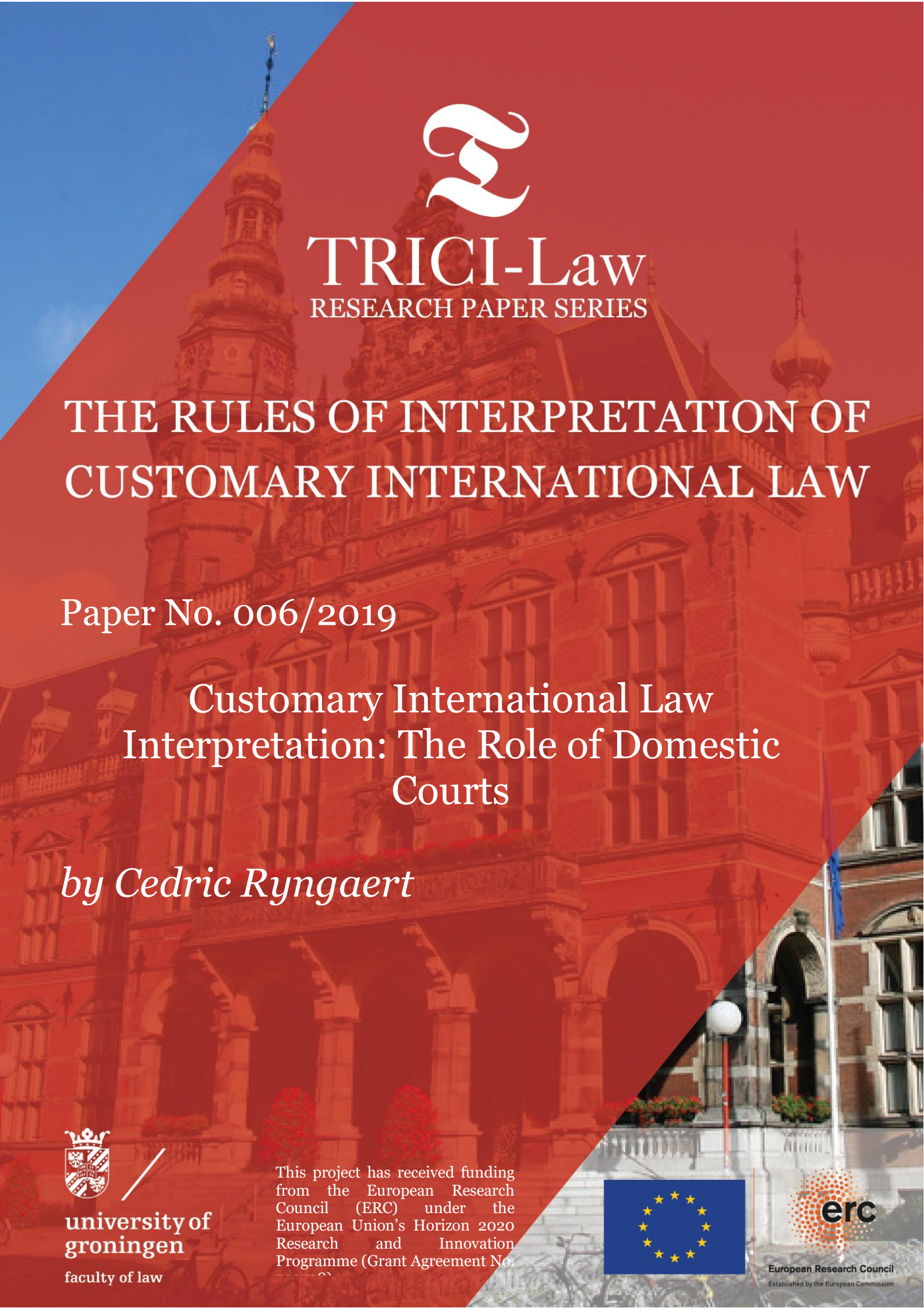

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# THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

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## Customary International Law Interpretation: The Role of Domestic Courts

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# Customary international law interpretation: the role of domestic courts

**Cedric Ryngaert**

## 1. Introduction

The TRICI-Law project observes that 'in the study of customary international law (CIL) there is a critical gap in understanding how CIL can be applied in individual cases once it has been formed. The project then sets for itself the goal to uncover rules of interpretation of CIL. In the words of the project, if such rules were to exist, CIL need not be induced (ascertained) each and every time, by reference to state practice and *opinio juris*, or asserted by judges.

This contribution attempts to narrow the gap in understanding how CIL is applied and interpreted by *domestic courts*. Domestic courts are important agents of international legal development,[1] and they contribute to the entrenchment of the rule of international law, including CIL.[2] Accordingly, a study of the interpretation of CIL cannot do without an analysis of domestic court practices.

This contribution opens with a critical reflection on the proposed doctrinal shift from mere CIL *ascertainment* to *interpretation* of more or less stabilized CIL norms (Section 2). Drawing on his earlier research that domestic courts tend to *apply* pre-existing CIL rather than ascertain CIL *de novo*,[3] the author sees a window of opportunity for CIL interpretation. He then goes on to ascertain whether domestic courts also use this window in practice. He does so by analyzing a large data set of domestic court decisions (Section 3). The empirical analysis yields a number of 'true positives' which suggest that, in admittedly rare cases, domestic courts genuinely *interpret* relatively stable, pre-existing CIL norms, in particular in the area of international immunities. These courts appear to use methods of interpretation that reflect those used for treaty interpretation, notably systemic interpretation and interpretation taking into account subsequent practice.

## 2. From CIL ascertainment to interpretation

The quest for rules governing the interpretation of norms of international law other than treaty-based norms is not new. Reference can notably be made to the interpretation of the text of resolutions of the UN Security Council (UNSC).[4] The Advocate General advising the Dutch Supreme Court, for instance, recently opined that 'while Article 31 VCLT did strictly speaking not apply to a resolution of the UN Security Council, its rule of interpretation can be

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[1] A. Tzanakopoulos, C. Tams, 'Introduction: Domestic Courts as Agents of Development of International Law', 26 *Leiden Journal of International Law* 531-540 (2013).

[2] P.A. Nollkaemper, *National Courts and the International Rule of Law* (OUP 2012).

[3] C. Ryngaert, D.W. Siccama, 'Ascertaining Customary International Law : An Inquiry into the Methods Used by Domestic Courts', 65 *Netherlands International Law Review* 1-25 (2018).

[4] *E.g.*, HR 14 December 2012, ECLI:NL:HR:2012:BX8351, *NJ* 2013/411 m.nt. E.A. Alkema, rov. 3.7.2. In a most recent case, decided by the Dutch Supreme Court, the Advocate General (AG), who advises the Court, also applied Article 31(1) VCLT to the term 'asset freeze' as it featured in a UN Security Council resolution (Libya sanctions), emphasizing the ordinary meaning of the notion of 'asset freeze' (para. 3.13). HR, 18 January 2019, ECLI:NL:HR:2019:67. Advocate General, 12 October 2018, ECLI:NL:PHR:2018:1145. While the Court itself did not cite Article 31(1) VCLT and reached another conclusion than the AG regarding the meaning of an asset freeze, it drew attention to the objective of the resolution. HR, para. 3.6.3 ('Ook zou een beperkte uitleg afbreuk kunnen doen aan het doel van de resoluties om de tegoeden ten goede te laten komen aan de bevolking van Libië.').

