Interpretation of Customary International Law in International Courts

Marina Fortuna

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by

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CONTENTS

Acknowledgments

While preparing for my first presentation as a PhD candidate, I have, by accident or not, come across the concept of the hero's journey developed by Joseph Campbell. Studying narratology and comparative mythology, Campbell reached the conclusion that all stories, from ancient to contemporary, follow a similar pattern, and, more than that, they can, in many cases, neatly be applied to our lives. It all starts with the protagonist of the story receiving a call to adventure which challenges her to go from the world that is known into the unknown. If she accepts the call and embarks upon the journey, then a road of tests, traps, trials and tribulations awaits. If the hero passes these tests successfully, then, at some point, she falls into an abyss, where she learns how to operate a sword, wear appropriate armour and all the other fancy equipment, meets the Dragon, kills the Dragon and comes out alive out of it. That's the 'Ultimate Boon', the Holy Grail, the place to which the whole journey led her to, the reason why she went on the journey in the first place.

But, you see, no hero gets to the 'Ultimate Boon', no hero survives all these trials and tribulations to be dubbed into the knighthood of the (still emerging) wise (We)men, without some help. No hero survives a journey alone. This is why in the next lines I would like to express my gratitude to those people who were by my side during this journey, my own magical helpers, inspirational heroes and my mentors.

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all the love, the love that was seen and the one that has gone unnoticed, but which was always there and which invariably had my back.

Моей семье, за поддержку и мудрость. За то, что заметили мой потенциал и дали ему, подобно маленькому зернышку, прорасти. Спасибо тем, кто был мягким и бережным, кто одаривал меня теплом и заботой, тем, кто помогал окрепнуть, поливал и следил за тем, чтобы древо моей души росло в правильном направлении, не скрутилось, не обезводилось, не перестало быть тем, чем оно есть на самом деле, и тем, кто направлял меня к непознанным высотам, кто учил добиваться и побеждать, кто взращивал во мне стойкость и умение претерпевать. Спасибо за щедрость, во всех ее смыслах, и спасибо за любовь, за любовь которую я успела заметить и за ту, что осталась мной незамеченной и недооцененной, но которая была со мной всегда и не переставала быть моей незыблемой опорой.

Abbreviations

Am. J. Juris. – American Journal of Jurisprudence

ASIL – American Society of International Law

Aust YBIL – Australian Yearbook of International Law

BYBIL – British Yearbook of International Law

Can J Law Jurisprud – Canadian Journal of Law & Jurisprudence

CIL – Customary International Law

CoE – Council of Europe

CUP – Cambridge University Press

ECCC – Extraordinary Chambers in the Courts of Cambodia

ECtHR – European Court of Human Rights

EJIL – European Journal of International Law

Eur J Legal Stud – European Journal of Legal Studies

Georget. J. Int. Law – Georgetown Journal of International Law

GlobCon – Global Constitutionalist Journal

GYIL – German Yearbook of Int Law

Harv. L. Rev. – Harvard Law Review

Harv. Hum. Rights J. – Harvard Human Rights Journal

Harv. Hum. Rights J., - Harvard Human Rights Journal

HRC – Human Rights Committee

ICC – International Criminal Court

ICJ – International Court of Justice

ICLQ – International and Comparative Law Review

ICLR – International Community Law Review

ICRC – International Committee of the Red Cross

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for Yugoslavia

ILC – International Law Commission

ILO – International Labour Organization

J. Int Crim. Just. – Journal of International Criminal Justice

J. Int. Disput. Settl. – Journal of International Dispute Settlement

LJIL – Leiden Journal of International Law

Loy LA Int'l & Comp L Rev – Loyola of Los Angeles International and Comparative Law Review

LPICT - Law and Practice of International Courts and Tribunals

LQR – Law Quarterly Review

MichJIntlL – Michigan Journal of International Law

Minn L Rev – Minnesota Law Review

MPEPIL – Max Planck Encyclopedia of International Law

NAFTA – North American Free Trade Agreement

NILR – Netherlands International Law Review

Nordic J Int'l L – Nordic Journal of International Law

OUP – Oxford University Press

PCIJ – Permanent Court of International Justice

RCADI – Recueil des Cours de l'Académie de Droit International de la Haye

Rev BDI – Revue Belge de Droit International

RGDIP – Revue Générale de Droit International Public

SC – Security Council

SCSL – Special Court for Sierra Leone

STL – Special Tribunal for Lebanon

Stud Transnat'l Legal Pol'y – Studies in Transnational Legal Policy

UN – United Nations

UNSC Res – United Nations Security Council Resolution

Utrecht J. Int. Eur. Law – Utrecht Journal of International and European Law

VandJTransnatlL – Vanderbilt Journal of Transnational Law

WCC – War Crimes Chamber in Bosnia and Herzegovina

YILC – Yearbook of the ILC

ZaöRV - Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

INTRODUCTION

1. Peeking Behind Closed Doors: the ILC's Draft Conclusions on the Identification of CIL

More than a hundred years have passed since a group of international law's ten illustrious minds sat down at a roundtable in the Peace Palace to establish the law to be applied by, at the time, the future PCIJ. To them the meaning of customary international law was quite clear: 'practice between nations accepted by them as law'.[1] The disagreements on how to formulate the definition of custom, although present, were minor. This stands in stark contrast to how preoccupied has recent scholarship been with the appropriate way to identify international custom.[2] The debate on the appropriate way of

[1] PCIJ, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee June 16th-July 24th, 1920, with Annexes (Van Langenhuysen Brothers 1920) 295.

[2] See indicatively G Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60/4 Harv. L. Rev. 539-570; G Fitzmaurice, 'Review of The Law of Treaties by Lord McNair' (1961) 37 BYBIL 563, 567; W Jenks, *The Prospects of International Adjudication* (Stevens & Sons 1964) 617-662; G Schwarzenberger, *The Inductive Approach to International Law* (Stevens & Sons 1965); M Bos, 'The Identification of Custom in International Law' (1982) 25 GYIL 9; T Hubert, 'L'évolution du droit international Cours général de droit international public' (1990) 222 RCADI 15, 37-40; G Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) 14-19; B Schlütter, *Developments in Customary International Law. Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Brill 2010); DJ Bederman, *Custom as a Source of Law* (CUP 2010) 135-167; A Alvarez-Jiménez, 'Methods for the Identification of Customary International Law in the International Court of Justice Jurisprudence 2000-2009' (2011) 60/3 ICLQ 681; RH Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal', in U Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 673; J d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011) 162-170; I Ziemele, 'Customary International Law in the Case Law of the European Court of Human Rights – the Method' (2013) 12 LPICT 243; WT Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis' (2014) 45 Georget. J. Int. Law 445; N Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (Routledge 2014); CJ Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making' (2015) 14 LPICT 51; S Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion' (2015) 26/2 EJIL 417; SM Choi and M Gulati, 'Customary International Law: How Do Courts Do it?', in Curtis Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 117; L Lijnzaad and Council of Europe (eds), *The Judge and International Custom* (Brill 2016); T Rauter, *Judicial Practice, Customary International Law and Nullum Crimen Sine Lege* (Springer 2017); Y Tan, 'The Identification of Customary Rules in International Criminal Law' (2018) 34/2 Utrecht J. Int. Eur. Law 92; M Wood, 'The Evolution and Identification of the Customary International Law of Armed Conflict' (2018) 51 VandJTransnatlL 727; BD Lepard, *Reexamining Customary International Law* (CUP 2017); H Bourgeois and J Wouters, 'Methods of Identification of International Custom: A New Role for Opinio Juris?', in RP Mazzeschi, and P De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018) 69-111; KA Johnston, 'The Nature and Context of Rules and the Identification of Customary International Law' (2021) 32/4 EJIL 1167; MC de Andrade, 'Identification of and Resort to Customary International Law by the WTO Appellate Body' in P Merkouris, N Arajärvi, J

the identification of customary international law (hereinafter also referred to as 'CIL') originates from Georg Schwarzenberger's 1948 article and subsequent book on the inductive approach to international law.[3] Schwarzenberger was resolute — it is unacceptable to *deduce* customary rules from morality or other similar considerations that have little to do with the *actual practice* of States.[4] Customary rules, he argued, had to be derived from State practice. To describe this method he used the term *induction*.[5] These two notions, induction and deduction, have been used in scholarly discussions on the identification of CIL ever since.

Although more than half a century has elapsed since the publication of Schwarzenberger's article, scholars still disagree on both the correct method of CIL identification and on meanings of State practice and *opinio juris*. In order to settle these debates, the ILC decided in 2012 to include the subject of CIL's formation and evidence in its programme of work. The goal was to provide guidance on the proper way to ascertain customary rules with an emphasis on what qualifies as evidence of State practice and *opinio juris*.[6] In 2013, the ILC changed the title of the subject from CIL's formation and evidence to 'identification of customary international law' and continued its arduous work until 2018 when it adopted its draft conclusions – the product of its six years of work.[7]

Adopting the view advanced by Schwarzenberger, the ILC established that in order 'to determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice

Kammerhofer, N Mileva (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) 277.

[3] Schwarzenberger (n 2).

[4] ibid 569.

[5] ibid 569.

[6] ILC, UN Doc A/73/10 'Draft Conclusions on Identification of Customary International Law, with Commentaries' YILC (2018) Vol. II 122 [53 et seq.].

[7] Summaries of the Work of the International Law Commission, 'Identification of Customary International Law' available at <https://legal.un.org/ilc/summaries/1_13.shtml> accessed 29 January 2023.

that is accepted as law'.[8] In other words, the ILC favoured induction as the method to determine customary international law.[9] However, it also stated that deduction was accepted, but only in two cases: when deriving a specific customary rule from a general rule and when rules of law form an indivisible regime.[10]

Reading the draft conclusions of the ILC and the commentaries thereto, it would seem that the case is closed. Yet, nothing could be farther from the truth. Whereas the commentaries to the draft conclusions only mention induction and deduction, during the discussions on the draft another term, that of *interpretation*, has been used repeatedly by different members of the Committee. Mr. Forteau affirmed that the ECtHR has given 'a slightly different *interpretation* of the customary law applicable to immunity'.[11] Mr. Hmoud called for a clarification of the situations when acts of the State, especially decisions of national courts, were either samples of State practice or showed the *interpretation* given by the State to a particular rule of CIL.[12] Mr. Petric contended that 'unless codified, customary international law was unwritten law, and the consequences of that fact in terms of its identification and *interpretation* should also be considered'.[13] Ms. Jacobsson mentioned 'European Union's *interpretation* of a rule of customary international law'.[14] Mr. Nolte, upon emphasising the interaction between CIL and general principles of law, noted that 'it was thus conceivable for a customary rule to be *interpreted* in the light of a recognized general principle'.[15] In the final stages of drafting, at the 3397th meeting, after congratulating the rapporteur on the

[8] ILC 'Draft conclusions' (n 6) 124.
[9] ibid 126 [5].
[10] ibid 126 [5].
[11] ILC, UN Doc A/CN.4/SR.3150 'Summary Record of the 3150th Meeting' YILC (2012) Vol. I 161 [64] emphasis added.
[12] ILC, UN Doc A/CN.4/SR.3183 'Summary Record of the 3183rd Meeting' YILC (2013) Vol. I 93 [21] emphasis added.
[13] ILC, UN Doc A/CN.4/SR.3225 'Summary Record of the 3225th Meeting as of 18 September 2014' YILC (2014) Vol. I 124 [37].
[14] ILC, UN Doc A/CN.4/SR.3184 'Summary Record of the 3184th Meeting' YILC (2013) Vol. I 100 [53] emphasis added.
[15] ILC, 'Summary Record of the 3183rd Meeting' (n 12) [14] emphasis added.

excellent work, Mr. Murase expressed his disagreement with the definition of the term identification that the Commission settled on.[16] He argued that the draft did not define identification, but only mentioned that it was used interchangeably with determination.[17] He subsequently added that 'it was not clear whether it included or excluded the process of *interpretation* and application of customary international law.'[18]Despite having been repeatedly mentioned throughout the Commission's discussions, the term interpretation had never made its way into the body of either the draft conclusions or the commentaries thereto. This is, perhaps, at least partly due to the stance taken by the Special Rapporteur, Sir Michael Wood, according to whom, 'if it was possible to speak of interpreting customary international law, determining the existence or non-existence of a rule and its detailed content could amount to interpretation.'[19] Yet, as this thesis will argue, this far from a mere terminological issue. Interpretation of CIL exists. It is present in the case law of international courts and tribunals and it is substantially different from identification of custom.

2. The Research Question(s), Methodology and Scope

The research question that this thesis sought to answer was:

> To what extent do international courts and tribunals resort to interpretation in order to determine the content of CIL and what methods of interpretation do they use to this end?

The answer to this question hinged on answering two preliminary questions. Firstly, what is interpretation and can customary rules be interpreted similarly to treaties? Secondly, how does this process of interpretation differ from identification of customary rules?

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[16] ILC, 'Provisional Summary Record of the 3397th Meeting from 11 June 2018' UN Doc A/CN.4/SR.3397 3.
[17] ibid.
[18] ibid, emphasis added.
[19] ILC, 'Provisional Summary Record of the 3338th Meeting from 2 May 2017' UN Doc A/CN.4/SR.3338 5.

As it will be explained in detail at a later point, the concept of CIL interpretation as used in this thesis refers to the interpretation of *rules* of customary international law and not the interpretation of the elements that make up custom – State practice and *opinio juris*. The term CIL interpretation is understood as the act of establishing the meaning and scope of a customary rule, the existence of which is not in dispute. In other words, while CIL identification concerns the finding of a customary rule by examining State practice and evidence of *opinio juris*, interpretation concerns the life of the rule past the stage of the establishment of its existence.

Considering the nature of both the main and the preliminary research questions, this thesis employs a doctrinal legal methodology and a case law based analysis.[20] Doctrinal legal methodology was used to examine the literature on customary international law, but also that on interpretation, especially treaty interpretation. Yet, principally this thesis is based on a case law analysis of, primarily, the case law on CIL interpretation and, secondarily, the case law on treaty interpretation.

In terms of method, this research was conducted in two stages. The first stage involved a collection and selection of judgments, including both judgments issued by the court and any separate or dissenting opinions, but also decisions by quasi-judicial bodies and other dispute settlement bodies. The selection of relevant judgments was made by using the word 'custom'. This choice was made for two reasons. Firstly, international courts and quasi-judicial bodies use different forms of this term interchangeably – 'custom', 'customary international law', 'customary rules', 'customary law'. However, 'custom' appears to be the lowest common denominator, which is why it was preferred. That is to say, using 'custom' as the keyword allowed to identify all the cases where international courts, quasi-judicial or other dispute settlement bodies referred to CIL. Secondly, although the subject of this thesis is not CIL as

[20] See I Dobinson, F Johns, 'Legal Research as Qualitative Research' in M McConville, WH Chui (eds), *Research Methods for Law* (2nd ed, Edinburgh University Press 2017) 18, 23-25 and 35-41; P Ishwara Bhat, *Idea and Methods of Legal Research* (OUP 2019) 143-168.

such, but its interpretation, 'custom' was chosen over 'interpret' or 'interpretation' because the preliminary research phase revealed that judges do not always explicitly use the word interpretation, even when they engage in CIL interpretation. It is at this stage that the relevant case law was sifted out and only the case law which contained the term 'custom' was used in the second stage of the research.

The second stage comprised an analysis of the relevant paragraphs. The analysis consisted of examining the language used by international courts, international judges in their dissenting or separate opinions or quasi-judicial or other dispute settlement bodies and disentangling its meaning. The focus here was, firstly, on determining whether the identified statement contained in the case is an instance of interpretation or identification of CIL. This analysis was done by way of a holistic interpretation of the relevant statement — both the meaning of the words used and the overall context within which the statement was made were taken into account. This choice was made to ensure, as far as a possible, an accurate understanding of the meaning that the court, the judge or the body intended to convey. In some cases, international courts, international judges or quasi-judicial bodies explicitly state that they are interpreting CIL. Looking at the overall context of the statement and the legal issue at stake, in some cases this is a case of interpretation of customary rules, whereas in others, this is a case of interpretation of the elements of the custom – State practice and/or *opinio juris*.[21] This means that the second type of case law, while used in Chapter 2 to distinguish between the two types of interpretation – interpretation of the rule versus interpretation of the State practice and *opinio juris* –, was not the main focus of this research. In addition, the research revealed cases where international courts, international judges and quasi-judicial or other dispute settlement bodies do not use the term interpretation, but either a contextual reading of the statement or the

[21] The distinction between the two is analysed in Chapter 2.

particular language used allows inferring the conclusion that they, in fact, engage in an interpretation of a customary rule.

Secondly, in the process of this analysis, each instance of interpretation of customary rules was labelled based on the method used. For example, the cases where treaties were used to interpret the meaning and scope of a customary rule were labelled as 'interpretation of a customary rule by reference to a treaty'. Subsequently, I have identified the repeated use of the same method of interpretation in different cases across and within international courts, quasi-judicial and other dispute settlement bodies which pointed to the existence of a pattern.

It needs to be pointed out that in the course of this research I have identified statements where international courts, judges in their separate or dissenting opinions, quasi-judicial or other dispute settlement bodies have used the term interpretation or expressions that seem to convey the meaning of interpretation. However, the cases which do not show a discernible method of interpretation are not the main focus of this paper and are either mentioned *in passim* or only cited in the footnotes. This decision was made is in light of the fact that the thesis chapters were devised based on the interpretative method used by international courts, judges, quasi-judicial or other dispute settlement bodies.

Once I have categorized the cases, and once the patterns in the interpretation of CIL have emerged, I have used these patterns as a guide for another stage of research, this time into the case law on treaty interpretation. For example, having identified that in the interpretation of customary rules international courts, judges or other dispute settlement bodies use the rule's purpose, I have inquired into the case law where treaty rules have been interpreted by, using the VCLT's formulation, reliance on object and purpose. This was done with the aim of establishing how international courts, international judges and quasi-judicial and other bodies understand the meaning of each method of interpretation and how they apply it. This was then used as a reference point

for the analysis on the use of this method in the interpretation of customary rules.

Having explained the methodology and the method employed, I now turn to the scope of this research. In order to explain the scope of this research I will rely on the synoptic chart 'International Judiciary in Context' devised by the Project on International Courts and Tribunals authored by Cesare PR Romano.[22] This chart distinguishes, firstly, between judicial and quasi-judicial, implementation control and other dispute settlement bodies. Secondly, it classifies both judicial and quasi-judicial, implementation control and other dispute settlement bodies by either the subject or the nature of their work. Within the two categories, each judicial or quasi-judicial body, implementation control and other dispute settlement body is placed under one of these four categories: existing, extinct, dormant or proposed.

Firstly, I excluded all the extinct, dormant or proposed judicial and quasi-judicial bodies, implement control and other dispute settlement bodies from the scope of this research. The only exception from this is African Court on Human and People's Rights, which was not in operation when the chart was devised but was already functioning when this research has commenced, which is why it was included in the scope of this research. The choice of excluding proposed judicial and quasi-judicial bodies was made for the obvious reason that they are not yet in operation and, therefore, have no case law. The extinct and dormant judicial and quasi-judicial bodies were excluded for reasons of feasibility.

Secondly, from the category of quasi-judicial, implementation and control and other dispute settlement bodies, I have excluded from the scope of this research the judicial bodies established under the regional economic and political integration agreements, such as the Court of Justice of the European

[22] CPR Romano, The Project on International Courts and Tribunals, 'The International Judiciary in Context. A Synoptic Chart' available at <http://cesareromano.com/wp-content/uploads/2015/06/synop_c4.pdf> accessed 20 April 2020.

Union (see synoptic chart). The choice to exclude the Court of Justice of the European Union owes to, firstly, the fact that the EU order can be regarded as a separate legal order and, secondly, for reasons of feasibility.

I have also excluded the following quasi-judicial bodies from the scope of this research: international administrative tribunals, inspection panels, non-compliance and implementation monitoring bodies, international claims and compensation bodies and permanent arbitral tribunals and, lastly, conciliation commissions, with the exception of the Permanent Court for Arbitration and the International Centre for the Settlement of Investment Disputes (see synoptic chart). This choice was made, once again, for reasons of feasibility, but also because it was predicted that the number of cases where CIL would be applied and/or interpreted would be very small, if present at all.

As a result, for the purposes of this research, the case law of the following judicial and quasi-judicial bodies was examined:

- the case law of international courts with general jurisdiction (Permanent Court of International Justice, International Court of Justice) and specialized jurisdiction (International Tribunal for the Law of the Sea)
- the case law of international and internationalized criminal courts (International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda, International Criminal Court, Special Court for Sierra Leone, Extraordinary Chambers in the Courts of Cambodia, Extraordinary African Chambers, Kosovo Specialist Chambers and the Special Tribunal for Lebanon, which is not included in the chart)
- the case law of international courts with specialized jurisdiction, quasi-judicial bodies in the area of human rights (European Court of Human Rights, Inter-American Court of Human Rights, African Court on Human and Peoples' Rights, Human Rights Committee, Inter-American Commission on Human Rights)

- the case law of permanent arbitral tribunals (Permanent Court of Arbitration, and arbitrations conducted under the auspices of the International Centre for the Settlement of Disputes)

The selection of these judicial and quasi-judicial bodies was made generally on the basis of the following criteria:

(1) The likelihood that the judicial or quasi-judicial body applied CIL in its practice
(2) The inclusion of both judicial and quasi-judicial bodies
(3) The inclusion of bodies that deal with different branches of international law
(4) The inclusion of both courts and arbitral tribunals
(5) The inclusion of both international and hybrid courts

The selection of the judicial and quasi-judicial bodies based on these criteria ensured that the research sample is both representative, to make it possible to draw patterns in the use of methods from practice, and diverse, to be able to compare and establish whether or not there are any patterns in the variation and prevalence of instances of CIL interpretation.

It is important to note that under the scope of this research I have included all the judicial, quasi-judicial and other dispute settlement bodies the case law of which was researched in preparation for this thesis. This, however, does not mean that the case law of all these bodies can be found in the body of this thesis, since not all of them contained instances of interpretation of customary rules.

To find the relevant judgments the following databases and websites of international courts and tribunals were used: Oxford Reports on International Law (for all types of judicial and quasi-judicial bodies),[23] the ICC Legal Tools Database (for the case law of international and internationalized criminal courts and tribunals),[24] HUDOC (for the practice of the European Court of

[23] 'Oxford Reports on International Law' available at <https://opil.ouplaw.com/> accessed 20 April 2020.
[24] 'ICC Legal Tools Database' <https://www.legal-tools.org/> accessed 20 April 2022.

Human Rights),[25] the website of the International Court of Justice,[26] the 'italaw' database and the Investor State Law Guide database for investment awards,[27] the 'worldcourts' database,[28] the JusMundi database,[29] UN Reports of International Arbitral Awards,[30] the website of the International Tribunal for the Law of the Sea[31] and the UN Treaty Bodies database.[32]

Apart from the collection, selection and categorization of case law, other primary sources, such as treaties and preparatory work were consulted. Among secondary sources, doctrinal works on CIL, on CIL interpretation, on interpretation in law generally and on treaty interpretation were consulted. Among soft-law documents, the Reports of the ILC (for instance, the ILC draft conclusions on the identification of custom and the reports on the interpretation of treaties), Reports of Special Rapporteurs of the ILC, Reports of the International Law Association, Reports and Yearbooks of the Institut de Droit International, to name but a few, were used.

In international legal scholarship the notion of method has also been used as synonymous to a theoretical commitment in light of which the research question is answered, such as feminism, third world approaches to international law and so on.[33] Due to the nature of the main research question, this thesis does not adopt a particular theory of international law. However, it is possible to say that the subject of CIL interpretation was examined from a

[25] 'HUDOC European Court of Human Rights' <https://hudoc.echr.coe.int/> accessed 20 April 2022.
[26] Website of the International Court of Justice available at <https://www.icj-cij.org/home> accessed 20 April 2022.
[27] 'italaw' <https://www.italaw.com/> accessed 20 April 2022; 'ISLG' < https://new.investorstatelawguide.com/> accessed 20 April 2022.
[28] 'WorldCourts' <http://www.worldcourts.com/> accessed 22 April 2022.
[29] 'JusMundi' <https://jusmundi.com/en> accessed 22 April 2022.
[30] 'Codification Division Publications. Reports of International Arbitral Awards' < https://legal.un.org/riaa/> accessed 22 April 2022.
[31] Website of the International Tribunal for the Law of the Sea <https://www.itlos.org/en/> accessed 22 April 2022.
[32] 'UN Treaty Bodies Database' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Home.aspx> accessed 22 April 2022.
[33] SR Ratner, A Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (2004) 36 Stud Transnat'l Legal Pol'y 1.

positivist stance, where positivism is understood broadly. In other words, I have examined courts and quasi-judicial bodies *actually* do, not what they *ought* to do. Putting it differently, the only strong theoretical commitment adhered to in this thesis is to describe the practice as it is, which is analogical to a *lex lata* (the law as it is) approach in traditional doctrinal research.[34]

The research questions that this thesis aims to answer are of a descriptive nature, which means that the present thesis seeks to determine how international courts *actually determine* the content of CIL rules by using methods similar to those found in treaty interpretation and not how they *ought to do it*, which would be a normative question.[35]

The scope of this research was limited to the case law of *international* judicial, quasi-judicial and other dispute settlement bodies containing instances of interpretation of the rules of customary *international* law that belong to the branch of *public* international law. This means that (1) customary rules from private international law, (2) any interpretations made by international courts and tribunals of domestic customary rules or customary rules of specific communities and (3) any interpretations of rules of customary international law by domestic courts and tribunals were excluded from the scope of this research. The exclusion of the case law of domestic courts has been done for reasons of feasibility.

3. Possible Limitations

As part of this introduction, I would like to address the possible limitations of this thesis. A first possible limitation concerns the identification of instances of CIL interpretation. Despite the intention to be as comprehensive as possible, it is not excluded that some cases have been overlooked, either because of the research strategy adopted or because of the difficulties

[34] See A Slaughter, SR Ratner, 'The Method Is the Message' (2004) 36 Stud Transnat'l Legal Pol'y 239.
[35] E Lieblich, 'How to Do Research in International Law? A Basic Guide for Beginners' (2021) 62 Harvard International Law Journal Online 42, 44.

concerning spotting instances of interpretation when courts do not explicitly mention that they engage in interpretation or simply due to the human factor involved.

Another possible limitation concerns the qualitative part of the research, where I interpret the judgments of the courts and the decisions of quasi-judicial and other dispute settlement bodies. I have tried to be as transparent as possible by explaining what I mean by interpretation and by describing in detail my research strategy. Yet, because it is a matter of interpretation, it is possible that some cases which could be qualified as interpretation under a different understanding of interpretation are not examined in this thesis.

4. Previous Research on Interpretation of Customary Rules

The subject of CIL interpretation has been mentioned *in passim* by many legal scholars,[36,37] but only a few legal scholars have examined this subject in-depth. In 1977, Albert Bleckmann published an article on the determination and interpretation of CIL.[38] Bleckmann explicitly argued that customary law as 'the abstract legal principle which has been developed out of the legal documents can itself be interpreted according to the principles of grammatical, systematic and teleological interpretation'.[39] While before Bleckmann Serge

[36] In this section I only refer to the scholarly works that were already published at the start of this PhD. However, works that have been published during this PhD are mentioned and addressed in the body of the thesis.

[37] Sir CK Allen, *Law in the Making* (6th ed, OUP 1958) 109-110; C de Visscher, *Problemes d'Interpretation Judiciaire en Droit International Public* (Pedone 1963); RB Bilder, O Schachter, JI Charney and M Mendelson, 'Disentangling Treaty and Customary International Law: Remarks' (1987) 81 ASIL Proceedings of the Annual Meeting 157-164, 159; F Capotorti, 'Cours Général de Droit International Public' (1994) 248 RCADI 17,121; IML de Souza 'The Role of Consent in the Customary process' (1995) 44/3 ICLQ 521, 528; II Lukashuk, 'Customary Norms in Contemporary International Law' in J Makarczyk (ed) *Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzysztof Skubiszewski* (Kluwer Law International 1996) 499; F Latty, 'Les Techniques Interpretatives du CIRDI' (2011) 115(2) RGDIP 459, 464; D Alland, 'L'interprétation du droit international public' (2013) 362 RCADI 45, 85; S Sur, 'La Créativité du Droit International Cours Général de Droit International Public' (2013) 363 RCADI 18, 295-296 ; M Herdegen, 'Interpretation in International Law' MPEPIL 723 (March 2013) [63] accessed 15 June 2020; G Distefano, *Fundamentals of Public International Law: A Sketch of the International Legal Order,* Queen Mary Studies in International Law, vol. 38 (Brill 2019) 340; D Hollis, 'Interpretation', in J d'Aspremont and S Singh, *Concepts for International Law: Contributions to Disciplinary Thought* (Elgar Publishing 2019) 559-560.

[38] A Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht' (1977) ZaöRV 505.

[39] ibid 529.

Sur used the term interpretation in relation to custom,[40] it is only the former who explicitly argued in favour of an interpretation of CIL rules that resembles treaty interpretation. Although innovative, Bleckmann's argument did not have a resounding impact on legal scholarship and the subject of CIL interpretation was only taken up in legal research years later.

Following Bleckmann, Kolb explicitly addressed the subject of CIL interpretation in his 2006 treatise *Interpretation et creation du droit international.*[41] He dismissed the argument that customary norms cannot be subject to interpretation because it is impossible to reduce custom to a textual expression.[42] On the contrary, Kolb argued, the jurists formulate the customary norm in words automatically, and this is how it acquires lexical content.[43] Interpretation is, according to Kolb, just as necessary in the case of customary rules as it is in the case of treaties because they too require a construction of their scope.[44] To this end, he gives the example of a customary rule that may regulate a certain space, e.g. the territorial sea, but the question may be raised whether it applies to other territories such as the contiguous zone or the exclusive economic zone.[45] In such cases it is not the existence of the rule that is in doubt, but its content.[46]

In 2008, Alexander Orakhelashvili published a volume on the interpretation of acts and rules in public international law that included a chapter on the interpretation of custom.[47] As Orakhelashvili clarified, his chapter did not address questions of custom-formation or interpretation of State practice, but rather 'the construction of the scope of established customary rules, as is the

[40] S Sur, *L'interpretation en droit international public* (Librairie Générale de droit et de jurisprudence, 1974) 190 et seq.
[41] R Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* (Editions de l'Université de Bruxelles 2006) 219-233.
[42] ibid 220.
[43] ibid 220-221.
[44] ibid 221.
[45] ibid.
[46] ibid 221-222.
[47] A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 496.

case with interpretation of treaties and other acts'.[48] He then examined different examples from the practice of international courts and tribunals where customary rules were interpreted by using methods similar to those contained in the rule on treaty interpretation.[49]

Santulli also discussed interpretation of customary rules in his Rapport General on the topic of the interpretative techniques used to interpret norms of international law.[50] He argued that, although hardly perceptible, the process of interpretation differs from the identification of a customary, but also from different statements or formulations on custom, such as the enunciations made by either courts or scholars.[51] He pointed out that there are disputes where parties do not question the existence of a customary rule, but its scope. According to Santulli, in this case the interpreter will have to engage in an analysis of State practice and *opinio juris*.[52]

Subsequently, two publications by Merkouris in 2015 and 2017 addressed both the theoretical arguments against the interpretability of CIL, but also examined the case law of different international courts and tribunals where customary rules were interpreted similarly to treaties.[53] Merkouris argued that not only customary rules can, similarly to treaties, be subject to interpretation for reasons based on theory, but that both the Statutes of international courts and tribunals and the case law are proof of this.[54]

5. The Main Argument of this Thesis

If the main argument advanced in this thesis could be encapsulated in one sentence, it would be this: international courts and tribunals engage in the

[48] ibid.
[49] ibid.
[50] C Santulli, 'Rapport General, Dossier : Les techniques interprétatives de la norme international' (2011) 115/2 RGDIP 297, 301-302.
[51] ibid 301.
[52] ibid 301.
[53] P Merkouris, 'Interpreting the Customary Rules of Interpretation' (2017) 19 ICLR 127, 134-137; P Merkouris, *Article 31 (3) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato's Cave,* Queen Mary Studies in International Law, vol. 17 (Brill 2015) 231-300.
[54] ibid.

interpretation of customary rules as act of establishing the meaning and scope of the rule and, to this end, use methods similar to those that are used in treaty interpretation. In this thesis, I have tracked the patterns existing in the case law and have assembled them, piece by piece, into a full and clear picture, a sort of mosaic, so to speak, which shows how international courts, international judges, quasi-judicial and other dispute settlement bodies interpret CIL.

6. The Structure of this Thesis

This thesis is structured in five chapters.[55] Chapters 1 and 2 have, primarily, a theoretical focal point. Chapter 1 stars off with presenting the current legal framework on interpretation in international law. It then explores the rules on treaty interpretation and the guiding principles on the unilateral declarations of States. This is followed by an examination of the objections that have been expressed in legal literature against applying the concept of interpretation to CIL and my arguments in favour of the interpretability of CIL.

Chapter 2 centers on drawing the distinction between identification and interpretation of customary rules. After an inquiry into the place of customary rules in the applicable law of different international courts, tribunals and other bodies, I turn to examining the meaning of identification of customary rules and the methods that are used thereto. Here, I zoom into the two requirements

[55] During this PhD I have authored a chapter in an edited volume (M Fortuna, 'Different Strings of the Same Harp: Interpretation of Customary International Rules, their Identification and Treaty Interpretation' in in P Merkouris, N Arajärvi, J Kammerhofer, N Mileva (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) 393) and a paper in a peer-reviewed online journal (M Fortuna, 'Customary International Law as an Object of Scrutiny and an Interpretative Aid. Obs ECtHR, 9 July 2019, Volodina v Russia, N° 41261/17 and ECtHR, GC, 29 January 2019, Güzelyurtlu and Others v Cyprus and Turkey, N° 36925/07' (2020) 2 Europe des Droits & Libertes 320. I have also co-authored one book chapter (N Mileva, M Fortuna, 'Environmental Protection as an Object of and Tool for Evolutionary Interpretation' in G Abi-Saab, K Keith, G Marceau, C Marquet, (eds), *Evolutionary Interpretation and International Law* (Hart Publishing 2019) and one blog post N Mileva, M Fortuna, 'Emerging Voices: The Case for CIL Interpretation – An Argument from Theory and An Argument from Practice' <https://opiniojuris.org/2019/08/23/emerging-voices-the-case-for-cil-interpretation-an-argument-from-theory-and-an-argument-from-practice/>). While none of these PhD chapters have been published separately, the research conducted for some of these papers have also been used in this PhD thesis.

that need to be identified in order to establish CIL – State practice and *opinio juris.* Further, the different types of interpretation that take place at the level of identification are examined. Finally, I draw the distinction between these different types of interpretation and the interpretation of the customary rule proper.

Chapters 3, 4 and 5 zoom into the methods of interpretation that have been identified in the case law of international courts, quasi-judicial and dispute settlement bodies. To make the analysis more coherent, consistent and accessible, these three chapters follow a largely similar structure. Firstly, I look into the meaning of each method or reference point in interpretation. Secondly, an inquiry is made into the use of this method in the field of treaty interpretation or interpretation of other norms/acts and how it is applied by international courts, quasi-judicial and other dispute settlement bodies. Thirdly, the case law where this method or methods have been used to interpret customary rules is presented and analysed. The conclusions reached in the first and second parts inform the analysis of this case law. Throughout the analysis, comparisons are drawn between the use of this method in treaty interpretation and its use to interpret customary rules.

Chapter 3 examines the use of ordinary meaning and that of object and purpose that are found in Article 31 of the VCLT on treaty interpretation. Chapter 4 looks into the use of treaties and general principles of laws as reference points in the interpretation of CIL and discusses the extent to which this is similar to systemic interpretation under Article 31(3)(c) of the VCLT. Chapter 5 explores the methods of interpretation that are not found in the VCLT, but which appear to have been used not only to interpret treaties, but also to interpret customary rules. These are necessary implication and evolutive interpretation. This is followed by a set of concluding remarks where I sum up the arguments made in this thesis and draw the final conclusions.

CHAPTER 1

Interpretation of CIL Rules — the Concept

1. Introduction

A lot has been written about customary international law. The metaphors used to describe it range from that of a peculiar jellyfish[56] to a dinosaur waiting in line for extinction.[57] Yet, it is difficult to dispute that, judging at least by the recent case law of the ICJ, customary rules retain their importance in a world of ever-expanding treaties. This is why the subject of CIL interpretation is as timely as ever.

As explained in the introduction, the concepts of CIL interpretation is understood in this thesis to connote the act of establishing the meaning and/or scope of customary rules the existence of which is undisputed. For some legal scholars whether CIL can be interpreted is unquestionable. Other scholars object to it and state that customary rules cannot be interpreted as treaty rules can. While the primary subject of this inquiry are the methods of CIL interpretation used in international courts and other dispute settlement bodies, it would be unwise to proceed without addressing these objections first. Chapter 1, then, focuses on the arguments brought against applying the concept of interpretation to customary rules.

The objections that have been advanced are premised largely on the meaning and the nature of the terms interpretation and customary international law. Interpretation is defined by critics of CIL interpretation as the act of decoding of the meaning of a legal text or the act that involves an inquiry into the intent of the authors. Since, according to these scholars, customary international law lacks both, it cannot be subject to interpretation in the same way as treaty

[56] E Jimenez de Arechaga, 'International Law in the Past Third of a Century' (1978) 159 RCADI 9.
[57] DP Fidler, 'Dinosaur, Dynamo, or Dangerous? Customary International Law in the Contemporary International System' in EG Schaffer, RJ Snyder (eds) *Contemporary Practice of Public International Law* (Oceana Publications 1997) 61,70.

rules. The other objections are premised on the nature of CIL. Firstly, it was argued that interpretation is superfluous in the case of customary rules because it would refer back to the original elements that make it up – State practice and *opinio juris* – and would, thus, start the cycle of identification anew. Secondly, it has been contended that interpretation is not necessary in the case of customary rules because they are not expressed in linguistic terms.

In this chapter, I argue that these objections rest on frail premises. The point of departure is the existing legal framework on interpretation, which is discussed in Section 2 of this chapter. Section 3 turns to the arguments against the interpretability of CIL. Here, I describe and, subsequently, refute the arguments that have been addressed against CIL interpretation. I start off by addressing the arguments that are founded on the definition of interpretation. This is followed by an exploration and refutation of the objections towards CIL interpretation that are founded in the characteristics of customary rules – their (alleged) lack of linguistic expression and their make-up. Here, I distinguish between customary rules and the elements that make up custom and argue that the concept of CIL interpretation has as its object the customary rule, not its elements.[58] Moreover, I argue that interpretation is just as necessary in the case of customary rules as it is in the case of treaty rules.

2. The Current International Legal Framework on Interpretation

The current international legal framework on interpretation includes general rules on treaty interpretation contained in Articles 31-33 VCLT, rules on treaty interpretation contained in other treaties and ILC guiding principles on the interpretation of unilateral declarations. Although the latter are not binding, they are, similarly to other outputs of the ILC, considered authoritative.

[58] In Chapter 2 I use the term interpretation in relation to the elements of custom but I argue that this is a very liberal use of the term interpretation that is different from interpretation of the law.

Article 31 of the VCLT establishes the general rule of interpretation, which is also considered a codification of customary international law.[59] According Article 31, '[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'.[60]

Article 31 of the VCLT is based on and is identical to Article 27 of the ILC Draft Articles on the Law of Treaties.[61] Unlike Article 19 of the Harvard Draft Convention — a first attempt at a convention on the law of treaties — that includes no explicit reference to ordinary meaning of the treaty's terms and puts the treaty's purpose at the forefront,[62] Article 31 establishes the text of the treaty as the starting point in treaty interpretation.[63] The text of the treaty assumes a primary importance in the act of interpretation because it is presumed to represent the authentic expression of the intention of the parties.[64] At the same time, Article 31 establishes that the text of the treaty cannot be divorced from its context, which includes elements such as the subsequent practice of the parties in the interpretation or implementation of the treaty and 'any relevant rules of international law applicable in the relations between the parties'.[65] In contrast to paragraph 1, which presumes that the parties settled on the ordinary meaning of the terms, Article 31(4) states that special meaning

[59] *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 [94]; *Fisheries Jurisdiction (United Kingdom v. Iceland)* (Jurisdiction and Admissibility) [1973] ICJ Rep 3 [36]; M Waibel, 'Principles of Treaty Interpretation Developed For and Applied by National Courts?' in HP Aust, G Nolte (eds), *The Interpretation of International law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016) 10, 10-11; Article 17. 6(ii) of the Anti-Dumping Agreement (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) (adopted on 15 April 1994, entered into force 1 January 1995) 1868 UNTS 31874, 201). *A contrario* UN Conference on the Law of Treaties, 1st and 2nd sessions, Vienna, 9 April- 22 May 1969, 31st meeting of the Committee, UN Doc A/CONF.39/C.1/SR.31 [44].

[60] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31.

[61] ILC, UN Doc A/CN.4/L.117 'Draft Articles on the Law of Treaties, with Commentaries' YILC (1966) Vol. II.

[62] Draft Convention on the Law of Treaties, With Comment (1935) 29 The American Journal of International Law, Supplement: Research in International Law 653, 937.

[63] ILC 'Draft Articles on the Law of Treaties' (n 61) 220 [11].

[64] ibid. *A contrario Institut de Droit International Annuaire* Vol. 43/I (1950) Bath Session September 1950, 438; *Institut de Droit International Annuaire* Vol. 46 (1956) Grenade Session April 1956, 321; Harvard Draft (n 62) 937-938.

[65] Vienna Convention on the Law of Treaties (n 60) art 31.

can be given to the terms of the treaty but only 'if it is established that the parties so intended'.[66] Thus, while the VCLT favours the textual approach, it leaves room for an inquiry into the intentions of the parties.

The general rule of interpretation contained in Article 31 calls for a holistic assessment of the elements included within the rule.[67] In other words, the interpreter is required to evaluate the ordinary meaning of the terms in light of all the other elements contained in the rule, instead of favouring one or the other. Rather than giving different weights to different elements, Article 31 provides a logical order in which the different elements must be examined.[68]

Article 32 VCLT sets forth the supplementary means of interpretation. These include, among others, the *travaux préparatoires* and the circumstances of the treaties' conclusion.[69] However, supplementary means of interpretation contained in Article 32 do not provide alternative methods of interpretation, but only aid the clarification and confirmation of the meaning arrived at by applying the general rule of interpretation.[70] Based on the language of these provisions, the elements in Article 31 exist in a hierarchical relationship with those contained in Article 32. Article 32 is followed by Article 33 which establishes that, if treaties were authenticated in two or more languages, the languages are taken as equally authoritative. Although Articles 31-33 of the VCLT appear comprehensive, they do not exhaust all the methods of interpretation actually used in the practice of international courts and

[66] ibid.
[67] ILC 'Draft Articles on the Law of Treaties' (n 61) 220. *A contrario* see *Institut de Droit International Annuaire* Vol. 43/I (n 64) 436 and 439-440.
[68] ibid.
[69] For the discussions concerning *travaux preparatoires* see ILC, A/CN.4/167 'Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' YILC (1964) Vol. II 58; *Institut de Droit International Annuaire* Vol. 43/I (n 64) 434; *Institut de Droit International Annuaire* Vol. 44/II (1952) Sienne Session April 1952, 372-374.
[70] ILC 'Draft Articles on the Law of Treaties' (n 61) 223; P Reuter, *Introduction Au Droit Des Traites* (Librairie Armand Colin 1972) 104.

tribunals,[71] such as restrictive interpretation,[72] effective interpretation[73] or evolutive interpretation.[74]

In addition, it is possible to identify treaties that contain other rules of treaty interpretation that supplement the general rules. This is the case of the ICC Statute. According to Article 21 (3) of the ICC Statute, 'the application and *interpretation* of law pursuant to this article must be consistent with internationally recognized human rights'.[75] In other words, in the presence of alternative interpretations, the Court must choose the one that is in line with human rights.[76] Reading this article together with Article 21 (1), it appears that this rule of interpretation applies not only to the ICC Statute itself and the Rules of Procedure, but also to other treaties that may be potentially applicable and to principles and rules of international law, which comprise CIL and general principles of law. While the relationship between the rule contained in Article 21(3) and the general rule of interpretation in Article 31 VCLT is unclear, there does not seem to be a *lex specialis* to *lex generalis* type of relationship between the two rules. Whereas there is similarity of subject matter – both rules concern interpretation – there is no identity. It seems that

[71] The intention to exclude other rules, such as *ejusdem generis*, *exclusio unius est exclusio alterius*, *contra proferentem* can be traced back to the discussions in the Institute de Droit International, where these rules were excluded from the scope of the resolution because they were qualified as technical rules, which may lead to to contradictory results. See *Institut de Droit International Annuaire* Vol. 43/I (n 64). For other rules see J Klinger, Y Parkhomenko, C Salonidis, *Between the Lines of the Vienna Convention?: Canons and Other Principles Of Interpretation in Public International Law* (Wolters Kluwer 2018).

[72] See H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 BYBIL 48; L Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21/3 EJIL 681.

[73] An attempt to include effective interpretation was made by Special Rapporteur Waldock during the drafting of the Draft articles. Article 72 proposed by the Special Rapporteur read:
'In the application of articles 70 and 71 a term of a treaty shall be so interpreted as to give it the fullest weight and effect consistent —
(a) with its natural and ordinary meaning and that of the other terms of the treaty; and
(b) with the objects and purposes of the treaty.'
Despite the support of some States, such as Cyprus and Portugal, this provision never made its way into the final body of the treaty.
See ILC, Third Report on the Law of Treaties (n 69) 53.

[74] Evolutive interpretation will be discussed in chapter 5 of this thesis.

[75] Rome Statute of the International Criminal Court (last amended 2010) (adopted on 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 90 art 21(3).

[76] G Hochmayr, 'Applicable Law in Practice and Theory: Interpreting Article 21 of the ICC Statute' (2014) 12 J. Int. Crim. Just. 655, 673. For an analysis of the case where the ICC applied this provision see E Irving, 'The Other Side of the Article 21(3) Coin: Human Rights in the Rome Statute and the Limits of Article 21(3)' (2019) 32 LJIL 837.

Article 21(3) adds to the general rule of interpretation, rather than truly establishing a special rule in the sense of the *lex specialis* principle.

The ICC Statute Article 22 (2) contains the *in dubio pro reo* interpretative principle, which is specific to the field of international criminal law. Again, this rule does not appear to be a departure from the general rule of interpretation, but rather an addition to it.

The other set of norms on interpretation are contained in the ILC guidelines on the unilateral declarations of States.[77] Although Article 38 of the ICJ Statute does not include unilateral declarations within the list of sources of law to be applied by the ICJ, it has in its case law established that certain types of unilateral declarations can have legal effects.[78] The category of unilateral declarations is quite heterogeneous and includes acts such as reservations to treaties, declarations accepting the jurisdiction of international courts and/or tribunals, unilateral international promises, waiver/renunciation of rights, recognition of States.[79]

In the case of unilateral declarations, judges, must, first, determine whether the declaration is one that produces legal effects. Following ILC Guiding Principle 3, this is done by looking at the content, the factual circumstances in which the declaration was made and the reactions it generated from other States. According to the ILC, the interpretation of unilateral declarations involves a determination of the scope of States' obligations after establishing the binding nature of the unilateral declaration.

According to the ILC Guiding Principle 7:

[77] ILC, UN Doc A/61/10 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto' YILC (2006) Vol. II.
[78] *Nuclear Tests Case (Australia v France)* (Jurisdiction and Admissibility) [1972] ICJ Rep 1974 [43]; *Case Concerning Armed Activities on the Territory of the Congo (New application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006) ICJ Rep 6 [50] and [52].
[79] R Bernhardt, *Encyclopedia of Public International Law* (Vol 7, North-Holland 1981) 518. See ILC, UN Doc A/CN.4/519 'Fourth Report on Unilateral Acts of States by Mr. Víctor Rodríguez Cedeño, Special Rapporteur' YILC (2001) Vol. II; AP Rubin, 'The International Legal Effects of Unilateral Declarations' (1977) 71/1 ASIL 1.

