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Customary International Law

Identification versus Interpretation

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1 Introduction

When dealing with a difficult issue such as the theory of interpretation,[1] the first obstacle to be faced concerns the nature of the object under examination: is interpretation relevant to a point of law or not?[2] Each doctrinal orientation would give a different answer. Some scholars consider that interpretation is an intellectual operation;[3] others define interpretation as a creative activity;[4] still others argue that interpretation is a linguistic issue, maybe even a methodological one, but, in any case, not a legal matter.[5] On the contrary, some scholars incorporate the study of interpretation into positive law:[6] by perceiving the legal

[1] A complete bibliography on legal interpretation is almost impossible to collect, since it has been studied extensively throughout time. Hence, only those which seem most useful to understand the current problems will be indicated below: E Betti, *Interpretazione della legge e degli atti giuridici* (Giuffrè 1949); S Pugliatti, *Conoscenza e diritto* (Giuffrè 1961); HLA Hart, *The Concept of Law* (Clarendon Press 1963); G Tarello, *Diritto, enunciati, usi: Studi di teoria e metateoria del diritto* (il Mulino 1974); N Bobbio, *Per un lessico di teoria generale del diritto* (CEDAM 1975); G Tarello, *L'interpretazione della legge* (Giuffrè 1980); E Betti, *Teoria generale dell'interpretazione* (Giuffrè 1990); H Kelsen, *On the Theory of Interpretation* (Cambridge University Press 1990); R Guastini, *Le fonti del diritto e l'interpretazione* (Giuffrè 1993); F Modugno, *Interpretazione giuridica* (CEDAM 2012).

[2] Interpretation is a human activity which goes well beyond the boundaries of law. Any human activity can be the object of interpretation, from music to language to paintings to dreams, from scientific theories to archaeological remains. A theory of legal interpretation should rest, therefore, on a general theory of interpretation.

[3] S Romano, *Frammenti di un dizionario giuridico* (Giuffrè 1947).

[4] 'The interpretation by the law-applying organ is always authentic. It creates law.' H Kelsen, *Pure Theory of Law* (University of California Press 1967) 354.

[5] See M Heidegger, *Being and Time* (Harper & Row ed 1962); HG Gadamer, *Truth and Method* (Bloomsbury Academic 2013).

[6] See N Bobbio, *Il positivismo giuridico* (Giappichelli Editore 1996).

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character of the object, they act on the ground of the so-called rules of interpretation.[7] It is impossible to give an exhaustive picture of such a debate in only a few lines.[8] I will confine myself to note that international law writers consider the matter under a different light compared to scholars of other juridical systems. In fact, with respect to public international law, a clear position has already been taken: I refer to the Vienna Convention on the Law of Treaties (VCLT)[9] that, while codifying the law of treaties,[10] included certain *rules* of interpretation.[11] Even though sometimes slightly modified, these rules of interpretation have been constantly applied by international tribunals. Internationalists, usually hindered by the soft formalism of the international legal order, in this matter enjoy a privileged position.

To interpret a rule means to seek and understand its exact meaning, and, as a consequence, to clarify its scope, in order to be able to correctly apply it to the material case. In fact, since a rule is susceptible to different applications – because of its character of generality and abstractness – that content must be specified from time to time for the particular case. To determine the meaning of a rule, thus, the interpreter must accomplish a task of cognition (or recognition). This creative activity also raises practical issues: to which types of rules can interpretation be applied? Which theoretical-methodological tools should the interpreter use? With regard to customary rules, is it possible to separate the two distinct processes of identification and interpretation?

[7] R Quadri, *Diritto internazionale pubblico* (Priulla 1960).

[8] For a complete overview on this topic see N Bobbio, *Giusnaturalismo e positivismo giuridico* (Editori Laterza 2011).

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

[10] See among others F Capotorti, *Il diritto dei trattati secondo la Convenzione di Vienna: studio introduttivo al volume Convenzione di Vienna sul diritto dei trattati* (CEDAM 1969); R Ago, 'Droit des traités à la lumière de la Convention de Vienne' (1971) 134 RdC 297; G Gaja, 'Trattati internazionali' in *Digesto delle Discipline Pubblicistiche*, Vol XV (UTET 1988) 344.

[11] On treaty interpretation, *ex multis*, see D Anzilotti, 'Efficacia ed interpretazione dei trattati' (1912) Rivista di diritto internazionale 520; H Lauterpacht, 'Les travaux préparatoires et l'interprétation des traités' (1934) 48 RdC 709; C De Visscher, 'Remarques sur l'interprétation dite textuelle des traites internationaux' (1959) 6 Nederlands Tijdschrift voor Internationaal Recht 383; V Degan, *L'interprétation des accords en droit international* (Martinus Nijhoff 1963); MK Yasseen, 'L'interprétation des traités d'après la convention de Vienne sur le droit des traités' (1976) 151 RdC 1; M Fitzmaurice, O Elias & P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of the Treaties: 30 Years On* (Martinus Nijhoff 2010).

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Bearing in mind the horizontal nature of the international legal system[12] as well as the important role played by customary rules in public international law, it is worth considering the following question: is it possible to apply to custom the international rules of interpretation (that, on their turn, are customary too)? In other words, is it possible to interpret customary international law (CIL) or can it only be identified? Hence, how can internationalists distinguish interpretation from identification with respect to customary rules? Has the International Court of Justice (ICJ or 'the Court') provided some methodological tools in this regard?