Thus, the Court implicitly applied Article 31(1) VCLT, which counsels both textual *and* teleological interpretation ('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.').

considered as a rule of customary international law'.[5] The reasoning appears to be that, precisely because Article 31 VCLT is of a customary nature, it can also be applied to the interpretation of *sources of international law* other than treaty law, such as UNSC resolutions. If that is the case, nothing stands in the way of applying the rules of interpretation laid down in Article 31 VCLT to *customary international law* as well.

This line of argumentation is not necessarily convincing, however. There may be little doubt regarding the customary character of Article 31 VCLT,[6] but that does not make the rules of interpretation laid down in that provision applicable to sources of international law *other* than the treaties which the VCLT is supposed to govern.[7] In fact, that the relevant rules of Article 31 VCLT are customary means, in the first place, that they can be applied to *other treaties* that are *not* governed by the VCLT, *e.g.*, because they predate the entry into force of the VCLT in 1980, because the state party to the relevant treaty has not ratified the VCLT, or because the treaty does not fall within the scope of the VCLT (for instance because it has been concluded in oral form, or between States and other subjects of international law, or between such other subjects *inter se*).[8] After all, Article 31(1) VCLT specifically stipulates that '[a] *treaty* shall be interpreted in good faith [etc.].'[9] If that rule has customary character, the parallel customary rule should also state 'a treaty shall be interpreted in good faith…'.

Nevertheless, this does not mean that Article 31 VCLT has no relevance for the interpretation of norms from other sources of international law. It may have such relevance, as a material source of inspiration, or via reasoning by analogy. In all likelihood, the VCLT rules of interpretation should not be transposed lock-stock-and-barrel to the interpretation of norms derived from other sources of international law, to paraphrase Arnold McNair's warning in the ICJ's *South West Africa* advisory opinion not to simply import domestic law institutions into international law.[10] Rather, when considering transposition, one may have to bear in mind the special features of other sources of international law compared to treaty law. Thus, Sir Michael Wood has sympathy for interpreters' reliance on Article 31 VCLT when interpreting

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[5] AG Palladyne, 3.5 (author's translation); AG Vlas 2012, fn. 23 ('De uitlegregels van verdragen gelden ook voor besluiten van internationale organisaties, hoewel het WVV daarop strikt genomen geen betrekking heeft. Art. 31 WVV kan echter worden gezien als een regel van internationaal gewoonterecht, zie A. Orakhelashvili, The Acts of the Security Council: Meaning and Standards of Review, in: A. von Bogdandy, R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, Vol. 11, 2007, p. 149 p. 153, 157; M.C. Wood, The Interpretation of Security Council Resolutions, in: Max Planck Yearbook of United Nations Law, 1998, Vol. 2, p. 73-95.').

[6] See O. Dörr and K. Schmalenbach, 'Article 31. General rule of interpretation', *Vienna Convention on the Law of Treaties: A Commentary*, pp.521-570 (2012), para. 6, with references to relevant case-law of the ICJ and other international dispute-settlement bodies.

[7] Similar confusion may perhaps surround the binding character of customary international norms for subjects *other than states*, such as international organizations or other non-state actors. The argument would then go that, because a particular norm is of a CIL character, that law is necessarily binding on other subjects of international law, or at the very least on intergovernmental organizations (which happy to typically consist of states). See regarding international organizations: N. Blokker , 'International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?, 14(1) *International Organizations Law Review* (2017), Section 3 (submitting that 'in the areas in which powers have been given to international organizations, it is increasingly recognized that these organizations are bound by the relevant rules of customary international law that are applicable in these areas'). See regarding non-state armed (opposition) groups: S. Sivakumaran, 'Binding Armed Opposition Groups'', 55(2) *International and Comparative Law Quarterly* 369-394 (2006) (discussing the explanation of the binding character of international humanitarian law (IHL) for non-state armed groups in the context of IHL being, at least in part, customary in nature, although in the end considering the state's ability to legislate on behalf of all its individuals to be the best explanation).

[8] Article 2(a) VCLT ('"treaty" means an international agreement concluded between States in written form'). Note that there is a 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations (not yet in force), which in Articles 31-33 restates the corresponding articles of the 1969 VCLT.

[9] Emphasis added.

[10] ICJ advisory opinion *South West Africa*, sep. op. Judge McNair, ICJ Reports 1950, 146, 148.

UNSC resolutions, but, given the more political nature of this source of law, invites the interpreter to pay specific attention to the circumstances in which the resolution has been adopted as well as the context of the UN Charter.[11]

That the rules of interpretation devised for treaties can apply *mutatis mutandis* to UNSC resolutions is in any event understandable to the extent that a binding UNSC resolution is, just like a treaty, a *written* source of international law. Moreover, UNSC resolutions find their legal basis in a treaty (the UN Charter).[12] It is less self-evident to apply Article 31 VCLT, with the necessary modifications or not, to the interpretation of CIL norms. Unlike a treaty or a UNSC resolution, CIL is an *unwritten* source of international law, and it does not, at least not formally, find its legal basis in a treaty. The *material* source of CIL may sometimes be a treaty, *e.g.*, because subsequent to the adoption of a treaty norm, state practice and *opinio juris* converge on the content of that norm, but at the end of the day, for its legal existence the customary norm is not dependent on the treaty norm.[13] Because CIL is an unwritten, flexible and protean source of international law, it does not easily lend itself to the transposition of rules of treaty interpretation. What is more, the question may arise whether rules of interpretation of customary law norms serve any purpose at all, as CIL is - at least potentially - in a state of constant flux. Interpretation of norms only makes sense if those norms have a stable existence. In the classic understanding of *ascertainment* and *identification* of norms of customary international law, legal authorities (law-applying or law-ascertainment agencies) always have to revisit the *very existence* of customary norms *de novo*. Although unlikely, it is after all not impossible that customary norms change or form almost overnight (instant custom).[14]

This also appears to follow from the very text of Article 38(1)(b) of the ICJ Statute, which provides that the ICJ (and courts more generally one may well posit) 'shall apply' … 'international custom, as evidence of a general practice accepted as law'. Pursuant to this provision, courts *apply* a customary norm as soon as they have established its evidence-based *existence*, without any need for interpretation *stricto sensu*. This process may perhaps *appear* interpretative, in that judges interpret evidentiary materials placed before them with the aim of distilling customary norms from those materials. But such interpretation takes place only in an *evidentiary* rather than normative sense. Judges do not interpret previously crystallized norms by analogy with Article 31 VCLT; they simply *ascertain the law*. Thus, Merkouris observes that judges do 'not interpret State practice, they evaluate it, they examine its gravity for the

[11] M. Wood, 'The Interpretation of Security Council Resolutions, Revisited', 20 *Max Planck Yearbook of United Nations Law* 2017, pp. 1-35.

[12] Cf. Article 25 UN Charter ('The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'). In fact, in the context of Article 103 of the UN Charter ('In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'), legal obligations under the Charter are considered as largely synonymous with legal obligations under *UNSC resolutions*. See, *e.g.*, S. Katharidis, 'The Power of Article 103 of the UN Charter on Treaty Obligations', *Journal of International Peacekeeping* 2016, 1-2.