> 'In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. 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.'[80]

Similar to treaty interpretation, the interpretation of unilateral declarations starts with an inquiry into the meaning of the text of the declaration taking into account the context. However, there are also significant differences between the two acts. Firstly, unlike the VCLT, guiding principle 7 opts for a restrictive standard of interpretation of a unilateral declaration.[81] Another difference with the VCLT is the exclusion of object and purpose from the list of elements by reference to which interpretation shall be made since, according to the Special Rapporteur, these are terms specific to treaty relations.[82] Even though the original draft also included references to *travaux préparatoires*, preamble and annexes, these were perceived as irrelevant to the interpretation of unilateral declarations and, therefore, excluded.[83] The commentary to this guiding principle also specifies that, if compatible with the unilateral nature of the declaration, Articles 31-33 VCLT may be applied to unilateral declarations by analogy.[84]

3. Interpretation of CIL – A Definition

In contrast to treaties and unilateral declarations of States, customary rules lack explicit rules or principles that would govern their interpretation. This, however, does not mean that customary rules cannot be interpreted. Before turning to the objections that have been brought against CIL interpretation, I will briefly explain the definition of CIL interpretation that this thesis adopts.

[80] ILC, 'Guiding Principles applicable to unilateral declarations' (n 77) 377. For the original version of the articles on interpretation See ILC, 'Fourth Report on Unilateral Acts of States' (n 79) 135-136 [154].
[81] E Kasotti, *The Juridical Nature of Unilateral Acts of States in International Law*, Queen Mary Studies in International Law Vol. 20 (Brill 2015) 149.
[82] ILC, 'Fourth Report on Unilateral Acts of States' (n 79) 133 [137].
[83] ibid.
[84] ILC, 'Guiding Principles applicable to unilateral declarations' (n 77) 378 [3].

Despite the fact that the concept of CIL interpretation that this thesis uses will become clearer throughout the sections of this chapter after the objections are discussed, briefly addressing it at this point will ensure greater clarity.

The definition of CIL interpretation relied on in this thesis is the following: the act of determining the meaning and/or scope of a customary rule the existence of which is not disputed. Put differently, when courts or other quasi-judicial bodies engage in interpretation their goal is not to find out whether or not the rule exists by looking at State practice and evidence of *opinio juris*. Instead, their object of inquiry is a rule that undoubtedly exists, but whose content is disputed. Establishing the content of the rule is necessary in order to be able to solve the case that the parties to the dispute have brought before the court/quasi-judicial body.

4. Objections to CIL Interpretation

We now turn to the objections that have been advanced in legal literature against interpretation. Firstly, it has been argued that the concept of interpretation that applies to the determination of the content of treaty rules cannot be applied to custom because the two acts are substantially different. According to Bos, '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'.[85] He contends that treaties go through three stages before being applied to the case.[86] The first and second stages are the identification that there is a treaty – an inquiry into its conclusion, ratification and entry into force – and the establishment that the document relied on by States before the Court is a treaty based on a definition of the treaty.[87] The third stage is the act of deciphering the message of the treaty that is done against the backdrop of the rules of interpretation.[88] In the

[85] M Bos, 'Theory and Practice of Treaty Interpretation' (1980) 27/1 NILR 3, 9. Bos (1982) (n 2) 9; M Bos, *A Methodology of International Law* (North-Holland 1984) 108-109.
[86] Bos (1980) (n 85) 10.
[87] ibid.
[88] ibid.

case of custom, Bos argues, the third stage is missing since 'content merges with existence'.[89] In other words, the 'message' of a customary rule is determined simultaneously with its existence by identifying State practice and *opinio juris*. This makes the process of interpretation superfluous.

The second objection rests not so much on the differences between interpretation of custom and treaty interpretation, but on the meaning of the concept of interpretation and on the ways in which CIL rules are clarified in practice. In this sense, Herdegen does not object to the idea that the content and scope of customary rules need to be clarified.[90] Yet, according to him, international courts engage in syllogisms, which are qualitatively different from interpretation, which he defines as an activity that seeks to determine the meaning of an act related to *specific authors* and their *intent*.[91]

Thirdly, Treves has advanced the argument that 'the irrelevance of linguistic expression excludes interpretation as a necessary operation in order to apply [customary rules]'.[92] Put differently, because CIL is not couched in words, interpretation is not necessary in its case. This view implies that only linguistic expressions, or, otherwise said, rules formulated in a text, lend themselves to interpretation.

These arguments rest on frail premises. As I will show in the next subsections, they proceed from a narrow or even imprecise definition of both the concept of interpretation and that of customary international law. To ensure that the argumentation follows a clear structure, I have divided it in two main claims. Firstly, I argue that legal interpretation is the act of discerning the meaning of a legal rule and does not depend on the existence of text or a set of discernible intentions. Secondly, I posit that, since the object of CIL interpretation are

[89] ibid. See also A Gourgourinis, 'The Distinction Between Interpretation and Application of Norms in International Adjudication' (2011) 2(1) J. Int. Disput. Settl. 31, 31.
[90] M Herdegen, 'Interpretation in International Law' MPEPIL 723 (March 2013) [63] accessed 15 June 2020.
[91] ibid.
[92] T Treves, 'Customary International Law' MPEPIL 1393 (November 2006) [2] accessed 12 April 2020.

customary rules and not their elements, there is no risk of starting a new cycle of identification and, therefore, interpretation is not superfluous. Moreover, interpretation is just as necessary in the case of customary rules as it is in the case of treaties.

5. Legal Interpretation as the Act of Determining the Meaning and Scope of a Legal Rule

5.1. The Meaning and Goal of Legal Interpretation in Scholarship

The arguments that rest narrow definition of the term interpretation are based on the fail premise that interpretation, as a concept, is limited to finding the meaning of a text or the intentions of the parties. I will start by addressing the first premise, namely that interpretation is limited to finding the meaning of a text or the intentions of the parties. To this end, in this subsection I discuss the different views on the meaning of legal interpretation and the role of the interpreter. Because the concept of interpretation can be found both within the discipline of law and outside of it, I also draw on the meanings of interpretation in literary studies and philosophy.

Both outside and within international law a variety of views has been expressed on the goal of interpretation and the role of the interpreter. Regarding the meaning and goal of interpretation, two opinions are dominant: one according to which interpretation is the act of finding and giving effect to the common intention of the parties, or of the author(s) of the text more generally, and one that defines interpretation as the act of finding the semantic meaning of the terms.[93] While the two are often perceived in opposition, there are authors outside the discipline of law who argue for a bipartite understanding of interpretation. According to these scholars, interpretation involves both an inquiry into the understanding of semantic meaning as the meaning of the words used and an inquiry into the author's state of mind, what he or she intended to convey by using those words.[94] This view rests on

[93] A Barak, *Purposive Interpretation in Law* (OUP 2005) 3-4.
[94] For theories on interpretation see K Greenawalt, *Law and Objectivity* (OUP 1992) 73 et seq.

the idea that every utterance is both a linguistic expression and an act of the mind of the author.[95]

Occasionally, the word interpretation has been used as synonymous to perception or perceptual interpretation, which is alleged to be at play whenever we observe/perceive something and a process that happens automatically.[96] For instance, we may perceive/interpret as an object passing by at a distance as a car, or, equally, we may perceive/interpret automatically the intention of the other person in a discussion based either on our pre-existent beliefs about the world/people or our previous interactions with the person in question. This kind of automatic perceptual interpretation is different from a deliberate, conscious and effortful exercise in decoding the meaning of a text or attributing this or that intention to a text's author.[97]

Different views have also been advanced regarding the role of the interpreter. Most of these views fall into one of the following categories: (1) the role of the interpreter is to discover the meaning of the text or (2) the role of the interpreter is to choose its meaning. Interpretation as discovery is a position that is closest to legal positivist views.[98] If interpretation is understood as an act of discovery, then the interpreter is a mere passive recipient of the content of a legal norm. Moreover, in this view the meaning is inherent in the norm and is given by the legislator, while the judge has the task of decoding it.[99] In contrast, interpretation as will or choice assumes an active role on behalf of the interpreter. He/she is tasked with choosing from a set of possible meanings of a legal text.[100] This view usually allows the interpreter to take upon him/herself a creative role that results in an incremental development of the

[95] F Schleiermacher, A Bowie (ed), *Schleiermacher: Hermeneutics and Criticism: And Other Writings* (CUP 1998) 9 [6].
[96] JR Searle, *The Construction of Social Reality* (Free Press 1995) 133-134.
[97] ibid.
[98] Kolb (n 41) 24.
[99] ibid; LM Bentivoglio, *Interpretazione del Diritto e Diritto Internazionale, Pubblicazioni Della Universita Di Pavia, Studi Nelle Scienze Giuridiche e Sociali* (Pavia 1953) 209.
[100] Kolb (n 41) 24.

law originally laid down by the legislator.[101] Apart from the views that can be placed at the extremes, there are moderate views that support the moderately active role of the interpreter who specifies the meaning and the scope of legal norms,[102] but is, at the same time, bound by certain limits given by law. Put differently, the interpreter acts as a mediator between the norm and the facts of the concrete case.[103]

5.2. Interpretation of the Law as the Act of Determining the Meaning and Scope of the Rule

Bearing in mind the different views on the meaning and the goal of interpretation, I argue that the primary goal of interpretation is that of determining the meaning and scope of a legal *rule* and not the establishment of the intentions or the meaning of a text. It must be acknowledged that this is a definitional problem and scholars, as language-users, may prefer a different meaning or understand the term differently. Unlike in the hard sciences, where an argument could be made that this or that phenomenon exists and acts in this or that way, the same cannot be said in the discipline of law. We cannot test what the correct meaning of interpretation is. However, there are compelling reasons to define legal interpretation in the proposed way. There are two main reasons for this.

Firstly, this definition distinguishes between legal interpretation and other types of interpretation. For instance, literary interpretation seeks to establish the meaning of words as part of a literary work, which is the object of interpretation. In law the object of interpretation are not the words used in a rule, but, first and foremost, the rule, the legal norm itself,[104] which is a legal prescription, command or prohibition.[105] In legal interpretation, then, interpretation centers not on the semantic content of the norm, but on the

[101] G Hernández, 'Interpretative Authority and the International Judiciary' in A Bianchi, D Peat, M Windsor (eds), *Interpretation in International Law* (OUP 2015) 166, 182.
[102] Kolb (n 41) 25; C Rousseau, *Droit International Public* (8th ed, Dalloz 1976) 61.
[103] Bentivoglio (n 99) 220.
[104] Barak (n 93) 3.
[105] H Kelsen, *General Theory of Norms* (Clarendon 1991) 2.

normative, legal content, for the determination of which the semantic content is only a means to an end.[106]

Secondly, this definition is more precise. The finding of the intentions of the parties is not an end in itself. Instead, the meaning and scope of the rule are determined in such a way that they *respect* the intention of the parties. This can be evidenced even by the content of the rules of interpretation contained in Articles 31 and 32 VCLT, which proceed from the assumption that the text is presumed to reflect the intention of the parties, and the evidence of the actual intention of the parties (for instance, preparatory work) is resorted to only as a supplementary means of interpretation.[107] At the same time, it cannot be said that the goal of legal interpretation is finding the meaning of the text because the importance of the semantic content or text is that it contains the *legal content* of the rule.

Having said that, I now turn to establishing the boundaries of the term legal interpretation by comparing it against other acts, namely construction, gap filling, application of the law and judicial interpretation.

5.3. Drawing the Line between Legal Interpretation and Other Acts

5.3.1. Legal Interpretation versus Construction

In legal theory, a distinction has been drawn between interpretation and construction.[108] This distinction rests, depending on the author, on either the distinction between ambiguity and vagueness[109] or on the difference between text and extra textual material.[110] According to the first view, interpretation is limited to resolving textual ambiguities – the situation when a term has

[106] The idea of the distinction between semantic and normative content belongs to Solum, although he applies it differently. See LB Solum, 'The Interpretation-Construction Distinction' (2010) 27 Constitutional Commentary 95, 98-100.
[107] See comments by Sir Erick Beckett, *Institut de Droit International Annuaire* Vol. 43/I (n 64) 438.
[108] See F Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, With Remarks on Precedents and Authorities* (Charles C Little and James Brown 1839) 23; H Taylor, *A Treatise on Public International Law* (Callaghan & Company 1901) 395. See also RE Barnefe, 'Interpretation and Construction' (2011) 34/1 Harvard Journal of Law & Public Policy 65; Solum (n 106).
[109] Solum (n 106) 97-98.
[110] Lieber (n 108) 56.

multiple meanings – whereas the process of resolving legal vagueness, when it is unclear as to whether a specific rule should apply to a case or not, is legal construction.[111] Pursuant to the second view, interpretation is concerned only with decoding the text, whereas construction adds to the text.[112] While these distinctions are valuable for legal theory, even legal theorists themselves acknowledge that, in practice, interpretation has both dimensions: clarificatory and constructive and the distinction between the two does not have significant consequences in practice.[113] This was also the stance taken by the early drafters of the VCLT. In the commentaries to the Harvard Research Draft, it was stated that interpretation and construction differ in degree rather than in kind.[114] Adding to that, in the case law the term construction is often used synonymously or interchangeably with interpretation, which points to the fact that even judges perceive them as equivalent.[115]

[111] Solum (n 106) 96, 98, 110.
[112] Barak (n 93) 64.
[113] R Stecker, *Interpretation and Construction: Art, Speech and the Law* (Wiley-Blackwell 2003) 154 and 168.
[114] Harvard Draft (n 62) 939. See also T Yu, *The Interpretation of Treaties* (CUP 1927) 40. On the reasons why the drafters of the VCLT opted for a holistic method for interpretation (which encompasses methods that do not fall under the narrow understanding of interpretation) see R Bachand, 'L'interprétation en droit international : une analyse par les contraintes' Société européenne de droit international, 2007, <https://esil-sedi.eu/wp-content/uploads/2018/04/Bachand.pdf> accessed 15 June 2020.
[115] ICTY: *Prosecutor v Delalić*, ICTY, Case no. IT-96-21-T Trial Chamber Judgment, 16 November 1998 [161]. ICJ: *Reparation for Injuries Suffered in Service of the United Nations* (Advisory Opinion) [1949] ICJ 174 Dissenting Opinion of Judge Hackworth 199; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion) [1954] ICJ 47 Dissenting Opinion by Judge Hackworth, 83, 86; *Interhandel Case (Switzerland v USA)* (Preliminary Objections) [1959] ICJ 6 Separate Opinion of Sir Percy Spender 57; *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain)* (Preliminary Objections) [1964] ICJ 6 Separate Opinion Judge Tanaka 74; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 59) [50]; *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* Separate Opinion of Judge Dillard [1972] ICJ 92, 101, ftn. 1; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ 166 [77]; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* [1986] ICJ Rep 14 Dissenting Opinion of Judge Schwebel [15]; *Case Concerning the Territorial Dispute (Libya v Chad)* [1994] ICJ 7 [47]; *Case Concerning Oil Platforms (Islamic Republic of Iran v the United States of America)* (Preliminary Objections) [1996] ICJ Rep 803 [52]; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v USA)* [1998] ICJ 115 Dissenting Opinion Judge Schwebel 72; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary Objections) [1998] ICJ 275 Dissenting Opinion Judge Weeramantry 366; *Case Concerning Kasikili/Sedudu Island (Bostwana v Namibia)* [1999] ICJ Rep 1045 Dissenting Opinion of Judge Weeramantry 1158 [18].

5.3.2. Legal Interpretation versus Gap Filling

Another issue to consider is the relationship between gap filling and interpretation. Some legal theorists distinguish between the two. Gap filling (*lacunae*) is triggered by silence, when the norm neither regulates, nor excludes certain types of behaviour from its scope.[116] It then follows from the reasoning of legal scholars that while interpretation establishes the meaning of the text which contains the norm (even pushing the language to the limits of the semantic range), gap filling adds to the text.[117] However, this neat distinction only makes sense if we accept a narrow meaning of the word interpretation, one that is reduced to the semantic understanding of the words.

In practice, judges use different ways to fill in legal gaps and one of the most common ones is legal analogy. However, it is not the only one. As it will be shown throughout this thesis, international judges also fills in legal gaps in such a way that their argument is framed as an interpretation (in its constructive function).[118] Through interpreting either by reference to purpose or other relevant rules, judges are able to patch up the canvas of the legal rules that regulate an issue. It is, therefore, unwise, perhaps from a descriptive point at least, as opposed to a normative one, to draw hard and fast distinctions between gap filling and interpretation and perhaps the best way to describe this relationship is to say that interpretation is sometimes used as a tool for gap filling.

5.3.3. Legal Interpretation versus Application of the Law

The relationship where the lines are most difficult to draw is that between interpretation and application.[119] This owes to the intangible character of

[116] Barak (n 93) 68.
[117] ibid 66.
[118] In support of this view see H Kelsen, 'On the Theory of Interpretation' (1990) 10/2 Legal Studies M127, 132.
[119] Harvard Draft (n 62) 938; ILC, 'Third Report on the Law of Treaties' (n 69) 54-55 [8] (where the Special Rapporteur states that establishing rules of interpretation is important for both the application and the drafting of treaties, which means that he understands the two as separate acts). On the distinction between application and interpretation see A McNair, *The Law of Treaties* (OUP 1986) 365; Gourgourinis (n 89) 44-46; M Milanovic, 'The ICJ and Evolutionary Treaty Interpretation' (EJIL Talk, 14 July 2009) <https://www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation/>

application. Whereas interpretation can be identified in a judgment because judges explain their reasoning when settling upon a particular interpretation of a rule, application is difficult to pinpoint. Usually application is taken to mean that a norm is put into action — 'to apply' in a legal sense is defined as 'to put into operation and effect'.[120] It is common to say that the law applies in a certain jurisdiction, which means that it can be used by a judge to solve a case. At the same time, it is not equivalent to enforcement, which is the practical act of carrying out what in the judicial context is a judicial decision and where there is tangible, observable behaviour.[121]

Some judges do not draw the line between interpretation and application. For instance, Judge Shahabudeen states that 'to apply is to interpret'.[122] Others draw a clear line between interpretation and application. For example, Judge Higgins of the ICJ clearly distinguishes between the two when she notes that '[i]t is exactly the judicial function to take principles of general application, to elaborate their meaning and to apply them to specific situations'.[123] And, finally, the most frequently quoted definition is that formulated in the Opinion of Judge Ehrilich in the *Chorzow Factory* case.[124] Justice Ehrilich defined interpretation as the act of 'determining the meaning of a rule'[125] and application as

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accessed 1 July 2020; R Gardiner, *Treaty Interpretation* (2nd ed, OUP 2017) 30; J Kammerhofer, 'Taking the Rules of Interpretation Seriously, but Not Literally? A Theoretical Reconstruction of Orthodox Dogma' (2017) 86 Nordic Journal of International Law 125, 140-141; C Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (CUP 2018) 14-15.

According to Kelsen, 'the act of application of the law by a legal organ combines the cognitive interpretation of the applicable law with an act of will; the latter is a choice by the law-applying organ between the possible meanings identified by cognitive interpretation'. See H Kelsen, *Reine Rechtslehre* (2nd edn, Deuticke, Vienna, 1960) 351 cited in and translated to English by Kammerhofer (2017) (n 119) 136. In the case law see *Prosecutor v Stakić*, ICTY, Case no. IT-97-24-A Appeals Chamber Judgment, 22 March 2006, Partly Dissenting Opinion of Judge Shahabudeen [35].

[120] 'Apply', Merriam Webster Dictionary <https://www.merriam-webster.com/dictionary/apply> accessed 12 January 2021.

[121] 'Enforce', Merriam Webster Dictionary <https://www.merriam-webster.com/dictionary/enforce> accessed 12 January 2021.

[122] *Prosecutor v Stakić*, Partly Dissenting Opinion of Judge Shahabudeen (n 119) [35].

[123] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, Dissenting Opinion of Judge Higgins [32].

[124] *Factory At Chorzów (Germany v Poland)* (Merits) Judgment No 13 [1928] PCIJ Series A No 17.

[125] ibid, Dissenting Opinion of Ehrilich 39.

> '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'.[126]

A somewhat similar definition of application was advanced in the *Industria Nacional de Alimentos SA and Indalsa Perú v Peru* ICSID Arbitration, where one of the arbitrators opined that 'treaty application will entail to some extent an assessment of the facts of the particular case and their correlation with the legal rights and obligations in play'.[127]

Scholarly definitions distinguish between interpretation as the act of decoding the meaning of the sign, which is the legal text, whereas application as an activity related to the meaning of the sign in the real world.[128] In another formulation, interpretation 'is the activity of establishing the linguistic or semantic meaning of a text; the latter [application] the activity of translating that text into workable legal rules to be applied in a given case'.[129] All these definitions seem to converge at the point that interpretation appears to be centered on the rule or on the text of the rule, in the case of treaties, whereas application concerns the facts of the particular case. Under this conception, interpretation precedes application[130] and the former is, in turn, preceded by a judicial qualification of the potentially applicable law,[131] which is done by looking at the factual situation against the background of existing norms of positive law.[132] Alternative views support a *lato sensu* definition of application which includes interpretation[133] while a third category of writers have argued

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[126] ibid.

[127] *Industria Nacional de Alimentos SA and Indalsa Perú (formerly Lucchetti SA and Lucchetti Perú SA) v Peru* (Decision on Annulment of 5 September 2007) Case No ARB/03/4, Dissenting Opinion, Judge Sir Franklin Berman [15] cited in E Bjørge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 15.

[128] Djeffal (n 119) 14. Relying on the example of the preliminary rulings procedure at the EU (Article 267 TFUE) Djeffal argues that it is possible to have in a judicial context interpretation without application, as an argument that interpretation and application are distinct processes. Djeffal (n 119) 15. See also Kammerhofer (2017) (n 119) 141.

[129] Milanovic (n 119).

[130] Gardiner (n 119) 30.

[131] Gourgourinis (n 89) 44-46.

[132] ibid 45.

[133] Even Gourgourinis who promotes the separation between interpretation and application, acknowledges that interpretation as part of application *lato sensu.* Gourgourinis (n 119) 43, 46-47.

that interpretation is intertwined with application in such a way that distinguishing them from one another is virtually impossible or, in any event, unnecessary.[134]

Based on the ordinary meaning definition of application (see *supra*), equating application and interpretation means stretching the concept of application beyond its natural limits. Because legal interpretation has besides a clarificatory, also a constructive function which involves a 'concretisation of abstract general norms in individual instances',[135] it may easily be confused with application as a notion that is tightly connected to the facts of the case. Moreover, even if we admit that the act of interpretation bleeds into application when judges concretize a rule because this is required by the facts of the case, this does not mean that the act itself loses its interpretative nature. Hence while interpretation and application operate in close proximity to each other, the argumentation of the judges on the rule, albeit taking into account the facts, remains primarily an interpretative act.

5.3.4. Legal Interpretation versus Judicial Interpretation

In the exercise of their function, judges and decision-makers from other dispute settlement bodies might need to engage in other types of interpretation, such as interpretation of evidence. This is distinct from the

According to Kelsen, 'the act of application of the law by a legal organ combines the cognitive interpretation of the applicable law with an act of will; the latter is a choice by the law-applying organ between the possible meanings identified by cognitive interpretation'. See Kelsen (1960) (n 119) 351 cited in and translated to English by Kammerhofer (2017) (n 119) 136.

[134] For an opinion that it is wither impossible or difficult to distinguish between interpretation & application: *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion, Separate Opinion of Judge Shahabudeen) [1988] ICJ Rep 12, 57-59; J Klabbers, 'Reluctant Grundnormen: Articles 31 (3) (C) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law' in M Craven, M Fitzmaurice, M Vogiatzi (eds) *Time, History and International Law* (Brill 2007) 141, 144. Some scholars contrast rule-application with rule-creation, as opposed to interpretation. In this sense, Mendelson argued that these two are merely theoretical ends of a spectrum and interpretation is something that happens in between. See M Mendelson, 'The Formation of Customary International Law' (1998) 227 RCADI 155,176 ftn 20. See also C McLachlan, 'The Principle of Systemic Integration and Article 31 (3) (C) of the Vienna Convention' (2005) 54 ICLQ 279; P Sands, J Commission, 'Treaty, Custom and Time: Interpretation/Application?' in M Fitzmaurice, O Elias, P Merkouris (eds) *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill 2010) 39.

[135] Kammerhofer (2017) (n 119) 131. It should be noted here that interpretation is also closely linked to norms of conflict resolution. See ILC, 'Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions' UN Doc A/CN. 4/L. 702 (18 July 2006) [26], [67], [83], [412].

interpretation of the law, but also part of the broader category of judicial interpretation.

6. Customary Rules as the Object of CIL Interpretation

One of the arguments against the interpretability of custom rests on the characteristics of customary rules. It says that any exercise of interpretation would entail looking back at State practice and *opinio juris*, which would essentially mean a new cycle of identification. This view, I argue, does not distinguish between the elements of custom and customary rules.

According to the ILC, '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*)'.[136] State practice makes up the content of a customary rule[137] and includes both physical and verbal acts (claims/statements).[138] Moreover, both actions and inactions may contribute to State practice.[139] The condition of practice refers not only to the practice of States but may, in certain cases, include the practice of international organizations.[140] Despite the fact that empirical research points to the conclusion that treaties are the most frequently relied on evidence of

[136] ILC, 'Draft conclusions' (n 6) 124. Against CIL as composed of two elements see G Distefano, *Fundamentals of Public International Law: A Sketch of the International Legal Order,* Queen Mary Studies in International Law, Vol. 38 (Brill 2019) 322.
[137] J Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems' (2004) 15/3 EJIL 72, 73.
[138] ILC, 'Draft conclusions' (n 6) 133. See M Akehurst, 'Custom as a Source of International Law' (1975) 47/1 BYIL 1, 1-8; *a contrario* A D'Amato, *The Concept of Customary International Law* (Cornell University Press 1971) 88; SM Schwebel, 'The Effect of Resolutions of the U.N. General Assembly on Customary International law' in Proceedings of the Annual Meeting 26-28 April 1979, ASIL, Vol. 73, 301, 302; I MacGibbon, 'Means for the Identification of International Law. General Assembly Resolutions: Custom, Practice and Mistaken Identity' in B Cheng (ed), *International Law: Teaching and Practice* (Stevens 1982) 10, 20; P Pazartzis, 'Le rôle de la pratique dans le droit coutumier' in R Huesa Vinaixa (ed), *L' influence des sources sur l' unité et la fragmentation du droit international* (Bruylant 2006) 81.
[139] ILC, 'Draft conclusions' (n 6) 133; Akehurst (n 138) 10;
[140] ILC, 'Draft conclusions' (n 6) 130. This was also discussed by L Kopelmanas, 'Custom as a Means of the Creation of International Law' (1937) 18 BYIL 127, 145 (*a contrario*); JL Kunz, 'The Nature of Customary International Law' (1953) 47/4 AJIL 662, 665; K Daugirdas, 'International Organizations and the Creation of Customary International Law', University of Michigan Public Law Research Paper No. 597, April 2018; S Droubi, J d'Aspremont (eds), *International Organizations and Non-State Actors in the Formation of Customary International Law* (Manchester University Press 2019).

State practice in international courts,[141] the ILC establishes that treaties, resolutions of international organizations and decisions of national and international courts and teachings of the most highly qualified publicists are not included in forms of evidence of State practice.[142] However, they may be used as means for the determination of customary international rules.[143]

For the successful invocation of a customary rule in international courts, it must be shown that State practice is 'general, meaning that it must be sufficiently widespread and representative, as well as consistent'.[144] While duration is, from a definitional standpoint, an important characteristic of the concept of custom,[145] according to the ILC conclusions, if the practice is general, then no specific duration is required.[146]

Yet, State practice is not the only element that is needed to identify an international custom. State practice must also be accompanied by *opinio juris* – 'a conviction that it is permitted, required or prohibited by customary international law'.[147] It must be noted that the ILC conclusions contain two different definitions of *opinio juris*. On the one hand, they define it as 'a conviction that it is permitted, required or prohibited by customary international law'.[148] According to this definition, the main function of *opinio juris* is to distinguish between legal and non-legal manifestations, such as international comity.[149] On the other hand, the ILC also defines *opinio juris* as acceptance as law when it States that 'acceptance as law (*opinio juris*) is to be

[141] Choi, Gulati (n 2) 117.
[142] ILC, 'Draft conclusions' (n 6) 142 [1].
[143] ibid. For the practice of the ICJ see *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Merits) [1985] ICJ Rep 13 [27]; *Military and Paramilitary Activities* 14 (n 115) [188]; *Legality of the Threat or Use of Nuclear Weapons* (n 123) [70].
[144] ILC, 'Draft conclusions' (n 6) 135.
[145] B Tierney, 'Vitoria and Suarez on *ius gentium*, natural law and custom' in A Perreau-Saussine, JB Murphy (eds), *The Nature of Customary Law. Legal, Historical and Philosophical Perspectives* 101, 117.
[146] ILC, 'Draft conclusions' (n 6) 138 [9]. On this point see GJ Postema, 'Custom, Normative Practice and the Law' (2012) 62/3 Duke Law Journal 707, 727.
[147] ibid 138 [2].
[148] ibid.
[149] ibid 139 [3]. For an analysis on the relationship between *opinio juris* as part of CIL and comity see A Pietrobon 'Dalla Comity All'Opinio Iuris: Note Sull'elemento Psicologico Nella Formazione Della Consuetudine' in Gaetano Arangio-Ruiz (ed) *Studi Di Diritto Internazionale in Onore Di Gaetano Arangio-Ruiz*, Volume I 355.

sought with respect to both the States engaging in the relevant practice and those in a position to react to it'.[150] This mirrors the different conceptions of *opinio juris* that also exist in the literature and the lack of clarity as to whether *opinio juris* has a declarative or a constitutive function.[151]

Opinio juris defined as the conviction that something is law resembles the language of the German historical school of jurisprudence,[152] who believed that all law, but custom in particular, originates organically from the spirit of a nation, as opposed to having been laid down arbitrarily by an external authority[153] — 'the common conviction of the people is the origin of [all] law'.[154] The practice only externalizes the pre-existent legal conviction or belief.[155] Following this line of thought, the existence of customary practices/rules depends on the identification of such a conviction.[156] While the idea of a *common* conviction of a nation that animates the creation of the law is justifiable on the grounds that nation States were believed to be cohesive units that share the same values, cultural and social life, it is difficult to apply this reasoning to the relationship between States, which are heterogeneous and frequently have opposing interests.

Commentators also criticize this meaning of *opinio juris* for generating a so-called chronological paradox.[157] It is argued that, state practice and *opinio juris*

[150] ILC, 'Draft conclusions' (n 6) 139 [5].
[151] RM Walden, 'The Subjective Element in the Formation of Customary International Law' (1977) 12 Israel Law Review 344, 357-358; O Elias, 'The Nature of the Subjective Element in Customary International Law' (1995) 44/3 ICLQ 501, 502 and 513.

[152] F Geny, *Méthode d'interprétation et sources en droit privé positif : essai critique. Tome premier* (LGDJ 1919) 347; AA Schiller, 'Custom in Classical Roman law' (1938) 24/3 Virginia Law Review 268, 272.This is why some scholars and judges call it either the mental/psychological or the intellectual element. See indicatively: G Gianni, *La coutume en droit international* (Pedone 1931) 132; M Virally, 'The Sources of International Law' in M Sørensen (ed), *Manual on Public International Law* (St. Martin's Press 1968) 116, 133.
[153] Walden (n 151) 357-358; D'Amato (1971) (n 138) 47.
[154] H Kantorowicz, 'Savigny and the Historical School of Law' (1937) 53 LQR 326, 332.
[155] CA Bradley, 'The Chronological Paradox, State Practice and Opinio Juris' <https://web.law.duke.edu/cicl/pdf/opiniojuris/panel_1-bradley-the_chronological_paradox,_state_preferences,_and_opinio_juris.pdf> (2013) accessed 20 May 2020 5.
[156] Geny (n 152) 347.
[157] Bourgeois H, Wouters J (n 2) 69-111.

cannot lead to the creation of custom if *opinio juris* is defined that the practice is already law before it becomes so.[158] One way out of this paradox is to assert that the States acted in legal error.[159] Another proposed way out of this paradox is to say that the *existence* of the belief is necessary for the validity of a customary rule (perhaps not for its creation), whereas its truth-value is irrelevant.[160]

However, there is another group of writers that define the *opinio juris* in a way that bypasses these critiques. The following definitions have been advanced: (1) that *opinio juris* is not the conviction that a rule already exists but, the conviction that it is good, just, equitable to act in a certain way,[161] (2) it is a conviction that it is desirable for a specific rule to exist,[162] (3) that it is not the belief that rule with a content X exists, but that certain behaviour are, generally speaking, mandated, permitted or prohibited,[163] or (4) such a practice, the violation of which would not be considered unlawful.[164]

An alternative understanding of *opinio juris* is that it equates with consent instead of belief. The function of *opinio juris* as consent is to justify the binding character of a customary rule. Different theories have been advanced concerning the reasons why customary international law is binding. In a nutshell, the binding character has been founded on the following grounds, such as: legitimate or shared expectations,[165] moral/ethical desirability,[166] or social conformity.[167] One theory that is connected to the ground of legitimate

[158] D'Amato (1971) (n 138) 53.
[159] Kunz (n 140) 667.
[160] Kammerhofer (2004) (n 137) 82.
[161] Gianni (n 152) 133.
[162] M Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999) 150-151.
[163] H Kelsen, *Principles of International Law* (2nd ed, Holt, Rinehart & Winston 1966) 440.
[164] M Sørensen, *Les Sources du Droit International, Etude Sur la Jurisdprudence de la Cour Permanente de Justice Internationale* (Einar Munksgaard 1946) 105.
[165] LL Fuller, 'Human Interaction and the Law' (1969) 14 Am. J. Juris. 1, 16; Byers (1999) (n 162) 106; AT Guzman, TL Meyer, 'Customary International Law in the 21st Century' in RA Miller, RM Bratspies, *Progress in International Law* Developments in International Law, Vol. 60 (Brill 2008) 197, 205.
[166] See J Tasioulas, 'Opinio Juris and the Genesis of Custom: A Solution to the 'Paradox''(2007) Australian Yearbook of International Law 26 199, 199-205.
[167] Postema (n 146) 716.

expectations is the theory of custom according to which it arises organically from the properties of the human mind – the tendency of the human brain to believe that identical acts will produce identical results, which creates order and predictability. [168] However, the mainstream view in international law is that the basis of custom is the *tacit* consent of States.[169] Whereas express consent is directly ascertainable, tacit consent is inferred from conduct/behaviour.[170] As Tunkin writes 'recognition or acceptance by a state of a particular customary rule as a norm of law signifies an expression of a state's will, the consent of a state, to consider this customary rule to be a norm of international law'.[171] This idea of founding custom on tacit consent seems to have the roots in domestic Roman law where the aim was to liken custom to regular legislation and to base it on the consent of the people.[172]

However, objections have been raised even to this meaning of *opinio juris.* Firstly, it cannot explain why customary international law also binds States that have not, even tacitly, consented to the norm, which would be the case of a newly formed State.[173] If consent/will is the basis for all law, then *all* states should have consented to it, given also the principle of equality of States.[174] Secondly, it has been argued that this does not correspond to what actually happens in practice. In reality, States often do not have a choice whether to consent to a CIL rule or not, even tacitly.[175] Even assuming that there is a will involved, it is argued, the will signifies the State's intent or consent to engage

[168] NM Korkunov, *General Theory of Law* (English Translation by WG Hastings) (Boston Book Company 1909) 417-418. For a similar argument see D Hume, Abrégé du Traité de la nature humaine (Allia 2016) 57 cited in M Gringon, 'Usage et légitimité' in L Mayali, P Mousseron (eds), *Customary Law Today* (Springer 2018) 1, 6.
[169] Kopelmanas (n 140) 128; Byers (1999) (n 162) 132; Guzman, Meyer (n 165) 205.
[170] Walden (n 151) 346.
[171] GI Tunkin, *Theory of International Law* (Harvard University Press 1974) 123.
[172] Schiller (n 152) 273; JAC Thomas, 'Custom and Roman Law' (1963) 31/1 The Legal History Review 39, 45.
[173] A Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th ed, OUP 2012) 50-52.
[174] Kelsen (1966) (n 163) 444; Tunkin (n 171) 126; GJH Van Hoof, *Rethinking Sources of International Law* (doctoral thesis) (Kluwer 1983) 94; *A contrario*, on the distinction between will and consent see GM Danilenko, 'The Theory of International Customary Law' (1988) 31 GYIL 9, 14.
[175] A Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1989) 12 Australian Yearbook of Int Law 22, 36.

in the behaviour and not to necessarily create a rule of law.[176] Thirdly, consent cannot be a sound basis of any type of law, including CIL, because it presupposes that a State may at any time withdraw from its obligations.[177] Finally, consent cannot work as the basis of an international obligation because one of the functions of law is precisely to limit the wills of its subjects.[178] While the theory of consent as the legal basis of CIL is compatible with the fundamental precepts of international law, such as State sovereignty,[179] it is a fiction generated by prior theoretical commitments, but which cannot explain and justify persuasively the legal basis of CIL.[180]

Opinions are also divided concerning whether *opinio juris* is the *opinio juris* of States taken individually or a collective *opinio juris*.[181] If one conceived *opinio juris* as a belief of each State, this raises issues concerning reliable proof of the motives that lay behind a certain action or inaction.[182] The issue of *opinio juris* as consent brings up the problem as to how many 'consents' is enough.[183] Additionally, it may be a challenge to the principle of sovereign equality of States, if some 'consents' are assessed as being weightier than others.

Although not without their problems, the two elements of custom – State practice and *opinio juris* – still provide the foundation for establishing any customary rule in international law. But what about interpretation of CIL? When we say 'interpretation of CIL', the concept may appear ambiguous.

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[176] ibid.

[177] JL Brierly, ed. H Lauterpacht, CHM Waldock, *The Basis of Obligation in International Law and Other Papers* (Clarendon Press 1958) 11. See also Gianni (n 152) 159.

[178] Brierly (n 177) 14.

[179] Postema (n 146) 713; Kelsen (1966) (n 163) 447.

[180] Kelsen (1966) (n 163) 448. For other possible explanations of the bindingness of custom see: D Anzilotti, *Cours de Droit International, Premier Volume, Introduction – Théories Générales* (translation by G Gidel, Librairie du Recueil Sirey 1929) 74; V Fon, F Parisi, 'International Customary Law and Articulation Theories: An Economic Analysis' (2006) 2 International Law and Management Review 201.

[181] Elias (n 151) 519; B Cheng, 'Hazards in International Law Sharing Legal Terms and Concepts with Municipal Law Without Sufficiently Taking into Account the Differences in Structure Between the Two Systems – Prime Examples: Custom and *Opinio Juris'* in G Arangio-Ruiz (ed*), Studi Di Diritto Internazionale in Onore Di Gaetano Arangio-Ruiz – Volume I* (Editoriale Scientifica 2004) 469, 478-480 and 488.

[182] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Merits) [1969] ICJ Rep 3, Dissenting Opinion of Judge Sørensen 246.

[183] G Scelle, Manuel de Droit International Public (Domat-Montchrestien 1948) 575.

This is because the notion of notion of custom has more than just one meaning. According to Article 38 (1) (b) of the ICJ Statute, custom is 'evidence of a general practice accepted as law', which essentially sends us back to the two elements that have just been analysed. Leaving aside the somewhat convoluted and inaccurate formulation, based on this provision it is common to understand international custom as the sum of its elements. However, customary international law also means the body of all the rules included within the scope of this source of law, or even denotes the *procedure* of customary law-creation, which focuses on *how* custom comes about, rather than what custom consists of.[184] Equally, the notion of customary international law and, more accurately, customary rule is used to denote the legal norm which is brought about by repeated usage that is accepted as law. This norm emerges after a repeated, widespread, consistent and representative practice conducted with the sense of legal obligation has taken place. Put differently, State practice conducted with the sense of legal obligation creates a *rule* of customary international law, which is the result of custom understood as a process of law-creation,[185] and the subsequent behaviour is engaged in because a rule in this sense has emerged. In the words of Brigitte Stern, 'the customary rule is an addition to the fact considered as law',[186] which means that the customary rule is more than just State practice and *opinio juris* as the legal norm does not identify with the verbal proposition, the gesture or behaviour that gives rise to it.[187]

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[184] Kopelmanas (n 140) 127; Kunz (n 140) 665; C Parry, *The Sources and Evidences of International Law* (Manchester University Press 1965) 59; Kelsen (1966) (n 163) 441; Tunkin (n 171) 125; Danilenko (n 174) 11; DM Bodansky, 'The Concept of Customary International Law' (1995) 16 MichJIntlL 667, 667; M Byers (1999) (n 162) 150 -151; Kammerhofer (2004) (n 137) 72; BD Lepard, 'Customary International Law as a Dynamic Process' in C Bradley (ed) *Custom's Future, International law in a Changing World* (CUP 2016) 62, 63.

[185] Danilenko (n 174) 9 and 10; Tunkin (n 171) 124.

[186] B Stern, 'La coutume au cœur du droit international : quelques reflexions' in P Reuter (ed), *Melanges offerts a Paul Reuter: le droit international; unite et diversite* (Pedone 1981) 479, 485. Stern writes 'la regle coutumiere est deplement du fair considere comme du droit' which is translated as 'the customary rule is a supplement to the fact considered as law'.

[187] JP Jacqué, 'Acte et norme en droit international public' (1991) 227 RCADI 357, 385-386; Kelsen (1991) (n 105) 2. For instance, Kelsen writes that ''validity' is the specific existence of a norm, an existence different from that of a natural fact, and in particular from that of the fact by which it is created.'

That *opinio juris* and State practice as elements of custom are different from the customary *rule* itself, as an abstraction derived from the elements,[188] is even reflected in the language of the ILC. In the words of the ILC, customary international law is 'unwritten law *deriving from* practice accepted as law'.[189] The verb 'derives' signifies that something is obtained from something else,[190] which means that there is no identity between the two objects.

The fact that the object of CIL interpretation is the customary rule and not the elements of custom has two main implications. Firstly, this means that the process of interpretation does not restart the process of identification and, therefore, it is not superfluous in the case of CIL. Secondly, it follows that even if State practice is relied on in the process of interpretation of the customary *rule,* it is used similarly as subsequent practice in treaty interpretation, rather than the elements that make up custom.[191] Moreover, addressing Herdegen's argument, as will be seen throughout this thesis, especially in chapters 3,4 and 5, the ways in which CIL's content is determined goes beyond mere syllogisms, but they also use methods of interpretation similar to those used in treaty rules. Finally, since CIL interpretation is concerned with the customary rule and not its elements, it is just as necessary to customary rules as it is to treaty rules. As legal theorists have argued, *every norm,* while not being wholly indeterminate, possesses an *area* of indeterminacy.[192] This view is based on 'the open texture of the law';[193] the formulation of general rules by virtue of the limits inherent in the nature of

[188] Lukashuk (n 37) 487.
[189] ILC 'Draft conclusions' (n 6) 122, emphasis added. According to Kelsen 'custom is a fact that creates law'. See H Kelsen, 'Théorie du droit international public' (1953) 84 RCADI 1, 124. This diversity in meanings of 'custom' is also seen in the discussions during the Preparatory Works of the Statute of the PCIJ. The Advisory Committee of Jurists talked about 'a general practice accepted as law by nations', but also about the existence of 'a general *rule* of customary international law' or, somewhat similarly, as 'a principle which must be followed by the judge'. See PCIJ, Procès-Verbaux of the Proceedings (n 1).
[190] 'Derive', Cambridge Dictionary Online <https://dictionary.cambridge.org/dictionary/english/derive?q=deriving> accessed 30 June 2020.
[191] These points are addressed in greater detail in chapter 2.
[192] Kelsen (1990) (n 118) 127-128; HLA Hart, *The Concept of Law* (Clarendon Press 1961) 128 and also page 272. See also Bentivoglio (n 99) 217.
[193] Hart (1961) (n 192) 126.

language which cannot account for all the 'particular fact-situations' that may arise in real life.[194] Thus, any legal norm may become at a certain point vague or open textured, even a norm the meaning of which at the moment of its adoption was perceived as fully determinate and clear.[195] Most legal norms will sooner or later be amenable to interpretation simply because while the norms are forward-looking, no legislator can account for all the 'particular fact-situations' that may arise in real life subsequently to the adoption of the norm.[196] Customary rules are no exception.

7. Conclusion

This chapter has shown that in legal literature different arguments have been brought against the concept of CIL interpretation. These arguments are mainly founded on the meanings attributed to the two terms: interpretation and customary international law. In this chapter, I have attempted to unpack these arguments and address their premises. Firstly, I have argued that while in the act of legal interpretation the interpreter may rely on text or the intention of the parties, finding or determining the meaning of the text or the intentions of the parties is not an end in itself. Instead, the goal of interpretation is to determine the meaning and scope of a legal rule.

The second argument concerned the meaning of a customary rule. In this regard, it was argued that customary rules need to be distinguished from elements of custom – State practice and *opinio juris.* Distinguishing between the elements of custom and customary rules eliminates the issue of viewing

[194] ibid 126; HLA, 'Positivism and the Separation of Law and Morals' (1958) 71/4 Harvard Law Review 593, 606.
According to Kelsen, a every norm possesses a frame with many possibilities of application and the judge is expected to fill this frame. Therefore, interpretation is the discovery of this frame and within this frame all the potential applications. See H Kelsen, *Introduction to the Problems of Legal Theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law* (Clarendon 1996) 80-81. For a criticism that neither Hart, nor Kelsen explain how the initial framing is done see D Kennedy, 'A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation' in D Kennedy (ed), *Legal Reasoning: Collected Essays* (Davies Book Publishers 2008) 153, 157.
[195] Hart (1961) (n 192) 128. *A contrario* D Patterson, 'Theoretical Disagreement, Legal Positivism, and Interpretation' (2018) 31/3 Ratio Juris 260, 273.
[196] Hart (n 192) 126; Hart (1958) (n 194) 607.

interpretation as a superfluous stage in the life cycle of CIL.[197] In other words, because the object of CIL interpretation is the customary rule, this process does not involve *per se* another inquiry into State practice and *opinio juris*. Rather than engaging in an examination of State practice, the interpreter can use methods similar to those used in treaty interpretation. Overall, this chapter set the terminological framework for the subsequent chapters that will focus on the use of different methods similar or identical to those used in treaty interpretation in the interpretation of customary rules.

[197] Merkouris (2017) (n 53) 128; 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, N Arajärvi, J Kammerhofer, N Mileva (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) 453, 459.

CHAPTER 2

Interpretation and Identification of Customary Rules – Birds of a Different Feather

1. Introduction

The practice of international courts and tribunals, quasi-judicial and other dispute settlement bodies abounds with references to 'interpretation' in relation to CIL. They refer to interpretation of customary *law,*[198] interpretation of customary *rules or standards*[199] or, even without using the term interpretation expressly, use a language that conveys the idea of interpretation when, for instance, they say that they inquire into the content and scope of a customary rule/standard.[200] However, both the case law and the literature also point to a different use of the term interpretation, which is used with reference to either State practice or *opinio juris*.[201] For instance, Lon Fuller writes: '[t]he central problem of "interpretation" in customary law is that of knowing when to read

[198] Perhaps the reference to interpretation of customary law is the most ambiguous reference, as it may refer either to the interpretation of a customary rule or to the interpretation of customary law understood as a body of rules on a specific subject or, more generally, the interpretation of custom as a source of law. See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v the United Kingdom)* (Preliminary Objections) [2016] ICJ Rep 833 Dissenting Opinion of Judge Trindade [70]; G Cataldi, 'In Tema di Applicazione Delle Norme Consuetudinarie Sui Diritti Umani Nei Giudizi Interni' in G Arangio-Ruiz, *Studi Di Diritto Internazionale in Onore Di Gaetano Arangio-Ruiz* (vol. 1, Editoriale Scientifica 2004) 441, 457; Lukashuk (n 37) 499. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422, Declaration of Judge Donoghue [21]; ibid, Separate Opinion of Judge Sebutinde [34].

