the older zeppelin and the newer airplanes or space shuttles), evolutions in the legal meaning of the term ('embargo' used to mean requisition but now also means the severance of commerce), or a mixture of evolutions of both.[1026] Exogenous changes on the other hand, can concern social changes which afffect how a legal concept is understood (the social understanding of 'family' has evolved significantly in recent decades, causing the legal term to evolve with it), or changes in the broader legal circumstances.[1027] The important takeaway on this point is that 'all elements of the norm and its environment can change and thus trigger changes in the point of reference of interpretation'.[1028]

In the field of treaty interpretation, the decision whether a rule should be interpreted evolutively is anchored in the will of the parties.[1029] The issue arises in respect of interpretation pursuant to ordinary meaning. The question usually posed is whether the parties intended to give a treaty term a meaning that is capable of evolving, or whether, rather, the meaning should be confined to the one given at the time of drafting. Questions of evolution permeate the discusson of treaty interpretation also with respect to systemic interpretation. Here, the dilemma is which 'rules applicable in the relations between the parties' should be considered for purposes of interpretation – rules in force at the time of the conclusion of the treaty, or rules in force at the time of interpretation. Insofar as these methods of interpretation are applicable to CIL rules, similar dilemmas arise. At the same time, given the nature of customary rules as rules which stem from the community they regulate and move with it, it is diffcult to imagine what static interpretation of CIL rules would look like. A potential answer in this respect might be found in the *Island of Palmas* case, where judge Huber famously pronounced that

> [. . .] a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. [. . .]
>
> As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction

Trail-Blazing Reflections in Georges Abi Saab, Kenneth Keith, Gabrielle Marceau and Clement Marquet (eds), *Evolutionary Interpretation in International Law* (Hart 2019) 15, 16-17.

[1026] Ibid, 16. As an example of a mixed evolution of both meaning and law, Kolb offers the term 'maritime areas under national jurisdiction' which 'formerly meant territorial waters' but '[u]nder the current law of the sea, these areas would probably have to be extended to all areas where the coastal State has sovereign rights, in particular to the 200-mile exclusive economic zone'.

[1027] Ibid, 17. As an example of changes in the broader legal context, Kolb offers the law related to the maintenance of peace, where 'the term 'war' was abandoned in favor of the legally broader term 'force' in the jus contra belum and 'armed conflict' in the jus in belo. This means that older treaties on the law of war, in particular The Hague Regulations of 1899 and 1907, containing the term 'war', are today interpreted as referring to an 'armed conflict'.

[1028] Ibid, 18.

[1029] For a detailed examination of this discussion see Fitzmaurice and Merkouris (n 301) 121-81.

> must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.[1030]

What this pronouncement tells us is that the creation of a right is governed by the law at the time of the creation, but the maintenance of the right is governed by the law as it evolves over time. If we seek to apply this reasoning to customary law, we may say that the question whether a customary rule exists or not (identification) should be governed by the law in place at the time of the (alleged) rule's coming into existence. Questions concerning the rule's continued existence on the other hand (interpretation) should follow the evolution of the law. This is arguably what judge Huber did, when he found that even if the effect of discovery of the island by Spain was to be determined by the rules in force at the time of discovery, the continued claim of sovereignty over the island was to be determined in light of legal developments across time.[1031] At the same time, this might be a very expansive reading of the *Island of Palmas*, leading to an equally expansive conclusion that all customary rules should be interpreted evolutively all the time. This is a normative claim that I am not ready to make at this time, based on the available materials collected for this thesis.

Much like in the case of treaty interpretation, there is no singular way of determining whether a customary rule should be interpreted evolutively or statically, and this issue is likely to be decided through interpretation itself. On this point, the observations of the Netherlands during the discussion of evolutive interpretation of treaties are instructive:

> Some legal terms will certainly have to be given the meaning they had when the treaty was concluded [. . .] But it is just as certain that in other cases legal terms will have to be interpreted according to their meaning in the legal rules in force at the time the dispute arises and again in other cases in the light of the law in force at the time of interpretation. [. . .] Accordingly, the Netherlands Government is in favor of deletion

[1030] *Island of Palmas* (Netherlands v United States of America) (1928) UNRIAA 829, 845.

[1031] 'International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise'. Ibid, 845-46.

> [. . .] to leave unanswered the question whether any term should be interpreted in any specific case according to the law in force at the time or to that in force now. *It would seem more correct and quite enough in itself to allow oneself to be guided solely by good faith when answering the question*.[1032]

IV. The Functions of Interpretation as Solutions to CIL's Perennial Problems: Possibilities and Limits

In Chapter 1 of the thesis, three broad problems which continue to plague CIL as a source of international law were outlined. These problems are: i) the incoherent application of the two-element doctrine; ii) problems of CIL evolution and change; and iii) problems emerging from the larger systemic context of international law. Scholarly accounts of these problems have tried to address them by either re-theorizing the identification of CIL, or proposing entirely new approaches to it. In this thesis however, I have suggested that rather than re-theorizing or changing the criteria around CIL identification, we should turn our attention to an operation that takes place at a later point of the rule's timeline, namely, interpretation.

Accounting for interpretation in the continuous existence of CIL rules gives us the opportunity to better understand the way customary rules function, and the way they are applied in the practice of international law. Consequently, accounting for interpretation allows us to see the problems associated with this source of law in a new light and find ways to address them that have previously not been considered. Moreover, accounting for interpretation enables us to put forward a renewed understanding of CIL which can gain traction in the practice of various relevant actors (such as courts and states) and affect the way this source is used in the practice of international law. As Chapter 1 demonstrated, the inability of new approaches to transition into the mainstream practice of international law often limits their scope of influence accordingly. Accounting for interpretation avoids this pitfall by remaining within the two-element formula of CIL, which continues to be the main framework in which claims about the existence of customary rules are made by actors in international law.

Interpretation, it has been argued, is the act of determining the meaning, scope, and content of customary rules, and it may happen once a general CIL rule has been identified. Interpretation performs two key functions in the continuous existence of customary rule. One is the concretizing function, whereby the content of general customary rules is specified, specific sub-elements or sub-obligation of the rule are fleshed out, or the scope of the rule is delineated. The other is the evolutive function, whereby the scope of older customary rules is expanded or restricted

[1032] ILC, 'Law of Treaties: Comments by Governments on the draft articles on the law of treaties drawn up by the Commission at its fourteenth, fifteenth and sixteenth session' (1966) A/CN.4/182 and Corr.1&2 and Add.1, 2/Rev.1 & 3, 322-23 [29] (emphasis added); Fitzmaurice and Merkouris (n 301) 127-28.

in light of new developments of fact or law. The two functions that interpretation performs are not mutually exclusive, and in fact may often be perceived jointly at play when customary rules are being interpreted. But how do these two functions address the problems identified in Chapter 1?

Beginning with the problem of incoherent application of the two-element doctrine, this problem is addressed by the concretizing function of interpretation. As the discussion above demonstrates, the concretizing function of interpretation enables an interpreter to distill particular sub-elements or sub-obligations of a general customary rule, without the need for amassing state practice or *opinio juris* every time a particular element of the general rule emerges in a particular case context. As we saw from the caselaw of both national and international courts, these sub-elements or sub-obligations may be arrived at by relying on interpretive rationales such as the purpose or nature of the rule, or its interaction with other rules of the system. Moreover, they can be arrived at by reference to relevant subsequent state practice in the application of the rule, thereby remaining anchored in the practice of states. The concretizing function of interpretation shows us that using the lens of interpretation allows us to analyze examples from international legal practice in a new and more accurate way. If we account for a process of interpretation, we are no longer pressed to fit all forms of judicial reasoning related to CIL in the category of identification, where inevitably many of them end up looking like problematic or flawed reasoning. This is an important realization because it shows us that often what might for a lack of category be characterized simply as "reasoning which is not CIL identification" (and therefore somehow problematic) is actually CIL interpretation. Moreover, by accurately re-tagging the operation as interpretation, we are able to understand it, anticipate it, and regulate it accordingly. In light of this, and much like in the case of treaties, the interpretation of CIL can be disciplined and restricted with the development of rules for CIL interpretation.[1033]

In the discussion in Chapter 1, we saw many examples of judicial reasoning being criticized as incoherent application of the two-element doctrine, and this led

[1033] See on this point Merkouris who argues that '[t]he adoption of a common lexicon for interpretation is not, however, the only effect of the VCLT rules. An immediate corollary is that the interpretative reasoning can become both simpler, more streamlined, but also vastly more nuanced and complex. Interpretative arguments are increasingly structured in such a way as to demonstrate that certain materials, or methods fall within or outside the elements mentioned in the VCLT rules, and follow very closely the structure and choices of those articles to such a precise degree sometimes even when one is applying CIL rules of interpretation. This increased streamlining and complexity in interpretative argumentation on why certain interpretative outcomes are preferable through an application of the VCLT rules, and of judicial reasoning in general, can also provide more data and opportunities for the 'users' of international law to more readily and clearly evaluate whether the reasoning (though not necessarily the outcome) of the court or tribunal in question may be flawed, from the perspective of the application of the rules of interpretation'. Panos Merkouris, 'Debating Interpretation: On the Road to Ithaca' (2022) 35(3) Leiden Journal of International Law 461, 463. See also at 466-67.

scholars to developing new categories of custom-identification or arguing for a complete dismissal of the two-element approach. However, if we apply the lens of interpretation, we start to see that many of the instances considered as examples of problematic or incoherent identification of CIL rules may in fact be more accurately recast as instances of CIL interpretation. For example, the categories of deduction identified in Talmon's exposition of problematic methods of CIL identification seem to almost exclusively refer to moments from the jurisprudence which are more accurately described as CIL interpretation. Taking the example of what Talmon calls 'functional deduction' as identified in the *Arrest Warrant* case,[1034] I would argue that this in fact better serves as an example of teleological interpretation of the customary rule of immunity. In particular, in order to determine the scope of immunity under CIL as concerning Ministers for Foreign Affairs, the court considered the purpose of granting such immunity in relation to the nature and functions exercised by a Minister of Foreign Affairs.[1035] In this sense, the court was not deducing a new rule of CIL but rather interpreting the existing customary rule on immunity as it pertained to the context at hand. Similarly, as the discussion of the interpretation of the customary rule of prevention demonstrates, what has been qualified as 'normative deduction'[1036] may be better understood as the concretizing function of CIL interpretation whereby specific content is fleshed out of a general customary rule. On this point, it has been aptly noted that asking courts (and in these particular cases the ICJ) to accompany every utterance with sufficient evidence of state practice and *opinio juris* 'may not only be asking too much but asking for the wrong thing'.[1037]

At the same time, re-characterizing instances of what has been tagged as bad identification as examples of interpretation has its limits. For instance, the theory of 'deductive custom' developed by Christian Tomuschat, seems to suggest that a number of customary rules may be deduced from the principle of state sovereignty which is axiomatic to the system of international law.[1038] Even if one would agree with this claim, this extrapolation of customary rules from what Tomuschat characterizes as a general principle of law is certainly not an instance of interpretation. Thus, the concretizing function of interpretation developed in this thesis is not meant to cover such broad deductions of rules from foundational principles of international law, without any interpretive reasoning or anchoring in the practice of states. A related danger here is the potential for judicial lawmaking, which is often flagged as the side effect of the incoherent application of the two-element doctrine in the identification of CIL rules. Similarly, with respect to the concretizing function as manifested in the construction of exceptions, it has been observed that the decentralized nature of international law makes the construction of exceptions

[1034] Talmon (n 2) 425. [1035] *Case concerning the Arrest Warrant of 1 April 2000* (n 22) [53].
[1036] Talmon defines 'normative deduction' as the act whereby '[n]ew rules are inferred by deductive reasoning from existing rules and principles of customary international law'. Talmon (n 2) 423.
[1037] Tassinis (n 389) 265. [1038] Tomuschat (n 36) 297-307.

a particularly 'risky affair'.[1039] This would mean that this aspect of the concretizing function is in particular need of clear limits. Accounting for interpretation in the continuous existence of customary rules plays a dual role in relation to these potential problems. Firstly, it enables us to correctly label different instances of judicial reasoning and differentiate between interpretation which is a permissible and indeed necessary judicial activity versus misidentification or misinterpretation of CIL which is problematic.[1040] Secondly, it enables us to adequately regulate the interpretive process – by for instance developing rules for CIL interpretation – thereby delineating the boundaries within which the interpretation of customary law operates. For instance, with respect to limits to the construction of exceptions, one way to enact this limit would be to apply the interpretive maxim that exceptions to a rule must be narrowly construed.[1041]

Turning to the problem of CIL evolution and change, this problem is addressed by both the concretizing and the evolutive functions of interpretation. As the discussion above demonstrates, the concretization of CIL rules can be undertaken with an evolutive approach in mind, and older customary rules can be "updated" in this way. For instance, what we saw with the customary rule on state immunity is that the scope of the rule has historically moved from absolute to restricted through the interpretation of national courts. In this example, interpretive considerations such as the purpose of the rule were combined with an examination of the practice of states in their application of the rule of immunity. Similarly, the scope of customary rules of warfare has been expanded to also include the regulation of weapons which did not exist at the time the rules were developed (such as nuclear weapons), as well as to regulate modalities of warfare which have only been developed recently (such as cyber warfare).

Looking finally to the problems of CIL emerging from the broader systemic context of international law, these may similarly be addressed by the evolutive function of interpretation. As discussed above, the evolutive function of interpretation allows for an evolution of law or an evolution of fact to be reflected in the content of existing customary rules. For instance, so-called 'exogenous' changes in societal values or broader legal circumstances may be translated into the content of the rule by virtue of interpretation, as long as the wording and rationale of the rule allow this. An example of how this might look like is the interpretive argument by judge Yusuf with respect to the *uti possidetis* rule, in his separate opinion to the *Frontier Dispute* (Burkina Faso/Niger) case.[1042] The reader will recall that in this

---

[1039] Bartels and Paddeu (n 968) 2.