[13] For instance, when the treaty norm disappears, *e.g.*, because the treaty is terminated, the customary norm can survive. Admittedly, a relatively stronger argument can be made for reliance on VCLT rules of treaty interpretation, or any rules of interpretation for that matter, in case of parallel existence of a customary norm with the same content, and in particular in case of that customary norm having been developed on the basis of the treaty norm: in case of parallelism, the customary norm is likely to be more stable, as it mirrors the treaty norm. See in this respect also the ICJ's reference to interpretation of CIL in *Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. United States of America), Judgment, ICJ Reports 1986*, para. 178 ('Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application').

[14] See on instant custom regarding the use of force, *e.g.*, B. Langille, 'It's "Instant Custom": How the Bush Doctrine Became Law after the Terrorist Attacks of September 11, 2001', 26 *Boston College International and Comparative Law Review* 145-156 (2003).

purpose of determining the existence or not of CIL', whereas "'interpretation of CIL' requires an already existing CIL rule'.[15]

This process of CIL-ascertainment or -identification has been the subject of many studies, most recently by the International Law Commission.[16] I myself have had a particular interest in how *domestic courts* identify CIL. In a previous publication with a co-author, we systematized and categorized the variegated CIL-ascertainment techniques used by these courts.[17] Triggered by Stefan Talmon's earlier finding that, 'when determining the rules of customary international law, the ICJ does not use one single methodology but, instead, uses a mixture of induction, deduction and assertion',[18] we set out to inquire whether similar processes could be witnessed in domestic courts. Our analysis of a large number of recent domestic court cases bore out that this is indeed the case. Domestic courts do not normally identify CIL norms on the basis of the textbook method of ascertaining a general practice accepted as law. Rather, they tend to outsource the determination of custom to treaties, non-binding documents, doctrine, or international judicial practice. Sometimes, these courts simply assert, without citing persuasive practice, the existence of a customary norm.

While, in principle, 'other authorities' only have evidentiary value that should be weighted with other materials which more inductively evidence (or not) the existence of a particular customary norm, one cannot escape the impression that domestic courts are simply giving effect to, or *applying pre-existing customary norms, i.e.*, norms which have been identified earlier. But if that is true, there is in principle room for the development of rules of *interpretation*. As Merkouris observed: '[O]nce CIL has been identified as having been formed, its continued manifestation and application in a particular case will be dependent on the deductive process of interpretation. In this manner, interpretation focuses on how the rule is to be understood and applied *after the rule has come into existence and for its duration.*'[19]

If domestic courts are in fact *interpreting* customary norms when applying them in given cases, our earlier publication's lament that domestic courts failed to engaged in a serious CIL-ascertainment process (which includes parsing all available materials),[20] loses some of its force. Indeed, assuming that customary norms existentially stabilize at one point, after which they are simply *interpreted*, there is no need for an elaborate process of identifying a customary norm *de novo*. Instead, courts may satisfy themselves with reaffirming the existence of the norm – presumably established by other law-ascertainment agencies at an earlier stage without subsequently being challenged – and instead concentrate on how to interpret the norm in a manner similar to how treaty interpretation takes place. Specific CIL rules of interpretation that are autonomous from the VCLT rules of interpretation can, in

[15] P. Merkouris, 'Interpreting the Customary Rules on Interpretation', 19 *International Community Law Review* 126, at 138 (2017).

[16] Draft conclusions on identification of customary international law, with commentaries, adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10), Yearbook of the International Law Commission, 2018, vol. II, Part Two.

[17] Ryngaert and Hora Siccama, above note 3.

[18] S. Talmon, 'Determining Customary International Law: the ICJ's Methodology between Induction, Deduction and Assertion', 26 *European Journal of International Law* 417-443 (2015).

[19] Merkouris, *supra* 2017, at 136 (original emphasis). See also P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (The Hague: Brill, 2015), pp. 241-42 ('[A] rule of customary international law, once identified by an international court or tribunal, does not cease to exist. When the same or a different judicial body attempts to apply the same rule in a different case, it usually does not go on about re-establishing that the rule in question is customary international law. It considers it as a given, but this does not imply that it can immediately apply it either. In this context, between the identification of a customary rule and its application at a later date and in a different case there is an intermediate stage; that of interpretation of the rule by the later court or tribunal.').

[20] Ryngaert and Hora Siccama, *supra*, at 23.

principle, develop via the regular customary process, through concurrent state practice and *opinio juris*.[21] Merkouris has argued that such rules already exist, and that they themselves are amenable to interpretation.[22]

### 3. The practice of domestic courts interpreting CIL

Based on my earlier research on how domestic courts found and applied customary norms, it was not my understanding that they in fact engaged in *interpretation*. However, this research could have suffered from a tunnel vision. Focusing excessively on domestic courts' *law-ascertainment* processes, I may have discounted or overlooked how, in fact, these courts *interpreted* CIL.[23] Accordingly, I decided to revisit relevant court decisions with a view to understanding more in-depth domestic practices of CIL *interpretation*.

In order to find relevant domestic court decisions, I consulted Oxford University Press's database *International Law in Domestic Courts* (ILDC), and used 'interpretation' as the search term, combined with the generic subject 'sources of international law'. ILDC does not use 'customary international law' as a subject, but the headnote of the search results does indicate whether customary international law was relevant to the domestic court decision.[24] Also, ILDC marks the search term – in this case 'interpretation' – in the summary and text of the decision, which greatly facilitated the research.[25] Methodologically, I carried out a *discourse analysis* of written texts (judgments),[26] analyzing to what extent domestic courts *explicitly* used the term 'interpretation' when applying customary international law.[27] Such an analysis has its limitations in that it may discount practices of courts implicitly interpreting customary norms. Accordingly, I have also included references to *interpretation* by the ILDC commentators directly commenting on the judgments. However, at the end of the day, I am not so much interested in what courts *may have meant* when applying customary norms, but primarily what they did *in fact*: did they consciously consider customary norms to be amenable to interpretation?

The search yielded a number of domestic court decisions which featured both 'customary international law' and 'interpretation'. However, not all of these results pertain to the interpretation of customary international law norms proper. I term such results 'false

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[21] See also Merkouris 2017, above note 15, at 141 ('[T]here are rules that guide the process of interpretation of CIL, although these will be, by virtue of the nature of CIL, different than those of treaties.'), also citing *North Sea Continental Shelf (Germany/Denmark and the Netherlands), Judgment, ICJ Reports 1969*, Dissenting Opinion of Judge Tanaka, p. 181.

[22] Merkouris 2017, above note 15, at 142-154 (discussing notably the customary law counterparts of Article 31(3)(a) and (b), and Article 32 VCLT).

[23] A tunnel vision, in the metaphorical sense, is defined as 'single-minded concentration on one objective' (Merriam-Webster Dictionary online). The occurrence of tunnel visions has been discussed in a variety of scientific disciplines. See, *e.g.*, A. Miller, 'Tunnel Vision in Environmental Management', 2 *The Environmentalist* 223-231 (1982); J. Breuer, M. Scharkow, T. Quandt. 'Tunnel vision or desensitization? The effect of interactivity and frequency of use on the perception and evaluation of violence in digital games', 26 *Journal of Media Psychology: Theories, Methods, and Applications* 176-188 (2014).