The recent codification promoted by the United Nations, in relation to the identification of customary rules,[13] has prompted the author to reflect about such questions.[14] At the end of its work, the International Law

[12] As far as the main subject of this chapter is concerned, it is worth mentioning that the role of interpretation is closely related to the legal system taken into consideration. The more homogeneous it is, consisting of harmonised rules, written and adapted to the system in its entirety, the more the role of the interpreter tends to be marginal. On the contrary, if these rules are few, poorly coordinated and moreover unwritten, the interpretative activity is of fundamental importance and covers a very wide scope. The international legal system undoubtedly falls into this second category. In this system, in fact, the interpretative function is not centralised: the power to interpret belongs to all subjects of the international community. This has inevitably led to a fragmentation of the methods of interpretation, which, although jointly established between the states, are optionally applicable and, thus, extremely uncertain.

[13] ILC, 'Report of the International Law Commission on the Work of its 70th Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10.

[14] The doctrine on the subject under examination is very broad considering that every book of public international law dedicates at least one chapter to CIL. However, for an exhaustive overview of the relevant doctrine, the following should be consulted: H Kelsen, 'Théorie du droit international coutumier' (1939) 1 Revue internationale de la théorie du droit 253; N Bobbio, *La consuetudine come fatto normativo* (Giappichelli 1942); R Ago, *Scienza giuridica e diritto internazionale* (Giuffrè 1950); G Barile, *Diritto internazionale e diritto interno* (Giuffrè 1957); LM Bentivoglio, *La funzione interpretativa nell'ordinamento internazionale* (Giuffrè 1958); P Ziccardi 'Consuetudine (diritto internazionale)', *Enciclopedia del diritto IX* (1961) 476; N Bobbio, 'Consuetudine (teoria generale)' (1962) IX *Enciclopedia del diritto* 426; C de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Pedone 1963); G Tunkin, *Droit international public: problèmes théoriques* (Pedone 1965); N Bobbio, 'Fatto normativo' (1967) XVI *Enciclopedia del diritto* (1967) 988; G Morelli, 'A proposito di norme internazionali cogenti' (1968) 51 Rivista di diritto internazionale 108; RR Baxter, 'Treaties and Custom' (1970) 129 RdC 31; A D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971); RJ Dupuy, 'Coutume sage et coutume sauvage' in C Rousseau (ed), *Mélanges offerts à Charles Rousseau: la communauté internationale* (A Pedone 1974) 75; S Sur, *L'interprétation en droit international public* (LGDJ 1974); G Arangio-Ruiz, 'Consuetudine internazionale', *Enciclopedia Giuridica* VIII (1988); L Condorelli, 'Consuetudine internazionale' in *Digesto delle discipline pubblicistiche*,

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Commission (ILC) reached highly practical draft conclusions.[15] Indeed, pointing out that the determination of the existence of a customary rule and of its content would be simultaneous processes,[16] the ILC seemed not to have independently dealt with the content-ascertainment issue of CIL, nor with the similarly interesting topic of its meaning-determination. Namely, whether a particular unwritten rule could be interpreted (even or exclusively?) after its identification. It is also worth noting that the relation between customary rules and rules of interpretation – the latter being usually considered relevant only for written rules – has been scarcely investigated in international legal literature.

In this chapter I shall draw a schematisation of the differences (many) and similarities (very few) between the processes of identification and interpretation of an international rule: in particular CIL.[17] By following

Vol III (UTET 1989) 490; R Kolb, *Interprétation et création du droit international* (Bruylant Editions 2006); G Arangio-Ruiz, 'Customary Law: A Few More Thoughts on the Theory of "Spontaneous International" Custom' in J Salmon (ed), *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon* (Bruylant 2007) 93; A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008); D Alland, 'L'interprétation du droit international public' (2014) 362 RdC 41; P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill Nijhoff 2015); S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) EJIL 417; A Gianelli, 'Consuetudine (diritto internazionale)', *Treccani* (2017) <https://bit.ly/3F1QjcG> accessed 18 December 2021.

[15] Both the conclusions and the commentaries aim to offer practical guidance on how the existence (or non-existence) of rules of CIL is to be established. In the end, the ILC, while able to avoid some of the theoretical debates connected with the formation of CIL given its focus on identification, has recognised that in practice the formation and identification cannot be distinguished. See ILC, 'Summary Record of the 3151st Meeting' (27 July 2012) UN Doc A/CN.4/SR.3151, 168[52] (Nolte); ILC, 'Summary Record of the 3183rd Meeting' (19 July 2013) UN Doc A/CN.4/3183, 92[18] (Hmoud); ILC, 'Summary Record of the 3185th Meeting' (24 July 2013) UN Doc A/CN.4/3185, 103[14] (Singh).

[16] Broadly speaking, the UN General Assembly has finally accepted that: 'To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.' See ILC, 'Draft Conclusions on the Identification of Customary International Law' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 11, Conclusion 16 [65].