[199] Indicatively: *"Ara Libertad" (No 2) (Argentina v Ghana)* (Provisional Measures, Order of 15 December 2012, Joint Separate Opinion of Judge Wolfrum and Judge Cot, ITLOS Reports 2012, 336, [7]; *The Rhine Chlorides Arbitration concerning Auditing of Accounts (The Netherlands/France)* (Award of 13 May 2014) PCA Case 2000-02, Unofficial Translation [43]; *Mesa Power Group LLC v Canada* (Award of 24 March 2016) PCA Case no. 2012-17 [468].

[200] Indicatively: *Nuclear Tests Case* (n 78) Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock [52]; *Windstream Energy LLC v Government of Canada* (Award of 27 September 2016) UNCITRAL [350].

[201] Indicatively: *Continental Shelf (Libya v. Malta)* (n 143) [44]; P Haggenmacher, 'La doctrine des deux éléments du droit coutumier dans la pratique de la cour internationale' (1986) 90 RGDIP 5; AE Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95/4 AJIL 757, 779; M Koskenniemi, *From Apology to Utopia: the structure of international legal argument* (CUP 2005) 435; Worster (n 2) 490; Talmon (n 2) 433; PH Verdier, E Voeten, 'How Does Customary International Law Change? The Case of State Immunity' (2015) 59 International Studies Quarterly 209, 209; N Banteka, 'A Theory of Constructive Interpretation for Customary International Law Identification' (2018) 39(3) MichJIntlL 301.

into an act, or a pattern of repetitive acts, an obligatory sense like that which may attach to a promise explicitly spelled out in words'.[202] In a similar vein, Petersen notes 'the formation of customary law is a complex exercise that needs to leave some flexibility to the lawyer or judge interpreting instances of state practice and *opinio juris* and assigning legal significance to them'.[203]

In this chapter, I argue that this type of interpretation belongs to the stage of identification of customary rules, that is, the establishment of the rules' existence, and is different from the interpretation of customary rules that is similar to treaty interpretation. Using both case law and legal scholarship as a backdrop for this analysis, I explore three different uses of the term interpretation in relation to State practice and/or *opinio juris* to then delineate the acts that belong to identification of custom from that of interpretation of customary rules.

Before proceeding to the main argument, I lay out the different ways in which the Statutes or laws of different international and internationalized courts and tribunals and other bodies refer to CIL to clarify the role that is played by CIL in different courts and bodies (Section 2). I then turn to a clarification of the term identification and how courts and other dispute settlement bodies proceed to apply rules of CIL. This is important as the identification of the elements of custom is part of this process of identification, which is different from the interpretation of customary rules. This is followed by a discussion of the different types of interpretation of elements of custom (Section 3). Finally, in Section 4 I draw the line between the interpretation of elements and that of the customary rules and discuss as to why and how this can be recognized in the case law (Section 4).

[202] Fuller (n 165) 15.
[203] Verdier, Voeten (n 200) 1; Lepard (2016) (n 184) 79; N Petersen,'The Role of Consent and Uncertainty in the Formation of Customary International Law' in B Lepard (ed) *Reexamining Customary International Law* (CUP 2017) 111, 116.

2. CIL as Applicable Law

Customary international law occupies an important place in the practice of international judicial and quasi-judicial bodies. This can be noticed primarily from the examination of the statutes, treaties and laws based on which these courts or bodies were established. Many of these mention CIL as applicable law expressly. Yet, even in those that do not, CIL is still relied upon either as a subsidiary source of law or for purposes of interpreting the applicable law. In discussing the applicability of customary international law in international and hybrid courts and tribunals, I will follow the following structure. Firstly, I discuss the statutes of the courts where CIL is referred to as applicable law explicitly. Secondly, I examine the statutes of courts where the reference to CIL as applicable law is implicit. Lastly, I look into the statutes and practice of those courts that do not mention CIL as applicable law, but have nevertheless applied it.

Article 38 of the ICJ Statute both establishes explicitly that CIL is among the sources of law to be applied by the court[204] and defines international custom as 'evidence of a general practice accepted as law'.[205] Identical language is used in Article 20 of the Protocol of the Court of Justice of the African Union,[206] and Article 31 of the Protocol on the Statute of the African Court of Justice and Human Rights.[207] The African Convention on Human and Peoples Rights in Article 61 also mentions CIL explicitly but, unlike the previously mentioned treaties, 'customs generally accepted as law' are to be used as *subsidiary measures* to determine the principles of law. This means that custom is not directly applicable, but has a function similar to judicial decisions and writings of publicists in the case of the ICJ.

[204] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 art 38. On the fact that Article 38 establishes a hierarchy of sources see PCIJ, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, 16 June-24 July 1920, 729. See also D Shelton, 'Normative Hierarchy in International law' (2006) 100/2 AJIL 291, 295.

[205] This definition is identical to that provided in Article 38 of the PCIJ Statute. Throughout the preparatory work of the Advisory Committee that designed the PCIJ Statute the reference to custom as applicable law ranged from the formulation of 'international custom, being practice between nations accepted by them as law' to 'international custom, as evidence of a common practice in use between nations and accepted by them as law' and, in the end, the Advisory Committee settled on 'international custom as evidence of a general principle accepted as law'. See PCIJ, Procès-Verbaux of the Proceedings (n 1) 306, 344, 548, 567.

[206] Protocol of the Court of Justice of the African Union (adopted 1 July 2003, entered into force 11 February 2009) <https://au.int/sites/default/files/treaties/36395-treaty-0026_-_protocol_of_the_court_of_justice_of_the_african_union_e.pdf> accessed 25 January 2022.

[207] Protocol on the Statute of the African Court of Justice and Human Rights (adopted on 1 July 2008, not in force) <https://au.int/sites/default/files/treaties/36396-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf> accessed 25 January 2022.

Most international and hybrid criminal courts equally mention CIL as applicable law either explicitly or, at least, implicitly. The Kosovo Specialist Chambers (hereinafter KSC), which is a hybrid court established pursuant to a domestic law,[208] also explicitly mentions customary international law.[209] Article 12 of the Law on the establishment of KSC states:

> 'The Specialist Chambers shall apply *customary international law* and the substantive criminal law of Kosovo insofar as it is in compliance with customary international law'

Here customary international serves a dual role: it is both applicable law and a yardstick by reference to which domestic criminal law is applied. Two other hybrid criminal courts that mention customary international law in their Statutes are the Extraordinary Chambers in the Courts of Cambodia (hereinafter ECCC)[210] and the Extraordinary African Chambers (hereinafter EAC).[211] Article 2 on the Law on the establishment of the ECCC mentions customary law when it states that the Chambers will bring to trial those who committed, among others, serious violations of international humanitarian law and *custom* – a formulation that is similar to that of the Statute of the

[208] Law no.05/L-053 On Specialist Chambers and Specialist Prosecutor's Office adopted by the Assembly of Republic of Kosovo, 3 August 2015, <https://www.scp-ks.org/sites/default/files/public/05-l-053_a.pdf> accessed 10 June 2021. This hybrid Court was established following a Council of Europe Report that discovered indications that the Kosovo Liberation Army held Serbians and Kosovar Albanians under detention and engaged in inhuman and degrading treatment and illicit trafficking of human organs during the Yugoslav war. See CoE, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 'Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo', Report, Doc. 12462, 7 January 2011, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12608&lang=en> accessed 25 June 2021. See K Ambos, SM Meisenberg, 'Kosovo Specialist Chambers' MPEPIL (August 2019) accessed 10 June 2021.

[209] For jurisdiction see Article 6 and 7 of the Law the Establishment of the Kosovo Specialist Chambers (n 209).

[210] Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Phnom Penh (adopted on 6 June 2003, entered into force on 25 April 2005) 2329 UNTS 41723.

[211] R Adjovi, 'The Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System Between the Government of the Republic Of Senegal and the African Union and the Statute of the Chambers' (2013) 52(4) International Legal Materials 1020-1036. On the creation of this hybrid court see S Williams, 'The Extraordinary African Chambers in the Senegalese Courts. An African Solution to An African Problem?' (2013) 11 J. Int Crim. Just. 1144-1145; E Cimiotta, 'Extraordinary African Chambers' MPEPIL (December 2019), accessed 25 January 2022.

ICTY, where according to Article 3, '[t]he International Tribunal shall have the power to prosecute persons violating the laws or *customs* of war'.[212] Article 3(1) of the Statute of the EAC provides that the Chamber's jurisdiction *rationae personae* that includes 'persons most responsible for crimes and serious violations of international law, *customary international law* and international conventions ratified by Chad'.[213]

[212] UNSC Res 827 (23 May 1993), Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002) < https://www.refworld.org/docid/3dda28414.html> accessed 25 January 2022. According to the Report of the Secretary General to the Security Council Resolution that established this *ad hoc* international court, the Tribunal was vested with the task of applying those provisions which are beyond any doubt customary international law. See UNSC, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993 [34]. One issue raised by CIL as applicable law in international criminal trials is the issue concerning the application of the principle *nullum crimen sine lege*, which includes the requirement of *lex scripta* – that the law is written down. The judgment of the Nuremberg Tribunal resolved this issue by declaring that the principle of legality (*nullum crimen sine lege*) is, first and foremost, a principle of justice. In *Prosecutor v. Delalić* the Trial Chamber distinguished the content of the *nullum crimen sine lege* principle in international law from its domestic counterpart. It subsequently added that international criminal law should preserve the balance between ensuring justice and fairness towards the accused and preserving the world order and these considerations are to be taken into account when determining the meaning of *nullum crimen sine lege* in international law. See IMT Judgment, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Vol 1, 219 available at <https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf > accessed 4 January 2019; *Prosecutor v. Delalić,* Trial Chamber Judgment (n 115) [105]. Regarding ECCC see Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004 <https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> accessed 25 January 2022. Under Articles 3-8 of the ECCC Law the Chambers had jurisdiction to try 3 types of crimes on the basis of the 1956 Penal Code: homicide, torture, religious persecution, crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, crimes against humanity, grave breaches of the Geneva Conventions of 1949, destruction of cultural property during armed conflict in accordance with the 1954 Hague Convention for Protection of Cultural Property in Armed Conflict and crimes against internationally protected persons under the 1961 Vienna Convention on Diplomatic Relations.

[213] Adjovi (n 211) 1020-1036. See also the official page of the Extraordinary African Chambers: <http://www.chambresafricaines.org/> accessed 25 January 2022.

The ICC Rome Statute limits in Article 21(1) (b) its applicable law to its 'Statute and the Elements of Crimes and its Rules of Procedure and Evidence' but allows the application of treaties, principles and rules of international law where appropriate, the reference to the latter to implying, among others, customary international law. The Regulation on the Establishment of the Special Panels for East Timor (hereinafter SPET) – a hybrid court established by Regulation no. 2000/15 of the United Nations Transitional Administration in East Timor[214] – uses language similar to that of the Rome Statute. According to it, the Panels shall apply '*where appropriate*, applicable treaties *and recognised principles and norms of international law*'.[215]

Lastly, the Agreement between the UN and Sierra Leone,[216] which established the Special Court for Sierra Leone, provides that the Court is competent to judge crimes against humanity, violations of Article 3 common to the Geneva Conventions and Additional Protocol II, other serious violations of international humanitarian law and certain acts which were crimes under Sierra Leonian law and not covered by the previous crimes. Given that rules of international humanitarian law also have the status of customary rule, the generic reference to 'other serious violations of international humanitarian law' may be interpreted to include customary international law.

[214] UN, United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000 <https://www.legal-tools.org/doc/c082f8/pdf/> accessed 25 January 2022.See also C Drew, 'The East Timor Story: International Law on Trial' (2001) 12/4 EJIL 651; S Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor' (2003) 16 Harv. Hum. Rights J. 245.

[215] Regulation No. 2000/15 (n 214) art 3.1.

[216] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown (adopted on 16 January 2002, entered into force on 12 April 2002) 2178 UNTS 38342. See also UN, SC, Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, S/2000/786, 10 August 2000 <http://www.rscsl.org/Documents/Establishment/S-2000-786.pdf> accessed 16 October 2021. For a more detailed analysis see SM Meisenberg, 'Sierra Leone' MPEPIL number (May 2013); WA Schabas, *The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 34-40.

While CIL is not automatically applicable to the arbitrations conducted under the auspices of ICSID, according to Article 42 (1) of the Convention on the Settlement of Disputes Between States and Nationals of other States, if the parties have not agreed on applicable law, the Tribunal 'shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.[217] This includes CIL by implication.

Other courts and tribunals appear to have taken a more restrictive approach to applicable law which narrows it to the interpretation and application of the treaty under which the respective court and tribunal has been established. The statutes or treaties that establish the functions of these courts or quasi-judicial bodies do not contain any explicit reference to CIL as applicable law. One such example is the ECtHR. According to Article 32 of the ECHR, the jurisdiction of the Court includes '*all matters* concerning the interpretation and application of the Convention and the Protocols thereto'.[218]

In a similar vein, Article 62(3) of the Inter-American Convention on Human Rights that established both the Inter-American Commission and the Inter-American Court states:

> '[t]he jurisdiction of the Court *shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it*, provided that the States Parties to the case recognize or

[217] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted on 18 March 1965, entered into force on 14 October 1966) 8359 UNTS 160 art 42.

[218] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 2889 UNTS 222. Interestingly, during the drafting of this provision, originally it followed a similar formulation as Article 38 of the ICJ Statute but which excluded CIL. During the discussions on the drafting the representative of the Netherlands proposed to expand the text of the provision to include 'the usual international custom, as proof of a practice generally accepted as law'. However, this proposal was rejected and the final version of Article 32 did not retain the reference to other sources of international law. See CoE, ECtHR, Preparatory work on Articles 45 and 49 of the European Court of Human Rights, Strasbourg, 6 November 1970 <https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART45+49-CDH(70)32-BIL2888561.pdf> accessed 19 October 2021 at 3, 25-26, 38.

have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or b a special agreement.'[219]

Likewise, the Protocol of the African Charter on Human and People's Rights on the Establishment of an African Court of Human and People's Rights in Article 7 limits the applicable law to 'the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned'.[220]

Among the hybrid criminal tribunals, the only tribunal that does not mention CIL either explicitly or implicitly is the Special Tribunal for Lebanon (STL).[221] In accordance with Article 2 of the Statute of the STL, the Court is called to apply the parts of the Lebanese criminal code which punished 'acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy' and the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".[222]

At the same time, when looking at the case law, it can be observed that both courts and tribunals whose statutes or laws contain an explicit or implicit reference to CIL as applicable law,[223] and those whose statutes do not, use not

[219] American Convention on Human Rights, 'Pact of San Jose, Costa Rica' (adopted on 22 November 1969, entered into force 18 July 1978) 17955 UNTS 144 art 62(3).
[220] Organization of African Unity, Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (adopted on 10 June 1998, entered into force on 25 January 2004) <https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf> accessed 18 October 2021.
[221] On the establishment of this Tribunal see UNSC Res 1595 (7 April 2005) <https://www.stl-tsl.org/sites/default/files/documents/legal-documents/un-documents/2005_04_07_SCR_1595_EN.pdf> accessed 18 October 2021; UNSC Res 1664 (29 March 2006) <https://www.stl-tsl.org/sites/default/files/documents/legal-documents/un-documents/2006_03_29_SCR_1664_EN.pdf> accessed 18 October 2021; UNSC Res 1757 (30 May 2007) <https://www.stl-tsl.org/sites/default/files/documents/legal-documents/un-documents/2007_05_30_SCR_1757_EN.pdf> accessed 18 October 2021.
[222] ibid UN Res 1757 (n 221) Attachment, Statute of the Special Tribunal for Lebanon.
[223] ICJ: *Military and Paramilitary* (n 115) [187-191]; *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* (Merits, Dissenting Opinion of Judge Thiery) [1991] ICJ Rep 53, 184; *Legality of the Threat or Use of Nuclear Weapons* (n 123) [34-51]; *Kasikili/Sedudu* (n 115) [18]; *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)* (Merits) [2012] ICJ Rep 99 [50-117]; *Case Concerning Maritime Dispute (Peru v. Chile)* (Merits) [2014] ICJ Rep 3 [57],[179]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Merits) [2015]

only the Courts that contain an explicit or implied reference to CIL, have relied on it in their case law. For instance, whereas the IACtHR Statute does not explicitly or impliedly mention CIL as a source of law to be applied, it referred to CIL in more than just a few cases. In a number of cases, it asserted that Article 63(1) of the Convention is a reflection of customary international law.[224] It has also applied international custom on the law of treaties as

ICJ Rep 3 [87]; *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles From the Nicaraguan Coast (Nicaragua v. Colombia)* (Preliminary Objections) [2016] ICJ Rep 100 [23], [82]; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (Preliminary Objections, Separate Opinion of Judge Ad Hoc Momtaz) [2019] ICJ Rep 7 [8], [13]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* (Merits, Dissenting Opinion of Judge Bhandari) [2021] at <https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf> accessed 15 January 2022 [7]. ICTY: *Prosecutor v Mucić et. al* (Judgment of 16 November 1998) ICTY Trial Chamber, Case no. IT-96-21-T [283]; *Prosecutor v Tadić* (Appeal Judgment of 15 July 1999) ICTY Appeals Chamber, Case no. IT-94-1-A [194]; *Prosecutor v Aleksovski* (Appeals Chamber Judgment of 24 March 2000) ICTY Appeals Chamber, Case no. IT-95-14/1-A [23]; *Prosecutor v Kunarac et al.* (Judgement of 22 February 2001) ICTY Trial Chamber, Cases no. IT-96-23-T & IT-96-23/1-T [194-195]; *Prosecutor v Kunarac et. al* (Appeals Chamber Judgment of 12 June 2002) ICTY Appeals Chamber, Case no. IT-96-23 & IT-96-23/1-A [89]; *Prosecutor v Hadžihasanović et al.* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility of 16 July 2003) ICTY Appeals Chamber, Case no. IT-01-47-AR72; *Prosecutor v Hadžihasanović and Kubura* (Judgment of 22 April 2008) ICTY Appeals Chamber, Case no. IT-01-47-A [23-33]; *Prosecutor v Orić* (Judgment of 3 July 2008) ICTY Appeals Chamber, Case no. IT-03-68-A [161-168].
ICTR: *Prosecutor v Kayishema and Ruzindana* (Appeals Chamber Judgment of 4 December 2001) ICTR Appeals Chamber, Case no. ICTR-95-1-A [51]; *Prosecutor v Nahimana et al.* (Judgment of 28 November 2007) ICTR Appeals Chamber, Case no. ICTR-99-52-A [984]. WCC: *Prosecutor's Office of Bosnia & Herzegovina v Enes Hadžić* (Verdict of 25 May 2011) WCC, Case No. S 1 1 K 005760 11 KRi [27] (although applied wrongly) and [69]; *Prosecutor's Office of Bosnia & Herzegovina v Miroslav Anić* (Verdict of 31 May 2011) WCC, Case no. S1 1 K 005596 11 Kro [32],[36], [39] ; *Prosecutor's Office of Bosnia & Herzegovina v Branko Vlačo* (Judgment of 25 February 2015) WCC, Case no. S1 1 K 007121 14 Krž 9 [211]; *Prosecutor's Office of Bosnia & Herzegovina v Mrda et al* (Judgment of 19 May 2017) WCC, Case no. S1 1 K 018013 15 Kri [137], [159]. ECCC: *Prosecutor v Ieng Sary* (Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise of 20 May 2010) ECCC Appeals Chamber, Case no. 002/19-09-2007-ECCC/OCIJ(PTC38) [75-89]; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgment of 7 August 2014) ECCC Trial Chamber, Case no. 002/19-09-2007/ECCC/TC [688-721]. ACmHPR: Communication 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 (*Malawi African Association v Mauritania)* ACmHPR (Decision of 11 May 2000) [84]; Communication 227/99 (*DRC v Burundi)* ACmHPR (Decision of 29 May 2003) [85]; Communication 275/2003 (*Article 19 v Eritrea*) ACmHPR (Decision of 30 May 2007) [45]; Communication 292/2004 *(IHRDA v Angola)* ACmHPR (Decision of 22 May 2008) [38]; Communication 284/2003 *(ZLHR v Zimbabwe*) ACmHPR (Decision of 3 April 2009) [99] Communication 295/2004 (*Kazingachire v Zimbabwe*) ACmHPR (Decision of 2 May 2012) [137]; Communication 302/05 (*Itundamilamba v DRC*) ACmHPR (Decision of 22 April 2013) [48]; Communication 409/12 (*Tembani v Angola*) (Decision of 5 November 2013) ACmHPR [96]; *Communication 383/10 (Al-Asad v Djibouti*) ACmHPR (Decision of 12 May 2014) [133]; Communication 431/12 (*Kwoyelo v Uganda*) ACmHPR (Decision of 22 February 2018) [151], [271], [289].
ACERW: Communication no.1/2005, *Hunsungule v Uganda* ACERWC (Decision of 19 April 2013) [64] ftn. 22, [67]; Communication no. 3/2015, *MRGI v Mauritania* ACERWC (Decision of 15 December 2017) [80].

[224] *Castillo-Páez v Peru* (Reparations and Costs) IACtHR Series C No. 34 (27 November 1998) [50]; *Cantoral-Benavides v Peru* (Merits) IACtHR Series C No. 69 (18 August 2000) [40]; *Bulacio v Argentina*

reflected in the VCLT to State parties to the American Convention that were not simultaneously party to the VCLT.[225] It found the existence of the following rights and obligations, which are, according to the Court rooted in customary international law: the obligation to investigate violations of human rights,[226] the affirmation of the customary prohibition of torture,[227] a customary rule that a State that ratified a human rights treaty is under the duty to modify its domestic laws in a way that ensures the compliance of the State with the treaty,[228] customary rules on state responsibility[229] and the customary right of a detainee that is a foreign national to communicate with the consular officers of his/her State of nationality.[230] In the brief submitted by the Inter-American Commission to the Court in *Las-Palmeras v Colombia,* the Inter-American Commission stated that

> 'as a declaration of principles, [..] the instant case should be decided in the light of "the norms embodied in both the American Convention and *in customary international humanitarian law* applicable to internal armed conflict and enshrined in Article 3, common to all the 1949 Geneva Conventions"' and was the Court was competent to apply these rules.[231]

(Merits, Reparations and Costs) IACtHR Series C No. 100 (18 September 2003) [71]; *Molina-Thiessen v Guatemala* (Reparations and Costs) IACtHR Series C No. 108 (3 July 2004) [40]; *De La Cruz-Flores v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 115 (18 November 2004) [139]; *"Juvenile Reeducation Institute" v Paraguay* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 112 (2 September 2004) [258]; *Almonacid-Arenallo et al v Chile* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 154 (26 September 2006) [135]; *Miguel Castro Castro Prison v Peru* (Interpretation of the Judgment on Merits, Reparations, and Costs) IACtHR Series C 181 (2 August 2008) [414].

[225] *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* (Merits, Reparations, and Costs) IACtHR Series C No. 9 (21 June 2002) [41-42].

[226] E.g. *Perozo et al v Venezuela* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 195 (28 January 2009) [298].

[227] *Juridical Conditions and Rights of Undocumented Migrants* (Advisory Opinion OC-18/03) IACtHR Series A No. 18 (17 September 2003), Concurring Opinion of Judge Trindade [1].

[228] *"The Last Temptation of Christ" (Olmedo Bustos et. al) v Chile* (Merits, Reparations and Costs) IACtHR Series C No. 73 (5 February 2001) [87]; *Cantos v Argentina* (Preliminary Objections) IACtHR Series C No. 97 (7 September 2001) [59]; *Ricardo Canese v Paraguay* (Merits, Reparations and Costs) IACtHR Series C 111 (31 August 2004) [148].

[229] *"Mapiripan Massacre" v Colombia* (Merits, Reparations, and Costs) IACtHR Series C 134 (15 September 2005) [243].

[230] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Advisory Op OC-16/99) IACtHR Series A No. 16 (1 October 1999) 19, 20 (*Although the formulation is confusing, because the court says – a rule of CIL or at least of international practice).

[231] *Las Palmeras v Colombia* (Merits) IACtHR Series C No. 67 (6 December 2001) [29].

Similarly, the African Court on Human and People's Rights has applied CIL on rules of State responsibility,[232] but also made the controversial finding that that the Universal Declaration of Human Rights is customary international law.[233] Lastly, although the Statute of the STL does not include CIL as a source of law, the Tribunal subsequently established in its case law, 'the incorporation of customary rules into Lebanese law is automatic'.[234]

Having established the applicability of CIL in these courts, I now turn to examining how courts identify CIL before applying them to a particular case. For reasons of feasibility, the discussion focuses mainly on the provisions of the ILC draft, which is, in turn, based on the practice of international courts, and legal scholarship.

3. Identification of CIL

This thesis started with the observation that upon the drafting of the PCIJ Statute, which the ICJ Statute largely based on, the way in which CIL should be determined was not an issue to begin with.[235] As Zimmerman noted in his commentary on the ICJ Statute referring to the preparatory work of the Committee of Jurists from 1920,

> 'in the light of the *travaux préparatoires* of para.2*, this provision does not prescribe a predetermined method for 'discovering' customary rules*. Its purpose was simply to enable the Court to apply such rules, without any attempt to describe a particular process'.[236]

[232] *Mtikila v Tanzania*, ACtHPR, Ruling on Reparations 011/2011 of 13 June 2014 [27].
[233] *Omary v Tanzania*, ACtHPR, Ruling 001/2012 of 28 March 2014 [72]-[73]; *Anudo v Tanzania*, ACtHPR, Judgment 012/2015 of 22 March 2018 [76]; *Mango v Tanzania*, ACtHPR, Judgment 005/2015 of 11 May 2018 [33].
[234] *Prosecutor v Ayyash* (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging of 16 February 2011) STL Appeals Chamber, STL-II-01/I [120].
[235] PCIJ, Procès-Verbaux of the Proceedings (n 1) 294-295, 322.
[236] A Zimmermann, CJ Tams et. al, *The Statute of the International Court of Justice. A Commentary*. (OUP 2012) 813 emphasis added. See also M Fitzmaurice, 'The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present' in S Besson, J d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 179-200.

However, as previously mentioned, the discussion on the appropriate method of identification can be traced back to Georg Schwarzenberger, who argued in favour of induction, as opposed to deduction of customary rules. Schwarzenberger criticized the deductive method for leading to arbitrary results and labelled it as 'law-making in disguise'.[237] He argued that the inductive method was more suitable as it was more conducive to legal certainty.[238]

This has also been the stance taken by the ILC in its Draft Conclusion on the identification on CIL. According to the ILC draft conclusions, '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*)'.[239] This corresponds to Schwarzenberger's inductive method and, therefore, the ILC itself refers to it as induction.[240] At the same time, the ILC states, this does not exclude the possibility of ascertaining custom by using a deductive approach in certain situations.[241] While an in-depth inquiry into induction and deduction as methods used in the identification of custom is beyond the scope of this thesis, in order to portray the difference between induction and deduction, a few examples are in order.

The ILC supports the use of deduction as a method of identification in cases where particular customary rules are derived from general norms or when two or more rules form part of an indivisible regime – a solution taken directly from the practice of the ICJ.[242] The ILC quotes two cases in which the ICJ identified customary rules by deduction. In *Pulp Mills* the ICJ deduced the principle of prevention in international environmental law as a customary rule

[237] Schwarzenberger (n 2) 543.
[238] ibid 569. In response see Jenks (n 2) 617-662. The main counterargument brought by Jenks was the meaning of induction and deduction in logic and in the way that Schwarzenberger used the terms. In essence it was a squabble on terminology. At the end of the day both agree that primarily induction should be used and, exceptionally deduction.
[239] ILC 'Draft conclusions' (n 6) 122.
[240] ibid 126 [5].
[241] ILC 'Draft conclusions' (n 6) 126. In support of this see also Fitzmaurice (1961) (n 2) 567.
[242] ILC 'Draft conclusions' (n 6) 126.

from the obligation of due diligence.[243] In *Territorial and Maritime Dispute* the Court reiterated its finding in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*[244] on the definition of islands in accordance with Article 121 UNCLOS as declaratory of customary international law,[245] but then argued that also Article 121(3) on the status of 'rocks' should be considered as CIL because Article 121 UNCLOS forms an indivisible regime. Adding to the examples discussed by the ILC, is the partially dissenting opinion and declaration of Judge Liu to the Appeals Chamber judgment in the *Prosecutor v Orić* case. In his partially dissenting opinion, Judge Liu opined that

> 'the [customary] principle of command responsibility may be seen in part to *arise from* one of the basic principles of international humanitarian law aiming at ensuring the protection for protected categories of persons and objects during armed conflicts'.[246]

All of these examples fall under the deductive approach in the identification of custom.

A few words need to also be said about the relationship between State practice and *opinio juris* and their weight in the determination of the existence of a customary rule. As d'Aspremont has recently shown, CIL was conceived and originally understood by the drafters of the PCIJ Statute as a monolith – 'a rule established by the continual and general usage of nations, which has consequently obtained the force of law'.[247] This definition is said to be markedly different from the one adopted by the ICJ in the *North Sea Continental Shelf* case, which according to d'Aspremont marked the transition from a monolithic to a dualistic understanding of custom.[248] According to the

[243] *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14 [101].
[244] *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 40 [185].
[245] *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) [2012] ICJ Rep 624 [139].
[246] *Prosecutor v Orić* (n 223) Partially Dissenting Opinion and Declaration of Judge Liu [30].
[247] J d'Aspremont, 'The Four Lives of Customary International Law' (2019) 21 ICLR 229, 233-239.
[248] ibid 241.

statement of the ICJ in the *North Sea Continental Shelf* judgment, in order for the instances of actions by States to constitute *opinio juris*, two conditions must be fulfilled:

> 'they [the actions of States] must amount to a settled practice and they must be such or carried out in such a way so as to be *evidence* of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[249]

Essentially, what the Court did was to point out that the frequency of conduct by itself does not prove the behaviour's acceptance as law. However, it had simultaneously turned the concept of acceptance as law on its head. Unlike in the PCIJ preparatory work, where the customary rule obtained its force of law as a result of continual and general usage, according to the ICJ, the practice already needed to be conducted with the belief that the practice is law – a non-sensical result brought about by the intention of the Court to show that the mere frequency of the practice does not *per se* mean that it had been accepted as law.

Looking at the essence of the Court's argument in the *North Sea Continental Shelf*, it seems that the Court did not necessarily have in mind an advocacy in favour of a two-element approach. Instead, it sought to establish the relationship between State practice and acceptance as law in terms of evidence. The conditions were not so much conditions for the existence of a customary rule, but put more precisely, for its proof: (1) there should be settled practice and (2) there should be additional evidence, besides the frequency of conduct or the settled character of practice that must be brought forward to prove that the practice had been accepted as law.

Unlike some commentators who take the stance that *opinio juris* can be inferred from State practice,[250] the ILC establishes that State practice is not *per se*

[249] *North Sea Continental Shelf Cases* (n 182) [77].

[250] Kelsen (1966) (n 145) 450. See also J Kammerhofer (2004) (n 145) 523. See also *North Sea Continental Shelf Cases* (n 182) Dissenting Opinion of Judge Lachs, 231 where he states that 'general practice of States should be recognized as *prima facie evidence that it is accepted as law*.'

evidence of acceptance as law.[251] In the words of the ILC, 'two distinct inquiries are to be carried out'[252] and 'acts forming the relevant practice are not as such evidence of acceptance as law'.[253] It then also adds that not only the conduct of States actually participating in the practice is to be sought, but also that of other States 'in a position to react to [this practice]'.[254]

In a nutshell, then, the question of identification of CIL is a question of proof – finding actual instances of State practice and evidence of acceptance as law. Upon finding such evidence, the court will conclude that a customary rule with a certain content exists. Regarding State practice, as has been previously noted, the practice must satisfy the criteria of widespread, consistent, uniform and representative, whereas the criteria or threshold of evidence that will satisfy the existence of *opinio juris* is not as straightforward.

4. 'Interpretation' of State Practice and *Opinio Juris* as Part of Identification

Taking into account the previously made observations, in the present section I argue that three types of interpretation take place at the level of CIL identification, where the term interpretation is used *lato sensu.* This argument shall be used as a stepping-stone to contend in the subsequent section that while we can refer to these acts as interpretation, they must be distinguished from the interpretation of customary rules, because they have a different object, which are the elements of CIL and not the customary rule.

Unlike the somewhat ideal and, perhaps, sterile model of judicial decision-making where identification means determining the existence of a customary rule merely by spotting evidence of State practice and *opinio juris*, identification of customary rules rarely, if ever, involves a mere data collection.[255] Often, the

[251] ILC 'Draft conclusions' (n 6) 129 [7].
[252] ibid 128.
[253] ibid 129.
[254] ibid.
[255] OC Tassinis, 'Customary International Law : Interpretation from Beginning to End' (2020) 31/3 EJIL 235, 242-244.

process of identification, as the stage at which the existence and content of a customary rule is established, includes other types of acts, which in legal literature have been labelled as interpretation.[256] The term interpretation has been used to describe (1) the process of evaluation of the mass of State practice and *opinio juris* when there is contradictory practice,[257] (2) the process of inferring the relevant customary rule from the mass of State practice[258] or (3) the process of analysis of a singular sample of State practice and the motivation behind it.[259]

Firstly, it has been argued that interpretation of the elements of CIL is necessary when there is inconsistent State practice and *opinio juris*.[260] A situation of this type can arise when there are simultaneously examples of State practice in favour of a customary rule with a specific content and equally compelling examples of contrary behaviour. An example is the prohibition of torture.[261] On the one hand, there are States that do not engage in acts of torture. On the other hand, there are examples of States that torture individuals and do so without protest from other States. In such a case, it is argued that there are two possible interpretations of State practice: (1) torture is permitted and (2) torture is prohibited. According to Roberts, the decision should ultimately be made based on considerations of morality as an implementation of the Rawlsian theory of reflective equilibrium.[262]

Secondly, interpretation has been used as the term to describe the act of deriving norms from patterns of State practice. This type of interpretation is resorted to because 'the same set of data can support indefinite series of statements as to what the content of the law is'.[263] In this case, 'interpretation'

[256] M Fortuna, 'Different Strings of the Same Harp: Interpretation of Rules of Customary International Law, Their Identification and Treaty Interpretation' in P Merkouris, N Arajärvi, J Kammerhofer, N Mileva (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) 393, 405.
[257] Roberts (n 201) 781.
[258] Tassinis (n 255) 241-242.
[259] Santulli (n 50) 301-302.
[260] Roberts (n 201) 781.
[261] ibid.
[262] ibid.
[263] Tassinis (n 255) 242.

means 'formulations of logical propositions describing the norm that we might infer from such conduct'.[264]

Finally, 'interpretation' is used as a synonym for the process of assessing the motivation of a State behind a specific behaviour. An example from legal scholarship is the act of allowing another State's warship to enter its port without authorisation.[265] Here, the act of interpretation contributes to the understanding the reasons behind engaging in this behaviour and whether or not it is conducted with a sense of legal obligation. Unlike the first type of interpretation, here interpretation is done at the level of a single specimen of practice, not at the level of the whole mass of State practice. In addition, this type of 'interpretation' at the level of a single sample of practice may be necessary when it is needed to establish between mere acquiescence and a sample of State practice that supports that the rule exists.[266]

In a similar vein, the term interpretation has been used in relation to State practice, where 'to interpret' equals to derive the meaning and intention of States by analyzing a declaration made by one of its officials,[267] as a sample of State practice, or analyzing the text of documents, such as resolutions of international organizations that may point to the existence of a customary rule.[268] These types of interpretations aim to clarify the ambiguities that exist at the level of identification, but are different from interpretation of customary *rules.*

[264] ibid. See also E Voyiakis, 'Customary International Law and the Place of Normative Considerations' (2010) 55/1 American Journal of Jurisprudence 163, 164. See also Tassinis (n 255) 163-164 and 172.
[265] Koskenniemi (n 201) 435.
[266] ILC, 'Provisional Summary Record of the 3225th Meeting' (n 13) [55].
[267] Mendelson (n 134) 368.
[268] ibid 357-358.

5. Drawing the Line Between 'Interpretation' of State Practice and *Opinio Juris versus* Interpretation of Customary Rule – the Why(s) and the How(s)

Since the term interpretation has been used both in relation to State practice and *opinio juris* and in relation to customary rules, the question arises as to how it is possible and why it is necessary to distinguish the two types of interpretation. Firstly, these two acts have a different object, as it was explained in chapter 1. It is important to note that the difference in object makes the two types of interpretation different in nature. If 'interpretation' of State practice and *opinio juris* concerns the elements that lead to the creation of the rule, the other type of interpretation concerns the *rule* itself.

Secondly, the three types of interpretation which have been described in Section 2 and which have as its object the elements of custom do not, strictly speaking, concern the interpretation of the law, as they deal with what is not yet law. For example, interpretation in describing State practice and *opinio juris* is closer to perceptual interpretation,[269] and focuses on the cognitive dimension, that of understanding, as opposed to legal interpretation.[270] The use of the term interpretation in the case of inconsistent State practice is, although somewhat similar to legal interpretation, because it requires a decision to be made on two or more alternative propositions, is still a process of ascertaining the law, rather than determining the meaning or scope of the law the existence of which is not in dispute.[271] A similar conclusion can be reached regarding interpretation as the act of deriving a customary norm from legal practice.

Finally, the assessment samples of State practice or their evidence, while similar to interpretation in the sense of an act which concerns deciphering legal intention, is, again, part of an exercise in law-ascertainment.[272] This differs from legal interpretation as it concerns the meaning of behaviour,

[269] Searle (n 96) 133-134.
[270] Fortuna (n 256) 406.
[271] ibid.
[272] ibid.

rather than the meaning of a rule. One particular challenge, here, however, is the case of domestic legislation as State practice, which may require judges or decision-makers to engage in an act interpretation. The issue here is the fact that the court might engage in a textual analysis of the legislation to determine whether a rule with a specific content, as argued by one of the parties to the dispute, exists. Factually, the court would engage in an interpretation of rules. However, for the purposes of international law, this would still be an exercise of interpretation of State practice as part of CIL identification, rather than an act of interpretation of customary rules.

Yet even assuming that acts that take place at the level of identification of custom could be labelled as interpretation, based on the ordinary meaning of this term, I argue that it is best to distinguish them terminologically. Since the VCLT already contains an authoritative meaning of interpretation, using the term interpretation with the same meaning with respect to rules of customary international law will contribute to terminological consistency within the discipline.[273] Moreover, adopting a different terminology for these acts is preferable because the two acts have a different aim.[274] The three types of interpretation that are part of the process of identification seek to identify the existence of a customary rule and determine its content. The purpose of interpreting the customary rule is to construe its meaning and scope to be able to solve a particular case.

In practice, the difference between interpretation of elements and the interpretation of the rule might not be as straightforwardly recognizable. Moreover, this line is not drawn clearly even in the body of the ILC draft conclusions, in particular conclusion 3. According to conclusion 3(1),

> 'In assessing evidence for the purpose of ascertaining whether there is a 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

[273] ibid 407.
[274] ibid 407.

particular circumstances in which the evidence in question is to be found.'[275]

In its commentary to Conclusion 3, the ILC establishes that 'the requirement that regard be had to the overall context reflects the need to apply the two-element approach while taking into account the subject matter that the alleged rule is said to regulate'.[276] The ILC also quotes the *Jurisdictional Immunities* case, where the ICJ argued that principle of sovereignty should inform the content of the customary *rule* on State immunity.[277] The ILC's reference to context resembles the language of Article 31 VCLT, when it refers to the 'ordinary meaning to the terms of the treaty in their context'[278] and then defines context as comprising agreements connected to the treaty or instruments made by the parties in connection with the conclusion of the treaty. However, what the ILC seems to say, although misusing the ICJ judgment, is that in the determination of whether a rule exists, sometimes a check of whether or not the invoked State practice is consistent with existing rules is necessary.[279] Doing this, means taking into account the operations of the system of rules as a whole, which is similar to systemic interpretation (see *infra* Chapter 4). Yet, these systemic considerations seem to be integrated here in the process of determining the existence of the rule.

Aside from context, the ILC also refers to the nature of the rule. In this regard, it distinguishes between prohibitive or imperative norms and emphasizes that because prohibitive rules require inaction from States, it is not affirmative practice, but examples of inaction that will be sought.[280] This seems to be a clarification of the type of State practice that will be used in the act of identification depending on the type of the rule involved.

[275] ILC 'Draft conclusion' (n 6) 127.
[276] ibid.
[277] ibid ftn 682.
[278] Vienna Convention on the Law of Treaties (n 60) art 31.
[279] See also Johnston (n 2) 1176.
[280] ILC 'Draft conclusions' (n 6) 126 [4].

Finally, the ILC refers to particular circumstances. In its commentaries, it explains that particular circumstances will be relevant to determine the weight that is given to this that practice or to the reasons why a State engaged in this or that behaviour.[281] This falls squarely within one of the types of interpretation conducted at the level of the identification of a customary rule.

Turning now to the practice, the following observations can be made. Firstly, there are clear-cut cases where judges or decision-makers from quasi-judicial or other dispute settlement bodies use the term interpretation explicitly in relation to a customary rule. To give an example, in his Separate Opinion to the *Barcelona Traction* judgment, Judge Tanaka expressed the view that

> 'if we *interpreted* the provision of Article 3 of the Treaty of Conciliation Judicial Settlement and Arbitration of 1927 and the customary international *rule* on the matter of local remedies too strictly, possible minor errors in the technical sense would cause those concerned to be deprived of the benefit of diplomatic protection'.[282]

In a similar vein, in the *ARA Libertad* case in the Joint Separate Opinion of Judge Wolfrum and Judge Cot to the Order for Provisional Measures, the judges stated that

> '[a] dispute concerning the *interpretation* and application of a *rule* of customary law therefore does not trigger the competence of the Tribunal unless such rule of customary international law has been incorporated in the Convention'.[283]

Sometimes courts or dispute settlement bodies do not interpret themselves, but refer to previous interpretations of CIL. For instance, in *Nabil Sayadi and Patricia Vinck v Belgium* the Human Rights Committee, pointed out that

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[281] ibid 128 [5].
[282] *Case Concerning the Barcelona Traction, Light and Power Company Limited (New Application: 1962, Belgium v Spain)* (Preliminary Objections, Second Phase) [1970] ICJ Rep 3 Separate Opinion of Judge Tanaka [147-148].
[283] *Ara Libertad* Joint Separate Opinion of Judge Wolfrum and Judge Cot (n 199) [7].

'[a]ccording to the *established interpretation of the law on international responsibility* [which is CIL], only by invoking article 4 of the Covenant can a State party avoid all responsibility'.[284]

Secondly, there are cases that the term interpretation is not directly used in connection to a customary rule, but the meaning of the statement connotes an exercise of this type of legal interpretation. An example in this sense is the Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock to the *Nuclear Tests* judgment.[285] The following observation was made:

> 'If the materials adduced by New Zealand were to convince the Court of the existence of a general rule of international law, prohibiting atmospheric nuclear tests, the Court would at the same time have to determine what is the precise *character and content of that rule* and, in particular, *whether it confers a right on every State individually to prosecute a claim to secure respect for the rule*. In short, the question of "legal interest"cannot be separated from the substantive legal issue of the existence and *scope* of the alleged *rule* of customary international law.'[286]

Similarly, in the *Chagos Advisory Opinion*[287] the ICJ firstly noted that '[t]he Court will have to determine the nature, *content* and *scope* of the right to self-determination'.[288]

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[284] *Nabil Sayadi and Patricia Vinck v Belgium,* Communication No. 1472/2006, UN Doc CCPR/ /C/94/D/1472/2006 [5.8]. For a similar use of the term see *Armed Activities on the Territory of the Congo* (n 78) Separate Opinion of Judge Koojimans [44]. Interestingly, the term interpretation has been used in this way not only by courts or dispute settlement bodies, but also by the parties. For instance, in the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* case the Marshall Islands argued that the Final Document of the UN General Assembly Special Sessions on Disarmament was relevant for the '*interpretation* of Article VI of the NPT and the *corresponding customary international law obligation* of nuclear disarmament'. See See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race* Dissenting Opinion of Judge Trindade (n 198) [70] quoting [129-130] of the Memorial submitted by the Marshall Islands.
[285] *Nuclear Tests Case* Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock (n 78).
[286] ibid [52].
[287] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95.
[288] ibid [144].

Things, however, get complicated when, similarly to the ILC, international courts or other dispute settlement bodies use language that is reminiscent of treaty interpretation. For instance, in his Dissenting Opinion to the *Asylum* case the Court had to deal with interruptions in State practice and their impact on the Court's judgment as to whether or not the rule exists. In his dissenting opinion, Judge Azevedo established that it was necessary to consider whether

> '*the nature and the purpose of the institution* [of diplomatic asylum], as they may be deduced from the form it has assumed in that part of the world, *have been affected by the exceptions or whether, on the contrary, the latter merely prove the rule'*.[289]

According to him, the fact that sometimes governments decide not to grant diplomatic asylum does not mean it destroys the rule built by continuous practice.[290] This is an example of when the Court could be said to be interpreting State practice in order to determine which proposition is true: there is a customary rule on diplomatic asylum or there is no customary rule on asylum. However, the language – the reference to nature and purpose of the legal institution of diplomatic asylum – is similar to object and purpose contained in Article 31 VCLT.

A similar example is the *Certain Activities Carried Out In Nicaragua* case,[291] where Judge Donoghue opined:

> 'where evidence of *State practice* and *opinio juris* is incomplete or inconsistent, no norm of customary international law constrains a State's freedom of action. Such an assertion, an aspect of the so-called "Lotus" principle, ignores the fact that the *identification of customary international law must take account of the fundamental parameters of the international legal order*. These include the basic characteristics of inter-State relations, such

[289] *Asylum Case (Colombia/Peru)* (Counter-claims, Dissenting Opinion by Judge Azevedo) [1950] ICJ Rep 266, 336.
[290] ibid.
[291] *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)* (Merits) [2015] ICJ Rep 665.

as territorial sovereignty, and the norms embodied in the Charter of the United Nations, including the sovereign equality of States.'[292]

In the same judgment, Judge Donoghue refers to the ICJ's pronouncement in *the Jurisdictional Immunities* case.[293] The Judge notes that

'the Court [..] *evaluated the evidence of State practice and opinio juris in light of these competing principles* [sovereign equality and territorial sovereignty], finding sufficient evidence of State practice and *opinio juris* to define with some precision the rules of customary international law that governed the facts in that case'.[294]

While the reference to the two principles of international law is similar to systemic interpretation under Article 31(3)(c) VCLT, the reference is made to State practice and *opinio juris* and its evaluation. Put differently, the use of these principles seems to be that of aiding the act of identification, rather than interpretation of a fully-fledged rule.

In addition, establishing the boundaries between interpretation of the elements of custom and the interpretation of the customary rule might be challenging given the considerations by reference to which the interpretation is made. For instance, according to Santulli, when a the scope of a customary rule is disputed, the interpreter may refer back to the precedents of State practice and *opinio juris* to determine the exact scope of the customary rule.[295] While this may, at first glance, be a referral back to State practice and *opinio juris* and, thus, a new cycle of identification, it may equally be an instance of interpretation by reference to subsequent practice, with everything hinging on the aim of the exercise.

In his treatise on interpretation in public international law, Kolb described four scenarios that may occur in relation to customary rules and their

[292] ibid, Separate Opinion of Judge Donoghue [3].
[293] *Jurisdictional Immunities of the State* (n 223).
[294] ibid, Dissenting Opinion of Judge Donoghue [4].
[295] Santulli (n 50) 301-302.

application to a case.[296] Firstly, customary rules may be determined without resort to interpretation.[297] This is usually the case when courts or other dispute settlement bodies need to establish the existence of the rule. This shall be done by inducing State practice and *opinio juris*, and may involve one of the three types of interpretation that take place at the level of identification.