[24] Somewhat confusingly, ILDC also uses the term 'subject(s)' in this regard.

[25] In the earlier publication in NILR, we also consulted Cambridge University Press's *International Law Reports* (ILR). ILR, however, is less user-friendly than ILR, at least not in the version I had access to via my institution. It was not possible to combine the search words 'interpretation' and 'customary international law', and unlike ILDC, the ILR application did not mark the term 'interpretation' in the summary or text of the decision. It was considered to be too time-intensive to copy, case-by-case, all decisions relevant to customary international law (*e.g.*, to Word), and then apply a search for 'interpretation'.

[26] See on discourse analysis at length: T. van Dijk, *Handbook of Discourse Analysis* (1985). Discourse analysis has been developed and applied mainly in linguistics, semiotics, and psychology.

[27] Obviously, the English term interpretation is not as such used in non-English-speaking jurisdiction. However, ILDC uploads official English translations of foreign-language judgments, translates relevant parts, and/or states in the headnote's 'Held' (H) sections the key holdings in English.

positives'.[28] A first category of false positives comprises those decisions in which domestic courts *erroneously* use the term 'interpretation', when they in fact meant something else, in particular *ascertainment*. A second category of false positive comprises those decisions in which courts do engage in interpretation, but not of CIL, but rather of domestic (statutory) law, although *in light of* CIL. I briefly discuss these two categories of false positives in Section 3.1. Subsequently, in Section 3.2, I proceed to the core analysis of *true positives*, *i.e.*, decisions in which court genuinely interpret CIL norms.

### 3.1. False positives

A number of domestic court decisions in which courts profess to *interpret* CIL are in fact examples of CIL *ascertainment*. These cases are false positives as they pertain to the identification of the very existence of a customary norm rather than its subsequent interpretation. For example, in the US Court of Appeals (Second Circuit) judgment in *Kiobel*, Leval, J., concurring, criticizes the majority's holding that corporate liability does not exist under customary international law,[29] on the following grounds: 'The majority's interpretation of international law, which accords to corporations a free pass to act in contravention of international law's norms, conflicts with the humanitarian objectives of that body of law.'[30] What the majority in fact did in *Kiobel* was *ascertaining the very existence* of a customary norm providing for liability of corporations for violations of international law, rather than 'interpreting (the body of) international law'. Another example is the following characterization by the US Court of Appeals (11th Circuit) of the difficulties of determining offenses that violate customary international law under the Offences Clause of the US Constitution (such as offences of drug trafficking):

> 'The determination of what offenses violate customary international law … is no simple task. Customary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas. Furthermore, the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source. All of these characteristics give the body of customary international law a soft indeterminate character that is subject to creative *interpretation'*.[31]

Here, the court refers to *evidentiary* interpretation, *i.e.*, the process of parsing state practice with a view to *ascertaining* customary international law. It does *not* refer to the interpretation of customary norms that have already come into existence.

A final example is the US trial court judgment in *Talisman*, where the court held that 'interpretations of [customary] international law [the law of nations] of the Supreme Court and Second Circuit are binding upon this Court'.[32] This case also concerned the question of whether corporations may be liable for international law violations, which, as pointed out

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[28] The term 'false positives' has its origins in medical research, where it is refers to errors in test results, which indicate that a disease is present which in reality is not. Cf. T R Dresselhaus, J Luck, J W Peabody, 'The ethical problem of false positives: a prospective evaluation of physician reporting in the medical record', 28 *J Med Ethics* 291–294 (2002).

[29] *Kiobel and ors (on behalf of Kiobel and Tusima) v Royal Dutch Petroleum Co and ors*, Appeal judgment, Docket No 06-4800-cv, Docket No 06-4876-cv, 623 F3d 111 (2d Cir2010), ILDC 1552 (US 2010), 17th September 2010, United States; Court of Appeals (2nd Circuit) [2d Cir], para. 58.

[30] *Kiobel I*, 621 F.3d at 155 (Leval, J., concurring).

[31] *United States v Bellaizac-Hurtado and ors*, Appeal judgment, 700 F3d 1245 (11th Cir 2012), ILDC 1949 (US 2012), 6th November 2012, United States; Court of Appeals (11th Circuit) [11th Cir], paras. 19-21, citing *Flores and ors v Southern Peru Copper Corporation*, Appeal Judgment, Docket No 02-9008, 414 F.3d 233, 247-249 (2d Cir. 2003), ILDC 303 (US 2003), 29th August 2003, United States; Court of Appeals (2nd Circuit) [2d Cir] (citations and references omitted) (emphasis added).

[32] *Presbyterian Church of Sudan v Talisman Energy, Inc*, Trial court judgment, 244 F Supp 2d 289 (SDNY 2003).

above, is a matter of ascertainment rather than interpretation of international law. This lower court simply wanted to say that, on the basis of *stare decisis*, it has little agency in *ascertaining* customary international law.[33] Of course, this need not totally exclude its *interpretation of* this law subsequent to its ascertainment - an issue which the court however did not address.

The search also yielded a relatively large number of potentially relevant cases that pertained to *statutory* interpretation in light of CIL. Also these cases are false positives, in that they are instances of 'consistent interpretation', *i.e.*, interpretation of domestic law in light of international law,[34] rather than interpretation of CIL proper. For instance, the Supreme Court of Appeal of South Africa held that '[w]hen interpreting legislation, the courts had to prefer a reasonable interpretation that was consistent with international law [including customary international law] over any alternative inconsistent interpretation'.[35] Another example is the Italian Supreme Court's interpretation of a provision in the Italian criminal code in light of the Convention on the Prevention of Terrorism which Italy had signed but not ratified, and accordingly, in light of customary international law.[36] Also included in this category are a large number of immunity cases from Anglo-Saxon jurisdictions (such as the US, UK, Canada), which have adopted specific immunity legislation, and whose courts go on to interpret such legislation in light of customary immunity rules.[37] In the end, however, all these decisions, while interesting in their own right, *do not interpret customary law*, but rather *statutory law*, unless it happens that, when interpreting statutory law, they also explicitly interpret rather than merely apply customary law.

### 3.2. True positives

The research did not just yield decisions in which domestic courts did *not* engage in CIL interpretation proper. In some cases, domestic courts appear to truly *interpret* CIL norms. These are the 'true positives' in which we are interested. They demonstrate that domestic courts assume that they *can* interpret CIL norms,[38] even if they have not given much thought to the doctrinal underpinnings or normative consequences of CIL interpretation.[39]

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[33] See its reference to *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61, 5 L. Ed. 57 (1820), quoted in *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir.1980) (the law of nations may be ascertained by consulting, inter alia, "judicial decisions recognising and enforcing [international law]").

[34] G. Betlem, A. Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: a Comparative Analysis of the Practice of Consistent Interpretation', 14 *European Journal of International Law* 569-589 (2003). In the US, this is known as the *Charming Betsy* canon of statutory construction. Cf. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 2 L.Ed. 208 (1804).

[35] *Minister of Justice and Constitutional Development and ors v The Southern African Litigation Centre*, Appeal judgment, 867/15, [2016] ZASCA 17, 2016 (4) BCLR 487 (SCA), [2016] 2 All SA 365 (SCA), 2016 (3) SA 317 (SCA), ILDC 2533 (ZA 2016), 15th March 2016, South Africa; Supreme Court of Appeal [SCA], H4, para. 62.