[1040] See on this point Merkouris 2023 (n 3) 50-68. See also Arajärvi (n 891) 40.

[1041] See on this point Alexia Solomou, 'Exceptions to a Rule Must Be Narrowly Construed' in Joseph Klingler, Yuri Parkhomenko, Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2018) 359.

[1042] *Frontier Dispute* (Burkina Faso/Niger) (Judgment) (Separate Opinion of Judge Yusuf) [2013] ICJ Rep. 44, 134 [6]

example Judge Yusuf argued for an interpretation of the customary rule which is sensitive to the local context and the particular view of *uti possidetis* adopted by the Organization of African Unity.[1043] This exemplifies a contextual approach to the interpretation of customary rules, which considers context-specific information such as the history of the development of the rule and its usage in the particular context. Once again, here we see a clear trajectory of how a customary rule may evolve or be adapted without the need for (re)identification.

The evolutive function of interpretation addresses the problems of CIL evolution and change and the problems emerging from the larger systemic context of international law head on. It gives us an account of how customary rules continue to exist and operate in international law, and how they can adjust to the evolutions of law and fact in international society. What the evolutive function of interpretation demonstrates is that a customary rule does not need to be re-identified every time a new factual situation arises, or every time new rules of the system interact with its scope. Moreover, it demonstrates that new factual scenarios such as the creation of nuclear weapons or the occurrence of cyber warfare do not have to remain unregulated until a treaty is adopted or a specific new CIL regime emerges. As aptly argued by Germany on this point, 'uncertainties as to how international law might be applied [in a new context] can and must be addressed by having recourse to the *established methods of interpretation of international law*'.[1044]

At the same time, limits to what the evolutive function of interpretation can do must be acknowledged. As discussed in Chapter 3, the evolution of CIL rules cannot transgress into a judicial modification of the rule which is not supported by state practice. The theory of CIL interpretation developed in this thesis has chosen to remain within the two-element approach to CIL identification, and as such subscribes to the view that it is states whose practice can bring about new rules or modify existing ones. Thus, while the evolutive function of interpretation enables a CIL rule to have a continuous existence, whereby its content is also responsive to the changing needs of both international society and the broader system of international law, it does not allow for the modification of customary rules through judicial interpretation which does not find support in the practice of states. At the same time, what we saw in the examples discussed in Chapters 3 and 4, is that interpretation can perfectly accommodate references to state practice in the application or interpretation of an existing CIL rule, which can be considered in order to determine whether that rule has evolved. Thus, there is no need to relapse into CIL identification every time. On the level of theory, it can be said that interpretation accounts for scenarios where a rule is adapted to new circumstances, all the while remaining within the limits posed by the rule. What constitutes the limits of the rule might be discerned by the purpose or underlying rationale of the

[1043] See discussion *supra* 48-49.

[1044] Germany, 'On the Application of International Law in Cyberspace – Position Paper' (n 27) 16 (emphasis added).

rule, by looking at the relevant practice that constituted the rule, or by looking at the subsequent practice of how the rule was applied. Modification on the other hand goes beyond this, and reads into the rule content that cannot be defended on the basis of any of these indicators.

What the discussion in this section illustrates is that the functions of interpretation identified in this thesis offer answers to the problems of CIL doctrine outlined in Chapter 1. The concretizing function addresses the problem of incoherent application of the two-element doctrine by offering an alternative characterization of judicial reasoning. This re-characterization enables us to analyze existing judicial reasoning with more accuracy and nuance. Moreover, it enables us to recognize and understand CIL interpretation when it takes place, as well as anticipate it, and regulate it accordingly. The concretizing function also addresses the problems of CIL evolution and change, this time accompanied by the evolutive function as well. As discussed above, the concretization of CIL rules can be undertaken with an evolutive approach in mind, and older customary rules can be "updated" in this way. Moreover, the evolutive function of interpretation gives us an account of the continuous existence of CIL rules, and shows us that a customary rule does not need to be re-identified every time a change in fact or law occurs. Finally, the evolutive function also addresses the problems emerging from the larger systemic context of international law, by allowing for "entry points" for changes in the international legal society in the interpretive exercise. In this way, changes in the broader context in which older customary rules operate can be reflected in the rules' scope and content.

Chapter 5

Conclusions

I began the research for this thesis guided by the research question – can customary international law be interpreted? Early into my research, I found that not only can CIL be interpreted, but that examples of its interpretation in the practice of courts abound. This led the research question to be expanded and also ask – what functions does interpretation perform in the continuous existence of customary rules? It is this latter version of the research question that has shaped the structure and focus of the present thesis.

Describing a fantasy encounter between two strangers from strange lands who are meeting each other for the first time, Ursula Le Guin captured the notion of preconceptions in the following way:

> Kimoe's ideas never seemed to be able to go in a straight line; they had to walk around this and avoid that, and then they ended up smack against a wall. There were walls around all his thoughts, and he seemed utterly unaware of them, though he was perpetually hiding behind them.[1045]

Trying to describe CIL interpretation at times felt like being part of this encounter, with walls of preconceptions encircling the thoughts of both myself and the members of my audience who did not subscribe to the idea of CIL interpretation. The early walls concerned the idea that CIL can only be identified but not interpreted. Often, they were made up of seemingly axiomatic bricks – unwritten rules cannot be interpreted because they are unwritten, customary rules cannot be interpreted because they are not treaties. For me, these came down quite easily, and I have tried to convey the same ease in taking them down for others. Sometimes, they were made of sturdier bricks – it cannot be interpretation if it refers back to the two elements, it is all simply identification. It cannot be interpretation if it brings about new elements of the rule, it must go through identification or not go at all. I have endeavored to pry these bricks loose and use them to pave a new road instead. It can be interpretation, even when it refers back to the two elements. As we know from treaties, both practice preceding the treaty, and subsequent practice in applying it, can figure in the interpretive reasoning. There is no compelling reason why this should not apply, *mutatis mutandis*, to the interpretation of CIL. In fact, when it comes to CIL, this is also how the rules evolve and

[1045] Ursula K. Le Guin, *The Dispossessed* (Harper Voyager 1974) 16.

stay relevant. It is interpretation, even when it fleshes out particular elements from the general rule. These are not new to the content of the rule, but are merely more specific parts of the general whole. This is how general CIL rules are operationalized, and enabled to apply to specific situations that they were designed to regulate. Finally, the toughest bricks were the ones that at times felt like they could never be removed. How far is too far into this new uncharted terrain? Will this argument be the drop that makes the cup run over, and take down the whole thesis with it? These were difficult to tear down, and on some level, they make up walls that continue to encircle my thoughts as I release this thesis into the world.

Guided by the sub-questions of each chapter, I gradually built up a theory of CIL interpretation that offered an answer to my main research question. Firstly, in Chapter 1, I asked *what is it we speak of when we speak of CIL*? The aim here was to define the main object of study – customary international law, situate myself in the broader existing scholarship on CIL, and identify the lacuna that my research fills. Chapter 1 demonstrated that the concept of CIL seems to be plagued by an irreconcilable conflict. On the one hand, there is a seemingly stable definition which is pervasive in practice – the two-element approach. On the other hand, strong and accurate criticism of this definition undermines the two-element approach, and constantly calls for its modification or dismissal. I proposed however that what seemed irreconcilable may in fact be reconciled if we account for interpretation as a stage in the continuous existence of a CIL rule. Having situated the study in this way, I moved on to Chapter 2 where I was guided by the question *what is it we speak of when we speak of interpretation*? The aim of Chapter 2 was to define the concept of interpretation for the purposes of the thesis, and demonstrate that there are no obstacles to applying this concept to a source such as CIL. This chapter dispelled existing arguments that CIL cannot be interpreted because it is unwritten, or that the attempt to interpret customary rules would inevitably revert back to identification. It further showed that there is room for interpretation in the timeline of a customary rule, and that accounting for this operation in the continuous existence of the rule is both theoretically relevant and practically necessary. With these two chapters, the stage was set for speaking about the interpretation of CIL as a specific and separate operation in the rule's continued existence.

Chapter 3 surveyed the caselaw of national courts, and extrapolated three main lessons from their interpretative practice. Firstly, while national courts use familiar methods in the interpretation of custom, there are also peculiarities that emerge when these methods are applied to an unwritten rule. Chapter 3 recorded these peculiarities, and proposed an adjustment to how these methods are used for CIL interpretation accordingly. Secondly, interpretation performs two crucial functions in the continuous existence of customary rules. In particular, interpretation performs a concretizing function whereby the content of general customary rules is specified, and an evolutive function whereby older customary rules are "updated" in light of factual or legal developments in the broader legal system. Thirdly, while

interpretation plays a central role in the continuous existence of customary rules, we must acknowledge the need for limits. In particular, the interpretation of customary rules should never lead to an outcome that is manifestly opposite to the purpose of the rule and should never lead to modification which is not supported by relevant practice. These limits to the interpretive exercise may be set by rules for interpretation. Chapter 4 took these lessons, and expanded on them from the perspectives of theory and international practice. It showed that the two functions of interpretation of CIL are not a peculiarity of the interpretive practice of national courts, but rather an inherent trait of interpretation when it comes to CIL. With this in mind, Chapter 4 demonstrated how these functions of interpretation address the problems identified in Chapter 1, keeping also in mind that this take has its limits. Thus, it was ultimately argued that by accounting for interpretation and bringing it within our domain of analysis, we are able to recognize it, anticipate when it can happen, and regulate it through the development of rules or guidelines. Moreover, by accounting for interpretation we are able to re-frame CIL's perennial problems, resolve many of them, and move forward with a reinvigorated CIL doctrine.

For a long time in our discipline, the idea of CIL interpretation was a riddle, wrapped in a mystery inside an enigma.[1046] This thesis, as a part of the broader TRICI-Law project, has done its best to contribute to the key.

[1046] This expression is an idiom referring to 'that which is so dense and secretive as to be totally indecipherable or impossible to foretell'. The expression is ascribed to a line used by Winston Churchill to describe the intentions and interests of Russia in 1939: 'I cannot forecast to you the action of Russia. It is a riddle, wrapped in a mystery, inside an enigma; but perhaps there is a key. That key is Russian national interest'. See Winston Churchill, *The Second World War: The Gathering Storm* (Rosetta Books 2002) 403. See also Farlex Dictionary of Idioms, 'A riddle, wrapped in a mystery, inside an enigma' (*The Free Dictionary*, 2015) < https://idioms.thefreedictionary.com/a+riddle%2C+wrapped+in+a+mystery%2C+inside+an+enigma> accessed 1 March 2023.

Bibliography

Books and Chapters in Edited Volumes

Alexandrowicz Charles H, 'The New States and International Law' (1974) reproduced in David Armitage and Jenifer Pitts (eds), *The Law of Nations in Global History – C.H. Alexandrowicz* (OUP 2017) 404

Ammann Odile, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* (Brill Nijhoff 2019)

Anghie Anthony, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007)

Anzilotti Dionisio, *Corso di diritto intemazionale* (3rd ed. Cedam 1955)

Arajärvi Noora, 'Misinterpreting Customary International Law: Corrupt Pedigree or Self-fulfilling Prophecy?' in Merkouris Panos, Kammerhoffer Jörg and Arajärvi Noora (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) 40

Barak Aharon, *Purposive Interpretation in Law* (Princeton University Press 2005)

Bartels Lorand and Paddeu Federica, 'Introduction' in Bartels Lorand and Paddeu Federica (eds), *Exceptions in International Law* (OUP 2020) 1

Bederman David, *Custom as a Source of Law* (CUP 2010)

Bedjaoui Mohammed, *Towards a New International Economic Order* (Holmes and Meier Publishers 1979)

Bianchi Andrea, 'Epistemic Communities' in d'Aspremont Jean and Singh Sahib (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 251

Bianchi Andrea, 'Textual Interpretation and (International) Law Reading: the Myth of Indeterminacy and the Genealogy of Meaning' in Bekker Pieter, Dolzer Rudolf and Waibel Michael (eds), *Making Transnational Law Work in the Global Economy* (CUP 2010) 34

Bianchi Andrea, 'The Game of Interpretation in International Law The Players, the Cards, and Why the Game is Worth the Candle' in Bianchi Andrea, Peat Daniel and Windsor Matthew (eds), *Interpretation in International Law* (OUP 2015) 34

Bianchi Andrea, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016)

Bjorge Eirik, *The Evolutionary Interpretation of Treaties* (OUP 2014)

Bradley Curtis A., 'Customary International Law Adjudication as Common Law Adjudication' in Bradley Curtis A. (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 34

Braumann Celine and Reinisch August, 'Effet Utile' in Klinger Joseph, Parkhomenko Yuri and Salonidis Constantinos (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2019) 47

Brownlie Ian, *Principles of Public International Law* (5th ed., OUP 1998)

Byers Michael, *Custom, Power and the Power of Rules* (CUP 1999)

Carleton Kemp Allen, *Law in the Making* (6th ed, OUP 1958)

Carty Anthony, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in Interna-*

tional Affairs (Manchester University Press 1986)

Cassese Antonio, *International Law in a Divided World* (OUP 1986)

Charlesworth Hilarry, 'Law-making and Sources' in Crawford James and Koskenniemi Martti (eds), *The Cambridge Companion to International Law* (CUP 2012) 187

Churchill Winston, *The Second World War: The Gathering Storm* (Rosetta Books 2002)

Collins Lord of Mapesbury and Cross Tom, 'The Law of International Custom in the Case Law of the House of Lords and the United Kingdom Supreme Court' in Lijnzaad Liesbeth and Council of Europe (eds), *The Judge and International Custom* (Brill Nijhoff 2018) 160