Secondly, the determination of the existence of the rule may be inextricably linked to interpretation. According to Kolb, an example of this scenario is the *North Sea Continental Shelf* case, where the judges of the ICJ had to interpret the meaning of special circumstances as an exception from the application of the equidistance rule. This, in turn, required an inquiry into State practice in such a way that the existence of the rule could not be established without resorting to some kind of interpretation on what qualified as special circumstances.[298] Thirdly, Kolb posits, the determination of a customary rule's existence can be subsequently followed by interpretation.[299] For instance, this can be the case when the court determines that the exercise of self-defense presupposes the existence of a prior armed attack.[300] Finally, the fourth case is when interpretation is engaged in without a determination of the existence of a customary rule, which happens when the parties do not disagree on the existence of a customary rule, but dispute its content.[301] These four scenarios accurately reflect what takes place in practice. However, what needs to be emphasized and added to this scenario framework is that often the choice – to identify or to interpret – belongs to the interpreter. In other words, when faced with a particular situation, some interpreters might indeed turn back to State practice and *opinio juris* as a way to restart the purpose of identification and to search for State practice that would perfectly overlap with the situation brought before the court, whereas others may instead argue that the situation

[296] Kolb (n 41) p. 222 et seq.
[297] ibid 222-223.
[298] ibid 224.
[299] ibid 225.
[300] ibid 225.
[301] ibid 225.

might fall within the scope of an existing rule by applying methods of interpretation similar to those used in treaty interpretation.[302]

6. Conclusion

In this chapter, I attempted to show that not all uses of the term interpretation actually refer to the legal interpretation of customary rules. Instead, interpretation has also been used to describe different processes/acts that happen at the stage of CIL identification, that is, the process that seeks to establish the existence and content of a customary rule. Simply spotting samples of State practice and evidence of *opinio juris* is often not enough in order to determine that the rule exists. Intermediate steps are often necessary and these intermediate steps have sometimes been referred to as interpretation.

This chapter started off with a discussion of the place of CIL as applicable law in the statutes, treaties and laws that establish the functioning of international courts and tribunals throughout the different sub-branches of international law. This was a necessary step before proceeding to discussing the identification of customary rules. With regard to identification, I have explained that the ILC articles largely take the stance originally advanced by Schwarzenberger more than a century ago – that CIL must be established inductively, from actual State practice and *opinio juris*. Subsequently, I have detailed the different ways in which the term interpretation is used at the level of identification.

Interpretation of the elements of custom, State practice and *opinio juris*, I have then argued, are different and must be terminologically distinguished from interpretation of customary rules as they follow different aims and take place at two different stages in the 'life' of a customary rule. This difference may not

[302] See infra analysis on the *Hadžihasanović* case.

be always as easy to make in practice, where the language of interpretation is sometimes used in a context of CIL identification.

CHAPTER 3

Ordinary Meaning and Purpose in the Interpretation of Customary Rules

1. Introduction

One of the earliest references in legal scholarship to the use of ordinary meaning to interpret treaties date back to the XVIIth century. The writings of Grotius and those of Vattel refer to the 'current usage'[303] of words or 'common use of language' as one of the considerations to be relied on when engaging in interpretation.[304] Today ordinary meaning is part and parcel of the rule of interpretation contained in Article 31 of the VCLT, according to which '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'.[305] As can be seen from the text of this provision, the ordinary meaning of the terms cannot on its own determine the interpretation of treaty terms. They must be taken in their context and in light of the object and purpose of the treaty.

The general rule of interpretation and the standard of ordinary meaning, in particular, has been applied not only to treaties, but also to other unilateral acts and UNGA resolutions.[306] As will be shown throughout this chapter, the standard of ordinary meaning, but also that of purpose have been used to interpret rules of customary international law. Whereas according to Article

[303] H Grotius, *De Jure Belli ac Pacis* (Oceana 1964 reprint) 409.
[304] E de Vattel, *The Law of Nations: or, Principles of the law of nature: applied to the conduct and affairs of nations and sovereigns* (printed for J Newbery, J Richardson, S Crowder, T Caslon, T Longman, B Law, J Fuller, J Coote, and G. Kearsly, 1759) 219.
[305] Vienna Convention on the Law of Treaties (n 60) art 31.
[306] See e.g. *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (Preliminary Objections, Questions of jurisdiction and/or admissibility, Dissenting Opinion of Judge Read) [1954] ICJ Rep 19, 38; *Case Concerning Right of Passage Over Indian Territory (Portugal v India)* [1957] ICJ Rep 125, 142; *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa* (Advisory Opinion) [1955] ICJ Rep 67, 72; *North Sea Continental Shelf* (n 182) Separate Opinion of Judge Ammoun [22] ; *Nuclear Tests Case* (n 186) [30]; *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Preliminary Objections) [1961] ICJ Rep 17 [54]; *Land and Maritime Boundary Between Cameroon and Nigeria* (n 115) [98]; ibid, Dissenting Opinion of Judge Ajibola 394.

31 the object and purpose of the treaty shall illuminate the ordinary meaning of the terms, in the interpretation of rules of CIL the two elements, ordinary meaning and purpose, are used as standalone methods in interpretation. In addition, the purpose against which the interpretation is made is not the purpose of the treaty, as, of course, would have been absurd, but the purpose of the customary rule or the purpose of the branch of law that the customary rule belongs to. In addition, this chapter argues that the use of language and elements similar to those contained in the VCLT owes to the fact that these methods of interpretation are universal.

This chapter starts off in Sections 2 and 3 with an exploration of the meaning of ordinary meaning and object and purpose in the preparatory work of the VCLT and its precursors and the ways in which they were applied in treaty interpretation in the practice of different international courts. The emphasis, here, is on explaining the way in which both terms — ordinary meaning and object and purpose — have been understood by the drafters and by international courts. Moreover, patterns are drawn from the ways in which international courts have applied these methods in their practice. Section 4 turns to the analysis of the case law where ordinary meaning and purpose have been explicitly used to interpret customary rules. Finally, Section 5 seeks to answer the question on why international courts rely on the elements found in Article 31 of the VCLT in the interpretation of customary rules.

2. An Ordinary Meaning in Context and in Light of Object and Purpose in the Preparatory Works of the VCLT and its Precursors

In order to explain the standard of ordinary meaning, we will, first, turn to the drafting of Article 31 of the VCLT and its precursors. The VCLT is largely based on the Draft Articles on the Law of Treaties adopted by the ILC in 1966.[307] However, the Draft Articles was neither the first, nor the only attempt to both codify and develop the law of treaties. The Draft Articles were

[307] ILC 'Draft Articles on the Law of Treaties' (n 61).

preceded by the 1928 Havana Convention on the Law of Treaties,[308] David Dudley Field's Draft Code,[309] Bluntschli's and Fiore's Draft Codes,[310] the 1927 Draft of the International Commission of Jurists,[311] the 1933 Draft adopted at the Seventh International Conference of American States[312] and, last but not least, the 1933 Harvard Research Draft.[313] Yet, only three of these contained rules on treaty interpretation, which is why the focus turns to these.

The Draft Code developed by Fiore is impressive in its comprehensiveness and precision. On the point of treaty interpretation, Fiore established both the conditions when the resort to interpretation is necessary and the two overarching methods or types of interpretation, which are grammatical and logical interpretation.[314] Under grammatical interpretation, Fiore establishes that 'the meaning of words used must be fixed and determined according to *common usage*'.[315] Unlike in the VCLT, ordinary meaning is not distinguished from especial meaning but from 'elegant language with all literary niceties'.[316]

Fiore also formulated a special rule for the use of technical terms. Technical terms, he writes, 'should be understood in their technical, rather than in their popular sense'.[317] Technical terms, then, are not covered by the general rule on the meaning established by common usage. Fiore's rules also guard against using an expression in its strict sense if the intention of the parties does not point to that direction. In other words, 'the true sense of the words, as deduced from the intention of the parties' must be sought.[318]

Fiore's logical interpretation revolves around two considerations — the intention of the parties and effectiveness. In these rules, he also refers to what

[308] Harvard Draft (n 62) Appendix 1, 1205-1207.
[309] ibid Appendix 2, 1207-1208.
[310] ibid Appendix 3, 1208-1212 and Appendix 4, 1212-1222.
[311] ibid Appendix 5, 1222-1224.
[312] ibid Appendix 7 1225-1226.
[313] Harvard Draft (n 62) .
[314] ibid Appendix 4, 1218.
[315] ibid.
[316] ibid.
[317] ibid.
[318] ibid.

appears similar to Article 31's object and purpose, especially given the interchangeable use, as we shall see, of object and purpose and spirit of the treaty: 'the spirit of every provision must be sought in its moving reasons'.[319]

Another set of rules on interpretation was devised by the Seventh American Conference.[320] Article 5 refers to the 'usual sense'[321] of the words contained in a treaty and the need to avoid 'results contrary to reason or absurdities, or that it should not appear from the text of the treaty that a special technical meaning was given to them'.[322] In article 6, a reference to context is made, which establishes that the meaning of the treaty is established by reference to the other provisions of the convention.[323] In addition, similarly to Fiore, special emphasis is placed on the intention of the parties. Here, however, the intention of the parties is only secondary and is to be discerned from the preamble of the treaty and the preparatory works when the meaning of the text of the treaty is unclear.[324]

Conversely, the text of Article 19 of the Harvard Draft Convention did not mention ordinary meaning or any similar terms, but put the purpose of the treaty was placed at the forefront of the exercise of interpretation. According to the drafters, 'a treaty is to be interpreted in the light of the general purpose which it is intended to serve'.[325] In addition, the

> 'historical background of the treaty, *travaux preparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be

[319] ibid.
[320] ibid Appendix 7 1225-1226.
[321] ibid art 5.
[322] ibid.
[323] ibid art 6.
[324] ibid art 3.
[325] Harvard Draft (n 62) 937.

considered in connection with the general purpose which the treaty is intended to serve'.[326]

While not in the text of the rule, the standard of ordinary meaning is found in the commentary to this article. The drafters refer to the by-then already rich jurisprudence of the PCIJ, which established that words had to be interpreted in the meaning they would normally have in their context, unless it leads to a meaning that is absurd or unreasonable.[327] In its case law the PCIJ, as the commentary to the draft shows have used the following terms interchangeably: natural, normal, literal, ordinary or reasonable meaning,[328] but all of these seem to point to the same meaning.

The Draft Articles on the Law of Treaties, the Third Report on the law of treaties, which laid its groundwork, and the Resolution of the Institute de Droit International, explicitly mention ordinary meaning of the terms of the treaty as the departure point for the exercise of interpretation. According to the ILC, the text is the point of departure in the interpretative exercise because it is presumed to reflect the authentic intentions of the parties.[329] In other words, instead of inquiring into the actual intention of the Parties, by, for instance, looking into the preparatory work of the treaty, it is to be presumed that the parties had the intention 'which appears from the natural and ordinary meaning of the terms used by them'.[330]

Both the Resolution of the Institut de Droit International and Article 70 of the of the Third Report on the Law of Treaties, where the original proposal on a rule of treaty interpretation for the purposes of the ILC draft convention was made, referred to 'ordinary *and natural meaning*'.[331] It is not very clear what

[326] ibid.
[327] ibid 942.
[328] ibid 942.
[329] ILC 'Draft Articles on the Law of Treaties' (n 61) 220 [11].
[330]ILC, 'Third Report on the Law of Treaties' (n 69) 56 [13] and [14]. For different approaches to treaty interpretation see FG Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18/2 ICLQ 318.
[331] ILC, 'Third Report on the Law of Treaties' (n 69) [52]; *Institut de Droit International,* Session de Grenade -1956, 'Interprétation des traités' (Rapporteur H.M. Lauterpacht) Article premier 1.

was attempted by adding the expression 'natural' meaning, but this formulation was not retained in Article 31.

Another interesting difference compared to Article 31, is that the originally proposed Article 70 left the resort to context and the object and purposes of the treaty only if the meaning is manifestly absurd or unreasonable or the meaning remains unclear.[332] Instead, the terms of the treaty were to be interpreted in their ordinary and natural meaning by reference the context of the terms in the treaty and in the context of the treaty as a whole and in the context of the rules of international law in force at the time of the conclusion of the treaty.[333] While the function of ordinary meaning is quite clear, neither the Third Report on the Law of Treaties, nor the ILC draft articles define what is considered as ordinary. At first glance this seems fairly intuitive, but as we shall see further, in the practice of international courts and tribunals, this has sometimes raised issues.

One of the issues at the heart of the debate during the drafting of the VCLT provision on treaty interpretation was the problem of multiple ordinary meanings. Some States rejected the textual approach to interpretation proposed by the ILC for different reasons. For instance, Ghana argued against the standard stating that 'words had no ordinary meaning in isolation from their context'.[334] Greece objected to the usage of this standard since

> '[t]he mere consultation of a dictionary would immediately reveal that a single word could have many meanings. Moreover, the same word was sometimes used to describe more than one thing, and the same thing could be described by two or more words.'[335]

[332] ILC, 'Third Report on the Law of Treaties' (n 69) [52].
[333] ibid.
[334] UN Conference on the Law of Treaties, 1st and 2nd sessions, Vienna, 9 April- 22 May 1969, 31st meeting of the Committee, UN Doc A/CONF.39/C.1/SR.31, 171 [70].
[335] ibid [8] 172; *A contrario* see comments of the Soviet Union and Poland ibid 173 [23], 175 [42]. Poland argued that 'the same word might have several meanings, but that was true of certain words only. Moreover, among different meanings of a word, there was usually one which could be considered as its ordinary and natural meaning'. The ordinary meaning formulation was also accepted by the French Republic (see ibid 176 [48],[49]). The UK supported the inclusion of ordinary

In addition, it raised the issue of the potential change of ordinary meaning through time.[336]

The way that the VCLT is trying to account for the issue of multiple meanings is by establishing that the ordinary meaning is to be assessed by reference to context and the object and purpose of the treaty. As the ILC established in its commentaries to the Draft Articles on the Law of Treaties:

> 'article 27 [Article 31 of the VCLT] is entitled "General *rule* of interpretation" in the singular, not "General *rules*" in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.'[337]

This was supposed to assuage the concerns and diminish the chances that multiple ordinary meanings shall be put forward.

Turning back to Article 31 VCLT, it establishes that 'a treaty shall be interpreted […] in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and *in light of their object and purpose*'.[338] Article 31 (2) explains context as including the text of the treaty, the preamble and the annexes, but also

> '(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

meaning in the rule on treaty interpretation (see UN Conference on the Law of Treaties, 1st and 2nd sessions, Vienna, 9 April- 22 May 1969, 33rd meeting of the Committee, UN Doc A/CONF.39/SR.33, 177 [5]. The United States was particularly vocal in its desire to eliminate any reference to ordinary meaning and assess the meaning in light of all relevant factors, such as context, object and purpose, preparatory work etc. Most delegations, however, agreed with the formulation proposed, as the text of the treaty (and its ordinary meaning) was seen as 'the most stable and permanent element of the treaty' and able 'to strengthen the stability and permanency of treaty relations'. See UN Conference on the Law of Treaties, 1st and 2nd sessions, Vienna, 9 April- 22 May 1969, 32nd meeting of the Committee, UN Doc A/CONF.39/C.1/SR.32, 174 [25].

[336] 31st meeting of the Committee (n 334) 171 [8].

[337] ILC 'Draft Articles on the Law of Treaties' (n 61) 220.

[338] Vienna Convention on the Law of Treaties (n 60) art 31.

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'[339]

In its commentary to the ILC draft article 27, on which Article 31 is based, the ILC explains that the interpreter cannot rely on unilateral documents presented by the parties to interpret the treaty 'unless not only it was made in connexion with the conclusion of the treaty but its relation to the treaty was accepted in the same manner by the other parties'.[340]

Aside from context, another reference point for determining the ordinary meaning is object and purpose. Although, at first glance, the meaning of object and purpose may seem obvious, it has, in fact, elicited controversy in legal scholarship. The concept of purpose encompasses two meanings. It means both 'the reason for which [something] is done, created or exists',[341] but also 'a fixed design, outcome, or idea that is the object of an action or another effort',[342] which is equivalent to teleology.[343] Equally, the concept of purpose is also two-dimensional because it may refer either to objective purpose[344] or to subjective purpose. The fact that purpose and, hence, purposive interpretation has two meanings was previously noted by Barak. Barak distinguishes between objective and subjective purpose,[345] where the subjective purpose is the subjective intent of its author[346] and the objective purpose is the intent of the reasonable and not the actual author and which reflects the values and objectives a society seeks to achieve.[347] According to

[339] ibid.
[340] ILC 'Draft Articles on the Law of Treaties' (n 61) 221 [13].
[341] 'Purpose', Collin's Dictionary, <https://www.collinsdictionary.com/dictionary/english/purpose> accessed 30 April 2022.
[342] ibid.
[343] 'Teleology', Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/teleology?utm_campaign=sd&utm_medium=serp&utm_source=jsonld> accessed 30 April 2022.
[344] A Falcon, 'Aristotle on Causality' (2022) The Stanford Encyclopedia of Philosophy available at <https://plato.stanford.edu/archives/spr2022/entries/aristotle-causality/> accessed 20 March 2021.
[345] Barak (n 93) 120-181.
[346] ibid 120.
[347] ibid 120, 148.

one view, 'object' and 'purpose' are identical, because the ordinary meaning of these two terms is the same. Thus, Article 31 merely reiterates, possibly to make the point more forcefully, the same thing.[348] An alternative view states that object and purpose are different concepts — in the legal tradition of civil law countries object signifies the totality of rights and obligations contained in the treaty, whereas purpose means aim.[349] Finally, a third view states that 'object and purpose' is an idiomatic phrasal lexeme, which essentially means that its correct understanding requires the presence of both elements within a single lexical unit.[350]

In the ILC Draft Convention on the Law of Treaties, which later became the VCLT, the two are always used together.[351] The only exception to this is Article 15 that establishes the obligation of State parties not to frustrate the object of a treaty before its entry into force.[352] It is interesting to note that subsequently Article 15 became Article 18 of the VCLT that no longer refers to the object of the treaty independently, but rather to the obligation not to defeat the object *and purpose* of the treaty prior to its entry into force, thus maintaining the uniformity of terminology across the VCLT.

3. Ordinary Meaning in Context and in Light of Object and Purpose – the Practice of International Courts

3.1. Ordinary Meaning in Context

The inquiry now turns to the case law of different international courts and quasi-judicial bodies and the way in which they determine ordinary meaning. At the ICJ, to determine the ordinary meaning of treaty terms the court have

[348] RK Gardiner, *Treaty Interpretation* (OUP 2008) 191 ; DS Jonas, TN Saunders, 'The Object and Purpose of a Treaty: Three Interpretative Methods' (2010) 43/3 VandJTransnatlL 565, 578; U Linderfalk, *On the Interpretation of Treaties: the modern international law as expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 207.
[349] I Buffard, K Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 311 Austrian Review of International and European Law 311, 325 and 326.
[350] Linderfalk (n 348) 209. See also J Klabbers, 'Treaties, Object and Purpose' MPEPIL (December 2006) [8].
[351] ILC 'Draft Articles on the Law of Treaties' (n 61) 218-221.
[352] ibid 202.

relied on materials ranging from regular dictionaries,[353] dictionaries in one of the working languages of the Court,[354] dictionaries in the language in which the respective treaty was concluded,[355] to technical or subject matter specific dictionaries[356] and legal dictionaries,[357] as opposed to its predecessor — the PCIJ.[358]

In international and internationalized criminal tribunals judges have applied Article 31 not only to treaties, but also to their Statutes, regardless of whether their constituent instrument was a treaty or not.[359] For example, in *Prosecutor v Tadić* the Trial Chamber noted that

> '[a]lthough the Statute of the International Tribunal is a *sui generis* legal instrument and not a treaty, in interpreting its provisions and [in] the drafters' conception of the applicability of the jurisprudence of other

[353]Judges of the ICJ have also resorted to dictionaries to interpret documents other than treaties or relevant legal concepts. See *The Mavrommatis Palestine Concessions* (Judgment) [1924] PCIJ Series A/B No. 2 Dissenting Opinion by Mr Moore, 74*; The Case of S.S. Lotus* (Judgment) [1927] PCIJ Series A No. 10, Dissenting Opinion M. Moore 85; *Fisheries Case (United Kingdom v Norway)* (Merits, Dissenting Opinion of McNaird) [1951] ICJ Rep 116, 169-170; *The Minquiers and Ecrehos Case (France/United Kingdom)* (Merits, Individual Opinion of Judge Levi Caneiro) [1953] ICJ Rep 47, 100; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 59) Dissenting Opinion of Judge Fitzmaurice [27]; *Questions related to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Order of 28 May 2009, Dissenting Opinion of Judge Trindade) [2009] ICJ Rep 139 [50]; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* [2013] ICJ Rep 281 Separate Opinion of Judge Trindade [17];*Certain Activities Carried Out by Nicaragua* (n 291) Separate Opinion of Judge Koroma [5-9]; ibid, Separate Opinion of Judge Ad Hoc Dugard [5]; ibid, Separate Opinion of Judge Shahabudeen [63].

[354] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* (Advisory Opinion, Dissenting Opinion of Judge Read) [1950] ICJ Rep 221, 239*; Oil Platforms* (Preliminary Objections) (n 115) [45].

[355] *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua)* (Merits, Dissenting Opinion Judge Urrutia Holguin) [1960] ICJ Rep 192, 233; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)* (Merits, Separate Opinion of Judge Torres Bernandez) [1992] General List No. 75 [192].

[356] *Kasikili/Sedudu Island Case* (n 115) [30]; *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* Dissenting Opinion of Judge Paolillo [2003] ICJ Rep 392 [32].

[357] *Oil Platforms* (Preliminary Objections) (n 115) [45]; *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, *Preliminary Objections (Yugoslavia v Bosnia and Herzegovina)* (Merits, Dissenting Opinion of Judge Vereshchetin) [2003] ICJ Rep 7 [10].

[358] *Competence of the ILO in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, [1925] PCIJ Series B 2, 33 and 35; *Lighthouses in Crete and Samos (France v Greece)* (Merits, Opinion Seferiades) [1937] PCIJ Series A/B No. 62, 135.

[359] For the distinction between international and internationalized courts and tribunals see A Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight against International Criminality', in CPR Romano, A Nolkaemper and JK Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford: OUP 2004) 3, 5.

courts, the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant.' [360]

To establish the ordinary meaning of treaty terms both judges from international criminal tribunals and those from human rights courts and tribunals have in most cases relied on regular dictionaries.[361] This is different from the practice of the ICJ and that of the Appellate Body of the World Trade Organization,[362] the ITLOS[363] and some arbitral tribunals that used in their

[360] For instance, *Prosecutor v Tadić* (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses of 10 Aug 1995) ICTY Trial Chamber, Case no. IT-94-1-T [18].
[361] ICTY: *Prosecutor v Blaskić* (Judgment of 3 March 2000) ICTY Trial Chamber, Case no. IT-95-14-T [280]; *Prosecutor v Strugar* (Judgment of 17 July 2008) ICTY Appeals Chamber, Case no. IT-01-42-A [365]; *Prosecutor v Martić* (Judgment of 8 October 2008) ICTY Appeals Chamber, Case no. IT-95-11-A [297]. ICTR: *Niyitegeka v the Prosecutor* (Judgment of 9 July 2004) ICTR Appeals Chamber, Case no. ICTR-96-14-A [98]. ICC: *Prosecutor v Lubanga* (Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) ICC Appeals Chamber, Case no. ICC-01/04-01/06 OA 9 OA 10 [31]; *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute Trial Chamber I of 14 March 2012) ICC Trial Chamber, Case no. ICC-01/04-01/06 [608]; *Prosecutor v Lubanga* (Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction of 1 December 2014) ICC Appeals Chamber, Case no. ICC-01/04-01/06 A 5 [277]. STL: *Prosecutor v Ayyash et al* (Decision Related to the Examination of the Indictment of 10 June 2011 issued against Mr Salim Jalim Ayyash, Mr. Mustafa Amine Badreddine of 28 June 2011) STL Pre-Trial Judge, Case no. STL-11-01/I [22]; *Prosecutor v Ayyash et al*, Pre-Trial Judge, (Decision on Victim's Participation in the Proceedings of 8 May 2012) STL Pre-Trial Judge, Case no. STL-11-01/I [63], [68]. The IACtHR: *Case of the "White Van" (Paniagua-Morales et. al) v Guatemala* (Preliminary Objections) IACtHR Series C No. 23 (25 January 1996) [29]; *Case of Benjamin et. al v Trinidad and Tobago* (Preliminary Objections) IACtHR Series C No. 2(b) (1 September 2001) [39]; *Case of Gutierez Soler v Colombia* (Order of the Inter-American Court of Human Rights, Provisional Measures Regarding the Republic of Colombia, Dissenting Opinion of Judge Eduardo Vio Grossi) IACtHR Series X (30 June 2011) 2 and 3; *Case of Artavia Murillo et. Al ("In Vitro Fertilization") v Costa Rica* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 257 (28 November 2012) [181].
[362] *China - Publications and Audiovisual Products, United States v. China, Report of the Appellate Body* (21 December 2009) WT/DS363/AB/R; AB-2009-3 (WTO Appeal, Dec. 21, 2009) [354]; See I van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 222. *A contrario* see G Abi-Saab, 'The Appellate Body and Treaty Interpretation', in M Fitzmaurice, O Elias, P Merkouris (ed.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff 2010) 97-109; J Pauwelyn, M Elsig, 'The Politics of Treaty Interpretation', in JL Dunoff, MA Pollack (eds), *Interdisciplinary Perspectives of International Law and International Relations: The State of the Art* (CUP 2013).
[363] *The "CAMOUCO" Case (Panama v France, Application for Prompt Release)* Judgment of 7 February 2000, Declaration of Judge Laing, ITLOS Reports, 2000, 10, 1; *The "Volga" Case, Russian Federation v Australia, Application for Prompt Release (Russian Federation v Australia)* Judgment of 23 December 2002, Dissenting Opinion of Judge Anderson, ITLOS Reports 2002, 10 [9], [12]; *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore)* Provisional Measures, Order of 8 October 2003, Separate Opinion of Judge Lucky, ITLOS Reports 2003, 10, [3]; *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* Judgment of 14 March 2012, Separate Opinion of Judge Gao, ITLOS Reports 2012, 4 [55]; *The M/V Virginia G (Panama/Guinea-Bissau)* Judgment of 14 April 2014, Separate Opinion of Judge Paik, ITLOS Reports, 2014, 4 [22].

practice in addition to regular dictionaries also legal dictionaries to determine ordinary meaning.[364]

An alternative way to support the ordinary meaning is to rely on the use of the same terms in other treaties or what van Damme coined as 'cross-referencing',[365] which essentially means looking for the meaning of treaty terms in similar treaties or/and in previous case law of the same or a different court or tribunal. The use of this method points to a different understanding of the term 'ordinary' where it focuses on the frequent use of the same terms in other treaties, rather than a usual meaning that it has in language in general. An example of this approach is the statement of the ICJ in *Land, Island and Maritime Frontier Dispute* where it noted that

> 'in considering the ordinary meaning to be given to the terms of the treaty, it is appropriate to compare them with the terms generally or commonly used in order to convey the idea that a delimitation is intended'.[366]

This way of determining the ordinary meaning may either be an interpretation in context or can equally qualify as an *in pari materiae* interpretation, where the treaties on the same subject matter or partially similar subject matter can be used for purposes of interpretation.[367]

Comparisons with the language used in other BITs or the construction of the meaning of specific terms made in previous cases is not an uncommon practice

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[364] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v United Mexican States* (Award 21 November 2007), ICSID case No. ARB(AF).04.5 [197]; *Cargill Incorporated v United Mexican States* (Award 18 September 2009), ICSID Case No. ARB(AF)/05/2 [315]; *C.C. Devas (Mauritius) Ltd. Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v Republic of India* (Award on Jurisdiction and Merits of 25 July 2016) PCA Case No. 2013-09 [243].

[365] See van Damme (n 362) 235 and 237-240.

[366] *Land, Island and Maritime Frontier Dispute* (n 355) [380]. Other examples from the ICJ and the PCIJ: *Interpretation of the Convention of 1919 concerning Employment of Women During the Night* (Advisory Opinion) [1932] PCIJ Series A/B No 50, 300, 388; *Case Concerning Rights of Nationals of the United States of America in Morocco (France v United States of America)* (Merits) [1952] ICJ Rep 176, 189; *Arbitral Award Made by the King of Spain* (n 355) Dissenting Opinion Judge Urrutia Holguin 233; *Land, Island and Maritime Frontier Dispute* (n 355) Separate Opinion of Judge Torres Bernandez [192]; *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432 [66];

[367] Linderfalk (n 348) 255 and 257.

in investment arbitration,[368] where, at least according to the arbitral tribunal in *Daimler v Argentina,* these fall within the broad notion of 'context' of a treaty.[369] Strictly speaking, other BITs or previous cases would fall outside the notion of 'context' as understood in Article 31 of the VCLT, which limits it to, besides the text of the relevant treaty, including the title, preamble and annexes, agreements relating to the treaty and made by the parties in connection with the conclusion of the treaty and consented to by the other parties.

Equally, a common tendency among international courts and tribunals, although less prevalent than determining ordinary meaning by reference to dictionaries, is circumscribing the meaning of legal norms by the judges' themselves. This is sometimes coupled with other considerations, but without disclosing an external source that would straightforwardly support this or that meaning.[370] For example, in *Prosecutor v Krstić,* after establishing that the

[368] *Asian Agricultural Products v Republic of Sri Lanka* (Final Award of 27 June 1990) ICSID Case, No. ARB.87.3, [47] and [48]; *Daimler Financial Services AG v Argentine Republic* (Award of 22 August 2012) ICSID Case No. ARB/05/1 [230].

[369] *Daimler Financial Services AG v Argentine Republic* (n 368) [218].

[370] ICJ: *Case concerning Aerial Incident of 27 July 1955 (Israel v Bulgaria)* (Preliminary Objections, Dissenting Opinion Judge Goitein) [1959] ICJ Rep 127, 197; *Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Merits) [2002] ICJ Rep 625 [43].IACtHR: *Other Treaties Subjected to the Consultative Jurisdiction of the Court* (Art. 64 American Convention on Human Rights) (Advisory Opinion OC-1/82) IACtHR Series A No. 1 (24 September 1982) [37]. ICTR: *Kanyabashi v the Prosecutor* (Decision on the Defense Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I of 3 June 1999) ICTR Appeals Chamber, Case no. ICTR-96-15-A [28]; *Prosecutor v Akayesu* (Judgment of 1 June 2001) ICTR Appeals Chamber, Case no. ICTR-96-4-A [478]. ICTY: *Prosecutor v Tadić* Appeals Chamber Judgment (n 223) [283]; *Prosecutor v Krstić* (Judgment of 19 April 2004, Partial Dissenting Opinion of Judge Shahabudeen) ICTY Appeals Chamber, Case no. IT-98-33-A [64]. SCSL: *Prosecutor v Norman et al*, (Decision on Motions by Moinina Fofana and Sam Hinga Norman for the issuance of a subpoena ad testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone of 13 June 2006) SCSL Trial Chamber, Case No. SCSL-04-14-T [49], [107]. ICC: *Prosecutor v Lubanga* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences on non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008' of 21 October 2008) ICC Case no. ICC-01/04-01/06 OA 13 [40]-[41]; *Prosecutor v Bemba* (Decision adjourning the hearing pursuant to Article 61 (7) (c) (ii) of the Rome Statute of 3 March 2009) ICC Case no.ICC-01/05-01/08 [32]; *Prosecutor v Ruto and Sang* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013, Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Usacka) ICC Case no. ICC-01/09-01/11-1066 [6]. ECCC: *Prosecutor v. Kaing Guek Eav alias Duch* (Judgment of 3 February 2012) ECCC Appeals Chamber, Case No. 001/18-07- 2007/ECCC/SC [62]; *Prosecutor v Nuon and Khieu* (Decision on Evidence Obtained through torture of 5 February 2016) ECCC, Case no. 002/19-09-2007-

preparatory work is inconclusive regarding the terms 'in part' contained in the definition of genocide, the Trial Chamber stated that in line with the ordinary meaning of the terms the expression 'in whole or in part' applied to intent and not to the actual destruction of the group.[371]

Overall, the use of these three methods of determining ordinary meaning point to a wide understanding of this standard, as well as a wide discretion with regard to the means which are used to determine or support an ordinary meaning. International courts and tribunals do not appear to go as far as equating ordinary meaning with 'logical meaning',[372] as the Harvard Draft did. Yet, they still appear to settle on a definition that includes both ordinary, as in regular meaning, and a narrower, particularly a legal or even sometimes a technical meaning. There have also been cases where under the guise of ordinary meaning, judges have supported interpretations that are far removed from a meaning that one would consider ordinary. In *Kasikili/Sedudu Island* case at the ICJ, Judge Higgins criticized the approach of the majority on the determination of the meaning of the term 'thalweg'.[373] Judge Higgings argued that there was no ordinary meaning of the term in either international law or in hydrology[374] and what the Court actually did was to *adapt* the meaning of the term and subsequently declare the meaning as ordinary.[375]

As somewhat predicted by the drafters the issue of multiple ordinary meanings also came up in the practice of international courts and tribunals. In *US-Softwood Lumber* the Appellate Body of the WTO noted that 'dictionary definitions have their limitations in revealing the ordinary meaning of a

ECCC/SC [43]. WTO: *WTO-EDF International SA, SAUR International SA and Leon Participaciones Argentinas SA v Argentine Republic* (Award 11 June 2012) ICSID Case No. ARB.03.23 [938].

[371] *Prosecutor v Krstić* (Judgment of 2 August 2001) ICTY Trial Chamber, Case no. IT-98-33-T [584].

[372] Harvard Draft (n 62) 942.

[373] *Kasikili/Sedudu Island* (n 115) Declaration of Judge Higgins 1113.

[374] ibid.

[375] For a recent criticism of the ordinary meaning standard in the VCLT see B G Slocum, J Wong, 'The Vienna Convention and Ordinary Meaning in International Law' (2021) 46 Yale J Int'l L 191, esp. 194, 208-209.

term'.[376] In *Avena*, when interpreting terms used in the Vienna Convention on Consular Relations, the ICJ had to resort to other methods of interpretation, as the dictionary definitions in the different languages of the Vienna Convention were inconclusive. The dictionaries offered different meanings of the same term.[377] The Court then had to look at the object and purpose of the treaty and the *travaux preparatoires* to determine the interpretation to be given.[378]

To add, it is clear from the language of these provisions that the text is prioritised over other elements, such as preparatory work. According to Article 32 of the VCLT, *travaux préparatoires* and the circumstances of the conclusion of the treaty are only supplementary means of interpretation. They are to be used either to confirm the meaning arrived at by applying the general rule of interpretation or to determine its meaning when the application of the general rule leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. As established by the ILC, the recourse to supplementary means of interpretation is not an alternative means of interpretation, but only aids the interpretation governed by the general rule.[379] This position was reiterated by the ICJ in the *Territorial Dispute* case when it underlined that 'interpretation must be based above all upon the text of the treaty',[380] but also in the practice of the Appellate Body of the WTO[381] and in some arbitral decisions.[382]

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[376] *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO, Appellate Body Report adopted on 19 January 2004, WT/DS257/AB/R [59]; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO, Appellate Body Report adopted on 7 April 2005, WT/DS285/AB/R [164]; *Cargill Incorporated v United Mexican States* (n 364) [316].

[377] *Case Concerning Avena and Other Mexican Nationals (Mexico v. the United States)* [2004] ICJ Rep 12 [84].

[378] ibid [86]-[90].

[379] ILC 'Draft Articles on the Law of Treaties' (n 61) 223.

[380] *Territorial Dispute* (n 115) 41. See also *Case Concerning Maritime Delimitation & Territorial Questions Between Qatar & Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1995] ICJ Rep 6 [33].

[381] AH Qureshi, *Interpreting WTO Agreements. Problems and Perspectives* (2nd ed, CUP 2015) 26.

[382] For e.g. *Wintershall Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/04/14, Award of 8 December 2008 [88].

3.2. In Light of Object and Purpose

In line with the general rule of interpretation contained in Article 31, in the practice of the PCIJ and the ICJ the determination of the ordinary meaning of treaty terms was rarely, if ever, divorced from context and teleology. As the PCIJ established early on in its practice, the natural sense of the terms should not be interpreted in the abstract, [383] but rather in the way in which it is used in the relevant convention[384] and bearing in mind its spirit.[385] This approach was subsequently adopted by the ICJ in its own case law.[386] In particular, in the *South West Africa* cases, the Court noted that

> 'this rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.'[387]

[383] *Exchange of Greek and Turkish Populations* (Advisory Opinion) [1925] PCIJ Series B No. 10, 17-21.
[384] ibid, 17. See also: *Polish Postal Service in Danzig* (Advisory Opinion) [1925] PCIJ Series B No. 11, 39; *Territorial Jurisdiction of the International Commission on the River Oder* (United Kingdom v Poland) (Merits) [1929] PCIJ Series A No. 23, 25-26; *Customs Regime between Germany and Austria* (Advisory Opinion, Individual Opinion of Judge Anzilotti) [1931] Series A/B 41, 60-61; *Employment of Women During the Night* (n 366) Dissenting Opinion of Judge Anzilotti, 383 and 387; *Legal Status of Eastern Greenland (Denmark v Norway)* (Merits) [1933] PCIJ Series A/B No. 53, 49; *Lighthouses in Crete and Samos* (n 384) *(France v Greece)* (Merits, Opinion Seferiades) [1937] PCIJ Series A/B No. 62, 135.
[385] *Exchange of Greek and Turkish Populations* (n 383) 20.
[386] See *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Reports 4, 8; *Arbitral Award of 31 July 1989* (n 223) [48]; *Anglo-Iranian Oil Co. Case (United Kingdom v Iran)* (Preliminary Objections) [1952] ICJ Rep 93, 104; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion)* [1960] ICJ Rep 150, 158; *South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Reports 319, 336; *Aegean Continental Shelf Case (Greece v Turkey)* [1978] ICJ Rep 3 [55].
[387] *South West Africa* (Preliminary Objections) (n 386) 336. See also *Land, Island and Maritime Frontier Dispute* (n 355) Separate Opinion of Judge Torres Bernandez [192]. More generally on the ICJ's holistic approach to treaty interpretation see LE Popa, 'The Holistic Interpretation of Treaties at the International Court of Justice' (2018) 87 Nordic J Int'l L 249.

Other international courts and tribunals adopted a similar approach. It was used by the IACtHR,[388] the ECtHR[389] and by international and internationalized criminal courts.[390] The same can be said of the Appellate Body of the WTO,[391] investment arbitrations[392] and ITLOS.[393] While context and object and purpose of the treaty are important to determine the ordinary

[388] Ordinary meaning assessed in context and in light of its object and purpose in: *Proposed Amendments to the Constitution of Costa Rica with regard to Naturalization* (Advisory Opinion AO-4/84) IACtHR Series A No. 4 (19 January 1984) [23]; *Compatibility of a Bill with Article 8(2) of the American Convention on Human Rights* (Advisory Opinion AO-12/91) IACtHR Series A No. 12 (6 December 1991) [21]; *Article 55 of the American Convention on Human Rights* (Advisory Opinion, AO-20/09) IACtHR Series A No. 20 (29 September 2009) 26; *Case of González et al. ("Cotton Field") v Mexico* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 205 (16 November 2009) [42]; *Case of Radilla Pacheco v Mexico* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 209 (23 November 2009) [30]; *Case of Kawas Fernandez v Honduras* (Order, Provisional Measures regarding the Republic of Honduras) (5 July 2011) [12].

[389] *Campbell and Cosans v the United Kingdom,* ECtHR App no. 7511/76, 7743/76 (25 February 1982) [36]; *Witold Litwa v Poland*, ECtHR App no. 26629/95 (4 April 2000) [60]; *Maaouia v France*, ECtHR, App no. 39652/98 (5 October 2000, Dissenting Opinion of Judge Loucaides joined by Judge Traja) 19; *Vo v France,* ECtHR App no. 53924/00 (08/07/2004, Dissenting Opinion of Judge Ress) [4]; *Stec and Others v the United Kingdom*, ECtHR App. Nos. 65731/01 and 65900/01, Judgment of 6 July 2005 [48].

[390] Indicatively: ICTY: *Prosecutor v Furundžija* (Appeals Chamber Judgment 21 July 2000, Declaration of Judge Patrick Robinson) ICTY Appeals Chamber, Case no. IT-95-17/1-A [280]; ICTR: *Prosecutor v Semanza* (Judgment of 15 May 2003) ICTR Appeals Chamber, Case no. ICTR-97-20-T [338]; ICC: *Prosecutor v Lubanga*, (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I) (n 370) [40] and [41]; *Prosecutor v Bemba* (Decision adjourning the hearing pursuant to Article 61 (7) (c) (ii) (n 370) [32]; STL: *Case against NEW TV S.A.L. Karma Mohamed Tahsin Al Khayat* (Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment of 24 July 2014) STL Contempt Judge, STL-14-05/PT/CJ [75] (an interesting particularity is that here they mention ordinary meaning should be established by reference to the international criminal law context – a branch of law serves as context); *NEW TV S.A.L. Karma Mohamed Tahsin Al Khayat* (Decision on Interlocutory Appeal Concerning personal jurisdiction in contempt proceedings of 2 October 2014) STL Contempt Judge, STL-14/05PT/AP/AR126.1 [36] and [37]; *Case against v Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin* (Decision on Motion Challenging Jurisdiction of 6 November 2014) STL Contempt Judge, STL-14-06/PT/CJ [45]; ECCC: *Prosecutor v Meas (Muth)* (Decision on Request for Annulment of D114/164; D114/167; D114/170 and D114/171 of 13 December 2017) ECCC, Pre-Trial Chamber Case no. 004/07-09-2009 [38].

[391] *Argentina – Safeguard Measures on Imports of Footwear* (Report of the Appellate Body, 14 December 1999) WT/DS121/AB/R, [91]; *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe From Korea Line Pipe* (Report of the Appellate Body, 15 February 2002) WT/DS202/AB/R, [251].

[392] *Methanex Corporation v the United States* (Partial Award of 7 August 2002) UNCITRAL [136]; *Archer Daniels v United Mexican States* (n 364) [197]; *Daimler Financial Services AG v Argentine Republic* (n 368) [209]; *Cargill Incorporated v United Mexican States* (n 364) [315]; *Ryan and Schooner Capital LLC v Poland* (Award of 24 November 2015) ICSID Case No. ARB(AF)/11/3 [244]. *A contrario*, in *Devas* the Tribunal noted that 'any interpretation must rest primarily on the ordinary meaning of the text of the treaty, only to be supplemented by considerations of content, object and purpose if the ordinary meaning of the text is not clear'. See *Devas v India* (n 364) [231].

[393] *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar* (n 363) [372]; *The M/V "Louisa" Case (Saint Vincent and the Grenadines v Kingdom of Spain)* (Judgment of 28 May 2013, Dissenting Opinion of Judge Lucky) ITLOS Reports 2013, 4 [67]-[68]; *"Volga" Case*, Dissenting Opinion of Judge Anderson (n 363) [10] and [13].

meaning of the terms, they cannot independently dictate the preferred interpretation.

Looking at the case law, both reference solely to purpose,[394] especially in cases prior to the adoption of the VCLT, and to both object and purpose[395] can be

[394] ICJ: *Minority Schools in Albania* (Advisory Opinion) [1935] PCIJ Series A/B No. 64, 15; *The Pajzs, Csáky, Esterházy Case (Hungary v Yugoslavia)* (Merits, Separate Op. of Mr. Hudson) [1936] PCIJ Series A/B) No. 68, 76; *Diversion of Water from the Meuse (Netherlands v Belgium)* (Merits, Dissenting Opinion of Sir Cecil Hurst) [1937] PCIJ Series A/B No. 70, 34; *The Oscar Chinn Case (Britain v Belgium)* (Merits, Individual Opinion of Judge Anzilotti) [1943] PCIJ Series A/B No. 63, 112; *Ambatielos Case (Greece v United Kingdom)* (Merits) [1953] ICJ Rep 10,15; *Case Concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands)* (Merits, Dissenting Opinion of Judge Armand-Ugon) [1959] ICJ Rep 209, 247; *Aerial Incident* (n 370) Joint Dissenting Opinion of Judge Lauterpacht, Koo and Spender, 169; *Case of Certain Norwegian Loans (France v Norway)* (Preliminary Objections) [1957] ICJ Rep 9, 24; *Case concerning the Barcelona Traction, Light and Power Company, Limited* Preliminary Objections (n 115) Separate Opinion of Judge Bustamante 78; *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6, 44; ibid Declaration, Judge Spender [6]; *North Sea Continental Shelf* (n 182) Separate Opinion Padilla Nervo 92; *La Grand Case (Germany v United States of America)* (Merits) [2001] ICJ Rep 466 [102]; *Pulp Mills* (n 243) [75]; *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Merits, Dissenting Opinion of Judge Abraham) [2014] ICJ Rep 226 [18]; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections) [2017] ICJ Rep 3 [65]; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v Russian Federation)* (Preliminary Objections, Declaration of Judge Robinson) [2019] ICJ Rep 558 [3]; ibid, Separate Opinion of Judge Pocar [2019] ICJ Rep 558 [5]-[7]; *Jadhav case (India v Pakistan)* (Merits) [2019] ICJ Rep 418, Declaration of Judge Iwasawa [7]. HRC: *Antti Vuolanne v. Finland*, Communication No. 265/1987, Views adopted on 7 April 1989, CCPR/C/35/D/265/1987 [9.3].

[395] ICJ: *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)* (Merits, Separate Opinion of Sir Percy Spender) [1958] ICJ Rep 55, 116; *Western Sahara* (Advisory Opinion, Separate Opinion De Castro) [1975] ICJ Rep 12, 132, 166-167; *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73 Separate Opinion of Judge Ruda, 114; ibid Separate Opinion of Judge Mosler [1]; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal* (Advisory Opinion, Dissenting Opinion of Judge de Castro) [1982] ICJ Rep 325 [19]; *Case Concerning Border and Transborder Armed Actions (Nicaragua v Honduras)* (Jurisdiction of the Court and Admissibility of the Application, Separate Opinion of Judge Shahabudeen) [1988] ICJ Rep 69, 146; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989] ICJ Rep 177 [47]; *Arbitral Award of 31 July 1989* (n 223) Dissenting Opinion of Judge Weeramantry142; ibid Dissenting Opinion of Judges Aguilar, Mawdsley and Ranjeva [14]; *Territorial Dispute* (n 115) [52]; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)* (n 380) Dissenting Opinion of Judge Koroma 70; *Kasikili/Sedudu Island* (n 115) [43]; ibid, Dissenting Opinion of Judge Fleischhauer 1199; *Sovereignity Over Pulau Litigan and Pulau Sipadan* (n 370) Dissenting Opinion of Judge Franck [27]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [109]; *Pulp Mills* (n 243) Dissenting Opinion of Judge Vinuesa [14]; *Application of Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece)* (Merits) [2011] ICJ Rep 644 [97]; *Obligation to Prosecute or Extradite* (n 198) [68]; ibid Separate Op of Judge Yusuf [22]; ibid, Dissenting Opinion of Judge Xue [23]; *Whaling in the Antarctic* (n 394) [57]; *Maritime Dispute* (n 223) Declaration of Judge Ad hoc Guillaume [7]; *Application of the Convention on the Prevention and Punishment of Genocide Convention* (n 223) Dissenting Opinion of Judge Trindade) [2015] ICJ Rep 3 [92]; *Maritime Delimitation in the Indian Ocean,* Preliminary Objections (n 394) [98]; *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections) [2018] ICJ Rep 292 [101]; *Jadhav Case* (n 394) Dissenting Opinion of Judge Jillani [4]; *Certain Iranian Assets* (n 224) [91]; *Certain Iranian Assets* (n 224) Separate Opinion of Judge Brower [23]. IACtHR: *The Effect of Reservations on the Entry into force of the American Convention*

found in cases concerning the interpretation of treaties, unilateral declarations, UNGA resolutions, rules of the ICJ and rules of international organizations. When judges refer to both object *and purpose*, they do not usually distinguish between the two.[396]

Object and purpose is also alternatively referred to in the case law as 'subject and aim',[397] 'intention/intent and purpose of the parties',[398] 'nature and purpose',[399] spirit and purpose,[400] 'essential purpose',[401] 'ultimate purpose',[402] 'terms and purpose',[403] but these do not appear to convey an additional or different meaning to that of object and purpose.