[36] *Public Prosecutor at the Tribunal of Brescia v Elvis and el Mahdi*, Appeal decision, No 40699, ILDC 2565 (IT 2015), 9th October 2015, Italy; Supreme Court of Cassation; 1st Criminal Section. The decision pertained to the question whether the expression 'enlistment for conducting acts of violence for terrorist purposes' in Article 270-quater of the Criminal Code (Italy), when interpreted in the light of international law, referred not only to the formal joining of armed forces, but also to the formal recruitment of enlisted persons in military or paramilitary terrorist networks.

[37] *E.g.*, *Estate of the late Zahara (Ziba) Kazemi and Hashemi*, Canadian Lawyers for International Human Rights (intervening) and ors (intervening) v Iran and ors, Final appeal, Case No 35034, 2014 SCC 62, [2014] 3 SCR 176, ILDC 1721 (CA 2014), 10th October 2014, Canada; Supreme Court [SCC]; *Arigo v Smith, Arigo and ors v Swift and ors*, Petition for the issuance of a writ of Kalikasan with prayer for the issuance of a temporary environmental protection order, GR No 206510, ILDC 2315 (PH 2014), 16th September 2014, Philippines; Supreme Court (the latter court in fact applying the US Foreign Sovereign Immunities Act).

[38] This finding is highly significant, as it proves that customary norms *can* be interpreted by domestic courts. Merkouris calls such decisions 'black swans', which disprove the statement that 'no swan can have any other colour other than white'. Merkourios 2017, above note 15, at 143. Applied to CIL interpretation by domestic

Most relevant domestic court decisions relate to *immunities*. This is not surprising as (1) immunities are normally invoked before *domestic courts*, and (2) the law of immunities, in particular the immunities of states and their officials, is one of the few fields of international law that is largely governed by CIL. As pointed out above, in Anglo-Saxon jurisdictions, international immunities tend to be laid down in statutes, as result of which statutory law – possibly interpreted in light of CIL – will be applied. However, in other jurisdictions, *e.g.*, on the European continent, immunities are directly derived from (customary) international law, possibly via a *renvoi* provision in domestic legislation.[40]

For analytical and pedagogical purposes, I have grouped these decisions into three theoretical categories. I have generated these categories inductively through coding, conceptualizing, and analyzing the available data (the court decisions referencing interpretation). In social science, such an approach would be termed 'grounded theory research'.[41] As the coding exercise is carried out by human beings, the data may obviously feed into different categories.[42] However, the generic categories offered here may have particular expository power in that they are also transferable to CIL-interpretation by law-interpreting agencies other than domestic courts, *e.g.*, international courts. They allow us to zoom out of the particular context in which domestic courts apply and interpret law, and to reflect at a more abstract level on the practice of CIL-interpretation.

I will successively discuss the following analytical categories: (a) autonomous CIL interpretation, (b) deference to CIL interpretation by other (international) courts, and (c) interpreting CIL norms laid down in authoritative (written) documents. In the discussion, I also pay particular attention to the *method* of interpretation applied by the court.

***(a) Autonomous CIL interpretation***

The research yielded a number of decisions in which domestic courts appeared to interpret CIL relatively autonomously, *i.e.*, without (explicitly) taking their cue from international courts' interpretations, or from written documents purportedly codifying CIL. Most of these decisions pertain to the immunity *ratione materiae* of state officials from foreign criminal jurisdiction, which has not been codified, at least not until recently,[43] and regarding which international courts have given little to no guidance. A Swiss, US, and Italian case were considered to be relevant.

In *A v Swiss Federal Public Prosecutor*, the Swiss Federal Criminal Court *interpreted* the customary norms on state official immunity *ratione materiae* (functional immunity) as follows, in a case concerning the claimed immunity of a former Defense Minister of a foreign state regarding a charge of war crime:

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courts, this means that it suffices to identify one instance of a domestic court interpreting CIL to disprove the statement that CIL is not, and cannot be interpreted by domestic courts. In fact, there is more than one instance.

[39] Compare Merkouris 2015, above note 19, at 244 (writing in respect of international judges and academic writers that '[i]t would seem more logical, perhaps, to consider this as an important indication that interpretation of customary international law is not only possible but also that it flows so logically and effortlessly from the structure and functioning of the source of international law and proper legal thinking that it is being employed all the time at a subconscious level, without the authors themselves realising it but also without them being able to escape from it.').

[40] *E.g.*, Article 13a of the Dutch *Wet Algemene Bepalingen* ('Act on General Provisions'), which provides (in old Dutch) that '[d]e regtsmagt van den regter en de uitvoerbaarheid van regterlijke vonnissen en van authentieke akten worden beperkt door de uitzonderingen in het volkenregt erkend' ('The jurisdiction of the judge and the execution of court judgments and authentic acts are limited by the exceptions recognized in public international law.').

[41] I have also applied this approach in Ryngaert and Hora Siccama, above note 3, at 3-5, where grounded theory is explained in greater detail.

[42] The coding has been done by myself and a research assistant.

[43] See the on-going work of the ILC on the 'Immunity of state officials from foreign criminal jurisdiction (since 2007), details of which are available at http://legal.un.org/ilc/guide/4_2.shtml.

> 'It remained to be decided whether A's residual immunity *ratione materiae* covered acts performed while in office, and whether it trumped the necessity of establishing his responsibility for alleged grave human rights violations. In light of … developments, it was not clear that this immunity should prevail, as serious crimes against humanity, including torture, were prohibited by customary international law. The Swiss legislature's commitment to repressing *ius cogens* violations was an additional reason for denying A immunity *ratione materiae*, as it would be contradictory to express such a commitment while giving a broad *interpretation* to this immunity'[44]

Arguably, the Swiss court assumed that a state official's immunity *ratione materiae* for official acts had already crystallized as a customary norm and thus had a relatively stable existence.[45] What mattered now, was how to *understand and apply* the norm in respect of *jus cogens* violations. This is an *interpretative* exercise that mirrors the interpretative rule enshrined in Article 31(3)(c) VCLT, pursuant to which '[t]here shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties'.

A practice of *interpreting* functional immunity in respect of *jus cogens* violations can also be gleaned from the judgment of the US Court of Appeals for the Fourth Circuit in *Yousuf v Samantar*, which concerned the same question of whether a high-ranking government official was immune from suit under head-of-state immunity or foreign official immunity for *jus cogens* violations, even if the acts had been performed in the defendant's official capacity.[46] The case had been remanded by the US Supreme Court, which had held that the Foreign Sovereign Immunities Act did *not* govern a claim of immunity by a foreign official.[47] On remand, the Court of Appeals held that the common law, which included customary international law, governed such a claim,[48] and it went on to (arguably) *interpret* functional immunity, holding that '[t]here has been an increasing trend in international law to abrogate foreign official immunity for individuals who commit acts, otherwise attributable to the State, that violate jus cogens norms — i.e., they commit international crimes or human rights violations'.[49] Admittedly, the Court itself did not use the term interpretation, but the ILDC commentator conspicuously did, not only in the analysis of the judgment, but also in the Held section which is supposed to simply restate the Court's reasoning.