Conforti Benedetto, *Diritto Internazionale* (10th ed Editoriale Scientifica 2014)

Crawford James, *Brownlie's Principles of International Law* (9th ed., OUP 2019)

D'Amato Anthony, *The Concept of Custom in International Law* (Cornell University Press, 1971)

d'Aspremont Jean, 'The Custom-Making Moment in Customary International Law' in Merkouris Panos, Kammerhoffer Jörg and Arajärvi Noora (eds), *The Theory, Practice and Interpretation of Customary International Law* (eds), *The Theory and Philosophy of Customary International Law and its Interpretation* (CUP 2022) 29

d'Aspremont Jean, *Formalism and the Sources of International Law* (OUP 2011)

d'Aspremont Jean, *International Law as a Belief System* (CUP 2017)

d'Aspremont Jean, *The Discourse on Customary International Law* (OUP 2020)

d'Aspremont Jean, 'The Multidimensional Process of Interpretation' in Bianchi Andrea, Peat Daniel and Windsor Matthew (eds), *Interpretation in International Law* (OUP 2015)

Danilenko Genady, *Law-Making in the International Community* (Martinus Nijhoff 1993)

de Hoogh André, 'The Compelling Law of Jus Cogens and Exceptions to Peremptory Norms, To Derogate or Not to Derogate, That is the Question!' in Bartels Lorand and Paddeu Federica (eds), *Exceptions in International Law* (OUP 2020) 128

de Visscher Charles, *Problemes d'Interpretation Judiciaire en Droit International Public* (Pedone 1963)

Degan Vladimir, *Sources of International Law* (Martinus Nijhoff Publishers 1997)

Duvic Paoli Leslie-Anne and Viñuales Jorge, 'Principle 2: Prevention' in Viñuales Jorge (ed), *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015) 107

Dworkin Ronald, *Law's Empire* (11th ed., Hart Publishing 2018)

Fernandez Carlos, *Sovereignty and Interpretation of International Norms* (Springer 2007)

Fitzmaurice Gerald, *The Law and Procedure of the International Court of Justice, Volume 1* (Grotius Publications Limited 1986)

Fitzmaurice Malgosia and Merkouris Panos, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (CUP 2020)

Fitzmaurice Malgosia, 'The History of Article 38 of the Statute of the International Court of Justice: The Journey from the past to the Present' in Besson Samantha and d'Aspremont Jean (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 179

Fortuna Marina, *There is a Method to my Practice! Interpretation of Customary Rules in International Courts – Methods and Language Patterns* (PhD Thesis University of Groningen, forthcoming 2023).

Fox Hazel and Webb Philippa, *The Law of State Immunity* (3rd ed. OUP 2013)

Galev Gale and Dabovikj-Anastasovska Jadranka, *Obligaciono Pravo* (3rd ed, University of St. Cyril and Methodius Skopje 2012)

Galev Gale and Dabovikj-Anastasovska Jadranka, *Obligaciono Pravo (Bachelor Studies)* (University of St. Cyril and Methodius Skopje 2021)

Geny Francois, Methode D'Interpretation et Sources en Droit Prive Positif, Vol. 1 (Librairie Generale de Droit & de Jurisprudence 1919)

Gorobets Kostiantyn, 'Chasing the 'Correct Interpretation': Reply to Panos Merkouris' in Gorobets Kostiantyn, Hadjigeorgiou Andreas and Westerman Pauline (eds), *Conceptual (Re)Constructions of International Law* (Edward Elgar 2022) 234

Hadjigeorgiou Andreas, 'Beyond Formalism: Reviving the Legacy of Sir Henry Maine for Customary International Law' in Merkouris Panos, Kammerhofer Jörg and Arajärvi Noora (eds), *The Theory, Practice, and Interpretation of Customary International Law* (CUP 2022) 183

Hage Jaap, Waltermann Antonia and Arosemena Gustavo, 'Exception in International Law' in Bartels Lorand and Paddeu Federica (eds), *Exceptions in International Law* (OUP 2020) 11

Hamster Jorian, 'Customary International Law' in Nollkaemper Andre and Reinisch August (eds), *International Law in Domestic Courts. A Casebook* (OUP 2018) 243

Hart H.L.A., *The Concept of Law* (Clarendon Press 1944)

Hernandez Gleider, 'Interpretation' in Kammerhofer Jörg and d'Aspremont Jean (eds), *International Legal Positivism in a Post-modern World* (CUP 2014)

Hernandez Gleider, 'Interpretative Authority and the International Judiciary' in Bianchi Andrea, Peat Daniel and Windsor Matthew (eds), *Interpretation in International Law* (OUP 2015) 166

Higgins Rosalyn, 'The Changing Position of Domestic Courts in the International Legal Order: Speech Given at the First International Law in Domestic Courts Colloquium 27 March 2008' in Higgins Rosalyn, *Themes and Theories* (OUP 2009) 1340

Higgins Rosalyn, *Problems and Process: International Law and How we Use It* (OUP 1994)

Hollis Duncan B, 'The Existential Function of Interpretation in International Law' in Bianchi Andrea, Peat Daniel and Windsor Matthew (eds), *Interpretation in International Law* (OUP 2015) 78

Jeutner Valentin, 'Both the Rule and the Exception: The Concept of a Legal Dilemma and the Survival of the State' in Bartels Lorand and Paddeu Federica (eds), *Exceptions in International Law* (OUP 2020) 242

Klabbers Jan, 'Virtuous Interpretation' in Fitzmaurice Malgosia, Elias Olufemi and Merkouris Panos (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on*' (Brill 2010) 15

Kammerhofer Jörg, *International Investment Law and Legal Theory: Expropriation and the Fragmentation of Sources* (CUP 2021)

Kanetake Machiko, 'The Interfaces Between the National and International Rule of Law: A Framework Paper' in Kanetake Machiko and Nollkaemper Andre (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart 2016) 13

Kelly J Patrick, 'Customary International Law in Historical Context: The Exercise of Power without General Acceptance' in Lepard Brian D. (ed), *Reexamining Customary International Law* (CUP 2017) 47

Kelsen Hans, *Pure Theory of Law* (University of California Press 1967)

Klinger Joseph, Parkhomenko Yuri and Salonidis Constantinos (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2019)

Kolb Robert, 'Evolutionary Interpretation in International Law: Some Short and Less than Trail-Blazing Reflections' in Abi Saab Georges, Keith Kenneth, Marceau Gabrielle and Marquet Clement (eds), *Evolutionary Interpretation in International Law* (Hart 2019) 15

Kolb Robert, *Interprétation et création du droit international: esquisses d'une herméneutique juridique moderne pour*

le droit international public (Bruylant, 2006)

Koskenniemi Martti, *From Apology to Utopia: The Structure of International Legal Argument* (2nd ed, CUP 2006)

Lanovoy Vladyslav, 'Customary International Law in the Reasoning of International Courts and Tribunals' in Merkouris Panos, Kammerhoffer Jörg and Arajärvi Noora (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) 231

Lauterpacht Hersch, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Longmans, Green and Co Ltd. 1927)

Lauterpacht Hersch, *The Development of International Law by the International Court* (2nd ed., CUP 1982)

Lauterpacht Hersch, *The Development of Law by the International Court* (Steven and Sons 1958)

Lepard Brian, Customary International Law as a Dynamic Process in Bradley Curtis (ed) *Custom's Future: International Law in a Changing World* (CUP 2016) 62

Lepard Brian, 'Why Does Customary International Law Need Reexamining' in Lepard Brian (ed), *Reexamining Customary International Law* (CUP 2017) 1

Lepard Brian, *Customary International Law – A New Theory with Practical Applications* (CUP 2010)

Le Guin, Ursula K. *The Dispossessed* (Harper Voyager 1974)

Lijnzaad Liesbeth, 'Customary International Law before Dutch Courts: Nyugat and Beyond' in Lijnzaad Liesbeth and Council of Europe (eds), *The Judge and International Custom* (Brill Nijhoff 2018) 121

Lijnzaad Liesbeth, The San Remo Manual on the Law of Naval Warfare – from Restatement to Development?' in Klein Natalie (ed), Unconventional Lawmaking in the Law of the Sea (OUP 2022) 21

Linarelli John, Salomon Margot & Sornarajah Muthucumaraswamy, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018)

Linderfalk Ulf, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007)

Maarten Bos, *A Methodology of International Law* (Elsevier Science Publisher 1984)

Mackenzie Ruth, Romano Cesare, and Shany Yuval (eds), *The Manual on International Courts and Tribunals* (2nd ed, OUP 2010)

McRae Donald, 'Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the WTO Antidumping Agreement' in Cannizzaro Enzo (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 164

Merkouris Panos, 'Interpretation is a Science, is an Art, is a Science' in Fitzmaurice Malgosia, Elias Olufemi and Merkouris Panos (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill 2010) 1

Merkouris Panos, 'The Correct Interpretation Premise in International Adjudication' in Gorobets Kostiantyn, Hadjigeorgiou Andreas and Westerman Pauline (eds), *Conceptual (Re)Constructions of International Law* (Edward Elgar 2022) 215

Merkouris Panos, *Article 31(3)(c) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato's Cave* (Brill 2015)

Merkouris Panos, *Interpretation of Customary International Law: of Methods and Limits* (Brill Research Perspectives 2023 forthcoming) available at <https://tricilawofficial.files.wordpress.com/2022/12/merkouris-research-perspectives.pdf>

Methymaki Eleni and Tzanakopoulos Antonios, 'Freedom with their Exception' in Bartels Lorand

and Paddeu Federica (eds), *Exceptions in International Law* (OUP 2020) 226

Mileva Nina and Fortuna Marina, 'Environmental Protection as an Object of and Tool for Evolutionary Interpretation' in Abi Saab Georges, Keith Kenneth, Marceau Gabrielle and Marquet Clement (eds), *Evolutionary Interpretation and International Law* (Hart Publishing 2019) 123

Mileva Nina, 'The Role of Domestic Courts in the Interpretation of Customary International Law: How can we Learn from Domestic Interpretive Practices?' in Merkouris Panos, Kammerhoffer Jörg and Arajärvi Noora (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) 453

Miron Alina, 'Per Argumentum a Fortiori' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention?: Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluver 2018)

Nollkaemper Andre, 'Conversations among Courts: Domestic and International Adjudicators' in Romano Cesare PR, Alter Karen J & Shany Yuval (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 524

Nollkaemper Andre, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' in Boas Gideon and Schabas William (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Brill 2003) 277

Nollkaemper Andre, *National Courts and the International Rule of Law* (OUP 2011)

Nowell-Smith Geoffrey and Hoare Quintin (eds), *Selections from the Prison Notebooks of Antonio Gramsci* (first published Lawrence & Wishart 1971, Electric Book Co. 2001)

Oesch Matthias, *Standards of Review in WTO Dispute Resolution* (OUP 2003)

Orakhelashvili Alexander, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008)

Orford Anne, *International Law and the Politics of History* (CUP 2021)

Pahuja Sundhya, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (CUP 2011)

Paparinskis Martins, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013)

Paulus Andreas, 'Customary Law before the Federal Constitutional Court of Germany' in Lijnzaad Liesbeth and Council of Europe (eds), *The Judge and International Custom* (Brill Nijhoff 2016) 106

Pauwelyn Joost and Elsig Manfred, 'The Politics of Treaty Interpretation; Variations and Explanations Across International Tribunals' in Dunoff Jeffrey L and Pollack Mark A (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 445

Peat Daniel and Windsor Matthew, 'Playing the Game of Interpretation: On Meaning and Metaphor in International Law in Bianchi Andrea, Peat Daniel and Windsor Matthew (eds), *Interpretation in International Law* (OUP 2015) 3

Peat Daniel, *Comparative Reasoning in International Courts and Tribunals* (CUP 2019)

Pellet Alain, 'Article 38' in Zimmerman Andreas, Oellers-Frahm Karin, Tomuschat Christian, and Tams Christian J. (eds), *The Statute of the International Court of Justice. A Commentary* (2nd ed., OUP 2012) 731

Pellet Alain, 'Canons of Interpretation under the Vienna Convention' in Klingler Joseph, Parkhomenko Yuri and Salonidis Constantinos (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluver 2019) 1

Pellet Alain and Muller Daniel, 'Article 38' in Zimmermann Andreas and Tams Christian J. (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed., OUP 2019) 924

Pulkowski Dirk, *The Law and Politics of International Regime Conflict* (OUP 2014)

Roberts Anthea and Sivakumaran Sandesh, 'The Theory and Reality of the Sources on International Law' in Evans Malcolm (ed), *International Law* (OUP 2018) 89

Ryngaert Cedric, 'Customary International Law Interpretation: The Role of Domestic Courts' in Merkouris Panos, Arajärvi Noora and Kammerhofer Jörg (eds), *The Theory Practice and Interpretation of Customary International Law* (CUP 2022) 481

Ryngaert Cedric, 'Sources of International Law in Domestic Law: Relationship between International and Municipal Law Sources' in Besson Samantha and d'Aspremont Jean (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 1137

Scelle Georges, *Précis de droit des gens. Principes et systématique* (Vol. 1, Librairie du Recueil Sirey 1932)

Scharf Michael, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (CUP 2013)

Schwarzenberger Georg, *The Inductive Approach to International Law* (Stevens and Sons 1965)

Scobbie Ian, 'Exceptions: Self-defence as an Exception to the Prohibition on the Use of Force in Bartels Lorand and Paddeu Federica (eds), *Exceptions in International Law* (OUP 2020) 149

Scobbie Ian, 'Rhetoric, Persuasion and Interpretation in International Law' in Bianchi Andrea, Peat Daniel and Windsor Matthew (eds), *Interpretation in International Law* (OUP 2015) 61

Sender Omri and Wood Michael, 'Custom's Bright Future: The Continuing Importance of Customary International Law' in Bradley Curtis A (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 360