Article 31 of the VCLT explicitly provides that it is the object and purpose of the *treaty* that is to be used for purposes of interpretation. Notwithstanding this, in practice, international courts and tribunals have engaged in interpretations by reference object and purpose of the treaty[404] or of the

of HR (Arts. 74 and 75), (Advisory Opinion OC-2/82) IACtHR Series A No. 2 (24 September 1982) [27]; *Restrictions to the Death Penalty* (Advisory Opinion OC3/82) IACtHR Series A No. 3 (8 September 1983) [50]; *Other Treaties Subjected to the Consultative Jurisdiction of the Court* (n 370) [24].
Other Courts: *Prosecutor v Tadić*, Appeals Chamber Jugdment (n 223) [166]; HRC, *Errol Johnson v. Jamaica*, Communication No. 588/1994, Views adopted on 22 March 1996, CCPR/C/56/D/588/1994 [8.2].

[396] Only three exceptions have been identified case law. See *Application of the Convention of 1902 Governing the Guardianship of Infants* (n 395) Dissenting Opinion of Judge Offerhaus 154-155; *Application of the Interim Accord* (n 395) Dissenting Opinion of Judge Roucounas [12]; *Kasikili/Sedudu Island* (n 115) Dissenting Opinion of Judge Fleishchhauer 1199.

[397] *Employment of Women During the Night* (n 366) Dissenting Opinion of Judge Anzilotti, 22.

[398] *Interhandel* case (n 115) 59; *Arbitral Award of 31 July 1989* (n 223) Dissenting Opinion of Judge Thiery 176;

[399] *Application of the Convention of 1902 Governing the Guardianship of Infants* (n 395) Separate Opinion Lauterpacht, 80; *Aerial Incident* (n 370) 139; *Prosecutor v Mucić et al.,* Trial Chamber Judgment (n 223) [431] and [438].

[400] *South West Africa,* Preliminary Objections (n 386) 336; *Norwegian Loans* (n 394) Dissenting Opinion of Judge Guerrero 69.

[401] *Barcelona Traction*, Preliminary Objections (n 115) Separate Opinion Tanaka, 71; *Oscar Chinn* (n 394) Dissenting Opinion Altamira, 102.

[402] *South West Africa*, Second Phase (n 394) Dissenting Opinion of Sir Louis Mbanefo 501.

[403] *Maritime Dispute* (n 223) [90].

[404] *Sovereignity over Pulau Litigan & Pulau Sipadan* (n 395) [51]; *Obligation to Prosecute or Extradite* (n 198) Separate Opinion of Judge Yusuf [22]; *Ramcharan Bickaroo v. Trinidad and Tobago,* Communication No. 555/1993, Views adopted on 29 October 1997, CCPR/C/55/D/555/1993 [5.3]. *Prosecutor v Tadić,* Appeal Chamber Judgment (n 223) [166] ; *Iron Rhine Arbitration (Belgium/Netherlands)* (Award of 24 May 2005) PCA Case No. 2003-03 [83] ; *Dawood Rawat v Republic of Mauritius* (Award on Jurisdiction 6 April 2018) PCA Case No. 2016-20 [172] ;

provision[405] or of a certain type of clause in a treaty[406] and, exceptionally, of the whole branch of law to which the rule belongs.[407] Whether an interpretation should be made by reference to the object and purpose *of the treaty* or *of a provision in the treaty* was an apple of discord at the WTO in the *Chicken Cuts* case.[408] The Appellate Body acknowledged that Article 31 of the VCLT, in light of its use of singular 'its' preceding object and purpose has in mind the treaty.[409] At the same time, it noted that

> 'we do not believe that Article 31(1) excludes taking into account the object and purpose of particular treaty terms, if doing so assists the interpreter in determining the treaty's object and purpose on the whole. We do not see why it would be necessary to divorce a treaty's object and purpose from the object and purpose of specific treaty provisions, or vice versa. To the extent that one can speak of the "object and purpose of a treaty provision", it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component.'[410]

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[405] ICJ: *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279 [101]; *Oscar Chinn* (n 394) Individual Opinion of Judge Anzilotti 112; *Immunities and Criminal proceedings,* Preliminary Objections (n 395) [95]; *Pulp Mills* (n 243) [62], [185]. WTO: *Japan-Taxes on Alcoholic Beverages* AB-1996-2, Report of the Appellate Body adopted on 4 October 1996, WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R 19; *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea,* WTO, Report of the Appellate Body adopted on 15 February 2002, WT/DS202/AB/R [81]; *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Product,* WTO, Report of the Appellate Body adopted on 23 September 2002, WT/DS207/AB/R [234]; ICTY: *Prosecutor v Aleksovski*, Appeals Chamber Judgment (n 223) [152].

[406] *Iberdrola Energia SA v The Republic of Guatemala* (Final Award of 24 August 2020) PCA Case no. 2017-41 [328].

[407] *Prosecutor v. Mucić et al.,* ICTY, Case No.IT-96-21-A, Appeals Chamber Judgment of 20 February 2001 [73]. Although not in the context of interpretation, but on a more general note, the ICJ made the following statement in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide:* '[s]tate responsibility and individual criminal responsibility are governed by different legal régimes and pursue different aims.' See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (n 223) [129].

[408] *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WTO, Report of the Appellate Body adopted on 12 September 2005, WT/DS269/AB/R, WT/DS286/AB/R [37], [69], [95], [131]-[132], [139], [238]-[239].

[409] ibid [238].

[410] ibid.

Taken together with the previously cited cases, this case shows that international adjudicators understand the reference to object and purpose quite liberally.

Regarding the determination of the treaty's or the rule's object and purpose, international courts and tribunals have developed different ways to determine it. The main methods are the following: the determination of object and purpose by reference to the preamble of the treaty,[411] by reference to title,[412] by reference to the general introductory provisions in the treaty,[413] by reference to the provisions of the treaty taken as a whole,[414] by reference to the history of negotiations or the overall historical context in which a treaty was adopted,[415] by reference to subsequent practice/agreements between the parties.[416]

In the law of treaty interpretation, and whenever it is applied by analogy to other acts/documents, 'in light of object and purpose' possesses different functions. Firstly, arguments based on object and purpose determine or, at

[411] *Diversion of Water from the Meuse* (n 394) 9; *Rights of Nationals of the United States of America in Morocco* (n 366) 196; *Case Concerning the Territorial Dispute* (n 115) [52]; *Whaling in the Antarctic* (n 394) [56]-[58]; ibid Dissenting Opinion of Judge Owada [7]; ibid Separate Opinion of Judge Trindade [4]; ibid, Separate Opinio Judge Greenweood [4]; *Obligation to Prosecute or Extradite*, Merits (n 198) [68]; *Jadhav case* (n 394) [73]-[75]; *Jadhav case* (n 394) Dissenting Opinion of Judge Jillani [4]; *Application of the International Convention for the Suppression of the Financing of Terrorism* (n 394) [59]; ibid, Declaration of Judge Robinson [3]; *Certain Iranian Assets* (n 224) [91]; *Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v Qatar)* (Merits, Separate Opinion de Arechaga) [2020] ICJ Rep 81, 149.

[412] *Norwegian Loans* (n 394) 24; *Certain Iranian Assets* (n 224) [91];

[413] *Immunities and Criminal Proceedings,* Preliminary Objections (n 395) [101]; ibid Separate Opinion of Judge Abraham [17]; ibid, Declaration of Judge Owada, [5]; ibid, Joint Dissenting Opinion of Judges Xue, Sebutinde, Robinson and Kateka [16]; *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia* (n 224) [39]; *Luxtona Limited v the Russian Federation* (Interim Award on Respondent's Objections to the Jurisdiction of the Tribunal of 22 March 2017) PCA Case No. 2014-09 [132]; *Prosecutor v Jelisić,* ICTY, Case no. IT-95-10-T, Trial Chamber Judgment of 14 December 1999) [71] and [82].

[414] *Access to, or Anchorage in, Port of Danzig, of Polish War Vessels* (Advisory Opinion) [1931] PCIJ Series A/B No. 43, 143;
Whaling in the Antarctic (n 394) [56]-[58]; *Pulp Mills* (n 243) Dissenting Opinion of Judge Vinuesa [14]; *Certain Iranian Assets* (n 224) [57]-[58]; *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia* (n 224) [39].

[415] *Barcelona Traction*, Preliminary Objections (n 115) 31; *Sovereignity over Pulau Litigan & Pulau Sipadan* (n 395) Dissenting Opinion of Judge Franck [27]; *Whaling in the Antarctic* (n 394) Dissenting Opinion of Judge Owada [8].

[416] *Maritime Dispute* (n 223) Joint Dissenting Opinion of Judges Xue, Gaja, Bhandari and Orego Vicuna [19].

least, influence the interpretation in accordance with ordinary meaning in accordance with Article 31. The relationship between these two methods of interpretation has been understood in different ways both in legal scholarship and in the case law. The mainstream view is that object and purpose provides insight into ordinary meaning. As Judge Armand-Ugon noted in the *Barcelona Traction* case:

> 'Account should not be taken, in isolation, of the literal meaning of words, without regard to the object and purpose they serve in the document in which they are employed, for it is from this that they derive a certain value and significance as the expression of the intention of the author.'[417]

According to another view, the object and purpose should be understood in a way that is compatible with and does not override the terms of the treaty.[418] Thus, *the ordinary meaning of the terms are determinant of how the object and purpose is understood*. A third and more balanced view states that the two reinforce each other. Jonas and Saunders note that 'a treaty's object and purpose is understood through the treaty's text, but the text is only properly understood when interpreted in light of the treaty's object and purpose';[419] it is a dialectical process.[420] According to these authors, neither of these two standards of interpretation can be fully understood without the other.[421] According to a contrary view, which was advanced before the adoption of the VCLT, states that a literal interpretation is not admissible, or the ordinary meaning of the provisions will not be determinant, if it is contrary to the purpose of the treaty.[422] Taking it to the extreme, the object and purpose may be construed in

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[417] *Barcelona Traction*, Preliminary Objections (n 115) Dissenting Opinion of Judge Armand – Ugon 161.
[418] *Obligation To Prosecute or Extradite* (n 198) Opinion of Judge Xue [23]; *The United States of America and the Federal Reserve Bank of New York v. The Islamic Republic of Iran and Bank Markazi Iran*, IUSCT Case No. A28 Decision (Decision No. DEC 130-A28-FT) - 19 Dec 2000 [58].
[419] Jonas, Saunders (n 348) 582.
[420] ibid.
[421] ibid 581.
[422] *Employment of Women During the Night* (n 366) Dissenting Opinion of Judge Anzilotti 22; *South West Africa*, Preliminary Objections (n 386) 336; *Legal Consequences for States of the Continued Presence of South*

light of the text of the treaty,[423] which, however, inverses the order set in Article 31 of the VCLT.

However, apart from the function ascribed to it under Article 31 VCLT, in practice it appears that object and purpose also fulfils two other important functions. One of these is closely connected to the determination of ordinary meaning, but touches not so much on the ordinariness of meaning, but on the temporal dimension of meaning — object and purpose may act as a justification for an evolutive interpretation of the treaty. Here the object and purpose acquires a third dimension – that of dynamicity.[424] Fitzmaurice calls this emergent purpose and states that:

> 'At any given moment, the convention is to be interpreted not so much, or not merely, with reference to what its object was when entered into, but with reference to *what that object has since become and now appears to be*.'[425]

An example is the ICTY's pronouncement in *Delalić*, where the Trial Chamber noted:

'The 'teleological approach', also called the 'progressive' or 'extensive' approach, of the civilian jurisprudence, is in contrast with the legislative historical approach. The teleological approach plays the same role as the 'mischief rule' of common law jurisprudence. This approach enables interpretation of the subject matter of legislation *within the context of contemporary conditions*. The idea of the approach is to adapt the law to changed

Africa in Namibia (n 59) Separate Opinion of Judge de Castro 183; *Maritime Delimitation in the Indian Ocean,* Preliminary Objections (n 394) Dissenting Opinion of Judge Bennouna 61;

[423] *Whaling in the Antarctic* (n 394) Separate Opinion of Judge Trindade [7].

[424] G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1975) 33 BYIL 203, 208.

[425] ibid 208. See also M Fitzmaurice, P Merkouris, *Treaties in Motion. The Evolution of Treaties from Formation to Termination* (CUP 2020) 168; I Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press 1984) 131.

conditions, be they special, economic or technological, and attribute such change to the intention of the legislation.[426]

Here, dynamic purpose can be tied to subjective purpose, or, more precisely, justified by reference to it, as the Trial Chamber seems to do in this case, but it still retains its additional dimension that is not included in the division of purpose into merely objective or subjective.

In addition, another function that object and purpose may fulfil is to act as a tool for ensuring the effectiveness of the treaty. This was the original idea of the ILC which intended to include the principle of effectiveness into the Convention:

> '[w]hen a treaty is open to two interpretations 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'.[427]

This provision, however, was not incorporated in order to avoid extensive interpretative results.[428] Fitzmaurice advances an understanding of teleological interpretation that is identical to effective interpretation and, therefore, distinct from the VCLT's approach of interpretation *in light of* object and purpose. He writes:

> 'The teleological approach goes much further than this, and, at any rate in its mote extreme forms, *virtually denies altogether the direct relevance of intentions as such:* whatever the intentions of the parties or some of them may have been, the convention as framed has a certain object or purpose, and the task of the tribunal is to ascertain and establish this object or purpose, and then to interpret the treaty so as to give effect to it'. [429]

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[426] *Prosecutor v. Delalić,* Trial Chamber Judgment (n 115) [163].
[427] ILC, Third Report on the Law of Treaties (n 69) 201 [8].
[428] M Waibel, 'Uniformity versus specialization (2): A uniform regime of treaty interpretation?' in CJ Tams, A Tzanakopoulos, A Zimmermann (eds) *Research Handbook on the Law of Treaties* (Edward Elgar 2014) 393.
[429] Fitzmaurice (1975) (n 424) 208.

An example from the case law is the *South West Africa* case, where the ICJ was called to determine the obligations of South Africa within the framework of the League of Nations Mandate for South West Africa. While stating that ruling on the issue would be beyond what can be reasonably considered as an exercise in interpretation, the Court also noted:

> 'It may be urged that the Court is entitled to engage in a process of "filling in the gaps", in the application of *a teleological principle of interpretation*, according to which instruments must be given their *maximum effect* in order to ensure the achievement of their underlying *purposes*.'[430]

The principle of effectiveness (or *effet utile* or *ut res magis valeat quam pereat*) is not as such part of Article 31 of the VCLT.[431] However, international judicial and quasi-judicial bodies appear to have used it in their practice, both before and after the adoption of the VCLT.[432] Notwithstanding the extensive use of the principle of effectiveness in international practice, it is noteworthy that this principle has acquired different dimensions of meaning in the practice of international courts. Firstly, according to the narrow meaning of this principle, treaty provisions will be read in such a way that does not deprive them of their meaning.[433] This is the classic understanding of this principle. Secondly, the principle of effectiveness is defined as one that prescribes that treaty provisions will be given their maximum effect. For instance, in the *Gabčíkovo-Nagymaros Project* case the ICJ explicitly stated that 'the principle of good faith obliges the Parties to apply it in a reasonable way and *in such a manner that its purpose can be realized*'.[434] Thirdly, the principle is defined as a form of interpretation that is in line with the context of the treaty or its object

[430] *South West Africa*, Second Phase (n 394) [91]. It is important to note that this judgment was rendered before the VCLT was concluded.
[431] See H Gutierrez Posse, 'La maxime 'ut res magis valueat quam pereat' (1972) 23 OZorv 229.
[432] See Fitzmaurice (1975) (n 424) 220-223; Lauterpacht, (1949) (n 72) 67-82; C Braumann, A Reinisch, 'Effet Utile' in J Klinger, Y Parkhomenko, C Salonidis, *Between the Lines of the Vienna Convention?: Canons and Other Principles Of Interpretation in Public International Law* (Wolters Kluwer 2018) 47-72.
[433] Braumann, Reinisch (n 432) 49.
[434] *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary / Slovakia)* [1997] ICJ Rep 7 [142] emphasis added; Fitzmaurice (1975) (n 424) 211.

and purpose.[435] The function that the object and purpose of the treaty will have will depend on the understanding of the principle of effectiveness.

Sometimes this principle is referred to as the purposive approach. For instance, in a case at the African Court of Human and People's Rights the Court defined the purposive approach as the approach 'according to what interpretation *would best achieve the purpose* of the act'.[436] It is important to note that this is very different from merely interpreting the text in light of the object and purpose of the treaty – it is far more ambitious, because, as exemplified by the *South West Africa* case, this interpretation aims to achieve the *maximum effect* of the treaty.

A similar approach can be noticed in the practice of the ECtHR. What the Court has previously noted in its rich case law, it has reiterated again in *Mamatkulov v Turkey*.[437] The Court noted that

> 'The *object and purpose* of the Convention as an instrument for the protection of individual human beings *require* that *its provisions be interpreted and applied so as to make its safeguards practical and effective*, as part of the system of individual applications. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society".'[438]

Here the object and purpose of the ECHR 'to maintain and promote the ideals and values of a democratic society'[439] is used to support an interpretation that would make the rights, and hence, the treaty as a whole, effective in practice.

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[435] Braumann, Reinisch (n 432) 49; *Arbitral Award of 31 July 1989* (n 223) Dissenting Opinion of Judge Thierry 184; *Temple of Preah Vihear,* Preliminary Objections (n 306) Dissenting Opinion of Judge Spender, 40.
[436] Request for Advisory Opinion by African Committee of Experts on the Rights & Welfare of the Child, ACtHPR, Request No. 002/2013 [92].
[437] *Mamatkulov and Askarov v Turkey*, ECtHR App no. 46827/99 46951/99 (4 February 2005).
[438] ibid [101] emphasis added.
[439] ibid.

Overall, as shown in this sub-section, interpretations by reference to object and purpose have three main functions: (1) to determine the ordinary meaning of the terms, (2) to justify the use of evolutive interpretations and (3) to further the effectiveness of rights and obligations contained in a treaty.

4. The Use of Ordinary Meaning and Purpose to Interpret Customary Rules

4.1. The Use of Ordinary Meaning to Define International Crimes and their Elements

Turning now to the examination of the case law on the interpretation of CIL rules, the first case in point is *Prosecutor v Krstić,* which was decided by the ICTY.[440] This case concerned the acts committed by Radislav Krstić, was General of the Bosnian Serb Army and was accused of crimes committed by the Serbian forces in Srebrenica in 1995 that took between 7000 and 8000 lives.[441] Krstić was indicted on charges of crimes against humanity that encompassed, among others, extermination as a crime against humanity established in Article 5 of the ICTY Statute.[442]

Two issues were raised before the Court: (1) whether or not extermination was part of customary international law when the act was committed and (2) what the content of the crime was. Regarding the first issue, the Trial Chamber acknowledged that extermination was recognized at the time as a crime against humanity in both national and international law.[443] To this end, the Trial Chamber relied on the Statutes of other criminal tribunals, on the work of the ILC and on French and Canadian criminal laws.[444] To establish the meaning of the offence, the ICTY first quoted the definition developed by the ICTR in its case law,[445] but then engaged in its own interpretation of the

[440] *Prosecutor v Krstić,* Trial Chamber Judgment (n 371).
[441] ibid [487].
[442] ibid [3].
[443] ibid [492].
[444] ibid.
[445] ibid [492].

offence. To define the notion of extermination, the Trial Chamber relied on the word's meaning found in the dictionary:

'To this end, the Trial Chamber notes the *common* definition of "extermination". According to the French Dictionary *Nouveau Petit Robert*, "*exterminer*" (to exterminate) derives from the Latin *exterminare*, meaning "to drive out", which comes from "*ex*" meaning "out" and "*terminus*" meaning "border". Likewise, the *Oxford English Dictionary* gives the primary meaning of the word "exterminate" as the act of driving out or banishing a person or group of persons beyond the boundaries of a state, territory or community. The *ordinary use* of the term "extermination", however, has come to acquire a more destructive connotation meaning the annihilation of a *mass* of people.[446]

In other words, the Trial Chamber distinguishes the ordinary meaning found in the dictionary and the ordinary meaning established in the use of the term extermination to reach the conclusion that it involved the destruction of a mass of people, rather than a single or a few individuals. In support of this understanding of extermination, the Trial Chamber then quoted the definition of extermination established by the ILC in the commentaries to its draft code of crimes against the Peace and Security of Mankind and the definition contained in the Statute of the ICC and the Report of the ICC Preparatory Commission on the Elements of the Crimes.[447] Finally, defining the crime against the background of the *in dubio pro reo* principle led the Court to conclude that 'the definition should be read as meaning the destruction of a numerically significant part of the population concerned'.[448] While the Trial Chamber adopted a holistic approach, which included consulting the definition in the ILC draft code and the ICC Statute, it started off, similarly as in treaty interpretation, with the ordinary meaning of the term. Because Article 5 of the ICTY Statute explicitly enumerates extermination as one of the forms of crimes against humanity, a counter-argument could be raised in

[446] ibid [496], emphasis added.
[447] ibid [497]-[503].
[448] ibid [502].

the sense that this is an example of treaty interpretation. While it is true that custom has been applied at the ICTY through the Statute as a proxy, because it is the Statute that contains the list of crimes, this does not undermine the conclusion that this is an example of CIL interpretation. Given the peculiar relationship between the treaty and the customary rule in this case, it seems that what the ICTY is doing is to interpret both the treaty and the customary crime that the treaty embodies.

The second case shows a similar use of this standard, but this time originates from the practice of the ECCC. In *Prosecutor v Chea and Samphan* the ECCC was called to interpret one of the elements of crimes against humanity.[449] Chea and Samphan were indicted on charges of crimes against humanity, genocide and grave breaches of the Geneva Conventions of 1949.[450] Both held high-ranking positions in the Democratic Kampuchea during the Khmer Rouge regime[451] and were charged for participation in a joint criminal enterprise.[452] The passage that is relevant for the present inquiry concerned the Court's analysis of the *chapeaux* elements of crimes against humanity, in particular the definition of civilian population.[453] The concept of civilian population originates from the principle of distinction, which is one of the cornerstone principles of international humanitarian law according to which 'the parties to the conflict must at all times distinguish between civilians and combatants'.[454] The ICRC refers to it as a principle of customary international law.[455] This principle originates from the St. Petersburg declaration concerning explosive projectiles from 1868.[456] In the Preamble of the declaration it was advanced that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces

[449] *Prosecutor v Chea and Samphan,* ECCC, Case 002/02, Judgment, 16 November 2018.
[450] ibid [16].
[451] ibid [14]-[15].
[452] ibid [16].
[453] ibid [301].
[454] 'Rule 1.The Distinction Between Civilians and Combatants', ICRC, *Customary International Law*, Vol. 1 (CUP 2001) 3.
[455] ibid.
[456] ibid.

of the enemy'.[457] Today the principle of distinction is contained in Article 48 of Additional Protocol I to the Geneva Conventions concluded in 1977 and entered into force 10 years later.[458] Article 48 reads:

> 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.'[459]

Article 50 of the same Protocol, read together with Article 4 of the Third Geneva Convention and Article 43 of Protocol I, defines the category of civilians negatively. It excludes from the category of civilians members of the armed forces of a Party to the conflict, other militias or volunteer corps under certain conditions and, under specified circumstances, inhabitants of a non-occupied territory who took up arms.[460] While this definition is quite precise, since the provisions of the Protocol were only applicable to State parties after its entry into force, it was not applicable to States before 1987, whereas the conduct took place before that. This is why the Trial Chamber of the ECCC proceeded from the fact that 'there was no established definition of civilian under customary international law in April 1975'.[461]

When assessing the meaning of civilian population, the Trial Chamber ECCC noted:

> 'In determining whether a population may be considered to be "civilian", the Chamber notes that, while this concept existed at that time, *there was no established definition of civilian under customary international law in April 1975. For the purposes of defining civilian population, the Chamber therefore*

[457] ibid.
[458] Additional Protocol I to the Geneva Conventions (adopted on 8 June 1977, entered into force on 7 December 1979) 17512 UNTS 1979.
[459] ibid art 48.
[460] ibid art 43, art 50. Geneva (III) Convention Relative to the Treatment of Prisoners in War (adopted on 12 August 1949, entered into force on 21 October 1950) 75 UNTS 135.
[461] *Prosecutor v Chea and Samphan,* Judgment (n 449) [185].

> *refers to the ordinary meaning of the term "civilian" (in English) and "civil" (in French), which encompasses persons who are not members of the armed forces.* On this basis, the Chamber holds that at the time relevant to the charges here at issue, *the civilian population included all persons who were not members of the armed forces or otherwise recognised as combatants*. While the Chamber does not here rely on the definition of "civilian" set out in Article 50 of Additional Protocol I to the 1949 Geneva Conventions, adopted by the *ad hoc* Tribunals as reflecting customary international law for the purposes of crimes against humanity post-1977, it notes that *this accords with the ordinary meaning of the term.*"[462]

We can see that the Trial Chamber did not examine State documents, such as military manuals. Neither did it use the strategy of defining civilians by reference to earlier case law. The Trial Chamber did not disclose whether it had used a dictionary or, like other international courts and tribunals as demonstrated in Section 1, relied on its own judgment as to what civilian means. It is interesting to note that the Trial Chamber explicitly distinguished the meaning of civilian in customary international law with that in the Additional Protocol to the Geneva Conventions. At the same time, it used it as a sort of confirmatory device somewhat similar to the use of supplementary means of interpretation in Article 32 VCLT that confirm the meaning resulting from the application of the general rule of interpretation. Similar to *Prosecutor v Krstić*, the ECCC Chamber in this case engaged in an interpretation of what is both a treaty and a customary rule. Because the rules that are applied as custom in criminal courts are also contained in treaties, it might explain why judges from these courts almost naturally resort to the use of the ordinary meaning standard of interpretation, which is the primary element to look at in the exercise of treaties. However, this does not mean that the ordinary meaning standard would be inapplicable to customary rules that are not in one way or another contained or referred to in a treaty. This is because, as Kolb

[462] ibid [306].

argued, customary rules automatically gain a lexical content when they are articulated.[463] Therefore, interpretation of customary rules may be made by reference to the ordinary meaning of the terms without there being a treaty as a backdrop for it.

The last case examined in this sub-section is *Prosecutor v Hadžihasanović* case.[464] The particularity of this case lies in the peculiar way in which the Appeals Chamber relied on the ordinary meaning standard. The case concerned a military officer of the Yugoslav People's Army, who reached to the rank of Major General in the Army of Bosnia and Hertegovina.[465] The main allegation against him at the ICTY was that he failed to punish those who were under his effective command and control for committing violations of the laws and customs of war.[466] The legal issue of the interlocutory appeal concerned the institution of command responsibility. The Appeals Chamber was called upon to determine whether under customary international law command responsibility, an institution that was applicable at the time to international armed conflict, applied to internal armed conflicts as well. The Appeals Chamber started off by looking at Article 3 common to the Geneva Convention of 1949, which is recognized as a rule of customary international law.[467] Article 3 provides minimum guarantees that the Parties to a conflict not of an international character should observe. The ICRC Commentary includes among the criteria for the existence of an armed conflict not of an international character the existence of a party possessing 'an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the' convention.[468] Relying on this the Appeals Chamber reasoned that Article 3 assumed the existence of an organized military force, which, however,

[463] Kolb (n 41) 220-221.
[464] *Prosecutor v Hadžihasanović et. al* Decision on Interlocutory Appeal (n 223).
[465] *Prosecutor v Hadžihasanović,* Third Amended Indictment, [2] and [3].
[466] ibid [9].
[467] *Prosecutor v Hadžihasanović,* Decision on Interlocutory Appeal (n 464) [13].
[468] ibid [15].

according to the judges, was impossible without the existence of a responsible command.[469] Giving thrust to what the Appeals Chamber established paragraphs earlier when it noted that

'where a principle can be shown to have been so established [on the basis of state practice and *opinio juris*], it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle'[470]

the Appeals Chamber made the following statement:

> 'It is true that, domestically, most States have not legislated for command responsibility to be the counterpart of responsible command in internal conflict. This, however, does not affect the fact that, at the international level, they have accepted that, as a matter of customary international law, relevant aspects of international law (including the concept of command responsibility) govern the conduct of an internal armed conflict, though of course not all aspects of international law apply. The relevant aspects of international law unquestionably regard a military force engaged in an internal armed conflict as organized and therefore as being under responsible command. In the absence of anything to the contrary, it is the task of a court to *interpret the underlying State practice and opinio juris* (relating to the requirement that such a military force be organized) as bearing *its normal meaning* that military organization *implies* responsible command and that responsible command in turn *implies* command responsibility.[471]

At first glance, the wording used by the judges would suggest that this is an example of interpretation of the elements of CIL – 'to interpret *the underlying State practice and opinio juris'*.[472] However, reading the paragraph as a whole

[469] ibid [16].
[470] ibid [12].
[471] ibid [17] emphasis added.
[472] ibid.

suggests that it meant custom as a whole, as a rule, and not its disparate elements taken together. Moreover, this interpretation does not take place upon the identification of the rule, since the general legal issue was not whether command responsibility exists in international law as a matter of CIL, but rather if it applies in non-international armed conflict – thus, it was the scope of a rule that was in question. Leaving aside the question that in this passage the Appeals Chamber was, to say the least, bordering on law-making, what is important for this inquiry is, once again, that judges explicitly use the ordinary meaning standard to interpret a rule of CIL. However, unlike in the previous case where it was the ordinariness of the meaning that appears to have led the court to its conclusion, the example here, *if looked at holistically*, is more suggestive of a logical reading of the rule, which may fall under the deductive approach discussed in Chapter 2. The Appeals Chamber does not actually look at the ordinary or, normal, meaning of military organization. Instead, the core message of this passage is that the concept of military organization (for the purposes of law!) suggests, as a logical consequence, the existence of a responsible command. The emphasis appears to be not so much on the meaning of military organization, but rather its logical relationship with responsible command; in other words, the Appeals Chamber could have simply said that the meaning, and not the ordinary meaning),of military organization is such that responsible command follows logically. The Appeals Chamber makes a big leap in reasoning when it states that responsible command implies command responsibility, given that in criminal law modes of liability must be established by law and cannot be derived in this manner from other concepts.

4.2. The Use of Ordinary Meaning to Interpret the Scope of Non-Refoulement

The ordinary meaning has also been used to interpret the scope of the customary rule on non-refoulement. The case in point here is the ICC *Prosecutor v Katanga*,[473] which concerned the Bogoro Massacre that took place

[473] *Prosecutor v Katanga,* ICC, Decision on an Amicus Curiae application and on the "Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux

on the 24th of February 2003 in the broader context of the Second Congo War.[474] Katanga was indicted with indirect commission under Article 25 (3) (a) for murder, destruction of enemy property and pillaging, rape and sexual slavery, using children under 15 years of age to participate actively in hostilities as war crimes and crimes against humanity.[475] During the proceedings, an issue arose concerning the scope of the Court's duty to protect witnesses contained in Article 68 of the Rome Statute. Article 68 (1) provides that 'the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'. During the proceedings, the duty counsel has submitted an application with a request to the Court for the latter to allow the presentation of the witnesses to the Dutch authorities for asylum.[476] Ruling on this question, the Court distinguished between the measures taken for the protection of witnesses by virtue of their cooperation with the court from the protection of witnesses against human rights violations in their home country.[477] It has argued that the only acceptable interpretation of Article 68 and, to be precise, the meaning of 'appropriate measures', only includes the first type of measures and not the latter.[478] Thus, there is no overlap between the conditions necessary to be fulfilled for asylum to be granted and the conditions necessary to obtain the protection of the court. In the context of this discussion, the Court noted:

> 'Accordingly, it cannot endorse the host State's argument that the Chamber should conduct an assessment of the risks faced by the witnesses in light of the principle known as "non-refoulement" [prohibition of expulsion or return] which is enshrined in several international instruments, including article 33 of the Geneva Convention of 28 July 1951. Admittedly, as an international organisation with a legal

autorités néerlandaises aux fins d'asile" (articles 68 and 93(7) of the Statute), Trial Chamber II Decision of 9 June 2011.

[474] *Prosecutor v Katanga*, Judgment pursuant to Article 74 of the Statute, ICC, Case no. ICC-01/04-01/07, Judgment 7 March 2014 [427] and [432].

[475] ibid.

[476] *Prosecutor v Katanga,* ICC, Decision on an Amicus Curiae application (n 473) [56].

[477] ibid [59].

[478] ibid [61].

personality, the Court cannot disregard *the customary rule of non-refoulement.* However, *since it does not possess any territory, it is unable to implement the principle within its ordinary meaning*, and hence is unlikely to maintain long-term jurisdiction over persons who are at risk of persecution or torture if they return to their country of origin. *In the Chamber's view, only a State which possesses territory is actually able to apply the non- refoulement rule.'*[479]

While the ICC explicitly stated 'implementation' that is, essentially, enforcement, it simultaneously interpreted the customary principle of non-refoulement, which although not a customary rule per se, had a bearing on the case. What the Court seems to say is that the ordinary meaning of non-refoulement is such that only entities that possess a territory (States) are under an obligation to apply it, hence not the Court itself. Probably the most pressing question that can be raised based on the Court's pronouncement is whether non-refoulment, as a legal term, actually has an ordinary meaning. It is true that, as already seen in the body of case law on ordinary meaning in treaty interpretation, it seems that international courts and tribunals understand the term 'ordinary meaning' quite broadly in a way that encompasses frequent usage and apply the standard to CIL in a similar vein as they do when they interpret CIL.

4.3. The Use of Purpose to Define International Crimes and their Elements

The analysis now turns to the cases where international courts relied on the concept of purpose to define international crimes and their elements. The first case under scrutiny is *Prosecutor v Delalić*, which can be considered an obiter in favour of a purposive interpretation of customary rules. This case concerned the events that happened at the *Celebići* prison camp in Bosnia and Herzegovina in 1992.[480] The defendants, two of whom were commanders in the prison camp and one of whom was a commander in the Bosnian Army,

[479] ibid [64] emphasis added.
[480] *Prosecutor v. Delalić,* Trial Chamber Judgment (n 115) [3].

were charged with grave breaches of the Geneva Conventions and violations of laws and *customs* of war.[481]

In its judgment, firstly, the Court distinguished between a broad and a narrow sense of 'interpretation'.[482] The broad meaning of interpretation is, according to the Trial Chamber, 'the creative activities of the judge in extending, restricting or modifying a rule of law contained in its statutory form',[483] whereas in its narrow meaning it encompasses 'the role of the judge in explaining the meanings of words or phrases used in a statute'.[484] Secondly, the Trial Chamber established that 'the essence of interpretation is to discover the true purpose and intent of the statute'.[485] Thirdly, it outlined the rules of interpretation that it was planning to apply. These were the literal rule of interpretation, which is essentially the same as interpretation by reference to ordinary meaning, according to which the literal meaning shall be put aside if it may lead to contradictory, absurd or unjust results,[486] and the teleological approach, which, as previously stated, is according to the Court is equivalent to a progressive reading of the article – an adaptation of the law to changed conditions. These were further supplemented by other canons of interpretation, such as *ejusdem generis*, *exclusion unius est exclusion alterius* and so on.[487] However, arguably the most important pronouncement was made by the Court in the conclusion, where it noted:

> 'The International Tribunal is an ad hoc international court, established with a specific, limited jurisdiction. It is sui generis, with its own appellate structure. The interpretation of the provisions of the Statute and Rules must, therefore, take into consideration the objects of the Statute and the social and political considerations which gave rise to its creation. The kinds of grave violations of international humanitarian law which

[481] ibid [3].
[482] ibid [158].
[483] ibid.
[484] ibid [158].
[485] ibid [159].
[486] ibid [161]-[163].
[487] ibid [166]-[169].

were the motivating factors for the establishment of the Tribunal continue to occur in many other parts of the world, and continue to exhibit new forms and permutations. *The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of the existing provisions of international customary law*.'[488]

In this passage, the Trial Chamber of the ICTY explicitly encourages a teleological and a reasonable approach towards the interpretation of rules of customary international law.[489] This pronouncement might be the reason why, as shall be seen in the next section, criminal courts and tribunals more than other courts used this method to interpret CIL. Purposive interpretation, in this case, is more than an interpretation in line with purpose and borders on an effective interpretation. At the same time, the Trial Chamber combines a purposive reading with a reasonable reading of CIL – an approach which appears to be particular to CIL interpretation and which, as shall be subsequently demonstrated, is also present in other cases.

The second judgment in this category is the Trial Chamber judgment in the *Prosecutor v Furundžija*.[490] The defendant, Anto Furundžija, was indicted on charges of torture as a violation of the common Article 3 of the Geneva Conventions of 1949 and outrages upon personal dignity, including rape as violations of Additional Protocol II of 1977.[491] The mode of liability retained by the Prosecution was that prescribed by Article 7(1) of the Statute, according to which '[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Article 2 to 5 of the present Statute, shall be individually

[488] ibid [170].
[489] Without engaging in an interpretation Judge Jessup stated in one of his Separate Opinions that '[a]ny court's application of a rule of law to a particular case, involves an interpretation of the rule. Historical and logical and teleological tools may be used by the judge, consciously or unconsciously'. See *Barcelona Traction*, Preliminary Objections, Second Phase (n 282) Separate Opinion of Judge Jessup [12].
[490] *Prosecutor v. Furundžija*, ICTY, Case no. IT-95-17/1-T Trial Chamber Judgment of 10 December 1998.
[491] ibid [42]-[46].

responsible for the crime'.[492] The core legal issue relevant to the present discussion was how to distinguish between perpetration or co-perpetration of torture and acts that qualify as aiding and abetting.[493] In this context, the Trial Chamber noted:

> 'To determine whether an individual is a perpetrator or co-perpetrator of torture or must instead be regarded as an aider and abettor, or is even not to be regarded as criminally liable, it is crucial to ascertain whether the individual who takes part in the torture process also partakes of the purpose behind torture [..] Arguably, if the person attending the torture process neither shares in the purpose behind torture nor in any way assists in its perpetration, then he or she should not be regarded as criminally liable.[494]

The Trial Chamber justified this by stating that:

> 'These legal propositions, which are based on a *logical interpretation* of the customary rules on torture, are supported by *a teleological construction of these rules*. To demonstrate this point, account must be taken of some *modern trends* in many States practicing torture: they tend to "compartmentalise" and "dilute" the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process.'[495]

and subsequently added:

> 'International law, were it to fail to take account of these modern trends, would prove unable to cope with this despicable practice. The rules of construction emphasising the importance of the object and purpose of international norms lead to the conclusion that international law renders all the aforementioned persons equally accountable, although some may

[492] ibid [42].
[493] ibid [250].
[494] ibid [252].
[495] ibid [253].

be sentenced more severely than others, depending upon the circumstances.'[496]

This case shows a combined use of purposive and reasonable interpretation of customary rules. Moreover, the reference to 'recent trends' may be read as a form of systemic interpretation (see *infra*).

The Appeals Chamber judgment in *Prosecutor v Tadić* is another example of the use of purposive interpretations of CIL. The relevant issue concerned the meaning and scope of the notion of control in the rules on State responsibility. The Appeals Chamber had to establish which degree of control by a State over specific individuals qualified them as *de facto* state officials. This was needed in order for the Appeals Chamber to determine whether an internal armed conflict had been transformed into an international one.[497] The ICTY Statute did not establish an independent notion of control, but rather looked into the law of State responsibility. It referenced what the ICJ established in the *Nicaragua* case where it chose a very high threshold of control, namely effective control,[498] and further set out the grounds why the Nicaragua test was unpersuasive.[499] The Appeals Chamber provided two reasons for this. Firstly, the test established by the ICJ was at odds with the logic of State responsibility and, secondly, it was contrary to judicial and State practice.[500] Within the purview of the first argument, the Appeals Chamber heavily relied on the *telos* of the rules on attribution in State responsibility.[501] Although the Appeals Chamber qualified the rules on attribution as principles of international law,[502] they can be considered as a reflection of customary rules because they were

[496] ibid [254].
[497] *Prosecutor v. Tadić* Appeals Chamber Judgment (n 223) [98].
[498] ibid [100].
[499] ibid [115] et seq.
[500] Ibid [116], [124] et seq.
[501] ibid [117], [121] and [122]
[502] ibid [117].

contained in, at the time, the draft articles on State responsibility.[503] The Appeals Chamber noted:

> 'The *principles of international law concerning the attribution to States* of acts performed by private individuals are not based on rigid and uniform criteria. These *principles* are reflected in Article 8 of the Draft on State Responsibility adopted on first reading by the United Nations International Law Commission and, even more clearly, in the text of the same provisions as provisionally adopted in 1998 by the ILC Drafting Committee. Under this Article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. *The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility*. In other words, States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.'[504]

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[503] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43 [401]. See ILC, UN Doc A/56/10 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' YILC (2001) Vol. II.

[504] *Prosecutor v. Tadić* Appeals Chamber Judgment (n 223) [117] emphasis added.

Subsequently, the Appeals Chamber added:

> 'Under the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for ultra vires acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. *The rationale behind this provision* is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities.'[505]

And further:

> 'international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act ultra vires or contra legem), or (ii) by individuals who make up organised groups subject to the State's control. International law does so regardless of whether or not the State has issued specific instructions to those individuals. Clearly, *the rationale behind this legal regulation* is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.'[506]

Therefore, what the Appeals Chamber did was to interpret this rule by reference to its purpose combining it with a consequentialist argument[507] — what would happen if a contrary interpretation of the rule was adopted.

The next case is also part of the ICTY case law — the *Prosecutor v Orić*.[508] In the *Orić* case, where the *ratio decidendi* in *Hadžihasanović* (see *supra*) was the

[505] ibid [121].
[506] ibid [123].
[507] F Carbonell, 'Reasoning by Consequences: Applying Different Argumentation Structures to the Analysis of Consequentialist Reasoning in Judicial Decisions' in C Dahlman, E Feteris (eds) *Legal Argumentation Theory: Cross-Disciplinary Perspectives* (Springer 2013) 1-19.
[508] *Prosecutor v. Orić*, (n 244).

object of contention, one of the dissenting judges, Judge Schomburg, argued that the customary principle of command responsibility must be interpreted by giving 'consideration to the purpose of a superior's obligation to effectively make his subordinates criminally accountable for breaches of the law of armed conflict'.[509] He then emphasized that

> 'considering thus the *purpose* of superior responsibility, it is arbitrary – and contrary to the spirit of international humanitarian law – to require for a superior's individual criminal responsibility that the subordinate's conduct took place only when he was placed under the superior's effective control'.[510]

Judge Liu also appended a partially dissenting opinion where he disagreed with the majority on this question. Judge Liu appealed to the purpose behind the concept of command responsibility, which was 'to ensure compliance with the laws and customs of war and international humanitarian law generally'.[511]

He then added:

> 'The Majority's restrictive view to a certain extent defeats this objective and may have far-reaching *consequences* in international humanitarian law. *It sends the signal that commanders are allowed to escape their responsibility to punish their subordinates for crimes they committed before they assumed office.* Its creation of a new defence does indeed create what Judge Hunt referred to as a "gaping hole" in the protection provided by international humanitarian law.'[512]

In this last example Judge Liu, similarly as it was done in the passage from the *Tadić* case, has interwoven the interpretation by reference to purpose with the consequences that an opposing interpretation would lead to.

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[509] ibid Separate and Partially Dissenting Opinion of Judge Schomburg [16].
[510] ibid, emphasis added.
[511] ibid Partially Dissenting Opinion and Declaration of Judge Liu [30].
[512] ibid, emphasis added.

Another example, this time from recent international criminal case law, is that of the ICC in the *Ntaganda Second Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9*.[513] In this case, the Trial Chamber of the ICC interpreted the scope of the prohibition of rape and sexual slavery in international humanitarian law to determine whether such acts may be regarded as war crimes when they are committed by armed forces against fellow members and not against the opposing party. The Defendant was indicted on the basis of Article 8 of the Statute of the ICC on, among others, charges of rape and sexual violence.[514] Given the wording of the *chapeaux* of Article 8 para 2 (b) and (e), the Trial Chamber had to look at the established framework of international humanitarian law to determine whether the indictment on charges of rape and sexual violence committed against one's own military forces fell under the scope of the crime. The established framework of international law should be understood as referring to both treaties and customary international law, between which the Trial Chamber did not distinguish. Though the Court does not explicitly mention 'interpretation', this emerges from the reference of the Court to 'scope of action' that means that it was the *content* of the prohibition that was investigated. The Trial Chamber noted that:

> 'The Chamber further considers that limiting the scope of protection in the manner proposed by the Defence is contrary to the *rationale of international humanitarian law*, which aims to mitigate the suffering resulting from armed conflict, without banning belligerents from using armed force against each other or undermining their ability to carry out effective military operations.'[515]

[513] *Ntaganda Second Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC, Case no.* ICC-01/04-02/06-1707, Decision of 04 January 2017.
[514] ibid [1].
[515] ibid [48].

Similar to the previous cases, here, once again, the reference to purpose is used to determine the scope of a rule that is both found in the ICC Statute, but is also part of CIL.

4.4. The Use of Purpose to Interpret the Rule on Diplomatic Protection

Another instance of the use of purpose to interpret customary rules concerns the scope of the rule on diplomatic protection, which was raised in the *Barcelona Traction* case. The case concerned the legal question whether or not a State can exercise diplomatic protection in the name of its citizens as shareholders in a foreign company in a dispute concerning actions taken against the company by a third State.[516] The Court framed this legal issue as a question of 'interpreting the general rule of international law concerning diplomatic protection'.[517] The Court has, for various reasons, rejected Belgian's application. Judge Tanaka submitted a Separate Opinion in which he argued the following:

> 'It will be recognized that absence of a uniform law relative to companies and the highly imperfect state of private international law on this matter increasingly require diplomatic protection of shareholders in a way that supplements the measures provided by municipal law. *Briefly, we should approach the customary rule of diplomatic protection from a teleological angle, namely from the spirit and purpose of diplomatic protection,* without being bound by municipal law and private law concepts, recognizing its relative validity according to different fields and institutions. The concept of juridical personality mainly governs private law relationships. It cannot be made an obstacle to diplomatic protection of shareholders. Concerning diplomatic protection, international law looks into the substance of matters instead of the legal form of technique; it pays more consideration to ascertaining where real interest exists, disregarding legal

[516] *Barcelona Traction*, Preliminary Objections, Second Phase (n 282).
[517] ibid [54].

concepts. International law in this respect is realistic and therefore flexible'.[518]

Judge Tanaka rejected the view that the intricacies concerning the relationship between the shareholders and the company, which is governed by domestic law, must be taken into account. Instead, he supported an approach that would involve considering the spirit and the purpose of diplomatic protection which is, arguably, protecting the rights and interests of citizens against the actions of other States.