There is obviously a fine line with *law-ascertainment* here, as it could as well be argued that whether immunity *ratione materiae* extends to international crimes is itself amenable to customary law *formation*: can sufficient state practice be identified to buttress the crystallization of a customary law exception to the immunity *ratione materiae* of state officials?[50] However, both courts embraced a deductive approach[51] which emphasizes the relationship of immunity with *jus cogens* norms. Such an approach can be termed

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[44] *A v Swiss Federal Public Prosecutor and ors*, Final appeal judgment, ILDC 1933 (CH 2012), BB.2011.140, TPF 2012 97, 25th July 2012, Switzerland; Federal Criminal Court [BStGer], H9, para. 5.4.3 (emphasis added). In the original French version: 'Or, il serait à la fois contradictoire et vain si, d'un côté, on affirmait vouloir lutter contre ces violations graves aux valeurs fondamentales de l'humanité, et, d'un autre côté, l'on admettait une interprétation large des règles de l'immunité fonctionnelle (*ratione materiae*) pouvant bénéficier aux anciens potentats ou officiels dont le résultat concret empêcherait, *ab initio*, toute ouverture d'enquête.'

[45] See also ILC, Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission, UN Doc. A/72/10 (2017), pp. 175-176, Article 5 ('State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.').

[46] *Yousuf and ors v Samantar*, Appeal judgment, 699 F3d 763 (4th Cir 2012), ILDC 1958 (US 2012), 2nd November 2012, United States; Court of Appeals (4th Circuit) [4th Cir].

[47] *Samantar v Yousuf and ors*, Appeal judgment, No 08-1555, ILDC 1505 (US 2010), 130 S.Ct. 2278 (2010), 1st June 2010, United States; Supreme Court [US].

[48] *Yousuf and ors v Samantar*, Appeal judgment, 699 F3d 763 (4th Cir 2012), ILDC 1958 (US 2012), 2nd November 2012, United States; Court of Appeals (4th Circuit) [4th Cir], para. 7.

[49] *Id.*, para. 33.

[50] S.D. Murphy, 'Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?' *AJIL Unbound* 112, 4-8 (2018).

[51] See also Merkouris 2017, above note 15, at 135-136.

'interpretative', as it gives meaning to an established customary norm in the specific *milieu* of international crimes. The fact that a court may also cite other state practice (other domestic court decisions)[52] does not necessarily render the process one of customary law-ascertainment, as such practice may well qualify as subsequent practice in the application of the customary norm which establishes the agreement of states regarding its *interpretation*, to paraphrase Article 31(3)(b) VCLT. Specifically regarding the purported immunity 'exception' for *jus cogens* violations, the systemic integration-based technique of interpretation may also be of particular relevance, *i.e.*, the interpretation of a customary norm in light of 'any relevant rules of international law applicable in the relations between the [states]', to paraphrase Article 31(3)(c) VCLT; *jus cogens* norms qualify as such rules.[53]

The fine line between law-ascertainment and interpretation is also apparent in another functional immunity case, *Abu Omar*, before the Italian Court of Cassation. In this case, which pertained to the question of whether, under customary international law, state officials who had participated in an extraordinary rendition operation enjoyed functional immunity from the criminal jurisdiction of a foreign state, the Court decided as follows:

> The problem […] consists of checking whether there effectively exists a customary law regulation under international law that also guarantees criminal immunity to the individual-entity of a sovereign State, even when it does not involve Diplomatic and/or Consular officials and high appointments of State.
>
> On this point, jurisprudence is divided, because alongside those authorities that recognise the existence of a customary law regulation of this kind, there are others that recognise this only in respect of the activities authorised by the foreign country where these take place, while there are still others that maintain that the benefit of immunity is recognised according to specific regulations only to certain categories of entities in exercising the functions that are typical of their office.
>
> This Court believes that this last ***interpretation*** is the more correct one, because it takes into account the developments in international relations, which as already stated, the *Nato [London] Convention* [Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces] and the *[Vienna Convention on Consular Relations]* are valid examples.[54]

At first sight, in this case, the Italian Court appears to ascertain the very existence of a customary norm on functional immunity ('checking whether there effectively exists a customary law regulation…'). However, the Court's use of the term 'interpretation' is not necessarily misguided, as what the Court may actually be doing is to *interpret the scope* of functional immunity, without casting doubt on the principled customary existence of functional immunity (the 'core norm'). The judgment could be read as affirming the principled existence of customary functional immunity, while denying its blanket application to all categories of state entities exercising official functions. To reach the conclusion that functional immunity under customary law 'only' applies to certain categories, the Court appears to have recourse to contextual interpretation, when it states that it 'takes into account the developments in international relations'.

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[52] See notably *Yousuf and ors v Samantar*, Appeal judgment, 699 F3d 763 (4th Cir 2012), ILDC 1958 (US 2012), 2nd November 2012, United States; Court of Appeals (4th Circuit) [4th Cir], para. 34.

[53] This is not the place to engage at length with the relationship between *jus cogens* and immunity, which has spawned a cottage industry of its own. See for relevant doctrine, *inter alia*: T. Weatherall, 'Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence'. 46 *Georgetown Journal of International Law* 1151-1212 (2015); A.J. Colangelo, 'Jurisdiction, Immunity, Legality, and Jus Cogens', 14 *Chicago Journal of International Law* 53-92 (2013). See also ILC, Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission, UN Doc. A/72/10 (2017), pp. 175-176, Article 7(1) ('Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law …').

[54] '*Abu Omar' case, General Prosecutor at the Court of Appeals of Milan v Adler and ors,* Final appeal judgment, No 46340/2012, ILDC 1960 (IT 2012), 29th November 2012, Italy; Supreme Court of Cassation; 5th Criminal Section, para. 23.7 (interpretation emphasized).

Finally, there is a decision by the Belgian Court of Cassation with respect to immunity from execution, which is particularly relevant from a conceptual perspective. In this decision, the Court held as follows:

> Il ne résulte pas de [l'article 38, § 1er, b), du Statut de la Cour internationale de Justice] que le juge étatique qui identifie et *interprète* une règle coutumière internationale est tenu de constater, dans sa décision, l'existence d'une pratique générale, admise par une majorité des États, qui soit à l'origine de cette règle coutumière.[55]

What the Court states here is that domestic courts identifying *and* interpreting a CIL norm are not required to establish the existence of a general practice accepted by a majority of states which is at the origin of the CIL norm. As the Court uses the terms 'identifying' and 'interpreting', it is apparent that the Court is not conflating law-ascertainment and law-interpretation. Arguably, the Court uses the term 'interpretation' in response to the applicant's subsidiary argument that the lower court:

> … ne justifie pas légalement sa décision en rendant applicable aux comptes d'ambassade la règle ne impediatur legatio, *à supposer celle-ci établie*, sans constater d'abord qu'une majorité des États admet que la règle ne impediatur legatio consacre également une immunité d'exécution diplomatique autonome des comptes d'ambassade (violation de la règle coutumière internationale ne impediatur legatio)'.[56]

Thus, the applicant assumes, *arguendo*, that the CIL norm *ne impediatur legatio* has already crystallized,[57] and then proceeds to argue that the majority of states still need to accept that this norm also provides for autonomous diplomatic immunity from execution of embassy bank accounts.[58] The Court of Cassation rejects this argument. While in the context of law-identification, this holding may possibly be problematic,[59] it is far less so in the context of

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[55] Belgian Court of Cassation, *NML Capital Ltd v République d'Argentine*, N° C.13.0537.F, judgment of 11 December 2014, décision, 2ième moyen, 4ième branche (emphasis added). This case is not reported on ILDC.