Schauer Frederick, 'Pitfalls in the Interpretation of Customary Law' in Perreau-Saussine Amanda and Murphy James B.(eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (CUP 2007) 13

Shahabuddeen M., 'Municipal Law Reasoning in International Law' in Lowe Vaughan and Fitzmaurice Malgosia (eds), *Fifty Years of the International Court of Justice Essays in Honor of Sir Robert Jennings* (CUP 1996) 90

Shaw Malcolm, *International Law* (CUP 7th ed, 2014)

Skouteris Thomas, *The Notion of Progress in International Law Discourse* (T.M.C Asser Press 2010)

Solomou Alexia, 'Exceptions to a Rule Must Be Narrowly Construed' in Klingler Joseph, Parkhomenko Yuri, Salonidis Constantinos (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2018) 359

Staubach Peter G, *The Rule of Unwritten International Law: Customary Law, General Principles, and World Order* (Routledge 2018)

Steinbruck Platiše Matija, 'The Development of the Immunities of International Organisations in Response to Domestic Contestations' in Kanetake Machiko and Nollkaemper Andre (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart 2016) 67

Suárez Francisco, *De legibus ac Deo legislatore* (1612)

Tasioulas John, 'Customary International Law and the Quest for Global Justice' in Amanda Perreau-Saussine and James B. Murphy (eds), *The Nature of Customary International Law: Legal, Historical and Philosophical Perspectives* (CUP 2007) 307

Thirlway Hugh, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Brill 1972)

Thirlway Hugh, *The Sources of International Law* (OUP 2nd ed., 2019)

Thuo Gathii James, 'The Agenda of Third World Approaches in International Law' in Dunoff Jeffrey and Pollack Mark (eds), *International Legal Theory: Foundations and Frontiers* (CUP 2022) 153

Tomka Peter, 'Customary International Law in the Jurisprudence of the World Court: The Increasing Relevance of Codification' in Lijnzaad Liesbet and Council of Europe (eds), *The Judge and International Custom* (Brill Nijhoff 2016) 2

Tzanakopoulos Antonios and Methymaki Eleni, 'Sources and the Enforcement of International Law: Domestic Courts-Another Brick in the Wall?' in Besson Samantha and d'Aspremont Jean (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 820

Tzouvala Ntina, *Capitalism as Civilisation* (CUP 2020)

Venzke Ingo, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012)

Viñuales Jorge E., 'Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law' in Bartels Lorand and Paddeu Federica (eds), *Exceptions in International Law* (OUP 2020) 65

Virally Michael, 'The Sources of International Law' in Sorensen Max (ed), *Manual of Internationation Law* (1968) 128

Virally Michael, *Manual of Public International Law* (St Martin's Press 1968)

Waibel Michael, 'Interpretive Communities in International Law' in Bianchi Andrea, Peat Daniel and Windsor Matthew (eds), *Interpretation in International Law* (OUP 2015) 147

Waibel Michael, 'The Origins of Interpretive Canons in Domestic Legal Systems' in Klinger Joseph, Parkhomenko Yuri and Salonidis Constantinos (eds), *Between the Lines of the Vienna Convention* (Wolters Kluwer 2019) 25

Webb Philippa, 'Immunities and Human Rights: Dissecting the Dialogue in National and International Courts' in Fauchald Ole Kristian and Nollkaemper Andre (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 245

Wolfke Karol, *Custom in Present International Law* (2nd ed., Martinus Nijhoff 1993)

Wouters Jan, Ryngaert Cedric, Ruys Tom and De Baere Geert, *International Law: A European Perspective* (Hart Publishing 2018)

Zidar Andraž, 'Interpretation and the International Legal Profession: Between Duty and Aspiration' in Bianchi Andrea, Peat Daniel and Windsor Matthew (eds), *Interpretation in International Law* (OUP 2015)133

Articles

Abi-Saab Georges, 'The Third World Intellectual in Praxis: Confrontation, Participation, or Operation behind Enemy Lines?' (2016) 37 Third World Quarterly 1958

Adegbule Femi, 'From Warrant Chiefs to Ezeship: A distortion of traditional Institution in Igboland?' (2001) 2 Afro Asian Journal of Social Sciences 1

Akehurst Michael, 'Custom as a Source of International Law' (1974) 47 British Yearbook of International Law 1

Alland Denis, 'L' interprétation du droit international public' (2013) 362 RdC 1

Allen Stephen, 'Self-determination, The Chagos Advisory Opinion and the Chagossians' (2020) 69(1) International and Comparative Law Quarterly 203

Alvarez-Jimenez Alberto, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000-2009' (2011) 60(3) The International and Comparative Law Quarterly 681

Ammann Odile, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (2018) 4 Swiss Review of International and European Law 489

Azaria Danae, 'Codification by Interpretation: The International Law Commission as an Interpreter of International Law' (2020) 31(1) EJIL 171

Banteka Nadia, 'A Theory of Constructive Interpretation for Customary International Law Identification' (2018) 39(3) Michigan Journal of International Law 301

Bassiouni Mahmoud Cherif, 'A Functional Approach to General Principles of International Law' (1990) 11 Michigan Journal of International Law 767

Bianchi Andrea, 'Ferrini v Federal Republic of Germany' (2005) 99(1) AJIL 242

Bilder Richard, Schachter Oscar, Charney Jonathan, and Mendelson Maurice, 'Disentangling Treaty and Customary International Law: Remarks' (1987) 81 ASIL Proceedings of the Annual Meeting 157

Bleckmann Albert, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht' (1977) ZaöRV 505

Blokker Niels, 'International Organizations and Customary International Law – Is the International Law Commission Taking International Organizations Seriously?' (2017) 14 International Organizations Law Review 1

Blutman Laszlo, 'Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail' (2014) 25(2) EJIL 529

Bradley Curtis and Gulati Mitu, 'Withdrawing from International Custom' (2010) 120 Yale Law Journal 233

Carty Anthony, 'Symposium on B.S. Chimni, "Customary International Law: A Third World Perspective": The Need to be Rid of the Idea of General Customary Law' (2018) 112 *AJIL Unbound* 319

Cassese Antonio, 'Remarks on Scelle's Theory of "Role Splitting" (*dedoublement fonctionnel*) in International Law' (1990) 1 EJIL 210

Cheng Bin, 'United Nations Resolutions on Outer Space: 'Instant' International Customary Law?' in Studies in International Space Law (OSAIL, 1997) 125

Chimni B. S, 'Customary International Law: A Third World Perspective' (2018) 112(1) AJIL 1

Conforti Benedetto, 'The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity' (2011) 21 Italian Yearbook of International Law 135

Croley Steven P. and Jackson John H., 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90(2) AJIL 193

Crowe Jonathan, 'Not-So-Easy Cases' (2019) 40(1) Statute Law Review 75

d'Aspremont Jean, The Four Lives of Customary International Law (2019) 21 International Community Law Review 229

Danilenko Gennady, 'The Theory of International Customary Law' (1988) 31 German Yearbook of International Law 9

de Vries-Zou Ivo Tarik, 'Common Convictions and the Interpretation of Custom' (2022) 11(4) ESIL Reflections 1

Dickerson Hollin, 'Minimum Standards' [2013] MPEPIL

Dinstein Yoram, 'The Interaction between Customary International Law and Treaties' (2006) 322 RdC 243

Dumberry Patrick, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59(3) International and Comparative Law Quarterly 779

Elias T. O., "The Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity" (1964) 40 BYIL 336

Eslava Luis and Pahuja Sundhya, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3 Trade, Law and Development 103

Falk Richard, 'The New States and International Legal Order' (1966) 118 RdC 1

Fiss Owen, 'Objectivity and Interpretation' (1982) 34(4) Stanford Law Review 739

Fry James, 'Formation of Customary International Law Through Consensus in International Organizations' (2012) 17 Austrian Review of International and European Law 49

Gaja Giorgio, 'The Protection of General Interests in the International Community' (2011) 364 RdC 1

Gaja Giorgo, 'Positivism and Dualism in Dionisio Anzilotti' (1992) 3 EJIL 123

Gallindo George R. B. and Yip Cesar, 'Customary International Law and the Third World: Do Not Step on the Grass' [2017] Chinese Journal of International Law 251

Garrido-Muñoz Asier, 'Dispute' [2018] MPEPIL

Gavouneli Maria and Bantekas Ilias, 'Prefecture of Voiotia v. Federal Republic of Germany. Case No. 11/2000' (2001) 95 AJIL 198

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

Guha Roy S. N., 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law' (1961) 55(4) AJIL 863

Guzman Andrew, 'Saving Customary International Law' (2005) 27 Michigan Journal of International Law 115

Hakimi Monica, 'Making Sense of Customary International Law' (2020) 118(8) Michigan Law Review 1487

Heller Kevin Jon, 'Specially Affected States and the Formation of Custom' (2018) 112(2) AJIL 191

Herdegen Matthias, 'Interpretation in International Law' [2020] MPEPIL

Higgins Rosalyn, 'The ICJ, the ECJ, and the Integrity of International Law' (2003) 52(1) The International and Comparative Law Quarterly 1

Honniball Arron, 'Private Political Activists and the International Law Definition of Piracy: Acting for 'Private Ends' (2015) 36(2) Adelaide Law Review 279

Iwasawa Yuji, Domestic Application of International Law (2016) 378 RDC 15

Jennings Robert, 'The Role of the International Court of Justice' (1997) 68(1) BYIL 1

Johnstone Ian, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12(2) Michigan Journal of International Law 371

Juillard Patrick, 'Calvo Doctrine/Calvo Clause' [2007] MPEPIL

Kammerhofer Jörg, 'Taking the Rules of Interpretation Seriously, but Not Literally? A Theoretical Reconstruction of Orthodox Dogma' (2017) 86 Nordic Journal of International Law 125

Kammerhofer Jörg, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems' (2004) 13(3) EJIL 523

Kelly J Patrick, 'Symposium on B.S. Chimni, "Customary International Law: A Third World Per-

spective”: Revolution by Customary International Law’ (2018) 112 *AJIL Unbound* 297

Kirchmair Lando, ‘What Came First: the Obligation or the Belief? A Rennaisance of Consensus Theory to Make the Normative Foundations of Customary International Law More Tangible’ (2016) 59 German Yearbook of International Law 289

Kirgis Frederick L, ‘Custom on a Sliding Scale’ (1987) 81 American Journal of International Law 146

Klabbers Jan, ‘The Cheshire Cat That is International Law’ (2020) 31(1) EJIL 269

Koskenniemi Martti and Nouwen Sarah, ‘The Politics of Global Lawmaking: A Conversation’ (2022) 32(4) EJIL 1341

La Manna Mariangela, ‘The Standards for the Identification of Exceptions to Customary Law’ (2018) 27(1) Italian Yearbook of International Law 151

Lando Massimo, ‘Identification as the Process to Determine the Content of Customary International Law’ (2022) XX Oxford Journal of Legal Studies 1

Lauterpacht Hersch, ‘Decision of Municipal Courts as a Source of International Law’ (1929) 10 BYIL 65

Lekkas Sotirios Ioannis, ‘The Use of the Outputs of the International Law Commission in International Adjudication: Subsidiary Means or Artefacts of Rules’ (2022) 69 Netherlands International Law Review 327

Lekkas Sotirios Ioannis, ‘The Hybridity of International Lawmaking: Impressions and Afterthoughts from the ESIL 2021 Stockholm Conference’ (2022) 32(4) EJIL 1353

Mendelson Maurice H, ‘The Formation of Customary International Law’ (1998) 272 RDC 155

Merkouris Panos and Mileva Nina, ‘Introduction to the Series ‘Customary Law Interpretation as a Tool’ ’ (2022) 11(1) ESIL Reflections 1

Merkouris Panos, ‘Interpreting the Customary Rules on Interpretation’ (2017) 19 International Community Law Review 126

Merkouris Panos, ‘Debating Interpretation: On the Road to Ithaca’ (2022) 35(3) Leiden Journal of International Law 461

Nesi Giuseppe, ‘Uti possidetis Doctrine’ [2018] MPEPIL

Nesiah Vasuki, ‘Symposium on B.S. Chimni, “Customary International Law: A Third World Perspective”: Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence’ (2018) 112 *AJIL Unbound* 313

Norton Patrick M., ‘A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation’ (1991) 85 AJIL 474

Okubuiro Joycelin C, ‘Application of Hegemony to Customary International Law: An African Perspective’ (2018) 7 Journal of Comparative Law 232

Palchetti Paolo, ‘Dispute’ [2018] MPEPIL

Petersen Niels, ‘The International Court of Justice and the Judicial Politics of Identifying Customary International Law’ (2017) 28(2) EJIL 357

Plakokefalos Ilias, ‘Current Legal Developments International Court of Justice: The Pulp Mills Case’ (2011) 26(1) The International Journal of Marine and Coastal Law 169

Roberts Anthea, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’ (2011) 60 ICLQ 57

Roberts Anthea, ‘Traditional and Modern Approaches to Customary International Law’ (2001) 95

AJIL 757

Ryngaert Cedric and Hora Siccama Duco, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 NILR 1

Schrijver Nico, 'Permanent Sovereignty over Natural Resources' [2008] MPEPIL

Schwarzenberger Georg, 'The Inductive Approach to International Law' (1947) 60(4) Harvard Law Review

Scoville Ryan M, 'Finding Customary International Law' (2016) 101 Iowa Law Review 1893

Sharf Michael, 'Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change' (2010) 43 Cornell International Law Journal 439

Sur Serge, 'La créativité du droit international' (2013) 363 RdC 83

Talmon Stefan, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) EJIL 417

Tams Christian J., 'Meta-Custom and the Court: A Study in Judicial Law-Making' (2015) 14 The Law and Practice of International Courts and Tribunals 51

Tassinis Orfeas Chasapis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31(1) EJIL 235