4.5. The Use of Purpose to Define Sovereign Immunities

Finally, the last case analysed in this section is from the practice of the Human Rights Committee. The subject matter of the complaint in *Sechremelis v Greece* was the enforcement of a judgment against a third State and, hence, it raised the legal issue of State immunity.[519] The author of the Communication was a relative of one of the victims of the Distomo massacre perpetrated by Nazi Germany in Greece in 1944.[520] He complained of the violation of Article 2 of the Covenant.[521] The majority of the Committee considered that the limitations to the rights contained in Article 2 of the Covenant were justified in this case.[522] In an individual opinion to the Committee's decision on the merits, three Committee members expressed their disagreement with the decision of the majority. In their dissent, they have noted that:

'it is evident that the *object and purpose of a foreign State's immunity* is a matter of public interest, both nationally and internationally, in that it avoids disturbances in relations between states. The Vienna Convention on the Law of Treaties evidently does have its relevance in this regard with a view to ascertaining whether, given its object and purpose, another generally accepted rule of international law, whether customary

[518] ibid Separate Opinion of Judge Tanaka 127.
[519] *Panagiotis A. Sechremelis et al. v. Greece*, Communication No. 1507/2006, Views adopted on 25 October 2010 CCPR/C/100/D/1507/2006.
[520] ibid [2.1].
[521] ibid [3].
[522] ibid [10.5].

or treaty based, has an impact, if any, on other international instruments.'[523]

And subsequently added that:

'The Covenant, however, is also a multilateral treaty and equally *has its own object and purpose*, thus attracting in its turn the interpretative guidance of the Vienna Convention.'[524]

Besides being another instance of a purposive interpretation of CIL, this interpretation points to the need to distinguish between the object and purpose of the customary rule and the object and purpose of the other source of law that the Court was bound to apply in this case. [525]

4.6. Drawing conclusions from the patterns in the case law

In this section, I have examined the case law where judges explicitly refer to either the ordinary meaning or purpose when interpreting rules of customary international law.[526] It can be noticed that the unwritten nature of customary rules does not dissuade international courts, quasi-judicial and other dispute settlement bodies from using this standard to interpret the meaning or scope of customary rules. The majority of the examined cases that depict the use of ordinary meaning in the exercise of CIL interpretation concerned a rule that is contained or has been codified in ILC outputs or treaty rules. 'Contained'

[523] ibid, Individual opinion by Committee members Mr. Lazhari Bouzid, Mr. Rajsoomer Lallah and Mr. Fabian Salvioli concerning merits (dissenting), 12 emphasis added.
[524] ibid.
[525] While the explicit use of object and purpose to define sovereign immunities is a singular example in international courts, these examples are complemented by the wealth of case law in domestic courts, where the sovereign immunity rule is applied more often. For a domestic practice of the use of sovereign immunity see N Mileva, 'A Theory of Interpretation for Customary International Law' (Doctoral dissertation, University of Groningen, 2023) 121-145.
[526] According to a study conducted by Veerburg, investment tribunals have relied on the on the obiter made by the PCIJ in the *Factory At Chorzów* case where the PCIJ established the standard of reparation in State responsibility by reference to the purpose of the rule ('reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed' in *Factory At Chorzów* (n 124) 47. These examples can be taken as indirect examples of teleological interpretations, where the tribunals rely on a previous pronouncement by another court, where the purpose of the rule has been decisive to establish its content. See C Veerburg, 'Damages and Reparation in Energy Related Investment Treaty Arbitrations: Interpreting and Applying Rules of Customary International Law Regarding State Responsibility' (2012) 23/1 ICLR 2, 17-20.

here is understood to mean that the 'rule', or to be precise, the crime, in the case of the ICTY, is present textually in the Statute. However, it is applied to the case not as a treaty rule that emerges from the Statute, but because it is a crime under CIL. Equally, the rule may be codified in ILC outputs or in treaty rules, as was the analysed case from the practice of the ECCC. As aptly put by Lekkas, in such cases the 'normative propositions contained in ILC outputs [or in treaties act] as a methodological shortcut for the interpretation of rules of customary international law'[527] or, put simply, 'as artefacts of the rule'.[528] Since the text is readily accessible, it allows courts to resort to ordinary meaning of the terms as a method of interpretation in a similar way as they would in the case of treaty interpretation. Moreover, as has been seen from the analysed case law, resort is made to dictionaries, similarly as it happens in treaty interpretation.

What patterns can be derived from the case law concerning the content and function of purposive interpretation of CIL? Firstly, unlike in the case of treaty interpretation, in the case of CIL interpretation purposive interpretation seems to be separate from interpretation according to ordinary meaning. Secondly, similar to treaty interpretation, where the object and purpose by reference to which the rule is interpreted is in most cases the object and purpose of the treaty as a whole or of a provision of a treaty, in the case of customary rules, it is most commonly the object and purpose of the customary rule or, as shown by one of the cases, the branch of law to which the rules belongs taken as a whole.

Thirdly, and this appears to be particular to CIL interpretation, purposive arguments are often intertwined with considerations of reasonableness or the consequences of interpretation. For instance, as shown above, the reference is often made to 'logical and teleological' or 'reasonableness and purpose'. In

[527] SI Lekkas, 'The Uses of the Outputs of the International Law Commission in International Adjudication: Subsidiary Means or Artefacts of Rules?' (2022) 69 Netherlands International Law Review 327, 329.
[528] ibid 347.

treaty interpretation, the standard of reasonableness performs the function of eliminating the absurd,[529] in line with Article 32 VCLT.[530] The language of Article 32 suggests reasonableness is not a distinct reference point in interpretation; instead, it is a barometer against which an interpretation achieved by other means is measured, also referred to in the case law as 'the test of reasonableness'.[531] The case law on treaty interpretation shows that the concept of reasonableness is applied either as prescribed by Article 32 as a corrective device that ensures that the meaning is not unreasonable,[532] and distinguishing what is reasonable from what is not is up to the Court making the assessment,[533] or, especially in the case law before the adoption of the

[529] JA Salmon, 'Le Concept de Raisonnable en Droit International Public' in P Reuter (ed), *Le droit international, unité et diversité : mélanges offerts à Paul Reuter* (Pedone 1981) 468-470.

[530] Article 32 VCLT provides that '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.' Vienna Convention on the Law of Treaties (n 60) art 32.
It is important to note that Article 32 prescribes that it should be '*manifestly* unreasonable' which establishes a very high threshold. O Dörr, K Schmalenbach, *Vienna Convention on The Law of Treaties, A Commentary* (Springer 2012) 631. For the probable origin of this requirement see Salmon (n 529) 469.

[531] *Aerial Incident* (n 370) Joint Dissenting Opinion by Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender 188.

[532] Even before the VCLT see *Customs Regime between Germany and Austria* Individual Opinion of Judge Anzilotti (n 384) 60. See this type of interpretation as a corrective interpretation see P Merkouris, ''Third Party' Considerations And 'Corrective Interpretation' In The Interpretative Use Of Travaux Préparatoires: – Is It Fahrenheit 451 For Preparatory Work?' in M Fitzmaurice, O Elias, P Merkouris (eds) *Treaty Interpretation and the Vienna Convention: 30 Years On* (Brill 2010) 75.

[533] Examples of this type of interpretation or application in the law of treaties or other documents: PCIJ: Lotus case, Dissenting Opinion M. Moore (n 353) 62; *Payment of Various Serbian Loans Issued in France* (Judgment) [1929] PCIJ Series A No. 20, 40; *Lighthouses in Crete and Samos* (n 358) 27; *Polish Postal Service in Danzig* (n 384) 39; *Customs Regime between Germany and Austria* Individual Opinion of Judge Anzilotti (n 384) 60-62; *Case of the Free Zones of Upper Savoy and the District of Gex* (Judgment) [1932] PCIJ Series A/B No. 46 Dissenting Opinion by M. Altamira and Sir Cecil Hurst 183; *The Panevezys-Saldutiskis Railway Case* (Judgment) [1939] PCIJ Series A/B 76, Dissenting Opinion of M. Erich 53; *Mavrommatis Palestine Concessions* (n 353) 33; ibid, Dissenting Opinion of M. Moore 62; ibid, Dissenting Opinion of M. Nyholm 29. ICJ: *Application of the Convention of 1902 Governing the Guardianship of Infants* (n 395) Dissenting Opinion of Judge Cordova 143; ibid, Separate Opinion of Judge Lauterpacht 100; ibid, Separate Opinion of Judge Moreno Quintana 109; *Aerial Incident,* Dissenting Opinion of Judge Goitein (n 370) 200 and 203; ibid, (n 370) Joint Dissenting Opinion by Judges Lauterpacht, Koo & Spender 188-190; *Interhandel case* (n 115) Dissenting Opinion of Judge Lauterpacht 117; *Anglo-Iranian Oil Case* (n 386) 104; ibid, Dissenting Opinion of Judge Hackworth 140; *Arbitral Award of 31 July 1989* (n 223) 132; *Barcelona Traction* (n 115) Dissenting Opinion of Judge Armand-Ugon 148; *Barcelona Traction* (Second Phase) (n 282) Separate Opinion of Judge Ammoun 313-314 [20]; *Fisheries Jurisdiction* (n 366) [47], [49], [54]; *Gabčíkovo-Nagymaros Project* (n 434) [142]; *Immunities & Criminal Proceedings,* Preliminary Objections (n 395) [91]; *Kasikili/Sedudu Island* (n 115) Dissenting Opinion of Judge Weeramantry [17]; *Land, Island and Maritime Frontier Dispute* (n 355) Separate Opinion of Judge Torres Bernandez [203]; *Maritime Delimitation in the Indian Ocean (*n 394)

VCLT, as part of the textual approach, hand in hand with the standard of ordinary meaning.[534] In practice, the term reasonable interpretation in the interpretation of treaties has an array of different meanings, which range from an interpretation that makes a provision meaningful to that which seeks to achieve the purpose of the rule.[535] While the normal meaning of the term 'reasonable' is 'sensible or logical',[536] a reasonable, in other words, common sense interpretation, should be distinguished from a *logical* reading of treaty provisions, where logic is understood strictly and which echoes deductive approaches in the reasoning on CIL. An example in this sense is the Separate Opinion of Judge Tomka in the *Suppression of Terrorism Case* where he used propositional logic to establish the semantic context of the relevant legal provisions.[537] In practice, even in the case of treaty interpretation, the term reasonable is understood in a wider sense,[538] which appears to be the case in customary international law interpretation as well.

5. The Use of Ordinary Meaning and Purpose in the Interpretation of Customary Rules — What's Article 31 VCLT got to do with it?

The analysis conducted in Section 5 shows that international courts, quasi-judicial and other dispute settlement bodies repeatedly use the interpretative reference points contained in Article 31 of the VCLT to interpret rules of

Dissenting Opinion of Judge Bennouna 58; ibid, Dissenting Opinion of Judge Robinson [16]; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (n 380) Dissenting Opinion of Judge Schwebel 36; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 59) Separate Opinion of Judge Dillard 157; ibid, Dissenting Opinion of Judge Gros 338; *North Continental Shelf Opinion* (n 182) Separate Opinion of Judge Ammoun [2]; *South West Africa*, Second Phase (n 394) Separate opinion of Judge van Wyk 121; *Temple of Preah Vihear* Preliminary Objections (n 306) Separate Opinion of Sir Percy Spender 41; *Whaling in the Antarctic* (n 394) [36].

[534] *Customs Regime between Germany and Austria* Individual Opinion of Judge Anzilotti (n 384) 60-62; *Fisheries Jurisdiction* (n 366) [49]; *Aerial Incident,* Dissenting Opinion of Judge Goitein (n 370) 200 and 203; *Anglo-Iranian Oil Case* (n 386) Dissenting Opinion of Judge Hackworth 140.

[535] See ftn 533.

[536] 'Reasonable' Cambridge Dictionary <https://dictionary.cambridge.org/dictionary/english-french/reasonable> accessed 20 April 2022.

[537] *Application of the International Convention for the Suppression of the Financing of Terrorism* (n 394) Separate Opinion of Judge Tomka [23].

[538] O Corten, 'The Notion of 'Reasonable' in International Law: Legal Discourse, Reason and Contradictions' (1999) 48/3 ICLQ 613, 616. See also J Salmon, O Corten, *Droit International et Argumentation* (Bruylant 2014) 120-170.

customary international law.[539] The question that remains is why international courts and other dispute settlement bodies resort to this. In this section, I aim to answer this question by looking at the nature of the rule of interpretation contained in the VCLT and briefly at its roots as this provides the necessary insight into why courts use its language and the reference points contained in it when they interpret rules of customary international law.

An examination of legal literature shows that a plethora of legal labels has been used to describe Articles 31-33 of the VCLT. They have been referred to as rules,[540] maxims,[541] principles,[542] standards,[543] canons,[544] methods,[545] techniques[546] or the same names, but used interchangeably.[547] According to some scholars, Articles 31-33 of the VCLT as interpretative techniques,[548] or categories of arguments.[549] The exercise of interpretation involves the collection of arguments that fall under the techniques mentioned in Article 31-33 and then assessing their argumentative weight[550] and balancing them

[539] For the view that the case law from international and internationalized criminal courts can be seen as an example of a misidentification of custom by way of treaty interpretation see Schlütter (n 2) 86-101.
[540] Indicatively: Linderfalk (n 348) 29; JG Merrills, 'Two Approaches to Treaty Interpretation' (1969) 4 Australian Yearbook of International Law 55, 56; JF Hogg, 'The International Court: Rules of Treaty Interpretation' (1959) 43 Minn L Rev 369; JF Hogg, 'The International Court: Rules of Treaty Interpretation II' (1959) 44 Minn L Rev 5.
[541] D Peat, M Windsor, 'Playing the Game of Interpretation: On Meaning and Metaphor in International Law' in A Biachi, D Peat, M Winsor (eds), *Interpretation in International Law* (OUP 2015) 12-13.
[542] Indicatively: A Aust, *Modern Treaty Law and Practice* (1st ed, CUP 2007) 232; Waibel (2016) (n 59); Van Damme (n 362) 32.
[543] I Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation' (2011) 34 Loy LA Int'l & Comp L Rev 99, 120.
[544] M Fitzmaurice, P.Merkouris 'Canons of Treaty Interpretation : Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement' in M Fitzmaurice, O Elias, P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff 2010) 153- 237.
[545] E Bjorge *The Evolutionary Interpretation of Treaties* (OUP 2014) 24; O Amman, *Domestic Courts and the Interpretation of International Law. Methods and Reasoning Based on the Swiss Example* (Brill 2020) 191.
[546] C Djeffal, 'An Interpreter's Guide to Static and Evolutive Interpretations: Solving Intertemporal Problems according to the VCLT' in G Abi-Saab, K Keith, G Marceau, C Marquet (eds) *Evolutionary Interpretation and International Law* (Hart Publishing 2019) 24-25; RE Fife, 'Les techniques interprétatives non juridictionnelles de la norme internationale' (2011) 11/2 RGDIP 367.
[547] I Tammelo, 'Treaty Interpretation and Considerations of Justice' (1969) 5 Rev BDI 80, 81; Orakhelashvili (n 47) 301.
[548] Djeffal (2019) (n 546) 24; I Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12/2 MichJIntlL 371, 372; Bjorke (n 545) 49; ILC, 'Report of the Study Group, Fragmentation of International Law' (n 135) [134].
[549] Djeffal (2019) (n 546) 24.
[550] ibid 25.

against each other.[551] In a similar vein, it has been argued that the rules of interpretation are rules that 'prescribe how participants in legal discourse have to craft their arguments'[552]; in other words, they are accepted forms of arguments on interpretation in the legal profession.[553] Other commentators have contended that the VCLT rules are constructive *justifications* for an interpretation[554] and this seems to have been the stance of the ILC in its Report on Fragmentation of International Law, where it stated that interpretation aims at giving the text a *justifiable* meaning.[555]

Looking at the VCLT itself, the title of Article 31 suggests that the drafters of the VCLT regard the provisions on interpretation as rules, since it is entitled 'general rule of interpretation'. However, the legal qualification of these 'rules' has been debated throughout the drafting of both the VCLT (and the ILC Draft at its basis) and the Harvard Draft, the precursor to the ILC Draft. According to the latter, 'the so-called rules of interpretation [...] developed as neat *ex post facto* descriptions or justifications of decisions arrived at by mental processes more complicated than the mere mechanical application of rules to a text'.[556] The reference to 'rules' was understood in a loose sense, as that of 'guides to direct the interpreter toward a decision.'[557]

The ILC qualified them as '*principles of logic and good sense* valuable only as guides to assist in appreciating the meaning'[558] of the legal provision. In addition, according to the Rapporteur, the recourse to these principles is discretionary, *not obligatory*, mainly because interpretation is an art, not an exact science.[559] This, however, is not to say that the rule, taken as a whole — the general rule of interpretation — is not legally binding. However, as aptly pointed out by Peat, the rules of interpretation appear to have a *thin* evaluative

[551] ibid 26.
[552] Venzke (n 543) 120.
[553] See F Zarbiyev 'The Cash Value of the Rules of Treaty Interpretation' (2019) 32/1 LJIL 33, 45.
[554] Koskenniemi (n 201) 530.
[555] ILC, 'Report of the Study Group, Fragmentation of International Law' (n 135) [464].
[556] Harvard Draft (n 62) 947.
[557] ibid.
[558] ILC, Third Report on the Law of Treaties (n 69) 54.
[559] ibid.

dimension, rather than be rules in the strict sense of the word,[560] or, even more precisely, in the words of de Hoogh, they are neither 'a toolbox or straightjacket [...] but instead constitute a *normative framework*'.[561]

Taking a step back to look at the origins of these methods in international law, we can stumble upon an interesting finding. According to Oppenheim,

> '*Grotius and the later authorities applied the Roman law respecting interpretation in general to interpretation of treaties*. On the whole, such application is correct in so far as *those rules* of Roman law *are full of common sense.*'[562]

It follows that rules of interpretation were imported into international law from Roman law. One reading of this statement may suggest that this a case of analogy. Yet, the analogy-argument is unpersuasive, because what prompts the application of analogy is the existence of a relevant similarity.[563] Such a relevant similarity between international and domestic law is lacking because the two systems of law differ significantly both in terms of their nature and in terms of the subjects of the law and the relationship between the creators and the subjects of the law. Rather, as it emerges from this statement, the rules are applied because they are reasonable; in other words, it is reasonable to interpret treaties using the same methods of interpretation as those used in Roman law. This points to a certain universality of the methods of interpretation. Put differently, these rules are applied not by virtue of their similarity, but by virtue of their universality.

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[560] D Peat, *Comparative Reasoning in International Courts and Tribunals* (CUP 2019) 46-48.
[561] AJJ de Hoogh, 'Toolbox, Straitjacket, or Normative Framework? The interpretation of Article 31 of the Vienna Convention on the Law of Treaties' in JGC Dohmen, MCEM Draisma (eds), *Een kwestie van grensoverschrijding, Liber amicorum P.E.L. Janssen* (Wolf Legal Publishers 2009) 145, 158, emphasis added.
[562] L Oppenheim, *International Law. A Treatise* (Longmans, Green 1905) Section XIII [553] emphasis added.
[563] S Vöneki, 'Analogy in International Law' MPEPIL (February 2002) [13] accessed 20 April 2022; F Schauer and BA Apellman, 'Analogy, Expertise, and Experience' (2017) 84/1 The University of Chicago Law Review 249, 251; F Macano, D Walton, C Tindale, 'Analogical Arguments: Inferential Structures and Defeasibility Conditions' (2017) 31/2 Argumentation 221, 225; FL Bordin, *The Analogy Between States and International Organizations* (CUP 2018) 20.

Taking a step further, this is exactly what happens in the case of interpretation of customary rules. The reference points contained in treaty interpretation is not an application of the VCLT either directly, which would be absurd, or by analogy. Instead, they are used because these are the typical canons of legal interpretation. The formulation similar or identical to the VCLT – ' ordinary meaning', 'object and purpose' – owes to the fact that the VCLT-language is the accepted language of the discipline. At the same time, as it was seen from the analysis in the previous section, the methods then are adapted to the particularities of custom. This is why we see a reference, for instance, to the rule's, instead of the treaty's, purpose.

6. Conclusion

This chapter analyzed the case law where international and internationalized courts and quasi-judicial bodies have engaged in an interpretation of customary rules by using two elements contained in Article 31 of the VCLT. It started off with an analysis of Article 31 of the VCLT based on both the preparatory works and the case law. Here, the focus was to understand the meaning of the three elements referred to in Article 31: ordinary meaning, context and object and purpose and the way in which these are determined and applied in treaty interpretation and in the interpretation of other acts. It was argued that both ordinary meaning and object and purpose are understood quite liberally and are not always applied by the letter, as prescribed in Article 31. With regard to ordinary meaning, it was shown that judges use different types of dictionaries to establish the meaning of ordinary, and that sometimes, despite the language of 'ordinary' they actually give a technical meaning to a term if the situation so requires. They also use cross-referencing and sometimes give an ordinary meaning based on their own analysis or, at least, without disclosing their sources. With regard to object and purpose, it was shown that it fulfils three main functions in treaty interpretation: (1) a yardstick against which ordinary meaning is determined,

(2) a justification for evolutive interpretation and (3) a tool for ensuring effectiveness.

While the elements found in Article 31 VCLT, namely, ordinary meaning and purpose have also been used to interpret rules of customary international law, the two elements are used independently from each other. Interpretations based on purpose do not clarify the meaning of the terms, but are used as a standalone means of interpretation. Moreover, the purpose against the background of which interpretation is made in the case of customary rules is either the purpose of the rule or the purpose of the branch of law to which the rule belongs. The analysis also showed that the interpretation of customary rules by reference to purpose often goes hand in hand with considerations or reasonableness and consequence-based arguments. Finally yet importantly, it was argued that the use of the elements contained in Article 31 VCLT should not be construed as either an application of Article 31 to the interpretation of CIL rules, either directly or by analogy, but owes to the universal character of these methods in legal interpretation.

CHAPTER 4

The Role of Treaties and General Principles of Law in the Interpretation of Customary Rules

1. Introduction

This chapter turns to an exploration of how other rules, namely treaties and general principles, have been used in practice in the interpretation of customary rules. According to the ILC's Draft conclusions on the identification of CIL, other rules, such as those contained in treaties, for instance, can aid the determination of a customary rule's existence.[564] However, judging by the practice of the courts, rules other than CIL have also been used when *interpreting* rules of customary international law,[565] as it will be argued in this chapter. Similar to interpretations of customary rules on the basis of ordinary meaning or those based on the rule's purpose, the ways of interpreting custom that are examined in this chapter echo the rules and approaches used in treaty interpretation. The resort to other sources of law, as shall be discussed in the last section of this chapter, can qualify as a form of systemic interpretation.

To facilitate the analysis of the case law and the argument advanced in this chapter, it has been structured in three sections. Section 2 unpacks the different meanings of systemic interpretation that can be found both in legal scholarship and in practice and that will be used as an analytical framework for the subsequent analysis. This is followed by Sections 3 and 4 that analyse the case law where the courts and quasi-judicial bodies used treaties and general principles of law to construe the content of customary rules. Section 5 examines the case law where the interpretation of CIL rules is made to the body of other rules as a whole.

[564] ILC, 'Draft conclusions' (n 6) 142.
[565] For systemic interpretation of CIL rules see also Bleckmann (n 38) 526-527; Merkouris (n 53) 266.

2. The Multiple Meanings of Systemic Interpretation as an Analytical Framework

It has been a common practice among international courts and tribunals to use customary rules to interpret treaties. For instance, in the *Jan Mayen* case the ICJ opined that Article 6 of the 1958 Convention on the Continental Shelf must be interpreted and applied by reference to customary law.[566] The examples of the use of customary rules in treaty interpretation usually fall under the ambit of Article 31(3)(c) of the VCLT according to which 'any relevant rules of international law applicable in the relations between the parties'[567] must be taken into account together with context for the purposes of interpreting treaty provisions. In most cases, this rule is referred to in the case law and legal literature as either the principle/rule of systemic interpretation[568] or systemic integration.[569] Yet, both of these terms have been used in more than one sense. Each of these nuances of meaning that are subsequently discussed are often treated under the same conceptual umbrella.

Firstly, following a textual analysis of Article 31(3)(c), this paragraph is part and parcel of the core rule which is to interpret the treaty provisions in accordance with ordinary meaning of the words in their context and in light of their object and purpose. In addition to context, Article 31(3)(c) states that any relevant rules of international law applicable in the relations between the parties must be taken into account *in the determination of the ordinary meaning of the terms.* As aptly noted by Tzekvelos, 'Article 31(3)(c) expands the semantic field of the provisions of a convention'.[570] One example of this is when interpreters look at the use of the same term in another treaty that is in force

[566] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Merits) [1993] ICJ Rep 38 [46].
[567] Vienna Convention on the Law of Treaties (n 60) art 31.
[568] An example in this sense is the *Certain Iranian Assets* (n 223) Separate Opinion of Judge Brower 17.
[569] ILC, 'Report of the Study Group, Fragmentation of International Law' (n 135) 84 [413]. For a more comprehensive enumeration of all the different ways that this rule is referred to see P Merkouris, 'Principle of Systemic Integration' MPEPIL (August 2020) [2].
[570] V Tzekvelos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration' (2010) 31 MichJIntlL 621, 651.

between the parties and uses it to further a particular understanding of this term. This is the first meaning of systemic interpretation.

Secondly, systemic interpretation is used in the meaning of interpreting the rule against the background of the system of law that it forms part of. In the Institut de Droit International, this position was expressed by Verdross who stated that 'a treaty must be interpreted in light of general law and general principles of law'.[571] According to the ICJ, 'a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and *in the context of a wider framework of legal rules of which it forms only a part'*.[572] Depending on how it is applied, this meaning of systemic interpretation may either converge with the first meaning, if the ordinary meaning is determined by reference to these other principles or rules, or may go beyond it and result in what Alexy and Adler describe as the use of systemic arguments in interpretation.[573]

This second meaning is markedly different from what Article 31(3)(c) prescribes,[574] which refers to the use of any relevant rules for the determination of ordinary meaning in light of context and object and purpose. It is important to note that this Article mentions the use of 'any' and not to *all* relevant rules applicable between the parties. Only the use of the latter expression would really suggest the idea that the rules as a whole should be taken into account for interpretative purposes. This approach is essentially a use of systemic arguments by placing the rule in the system of international law as a wider form of context.[575]

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[571] Comments by Verdross, *Institut de Droit International Annuaire* Vol. 43/I (n 64) 456.
[572] *Interpretation of the Agreement of 25 March 1951* (n 395) [10]; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 59) [53]; *Jadhav case* (n 394) Declaration of Judge Robinson [2(xi)].
[573] R Alexy, R Adler, *A theory of Legal Argumentation* (OUP 2011) 240.
[574] *A contrario* the ILC Study Group on Fragmentation establishes that. 'it [the rule] points to a need to take into account the normative environment more widely'. See ILC, 'Report of the Study Group, Fragmentation of International Law' (n 135) [415].
[575] ibid [414]. See also Bentivoglio (n 99) 234; PG Staubach, *The Rule of Unwritten International Law. Customary Law, General Principles and World Order* (Routledge 2018) 156.

Another meaning of systemic interpretation is reflected in Verzijl's dictum in the *Georges Pinson Case* where he noted that every treaty must be considered to refer tacitly to general principles of international law for all those matters that it does not clarify in express terms.[576] This is very different from stating that other rules should be used to determine the meaning of terms. Instead, it is a form of gap filling, a technique to avoid a pronouncement of *non- liquet*. And while Verzijl's statement conditions the resort to general principles of law on lack of an express resolution of the issue in the conventional rules, systemic interpretation or integration have also been argued to support what essentially is an incorporation of extraneous rules and their application to the case, even when a reference clause in this sense is missing.[577] The issue here is that the use of what is termed as systemic interpretation in this case would be in violation of the obligation of good faith in interpretation.[578] Moreover, as Moreno-Lax rightfully points out, 'Article 31(3)(c) VCLT should indeed be taken as a rule of interpretation, rather than a source of directly applicable law'.[579]

Finally, systemic interpretation or integration has also been interpreted in a way that equates it with an interpretation that allows the coordination of norms in the case of indirect or, what de Wet and Widmar call broad normative conflict.[580] The case law of the ECtHR, which refers to it as harmonization, is a good example of this approach,[581] although, strictly

[576] *Georges Pinson (France) v United Mexican States* (1928) 5 RIAA 327, 422 [50(4)].
[577] See McLachlan (n 134). Against this view see Gourgourinis (n 89) 51.
[578] V Moreno-Lax, 'Systematising Systemic Integration' (2014) 12 J. Int. Crim. Just. 907, 922.
[579] ibid.
[580] E De Wet, J Vidmar, 'Conflicts between International Paradigms: Hierarchy versus Systemic Integration' (2013) 2 GlobCon 196, 208.
[581] See indicatively: *Loizidou v Turkey,* ECtHR App. No. 15318/89 (Merits, 18 December 1996) [43]; *Fogarty v the United Kingdom*, ECtHR App. No. 37112/97 (Merits and Just Satisfaction, 21 November 2001) [35]; *McElhinney v Ireland*, ECtHR App. No. 31253/96 (Merits, 21 November 2001) [36]; *Banković and Others v Belgium,* ECtHR, App. No. 52207/99 (Decision on Admissibility, 12 December 2001) [57]; *Cudak v Lithuania,* ECtHR App. No. 15869/02 (Merits and Just Satisfaction, 23 March 2010) [56]; *Sabeh El Leil v France*, ECtHR App. No 34869/05 (Merits and Just Satisfaction, 29 June 2011) [48]; *Oleynikov v Russia,* ECtHR App. No. 36703/04 (Merits and Just Satisfaction, 14 March 2013) [56]; *Hassan v the United Kingdom,* ECtHR App. No. 29750/09 (Merits, 16 September 2014) [102]; *Radunović and Others v Montenegro,* ECtHR App. No. 45197/13, 53000/13 and 73404/13 (Merits and Just Satisfaction, 25 October 2016) [63]; *Rinau v Lithuania,* ECtHR App. No 10926/09 (Merits, 14 January 2020) [185].

speaking and interpreting the Article 31(3) holistically, it goes beyond what this article prescribes. In the words of Tzevelekos, the Convention 'benefits from the latter [international law] through absorption of normative elements which, although absent from its "imperfect" text, are both complementary and necessary for the effective promotion of its special scopes'.[582]

To sum up, this means that other rules may essentially fulfill four different functions, all under the title of systemic interpretation/integration: (1) other rules as an aid to determine the ordinary meaning of the terms, (2) other rules may be used as a tool for systemic arguments, (3) other rules may be used as tools for gap-filling or (4) other rules may be used as a tool for the resolution of normative conflict, the latter two of which go beyond the meaning of interpretation adopted in this thesis. I will use this framework as a reference point for my analysis in the subsequent 3 chapters of the case law where customary rules have been interpreted.

3. Interpretation of Customary Rules by Reference to Treaties

While international custom is according to Article 38 of the ICJ Statute a separate source of law, it exists in close interconnection with the other sources of international law. This can be clearly seen in the recent ILC conclusions. According to the ILC's Draft conclusions on the identification of customary international law, 'various materials other than primary evidence of alleged instances of practice accepted as law (accompanied by *opinio juris*) may be consulted in the process of determining the existence and content of rules of customary international law',[583] such as 'treaties, resolutions of international organizations and intergovernmental conferences, judicial decisions (of both national and international courts', and scholarly works'.[584] It then adds that 'such texts may assist in collecting, synthesizing or interpreting practice relevant to the identification of customary international law, and may offer

[582] Tzevelkos (n 570) 650.
[583] ILC 'Draft conclusions' (n 6) 142 [1].
[584] ibid.

precise formulations to frame and guide the inquiry into its constituent elements'.[585]

According to an empirical study conducted by Choi and Gulati, treaties are the most frequently used materials for the identification of customary rules.[586] Treaties can codify, crystallize and even generate customary rules.[587] Treaties that codify pre-existent custom are known as declaratory and whether a treaty is declaratory of CIL is determined by analysing the preamble of the treaty or by looking to the *travaux preparatoires* for the intention of the parties in this sense.[588] Most treaties, however, fall into the category of *partly* declaratory treaties,[589] meaning that some provisions are codifications, whereas others are not.

At the same time, because treaties and custom originate from two different processes of law creation,[590] treaties do not absorb CIL even when they codify it. This means that upon codification custom does not cease to exist, but runs its course parallel to the treaty.[591] This is what the ICJ conveyed with its statement in the *Nicaragua* case when it noted that

> 'even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability.'[592]

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[585] ibid. An example in this sense is *Responsibilities and Obligations of States with Respect to the Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Dispute Chambers)* Advisory Opinion, ITLOS Case No. 17 [2011] ITLOS Reports 10 [169].
[586] Choi, Gulati (n 2) 117.
[587] *North Sea Continental Shelf* (n 182) [37]; *Military and Paramilitary Activities in and Against Nicaragua* (n 115) [177]. See also Bilder et al (n 37) 157-164; BB Jia, 'The Relations Between Treaties and Custom' (2010) 9/1 Chinese Journal of International Law 81-109, esp. 92; ILC 'Draft conclusions' (n 6) 143.
[588] Y Dinstein, 'The Interaction Between Customary International Law and Treaties ' (2007) 322 RCADI 360-363.
[589] ibid 355.
[590] Jia (n 587) 97.
[591] Dinstein (n 588) 386-387.
[592] Nicaragua case, para 175.

Moreover, as the ICJ argued, custom continues to apply even between the States that are parties to the treaty.[593] This means that while different in nature and form, custom and treaty often overlap in substance.

But treaties can also crystallize emergent customs,[594] where crystallization means that the custom was *in statu nascendi* when the treaty was drafted, but became a customary rule subsequently.[595] They can also generate custom, where a provision was created in the process of the drafting of a treaty, but because it is widely followed even by non-parties, it becomes customary.[596]

According to the ILC, all three types of treaties can be used in the process of CIL identification. Yet, as the ILC itself points out, a distinction needs to be drawn between the use of conduct in relation to treaties as State practice, where behaviour such as voting patterns are used as evidence for one of the elements of CIL, and the use of treaties as a reflection of CIL,[597] where actual treaty provisions are used as the container of a customary rule, because they codified, crystallized or generated a customary rule.

The use of treaties for what is or, in some cases what the courts frame as, interpretation of customary rules in international courts and quasi-judicial bodies tends to fall into these two categories: (1) the use of treaty provisions to interpret CIL or (2) the use of elements from treaty interpretation to interpret CIL.

In none other but the *Nicaragua* case, where the ICJ has also established the relationship between treaties and custom, the Court also noted that

> 'while the Court has no jurisdiction to consider that [the Charter of the Organization of the American States] instrument as applicable to the

[593] Dinstein (n 588) 396.
[594] ibid 352.
[595] ibid 358.
[596] ibid. For a comprehensive analysis on the relationship between CIL and treaties see also ME Villiger, *Customary International Law and Treaties. A Manual on the Theory and Practice of the Interrelation of Sources* (2nd ed, Brill 1997)
[597] ILC 'Draft conclusions' (n 6) 143 [1].

dispute, it may examine it to ascertain *what light it throws* on the *content* of customary international law'.[598]

This statement was made in the context of the examination of the question whether the lawful use by a third State of collective self-defence depended on the request of the attacked State.[599] After examining the provisions of the OAS Charter and the Inter-American Treaty of Reciprocal Assistance, the Court concluded that there was no rule allowing for the exercise of collective self-defence without a prior request made by the attacked State.[600] In this case, the court frames its reasoning as a form of interpretation. Yet, it ends up applying the requirement contained in the Charter of the OAS and in the 1947 Rio Treaty, according to which the measures of collective self-defence must be taken on the request of the attacked State. This leads the Court to the conclusion that

'the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is not rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of the attack.'[601]

In other words, what the Court does is engage in a form systemic integration as a gap-filling exercise bordering on law-making.

The second case under analysis is the *Nuclear Weapons Advisory Opinion,*[602] which raised the legal issue of the permissibility of the use and threat of use of nuclear weapons. The issue was controversial because international humanitarian law, including customary rules, lacked specific rules that would govern the use or threat of use of nuclear weapons in particular. One of the members of the bench, Judge Guillaume appended a separate opinion, where he stated that the rules *jus ad bellum*, in particular Article 51 of the UN Charter

[598] *Military and Paramilitary Activities in and Against Nicaragua* (n 115) [196] emphasis added.
[599] ibid [196].
[600] ibid [199].
[601] ibid.
[602] *Legality of the Threat or Use of Nuclear Weapons* (n 123) Separate Opinion of Judge Guillaume [8].

in the case, could provide a *clarification* of the *jus in bello.*[603] To answer the question on the extent to which the use or threat of use of nuclear weapons was permitted in international law, Judge Guillaume, largely following the ideas set out in the main advisory opinion, emphasized that given the content of Article 51, according to which nothing shall impair a State's right to self-defence, the use of nuclear weapons is allowed.[604]

Judge Guillaume also opined that customary rules of humanitarian law must also be 'completed by reference to the rules concerning the collateral damage which attacks on legitimate military objectives can cause to civilian population'[605] contained in the Additional Protocol to the Geneva Conventions. From this, it followed that the only prohibition in customary humanitarian law was that of using weapons which could not distinguish between civilian and military targets which, according to the judge, was not necessarily the case of nuclear weapons.[606]

What we see in both cases is the presence of a legal gap, which is covered by what is framed as an interpretative exercise. Whereas in the first case the customary rules of self-defence were completed with the requirement of request by an appeal to the OAS Conventions, in the second case, treaty rules were used to make the argument that the rules of customary international law do not prohibit the use or threat of use of nuclear weapons. In both cases the answer was sought outside of CIL itself or its elements – there was no mention of either State practice or *opinio juris* – instead, the reasoning was framed as an attempt at clarification or explanation, both of which are more akin to interpretation, rather than orthodox ascertainment of customary rules. While in its Draft Conclusions on the Identification of CIL the ILC established that treaties may 'assist in collecting, synthesizing or interpreting practice relevant to the identification of customary international law, and may offer precise

[603] ibid [8].
[604] ibid.
[605] ibid [5].
[606] ibid.

formulations to frame and guide an inquiry into its two constituent elements',[607] it is clear that the function of treaties in these cases goes beyond this and extends to the interpretation in its *lato sensu* of the content of CIL in a way that completes it.

Two other cases, both from the practice of international and internationalized criminal courts, show a different facet of systemic interpretation. In *Prosecutor v Kunarac* the Trial Chamber sought to establish the definition of torture under customary international law.[608] After noting that the definition given in the Torture Convention cannot be taken as representing customary international law, the Trial Chamber stated that Article 1 of the Torture Convention could nevertheless be used as an interpretational aid.[609] In a similar veil, the ECCC Pre-Trial Chamber Decision on Appeals in *Prosecutor v Kaing* the Pre-Trial Chamber found that the expression 'other inhumane acts' as part of crimes against humanity was likely a CIL rule and then stated that 'in determining what constitutes "inhumane" conduct reference could be made to: 1) serious breaches of international law regulating armed conflict from 1975-1979, *including the grave breaches provisions of the 1949 Geneva Conventions* or 2) serious violations of the fundamental human rights norms protected under international law at the relevant time'.[610] In these cases, other treaty provisions seem to be used for construing the meaning of the customary rule.

Another pair of cases, two individual opinions, to be precise, illustrate how elements of treaty interpretation have been used in an interpretative argument on customary rules. The first example here is the dissenting opinion of Judge Sørensen in the *North Sea Continental Shelf* case,[611] where he noted that:

> 'If the provisions of a given convention are recognized as generally accepted rules of law, this is likely to have an important bearing upon

[607] ILC 'Draft conclusions' (n 6) 142 [1].
[608] *Prosecutor v Kunarac*, Trial Chamber Judgment (n 223).
[609] ibid 482.
[610] *Prosecutor v Chea*, Case no. 002 (Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011) ECCC Pre-Trial Chamber [164].
[611] *North Sea Continental Shelf* (n 182).

> any problem of *interpretation* which may arise. *In the absence of a convention* of this nature, any question as to the exact *scope* and *implications of a customary rule* must be answered on the basis of a detailed analysis of the State practice out of which the customary rule has emerged. If, on the other hand, the provisions of the convention serve as evidence of generally accepted rules of law, it is legitimate, or even necessary, to have recourse to *ordinary principles of treaty interpretation*, including, if the circumstances so require, an examination of *travaux preparatoires*.'[612]

Unlike in the previous pair of cases where treaties themselves have been used to construe and complete the content of customary rules, in this case Judge Sørensen, while not as such making an interpretation on the basis of elements of treaty interpretation, clearly advocated in its favour, but only in cases where the treaty either codifies, crystallizes or generates rules of CIL. In such a case, the argument goes, judges may resort even to looking at the preparatory work of the treaty.

The second case is the Opinion of Judge Shahabudeen in the *Hadžihasanović* Decision on Interlocutory Appeal from the ICTY, where the Tribunal was called upon to determine whether a superior can be punished under the principle of command responsibility for acts committed by subordinates prior to the assumption of command.[613] When determining the scope of action of the customary principle of command responsibility, Judge Shahabudeen argued that 'any interpretation [of the customary rule] can be made *by reference to the object and purpose of the provisions laying down the doctrine*'[614] — Articles 86 and 87 of the Protocol I Additional to the Geneva Conventions. Unlike in the cases examined in Chapter 3 of this thesis, here the determination of the content of custom advocated for is to be made by reference to the object and purpose of the treaty provisions and not the customary rule itself.

[612] *North Sea Continental Shelf* (n 182) Dissenting Opinion of Judge Sørensen 244, emphasis added.
[613] *Prosecutor v Hadžihasanović,* Decision on Interlocutory Appeal (n 464).
[614] ibid, Dissenting Opinion Judge Shahabudeen [11].

A final example that illustrates this approach is the judgment of the Appeals Chamber of the ICTY in the *Prosecutor v Aleksovski* case.[615] In the examination of the standard of control for the purposes of establishing the international character of an armed conflict, the Appeals Chamber opined that

> 'to the extent that it provides for greater protection of civilian victims of armed conflicts, this [the overall control test] different and less rigorous standard is wholly consistent with the fundamental purpose of Geneva Convention IV, which is to ensure "protection of civilians to the maximum extent possible"'[616]

In other words, the Appeals Chamber favoured the overall control test applied in the *Prosecutor v Tadić* over the effective control test applied in the *Nicaragua* case and used the purpose of the Geneva Convention IV as an argument to buttress its position.[617] This statement evokes, to some extent, Article 32 according to which supplementary means of interpretation may be used to confirm the meaning arrived at by the general rule. Unlike prescribed by Article 32, it is not supplementary means, but rather the consistency of the chosen standard with the *purpose of a treaty*, is being used to confirm the choice in favour of the overall control standard. At the same time, however, the argument relies on the need to ensure normative harmony or consistency between the chosen standard and the Convention in relation to which it applies.

4. Interpretation of Customary Rules by Reference to General Principles

While it seems that general principles have no role to play in the identification of customary international law, in the practice of courts, especially criminal courts, it can be seen how the two can be embedded in judicial reasoning, often to the point of confusion. A few words then need to be said first about

[615] *Prosecutor v Aleksovski*, Appeals Chamber Judgment (n 223).
[616] ibid [146].
[617] *Prosecutor v. Tadić* Appeals Chamber Judgment (n 223).

the conceptual embeddedness and difference of general principles with custom.[618]

The reference to principles in the case law of international courts frequently causes confusion because it is unclear whether it refers to fundamental principles of international law or those belonging to a branch of international law or to general principles of law recognized by civilized nations.[619] The latter, in turn, are defined alternatively either as domestic law principles which are common to all/most States such as estoppel,[620] *or* as natural law principles, such as equity or considerations of humanity,[621] or principles that originate from international relations[622] or, alternatively, 'general propositions underlying the various rules of law which express the essential qualities of juridical truth itself'.[623] Yet, because there is a lack of agreement or a lack of clearcut definition of (general) principles, their analysis is often embedded with that of custom.[624] This is seen especially in the case of the *ad hoc* courts where the tribunals declare their aim to be the establishment of customary international law at a particular point in time. However, what is actually done is a survey of the domestic legislation of States, not as State practice, but with a purpose to find a common denominator in the definition of specific crimes.[625]

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[618] See *Pulp Mills Case* (n 243) Separate Opinion of Judge Trindade [17].
[619] See, for instance, *Military and Paramilitary Activities in and Against Nicaragua* (n 115) [220]. It has also been argued that '[t]he constituent elements of custom and general principles are notoriously vague'. See J Pauwelyn, RA Wessel, J Wouters, 'Informal International Lawmaking: An Assessment and Template to Keep it Both Effective and Accountable' in J Pauwelyn, RA Wessel, J Wouters (eds), *Informal International Lawmaking* (OUP 2012) 500, 508.
[620] Tunkin (n 171) 202.
[621] A Verdross, 'Les principes généraux du droit dans la jurisprudence Internationale, 1935' (1935) 52 RCADI 193, 228.
[622] AC Arend, 'Toward Understanding of International Legal Rules' in RJ Beck, AC Arend, RD Vander Lugt, *International Rules – Approaches from International Law and International Relations* (OUP 1996) 289, 297-298; T Klenlein, 'Customary International Law and General Principles, Rethinking Their Relationship' in B Lepard (ed), *Reexamining Customary International Law* (CUP 2016) 133, 133-139; G Gaja, 'General Principles of Law' MPEPIL (April 2020) [19].
[623] B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 2006) 24.
[624] M Dordeska, *General Principles of Law Recognized by Civilized Nations (1922-2018). The Evolution of the Third Source of International Law through the Jurisprudence of the Permanent Court of International Justice and the International Court of Justice.* (Brill 2020) 54.
[625] See, for instance, *Prosecutor v Chea and Samphan* (n 449) [392], esp. [396],[409-410].

The embeddedness between general principles and custom can not only be seen in the case law, but even in the writings of legal scholars, which propound a broad understanding of the concept of customary international law.[626] The confusion owes to, or at least so it seems, the early practice of the PCIJ. For instance, in the *Lotus* case the PCIJ observed that 'rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by *usages generally accepted as expressing principles of law*'.[627] What adds to the confusions is that in its more recent practice, the ICJ seems to have requalified norms that it previously considered general principles as customary international law.[628]

The absence of a clear-cut distinction can even be found in the conclusions of the ILC. The ILC's stance is that the '"rules" of customary international law […] may be referred to as "principles" because of their more general and more fundamental character'.[629] In other words, it is admitted that general principles can be of a customary origin (also given that customary international law is part and parcel of general international law), which are distinguished from regular customary rules by possessing a higher degree of abstractness.[630] The practice of international courts and tribunals seems to support this view, at least to a certain degree.[631] However if one does keep the neat distinction between general principles and CIL then, given the former's high degree of generality, that general principles is a residual category which acts as a filler when the other two sources are unable to give an answer to the dispute.[632]

[626] Cheng (2006) (n 623) 23.
[627] *Lotus case* (n 353) 18.
[628] Dordeska (n 624) 153-156. See also K Wolfke, *Custom in Present International Law* (2nd Revised Edition, Martinus Nijhoff 1993) 105-108.
[629] ILC 'Draft conclusions' (n 6) 124 [3].
[630] Tunkin (n 171) 124; H Lauterpacht, 'Some Observations on the Prohibition of 'Non Liquet' and the Completeness of the Law' in *Symbolae Verzijl* (Martinus Nijhoff 1958) 196, 196; K Wolfke, 'Some persistent controversies concerning customary international law' (1993) 24 Netherlands International Law Review 1, 12.
[631] *Pulp Mills* (n 243) [101].
[632] See X Shao, 'What We Talk About When We Talk about General Principles of Law' (2021) 20/2 Chinese Journal of International Law 219-255.