[17] One caveat is in order. The following presentation is a synthesis. Within the confines of this chapter, it is not possible to deal with the very large topic of interpretation of CIL as a – logically and practically – distinct moment from its identification. My intention is to highlight the relevance of this subject and, for this reason, I would like to lay the foundations for solving (or, at least, try to solve) some questions I will illustrate. I will simply provide a summary of certain critiques that have been expressed with regard to the interpretability of CIL combined with some attempts to solve this debate.

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a positivist approach – which reflects, at the same time, the reality of the social phenomenon to which international law refers and its historical evolution – I will try to take into account the close connection with the dynamics of international relations, proper to the relationship between the international community and the law which regulates it. This chapter will therefore aim to present international law as it results from the practice of international actors on the one hand and, on the other, as it is interpreted by international jurisdictions, in particular by the ICJ.

My argument is developed in two parts. After providing a plausible definition of interpretation in international law, I will investigate – by taking as main example the *Jurisdictional Immunities of the State* case – both legal and logical differences between the two distinct moments of identification and interpretation of a customary rule.

2 A Fundamental Preliminary Definition

The interpretation of international law in general[18] poses a multitude of challenges:[19] one of these is that its rules are often extremely indeterminate. In fact, sometimes they are unwritten,[20] like CIL. Unwritten rules present, especially in public international law, a peculiar issue of interpretation. There is no text and, despite this, they would appear to be constantly interpreted. In fact, the very fact that the customary rule is not written, makes this rule even more subject to a heterogenesis of meanings. It is therefore very difficult not to ask the fundamental question: is CIL subject to the interpretative rules of international law? And by consequence, in practice, are customary rules interpreted or are they only identified? It should also be noted that interpretation, being a ubiquitous and helpful activity for the intricate nature of the discipline of international law, can potentially produce conflicts between rules too. Yet even if it is taken as a ubiquitous activity, it does not mean that interpretation is a homogeneous and unitary phenomenon. According to the interpretative process, judges interpret the rule which they are

[18] For a detailed analysis, see for instance: LM Bentivoglio, 'Interpretazione delle norme internazionali', *Enciclopedia del diritto XXII* (1972) 310; Bentivoglio (n 14); H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958); de Visscher (n 14); Sur (n 14); Kolb (n 14); Alland (n 14); Orakhelashvili (n 14); Merkouris (n 14).

[19] See E Betti, *Problematica del diritto internazionale* (Giuffrè 1956).

[20] See P Ziccardi, 'La consuetudine internazionale nella teoria delle fonti giuridiche' (1958) 10 Comunicazioni e studi 190.

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empowered to apply, with a view to determining (or creating, according to a Kelsenian account[21]) the normative guideline for the case of which they are seized. This activity consists in an interpretation for meaning-determination purposes, which is surely not an activity reserved only to the judges. In fact, any professional dealing with international law will undertake this operation.[22] Nevertheless, it is within the context of adjudication that the interpretative activity is the most visible. Excluding those who in no way allow customary law to be interpreted, I now refer to those who argue that the interpretation of a custom is contextual to its identification. The main point to be made here is that our understanding of interpretation of a customary rule should not be limited to its identification process. This particular distinction between the content-ascertainment process and the scope-determination process of a customary rule is, in my opinion, essential to understand the concept and the practice of interpretation as well as the general concept of law. Mainstream studies of interpretation in international law look almost exclusively at the content-determination of a customary rule. However, what allows a rule to be applied involves an act of interpretation. When applying a custom, the judge, the practitioner, or the academic necessarily try to clarify the meaning of some pre-existing – thus, already identified – customary international rules.[23] Hence, to fully understand the distinction – in my

[21] See Kelsen (n 4).

[22] No authority in the international legal system has been able to legitimise itself as a monopolistic interpretative entity for international legal rules. Neither the establishment of a world court nor the Institut de Droit international, intended to mirror '*the legal conscience of the civilized world*', came to balance the lack of a supreme guardian of the interpretative activity in the community of international lawyers. Interpretative power in international law has accordingly persisted extremely scattered. Today, this activity is diffused between domestic and international courts, universal and regional codifying bodies as well as prominent and creative minds affiliated with prestigious research institutions, which clash with one another for authority and persuasiveness in the interpretative activity.

[23] See Kelsen (n 4): 'there also exists an interpretation of the norms created by international treaties or of the norms of general international law created by custom, if these norms are to be applied in a concrete case by a government or an international or national court or an administrative organ'; see also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA)* (Judgment) [1984] ICJ Rep 246. That dispute did not concern the existence of the customary rule in question, on which both the parties involved and, above all, the whole international community '*agreed*', but rather a clearer determination ('*better formulation*') of its content. In addition, Judge Gros, in his dissenting opinion, maintained that the ICJ a few years earlier had proceeded to interpret general international law concerning the delimitation of the continental shelf, whose existence was not questioned, pursuant to the provisions of the draft convention provided by the Third United Nations Conference on the Law of the Sea. This, exclusively

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opinion not only terminological – between identification and interpretation that I will try to outline in this chapter, it seems appropriate first to define what is meant by interpretation of a rule: ascertainment of content or determination of meaning? If the scholarly debate does not preliminarily agree on the definition to give to the interpretative activity, it seems useless to carry on.[24] This is precisely the point that deserves a preliminary, more careful reflection. If by interpretation we mean determination of content, it seems natural to affirm that the interpretative process of a customary rule is absorbed in its identification process and that, by consequence, it takes place at the same time as the ascertainment of its existence. If, on the contrary, we define interpretation as the operation by which the meaning of a legal provision is reconstructed, in order to understand its scope, it would seem logical to maintain that such activity is carried out at a different time from that of its identification. As a result, if the second definition of interpretation is accepted, it would appear that the answer to this question does not raise too many difficulties and that it is therefore possible to clearly distinguish between the activity of identification and that of interpretation.