Thirlway Hugh, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning' (2002) 294 RDC 265

Thirlway Hugh, 'The Law and Procedure of The International Court of Justice 1960–1989 Supplement, 2006: Part Three' (2006) 77 BYIL 1

Tomuschat Christian, 'Obligations Arising for States Without or Against their Will' (1993) 241 RdC 195

Treves Tulio, 'Customary International Law' [2006] MPEPIL

Treves Tulio, 'The Expansion of International Law' (2015) 398 RdC 37

Tunkin Grigory, 'Is General International Law Customary Law Only' (1993) 4 EJIL 534

Tzanakopoulos Antonios and Tams Christian J, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 LJIL 531

Udombana Ngongura J, 'The Ghost of Berlin still haunts Africa! The ICJ Judgement on the Land and Maritime Boundary Disputes between Cameroon and Nigeria' (2002) 10 African Yearbook of International Law 13

van Aaken Anne, 'Interests, Strategies and Veto Players: The Political Economy of Interpreting Customary International Law' (2022) 11(2) ESIL Reflections 1

van der Wilt Harmen, 'National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals' (2010) 10 International Criminal Law Review 209

Venzke Ingo, 'Authoritative Interpretation' [2018] MPEPIL

Verdier Pierre-Hugues and Voeten Eric, 'Precedent, Compliance and Change in Customary International Law: An Explanatory Theory' (2014) 108 AJIL 389

von Bogdandy Armin and Venzke Ingo, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12(5) German Law Journal 979

von Bogdandy Armin and Venzke Ingo, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 Leiden Journal of International Law 49

Vöneky Silja, 'Analogy in International Law' [2008] MPEPIL

Vordemayer Markus, 'Gardening the Great Transformation: The Anthropocene Concept's Impact on International Environmental Law Doctrine' (2015) 25 Yearbook of International Environmental Law 79

Werner Wouter G., 'Custom as Rewritten Law – The Text and Paratext of Restatement Reports' (2022) 11(3) ESIL Reflections 1

Wiener Jonathan B, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2000) 27 Ecology Law Quarterly 1295

Wood Michael, 'The Evolution and Identification of the Customary International Law of Armed Conflict' (2018) 51 Vanderbilt Journal of Transnational Law 727

Xue Hanqin, 'Chinese Observations on International Law' (2007) 83(6) Chinese Journal of International Law 84

Zarbiyev Fuad, 'On the Judge Centredness of the International Legal Self' (2021) 32(4) EJIL 1139

Working Paper Series

Goldsmith Jack and Posner Eric, 'A Theory of Customary International Law' (1999) Chicago Working Paper in Law and Economics No. 63

Mileva Nina, 'The Role of Customary International Law Interpretation in the Balancing of Interests at Sea: The Example of Prevention' (2020) 010/2020 TRICI-Law Research Paper Series <https://tricilawofficial.files.wordpress.com/2021/06/mileva_rps-010-2020.pdf>

Dupuy Pierre-Marie, Le Moli Ginevra and Viñuales Jorge, 'Customary International Law and the Environment' [2018] 2018-2 C-EENRG Working Papers

Andrew T. Guzman and Timothy L. Meyer, 'Customary International Law in the 21st Century' [2007] UC Berkeley Public Law Research Paper No. 984581

Nolte Georg, 'How to Identify Customary International Law? On the Final Outcome of the Work of the International Law Commission (2018)' [2019] KFG Working Paper Series No. 37

Mileva Nina, 'The Under-representation of Third World States in Customary International Law: can interpretation bridge the gap?' (2019) 13(11) ESIL Conference Paper Series, Conference Paper No. 11/2019

Orrega Vicuña Francisco, 'Customary International Law in a Global Community: Tailor Made?' [2005] Estudios Internacionales No. 148, Instituto de Estudios Internacionales Universidad de Chile 21.27.

Mujoska Trpevska Elena and Bitrakov Konstantin, 'The Legal System of the Republic of North Macedonia and Application of Customary Law by the National Courts' (31 March 2020) TRICI-Law National Report Series

Mukuki Allan et al., 'Customary Law in the Legal System of the Republic of Kenya' (31 March 2020) TRICI-Law National Report Series

<https://tricilawofficial.files.wordpress.com/2022/02/kenya-final-report_2022.pdf>

Blogs/Websites

Heller Kevin John, 'The Stubborn Tenacity of Secondary Rule' (*Opinio Juris*, 7 July 2020) <https://opiniojuris.org/2020/07/07/customary-international-law-symposium-the-primary-rules-of-ci

l-are-not-coming-to-save-us/ >

Brunnee Jutta, 'Making Sense of Law as Practice (Or: Why Custom Doesn't Crystallize)' (*Opinio Juris*, 7 July 2020) <https://opiniojuris.org/2020/07/07/customary-international-law-symposium-making-sense-of-law-as-practice-or-why-custom-doesnt-crystallize/>

Crivellaro Jacopo, 'How did Anzilotti's Jurisprudential Conception Influence the Jurisprudence of the Permanent Court of International Justice?' (*Jura Gentium*, 2011) < https://www.juragentium.org/topics/thil/en/crivella.htm#38>

Haque Adil, 'Panel 1: Interpretation as a Tool in the Construction of CIL rules' (5 November 2021) <https://www.youtube.com/watch?v=iG4IUuTAfyQ>

Mileva Nina and Fortuna Marina, 'Emerging Voices: The Case for CIL Interpretation–An Argument from Theory and an Argument from Practice' (*Opinio Juris*, 23 August 2019) <https://opiniojuris.org/2019/08/23/emerging-voices-the-case-for-cil-interpretation-an-argument-from-theory-and-an-argument-from-practice/>

Hyde Dominic and Raffman Diana, 'Sorites Paradox' (*Stanford Encyclopedia of Philosophy*, 26 March 2018) <https://plato.stanford.edu/entries/sorites-paradox/>

Constitutional Court of the Republic of North Macedonia, 'Procedure' (Constitutional Court of the Republic of North Macedonia, 2021) <http://ustavensud.mk/?page_id=4607>

Branca Eleonora, ' 'Yet it moves . . . ': The Dynamic Evolution of State immunity in the 'Comfort Women' case' (*EJIL: Talk!*, 7 April 2021) <https://www.ejiltalk.org/yet-it-moves-the-dynamic-evolution-of-state-immunity-in-the-comfort-women-case/>

Hee-Seok Shin Ethan and Minyoung Lee Stephanie, 'Japan Cannot Claim Sovereign Immunity and also Insist that WWII Sexual Slavery was Private Contractual Acts' (*Just Security*, 20 July 2021) <https://www.justsecurity.org/77492/japan-cannot-claim-sovereign-immunity-and-also-insist-that-wwii-sexual-slavery-was-private-contractual-acts/>

Pavoni Riccardo, 'Germany versus Italy reloaded: Whither a human rights limitation to State immunity?' (*Questions of International Law*, 31 July 2022) <http://www.qil-qdi.org/germany-versus-italy-reloaded-whither-a-human-rights-limitation-to-state-immunity/#_ftnref60>

Ryngaert Cedric and Kim Hye-Min, 'Justice for World War II's 'Comfort Women': Lessons from the Seoul District Court's rejection of Japan's State Immunity' (*UCALL Blog*, 23 February 2021) <https://ucallblog.sites.uu.nl/2021/02/23/justice-for-world-war-iis-comfort-women-lessons-from-the-seoul-district-courts-rejection-of-japans-state-immunity/ >

Faye Jan, 'Copenhagen Interpretation of Quantum Mechanics' (*Stanford Encyclopedia of Philosophy*, 6 December 2019) < https://plato.stanford.edu/entries/qm-copenhagen/#MeaProClaQuaDis>

Lincoln Don, 'Copenhagen Interpretation of Quantum Mechanics' (*Wondrium Daily*, 18 December 2020) <https://www.wondriumdaily.com/copenhagen-interpretation-of-quantum-mechanics>

Farlex Dictionary of Idioms, 'A riddle, wrapped in a mystery, inside an enigma' (*The Free Dictionary*, 2015) <https://idioms.thefreedictionary.com/a+riddle%2C+wrapped+in+a+mystery%2C+inside+an+enigma>

International Documents

General Assembly & Security Council

UNGA Res 1514(XV) 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (14 December 1960) UN Doc A/RES/1514(XV)

UNGA Res 2260 'Question of Mauritius' (16 December 1965) UN Doc A/RES/2066(XX)

UNGA Res 523 (VI) 'Integrated Economic Development and Commercial Agreements' (1952) UN Doc A/RES/523

UNGA Res 1803 (XVII) 'Permanent Sovereignty over Natural Resources' (14 December 1962) UND Doc A/RES/1803

UNGA Res 3281(XXIX) 'Charter of Economic Rights and Duties of States' (12 December 1974) A/RES/3281(XXIX)

UNGA Res 3171 (XXVIII) 'Permanent Sovereignty over Natural Resources' (17 December 1973) UN Doc A/RES/3171 (XXVIII)

International Law Commission

ILC, 'Comments and Observations Received from Governments' (27 January, 3 & 12 April 2006) UN Doc A/CN.4/561 and Add 1-2

ILC, 'Content of the International Responsibility of a State' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, reproduced in [2001/II – Part Two] YBILC 86

ILC, 'Draft Articles on the Law of Treaties with Commentaries' (4 May–19 July 1966) UN Doc A/CN.4/191, reproduced in [1966/II] YBILC 187

ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 122

ILC, 'Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*)' (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, reproduced in [2019/II – Part Two] YBILC 141

ILC, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), with Commentaries' (2022) A/77/10

ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 11

ILC, 'Fifth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (14 March 2018) UN Doc A/CN.4/717

ILC, 'First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur' (26 March 1962) UN Doc A/CN.4/144 and Add.1 reproduced in [1962/II] YBILC

ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations with Commentaries Thereto' (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10 reproduced in [2006/II – Part Two] YBILC 160

ILC, 'Identification of Customary International Law: Comments and Observations received from Governments, Comments and Observations by the Kingdom of the Netherlands submitted on 23 January 2018' (14 February 2018) UN Doc A/CN.4/716

ILC, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (27 April–5 June and 6 July–7 August 2020) UN Doc. A/CN.4/741

Wood Michael, 'Second report on identification of customary international law' [2014] Sixty-sixth session of the International Law Commission A/CN.4/672

Wood Michael, 'Fifth report on identification of customary international law – Addendum' [2018]

Seventieth Session of the International Law Commission A/CN.4/717/Add.1.

Wood Michael, 'First report on formation and evidence of customary international law' [2013] Sixty-fifth Session of the International Law Commission A/CN.4/663

Mohammed Bedjaoui, 'First Report on Succession of States in Respect of Rights and Duties Resulting From Sources Other Than Treaties', UN Doc. A/CN.4/204, in *Yearbook of the International Law Commission*, II, 1968, UN Doc. A/CN.4/SER.A./1968

ILC, First Report on Formation and Evidence of Customary International Law by Sir Michael Wood, Special Rapporteur' (17 May 2013) UN Doc. A/CN.4/663

ILC, 'Summary Records of the 8th Session' (23 April-4 July 1956) [1956/1] YBILC 1

ILC, 'Summary Record of 726th Meeting' (1964) UN Doc. A/CN.4/SR.726 reproduced in [1964/I] YBILC 20

ILC, Sixth Report of the Special Rapporteur, Sir Humphrey Waldock (1966) II Yearbook of the International Law Commission 51

ILC, 'Second Report on Identification of Customary International Law, by Michael Wood, Special Rapporteur' (22 May 2014) UN Doc A/CN.4/672

ILC, 'Fourteenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur' (2009) A/CN.4/614

ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with commentaries thereto' (2006) Vol. II/Part Two Yearbook of the International Law Commission 161

ILC, Report of the International Law Commission Seventy-second session (26 April–4 June and 5 July–6 August 2021) A/76/10

ILC, 'Report of the International Law Commission Seventieth Session' (30 April–1 June and 2 July–10 August 2018) A/73/10

ILC, 'Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur' (2 May-10 June and 4 July-12 August 2016) A/CN.4/694

ILC, Draft Articles on Jurisdictional Immunities of States and their Property, with commentaries (1991) II(2) Yearbook of International Law Commission 13

Anatolevich Kolodkin Roman, Special Rapporteur, 'Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction' (29 May 2008) A/CN.4/601

ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi' (13 April 2006) A/CN.4/L.682 and Add. 1

International Law Association

Committee on Formation of Customary (General) International Law, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law' (London Conference 2000)

ILA Study Group on Principles of the Engagement of Domestic Courts with International Law, 'Final Report Mapping the Engagement of Domestic Courts with International Law' (2016)

Other International Documents

ICRC, 'Rule 1 The Principle of Distinction between Civilians and Combatants' (*ICRC IHL Database*, 2021) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule1>

Germany, 'On the Application of International Law in Cyberspace – Position Paper' (Auswärtiges Amt, March 2021). <https://www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf >

International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009)

Resolution of the All African People's Conference (Accra, 5-13 December 1958) reproduced in 37(215) Current History 41.