According to Judge Trindade of the ICJ, general principles of law 'orient the interpretation and application of the norms and rules of this legal order, be them *customary* or conventional'.[633] This position is confirmed by the existing case law from the practice of the ICTY. In *Prosecutor v Kupreškić*,[634] the Trial Chamber explicitly advocated in favour of a systemic approach in its meaning of taking into account *other principles*, when it examined the prohibition on attacks of civilian population. The Trial Chamber argued that in order to establish 'the scope and purport'[635] of the customary rules on the requirement of proportionality between collateral damage and direct military advantage and the prohibition of the use of indiscriminate means or methods of warfare they must be interpreted by reference to elementary considerations of humanity which the Trial Chamber framed as being 'illustrative of a general principle of international law'.[636]

In *Prosecutor v Furundžija* the Trial Chamber had to decide on the definition of rape and the forms of behaviour that fall under this offence, in particular, whether oral penetration can qualify as rape.[637] The Trial Chamber, firstly, stated that the prohibition of rape in armed conflict has evolved into a norm of customary international law,[638] yet found that international law (either treaty or custom) contains no definition of rape.[639] Subsequently it scrutinised national legislation and, as a result, established that while the national laws generally converged regarding the definition of rape as 'the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus',[640] yet there were discrepancies on whether oral penetration qualified as rape or a different type of sexual assault.[641] The question whether the definition of rape included or excluded

[633] *Pulp Mills*, Separate Opinion of Judge Trindade (n 243) [216].
[634] *Prosecutor v Kupreškić*, ICTY, Case no. IT-95-16-T, Trial Chamber Judgment, 14 January 2000.
[635] ibid [526].
[636] ibid [525].
[637] *Prosecutor v. Furundžija*, Trial Chamber Judgment (n 490).
[638] ibid [168].
[639] ibid [174].
[640] ibid [181].
[641] ibid [178]-[182].

oral penetration was decided by reliance on the principle of respect for human dignity as 'the essence of the whole corpus of international humanitarian law as well as human rights law'.[642] The inclusion of oral penetration into the definition of rape, both as a treaty and a customary prohibition, was preferred because this solution appeared to be 'consonant with this principle'.[643] Judging from these two cases, it appears that general principles of law are used mainly for making systemic arguments that would determine the scope of the customary rule.

One statement points to how the language of systemic interpretation is misused. In *Case 002* ECCC Trial Chamber stated that 'as recognised by the Pre-Trial Chamber, having regard to *general principles of law* can *assist* when *defining the elements of an international crime*, where that crime has otherwise been recognised in *customary international law*'.[644] After surveying the legislation of different countries, the Trial Chamber concluded that the *mens rea* of murder as a crime against humanity included *dolus eventualis*.[645] While announcing what appears a systemic approach towards the interpretation of the elements of the crimes found in CIL, the Court ended up surveying the legislation of states and given that the majority included *dolus eventualis* as the mental element for this crime, established that this has been the *mens rea* for murder prior to 1975.

5. Interpretation of Customary Rules by Reference to the System of Rules as a Whole

Adding to the case law analysed in the previous sections, where rules were other rules were used to construe custom, in one case judges have relied on a system of rules as a whole to interpret the customary rule on attribution. In *Prosecutor v Tadić*, when arguing against the use of the *Nicaragua* effective control test in this case, the Appeals Chamber made the overarching argument

[642] ibid [183].
[643] ibid.
[644] *Prosecutor v Chea and Samphan* (n 449) [638] emphasis added.
[645] ibid [650].

that 'a first ground on which the *Nicaragua* test as such may be held to be unconvincing is based on the very *logic* of the entire *system* of international law on State responsibility.'[646] It subsequently added that

> 'the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives'[647]

In addition, it stated that the same logic had to apply to the questions on the appropriate control test.[648] Overall when looking at the argument advanced by the Appeals Chamber it appears to coalesce teleological considerations with systemic ones in order to show why the effective control test is at odds with the whole system of state responsibility. In subsequent paragraphs, the Appeals Chamber examined State practice and *opinio juris* to show how the effective control was not rooted in practice.[649] However, this was done only subsequently and as an additional argument to the first teleologic-systemic argument advanced, which means that it supports one of the underlying arguments of this thesis that ascertainment of State practice and *opinio juris* is hardly the only method of determining the content of CIL rules in the case law of international courts and tribunals. This is an instance of a classic systemic argument in interpretation combined with teleological considerations, which shows that systemic arguments in the wider sense are not alien to the interpretation of customary rules.

[646] *Prosecutor v Tadić* Appeals Chamber Judgment (n 223) [116].
[647] ibid [121].
[648] ibid [122].
[649] ibid [124] et seq.

6. Conclusion

The focus of this chapter was the use of other rules interpretation of customary rules, in particular, treaty rules and general principles of law. I started off with establishing the analytical framework of this chapter – the different meanings of systemic interpretation and/or systemic integration in legal scholarship and the case law. While systemic interpretation is the title that is used to the elements of interpretation contained in Article 31(3) VCLT, it was shown that the use of this term goes beyond these provisions. Essentially, there are four meanings of systemic interpretation/integration. Firstly, other rules may be used to aid the determination of the meaning of the terms contained in the treaty. Secondly, they may found systemic arguments. Thirdly, they may be used as gap fillers and, finally, they can be tools for the resolution of normative conflict.

Having established these four meanings of systemic interpretation/integration, I have relied on them in the analysis of the case law where treaty rules and general principles of law have been used to interpret customary rules. I have proceeded to this analysis, but not before, firstly, clarifying the relationship between treaties and custom. In a nutshell, treaties can codify, crystallize or generate custom, but they can equally aid the determination of customary rules. Needless to say, as shown subsequently, they have also been used to construe the content of customary rules. While in some cases they have been used in a way that goes beyond mere interpretation and borders on law-making, in others they have informed the content of customary rules, as is the case in the criminal courts and tribunals. Moreover, an interesting pattern has been observed in individual opinions, where judges have relied on elements connected to treaties as an argument in favour of a particular interpretation of a customary rule.

Then, I have turned to the relationship between customary rules and general principles of law. I have shown that in international law it is not always clear what the difference between the two is. This is not so much a conceptual issue,

as it is an issue regarding the use of language. For instance, as it was shown in this chapter, sometimes customs are referred to as customary principles. Having addressed these linguistic challenges and inconsistencies, I have proceeded to an analysis of the case law where general principles have been used to interpret custom. Once again, the case law from international criminal courts and tribunals that is instructive in this regard. General principles have been used to establish the meaning and scope of customary rules by ensuring that the latter are interpreted in a way that is consistent with the content of the former. Last but not least, I have examined the case where the whole system of rules belonging to the legal institution of State responsibility was used to interpret a rule of CIL. From this analysis, it can be concluded that other rules have been used to interpret CIL rules systemically.

CHAPTER 5

Necessary Implications and Evolutive Interpretations of Customary Rules

1. Introduction

This chapter turn to two other ways of interpreting customary rules: interpretation by necessary implications and evolutive interpretation. It has been argued in legal literature that both necessary implication and evolutive interpretation are not means or methods interpretation, but rather interpretative results.[650] While means of interpretation deliver a specific method of interpreting the rule, for example, by looking at its ordinary meaning or by looking at its object and purpose, interpretative results is the qualification given to a conclusion reached by using the means of interpretation.[651] While not attempting to solve this issue in the present chapter, I rely on this particularity that unites necessary implications and evolutive interpretations, to analyze them together in this chapter. The main focus of this chapter is not so much on the nature these two rules of interpretation, but the way in which they were used in the interpretation of treaty and customary rules.

This chapter is subdivided in two main sections, each of which address one of the two types of interpretative results. Section 2 examines necessary implication, while Section 3 explores evolutive interpretations. Following the same method was used in the last two chapters, I start off by clarifying the meaning of these concepts: what is an implication and what makes it necessary by looking at the case law on treaty interpretation? What is an evolutive as opposed to a static interpretation? Subsequently, I analyse the

[650] Djeffal (n 119) 22 and 24.
[651] AD Mitchell, T Voon 'The Rule of Necessary Implication' in J Klinger, Y Parkhomenko, C Salonidis (eds), *Between the Lines of the Vienna Convention?: Canons and Other Principles Of Interpretation in Public International Law* (Wolters Kluwer 2018) 331, 356.

case law on treaty interpretation where these two methods have been used and establish the patterns in the case law as to how they have been applied and then turn to the case law on the interpretation of CIL rules.

2. CIL interpretation and Necessary Implications

2.1. The Meaning of Necessary Implication

The concept of implication can be found in both ordinary and in domain-specific language. In ordinary language an implication is a statement that is suggested, rather than spoken directly,[652] while in logic it is defined as 'a relationship between two propositions in which the second is a logical consequence of the first'.[653] In legal scholarship, necessary implication has been defined as 'an act of interpretation based on the assumption that the parties to the interpreted treaty have expressed themselves through implication, *regardless of what the treaty contains*'.[654] In other words, a distinction is drawn between express terms, which are contained directly in a treaty, and implied terms, which, although not contained directly in a treaty, must be assumed to have been included by the parties.

During the drafting of the VCLT, Special Rapporteur proposed the inclusion of Article 72, which would read as follows:

> 'In the application of articles 70 and 71 a term of a treaty shall be so interpreted as to give it the fullest weight and effect consistent —
>
> (a) with its natural and ordinary meaning and that of the other terms of the treaty; and
>
> (b) with the objects and purposes of the treaty.'[655]

[652] 'Imply', Cambridge Dictionary <https://dictionary.cambridge.org/dictionary/english-french/imply> accessed 30 September 2022.
[653] 'Implication', Encyclopedia Britannica <https://www.britannica.com/topic/implication> accessed 30 September 2022.
[654] Linderfalk (n 348) 287.
[655] ILC, 'Third Report on the Law of Treaties' (n 69) 53.

In the commentary, the draft rapporteur explained that proposed Article 72 'does not call for "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed *or necessarily implied* in the terms'.[656] He then added that this 'principle has special significance as the basis upon which it is justifiable to *imply* terms in a treaty for the purpose of giving efficacy to an intention *necessarily to be inferred* from the express provisions of the treaty'.[657]

In a similar vein, Fitzmaurice used the term 'necessary inference'.[658] Fitzmaurice excellently describes the meaning of the necessary character of these inferences or implications, when he states that 'only inferences having a compelling character can properly be drawn, and that this compelling character must arise from the text itself rather than from factors outside it'.[659]

2.2. Necessary Implications in Treaty Interpretation – Patterns in the Case Law

In legal scholarship, the argument has been made that necessary implication is not an independent rule of interpretation.[660] There are two reasons for this. Firstly, it is argued that it does not provide 'guidance to a treaty interpreter as to when or why to read a term or provision of a treaty as implying something not explicit in the text'.[661] Secondly, judging by the way in which this rule had been applied by, at least, some, international courts or other dispute settlement bodies, the result of interpretation which is termed as having been achieved by necessary implication is often just a regular application of the rules contained in the VCLT.[662]

Perhaps the first and the most important observation must be that the ICJ has used the term necessary implication quite liberally and, more than once, in a

[656] ibid 60 [27].
[657] ibid 61 [29]. A similar view has been expressed in F Wilmot-Smith, 'Express and Implied Terms' (2023) 43/1 Oxford Journal of Legal Studies 54, 62.
[658] G Fitzmaurice, 'Hersch Lauterpacht – The Scholar as Judge. Part III' (1961) 39 BYIL 133, 154 ftn.
[659] ibid.
[660] Mitchell, Voon (n 651) 356.
[661] ibid.
[662] ibid.

much more extensive way then the meaning of the term itself allows, especially when it used necessary implication in discussions concerning the powers of international organizations. Unlike States, international organizations are governed by the principle of specialty, which means that they have those powers attributed to them by the State parties.[663] However, in its practice the ICJ has developed the doctrine of implied powers. In the *Reparation for Injuries* advisory opinion, the ICJ established that:

> 'Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication.'[664]

The ICJ did not fully assume the authorship of this, as the ICJ itself qualifies it, principle. Instead, it stated that this principle was previously applied by the PCIJ in the *Competence of the ILO* Advisory Opinion.[665] However, the two judgments are dissimilar in the way in which the powers of the two organizations are construed. While it could be argued that the PCIJ, even without saying so, applies the principle of necessary implication, or implied terms, the same cannot be said of the judgment of the PCIJ. The legal question raised in the *Competence of the ILO* advisory opinion was whether or not it was within the competence of the ILO to 'draw up and propose labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself'.[666] While it was undisputed that the ILO had competence to regulate the work performed by employees and was not competent to tackle matters concerning the personal work of employers, it was unclear whether dealing with the later matter incidentally was within the competence of the organization.[667] This entailed

[663] See NM Blokker, 'International Organizations or Institutions, Implied Powers' MPEPIL (December 2021) [1].
[664] *Reparation for Injuries Suffered in Service of the United Nations* (n 115) 182.
[665] ibid.
[666] *Competence of the ILO* (n 358) 7.
[667] ibid 14.

an examination and interpretation of Part XIII of the Peace Treaty of Versailles that outlined the powers granted to the ILO.[668]

The PCIJ admitted that the powers of the organization to investigate and discuss issues concerning labour were very broad and language is very general, the powers granted in this area are very broad.[669] It then argued that in light of the aims of the parties for establishing the organization, which are contained in the preamble to the relevant articles, it 'was not conceivable that [the Parties] intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end'[670] and

> 'if such a limitation of the powers of the International Labour Organization, clearly inconsistent with the aim and scope of Part XIII, had been intended, it would have been expressed in the treaty itself'[671]

The PCIJ went on to add that

> 'Not only does the entire framework of Part XIII justify the inference that the International Labour Organization is not excluded from proposing measures for the protection of wage-earners because they may incidentally regulate the personal work of employers, but there are specific provisions of the Treaty, in the application of which, as they are generally understood, it may be assumed that the *incidental regulation* of the personal work of the employers is potentially involved.'[672]

In other words, it established the principle that *limitations* on the powers of an international organization — powers that seem to be able to further the aims for which the organization was set up — cannot be implied, but need to be expressly provided for. What was decisive for the Court's conclusion to this

[668] ibid.
[669] ibid 16-17.
[670] ibid 18.
[671] ibid.
[672] ibid 18, emphasis added.

advisory opinion was that the exercise of the powers over employers was incidental.

This advisory opinion of the PCIJ needs to be distinguished from the *Reparation for Injuries* advisory opinion, where the ICJ was tasked with establishing whether or not the United Nations can bring an international claim against a State for the damage caused either to it as an organization or to an individual which acted on behalf of the organization.[673] The ICJ started off by establishing that the Charter granted the United Nations international legal personality.[674] It then established that the organization undoubtedly has the capacity to bring a claim based on the damage caused to its interests, property and assets and turned to the issue of damage cause to agents acting on behalf of the organization.[675] In this regard, it, firstly, noted that the scope of the rights and duties of an international organization are dependent on the functions that the organization has been endowed with.[676] These functions are either explicitly spelled out or implied in the constituent treaty and developed in practice.[677] Turning to the UN Charter, the ICJ set the scene, so to speak, by establishing that it much check whether the provisions of the Charter imply the power of the organization to bring a claim on behalf of the agents of the organization for damage suffered in the performance of their mission.[678] It then reasoned as follows. In the performance of its functions, the UN 'entrusts its agents with important missions to be performed in disturbed parts of the world'.[679] In the fulfilment of their duties, its agents might suffer injuries with regard to which their State of nationality might be unable or unwilling to exercise diplomatic protection.[680] Yet, 'to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the

[673] *Reparation for Injuries Suffered in Service of the United Nations* (n 115) 176-177.
[674] ibid 179.
[675] ibid 180.
[676] ibid.
[677] ibid.
[678] ibid 182.
[679] ibid 183.
[680] ibid.

Organization must provide them with adequate protection'.[681] As a result, the ICJ concluded that

> 'Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by *necessary intendment* out of the Charter.'[682]

The ICJ subsequently relied on this pronouncement in the *Effects of Awards* advisory opinion, where it ruled that

> 'it would hardly be consistent with the aim of the Charter to promote freedom for justice and individuals [..] that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them'.[683]

However, it the advisory opinion on the *Use of Nuclear Weapons* it ruled against the capacity of the WHO to ask the Court as to whether the use of nuclear weapons by a State in war or other armed conflict constitute a violation of international law.[684] According to the Court, 'such competence [to address the legality of nuclear weapons] could not be deemed to be a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States'.[685]

The reasoning of the ICJ, although framed as a necessary implication, goes far beyond the limit of what a necessary implication is. Instead, this is an example of a misapplication of necessary implication. Instead of deriving an implication that necessarily flows from either the text or the content of the

[681] ibid.
[682] ibid 184.
[683] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47, 57.
[684] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1966] ICJ Rep 66.
[685] ibid 79.

treaty, the Court derived the necessity from the fact that if the organization would not be able to exercise such a power, then the individual would remain unprotected by law, as the State would most likely not submit a diplomatic protection claim on its behalf. Put differently, what fueled the Court's reasoning was practical necessity, rather than a true necessary implication.

This point is aptly made by Judge Hackworth in his dissenting opinion where he points out that '[p]owers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted'.[686] This is of the essence of a correct application of the rule of necessary implication.

Let us know turn, however, to the practice where the ICJ actually seems to have appropriately relied on the rule of necessary implication.[687] While this method was used both when interpreting its own previous decisions, either the dispositions in judgments or its dispositions in orders for provisional measures,[688] and when interpreting treaty rules, the subsequent analysis focuses solely on its use in treaty interpretation. What patterns can, then, be observed in the use of the ICJ of this rule?

Firstly, the Court seems to base its necessary implications, first and foremost, on the express terms of treaty. To give an example, in the *Aerial Incident* case, the Court had to examine the content of Article 36 (5) of the ICJ Statute. It established that:

> '*In expressing itself thus*, Article 36, paragraph 5, neither states nor implies any reference to a fixed date, that of the signature of the Charter and of

[686] *Reparation for Injuries Suffered in Service of the United Nations,* Dissenting Opinion of Judge Hackworth (n 115) 198.
[687] Whereas I focus on the court, it is not just the court but also parties to the dispute have invoked this method of interpretation. See, for example, *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment, Intervention) [1981] ICJ Rep 3 [12]; *Certain Iranian Assets* (n 224) [60].
[688] *Request for an Examination of the Situation in Accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case* (Order, 22 September 1995, Dissenting Opinion Judge Weeramantry) [1995] ICJ Rep 288, 336; *Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 503) [132]; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (Provisional Measures, Dissenting Opinion of Judge Ad Hoc Dugard) [2011] ICJ Rep 6 [8].

the Statute, or that of their original entry into force […] only if that provision had referred thereto *expressly or by necessary implication; nothing of the kind is stated or implied in the text*.'[689]

Similarly, in the advisory opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the ICJ stated that:

'It is the problem of dealing with a contingency for which the Parties have made no express provision, and which can be solved only by judicial interpretation with a view to giving effect to the intention of the Parties as *disclosed by legal implication based upon the terms and expressions actually used.*'[690]

In the same vein, but in a more recent judgment, in the *Territorial and Maritime Dispute*, the ICJ opined

'In the Court's view, the difference between the language of the Treaty and that of the Protocol cannot be read to have transformed the territorial nature of the Treaty into one that was also designed to effect a general delimitation of the maritime spaces between the two States. *This conclusion is apparent from the full text* of the aforementioned *phrase* in the Protocol [..] In other words, the "dispute" to which the Protocol refers relates to the Mosquito Coast along with the San Andres Archipelago; *it does not refer, even by implication, to a general maritime delimitation*.'[691]

In a similar vein, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court ruled that:

'*those words imply* that the option or right to move the Court was capable of being exercised as soon as the time-limit expired.'[692]

[689] *Aerial Incident* (n 370) 144.
[690] *Interpretation of Peace Treaties* (n 354) 241.
[691] *Territorial and Maritime Dispute* (n 245) [117].
[692] *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (n 380) [35].

This can also be seen in the separate or dissenting opinions of judges. For example, in his Separate Opinion to the *Land, Island and Maritime Frontier Dispute* case order, Judge Shshabudeen also looked at the text to reject, in the end, the contentions made by one of the parties.[693] Unlike it was argued in legal scholarship, it seems that the rule of necessary implication is, at least in some cases, applied independently from other rules of treaty interpretation and does not overlap with a determination by reference to ordinary meaning, as the ordinary meaning of the term would not elucidate the matter.

Secondly, while most of the times the Court derives necessary implications from the express text on several occasions it has grounded its judgment on other considerations, such as the nature of the act or the context.

In *Ambatielos*, the Court ruled that:

> 'the Court holds that either expressly (by virtue of the United Kingdom's own instrument of ratification) or by necessary implication (from the very nature of the Declaration) the provisions of the Declaration are provisions of the Treaty within the meaning of Article 29'[694]

Subsequently, in *Dispute Regarding Navigational and Related Rights* it established that:

> 'the Court is of the opinion that there is reason *to take into account the provisions of the Treaty as a whole*, especially those fixing the boundary between the two States, *in order to draw, if need be, certain necessary implications*. In other words, even *if no provision expressly guaranteeing a right of non-commercial navigation* to the inhabitants of the Costa Rican bank can be found in the Treaty, the question must be asked *whether such*

[693] *Case Concerning the Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras)* (Order of 13 December 1989, Separate Opinion of Judge Shahabudeen) [1989] ICJ Rep 162, 167.
[694] *Ambatielos Case (Greece v United Kingdom)* (Preliminary Objections) [1952] ICJ Rep 28, 44.

a right does not flow from other provisions with a different purpose, but of which it may, to a certain extent, be the necessary consequence.'[695]

Sometimes, however, the Court does not even explicitly state where it draws its necessary implications. For example, in *US Nationals in Morocco*, the ICJ ruled that 'the right to tax necessarily implies the right to take coercive measures in case of non-payment'.[696]

Thirdly, somewhat in line with the ILC draft on the law of treaties, necessary implications appear to be connected to considerations of effectiveness. For example, again, in *US Nationals in Morocco*, the ICJ established that:

'So long as the provisions of the Convention of Madrid and the Act of Algeciras to which we have referred are in force, as they undoubtedly are in force so far as the United States is concerned, a general immunity follows from those provisions by *necessary implication*. *For it would be meaningless* to enumerate certain special taxes and provide safeguards for their levy from foreign nationals, if the rest of the whole field of taxation were left open.'[697]

In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court established that

'*those words imply* that the option or right to move the Court was capable of being exercised as soon as the time-limit expired; this in turn necessarily implies the existence of an option or a right of unilateral seisin. *Any other interpretation would encounter serious difficulties: it would deprive the phrase of its effect and could well, moreover, lead to an unreasonable result*.'[698]

[695] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Merits) [2009] ICJ Rep 213 [77].
[696] *Rights of Nationals of the United States of America in Morocco* (n 366) [187].
[697] ibid [193].
[698] *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (n 380) [35].

Another Court that relies just as actively on necessary implications as the ICJ does seems to be ECtHR. The ECtHR has relied on implications to derive a positive obligation to conduct an effective official investigation in the cases of Articles 2 and 3 violations.[699] The Court also used the language of necessary implications to derive limitations to the right of access to education and to the right of access to a court.[700] Unlike the ICJ, the ECtHR uses the language of (simply) implication, instead of necessary implication, and in many instances, it could be argued against the fact that the duties derived by the ECtHR from a particular provision are actually implications and not reading into the provision something that is not already there.

2.3. Necessary Implications in the Interpretation of Customary Rules

Having in mind the observations made in the previous section, I now turn to two instances that have been identified in the case law and which show the use of necessary implications in the interpretation of customary rules. Here, I examine two cases from the case law of international courts and tribunals. The first instance of interpretation by necessary implication is the Dissenting Opinion of Judge Shahabudeen to which concerned the legal issue of whether or not the use by a State of nuclear weapons is a violation of its obligations under international law.[701]

Judge Shahabudeen firstly sets the scene by establishing that

> 'A useful beginning is to note that what is in issue is not the existence of the principle, but its application in a particular case. Its application does not require proof of the coming into being of an *opinio juris* prohibiting

[699] Indicatively: *McCann and Others*, ECtHR App no. 18984/91 (27 September 1995) [161]; *Cakici v Turkey*, ECtHR App no. Application no. 23657/94 (8 July 1999) [86]; *Al Adsani v UK*, ECtHR App no. 35763/97 (21 November 2000) [38]; *Cyprus v Turkey*, ECtHR App no. 25781/94 (10 May 2001) [131]; *Gäfgen v Germany*, ECtHR App no. 22978/05 (1 June 2010) [117]; *Giuliani and Gaggio v Italy*, ECtHR App no. 23458/02 (24 March 2011) [298]; *Al-Skeini and Others v UK*, ECtHR App no. 55721/07 (7 July 2011) [163]; *Boyuid v Belgium*, ECtHR App no. 23380/09 (28 September 2015) [116]; *Armani da Silva v UK*, ECtHR App no. 5878/08 (30 March 2016) [230].

[700] Indicatively: *Fogarty v the United Kingdom* (n 581) [33]; *Kart v Turkey*, ECtHR App no. 8917/05 (3 December 2009) [79]; *Cudak v Lithuania* (n 581) [55]; *Catan and Others v Moldova and Russia*, ECtHR App nos. 43370/04, 8252/05 and 18454/06 (19 October 2012) [140]; *Lupeni Greek Catholic Parish and Others v Romania*, ECtHR no. 76943/11 (29 November 2016) [89]; *McElhinney v Ireland* (n 581) [34].

[701] *Legality of the Threat or Use of Nuclear Weapons* (n 123) [1].

the use of the particular weapon; if that were so, one would be in the strange presence of a principle which could not be applied without proof of an *opinio juris* to support each application.'[702]

He then asks

'But how can the principle apply in the absence of a stated criterion? If the principle can operate to prohibit the use of some means of warfare, it *necessarily implies* that there is a criterion on the basis of which it can be determined whether a particular means is prohibited.[703]

And finally argues that

'As seems to be recognized by the Court, humanitarian considerations are admissible in the interpretation of the law of armed conflict (see paragraphs 86 and 92 of the Court's Advisory Opinion). Drawing on those considerations, and taking an approach based on the principle of effectiveness, it is reasonable to conclude that the *criterion implied* by the principle in question is set by considering whether the use of the particular weapon is acceptable to the sense of the international community; it is difficult to see how there could be a right to choose a means of warfare the use of which is repugnant to the sense of the international community.'[704]

In a similar vein, in the already discussed case of *Prosecutor v Hadžihasanović* the Appeals Chamber argued:

'It is true that, domestically, most States have not legislated for command responsibility to be the counterpart of responsible command in internal conflict. This, however, does not affect the fact that, at the international level, they have accepted that, as a matter of customary international law, relevant aspects of international law (including the concept of command responsibility) govern the conduct of an internal armed

[702] ibid 398.
[703] ibid.
[704] ibid.

> conflict, though of course not all aspects of international law apply. The relevant aspects of international law unquestionably regard a military force engaged in an internal armed conflict as organized and therefore as being under responsible command. In the absence of anything to the contrary, it is the task of a court to *interpret the underlying State practice and opinio juris* (relating to the requirement that such a military force be organized) as bearing its normal meaning that military organization *implies* responsible command and that responsible command in turn *implies* command responsibility.'[705]

The caveats that have been expressed in the chapter on ordinary meaning and purpose regarding the language used by the Appeals Chamber in this paragraph apply here as well, as it is not entirely clear whether the Appeals Chamber refers to the customary rule or to State practice. Yet, what can be noticed from these two cases is, firstly and obviously, that necessary implications can be used to interpret the content of customary rules. Secondly, they are applied identically as in treaty interpretation and, similarly to treaty interpretation, where necessary implications have been misused to draw conclusions that do not necessarily flow from the text, the same issue can be seen in the second case as a possible example of an interpretation of a customary rule by necessary implication. While the Appeals Chamber is attempting to tie the implication to the meaning of the rule, akin to the text of the rule, the implication fails on the grounds of lack of necessity. The first case, however, is a good example of the use of necessary implications, which, although not resting on the text, is based on the logic of the rule and is implied logically, instead of purely linguistically.

[705] *Prosecutor v Hadžihasanović,* Decision on Interlocutory Appeal [17] emphasis added.

3. Evolutive Interpretations of Customary Rules

3.1. What Makes an Interpretation Evolutive?

A review of the literature shows that the concept of evolutive interpretation is used both in a narrow and in a broad sense.[706] In the narrow sense, evolutive interpretation is premised on a semantic change of the words, which are contained in a rule, over time.[707] This can be either a shift in meaning – something that meant X now means Y – or the subsequent acquisition of an additional nuance of meaning. For example, the word 'profile' changed its meaning with the advent of technology. It no longer represents just 'a human head or face represented or seen in a side view',[708] but also a section on the social media 'where you post your name, picture, and personal information'.[709] Another example is the word 'viral', which initially meant that something is caused by a virus and now means something 'that spreads quickly because people share it on social media and send it to each other'.[710] Expansion of meaning is another example of semantic change that occurs due to technological developments. For instance, the word telephone did not include mobile phones at the beginning of the 20th century, but does so now; in other words, the scope of meaning of the word telephone has changed because new particulars (with slightly different features) now fall into this category. In these cases no special interpretative rule or technique would normally be required because the evolving meaning of such terms can be argued based on the standard of ordinary meaning. In other words, judges can

[706] For a distinction between evolutive interpretation and intertemporal law see ST Helmersen, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) 6 Eur J Legal Stud 161, 183-186; EE Triantafilous, 'Contemporaneity and its Limits in Treaty interpretation' in DD Caron, SW Schill, AB Smutny, EE Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (OUP 2015) 450;

[707] J Wyatt, 'Using Intertemporal Linguistics to Resolve the Problem at the Origin and Core of the Evolutionary Interpretation Debate' in G Abi-Saab, K Keith, G Marceau, C Marquet (eds) *Evolutionary Interpretation and International Law* (Hart Publishing 2019) 47, 53.

[708] 'Profile', Merriam-Webster Dictionary <https://www.merriam-webster.com/dictionary/profile?utm_campaign=sd&utm_medium=serp&utm_source=jsonld> accessed 20 April 2022.

[709] 'Profile', Collins Dictionary, <https://www.collinsdictionary.com/dictionary/english/profile> accessed 20 April 2022.

[710] 'Viral', Collins Dictionary <https://www.collinsdictionary.com/dictionary/english/viral> accessed 20 April 2022.

resort to the ordinary meaning standard to interpret the provisions that contain terms which have changed its meaning during the rule's existence due to technological, scientific or social developments.[711] As Georgopoulos notes, 'if we accept that evolution is an inherent element of a norm, the justifying it back to the intention of the parties is superfluous'.[712]

These observations are valid if we look at evolutive interpretation at the level of words and, to a large extent, this overlaps with what Georgeopoulos qualifies as open text (*ouverture du text*) as the first vehicle for evolutive interpretation.[713] The given examples, however, only concerned 'regular' language, but open text may also concern legal concepts. In such cases, the opening of the text of a legal rule results in (implicitly) accepting all its subsequent evolution.[714] The ordinary meaning of the legal concept will be established on the basis of subsequent evolution.

A second vehicle for evolutive interpretation in its narrow sense is dynamic reference (*renvoi mobile*), which is a technique where the parties to a treaty incorporate a reference to other rules within the treaty.[715] This allows for an automatic adaptation of the treaty when the content of the other rules has evolved throughout the existence of this first treaty. This technique is a technique of avoidance of normative conflict between the treaty and the rules referred to. However, the technique of dynamic reference, which is part and parcel of incorporation by reference, only works in the case of evolution of law when the intention of the parties was to bring the two rules in sync.[716] In such cases, evolutive interpretation operates not at the level of individual words, but that of a rule taken as a whole. An example of this is Article 1105(1) of the NAFTA, which provides that '[e]ach Party shall accord to investments of investors of another Party treatment *in accordance with international law*'. This

[711] For e.g. *Kasikili/Sedudu Island* (n 115) [20].
[712] T Georgopoulos, 'Le droit intertemporel et les dispositions conventionnelles évolutives. Quelle thérapie contre la vieillesse des traités?' (2004) CVIII/1 RGDP 123, 138.
[713] ibid 132.
[714] ibid 134.
[715] ibid 132.
[716] ibid 134.

provision allows for the adaption of the content of this treaty to the standards of international law at the time of its application, not based on the standards that were in force at the time of the conclusion of this treaty.

The concept of evolution or evolutive interpretation is often used as synonymous with progressive adjudication,[717] which springs from a theoretical commitment to adapt the law in a way that it changes with the types. This goes, however, beyond being a mere interpretative technique. Such a commitment can be aptly portrayed by the statement made by Judge Trindade in in his Concurring Opinion to the IACtHR Advisory Opinion OC-16/99 on the Right to Information on Consular Assistance when he stated that '[t]he contents and effectiveness of juridical norms accompany the evolution of time'.[718]

3.2. A Failed Attempt to Include a Provision on Inter-Temporal Law into the VCLT

During the work on the ILC Draft Articles on the Law of Treaties, Special Rapporteur Waldock proposed introducing an article which would state that a treaty would be interpreted in the light of the law in force at the time when it was drawn up (contemporaneous interpretation, static interpretation), as opposed to its application which would be done in accordance to the law in force at the moment of application (evolutive interpretation).[719] The proposed article 56 read as follows:

> '1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up.

[717] Wyatt (n 707) 50. For e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (n 394) Dissenting Opinion of Judge Trindade [183]; *The Right to Information on Consular Assistance* (n 230) [114]-[115].
[718] *The Right to Information on Consular Assistance* (n 230) Opinion of Judge Trindade [5].
[719] ILC, 'Third Report on the Law of Treaties' (n 69) 8-9.

2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied'.[720]

The provision, however, never made its way neither into the ILC Draft Articles and, thus, nor in the VCLT for arguably the following reasons: the inability to distinguish interpretation from application, the potential differences in interpretation between law-making (multilateral) and contract (bilateral) treaties, the need to ensure that the will of the Parties is determinative in interpretation.[721] This decision was taken despite the fact that there were states, such as Portugal, Israel and the Netherlands, that actively supported an inclusion that would include a temporal point by reference to which an interpretation should be made.[722]

Draft Article 56 provision was very likely to have been inspired from Gerald Fitzmaurice who in his article on treaty interpretation proposed six principles of treaty interpretation with the last one being the principle of contemporaneity.[723] According to Fitzmaurice, 'the terms of the treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded'.[724] In his commentary to this principle, he also noted its connection with the standard of ordinary meaning and its similarity with the concept intertemporal law.[725] While Fitzmaurice's principle settles on the meaning contemporaneous with the conclusion of the treaty, which is sensible if the concept of a treaty resembles the concept of a contract in domestic law from which it follows that the will of the parties as expressed at the time must be respected, it simultaneously

[720] ibid.
[721] ILC, 'Summary Record of the 728th Meeting', 21 May 1964, UN DOC A/CN.4/SR.728, 33 [6],[7] et seq.
[722] ILC, 'Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session' UN Doc A/6309/Rev.1 in YILC, 1966 Vol. II 300, 322-323, 336.
[723] Fitzmaurice (1975) (n 424) 212.
[724] ibid.
[725] ibid.

allows for evolutive considerations to be taken into account. In contrast, current international practice treats the two as opposites and therefore we see a heterogeneous practice where international and hybrid courts, or even judges within the same court, opt either for one or the other – evolutive or static interpretation.

3.3. Evolutive treaty interpretations in the practice of international courts

Turning to practice, the approach to evolutive interpretation depends on the court and the case at hand. The ICJ has, for instance, in some cases adhered to the original meaning of treaty terms at the moment of a treaty's conclusion,[726] whereas in others opted for an interpretation contemporaneous with the moment of interpretation, while the ECtHR clearly favours evolutive interpretation, both in its narrow and broader sense.[727] The ICJ has devised two main criteria to aid the determination of when the Court should settle on an evolutive meaning: (1) the presence of generic terms, (2) the long duration of the treaty,[728] which are sometimes complemented by a third one to buttress the Court's argument in favour of an evolutive reading — the treaty's object and purpose.[729] The first criterion, the use of generic terms by the parties,[730] allows judges to presume that the intention of the parties was to allow the meaning of treaty provisions to evolve over time.[731] That the intention is

[726] *Rights of Nationals of the United States of America in Morocco* (n 366) 176; *Kasikili/Sedudu Island* (n 115) [25]. For an analysis of the ICJ's practice on this subject see P Tzeng, 'The Principles of Contemporaneous and Evolutionary Interpretation' in J Klinger, Y Parkhomenko, C Salonidis (eds), *Between the Lines of the Vienna Convention?: Canons and Other Principles Of Interpretation in Public International Law* (Wolters Kluwer 2018) 387.

[727] See M Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties, Part I' (2008) 21 Hague Yearbook of International Law 101.

[728] Helmersen (n 706) 172.

[729] *Iron Rhine Arbitration* (n 404) [83]; Fitzmaurice, Merkouris (n 424) 139-141.

[730] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 59) [53]; *Aegean Continental Shelf* (n 386) [77]; *Dispute regarding Navigational and Related Rights* (n 695) [67]-[71]. This approach was also adopted by other judicial bodies: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO, Report of the Appellate Body adopted on 12 October 1998, WT/DS58/AB/R [130].

[731] J Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation Over Time and Their Diverse Consequences' (2010) 9/3 LPICT 443, 465-466; E Bjorge, 'Time Present and Time Past: The Intention of the Parties and the Evolutionary Interpretation of Treaties' in G Abi-Saab, K Keith, G Marceau, C Marquet (eds) *Evolutionary Interpretation and International Law* (Hart Publishing 2019) 35, 36; 'Le problème dit du droit intertemporel dans l'ordre international, Rapport provisorie Max Sørensen' (1973) 43 Annuaire de Institut de Droit International 1, 16 [20].

presumed means that it is not the actual, original will of the parties, but a reconstruction of a *hypothetical* will.[732] While the ICJ can be credited with developing an approach on an otherwise no rule's land, the construction of a presumed intention, in other words, saying that because the parties introduced generic terms and entered into a treaty of long duration they actually *accepted*, or in some cases that they *desired*, for treaty provisions to be read by reference to the time of interpretation is not very convincing.[733] Moreover, what appears as a single presumption, is actually a two-level presumption. Firstly, judges presume that the usage of generic terms was made by the parties with awareness that the law or the meaning might change and from this it is inferred that the parties either intended, or, in any event, have at least accepted, for the generic terms to be given a meaning different from that contemporaneous with the treaty's conclusion. The problem with this argument is that it is unlikely to be true. Hart's remark concerning the legislator that often cannot predict all the situations that may arise in practice over time and, thus, cannot create legislation that would cover all possible factual situations, can apply to the representatives of State parties to the treaty, who, simply by their capacity of being human, cannot be that forward-looking so as to predict all the changes and developments that may occur.

The second criteria requires that the treaty had to be entered into for a long duration.[734] This seems to be evidence of the fact that the parties understood and, having agreed to the treaty, have accepted it will continue over time. Otherwise, there is no issue of change over time in the first place.

Different from the ICJ, which focuses on the intention of the parties as the main driver behind the application of evolutive interpretation, the ECtHR justifies its dynamic reading of the European Convention on Human Rights by the special status of this treaty and the need to make sure that the rights are

[732] *Gabčíkovo-Nagymaros Project* (n 434) Separate Opinion of Judge Bedjaoui 121 [7].
[733] See ftn. 730.
[734] Helmersen (n 706) 172.

effective and not illusory.[735] It often calls the Convention a 'living instrument'. However, this expression has also been used in relation to other human rights treaties, for instance, the American Convention on Human Rights,[736] but also in relation to treaties on other subject matters such as UNCLOS in an attempt to ground a dynamic reading of its provisions.[737] The ECtHR's approach often borders on the wider meaning of evolutive interpretation. A similar remark can be made with regard to the practice of international criminal courts, where judges sometimes opted for an evolutive reading of the definition of crimes.[738]

Another point to be made here is that opting in favour of an evolutive reading of a provision does not always have to happen on the basis of an evolved ordinary meaning of the terms. It can be better argued on considerations of subsequent convergent practice, which is evidence of a tacit agreement to change the meaning,[739] or acquiescence, when only one party engages in the behaviour/practice, while the other does not protest against it. According to the ILC, 'subsequent agreements and subsequent practice under articles 31 and 32 may [also] assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time'.[740] As an example of this, the ILC advances the *Dispute regarding Navigational and Related Rights* case.[741] In this case, the Court did not actually say that subsequent practice may be used as evidence of original intent. Instead, it mentioned subsequent practice and evolutive interpretation as two examples of cases when a meaning that is

[735] For an overview of the case law see M Fitzmaurice (n 727) 123.
[736] *Inter-American Court of Human Rights Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* Judgment of August 31, 2001 (Merits, Reparations and Costs) [146].
[737] *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC),* Advisory Opinion, ITLOS Case No 21, ICGJ 493 (ITLOS 2015), 2nd April 2015, Opinion Judge Lucky [9] read together with [12]; *Questions of Interpretation and Application of the 1971 Montreal Convention* Dissenting Opinion of Judge Schwebel (n 115) 80; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, Dissenting Opinion of Judge Trindade (n 224) [179].
[738] E.g. *Prosecutor v Kunarac*, Appeals Chamber (n 223) [117].
[739] G Distefano, 'La practique subsequente des Etats parties a un traite' (1994) 40 Annuaire Français de Droit International 41, 46.
[740] ILC, UN Doc A/73/10 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties' YILC (2018) Vol. II Conclusion 8, 64.
[741] *Dispute regarding Navigational and Related Rights* (n 695).

contemporaneous with the application rather than the conclusion of the treaty is to be preferred, but nowhere did it put them under the same heading.[742] In this case, the argument of the majority was based on evolutive interpretation, by applying the two criteria that it devised in its practice, while equally an interpretation by reference to subsequent practice could have supported a meaning that was contemporaneous with the exercise of interpretation, although on slightly different grounds.[743] Arguing that subsequent practice falls under the sub-heading of evolutive interpretation would be non-sensical, especially if the second one is grounded in presumed intent. This is because while evolutive interpretation, as it is understood by the ICJ, is justified on the basis of presumed intent at the moment of the conclusion of the treaty, subsequent practice is a tacit agreement on a meaning that is different from that adopted originally.[744]

3.4. Are evolutive interpretations possible in the case of customary rules?

It has been argued in legal scholarship that customary international law can be and has been interpreted evolutively in the practice of international criminal courts. According to Grabert,

> 'In practice, this approach has been applied in the following manner: in the first step, a customary rule was identified on the basis of state practice and *opinio juris.* In the second step, this rule *was interpreted in light of the present circumstances*. One example of this approach is the application of the doctrine of command responsibility to internal armed conflicts.'[745]

Grabert relies on two examples to support his view. The first is the Dissenting Opinion of Judge Shahabudeen in the *Stakić* case and the second is the

[742] ibid [64].
[743] ibid, Separate Opinion of Judge Skotnikov [9]-[10].
[744] For more differences see Arato (n 731); R Moloo, 'When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation' (2013) 31 Berkeley Journal of International Law 39, 55; M Fitzmaurice, 'Subsequent Agreement and Subsequent Practice. Some Reflections on the International Law Commission's Draft Conclusions' (2020) 22 ICLR 14, 26-31.
[745] A Grabert, *Dynamic Interpretation in International Criminal Law: Striking a Balance Between Stability and Change* (utzverlag GmbH 2015) 90-91.

judgment of the Appeals Chamber in *Hadzihasanović*. The issue in *Stakic* was whether customary international confined the notion of deportation to crossing of a border and could not, therefore, be applied to the crossing of a front line.[746] In *Stakić* Judge Shahabudeen noted that the Tribunal has a duty to interpret the law — in this case customary international law — and, in this exercise of interpretation, to clarify it in a way that preserves the rule's essence while simultaneously establishing whether or not the new circumstances in the case at hand reasonably fall under the scope of the law in force.[747] He then reasoned that even if one assumed that customary international law, based on state practice and *opinio juris*, only encompassed the crossing of a border, it could still be reasonably interpreted and, in consequence, applied in the case of a front line as well.[748] It appears that what leads to the qualification of 'evolutive' or dynamic interpretation is the fact that, prior to this case, deportation as a customary international law offence had never been applied to the crossing of a front line.

In a similar vein, the Appeals Chamber in *Hadzihasanović* stated that

> 'where a principle can be shown to have been established, it is not an objection to the application of the principle to a particular situation to say *that the situation is new* if it reasonably falls within the application of the principle'.[749]

It must be acknowledged that in these cases the factual circumstances were new compared to the facts of the cases previously adjudicated by the court and which fell squarely within the scope of the provision. Yet, even though case concerned a new situation, this does not automatically mean that this is a case of an evolutive interpretation of custom. This is because the interpretation

[746] *Prosecutor v Stakić*, Appeals Chamber Judgment (n 119) [288]-[303].
[747] ibid, Partly Dissenting Opinion of Judge Shahabudeen [33].
[748] ibid [34]-[39].
[749] *Prosecutor v Hadžihasanović,* Decision on Interlocutory Appeal (n 464) [12].

does not rest on a semantic change over time owing to either legal or factual developments.

Nevertheless, there are cases that seem to support the conclusion that evolutive interpretations are possible in the case of customary rules. For instance, in *Prosecutor v Musema* the ICTR Trial Chamber stated:

> 'in light of the *dynamic* ongoing *evolution* of the understanding of rape and the incorporation of this understanding into the principles of international law the Chamber considers that a conceptual definition is preferable to a mechanical definition of rape. The conceptual definition will better *accommodate evolving norms of criminal justice*.'[750]

The Trial Chamber also referred in this context to the *Furundžija* case[751] where the Trial Chamber advocated the reading of the definition of rape in light of new trends in national legislation, which may fall either under a form of evolutive or systemic interpretation of CIL.

Another case in point is the *Kunarac* Appeals Chamber judgment where the Appeals Chamber noted that 'the traditional concept of slavery […] has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all the powers attached to ownership',[752] ultimately concluding that 'at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law'.[753]

The concept of evolution in relation to custom is also not alien to the practice of the ICJ. It has been used in the case law of the ICJ in three situations: (1) when judges opposed the argument of one of the parties that a customary rule had emerged on grounds that a rule may be emerging but has not yet achieved

[750] *Prosecutor v Musema* (Trial Chamber Judgment of 27 January 2000) Case no. ICTR-96-13-T [228].
[751] ibid.
[752] *Prosecutor v Kunarac*, Appeals Chamber (n 223) [117].
[753] ibid.

the status of a 'ripe' customary rule,[754] (2) when they signalled that a CIL rule is emerging and needs to be considered in the case at hand[755] and (3) when they intended to convey that a customary rule has developed or changed.[756] However, one particular example stands out in the case law because it comes closest to an evolutive interpretation of customary international law. This example concerns the customary rule on State immunity. The history of jurisdictional immunity of States shows a gradual shift from the doctrine of absolute immunity, which meant that proceedings could never be brought against a State in the domestic courts of the (prospective) applicant State unless some exceptions such as waiver applied, to the doctrine of restrictive immunity. In the *Arrest Warrant* case, where the subject of the immunity of Heads of State and Ministers of Foreign Affairs was raised, Judges Higgins, Koojimans and Buergenthal appended a Joint Separate Opinion in which they argued that

> '[a]n 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'.*[757]

[754] Indicatively: *Fisheries Jurisdiction (United Kingdom v. Iceland)* (n 59) Declaration of Judge Singh [4]; ibid, Concurring Opinion of Judge Forester [12]. For a more generic reference to evolution of norms (both customary and conventional) see *Competence of the General Assembly for the Admission of a State* (n 386) [113]; *Legality of the Threat or Use of Nuclear Weapons* [70].

[755] Indicatively: *Nuclear Tests Case* (n 78) Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock [20] read together with [47]; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race* Dissenting Opinion of Judge Trindade (n 198) [150].

[756] Indicatively: *Fisheries Jurisdiction (United Kingdom v. Iceland)* (n 59) Dissenting Opinion of Judge Petren [22]; *Request for an Examination of the Situation in Accordance with paragraph 63 of the Court's Judgment* (n 688) [34].

[757] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 Joint Separate Opinion of Judges Higgins, Koojimans and Buergenthal [72].

The meaning of this passage is that the two legal notions, *acta jure imperii* and *acta jure gestionis*, which are part and parcel of the customary rule on State immunity, are not to be interpreted statically, but evolutively, in such a way that reflects the different priorities of society over time.