[56] Belgian Court of Cassation, *NML Capital Ltd v République d'Argentine*, N° C.13.0537.F, judgment of 11 December 2014, griefs, 2ième moyen, 4ième branche (emphasis added). The applicant's primary argument was that the Court of Appeal had wrongly introduced the doctrine of stare decisis through the backdoor, by relying on a judgment of the Court of Cassation of 22 November 2012 in the same case, N° C.11.0688.F (*République d'Argentine v NML Capital Ltd*), in which the Court held: 'En vertu de la règle coutumière internationale *ne impediatur legatio*, suivant laquelle le fonctionnement de la mission diplomatique ne peut être entravé, l'ensemble des biens de cette mission qui servent à son fonctionnement bénéficie d'une immunité d'exécution autonome, se superposant à celle de l'État accréditant.'

[57] Articles 22(3) and 25 of the Vienna Convention on Diplomatic Relations (VCDR) could be considered to have codified some specific aspects of the CIL norm of *ne impediatur legatio*. Article 22(3) VCDR provides that '[t]he premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution', while Article 25 VCDR provides that '[t]he receiving State shall accord full facilities for the performance of the functions of the mission'. In its judgment of 22 November 2012, N° C.11.0688.F (*République d'Argentine v NML Capital Ltd*), the Belgian Court of Cassation held that '[l]'arrêt, qui, sans constater que les sommes saisies étaient affectées à d'autres fins que le fonctionnement de la mission diplomatique de la demanderesse, décide que la renonciation générale contenue dans les actes susmentionnés s'étend aux biens de cette mission diplomatique, y compris ses comptes bancaires, sans qu'il soit besoin d'une renonciation expresse et spéciale en ce qui concerne ces biens' violates both the VCDR provisions and the CIL norm of *ne impediatur legatio*.

[58] This is particularly relevant for the question whether a general waiver of immunity from execution by a foreign state also extends to embassy bank accounts. If diplomatic property were to have an autonomous status pursuant to the rule of *ne impediatur legatio*, a waiver that specifically applies to such property would be required. For a discussion (in Dutch) regarding the Belgian context: S. Duquet, J. Wouters, 'De (on)beslagbaarheid van bankrekeningen van buitenlandse ambassades', *Rechtskundig Weekblad* 2015-16, nr. 38, pp. 1483-1499.

[59] *North Sea Continental Shelf Cases*, Merits [1969] ICJ Rep 3, para. 74 ('State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule

law-interpretation insofar as the core CIL norm has already crystallized and no proof of existence needs to be adduced. The Court of Cassation ultimately does not state what rules govern the interpretation of CIL norms (the principle of *ne impediatur legatio* in particular), nor does the lower court.[60]

***(b) Deference to CIL interpretation by international courts***

A second category consists of those decisions referring and deferring to an *international court* which has previously interpreted CIL. Such decisions are relevant in that they *confirm* the methodological validity of interpreting CIL. Three decisions with respect to the immunity of states, the scope of which the ICJ clarified in *Jurisdictional Immunities of the State (Germany v Italy)*,[61] stand out. Firstly, in *Simoncioni*, the Italian Constitutional Court cited the '*interpretation* by the ICJ of the customary rule on state immunity for acts *iure imperii*' in *Jurisdictional Immunities of the State (Germany v Italy)*.[62] By the same token, in *Alessi*, the Florence Court of First Instance held that the Italian court is not permitted 'an *interpretation* of the binding, inescapable validity of the *jus cogens* rules of international law, the area in which the International Court of Justice has absolute and exclusive jurisdiction'.[63] In the context of state immunity from execution, a commentator commenting on a decision of the German Federal Court of Justice somewhat similarly pointed out that the distinction between state property used for sovereign purposes and property not so used 'corresponded to the *interpretation* of customary international law on immunity from enforcement given by the International Court of Justice ('ICJ') in *Jurisdictional Immunities'*.[64]

That the ICJ interpreted customary law in *Jurisdictional Immunities* is *itself* an interpretation by domestic courts, for that matter. Indeed, in *Jurisdictional Immunities* the ICJ did not explicitly use the term 'interpretation' in the context of immunities under customary international law. Still, the judgment contains indications that the ICJ did actually *interpret* rather than ascertain customary international law on immunities, in line with how the aforementioned domestic courts construed the ICJ's judgment. First, with respect to immunity from jurisdiction, the ICJ stated in respect of Article 12 of the UN Convention on

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of law or legal obligation is involved.'); A. Henriksen, *International Law* (OUP 2017), p. 26 ('While unanimity is not required, practice should include the majority of states.'). That being said, the ICJ nor the ILC technically require acceptance by the *majority* of states. See ILC, Draft conclusions on identification of customary international law, with commentaries, Commentary (3) to Conclusion (8), UN Doc. A/73/10 (2018), p. 136 ('The requirement that the practice be "widespread and representative" does not lend itself to exact formulations, as circumstances may vary greatly from one case to another … [U]niversal participation is not required: it is not necessary to show that all States have participated in the practice in question. The participating States should include those that had an opportunity or possibility of applying the alleged rule. It is important that such States are representative, which needs to be assessed in light of all the circumstances, including the various interests at stake and/or the various geographical regions.') (footnotes omitted).

[60] The lower court's decision has not been made public (Court of Appeals Brussels, judgment of 28 June 2013), but it was summarized in the Court of Cassation's 2014 judgment. In its 2012 judgment (N° C.11.0688.F), the Court of Cassation did not elaborate either on its methods to ascertain or interpret the CIL norm.

[61] *Jurisdictional Immunities of the State* (Germany v. Italy : Greece intervening), Judgment, I.C.J. Reports 2012, p. 99.

[62] *Simoncioni and ors v Germany and President of the Council of Ministers of the Italian Republic* (intervening), Constitutional review, Judgment No 238/2014, ILDC 2237 (IT 2014), 22nd October 2014, Italy; Constitutional Court, H3, para. 3.1 (emphasis added).

[63] *Alessi and ors v Germany and Presidency of the Council of Ministers of the Italian Republic* (intervening), Referral to the Constitutional Court, Order No 85/2014, ILDC 2725 (IT 2014), 21st January 2014, Italy; Tuscany; Florence; Court of First Instance, para. 18 (emphasis added).

[64] Greece v A, Appeal order, BGH Urteil vom 25.06.2014 - VII ZB 24/13, VII ZB 24/13, ILDC 2388 (DE 2014), 25th June 2014, Germany; Federal Court of Justice [BGH], A3 (emphasis added). The court itself, however, did *not* refer to interpretation, however, and limited itself to stating as follows: 'In German practice, the cultural institutions of foreign states were considered immune from enforcement. The promotion of culture and research by a foreign state formed part of its sovereign functions …' (H5, para. 14).