Organization of African Unity, 'Border Dispute Among African States' (17-21 July 1964) AHG/Res. 16 (I). Later enshrined in Constitutive Act of the African Union (adopted 11 July 2000)

Root Elihu, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proc 16

Insitut de Droit International 'VII — Les Sessions de l'Institut de Droit International' (1952) 44(II) AIDI

Institut de Droit International, '7th Commission – Report: Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)? – Rapporteur M Arsanjani' (2021)

Netherlands, 'ILC Draft Conclusions on the Identification of Customary International Law – Comments and Observations by the Kingdom of the Netherlands' (*UN*, 2018) [5] <https://legal.un.org/ilc/sessions/70/pdfs/english/icil_netherlands.pdf>

Advisory Committee on Issues of Public International Law (CAVV), 'Advisory Report on the Identification of Customary International Law' (*CAVV*, 2017) <https://www.advisorycommitteeinternationallaw.nl/binaries/cavv-en/documents/advisory-reports/2017/11/01/the-identification-of-customary-international-law/The_identification_of_customary_international_law_CAVV-Advisory-report-29_201711.PDF>

Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee (The Hague, 16-24 June 1920)

Table of Cases

International Court of Justice

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) [2010] ICJ Rep 403

Asylum Case (Colombia v Peru) (Judgment) [1950] ICJ Rep 266

Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits Judgment) [1986] ICJ Rep 14

Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits) [2010] ICJ Rep 14

Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Carribean Sea (Nicaragua v Honduras) (Judgment) [2007] ICJ Rep 659

Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment) [2002] ICJ Rep 3

- Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal

Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment) [1985] ICJ Rep 13

Case Concerning the Frontier Dispute (Benin/Niger) (Judgment) [2005] ICJ Rep 90

Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali) (Judgment) [1986] ICJ Rep 554

Case concerning the Gabčikovo Nagymaros Project (Hungary/Slovakia) Judgment of 25 September 1997 [1997] ICJ Rep 7

- Separate Opinion of Judge Bedjaoui

Case Concerning the Kasikili/Sedudu Island (Botswana/Namibia) (Declaration of Judge Higgins) [1999] ICJ Rep 1113

Case Concerning the Land and Maritime Boundary (Cameroon v Nigeria: Equatorial Guinea intervening) (Judgment) [2002] ICJ Rep 30

Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (Judgment) [2015] ICJ Rep 665

Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA) (Merits) [184] ICJ Rep 246

Dispute over the Status and Use of the Waters of the Silala (Chile v. *Bolivia)* (Judgment) <https://www.icj-cij.org/sites/default/files/case-related/162/162-20221201-JUD-01-00-EN.pdf>

Fisheries Case (United Kingdom v Norway) (Judgment) [1951] ICJ Rep 116

Frontier Dispute (Burkina Faso/Niger) (Judgment) [2013] ICJ Rep 44

- Separate Opinion of Judge Yusuf

International Status of South West Africa (Advisory Opinion) [1950] ICJ Rep 128

- Separate Opinion by Sir Arnold McNair

Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (Judgment) [2012] ICJ Rep 99

- Separate Opinion of Judge Bennouna
- Dissenting Opinion of Judge Yusuf

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (Judgment) [1992] ICJ Rep 351

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep. 16

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) [2019] ICJ Rep. 95

- Written Statement submitted by the Government of the Republic of South Africa
- Statement of Belize
- Written Statement of the Kingdom of the Netherlands

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep. 226

- Dissenting Opinion of Judge Higgins 583

North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment) [1969] ICJ Rep 3

- Dissenting Opinion of Judge Tanaka 183

Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshal Islands v. United Kingdom)

- Dissenting Opinion of Judge Cançado Trindade 833

Permanent Court of International Justice

Case Concerning the Factory at Chorzów (Germany v Poland) (Merits) [1928] PCIJ Series A No 17

Factory At Chorzów (Germany v Poland) (Jurisdiction) Judgment No 8 [1927] PCIJ Series A No 9, Dissenting Opinion by M Ehrlich 39

Question of Jaworzina (Polish-Czechoslovakian Frontier) (Advisory Opinion) [1923] PCIJ Series B, No. 8

SS 'Lotus' (France v. Turkey) (Judgment) [1927] PCIJ Series A No 10

International Tribunal for the Law of the Sea

Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Order of 8 October 2003) [2003] ITLOS Rep. 10 [99]

MOX Plant (Ireland v United Kingdom) (Order of 3 December 2001) [2001] ITLOS Rep. 95

- Separate Opinion of Judge Wolfrum 131
- Separate Opinion of Judge Anderson 124

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion) [2011] ITLOS Rep. 2011

Arbitration

Arbitration between Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil and the Republic of Estonia, Case No. ARB/99/2, Award (21 June 2001)

Azinian v Mexico (Award of 1 November 1999) ICSID Case No ARB(AF)/97/2

Bilcon v Canada (Award on Jurisdiction and Liability of 17 March 2015) PCA Case No. 2009-04

CMS Gas Transmission Company v Argentina (Award of 12 May 2005) ICSID ARB/01/8

Eco Oro Minerals Corp v Colombia (Decision on Jurisdiction, Liability and Directions on Quantum of 9 September 2021) ICSID Case No ARB/16/41

France (Affaire Chevreau) v UK (Award of 9 June 1931) 2 RIAA

Island of Palmas (Netherlands v United States of America) (1928) UNRIAA 829

Loewen Group, Inc and Raymond L Loewen v USA (Award of 26 June 2003) ICSID Case No ARB(AF)/98/

Merrill & Ring Forestry L, P. v Canada (Award of 31 March 2010) UNCITRAL

Mondev International Ltd v USA (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2

Occidental Exploration and Production Company v Ecuador (Final Award of 1 July 2004) UNCITRAL

Pope & Talbot Inc v Canada (Award in Respect of Damages of 31 May 2002) UNCITRAL

USA (Harry Roberts) v Mexico (Award of 2 November 1926) 4 RIAA

USA (Hopkins) v Mexico (1926) 4 RIAA

USA (LFH Neer) v Mexico (Award of 15 October 1926) 4 RIAA

Waste Management, Inc v Mexico ("Number 2") (Award of 30 April 2004) ICSID Case No ARB(AF)-/00/3

Windstream v Canada (Award of 27 September 2016) PCA Case No 2013-22

International Criminal Tribunal for the Former Yugoslavia (ICTY)

Prosecutor v Anto Furundzija (Judgment) IT-95-17/1-T (10 December 1998)

Prosecutor v Dražen Erdemović (Appeal Chamber Judgment) [7 October 1997] ICTY IT-96-22-A

Prosecutor v Duško Tadić (Judgment) IT-94-1-A (15 July 1999)

Prosecutor v Zoran Kupreškič and Others (Trial Judgment) IT-95-16-T (14 January 2000)

Prosecutor v. Dusko Tadic, Opinion and Judgment [7 May 1997] IT-94-1-T

Prosecutor v. Hadzihasanovic et al., Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility [16 July 2003] IT-01-47-AR72

International Criminal Tribunal for Rwanda (ICTR)

Prosecutor v Akayesu, Judgment [2 September 1998] ICTR-96-4-T

International Criminal Court (ICC)

Prosecutor v Omar Hassan Ahmad Al-Bashir, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir [6 July 2017] ICC-02/05-01/09

European Court of Human Rights (ECtHR)

Al-Adsani v United Kingdom 21 November 2001) (Judgment) European Court of Human Rights, App no 35763/97

WTO

Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands (21 December 2022) Award of the Arbitrators WT/DS591/ARB25

European Communities—Anti- Dumping Duties on Imports of Cotton Type Bed Linen from India (30 October 2000) WTO Panel Report WT/DS141/R

European Communities—Anti- Dumping Duties on Imports of Cotton Type Bed Linen from India (1 March 2001) Report of the Appellate Body WT/DS141/AB/R

United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (24 July 2001) Report of the Appellate Body WT/DS184/AB/R

United States - Continued Existence and Application of Zeroing Methodology (1 October 2008) Report of the Panel WT/DS350/R

United States – Continued Existence and Application of Zeroing Methodology (4 February 2009) Report of the Appellate Body WT/DS350/AB/R

United States - Final Anti-dumping Measures on Stainless Steel from Mexico (20 December 2007) Report of the Panel WT/DS344/R

United States - Final Anti-dumping Measures on Stainless Steel from Mexico (30 April 2008) Report of the Appellate Body WT/DS344/AB/R

National Cases

United States of America

Flores and ors v Southern Peru Copper Corporation (29 August 2003) 2nd Circuit Court of Appeal of the United States of America Docket No 02-9008, 414 F.3d 233 (2d Cir. 2003), ILDC 303 (US 2003)

Institute of Cetacean Research and ors v Sea Shepherd Conservation Society and Watson (24 May 2013) United States Court of Appeals 9th Circuit, Appeal judgment, 725 F3d 940 (9th Cir) ILDC 2176 (US 2013)

Kiobel and ors (on behalf of Kiobel and Tusima) v Royal Dutch Petroleum Co and ors (17 September 2010) 2nd Circuit Court of Appeals of the United States of America Docket No 06-4800-cv, Docket No 06-4876-cv, 623 F3d 111 (2d Cir2010), ILDC 1552 (US 2010)

The Exchange v. McFaddon, 11 U.S. 7 Cranch 116 116 (1812)

United States v Bellaizac-Hurtado and ors (6 November 2012) 11th Circuit Court of Appeal of the United

States 700 F3d 1245 (11th Cir 2012), ILDC 1949 (US 2012)

United States v Beyle and Abrar (3 April 2015) 4th Circuit Court of Appeal of the United States 782 F3d 159, 169 (4th Cir), 136 S Ct 179 (2015) ILDC 2483 (US 2015)

United States v Salad and ors (30 November 2012) District Court for the Eastern District of Virginia 908 F Supp 2d 730 (ED Va 2012), ILDC 2027 (US 2012)

United State v Dire and ors (23 May 2012) United States Court of Appeal 4th Circuit, Appeal Judgment 80 F3d 446 (4th Cir 2012), ILDC 1985 (US 2012)

United State v Hasan and ors (29 October 2010) District Court for the Eastern District of Virginia, Decision on motion to dismiss, No 2:10cr56, ILDC 1586 (US 2010)

United Kingdom

R and United Nations High Commissioner for Refugees (intervening) (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport (9 December 2004) United Kingdom House of Lords UKHL 55, [2005] 2 AC 1, [2005] 2 WLR 1, [2005] 1 All ER 527, ILDC 110 (UK 2004)

The Queen (on the Application of The Freedom and Justice Party and ors, Yehia Hamed), Amnesty International (intervening) and Redress (intervening) v Secretary of State for Foreign and Commonwealth Affairs and Director of Public Prosecutions (19 July 2018) Court of Appeal of United Kingdom Civil Division, Appeal Judgment, [2018] EWCA Civ 1719, ILDC 3055 (UK 2018)

Trendtex Trading Corporation v Central Bank of Nigeria (13 January 1977) Appeal Court of the United Kingdom, Appeal Decision, QB 529 [1977] 1 All ER 881, [1977] 2 WLR 356, ILDC 1735 (UK 1977)

Israel

Yesh Din–Volunteers for Human Rights v. Chief of General Staff (24 May 2018) Supreme Court of Israel HCJ 3003/18

Yosefov and ors v Egyp and Attorney General (joining) (13 February 2011) Supreme Court of Israel, Motion to dismiss, CC (BS) 5006-08, ILDC 1771 (IL 2011)

Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors (13 December 2006) Supreme Court of Israel, HCJ 769/02

A and B v Israel (11 June 2008) Israel Supreme Court, Appeal Decision, CrimA 6659/06, 1757/07, 8228/07, 3261/08, ILDC 1069 (IL 2008)

Israel v Saidi and ors (3 May 2010) Supreme Court of Israel, CA 9656/08, ILDC 2101 (IL 2008)

Israel v 'Estelle' (31 August 2014) Haifa District Court, Original petition, Claim in Rem 26861-08-13, ILDC 2299 (IL 2014)

Her Majesty the Queen in Right of Canada v Edelson and ors (3 June 1997) Supreme Court of Israel, Final appeal judgment, PLA 7092/94, 51(1) PD 625, ILDC 577 (IL 1997)

Ireland

Horgan v Ireland and ors (28 April 2003) Ireland High Court, Application for declaratory relief 2003 No 3739P, [2003] IEHC 64, (2003) 2 IR 468, ILDC 486 (IE 2003)

Italy

'Abu Omar' case, General Prosecutor at the Court of Appeals of Milan v Adler and ors (29 November 2012) Supreme Court of Cassation of Italy, Final appeal judgment, No 46340/2012, ILDC 1960 (IT 2012)

Alessi and ors v Germany and Presidency of the Council of Ministers of the Italian Republic (intervening) (21 January 2014) Florence Court of First Instance, Referral to the Constitutional Court, Order No 85/2014, ILDC 2725 (IT 2014)

British Council v Dickinson (8 March 2019) Court of Cassation of Italy, Final Appeal Judgment, No 6884/2019, ILDC 3010 (IT 2019)

Federal Republic of Germany v Ferrini and Ferrini (21 January 2014) Supreme Court of Cassation of Italy, Appeal Judgment, No 1136, ILDC 2724 (IT 2014)

Ferrini v Germany (11 March 2004) Supreme Court of Cassation of Italy, Appeal decision, Cass no 5044/04, ILDC 19 (IT 2004)

Frascà v Germany and Giachini (guardian of Priebke) and Italy (joining) (21 February 2013) Court of Cassation of Italy, Preliminary order on jurisdiction, No 4284/2013, ILDC 1998 (IT 2013)

Germany v Mantelli and ors (29 May 2008) Supreme Court of Cassation of Italy, Preliminary Order on Jurisdiction, Case No 14201/2008, (2008) Riv Dir Int 896, ILDC 1037 (IT 2008)

Germany v Milde (Max Josef) (13 January 2009) Supreme Court of Cassation of Italy, Appeal Judgment, Case no 1072/2009, (2009) 92 Riv Dir Int 618, ILDC 1224 (IT 2009)

Germany v Prefecture of Vojotia representing 118 persons from Distomo village and Presidency of the Council of Ministers of Italy (20 May 2011) Final appeal judgment (opposition to enforceability of a foreign ruling in Italy) No 11163/2011, ILDC 1815 (IT 2011)

Mabrouk v Registro Italiano Navale SpA (10 December 2020) Supreme Court of Cassation of Italy, Final appeal on a point of law, No 28180/2020, ILDC 3224 (IT 2020)