Aside from the aforementioned case, there are equally cases that have been linguistically framed by adjudicators in a way that might suggest evolutive interpretation, although it is not entirely clear whether it is indeed a case of evolutive interpretation or rather one of modification of CIL. One example is the *Mesa Power* arbitral award, where the parties disagreed on the content of the CIL minimum standard of treatment, which was necessary to be established when interpreting Article 1105(1) of the NAFTA.[758] The Tribunal started off its inquiry with an examination of the case law. It observed that in the practice of arbitral tribunals there were two lines of decisions on this subject: 'decisions questioning the relevance and applicability of the *Neer* standard, and decisions applying it with a number of important qualifications.'[759] The *Neer* standard — a standard that emerged from one of the US-Mexican claims commissions case — 'required the existence of outrageous conduct' for a finding on the violation by the State of the minimum standard of treatment.[760] In this context, the Tribunal noted that:

> 'In practice, these two approaches have much in common. More importantly, they both accept that *the minimum standard of treatment is an evolutionary notion*, which offers greater protection to investors than that contemplated in the *Neer* decision.'[761]

[758] *Mesa Power Group LLC v Canada* (n 199) [495]. Article 1105 of the NAFTA provides that 'Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. See North American Free Trade Agreement between Canada, The United States and Mexico (adopted on 17 December 1994, entered into force 1 January 1994, terminated on 1 July 2020).
[759] *Mesa Power Group LLC v Canada* (n 199) [497].
[760] ibid [496], quoting *LFH and Pauline E Neer (United States) v United Mexican States*) (1926) 4 RIAA 61-62 [4].
[761] *Mesa Power Group LLC v Canada* (n 199) [485],[486], [500].

Yet, while the use of the expression 'evolutionary notion' brings one back to the case law of the ICJ, which might seem like an indication in favour of an evolutive interpretation taking place in this case, the tribunal is actually mirroring the language of the previously cited arbitral award in *Mondev*, where it was argued that 'Article 1105 incorporated an evolutionary standard, *which allowed subsequent practice, including treaty practice, to be taken into account*.'[762] Therefore, the reference to evolutive interpretation here might at most be suggestive either of an evolutive treaty interpretation or as modification through subsequent practice.

The second case is the *Pope & Talbot* arbitration,[763] which raised the same issue as *Mesa Power.* In *Pope and Talbot*, the State argued that 'the principles of customary international law were frozen in amber at the time of the *Neer* decision'[764] and therefore, the award of damages was justified only if its conduct qualified as egregious.[765] The Tribunal disagreed and explicitly stated that it rejected 'this static conception of customary international law'.[766] To this end, the Tribunal argued that there has been an evolution in customary international law, as reflected in the evolution of state practice and this state practice has broadened 'to include the concept of fair and equitable treatment'.[767] The existence of this evolution of practice is more suggestive of a modification through subsequent practice, rather than evolutive interpretation. Unlike in the reasoning of the dissenting judges on State immunity, where the meaning of the two notions of *acta juri imperii* and *acta jure gestionis* was argued on the basis of the need to reflect the changing priorities of the society, that may include evolution of practice but is not necessarily reducible to it, a judicial argument based on evolution of practice

[762] *Mondev International Ltd v USA,* (Award of 11 October 2002) ICSID Case No. ARB(AF)/99/2 [105].
[763] *Pope & Talbot Inc v Government of Canada*, UNCILTRAL, Award in Respect of Damages of 31 May 2002.
[764] ibid [57].
[765] ibid.
[766] ibid [58].
[767] ibid [59]-[60].

is more suggestive of a modification, rather than an evolutive interpretation of custom.

The most important challenge posed by evolutive interpretations in the case of customary rules is how to justify an evolutive reading of CIL rules, especially given the already developed criteria, for example those that are found in the practice of the ICJ in treaty interpretation. The first justification or criterion for evolutive interpretation used by the ICJ is that of presumed intention of the parties, which is in turn evidenced either by the use of generic terms or object and purpose. In the case of treaties, the *common* intention of the parties is often referred to, although in practice it is often a fiction. This is why international courts determine the *presumed* common intention that results from the text and does not inquire into the actual common intention based on preparatory works. Would it be possible to justify a dynamic interpretation of a CIL rule based on the *presumed intention of the parties*? The problem with this justification is that unlike treaties, which, like contracts, are assumed to be a *simultaneous* meeting of wills, the same cannot be said about customary international law, since it develops by accretion over time. The closest concept that comes to intention in the case of CIL is *opinio juris*. But even *opinio juris* does not reflect what States had in mind when they engaged in a practice understood largely, but whether or not they regarded the practice as law or not, which is an entirely different question. Hence, it is difficult without stretching it too much to make an analogy with intention in the case of *opinio juris.* While CIL rules may also contain generic terms and even have an object and purpose or teleology, there can only be a shared intention, instead of a common intention, as an amalgam of all individual intentions of the states. For instance, if we are talking about customary rules that are evidenced by domestic legislation, possibly the ratio of the domestic legislation, which is usually reflected in the preambular paragraphs, may serve as evidence of the individual intention of the State in question – but it would still need to be established that the same was 'in the mind' of the other states.

Hence, it would not be a common simultaneous intention, but a shared intention. Of course, while theoretically such a shared intention could be findable, it would be a very laborious exercise in practice.

In contrast, it would be much easier to justify a dynamic reading of a CIL rule based on considerations of effectiveness coupled with the special, for instance, human rights, nature of this rule, as the ECtHR does. Similar to the case of treaties, this can be argued on moral or value-laden grounds and lead to a dynamic reading of norms in light of social and legal developments.

3.5. Interpretation by Reference to Legal Trends

A particular category of case law is the one where courts refer to legal trends. While not an evolutive interpretation in itself, the reference to legal trends possesses an evolutive dimension. By trends, I understand rules that have been adopted but are not yet in force or tendencies in practice that do not qualify as a customary rule. Because these norms are not yet in force, but in *evolution,* it would be tempting to qualify them as a form of evolutive interpretation. If one adopts a wide understanding of the term evolutive interpretation, then these cases can equally qualify as cases of evolutive interpretation. As Tzevelekos observed, sometimes these two interpretative techniques appear to converge.[768]

In an interesting and precise formulation, Judge Pinto de Albuquerque of the ECtHR observed that certain trends, regardless of how they are called, seem to produce normative consequences[769] whether or not they are framed as being applied to the facts of the case or aiding the interpretation of applicable legal rules.

If we look from a bird's eye view at the case law, the term 'trend', in the sense of either trends in international law or in the practice of States among each other, understood liberally, is frequently used, especially at the ICJ and in

[768] Tzevelkos (n 570) 484.
[769] *Carreia de Matos v Portugal*, ECtHR App. No 56402/12 (4 April 2018) Dissenting Opinion of Judge de Albuquerque joined by Judge Sajó [20].

human rights courts to support a certain interpretation of the law or to advance a certain solution to the case.[770] For instance in the *Case of Balmer-Schafroth and Others v Switzerland*, the dissenting judges opposed the decision of the majority on Article 6 regarding the access to an effective remedy for the installation of nuclear power stations arguing that the majority ignored 'the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle and the principle of conservation of the common heritage'.[771] Another example, also at the ECtHR, is the *Case of Beer and Regan v Germany* where the Court noted that 'to read Article 6(1) of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in such matters would […] *run counter* to the current *trend* towards extending and strengthening international cooperation'.[772] Here we can see how current trends act as a yardstick to determine which interpretation of the rule the court will settle on.

[770] E.g.: ICJ: *Case Concerning the Arrest Warrant of 11 April 2000,* Separate Opinion of Judges Higgins, Koojimans and Buergenthal (n 757) [75]; ibid, Dissenting Opinion of Judge Oda [12]; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race* Dissenting Opinion of Judge Trindade (n 198) [181]. ECtHR: *V v the United Kingdom*, ECtHR App. no. 24888/94 (16 December 1999) [77]; *Fogarty v the United Kingdom* (n 581) [37]; *Dickson v the United Kingdom*, ECtHR App. No. 44362/04 (4 December 2007) [28]; *Herrman v Germany*, ECtHR App no. 9300/07 (26 June 2012) Partly Concurring and Partly Dissenting Opinion of Judge Pinto de Albuquerque, 33 and 36; *Janowiec and others v Russia,* ECtHR App. No. 55508/07 and 29520/09 (21 October 2013) Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller [8]; *Parillo v Italy*, ECtHR, App no. 46470/11 (27 August 2015) Concurring Opinion of Judge Pinto de Albuquerque [24]; *Dubska and Krejzova v the Czech Republic*, ECtHR App. no. 28859/11 and 28473/12 (15 November 2016) Dissenting Opinion of Judges Sajo, Karakas, Nicolau, Laffranque and Keller [22].IACHR: *Juan Raul Garza v United States*, IACHR, Case 12.243, Report No 52/01 [93]. IACtHR: *Isidro- Caballero-Delgado and Maria del Carmen Santana v Colombia*, IACtHR Series C no. 22 (8 December 1995) Dissenting Opinion of Judge Nieto-Navia, 1; *Moiwana Village v Suriname*, IACtHR Series C No. 145 (15 June 2005) [21]; *Gerardo Vargas-Areco v Paraguay*, IACtHR Series C No. 155 (26 September 2006) [122]. ICTY: *Prosecutor v Kupreskic,* Trial Chamber, (n 634) [518] and [529].

[771] *Balmer-Schafroth and Others v Switzerland*, ECtHR App. No 67/1996/686/876 (27 August 1997) Dissenting Opinion of Judge Pettiti, Joined by Judges Golcuklu, Walsh, Russo, Valticos, Lopes Rocha and Jambrek 17.

[772] *Beer and Regan v Germany*, ECtHR App no 28934/95 (18 February 1999) [62]. In a similar way see *Biao v Denmark*, App no. 38590/10 (24 May 2016) Concurring Opinion of Judge Pinto de Albuquerque [24].

This type of interpretation seems to be also encouraged by the Parties and even international organizations whose opinion the Court takes into account.[773]

Apart from this, trends in the domestic practice of States have also been used for interpretative purposes. In many cases at the ECtHR they are part and parcel of the analysis conducted by the Court on the emergence of a European consensus on a particular issue[774] or, even if not phrased as such, an analysis that seeks to establish whether there is a common ground on an issue.[775] In some cases, the existence of a trend was distinguished from a formed consensus, but it was argued that it should still be taken into account as a relevant consideration[776] or even that because it conveys a lower threshold, it should be preferred instead of consensus.[777]

This practice is not particular to the ECtHR, but can also be found in the practice of international criminal courts and tribunals. For example, in *Prosecutor v Furudžija*, the Trial Chamber noted that 'a trend can be discerned

[773] E.g. In the *Bosphorus Hava Yollari* case the Government quoting the previous case law of the Court advanced the view that 'the Convention must be interpreted in such a manner so as to allows States Parties to comply with international obligations so as not to thwart the current *trend* towards extending and strengthening international cooperation.' See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, ECtHR App no. 45036/98 (30 June 2005) [108]. See also *Centre for Legal Resources on Behalf of Valentin Campeanu v Romania*, ECtHR App no. 47848/08 (17 July 2014) [92];

[774] An interesting opinion has been advanced (but which is outside the scope of this analysis) is that European consensus may point not just to a European agreement on a certain issue, but actually constitute a regional customary rule. See I Ziemele (n 2) 250; *Lalmahomed v The Netherlands*, ECtHR App. no. 26036/08 (22 February 2011) Concurring Opinion of Judge Ziemele 14; *Hämäläinen v Finland*, ECtHR App. no. 37359/09 (16 July 2014) Concurring Opinion of Judge Ziemele [2].

[775] E.g. *X, Y and Z v the United Kingdom*, ECtHR App no. 21830/93 (22 April 1997) [40]; *Sheffield and Horsham v the United Kingdom*, ECtHR App 31-32/1997/815-816/1018-1019 (30 July 1998) Dissenting Opinion of Judge Van Dijk [3]; *Christine Goodwin v the United Kingdom*, ECtHR App no. 28957/95 (11 July 2002) [84]; *Kafkaris v Cyprus*, ECtHR App 21906/04 (12 February 2008) Joint Partly Dissenting Opinion of Judges Tulkens, Cabral Barreto, Fura-Sandstrom, Spielmann and Jebens, 66; *Stummer v Austria*, ECtHR App no 37452/02 (7 July 2011) [105]; ibid, Joint Partly Dissenting Opinion of Judges Tulkens, Kovler, Gyulumyam, Spielmann, Popovic, Malinverni and Pardalos, [5]; *Bayatyan v Armenia*, ECtHR App no. 23459/03 (7 July 2011) [103]; *S.H. and Others v Austria*, ECtHR App no 57813/00 (3 November 2011) [96]; *Stanev v Bulgaria*, ECtHR App no. 36760/06 (17 January 2012) [243]; *Vallianatos and Others v Greece,* ECtHR App nos. 29381/09 and 32684/09 (7 November 2013) [91]; *Hämäläinen v Finland* (n 774) Joint Dissenting Opinion of Judges Sajo, Keller and Lemmens [5]; *Khamtokhu and Aksenchik v Russia*, ECtHR App no. 60367/08 and 961/11 (24 January 2017) [85]; *Nait-Liman v Switzerland*, ECtHR App no 51357/07 (15 March 2018) Dissenting Opinion Judge Dedov, 75.

[776] *Magyar Helsinki Bizottsag v Hungary*, ECtHR App no 18030/11 (8 November 2016) [145]. On the perceived distinction between trends and consensus see ibid, Concurring Opinion of Judge Sicilianos, Joined by Judge Raimondi [16].

[777] *X and Others v Austria*, ECtHR App no 19010/07 (19 February 2013) Joint Partly Dissenting Opinion of Judges Casadevall, Ziemele, Kovler, Jociene, Sikuta, De Gaetano and Sicilianos [15].

in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault.'[778] It went on to say that the trend demonstrated that 'at the national level States tend to take a stricter attitude towards serious forms of sexual assault'.[779] Here, the reference to trends is made in the context of a frequently noticed practice of international criminal courts, especially that of *ad hoc* courts, to look into the practice of States in the search for a common denominator that would aid the determination of the elements of the crime, often made under the guise of the search for a customary rule. [780]

At the ICJ, legal trends are often contrasted from fully-fledged/emerged customary rules and signify that the practice in support of which one party argues did not become a customary rule.[781] However, even there, trends are used for the interpretation of customary rules. In the *Tunisia Libya Continental Shelf* case, the Parties to the case mandated the Court by Special Agreement to consider, upon deciding the case, any trends (especially those reflected in the negotiation of the Third Convention on the Law of the Sea) in the law of the continental shelf. However, the Parties disagreed as to the meaning attributed to this expression. While Libya considered that the trends have to be accepted, in the sense of having become rules of customary international law, Tunisia argued that

> 'even if a new trend does not qualify as a rule of customary law, it still may have a bearing on the decision of the Court, not as part of applicable law, but *as an element in the interpretation of existing rules or as an indication of the direction in which these rules should be interpreted*.'[782]

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[778] *Prosecutor v. Furundžija*, Trial Chamber Judgment (n 490) [179].
[779] ibid.
[780] For e.g. *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995,) ICTY Trial Chamber, Case no. IT-94-1 [83].
[781] *Fisheries Jurisdiction (United Kingdom v. Iceland)* (n 59) Separate Opinion of Judge de Castro 78 and 90.
[782] *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* Separate Opinion of Judge de Arechaga [1982] ICJ Rep 18 [33].

Judge de Arechaga supported the latter interpretation of an Agreement as it was 'the only one which assigns practical effect and an independent meaning and significance to the reference to new accepted trends'[783] and this seems to have been also the approach of the majority of the Court. As the majority noted, 'Article 76 and Article 83 of the draft convention are the provisions of the draft convention prepared by the Conference which may be relevant as incorporating new accepted trends to be taken into account in the present case'.[784]

This example can be understood as a combination between a systemic approach and an evolutive interpretation understood broadly, because the trends that are taken into account are subsequent to the conclusion of the treaty, but are used for interpretative purposes. Somewhat it echoes a more general statement made by the ICJ in the *Namibia Advisory Opinion* when it stated that 'interpretation cannot remain unaffected by the subsequent development of the law'[785] and that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.[786]

At the same time, a particularity of the case is that the Parties expressly gave their consent for the Court to consider these trends. This raises the question of the extent to which legal developments or trends may be taken into account for interpretative purposes when the consent of States to the jurisdiction of the ICJ does not precisely allow for it. This may generate a conflict between, on the one hand, the respect for the will/consent of the parties, and, on the other, the protection of judicial discretion. If trends are used for merely interpretative purposes, this might not be a problem *per se* from the standpoint of consent, but because although interpretation is definable, in practice, its boundaries are fluid, and in some cases, it might be difficult to determine between where

[783] ibid, [34]. In a somewhat similar vein *Continental Shelf (Libya v. Malta)* (n 143) Separate Opinion of Judge Valticos [9].
[784] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 782) [47].
[785] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 59) [53].
[786] ibid.

interpretation ends and the actually application of these trends to the case begins. In addition, it can be noticed that by reference to the whole body of case law that the ICJ is much more cautious when dealing with legal trends, as opposed to the ECtHR, where these are constantly invoked in judicial reasoning and are an important pillar thereof.

Albeit sparse, the reference to trends as a factor/element in interpretation was invoked not only in the *Continental Shelf Tunisia Libya* case, but also in a more recent case – the *Jurisdictional Immunities* case.[787] In a Separate Opinion to the majority's judgment, Judge Bennouna noted that:

> 'That evolution [of the regime governing jurisdictional immunity] 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 (adopted by the United Nations General Assembly on 2 December 2004, resolution 59/38), 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.*'[788]

In other words, Judge Bennouna seems to suggest that, similarly to what was argued in the *Continental Shelf* case, legal trends must be taken into account for interpretative purposes. Moreover, although he does not put it bluntly, there appears to be no reference to the consent of the parties to jurisdiction, which means that the statement implies that the trends can be taken into account for interpretation regardless of whether the parties have expressed an explicit intention in this sense.[789]

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[787] *Jurisdictional Immunities of the State* (n 223).
[788] ibid, Separate Opinion Judge Bennouna [19] emphasis added.
[789] It is interesting to note that a similar statement was made by the Supreme Court of Lithuania. In the *Cudak v Lithuania* case, the ECtHR describing the reasoning of the Court noted that 'it was considered that the provisions of the United Nations Convention on Jurisdictional Immunities of States and their Property, adopted on 2 December 2004, could be taken into account, even though

A few words need to also be said about the use of legal trends. While the use of trends in the interpretation of customary rules is not only not analogical to the taking into account any relevant rules in force between the parties, as Article 31 (3) (c) prescribes in the case of treaties, and it would not strictly fall under the other definitions of systemic interpretation, it reflects a more systemic or integrative approach towards the interpretation of custom, where *prospective* rules may be taken into account. Because trends are the law that is not yet in force, there is some overlap with the use of evolutive considerations in interpretation, although not, strictly speaking, evolutive interpretation. Unlike in the case of treaties, where evolution of law is prompted either because there is a mobile reference contained which permits automatic adaptation through interpretation or the open nature of the terms allow it and an evolutive interpretation is made based on the content of the rule itself, in the case of customary rules it can be seen that trends are referred to in order to ensure a certain degree of complementarity, because there is a connection in the subject matter between the customary rule and the trends that are referred to.

There always remains the possibility that legal trends may be used as a disguised version of the application to the case of certain legal developments that did not become custom. To a large extent these dangers mirror what has been the case when customary rules are used as an interpretative aid in the interpretation of treaties. One example is the *Oil Platforms* case[790] where the Court instead of using the rules for interpretative purposes ended up applying extraneous rules to the case as a declared part of the task of interpretation.[791] Fortunately, the recent *Certain Iranian Assets* case shows that the ICJ has

they were not binding, since they reflected a certain trend in international law in matters of State immunity.' See *Cudak v Lithuania* (n 581) [23].

[790] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161.

[791] ibid [41]-42. Other examples include *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (Judgment of 12 October 1984 given by the Chamber constituted by the order made by the Court on 20 January 1982) [1984] ICJ Rep 246 [83], [89-90] and *Pulp Mills* (n 224) Separate Opinion of Judge Ad Hoc Torres Bernardez [27].

departed from this practice. It rejected the interpretation forwarded by one of the Parties that was attempting to incorporate in the applicable law the customary rules on sovereign immunity. The Court refused to apply the customary rules on immunity by noting that the applicable law did not incorporate them by reference.[792]

4. Conclusion

In this chapter, I have examined two methods of interpretation that are not present in the rule of interpretation contained in Article 31 of the VCLT and whose nature of methods of interpretation is still debated: necessary implications and evolutive interpretations. The main argument advanced in this chapter was that both methods of interpretation can be and have been used to interpret not only treaties, but rules of customary international law too. Whereas in treaty interpretation necessary implications are typically drawn either from the text or, in some cases, the nature of the rule or the context, in the interpretation of customary rules they have been drawn either somewhat from the text or from the logic of the rule itself.

With regard to evolutive interpretation, it has been shown that, to some degree in a similar vein as systemic interpretation/integration in the previous chapter, it has a few different meanings. Moreover, there are different ways to support an evolutive reading of the terms of the rule. While an attempt has been made to include a rule on intertemporal law in, the ILC draft articles on the law treaties, this attempt failed and there evolutive interpretation exists outside the framework of the VCLT rules. Yet, it proves to be frequently relied on in practice, including in the interpretation of customary rules. While some cases that have been portrayed as examples of evolutive interpretations of

[792] *Certain Iranian Assets* (n 224) [58]; *A contrario* see ibid, *Certain Iranian Assets* (n 224) Separate Opinion of Judge Ad Hoc Momtaz [16]. An example of incorporation by reference is Article 1105 of the NAFTA. Article 1105 according to which 'Each Party shall accord to investments of investors of another Party treatment in accordance with international law, *including fair and equitable treatment and full protection and security*'. This standards was interpreted to incorporate customary international law in this provision, thus making it applicable to the cases brought in front of the arbitral tribunals. See *Mondev International Ltd v USA* (n 762) [111].

customary rules do not seem to fit the bill, other cases point to the fact that evolutive interpretation is possible in the case of custom. The only challenge here is where to draw the line, especially in light of the fact that there is no agreed threshold on the changes in CIL practice that aid the determination when a customary rule can be considered as modified.

FINAL CONCLUSIONS

What methods do international courts and tribunals use to interpret rules of customary international law? This was the question from which my inquiry proceeded. In order to answer it, I have unearthed a substantial number of cases from different international courts, quasi-judicial and dispute settlement bodies. I have sought to bring to light what they rely on when they engage in interpretation of customary rules. I will now sum up the main conclusions that emerge from my study.

The first conclusion is that, despite voices to the contrary, customary rules are interpretable, both from the standpoint of theory and resulting from an analysis of the case law. CIL interpretation is different from identification and does not bleed into it. While identification is concerned with identifying State practice and *opinio juris* and might occasionally involve an act that was regarded as interpretative, the types of interpretation that happen at this stage are different from CIL interpretation that is similar to the interpretation of treaties. Whereas the former is concerned with State practice and *opinio juris* as elements of custom, the object of the later is the customary *rule* itself.

Secondly, my research shows that in the interpretation of customary rules international courts, international judges in their separate or dissenting opinions, quasi-judicial and other dispute settlement bodies use methods similar or sometimes even identical to those used in treaty interpretation. This was, to some extent, an unexpected finding, given the differences between the two sources of law. These methods include, firstly, interpretation by reference to ordinary meaning and interpretation by reference to object and purpose. Whereas in treaty law, at least in accordance with Article 31 of the VCLT, these methods or elements by reference to which interpretation is done cannot be taken independently, in customary international law, they are often used as independent methods of interpretation. Apart from interpretation by reference to ordinary meaning and object and purpose, my research has

demonstrated that these courts and bodies have also engaged in systemic interpretations, necessary implications and evolutive interpretations.

At the same time, I have argued that the use of these methods is not an application of Article 31 VCLT, either directly or by analogy, but owes to the universal character of these methods of interpretation. Of course, customary rules have their particularities and these particularities may slightly re-shape these methods, in order to adapt them to their features.

Thirdly, in terms of patterns, it can be seen from this study that many cases of CIL interpretation can be found (1) in dissenting or separate opinions and (2) most of the instances of interpretation take place in international or internationalized criminal courts. The reasons for the first pattern is perhaps the fact that identification remains the dominant method of establishing the content of custom, while the reasons for second is that criminal courts are more often than other courts confronted with definitional problems of CIL rules, especially the ICTY, where CIL was the main applicable law.

This study concludes that accepting the existence of interpretation of CIL and understanding how it is applied in practice will assist judges in making clearer arguments on CIL. Given the somewhat fluid nature of CIL and the difficulties in identifying and developing its content, clarifying how CIL can be interpreted will increase the transparency and persuasiveness of judicial reasoning on the content of CIL in cases where CIL rules need to be concretized and individualized.

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ACADEMISCHE SAMENVATTIG

Het internationaal gewoonterecht is een van de rechtsbronnen die de relaties tussen staten regelt. Net als bij verdragsregels, dat wil zeggen regels in internationale verdragen, moet internationaal gewoonterecht worden geïnterpreteerd om het op bepaalde gevallen te kunnen toepassen. Deze dissertatie onderzoekt het onderwerp van de interpretatie van internationaal gewoonterecht en, in het bijzonder, de methoden die internationale rechtbanken en tribunalen en quasi-rechterlijke organen hebben gebruikt om gewoonteregels in hun praktijk te interpreteren.

De onderzoeksvraag die deze scriptie probeerde te beantwoorden was: in hoeverre nemen internationale rechtbanken en tribunalen hun toevlucht tot interpretatie om de inhoud van de internationaal gewoonterecht vast te stellen en welke interpretatiemethoden gebruiken zij daarbij? Het antwoord op deze vraag hing af van het beantwoorden van twee inleidende vragen. Ten eerste, wat is interpretatie en kunnen gewoonteregels op dezelfde manier worden geïnterpreteerd als verdragen? Ten tweede, hoe verschilt dit interpretatieproces van de identificatie van gewoonteregels?

De **hoofdstukken 1 en 2** zijn bedoeld om deze laatste vragen te beantwoorden. In hoofdstuk 1 wordt de betekenis van interpretatie van de internationaal gewoonterecht uitgelegd en wordt ingegaan op de bezwaren die zijn aangevoerd tegen het gebruik van de term interpretatie met betrekking tot internationaal gewoonterecht. In deze dissertatie werd de volgende definitie van interpretatie van de internationaal gewoonterecht gebruikt: het bepalen van de betekenis en/of reikwijdte van een gewoonterecht waarvan het bestaan niet wordt betwist. Anders gezegd, wanneer rechtbanken of andere quasi-rechterlijke organen zich bezighouden met interpretatie, is hun doel niet om uit te zoeken of de regel al dan niet bestaat door te kijken naar de praktijk van de staat en bewijs van *opinio juris*. In plaats daarvan is hun onderzoeksobject een regel die ongetwijfeld bestaat, maar waarvan de inhoud

wordt betwist. Het vaststellen van de inhoud van de regel is noodzakelijk om de zaak te kunnen oplossen die de partijen bij het geschil aan de rechtbank/het gerechtelijk orgaan hebben voorgelegd.

De bezwaren die in de juridische literatuur naar voren zijn gebracht tegen de interpretatie van de internationaal gewoonterecht, zijn grotendeels gebaseerd op de betekenis en de aard van de termen interpretatie en internationaal gewoonterecht. Interpretatie wordt door critici van de interpretatie van het internationaal gewoonterecht gedefinieerd als het decoderen van de betekenis van een wettekst of het onderzoeken van de bedoeling van de auteurs. Aangezien volgens deze geleerden het internationaal gewoonterecht beide niet heeft, kan het niet op dezelfde manier worden geïnterpreteerd als verdragsregels. De andere bezwaren zijn gebaseerd op de aard van het internationaal gewoonterecht. Ten eerste werd aangevoerd dat interpretatie overbodig is in het geval van gewoonterecht omdat het zou verwijzen naar de oorspronkelijke elementen waaruit het is opgebouwd —

staatspraktijk en *opinio juris* — en dus de cyclus van identificatie opnieuw zou beginnen. Ten tweede is beweerd dat interpretatie niet nodig is in het geval van gewoonteregels omdat ze niet in taalkundige termen zijn uitgedrukt. In **hoofdstuk 1** van deze scriptie heb ik betoogd dat de argumenten die berusten op de enge definitie van de term interpretatie gebaseerd zijn op de onjuiste premisse dat interpretatie, als concept, beperkt is tot het vinden van de betekenis van een tekst of de bedoelingen van de partijen. Rekening houdend met verschillende opvattingen over de betekenis en het doel van interpretatie, heb ik betoogd dat het primaire doel van interpretatie het bepalen van de betekenis en de reikwijdte van een rechtsregel is en niet het vaststellen van de bedoelingen of de betekenis van een tekst.

Een ander argument tegen de interpreteerbaarheid van gewoonten is gebaseerd op de kenmerken van gewoonteregels. Volgens dit argument zou elke interpretatie terug moeten grijpen op de praktijk en *opinio juris* van staten, wat in wezen een nieuwe identificatiecyclus zou betekenen. Deze opvatting

maakt geen onderscheid tussen de elementen van gewoonte en gewoonteregels. Het begrip internationaal gewoonterecht en, nauwkeuriger gezegd, gewoonteregel wordt gebruikt om de wettelijke norm aan te duiden die door herhaald gebruik tot stand is gekomen en als wet is aanvaard. Deze norm ontstaat na een herhaalde, wijdverspreide, consistente en representatieve praktijk die wordt uitgevoerd met het gevoel van wettelijke verplichting. Anders gezegd, de praktijk van een staat in de zin van een wettelijke verplichting creëert een regel van internationaal gewoonterecht, die het resultaat is van gewoonte, opgevat als een proces van rechtsvorming, en het daaropvolgende gedrag wordt vertoond omdat er een regel in deze zin is ontstaan. Dit betekent dat een gewoonterechtregel meer is dan alleen staatspraktijk en *opinio juris*, aangezien de rechtsnorm zich niet identificeert met de verbale propositie, het gebaar of het gedrag dat er aanleiding toe geeft.

Het feit dat het voorwerp van de interpretatie van het recht van gewoonterecht de gewoonterechtelijke regel is en niet de elementen van het gewoonterecht, betekent dat het proces van interpretatie van de gewoonterechtelijke regels het proces van identificatie niet opnieuw start en dus niet overbodig is in het geval van het recht van gewoonterecht. Aangezien de interpretatie van het recht van de staat betrekking heeft op de gewoonterechtelijke regel en niet op de elementen ervan, is zij bovendien even noodzakelijk voor de gewoonterechtelijke regels als voor de verdragsregels.

In **hoofdstuk 2** staat het onderscheid centraal tussen de identificatie en, in het bijzonder, de zogenaamde interpretatie van staatspraktijken en *opinio juris*, die plaatsvindt op het niveau van identificatie, en de interpretatie van gewoonteregels. Met betrekking tot staatspraktijk en *opinio juris* is de term interpretatie gebruikt om (1) het proces van evaluatie van de massa van staatspraktijk en *opinio juris* te beschrijven wanneer er sprake is van tegenstrijdige praktijk, (2) het proces van het afleiden van de relevante gewoonteregel uit de massa van staatspraktijk, of (3) het proces van analyse van een enkel voorbeeld van staatspraktijk en de motivatie erachter.

In dit hoofdstuk heb ik betoogd dat, hoewel de term interpretatie in de juridische literatuur en in de jurisprudentie is toegepast op de elementen waaruit gewoonte bestaat — staatspraktijk en *opinio juris* —

dit type interpretatie verschilt van de interpretatie van gewoonteregels, die verwant is aan verdragsinterpretatie. Ik heb de redenen uiteengezet waarom de term "interpretatie" niet accuraat beschrijft wat er in deze gevallen gebeurt en heb betoogd dat in het belang van terminologische consistentie de term "interpretatie" moet worden gereserveerd voor interpretatie van de *gewoonteregel*, en dus de taal van verdragsinterpretatie weerspiegelt.

In de **hoofdstukken 3, 4 en 5** zoomde het onderzoek in op de interpretatiemethoden die zijn geïdentificeerd in de jurisprudentie van internationale rechtbanken, semi-rechterlijke en geschillenbeslechtingsinstanties. Om de analyse coherenter, consistenter en toegankelijker te maken, volgden deze drie hoofdstukken een grotendeels vergelijkbare structuur. In elk hoofdstuk heb ik gekeken naar de betekenis van elke interpretatiemethode. Vervolgens heb ik de manieren geanalyseerd waarop ze werden gebruikt bij verdragsinterpretatie en vervolgens hoe ze werden gebruikt om gewoonteregels te interpreteren.

Hoofdstuk 3 onderzocht het gebruik van de gewone betekenis en van het voorwerp en doel van artikel 31 van het Verdrag van Wenen inzake het verdragenrecht over verdragsinterpretatie. In dit hoofdstuk heb ik betoogd dat internationale rechtbanken en internationale quasi-rechterlijke organen, net als bij verdragsinterpretatie, gebruik hebben gemaakt van de normen van gewone betekenis en doel en strekking om regels van internationaal gewoonterecht te interpreteren. In dit hoofdstuk heb ik enkele patronen afgeleid in het gebruik van deze interpretatiemethoden. Hoewel de elementen van artikel 31 Verdrag van Wenen inzake het verdragenrecht, namelijk gewone betekenis en doel, ook zijn gebruikt om regels van internationaal gewoonterecht te interpreteren, worden de twee elementen onafhankelijk van elkaar gebruikt. Interpretaties op basis van doel verduidelijken de betekenis

van de termen niet, maar worden gebruikt als op zichzelf staande interpretatiemiddelen. Bovendien is het doel tegen de achtergrond waarvan interpretatie plaatsvindt in het geval van gewoonterecht ofwel het doel van de regel ofwel het doel van de rechtstak waartoe de regel behoort. De analyse toonde ook aan dat de interpretatie van gewoonteregels onder verwijzing naar het doel vaak hand in hand gaat met overwegingen van redelijkheid en op gevolgen gebaseerde argumenten. Ten slotte, en dit is nog belangrijker, werd betoogd dat het gebruik van de elementen van artikel 31 Verdrag van Wenen inzake het verdragenrecht niet moet worden opgevat als een rechtstreekse of analoge toepassing van artikel 31 op de uitlegging van de regels van het internationaal privaatrecht, maar te danken is aan het universele karakter van deze methoden voor juridische uitlegging.

In **hoofdstuk 4** wordt ingegaan op het gebruik van verdragen en algemene rechtsbeginselen als referentiepunten bij de uitlegging van de internationaal gewoonterecht en wordt besproken in hoeverre dit vergelijkbaar is met systemische uitlegging in de zin van artikel 31, lid 3, onder c), van het Verdrag van Wenen inzake het verdragenrecht (het gebruik van andere relevante regels). Daartoe distilleer ik eerst de verschillende betekenissen die systemische interpretatie heeft in verdragsinterpretatie en gebruik deze vervolgens als analytisch kader voor mijn analyse van de interpretatie van de internationaal gewoonterecht. Ik heb vastgesteld dat andere regels in wezen vier verschillende functies kunnen vervullen, alle onder de noemer van systemische interpretatie/integratie: (1) andere regels als hulpmiddel om de gewone betekenis van de termen te bepalen, (2) andere regels kunnen worden gebruikt als hulpmiddel voor systemische argumenten, (3) andere regels kunnen worden gebruikt als hulpmiddel om leemten op te vullen of (4) andere regels kunnen worden gebruikt als hulpmiddel om normatieve conflicten op te lossen, waarvan de laatste twee verder gaan dan de betekenis van interpretatie die in deze dissertatie wordt gehanteerd.

In het geval van de interpretatie van gewoonteregels door verwijzing naar verdragen en algemene beginselen, vervult het gebruik van deze twee rechtsbronnen voornamelijk de tweede functie, die van instrument voor systemische argumenten. Toch verloopt de toepassing van deze interpretatiemethode niet altijd vlekkeloos.

Hoofdstuk 5 onderzocht de interpretatiemethoden die niet voorkomen in het Verdrag van Wenen inzake het verdragenrecht, maar die niet alleen lijken te zijn gebruikt om verdragen te interpreteren, maar ook om gewoonteregels te interpreteren. Dit zijn noodzakelijke implicatie en evolutieve interpretatie. Het eerste deel van dit hoofdstuk bespreekt het liberale gebruik door het Internationaal Gerechtshof van de term noodzakelijke implicatie en de gronden of elementen waaruit het Hof implicaties afleidt die, naar zijn mening, noodzakelijk zijn. Verder onderzoek ik hoe noodzakelijke implicaties kunnen worden gebruikt om de inhoud van gewoonteregels te interpreteren en waar noodzakelijke implicaties zijn misbruikt. In het tweede deel van dit hoofdstuk heb ik de inhoud en het gebruik van evolutieve interpretatie bij de interpretatie van gewoonten onderzocht. In de rechtswetenschap is betoogd dat internationaal gewoonterecht evolutief kan worden geïnterpreteerd en dat dit ook is gebeurd in de praktijk van internationale strafhoven. Ik heb dit begrip van evolutieve interpretatie van het internationaal gewoonterecht weerlegd, maar heb betoogd dat er gevallen zijn die de conclusie lijken te ondersteunen dat evolutieve interpretaties mogelijk zijn in het geval van gewoonteregels. Tegelijkertijd heb ik betoogd dat de belangrijkste uitdaging van evolutieve interpretaties in het geval van gewoonteregels is hoe een evolutieve interpretatie van internationaal gewoonterecht-regels te rechtvaardigen is, vooral gezien de reeds ontwikkelde criteria die door het Internationaal Gerechtshof worden gebruikt om te bepalen of een evolutieve interpretatie al dan niet gerechtvaardigd is.

In het algemeen weerlegt deze studie niet alleen het feit dat gewoonteregels niet op dezelfde manier kunnen worden geïnterpreteerd als verdragsregels en

presenteert ze de verschillende methoden die internationale rechtbanken en tribunalen hebben gebruikt om internationaal gewoonterecht te interpreteren, maar wil ze in de toekomst ook bijdragen aan het opstellen van een reeks regels of aanbevelingen waarmee rechters hun argumenten over internationaal gewoonterecht zo kunnen vormgeven dat ze de transparantie en overtuigingskracht van gerechtelijke redeneringen over de inhoud van internationaal gewoonterecht vergroten.

SCIENTIFIC SUMMARY

Customary international law (CIL) is one of the sources of law that regulates the relationships between States. As with treaty rules, that is, rules contained in international conventions, in order to apply to customary international law to particular cases, it needs to be interpreted. This thesis explores the topic of the interpretation of international custom and, in particular, the methods that international courts and tribunals and quasi-judicial bodies have used to interpret customary rules in their practice.

The research question that this thesis sought to answer was: to what extent do international courts and tribunals resort to interpretation in order to determine the content of CIL and what methods of interpretation do they use to this end? The answer to this question hinged on answering two preliminary questions. Firstly, what is interpretation and can customary rules be interpreted similarly to treaties? Secondly, how does this process of interpretation differ from identification of customary rules?

Chapters 1 and 2 aimed to answer these latter questions. **Chapter 1** explains the meaning of CIL interpretation and addresses the objections that have been advanced against using the term interpretation in relation to international custom. The definition of CIL interpretation relied on in this thesis was the following: the act of determining the meaning and/or scope of a customary rule the existence of which is not disputed. Put differently, when courts or other quasi-judicial bodies engage in interpretation their goal is not to find out whether or not the rule exists by looking at State practice and evidence of *opinio juris*. Instead, their object of inquiry is a rule that undoubtedly exists, but whose content is disputed. Establishing the content of the rule is necessary in order to be able to solve the case that the parties to the dispute have brought before the court/quasi-judicial body.

The objections that have been advanced in legal literature against CIL interpretation are premised largely on the meaning and the nature of the terms

interpretation and customary international law. Interpretation is defined by critics of CIL interpretation as the act of decoding of the meaning of a legal text or the act that involves an inquiry into the intent of the authors. Since, according to these scholars, customary international law lacks both, it cannot be subject to interpretation in the same way as treaty rules can. The other objections are premised on the nature of CIL. Firstly, it was argued that interpretation is superfluous in the case of customary rules because it would refer back to the original elements that make it up – State practice and *opinio juris* – and would, thus, start the cycle of identification anew. Secondly, it has been contended that interpretation is not necessary in the case of customary rules because they are not expressed in linguistic terms. In Chapter 1 of this thesis I have argued that the arguments that rest on the narrow definition of the term interpretation are based on the fail premise that interpretation, as a concept, is limited to finding the meaning of a text or the intentions of the parties. Bearing in mind different views on the meaning and the goal of interpretation, I argued that the primary goal of interpretation is that of determining the meaning and scope of a legal rule and not the establishment of the intentions or the meaning of a text.

Another argument against the interpretability of custom rests on the characteristics of customary rules. It says that any exercise of interpretation would entail looking back at State practice and *opinio juris*, which would essentially mean a new cycle of identification. This view does not distinguish between the elements of custom and customary rules. The notion of customary international law and, more accurately, customary rule is used to denote the legal norm which is brought about by repeated usage that is accepted as law. This norm emerges after a repeated, widespread, consistent and representative practice conducted with the sense of legal obligation has taken place. Put differently, State practice conducted with the sense of legal obligation creates a rule of customary international law, which is the result of custom understood as a process of law-creation, and the subsequent behaviour is engaged in because a rule in this sense has emerged. This means that a

customary rule is more than just State practice and *opinio juris* as the legal norm does not identify with the verbal proposition, the gesture or behaviour that gives rise to it.

The fact that the object of CIL interpretation is the customary rule and not the elements of custom means that the process of interpretation of customary rules does not restart the process of identification and, therefore, it is not superfluous in the case of CIL. Moreover, since CIL interpretation is concerned with the customary rule and not its elements, it is just as necessary to customary rules as it is to treaty rules.

Chapter 2 centers on drawing the distinction between the identification and, in particular, the so-called interpretation of State practice and *opinio juris*, which takes place at the level of identification, and interpretation of customary rules. In relation to State practice and *opinio juris,* the term interpretation has been used to describe (1) the process of evaluation of the mass of State practice and *opinio juris* when there is contradictory practice, (2) the process of inferring the relevant customary rule from the mass of State practice, or (3) the process of analysis of a singular sample of State practice and the motivation behind it.

In this chapter I have argued that while the term interpretation has been applied in legal literature and in case law to the elements that make up custom – State practice and *opinio juris* – this type of interpretation is different from the interpretation of customary rules, which is akin to treaty interpretation. I have spelled out the reasons why the term 'interpretation' does not accurately describe what happens in these instances and have argued that in the interest of terminological consistency the term 'interpretation' must be reserved for interpretation of the customary *rule*, mirroring thus the language of treaty interpretation.

In **Chapters 3, 4 and 5** the inquiry zoomed into the methods of interpretation that have been identified in the case law of international courts, quasi-judicial and dispute settlement bodies. To make the analysis more coherent, consistent and accessible, these three chapters followed a largely similar structure. In

each chapter I have looked into the meaning of each method of interpretation. Then I have analyzed the ways in which it was used in treaty interpretation and subsequently how it was used to interpret customary rules.

Chapter 3 examined the use of ordinary meaning and that of object and purpose that are found in Article 31 of the VCLT on treaty interpretation. In this chapter I have argued that similar to what happens in treaty interpretation, international courts and international quasi-judicial bodies have relied on the standard of ordinary meaning and object and purpose to interpret rules of customary international law. In this chapter I have derived some patterns in the use of these methods of interpretation. While the elements found in Article 31 VCLT, namely, ordinary meaning and purpose have also been used to interpret rules of customary international law, the two elements are used independently from each other. Interpretations based on purpose do not clarify the meaning of the terms, but are used as standalone means of interpretation. Moreover, the purpose against the background of which interpretation is made in the case of customary rules is either the purpose of the rule or the purpose of the branch of law to which the rule belongs. The analysis also showed that the interpretation of customary rules by reference to purpose often goes hand in hand with considerations of reasonableness and consequence-based arguments. Finally, yet importantly, it was argued that the use of the elements contained in Article 31 VCLT should not be construed as either an application of Article 31 to the interpretation of CIL rules, either directly or by analogy, but owes to the universal character of these methods in legal interpretation.

Chapter 4 looks into the use of treaties and general principles of laws as reference points in the interpretation of CIL and discusses the extent to which this is similar to systemic interpretation under Article 31(3)(c) of the VCLT (the use of other relevant rules). In order to do so, I firstly distil the different meanings that systemic interpretation has in treaty interpretation and subsequently use them as an analytical framework for my analysis on the

interpretation of CIL. I have found that other rules may essentially fulfil four different functions, all under the title of systemic interpretation/integration: (1) other rules as an aid to determine the ordinary meaning of the terms, (2) other rules may be used as a tool for systemic arguments, (3) other rules may be used as tools for gap-filling or (4) other rules may be used as a tool for the resolution of normative conflict, the latter two of which go beyond the meaning of interpretation adopted in this thesis.

In the case of the interpretation of customary rules by reference to treaties and general principles, the use of these two sources of law mainly fulfils the second function, that of a tool for systemic arguments. Yet, the application of this method of interpretation is not always flawless.

Chapter 5 explored the methods of interpretation that are not found in the VCLT, but which appear to have been used not only to interpret treaties, but also to interpret customary rules. These are necessary implication and evolutive interpretation. The first part of this chapter discusses the liberal use by the ICJ of the term necessary implication and the grounds or elements from which the Court derives implications that are, in its view, necessary. Further, I examine how necessary implications can be used to interpret the content of customary rules and where necessary implications have been misused. In the second part of this chapter, I have examined the content and use of evolutive interpretation in the interpretation of custom. It has been argued in legal scholarship that customary international law can be and has been interpreted evolutively in the practice of international criminal courts. I have refuted this understanding of evolutive interpretation of CIL, but have argued that there are cases that seem to support the conclusion that evolutive interpretations are possible in the case of customary rules. At the same time, I argued that the most important challenge posed by evolutive interpretations in the case of customary rules is how to justify an evolutive reading of CIL rules, especially given the already developed criteria that are used by the ICJ to determine whether or not an evolutive interpretation is warranted.

Overall, this study not only disproves the fact that customary rules cannot be interpreted in a similar way as treaty rules can and presents the different methods that international courts and tribunals have used to interpret CIL, but also aims to contribute in the future to the creation of a set of rules or recommendations that would allow judges to craft their arguments on CIL in such a way that it increases the transparency and persuasiveness of judicial reasoning on the content of CIL.

BIOGRAPHY

Marina Fortuna joined the University of Groningen as a PhD candidate in 2018 when she joined the TRICI-Law ERC funded research project. Prior to that she completed an LLM in International Law and the Law of International Organizations (*cum laude*) at the University of Groningen and an LLB degree (*cum laude*) at Babeș-Bolyai University.

Before her PhD, she worked as an intern at two law firms and at the Romanian Ministry of Foreign Affairs. During her PhD, she completed an internship at the United Nations Human Rights Committee in Geneva and has also been awarded a scholarship to follow the Hague Academy International Law programme. While pursuing her PhD, she also taught at the LLB and the LLM levels at the University of Groningen.

In the context of the TRICI-Law project, she has authored four publications on the interpretation of customary international law and co-authored one blog post and one contribution to an edited volume. She has also been the main organizer of the 2nd TRICI-Law conference on 'Interpretation of CIL: Methods, Interpretative Choices and the Role of Coherence', co-organized with PluriCourts and the Transboundary Legal Studies Department of the University, and one of the editors of the output of this conference which is forthcoming at the end of 2023 and will be published by Cambridge University Press.

Marina's research focuses primarily on the practice of international courts (ICs) and quasi-judicial bodies (QJBs), especially that of the ICJ, human rights courts and quasi-judicial bodies and international criminal tribunals, which she examines from the perspective of different topics that belong to general international law. The topics she has previously researched include impartiality of judges for expressed opinions on legal matters, the use of customary international law in the practice of ICs and QJBs, methods of treaty interpretation and methods of customary international law interpretation in ICs and QJBs. Her research interests are always expanding and, currently, her secondary research interests lies in the field of science (in particular, psychology and bioethics) and international law.

As of November 2023, Marina will take up a position as Assistant Professor of Public International Law at the University of Groningen.