3 Identification versus Interpretation

First of all, it is necessary to provide some tools in order to deal with the peculiar distinction between 'identification' and 'interpretation' of a rule in general, and, in particular, of a customary rule.[25] With respect to customary

in order to clarify the content of the customary rule taken into account: 'The Court had already, in February 1982, revised the 1969 Judgment so far as delimitation of the continental shelf was concerned, by interpreting customary law in accordance with the known provisions of the draft convention produced by the Third United Nations Conference'. *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Dissenting Opinion of Judge Gros 360, 365 [8]. Hence, by admitting that identification and interpretation of a customary rule are two distinguished operations and therefore not always contextual, once the existence of a customary rule is ascertained, the interpreter will be able to analyse its content.

[24]

> We all have a world of things inside ourselves and each one of us has his own private world. How can we understand each other if the words I use have the sense and the value that I expect them to have, but whoever is listening to me inevitably thinks that those same words have a different sense and value, because of the private world he has inside himself, too.

L Pirandello, *Six Characters in Search of an Author* (Mineola 2000).

[25] According to some scholars, treaty interpretation and customary interpretation are two clearly distinct operations since they refer to two different sources of international law. See Judge Shahabuddeen who, in his dissenting opinion in the Advisory Opinion on the *Nuclear*

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rules, in fact, the confusion between the two concepts is at the root of numerous misunderstandings and essential divergences. As far as treaty law is concerned, interpretation and identification are two, clearly separate, processes. Treaties are generally easy to identify and in most cases, once their identification is completed, it is possible to interpret their content with ease. Instead, when dealing with unwritten rules, specifically with customary rules, this distinction does not seem to be so evident. In this case, the analysis seems to concern two groups of elements: those relevant to the emersion process of the rule (state practice and *opinio juris*), on one side and the written and/or verbal formulations of the rule (generally retrospective, but sometimes programmatic or even concomitant) defined by a number of actors (judges, diplomatic chancelleries, scholars, etc.), that spare no efforts to express with words the customary rule, on the other.[26]

Both identification and interpretation processes have been the object of formalisation by international legal scholars. International lawyers have long attempted to balance the uncertainty of the meaning of rules through a definition of the techniques and methods of the interpretative process. The process of such formalisation has not followed the same path for interpretation and identification, the two concepts being substantially distinct. With regard to interpretation, scholars have tried to delineate its criteria, finding a compromise between intentional, purposive and textual methods. On the one hand, the VCLT can be seen as the epitome of this effort to delineate the techniques of interpretation.[27] On the other hand, as

Weapons case, stated that: 'the purpose of the Martens Clause was confined to supplying a humanitarian standard by which to interpret separately existing rules of conventional or CIL on the subject of the conduct of hostilities'. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 375, Dissenting Opinion of Judge Shahabuddeen.

[26] When the judges deal with a customary rule, they are naturally led to take into consideration and try to coordinate the different formulations (juridical, diplomatic, etc.) of such rule. At least this seems to be the process followed. Written formulations helped to clarify the meaning of certain customary rules and to consolidate it in the international system. The meaning of certain customary rules defined over the years – such as, for example, those establishing territorial sovereignty, freedom of the high seas, the relative effect of treaties or the immunities – has been subject to a perceptible interpretative work frequently accompanied by a harmonising effort of the '*auctoritas*' – doctrinal or jurisdictional – which expressed case-by-case the meaning of those customary rules.

[27] The debate on the delineation of the most appropriate method of interpretation in international law can be traced back to Grotius, the upholder of the subjective method, which was later opposed by Vattel, proponent of the objective method. In H Grotius, *De iure belli ac pacis* (1625) Grotius entirely dedicated Chapter XV of Book II to public conventions and, starting from the Roman jurists, used Ulpian as the main source for his examination. One of the chapters of Vattel's *Droit des gens* which received much acclamation as well as many criticisms during the eighteenth and nineteenth centuries