Military Prosecutor v Albers and ors and Germany (joining) (9 August 2012) Supreme Court of Cassation of Italy, Final appeal judgment No 32139/2012, ILDC 1921 (IT 2012)

Simoncioni and ors v Germany and President of the Council of Ministers of the Italian Republic (intervening) (22 October 2014) Constitutional Court of Italy, Constitutional review, Judgment No 238/2014, ILDC 2237 (IT 2014)

Toldo v Germany (7 July 2020) Supreme Court of Cassation of Italy, Appeal judgment, No 20442, ILDC 3220 (IT 2020)

Belgium

Belgium v Ms XX and Ms XX (26 December 2018) Brussels Court of First Instance 2018/XX/C, ILD 3006 (BE 2018)

Sawas v Saudi Arabia (11 January 2007) Brussels Labor Court, First Instance Judgment, Journal des Tribunaux 494, ILDC 1146 (BE 2007)

Estonia

Prosecutor v Paulov (Karl-Leonhard) (21 March 2000) Supreme Court of Estonia, Cassation Judgment no 3-1-1-31-00 Official Gazette, Riigi Teataja-RT Part III 2000, 11, 118, ILDC 198 (EE 2000)

Greece

Germany v Prefecture of Voiotia (Representing 118 persons from Distomo village) (4 May 2000) Supreme Court of Greece, Petition on cassation against default, no 11/2000, (2000) 49 Nomiko Vima 212, ILDC 287 (GR 2000)

Slops, Marine Environmental Services MC and Environmental Protection Technical SA v International Oil Pollution Compensation Fund 1992 (16 February 2004) Piraeus Court of Appeal, Appeal Judgment No 103/2004, ILDC 855 (GR 2004)

Germany

Former consular employee at the Consulate General of Croatia in Stuttgart v Croatia (23 October 2014) Higher Regional Court of Stuttgart, Second instance order, Case No 5 U 52/14, ILDC 2428 (DE 2014) 5 U 52/14, ILDC 2428 (DE 2014)

Jorgic Case, Individual Constitutional Complaint (12 December 2000) Constitutional Court Germany 2 BvR 1290/99, ILDC 132 (DE 2000)

Prevention of the use of Ramstein Air Base for United States armed drone strikes in Yemen, Yemini citizen living in Sana'a and ors v Germany (19 March 2019) German Higher Administrative Court of North Rhine-Westphalia, Appeal, 4 A 1361/15, ILDC 3059 (DE 2019)

Stationierung US-Amerikanischer Atomwaffen auf dem Fliegerhorst Büchel, K v Federal Republic of Germany (15 March 2018) Constitutional Court of Germany, 2 BvR 1371/13, ILDC 2941 (DE 2018)

Unidentified holders of Greek government bonds v Greece (19 December 2017) Federal Court of Justice of Germany, Appeal decision, XI ZR 796/16, ILDC 2881 (DE 2017)

Slovenia

Decision No. UP-13/99 (8 March 2001) Constitutional Court of the Republic of Slovenia, Selected Decisions 1991-2015, 354

Spain

Guatemala Genocide case (26 September 2005) Constitutional Court of Spain, Case No 237/2005, ILDC 137 (ES 2005)

Sweden

Bostadsrättsföreningen Villagatan 13 v Belgium (30 December 2009) Supreme Court of Sweden, Judgment, Ö 2753-07, NJA 2009 s 95, ILDC 1672 (SE 2009)

Switzerlands

A v Swiss Federal Public Prosecutor and ors (25 July 2012) Federal Criminal Court of Switzerland, Final appeal judgment BB. 2011.140, TPF 2012 97 ILDC 1933 (CH 2012)

South Africa

American Soda Ash Corporation and CHC Global (Pty) Limited v Competition Commission of South Africa and ors. (25 October 2002) Competition Appeal Court of South Africa, Case 12/CAC/DEC01, ILDC 493

(ZA 2002)

South Korea

Case no.: 2016 Ga-Hap 505092 Compensation for Damage (Others) (8 January 2021) Seoul Central District Courrt, 34th Civil Chamber, Judgment < https://womenandwar.net/kr/wp-content/uploads/2021/02/ENG-2016_Ga_Hap_505092_23Feb2021.pdf?ckattempt=1> (unofficial translation by The Korean Council for Justice and Remembrance for the Issues of Military Sexual Slavery by Japan)

New Zealand

Attorney-General v Zaoui and Inspector-General of Intelligence and Security and Human Rights Commission (intervening) (21 June 2005) Supreme Court of New Zealand [2005] NZSC 38, (2006) 1 NZLR 289, (2005) 7 HRNZ 860, ILDC 81 (NZ 2005)

North Macedonia

ТС1.бр.7613, Veles Court of First Instance, North Macedonia (2013)

Рев2.бр.111/2016, Supreme Court of the Republic of Macedonia (2016)

Решение У.бр.230/2005, Constitutional Court of the Republic of JMacedonia (31 May 2006)

Canada

Canada Ltée (Spraytech, Société d'arrosage) and Services des espaces verts Ltée/ Chemlawn v Town of Hudson (28 June 2001) Supreme Court of Canada, Docket No 26937, 2001 SCC 40, ILDC 185 (CA 2001)

Hape v The Queen (7 June 2007) Supreme Court of Canada Docket No 31125, 2007 SCC 26, [2007] 2 SCR 292, 280 DLR (4th) 385, 220 CCC (3d) 161, 47 CR (6th) 96, 160 CRR (2d) 1, 227 OAC 191, ILDC 758 (CA 2007)

Parent and ors v Singapore Airlines Ltd and Civil Aeronautics Administration (22 October 2003) Superior Court of Quebec, 2003 IIJ Can 7285 (QC CS), ILDC 181 (CA 2003)

The Queen v Klassen (19 December 2008) Supreme Court of Canada, Docket No 24292, 2008 BCSC 1762, 240 CCC (3d) 328, 63 CR (6th) 373, 182 CRR 291, ILDC 941 (CA 2008)

Colombia

García de Borrisow v Embassy of Lebanon (13 December 2007) Supreme Court of Justice of Colombia, Decision on Admissibility, Case No 32096, ILDC 1009 (CO 2007)

Latvia

VČ v Embassy of the Russian Federation to Latvia (12 December 2007) Supreme Court of Latvia, Appeal decision on Jurisdiction, Case No SKC-237, No 10 (514), ILDC 1063 (LV 2007)

The Netherlands

Claimant v Defendant I and Defendant II (29 January 2020) The Hague District Court, Judgment, Case No C-09-554385-HA ZA 18-647, ECLI:NL:RBDHA:2020:559, ECLI:NL:RBDHA: 2020:667, ILDC 3131 (NL 2020)

Appellant v Respondent 1 and Respondent 2 (7 December 2021) Gerechtshof Den Haag, Zaaknummer C/09/554385/HA ZA 18/647, ECLI:NL:GHDHA:2021:2374

Kenya

Andrew Manunzyu Musyoka case. *Andrew Manunzyu Musyoka* (15 December 2005) High Court of Kenya at Machakos, Succession Cause 303 of 1998

Katet Nchoe & Another v Republic (11 February 2011) High Court of Kenya, Criminal Appeal No 115 of 2010

Martha Wanjiru Kimata & another v Dorcas Wanjiru & Another (24 February 2015) High Court of Kenya, Civil Appeal No 94 of 2014

Mary Rono v Jane Rono & Another (29 April 2005) Kenyan Court of Appeal at Eldoret, Civil Appeal No 66 of 2002

Table of Treaties

1920 Statute of the Permanent Court of International Justice (adopted 16 December 1920, entered into force 8 October 1921) 6 LNTS 389

1945 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993

1947 Statute of the International Law Commission, Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981

1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397

1998 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3

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

United Nations Convention on Jurisdictional Immunities of States and Their Property (Adopted by the General Assembly of the United Nations on 2 December 2004. Not yet in force)

Academisch Samenvatting

Het internationaal gewoonterecht (CIL) is, naast verdragen en algemene rechtsbeginselen, een van de drie primaire bronnen van het internationaal recht. Regels van internationaal gewoonterecht komen voort uit het gedrag van staten en hebben als doel het reguleren van interstatelijke en andere internationale betrekkingen. Om gewoonteregels te laten ontstaan, moet er een voldoende accumulatie van staatspraktijk zijn die gepaard gaat met de houding dat deze praktijk wordt aanvaard of verwacht als een kwestie van recht (*opinio juris*). Staatspraktijk en *opinio juris* vormen de zogenaamde „twee elementen" van het internationaal gewoonterecht. Eenmaal gevormd, zijn gewoonteregels bindend voor alle staten, ook voor staten waarvan de praktijk misschien niet heeft bijgedragen aan het ontstaan van de specifieke regel in kwestie.

Historisch gezien vormen regels van internationaal gewoonterecht de hoeksteen van het internationale rechtssysteem. Het spreekt dan ook voor zich dat er geen gebrek is aan wetenschappelijke publicaties over de doctrinaire en praktische aspecten van het gewoonterecht en de problemen ervan. Terwijl de wetenschap zich uitgebreid en divers heeft beziggehouden met gewoonterecht als bron van internationaal recht, is er één aspect dat minder aandacht heeft gekregen, namelijk de interpretatie van het internationaal gewoonterecht.

De interpretatie van het internationaal gewoonterecht is een vraag over hoe we de reikwijdte en inhoud van gewoonteregels bepalen. Traditioneel heeft de wetenschap deze vraag ondergebracht in de paraplu van identificatie en de discussie over de twee-elementen-benadering van gewonterecht identificatie. Dit heeft geleid tot een discussie over internationaal gewoonterecht waarin het óf identificatie óf niets is. Ofwel worden de regels van het internationaal gewoonterecht geïdentificeerd aan de hand van de praktijken en *opinio juris* van de staten, ofwel doet iemand iets verkeerd. De beperkte voorwaarden van dit debat hebben ertoe geleid dat veel wetenschappers de doctrine van de twee elementen hebben afgewezen en alternatieve benaderingen hebben voorgesteld voor de identificatie van het internationaal gewoonterecht. Velen van hen hebben nauwkeurige en vernietigende kritiek geuit op de manier waarop CIL-regels worden geïdentificeerd en functioneren in de gangbare praktijk van het internationaal recht. Tegelijkertijd blijkt uit de praktijk van verschillende internationale actoren dat de tweeledige benadering van de identificatie van CIL een blijvertje is. Het is de benadering die domineert in de manier waarop internationale rechtbanken regels van gewoonterecht identificeren, en de benadering die bepaalt hoe staten en andere actoren in het veld argumenten over CIL formuleren. De tweeledige benadering is dus niet alleen een formule voor het identificeren van regels van het internationaal gewoonterecht, maar vertegenwoordigt een groter paradigma waarbinnen we moeten opereren wanneer we denken over of argumenteren op basis van het internationaal gewoonterecht. Dit tegenstrijdige beeld van de CIL-doctrine roept de vraag op: hoe nu verder?

Voortbouwend op de bestaande wetenschap over internationaal gewoonterecht, stel ik voor dat veel van de problemen met betrekking tot de CIL als bron van internationaal recht opnieuw gekaderd en opgelost kunnen worden op het niveau van interpretatie. Ik ben van mening dat we, door interpretatie te introduceren als een mogelijk analytisch kader met betrekking tot het bestaan van CIL-regels, de tweeledige benadering van CIL-identificatie niet hoeven te wijzigen of te verwerpen. De reden hiervoor is dat veel van de problemen die in de CIL-doctrine zijn vastgesteld, ten minste gedeeltelijk voortvloeien uit het beperkte kader van de discussie als identificatie of niets. Dus wat bij gebrek aan categorie gekarakteriseerd zou kunnen zijn als redenering die geen CIL-identificatie is, en daarom op de een of andere manier problematisch, is in feite CIL-interpretatie.

De belangrijkste bewering van dit proefschrift is dat gewoonteregels kunnen worden geïnterpreteerd en dat interpretatie een specifieke en afzonderlijke handeling is in het voortbestaan van gewoonteregels, anders dan hun identificatie. Bovendien vervult interpretatie cruciale functies in het voortbestaan van gewoonteregels, en is het zowel theoretisch relevant als praktisch noodzakelijk om rekening te houden met interpretatie. Het uiteindelijke resultaat van dit proefschrift is een theorie over interpretatie voor het internationaal gewoonterecht.

Het onderzoek voor deze scriptie begon met de brede theoretische vraag - kunnen regels van internationaal gewoonterecht worden geïnterpreteerd? Al vroeg in het onderzoek bleek dat regels van internationaal gewoonterecht niet alleen geïnterpreteerd kunnen worden, maar dat er ook talloze voorbeelden van zijn in de praktijk van nationale en internationale rechtbanken. Tegelijkertijd was het duidelijk dat het aanwijzen van deze voorbeelden op zich niet voldoende was om de conceptuele puzzel van de interpretatie van het CIL op te lossen. Er bleven vragen bestaan over de theoretische implicaties van de toepassing van het interpretatiekader op een ongeschreven bron, en over de rol die interpretatie speelt in het voortdurende bestaan van gewoonteregels. Dit leidde tot de uitbreiding van de onderzoeksvraag om nu ook de vraag te stellen - welke functies vervult interpretatie in de context van het internationaal gewoonterecht? Het is deze laatste, uitgebreide versie van de onderzoeksvraag die de focus en structuur van dit proefschrift heeft bepaald.

De belangrijkste vraag waar dit proefschrift zich mee bezighoudt is dus:

Wat houdt de interpretatie van internationaal gewoonterecht in, en welke functies vervult interpretatie in het voortdurende bestaan van gewoonterechtelijke regels?

