The Practical Question of the Interpretation of Customary International Law

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The featured monograph in this symposium – *The Theory, Practice, and Interpretation of Customary International Law* – offers welcome engagement with the question of whether there can be such a thing as interpretation of customary international law. The International Court of Justice (ICJ) has recognized, in general terms, that it is possible to speak of "the methods of interpretation and application" of customary international law (*Armed and Paramilitary Activities*, ICJ Rep 1986, p 14, 95, para 178). It has also spoken of determining the meaning of particular terms in a rule of customary international law, such as in *Barcelona Traction*, where it reasoned in terms of "interpreting the general rule of international law concerning diplomatic protection" (*Barcelona Traction*, ICJ Rep 1970, p 3, 38, para 54). But the question of the interpretation of customary international law – as was the case with the question of the interpretation of treaties some fifty or seventy-five years ago – is one that cries out for scholarly engagement.

Arguments Informed by Practice in International Life

Although the treatment of this question by the contributors to *The Theory, Practice, and Interpretation of Customary International Law* does not lack in theoretical sophistication, the chapters that deal with this particular question (i.e. the Chapters by *Merkouris*, *Fortuna*, and *Gorobets*) do not lose sight of the practical aspects of the question of the interpretation of customary international law. As *Fife* has observed, the function of interpretation generally is the formulation of the legal rule to be applied *in a given situation* ("Les techniques interprétatives non juridictionnelles de la norme internationale" (2011) 115 RGDIP 367). Interpretation, whether of treaties or of customary international law, is not a theoretical undertaking or one deracinated from the practical realities of international life: it is undertaken with a view to "*dégager le sens exact et le contenu de la règle de droit applicable dans une situation donnée*" (M Forteau, A Miron and A Pellet, *Droit international public* (9th edn, LGDJ 2022) 327). It is interesting in that regard to note that practically minded international lawyers of distinction, such as *Lacharrière* (in his *La politique juridique extérieure* (Economica 1983)) and *Fife* (*op. cit.*), seem to take it for granted that customary international law, in common with other norms of international law, very often cannot be applied before it has been interpreted.

Is There Room for Interpretation of Customary International Law?

Merkouris' fine chapter on the question of interpretation of customary international law tackles head on the contentions put forward by those who argue that there is no room for the interpretation of customary international law. A particular contention

with which *Merkouris* takes issue is that there is identity between the content of a rule of customary international law and its existence. As he argues, such an approach seems to put too much faith in the level of precision of rules of customary international law (*The Theory, Practice, and Interpretation of Customary International Law*, 349). In *Gulf of Maine,* the Chamber of the International Court of Justice warned against precisely such an approach:

> "[a] body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community" (ICJ Rep 1984, p. 246, 299, para 111).

A similar point emerges from *Colombia v Nicaragua*, where the Court considered the customary international law status of Article 76 of the United Nations Convention on the Law of the Sea. The Court held only that the general definition in Article 76(1) UNCLOS formed part of customary international law. It stopped short of concluding that the ready-made set of rules in the subsequent provisions of Article 76, which establish the methodology for determining the outer edge of the margin, formed part of customary international law (*Territorial and Maritime Dispute*, ICJ Rep 2012, p 624, 666, para 118).

In fact, when the Chamber in *Gulf of Maine* continued, as it did, to observe that it would be unrewarding "to look to general international law to provide a ready-made set of rules", and reasoned instead that "[a] more useful course is to seek a better formulation of the fundamental norm" (*ibidem*), it seemed to suggest that the interpretation of customary international law was not only possible, but at times indispensable.

Another contention to which *Merkouris* takes his finely ground axe is that there is no room for the interpretation of customary international law because it is not a written source of international law. *Merkouris* points out that, even on the approach of Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT), it is apparent that interpretation of non-written expressions is possible: examples would include the subsequent practice of the parties in their application of the treaty, the circumstances of its conclusion, and the commodious category of "context" itself. This is borne out in the practice of international law: in the French–American *Air Transport Services* case, the tribunal interpreted, in minute detail, the "attitudes" of France and the United States, on the basis not only of texts, or other kinds of linguistic expression, but of their comportment ((1963) 16 RIAA 61–3). Similarly the Chamber of the Court, in the previously mentioned *Gulf of Maine*, had no problem in discussing "unilateral conduct" by a State as something that was capable of interpretation (p 305, para 130).

Fortuna, whose chapter has the merit of introducing to English speaking audiences classic writings in the field in French (*de Visscher*, *Sur*) and German (*Bleckmann*), takes a similar approach to *Merkouris*. She points up differences of approach as between the interpretation of treaties and the interpretation of customary international law. *Gorobets*, in his nuanced chapter, argues that the focus of interpretation of customary international law must necessarily be State practice:

it is, he argues, an enquiry into "what, how, in which circumstances, and so on, participants of a certain practice do and not do" (*The Theory, Practice, and Interpretation of Customary International Law*, 375).

Scholarly contributions continue to be written, however, which argue with some vigour that "the case for the interpretability of customary rules is not convincing" (e.g. M Lando, "Identification as the Process to Determine the Content of Customary International Law" (2022) 42 OJLS 1042, 1042). There is, indeed, the authority of *Treves* for the proposition that "though language is necessary to communicate their content, expression through language is not an indispensable element of customary international law rules". This means, in his view, that "[t]he irrelevance of linguistic expression excludes interpretation as a necessary operation in order to apply them" ("Customary International Law", *Max Planck Encyclopedia of International Law*, 2006, para 2). The insights of *The Theory, Practice, and Interpretation of Customary International Law* invite scrutiny of such statements. In fact, *Treves* concedes that, in modern times, rules of customary international law have developed in connection with written texts, the interpretation of which might be relevant for the determination of the existence and contents of the rules. In fact, "contemporary customary international law, although unwritten, is increasingly characterized by the strict relationship between it and written texts" (*ibidem*).

What is Being Interpreted?

On *Gorobets'* approach the focus of the interpretative process would be State practice, what he terms "what, how, in which circumstances, and so on, participants of a certain practice do and not do" (p 375). There may be some support in the case-law of the International Court of Justice for this contention: in *Chagos Archipelago,* the ICJ was confronted with the customary international law rule of the self-determination of peoples, which the Court said had "a broad scope of application" (*Chagos Archipelago*, ICJ Rep 2019, p 95, 131, para 144). When the Court advised that the exercise of self-determination "must be the expression of the free and genuine will of the people concerned" (p 134, para 157), surely it was interpreting the broad rule of customary international law in the context of the facts of the case. The Court pointed out that "States have consistently emphasized that respect for the territorial integrity of a non-self-governing territory is a key element of the exercise of the right to self-determination under international law" (p 134, para 160). On that basis, it was able to conclude that the specific legal rule to be applied in the given situation before it was that "any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination" (*ibidem*). By pointing to what States had consistently emphasized in their practice, the Court could be said to be following *Gorobets'* approach. But perhaps the more important aspect of the Court's interpretation is its focus on ensuring something like the *effet utile* of the rule? What the Court did was ensure that the broad rule of self-determination was capable, in the circumstances of the case, of applying effectively in keeping with the rationale undergirding the rule. These and similar (it is hoped) productive speculations are what the excellent

collection *The Theory, Practice, and Interpretation of Customary International Law* inspires in a grateful readership.