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to identification, recent works of the ILC on 'identification of customary international law' can be considered the embodiment of such an attempt to formalise the recognition methods of customary law. The suggested dichotomy implies a practical discrepancy between interpretation and identification,[28] each of these processes accomplishing a peculiar operation. The former seeks to explicate the meaning of rules with a view to establishing the standard of conduct, hence, the scope of the rule. The latter intends to determine how a given rule is a part of the international legal order. This means that interpretation is supposed to define meanings and standards of behaviour, while identification is meant to build a double architecture of ascertainment that differentiates law and non-law. Consequently, as far as both customary and treaty rules are concerned, while 'identification' seems to be an intellectual phenomenon, 'interpretation' appears a purely legal operation. More precisely, the first seems to consist in 'representing' a rule, the second in 'building it'[29] or, to put it in another way, to rebuild it on the basis of certain legal methods.[30]

is certainly the one dealing with the problem of treaty interpretation. Here, Vattel explained why legal doctrine should lay down general criteria for interpreting international rules. According to the Swiss jurist, the interpretative rules – recognised through natural law – are, in fact, those '*capables de répandre la lumière sur ce qui est obscur*'. It does not seem bizarre to try to find interpretative methods of customary rules in other generally recognised interpretative rules. One could, for example, apply rules of legal interpretation developed in Roman law (as internationalists did with respect to treaty law). Legal interpretation, indeed, still remains a logical operation. Notably, this operation is guided by logical rules as well as by very general criteria that can be deduced from the nature and the character of the legal system. Perhaps the internationalist doctrinal tradition can be helpful today, especially on this, still '*obscure*', matter.

[28] Judge Morelli, in his dissenting opinion in the *North Sea Continental Shelf* case, affirmed the need to clarify (i.e., to interpret) the content of a customary rule even after its existence has been ascertained: 'Once the existence of a rule of general international law which confers certain rights over the continental shelf on various States considered individually is admitted, the necessity must be recognised for such a rule to determine the subject-matter of the rights it confers'. *North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* (Judgment) [1969] ICJ Rep 3, Dissenting Opinion of Judge Morelli 198.

[29] This operation is usually accomplished with the aim of obtaining a certain form of understanding of the rule. See M Klatt, *Making the Law Explicit: The Normativity of Legal Argumentation* (Oxford University Press 2008).

[30] As is well known, the three articles relating to the interpretation of treaties between states enshrined in the VCLT, have been subsequently reproduced as they stand in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) 25 ILM 543. It is usually believed that these principles of interpretation are of general application and that they can be used to interpret not only the treaties but also other sources of law, such as unilateral declarations, Security Council resolutions, or even contracts between

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Nevertheless, it seems likewise appropriate to admit that both processes of interpretation and identification of a customary rule can share some comparable characteristics. Such similar features may justify the fact that – with respect to customary law – they are often confused one for the other. The difficulty in categorising them and, by consequence, in denying the possibility to interpret the *ius non scriptum*,[31] is also intensified by the fact that in practice, according to many authors, they may be performed at the same time.[32] Nonetheless, by accepting the above-mentioned conceptual dissimilarities between the two operations, it seems difficult to argue that the process of identification of a rule is indistinguishable from the one of its interpretation, even in the case of an unwritten rule.[33] It is true that, in the case of a written rule, the determination of its content is clearer. That is evident. However, it is also true that although a written rule has (apparently) a clear content, this should be interpreted in the subsequent moment of the rule application. And the same operation, in my view, takes place with reference to customary rules too. These, in fact, once identified, have a (more or less) clear content. Afterwards, at the moment of the application to the

domestic entities and states (see *Eurotunnel, Channel Tunnel Group Limited and France-Manche S A v Secretary of Transport of the United Kingdom and Secretary of Transport of France* (Partial Award) (2007) PCA Case No 2003–06); therefore, it would seem natural to apply – *mutatis mutandis* – these general criteria of interpretation (which, in turn, are customary) to customary international rules: 'The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law.' *North Sea Continental Shelf cases*, Dissenting Opinion of Judge Tanaka 172; see also Kolb (n 14); Orakhelashvili (n 14); Merkouris (n 14).

[31] See Quadri (n 7); Bentivoglio (n 14); Degan (n 11); T Treves 'Customary International Law' [2006] MPEPIL 1393.

[32] According to some authors, the interpretative process of the custom is absorbed by the process of its identification. See in more detail: G Barile, *I principi fondamentali della comunità statale ed il coordinamento tra sistemi* (CEDAM 1969); R Monaco 'Interpretazione', *Enciclopedia Giuridica VIII* (1988); M Herdegen 'Interpretation in International Law' [2013] MPEPIL.

[33] In more than one case, the ICJ explicitly mentioned the possibility to interpret a customary rule without having made any allusion to its identification process. With regard to state responsibility, for example, in the *Nicaragua* case, the ICJ declared that it was possible to distinguish treaty law and customary international law 'by reference to the methods of interpretation and application'. It is also worth noting that, in this landmark case, the Court had no difficulties to closely correlate the two moments of interpretation and application of a rule. In so doing, the Court seemed to acknowledge that, as stated in the present chapter, identification and interpretation seems not to happen simultaneously, in reverse of what can occur with respect to the interpretation and application processes. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14 [178].

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particular case, this (the content) needs to be interpreted in order to exactly understand the scope of the rule. Consequently, to deny the possibility that such an operation is also applicable to customary rules would be detrimental to the correct and consistent application of the whole international law. This point of view intends, in fact, to assure the maintenance of a reasonable (logical and juridical) flexibility in the application of rules in general. Hence, in the application of customary rules too.