Om deze onderzoekspuzzel aan te pakken is het onderzoek opgedeeld in vier deelvragen, die elk een stap vertegenwoordigen naar het uiteindelijke onderzoeksresultaat van deze scriptie - een theorie over interpretatie van internationaal gewoonterecht. De eerste twee deelvragen zijn gericht op het afbakenen van de basisbegrippen die ten grondslag liggen aan deze scriptie, namelijk internationaal gewoonterecht en interpretatie. Het onderzoek begint dus met de deelvragen: 1) waar hebben we het over als we het over CIL hebben? en 2) waar hebben we het over als we het over interpretatie hebben? Het beantwoorden van deze twee vragen stelt de scriptie in staat om te spreken van interpretatie van de CIL als een specifieke en afzonderlijke handeling in het voortdurende bestaan van gewoonteregels, anders dan identificatie. Na deze twee vragen te hebben beantwoord, kan de dissertatie

overgaan tot een meer gedetailleerde bespreking van de wijze waarop de interpretatie van de CIL plaatsvindt in de praktijk van de rechtbanken, teneinde de rol ervan vast te stellen. De resterende twee subvragen zijn 3) wat kunnen we leren van rechtbanken over de interpretatie van gewoonten? en 4) wat zijn de theoretische implicaties van deze bevindingen? Het proefschrift is onderverdeeld in vier inhoudelijke hoofdstukken, gevolgd door een algemene conclusie. Elk hoofdstuk is gewijd aan het beantwoorden van een van de geschetste deelvragen, waardoor de in deze dissertatie gepresenteerde interpretatietheorie voor de CIL geleidelijk wordt opgebouwd.

De hoofdstukken 1 en 2 zijn gewijd aan het beantwoorden van de eerste twee deelvragen en het leggen van de fundamenten van de theorie die in deze dissertatie wordt gepresenteerd. **Hoofdstuk 1** is dus gewijd aan de vraag: waar hebben we het over als we het over CIL hebben? Het doel van dit hoofdstuk is om het object van het onderzoek - het internationaal gewoonterecht - te definiëren, het proefschrift te situeren in de bestaande literatuur over het internationaal gewoonterecht, en de leemte te identificeren die het onderzoek opvult. Hoofdstuk 1 identificeert een schijnbaar onoverbrugbaar conflict in de doctrine van het internationaal gewoonterecht. Enerzijds is er een definitie die alomtegenwoordig is in de praktijk (de tweeledige benadering), en anderzijds is er sterke en nauwkeurige kritiek op deze definitie, zowel op theoretisch als op praktisch niveau. Dit genereert een beeld van twee schijnbaar onverenigbare kenmerken van CIL die desondanks naast elkaar blijven bestaan. Als antwoord hierop beweert deze dissertatie dat we deze tegenstrijdige kenmerken misschien wel met elkaar kunnen verzoenen als we interpretatie beschouwen als een fase in het voortdurende bestaan van een regel van internationaal gewoonterecht.

Tegen deze achtergrond gaat het proefschrift over naar **Hoofdstuk 2**, dat is gewijd aan de vraag: waar hebben we het over als we het over interpretatie hebben? Het doel van dit hoofdstuk is om af te bakenen hoe de term „interpretatie" in het kader van dit proefschrift wordt geconceptualiseerd, en om aan te tonen dat er geen theoretische belemmeringen zijn om dit concept toe te passen op regels van internationaal gewoonterecht. In Hoofdstuk 2 wordt interpretatie dus gedefinieerd als een handeling die zich bezighoudt met het bepalen van de reikwijdte en inhoud van rechtsregels, die ook de verduidelijking van de betekenis omvat. Terwijl de internationale rechtswetenschap interpretatie van oudsher opvat als het proces waarbij betekenis wordt toegekend aan geschreven tekst, toont Hoofdstuk 2 aan dat argumenten tegen de toepassing van dit concept op gewoonterecht geen steek houden. Ten eerste sluit het ongeschreven karakter van gewoonteregels de noodzaak van interpretatie niet uit. Hoewel ze inderdaad ongeschreven zijn, zijn gewoonteregels uitgedrukt in taal en hebben ze een normatieve inhoud. Als zodanig kan de behoefte ontstaan om deze inhoud te verduidelijken met het oog op toepassing in een bepaalde juridische en feitelijke context. Bovendien bevatten ongeschreven bronnen, in tegenstelling tot geschreven bronnen, een hogere mate van vaagheid en algemeenheid als gevolg van hun ongeschreven karakter. Ongeschreven bronnen zijn dus niet voor interpretatie vatbaar, maar lijken juist interpretatie nodig te hebben om hun anders ongrijpbare inhoud te begrijpen. Ten tweede leidt het proces van identificatie van gewoonteregels niet automatisch ook tot afbakening van hun inhoud. Het proces van identificatie van gewoonteregels omvat de evaluatie van overheidspraktijken en opinio juris en resulteert in een van de volgende twee opties: ofwel wordt vastgesteld dat een gewoonteregel bestaat, ofwel niet. Identificatie levert een algemene gewoonteregel op. Het proces van internationale gewoonterechtinterpretatie vindt daarentegen plaats nadat een regel van het internationale gewoonterecht is

geïdentificeerd, en omvat de verduidelijking van de betekenis, reikwijdte en inhoud van de regel in de specifieke context in kwestie. De interpretatie wordt gestuurd door interpretatieve overwegingen, zoals de betekenis en het doel van de regel, en kan leiden tot een aantal verschillende resultaten, afhankelijk van de context.

Na het definiëren van de basisbegrippen van internationaal gewoonterecht en interpretatie, en het wegwerken van argumenten dat interpretatie niet mogelijk is in de context van gewoonterecht, gaat het proefschrift verder met de hoofdstukken 3 en 4, waar de aard en de functies van de interpretatie van het internationaal gewoonterecht worden besproken. **Hoofdstuk 3** is gewijd aan de vraag wat we van rechtbanken kunnen leren over de interpretatie van gewoonterecht, en beantwoordt deze vraag met een diepgaande studie van de nationale jurisprudentie. De analyse in hoofdstuk 3 illustreert dat er voor alle nationale rechtbanken bepaalde gemeenschappelijke methoden en benaderingen zijn die kunnen worden onderscheiden wanneer deze rechtbanken gewoonterecht interpreteren. In het licht hiervan concludeert Hoofdstuk 3 met 3 belangrijke "lessen"die we uit de nationale rechtbanken kunnen trekken voor een theorie over de interpretatie van het recht van gewoonterecht. Ten eerste vertrouwen rechtbanken bij de interpretatie van gewoonterecht (zowel internationaal als binnenlands gewoonterecht) op interpretatiemethoden die vergelijkbaar zijn met de methoden die worden gebruikt bij de interpretatie van verdragen. Maar hoewel deze methoden vertrouwd zijn, zijn er ook enkele eigenaardigheden die naar voren komen wanneer ze worden toegepast op een ongeschreven regel. Daarom moet worden erkend dat de manier waarop deze methoden werken in de context van gewoonte moet worden aangepast. Ten tweede wijst de analyse op twee cruciale functies die interpretatie vervult in het voortdurende bestaan van gewoonteregels. In het bijzonder vervult interpretatie een concretiserende functie waarbij de inhoud van algemene gewoonteregels wordt gespecificeerd, en een evolutieve functie waarbij oudere gewoonteregels worden "geactualiseerdïn het licht van feitelijke of juridische ontwikkelingen in het bredere rechtssysteem. Ten derde, hoewel interpretatie een centrale functie vervult in de operationalisering en het voortbestaan van gewoonteregels, moet een theorie van interpretatie ook rekening houden met de beperkingen van het interpretatieproces. De interpretatie van gewoonteregels mag nooit leiden tot een resultaat dat duidelijk tegengesteld is aan het doel van de regel en mag nooit leiden tot een wijziging die niet wordt ondersteund door de relevante praktijk. Deze grenzen aan de interpretatie kunnen worden vastgesteld door interpretatieregels.

Hoofdstuk 4, ten slotte, is waar het proefschrift de theoretische implicaties van de bevindingen van Hoofdstuk 3 ontwikkelt en deze bevindingen ook "toetstäan voorbeelden van internationale rechtbanken. Hoofdstuk 4 is dus gewijd aan het beantwoorden van de vraag: wat zijn de theoretische implicaties van de bevindingen in Hoofdstuk 3 met betrekking tot een interpretatietheorie voor de CIL? Om deze vraag te beantwoorden, baseert het proefschrift zich op de bevindingen in Hoofdstuk 3 met betrekking tot de concretiserende en evolutieve functies van interpretatie en het besef dat er grenzen moeten worden gesteld aan het interpretatieve proces. In Hoofdstuk 4 wordt de bespreking van de twee functies uitgebreid met een meer diepgaande karakterisering van elke functie op basis van voorbeelden uit de internationale jurisprudentie. Dit wordt gevolgd door een reflectie over de mogelijkheden die deze functies bieden om de problemen van de CIL op te lossen, en over hun beperkingen. Op basis van de analyse in Hoofdstuk 4 betoogt de dissertatie dat de twee interpretatiefuncties van het internationaal gewoonterecht geen eigenaardigheid zijn

van de interpretatiepraktijk van nationale rechtbanken, maar in feite ook kunnen worden waargenomen in de internationale praktijk. Dit versterkt de observatie dat deze functies een inherent kenmerk zijn van interpretatie als het gaat om internationaal gewoonterecht. Tegen deze achtergrond maakt Hoofdstuk 4 de cirkel rond en bespreekt hoe de interpretatiefuncties de in Hoofdstuk 1 geschetste problemen van het internationaal gewoonterecht aanpakken.

Samen vormen deze vier hoofdstukken de onderdelen van het argumentatieve geheel dat de in deze dissertatie gepresenteerde interpretatietheorie voor het internationaal gewoonterecht is. Ze tonen aan dat gewoonteregels kunnen worden geïnterpreteerd en dat interpretatie cruciale functies vervult in hun voortdurende bestaan.

Biography

Nina Mileva joined the University of Groningen in 2018 as a PhD researcher on the TRICI-Law project. Prior to this, she held a position of junior researcher and lecturer at the University of Utrecht. She holds a Bachelor of Liberal Arts and Science from the Amsterdam University College, and an LLM in Public International Law from Utrecht University. Before coming to academia, Mileva acquired work experience at the International Criminal Tribunal for Yugoslavia (ICTY), the Amnesty International Center for International Justice in the Hauge, and the International Criminal Court (ICC). Parallel to her PhD, at the University of Groningen Mileva acted as a lecturer of Public International Law.

Mileva's research interests lie in the fields of general international law, legal theory, the relationship between national and international law, and critical approaches to international law. In the context of the TRICI-Law project, Mileva established cooperation with research institutions in North Macedonia, Kenya, Singapore, Indonesia and the Philippines, in order to study the application and interpretation of customary law in national courts. The products of this cooperation are available as the 'TRICI-Law National Reports' series. In addition to this, in 2019 Mileva participated in the organization of the first TRICI-Law conference on the 'Theory and Practice of CIL Interpretation' co-organized with the ESIL Interest Group on International Legal Theory & Philosophy (IGILTP), and in 2021 organized a workshop on "The Role of Interpretation in the Practice of Customary International Law'. The research outputs of these events include the edited volume 'The Theory, Practice, and Interpretation of Customary International Law' (CUP 2022) to which Mileva is the Assistant Editor, and the ESIL Reflections special series 'Customary Law Interpretation as a Tool'. At the University of Groningen, Mileva is a member of the Department of Transboundary Legal Studies, where she co-convenes the monthly research event TaLkS with colleagues Kostia Gorobets and Monique Kalsi.

As of September 2023, Mileva will take up a position as Assistant Professor of Public International Law at the University of Groningen.

Publications

Books and Monographs

N Mileva (assistant editor) in P Merkouris, J Kammerhoffer & N Arajärvi (eds.) The Theory and Philosophy of Customary International Law and its Interpretation (CUP 2022)

Chapters in Edited Volumes

N Mileva, 'A TWAIL Engagement with Customary International Investment Law: Some Strategies for Interpretation' in P Merkouris, A Kulick, J Alvarez-Zarrate, M Zenkiewicz (eds.) Custom and its Interpretation in International Investment Law (forthcoming CUP 2023)

N Mileva, 'The Role of Domestic Courts in the Interpretation of Customary International Law: How can we Learn from Domestic Interpretive Practices?' in P Merkouris, J Kammerhoffer & N Arajärvi (eds.) The Theory and Philosophy of Customary International Law and its Interpretation (CUP 2022) 453

N Mileva and M Fortuna, 'Environmental Protection as an Object of and Tool for Evolutionary Interpretation' in G Abi Saab et al (eds.) Evolutionary Interpretation and International Law (Hart Publishing 2019) 123

Articles

P Merkouris and N Mileva, 'Customary International Law as a Tool: Introduction' (2022) 11(1) ESIL Reflections 1

N Mileva, 'The Role of Customary International Law Interpretation in the Balancing of Interests at Sea: The Example of Prevention' (2020) 10/2020 TRICI-Law Research Paper Series

N Mileva, 'The Under-Representation of Third World States in Customary International Law: Can Interpretation Bridge the Gap?' 13(11) ESIL Conference Paper Series, Conference Paper No. 11/2019

N Mileva, 'State Responsibility in Peacekeeping: The Effect of Responsibility on Future Contributions' (2016) 12(1) Utrecht Law Review 122 (student paper)

Blog Posts

N Mileva, 'The Theory and Practice of Customary International Law: What's Interpretation Got to Do with It?' (CIL Dialogues, 25 November 2022) <https://cil.nus.edu.sg/blogs/the-theory-and-practice-of-customary-international-law-whats-interpretation-got-to-do-with-it/>

N Mileva and M Fortuna, 'The Case for CIL Interpretation–An Argument from Theory and an Argument from Practice' (Opinio Juris, 23 August 2019) <http://opiniojuris.org/2019/08/23/emerging-voices-the-case-for-cil-interpretation-an-argument-from-theory-and-an-argument-from-practice/>