In order to better understand my perspective, I will refer to the 'dynamic' of customary rules. Such a 'dynamic' is obviously tied to the existence of the rule (formation and identification), but it can also involve the interpretation of the same (i.e., meaning and scope determination aimed at the rule application). In my opinion, those two 'dynamics' operate in a totally independent way to one another. In fact, they refer to two distinct operations: one thing is to investigate the dynamic of the existence of a customary rule (identification), and another is to analyse – once dealing with an already consolidated customary rule – the dynamic of its application, hence, its scope (interpretation).[34] Although in legal literature it is widely considered that the only logical path to follow is: first, identification (thus, the simultaneous interpretation); second, application of a customary rule, from my point of view, it would seem difficult

[34] Indeed, since customary law produces rules not formulated in a text, it often happens that the evidence of the two constitutive elements of a customary rule is theoretically and logically confused with the interpretation of a customary rule properly understood (unwritten). Nonetheless, it appears logical to distinguish these two operations too, since they refer to two distinct objects and to two distinct stages towards the application of a customary rule. Hence, bearing in mind the before-mentioned 'dynamic', customary rules interpretation should be also clearly distinguished from the process aimed at proving both its existence and content, through an examination of practice and *opinio juris*. While the 'examination' moment of practice and *opinio juris* can also take place when a customary rule is not yet born – and it exclusively refers to the two constitutive elements of a customary rule, not to the rule itself – the interpretative moment of a customary rule can only take place once its identification process (ascertainment of existence and content) has been completed. By consequence, once a customary rule has been identified, the clarification of its meaning will be a matter of interpretation. In this sense, the interpretative activity of CIL can be possible only with regard to an existing customary rule. More accurately and in short, the interpretative moment of a customary rule should be clearly distinguished from the evaluation moment of practice and *opinio juris*. Thus, it seems logical to argue that a customary rule, as distinct from each of its two constitutive elements, can be expressed verbally as well as in a written way. Therefore, since all customary rules are verbally expressible and since any verbal concept can be interpreted, customary rules should also be interpretable. However, this argument, although abstractly logical, needs to be practically proved.

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to deny that identification and interpretation take place in two distinct moment of the 'dynamics' of a customary rule. As a result, after the customary rule formation, by means of both a consistent and general international practice by states and a subjective acceptance of the practice as binding by the international community, once the rule is identified (i.e., its existence and its content are ascertained) – through an evaluation of its two constitutive elements – this can be applied to a particular case only after a preliminary interpretative operation. An important premise must be made to fully understand this point of view: by interpreting a customary rule I explicitly refer to an already identified rule, properly understood (i.e., unwritten) and not to its constitutive elements, nor to its written reformulation.

Its existence being totally uncontested, I will take as a main example the customary rule of state immunity in order to investigate whether and to what extent this distinction occurred in practice by exploring the thin border between rule modification (related to the dynamic of its existence) and rule interpretation (related to the dynamic of its application). The practical relevance of this matter has been particularly evident with regard to the *Jurisdictional Immunities of the State* case.[35] The object of the litigation dealt with '*the scope and extent*' of the customary rule, whose existence was recognised by Italy as well as by Germany, regarding foreign states' immunity from civil jurisdiction. Indeed, both parties admitted 'that States are generally entitled to immunity in respect of *acta jure imperii*',[36] but they disagreed on the scope of such a norm. Italy invoked the application of the so-called tort exception – that is, the absence of immunity in case of actions having caused death, personal injury or damages in the territory of the host state – also in relation to *acta jure imperii*. On the contrary, Germany – by giving a different interpretation of such rule, that is, by considering that this particular case did not fall within the rule's scope – denied the application of such an exception of the customary international rule. The ICJ itself stated that the parties' agreement on the existence and/or the content of a rule would not, after establishing the existence of this international custom (i.e., identifying it), exempt it from making its own evaluation on the scope and extension of state immunity (i.e., to make its own interpretation).[37] Hence,

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

[36] ibid [61].

[37] ibid [55]: 'the Court must determine, in accordance with Article 38 (1) (b) of its Statute, the existence of "international custom as evidence of a general practice accepted as law" conferring immunity on States and, if so, what is the scope and extent of that immunity'.

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in order to decide this case, did the court interpret or identify the customary rule under consideration? More generally, when a judge deals with a modification of a customary rule, does he identify the rule or does he interpret it? Both stances could be convincingly supported.[38] Nevertheless, in the *Jurisdictional Immunities of the State* case, by ruling upon the so-called tort exception, the ICJ seemed to confine its assignment to the identification of the existence of an exception from the general rule and, thus, stated the inexistence of such exception. However, the Court could have operated in a different manner. In fact, as asserted in the judgment, the ICJ task could also have been understood as an interpretation of the customary rule under consideration.[39] Without searching for the two constitutive elements of the customary rule on state immunity, aimed at confirming or not the existence of the tort exception, the ICJ could have interpreted the customary rule on state immunity – already identified and uncontested by the parties – in order to establish the scope of the same: that is, whether and to what extent it could have been applied to this specific case. As mentioned above, since examining state practice and *opinio juris* reveals the existence and the content of the rule and does not explain whether this rule is applicable or not to the particular case, in order to apply a rule to a specific case, it seems crucial to investigate the scope and the extent of the same (to interpret it), and not anymore its existence (to identify it).[40] In fact, any operation by which a rule is applied requires a prior interpretative activity. The application to a particular case of a general and abstract rule, logically implies the determination of its meaning too. Without such operation, it would not be even possible to understand all the legal consequences resulting in that particular case. In other words, the problem of legal

[38] On the difficulty to discern these two performable logical operations by the ICJ see Gianelli (n 14).

[39] In its jurisprudence, the Court itself stated very clearly that interpreting customary rules is one of its tasks. 'The Court is of the opinion that, for the purpose of interpreting the general rule of international law concerning diplomatic protection, which is its task, it has no need to determine the meaning of the term interests in the conventional rules, in other words to determine whether by this term the conventional rules refer to rights rather than simple interests'. *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 [54]. Furthermore, even after an international case law short examination, it is possible to observe the ICJ interpretative activity with respect to various areas of CIL, namely: law of the sea, state responsibility, international humanitarian law, diplomatic protection, state immunity, etc.; see *North Sea Continental Shelf*; *Military and Paramilitary Activities in and against Nicaragua*; *Nuclear Weapons Advisory Opinion*; *Barcelona Traction*; *Jurisdictional Immunities of the State*.

[40] Indeed, the main task of the judge is to investigate the legal meaning of the applicable rule and the scope of its application.

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interpretation cannot be circumvented since it is always indispensable (and propaedeutic) for the rule application. Therefore, by taking the *Jurisdictional Immunities of the State* case as main example, my purpose is to highlight how in practice identification and interpretation processes can both be easily performable and, by consequence, often confused. This case is particularly relevant for my argument since here it is evident how thin the line between the two operations can be, one related to the 'dynamic' of a rule existence, and the other related to the 'dynamic' of a rule application.

The logical correlation between the two moments of interpretation and application, with respect to customary rules too, can also be grasped by observing the conduct of the actors obliged to comply with the customary rule provision: the states. The customary rule, already identified, conditions their behaviour through an intellectual operation (interpretation) intended to clarify the correct meaning in the specific case. This means that customary rules would require the state whether it is or not in the situation (the particular case) provided for by the rule itself.[41] This intellectual operation – aimed at verifying whether in a particular case the conditions provided by the customary rule are satisfied – can, indeed, determine state observance of customary provisions. It can also lead to a conflict of evaluations between two or more states,[42] to a rule infringement,[43] possibly also to an impartial, third-party evaluation.[44] The spontaneous observance, the impartial evaluation as well as the enforcement of a customary rule, all belong to the application of CIL. The practical implication is the safeguard of a reasonable flexibility in the process of customary rule application. In fact, excluding any interpretative activity with reference to custom would

[41] In fact, it would seem that the states belonging to the international community are constantly interpreting customary international rules in order to act (or, at least, try to act) according to their provisions.

[42] Take the case where two or more states offer a different interpretation of a customary rule. Besides the above-mentioned case on state immunity, in practice there has been a distorted interpretation of the rule of *uti possidetis* too. In the *Land, Island and Maritime Frontier Dispute* case, both El Salvador and Honduras recognised the existence and the applicability of the customary rule of *uti possidetis* to their border dispute; however, at the same time, they both contested the scope of this custom, due to their behavior. See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (Judgment) [1992] ICJ Rep 351.

[43] That is, every case in which a state breaches a customary rule.

[44] This is the case where two or more states resort to an international jurisdiction to determine the exact meaning of a customary rule. See the *Barcelona Traction* case where the ICJ, by rejecting Belgium's claim based on its interpretation of diplomatic protection – and after including the interpretation of general international rules among its tasks – seems to have applied to that particular case a different interpretation of that customary rule.

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artificially restrict the interpreter's necessary task.[45] Hence, in the application of a well-established custom, the legal operator must take into account the content of the rule in order to understand its meaning (interpretation).[46] This, of course, without affecting its content (established at the time of identification) by modifying it.

At the end of this short analysis, it should also be emphasised that this practical and theoretical distinction raises the question of the admissibility of analogy[47] or restrictive[48] interpretation of customary rules too. Indeed, one should not wonder what and how the international community

[45] One example of the practical relevance of this matter can be found when the interpreter is bound to apply a customary rule to a situation which has no precedents. See L Gradoni, 'Consuetudine internazionale e caso inconsueto' (2012) 95(3) Rivista di diritto internazionale 704.

[46] As a consequence, once the existence of a customary rule is not called into question, the interpreter, in order to clarify its meaning, should only investigate the content of this rule and not its constitutive elements. This is what Judge Morelli argued in his dissenting opinion in the *North Sea Continental Shelf* case. Moreover, in applying the already existing rule, the Court has frequently proceeded to the determination, more or less exact, of its meaning. An evidence of this eventuality can be found in the ICJ Advisory Opinion in the *Chagos* case. The ICJ, after maintaining that the General Assembly confirmed on several occasions the existence of the customary rule on self-determination, stated that only after UNGA Res 1514(XV) 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (14 December 1960) UN Doc A/RES/1514(XV) 'the content and scope of the right to self-determination' was clarified: namely the customary rule to self-determination was interpreted. The ICJ seemed also to distinguish the moment of birth of the customary rule concerning the right to self-determination from the moment of clarification of its content. By ascertaining the customary character of the right to self-determination, the Court referred to UNGA Res 1514(XV), not only to interpret this customary rule, but also as evidence of an already existing custom in question. This means that, according to the Court, a customary rule can also be interpreted after its formation/identification process. See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 [150].

[47] Customary rules are applicable through an analogical interpretation. As known, analogy is a form of extensive interpretation, which consists in applying a rule to a case which it does not provide for, but whose essential characteristics are similar to those of the particular case. In the area of CIL, the use of analogy makes sense only with respect to new cases. Consider both the application of maritime navigation customary rules to air navigation and the application of air navigation rules to cosmic navigation.

[48] As far as a particular (or regional) custom is concerned, for example in the *Asylum* case, the ICJ apparently operated a restrictive interpretation of the so-called American customary international law on political asylum. In this judgment, the Court sought to balance the claim of sovereignty of Colombia versus the right of political asylum of a Peruvian political leader. The Court resolved the question by giving greater weight to the claim of sovereignty, as embodied in the prohibition of intervention. For that reason, according to Sir Hersch Lauterpacht : 'the Judgment provides an example of a restrictive interpretation of an alleged particular, or regional, custom by reference to what the Court

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members would have decided in a specific matter by going to investigate the constitutive elements of a customary rule, such as state judgments, domestic laws or diplomatic notes. In the search for the meaning of the prescription of the customary rule, it would not seem to be relevant, nor it would seem to lead to any reliable result in the interpretation of the rule itself. On the contrary, this is an evaluation on whether the content of the customary rule (established through the identification process) can be applied to the new particular case too, for example, through its analogy with the hypotheses regulated by the customary rules in question. This will widen, narrow down or otherwise correct the scope of the rule already formed for the generality of the affiliates.

4 Concluding Observations

To differentiate the two operations of identification and interpretation is essential to correctly determine the scope of a rule. This is true for a written rule and, in my view, is even more true for an unwritten rule. For a written rule it can be considered that, exactly because it is written, it is relatively simple to separate its content-ascertainment moment from that of its meaning and scope-determination. By contrast, for an unwritten rule – and in particular, for a customary rule – this may not be evident. As is well known, in a legal system as little organised as the international one, given the importance of customary rules as well as the lack of specific bodies for the formation and manifestation of collective will – and therefore for the formation and manifestation of law – the need to distinguish these two operations seems even more important.

Hence, this distinction is evident for both categories of rules (treaty and customary), being, even if at times confusing, two operations logically and chronologically clearly divergent. As I tried to highlight with respect to the *Jurisdictional Immunities of the State* case, the interpretative activity takes place at a time subsequent to that of the identification of the content. That is, when the rule is applied to the particular case. In fact, for customary rules, as well as for treaty rules, the search for the scope is an indispensable operation, accomplished after the identification and preliminary to that of the application of the rule to the particular case. In other words, it is the application of the rule to a particular case that, indeed, forces the legal practitioner to interpret its content. The

considered to be general principles of international law'. H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 382.

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interpretative activity, thus understood, is therefore inherent to the moment of the rule application to the particular case. If this were not the case, there would never be a problem of interpretation, neither with regard to treaty rules nor with regard to customary rules. This would be the same as arguing that any content of a law is so clear and so specific that it is able to precisely reproduce every case that will occur in the future.[49] A rule will never be so clear as to be directly applied to a particular case without further logical steps. Furthermore, to support the assimilation of the interpretative process of a customary rule to its identifying process would lead to the paradoxical scenario in which a customary rule would require to be identified each and every time it needs to be applied.[50] This begs the question of whether a customary rule can be interpreted.[51] Consequently, according to such an approach, whenever a dispute concerning a customary rule is brought before a judge, he should constantly – by making reference to both state practice and *opinio juris* – take into account the existence, development and manifestation of customary rules. According to such a perspective, a judge should identify the customary rule each time he applies it to the particular case. In a similar conception there would exist an infinity of customary rules, all different from each other but each of them extremely specific and very particular, being applicable to only one specific case: the one in which it was identified. This would defeat the very function of having a rule and it would no longer be useful to have a system composed of general and abstract rules. It seems extremely difficult to argue that a previously established customary rule could be applied to new cases falling within its scope, regardless of the general principles of interpretation. Such a theoretical approach would seem to conform to the logical requirements of the whole dynamic of customary rule.

However, several doubts remain. For example, how did the international actors deal with the issue of the interpretation of CIL? Has it been differently addressed in the various cases? According to the ICJ, what would it mean to interpret a customary rule? Has the Court

[49] Clearly no rule, nor state practice or *opinio juris* will ever be so specific as to provide concrete solutions to the application of a customary rule in any imaginable particular situation. No rules (although written) have such degree of specificity.

[50] See P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 IntCLRev 126.

[51] In logic, begging the question defines the sophism that occurs when an argument's premises assume the truth of the conclusion, in lieu of supporting it. It recalls both the Aristotelian *αἰτεῖσθαι τὸ ἐν ἀρχῇ* and the Latin expression *petitio principi*.

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provided the theoretical-methodological tools needed to interpret a customary rule? And to distinguish the two logical operations of interpretation and identification? What are the principles established in this regard by the ICJ? As pointed out before, in the *Jurisdictional Immunities of the State* case the Court could have interpreted the customary rule on state immunity? Or it could exclusively have identified it? Both stances could be convincingly supported. Further study and analysis of the topic might try to answer some of these questions.

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