Jurisdictional Immunities that '[n]o state questioned this *interpretation'*, [65] *i.e.*, the interpretation that military activities are not covered by the territorial tort exception. While it may appear that the ICJ interpreted the Convention and thus simply applied rules of treaty interpretation – in this case having recourse to the *travaux préparatoires* of the Convention per Article 32 VCLT - it bears emphasis that the Convention has not yet entered into force. The territorial tort exception being of customary law character,[66] the ICJ may instead have interpreted the *customary international law* equivalent of the conventional exception. The stabilized 'core' customary norm is that immunity in principle does not extend to territorial torts, whereas interpretation of that norm may yield the identification of the limited circumstances in which immunity *does* extend to territorial torts. Second, with respect to state immunity from execution, the ICJ may have used the term 'find',[67] which may suggest ascertainment rather than interpretation of the law,[68] but it is of note that 'find' has other meanings too. The most relevant are 'to discover' and 'to determine and make a statement about',[69] the latter approximating the meaning of 'to interpret' as 'to conceive in the light of individual belief, judgment, or circumstance'.[70] Accordingly, what the ICJ possibly did was to interpret a core customary norm on state immunity from execution on the basis of 'subsequent practice in the application of the [customary norm] which establishes the agreement of [states] regarding its interpretation', to paraphrase Article 31(3)(b) VCLT. Besides, the customary norm on state immunity could also be interpreted in light of international human rights law, in particular creditors' rights to a remedy and to property.[71] Such an interpretation would give effect to the CIL equivalent of Article 31(3)(c) VCLT. Arguably, the relevant core customary norm is that state immunity from execution is not absolute, but relative. Under what precise circumstances state immunity does not apply will then be amenable to *interpretation*.[72]

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[65] *Jurisdictional Immunities of the State* (Germany v. Italy : Greece intervening), Judgment, I.C.J. Reports 2012, para. 69 (emphasis added).

[66] *Jurisdictional Immunities of the State* (Germany v. Italy : Greece intervening), Judgment, I.C.J. Reports 2012, paras. 77-78.

[67] *Jurisdictional Immunities of the State* (Germany v. Italy : Greece intervening), Judgment, I.C.J. Reports 2012, para. 118 ('it suffices for the Court to find that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State …').

[68] Especially in combination with the ICJ's identification of state practice (four judgments of national Supreme Courts. *Id.*, para. 118 [(Bundesverfassungsgericht) of 14 December 1977 (BVerfGE, Vol. 46, p. 342 ; ILR, Vol. 65, p. 146), by the judgment of the Swiss Federal Tribunal of 30 April 1986 in Kingdom of Spain v. Société X (Annuaire suisse de droit international, Vol. 43, 1987, p. 158 ; ILR, Vol. 82, p. 44), as well as the judgment of the House of Lords of 12 April 1984 in Alcom Ltd. v. Republic of Colombia ([1984] 1 AC 580 ; ILR, Vol. 74, p. 170) and the judgment of the Spanish Constitutional Court of 1 July 1992 in Abbott v. Republic of South Africa (Revista espa- ñola de derecho internacional, Vol. 44, 1992, p. 565 ; ILR, Vol. 113, p. 414)].

[69] Merriam-Webster Dictionary online.

[70] *Id.*

[71] C. Ryngaert, 'Embassy bank accounts and State immunity from execution : Doing justice to the financial interests of creditors', 26 *Leiden Journal of International Law* 73-88 (2013); C. Ryngaert, 'Immunity from Execution and Diplomatic Property', in T. Ruys, N. Angelet, L. Ferro (eds.), *The Cambridge Handbook of Immunities and International Law* (CUP 2019), pp. 285-306.

[72] These circumstances may have been specified in Article 19 of the UN Convention on the Jurisdictional Immunities of States and their Properties, but it is of note in *Jurisdictional Immunities* the ICJ considered 'that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law' (ICJ, *Jurisdictional Immunities*, para. 118). Arguably, the core customary norm can be found in the first sentence of Article 19: 'No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that …', with the precise exceptions and circumstances being a matter of interpretation. Thus, the ICJ's finding (para. 118) that 'that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State : that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State

***(c) Interpreting CIL norms laid down in authoritative (written) documents***

A third category is made up of those decisions that indirectly interpret CIL norms by interpreting the written documents in which they have been laid down. Insofar as CIL is laid down in an authoritative written text, courts will be more likely to have recourse to customary law *interpretation* than to customary law *ascertainment*, as supposedly the norm has already crystallized, black-on-white. It is the very codification of customary law which gives this body of law a more stable existence and shifts the focus to subsequent interpretation. Methodologically speaking, relying on codification treaties to understand the meaning of CIL rules is a form of systemic interpretation mirroring the interpretative rule laid down in Article 31(3)(c) VCLT, the written text being a 'relevant rule of international law'.[73]

The most obvious written documents serving such a purpose are obviously treaties. Thus, it is no surprise that the ICJ relied on, and arguably *interpreted* Article 12 of the UN Convention on Jurisdictional Immunities as CIL, as discussed in section 3.2(b). Another example is offered by US courts' reliance on the UN Convention on the Law of the Sea (UNCLOS), to which the US is not a party, for purposes of applying parallel customary international law of the sea with the same content.[74] The application of such CIL also has an interpretative dimension, as is borne out by the *Sea Shepherd* case. In this case, the US Court of Appeals for the Ninth Circuit interpreted the 'private ends' requirement of piracy by taking the UNCLOS definition of piracy (Article 101 UNCLOS) as the starting point for its investigation of whether 'private ends' include those pursued on personal, moral or philosophical grounds, such as the NGO Sea Shepherd's professed environmental goals.[75] The Court held as follows: 'Belgian courts, perhaps the only ones to have previously considered the issue, have held that environmental activism qualifies as a private end. See Cour de Cassation [Cass.] [Court of Cassation] Castle John v. NV Mabeco, Dec. 19, 1986, 77 I.L.R. 537 (Belg.). This *interpretation* is "entitled to considerable weight."'[76] What the Court was in fact doing was to *interpret* the 'private ends' variant of the *CIL* definition of piracy, which just happens to be codified in UNCLOS. The interpretative rule applied by the Court was arguably the one based on subsequent practice, echoing Article 31(3)(b) VCLT.

The shift from ascertainment to interpretation, facilitated by CIL having been laid down in a written document, may not be limited to situations of CIL norms codified in a *treaty*. It may also extend to situations of such norms being derived from *authoritative*, although *non-binding* written documents. An example of a court apparently *interpreting* CIL laid down in such a document is the Haifa District Court (Israel), which held that the non-binding San Remo Manual on International Law applicable to Armed Conflicts at Sea (1990)[77] was recognized as reflecting CIL, and thus that the authority for confiscating a vessel, at issue in

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which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim', can be considered as the interpretation or further refinement of the relative character of the core customary norm on state immunity from execution.

[73] Merkouris 2015, above note 15, at 272.

[74] *United States v Beyle and Abrar*, Appeal decision, ILDC 2483 (US 2015), 782 F3d 159, 169 (4th Cir), 136 S Ct 179 (2015), 3rd April 2015, United States; Court of Appeals (4th Circuit) [4th Cir], para. 33 (holding that widespread acceptance of the UNCLOS provided support for its status as an accurate reflection of customary international law); *Institute of Cetacean Research and ors v Sea Shepherd Conservation Society and Watson*, Appeal judgment, 725 F3d 940 (9th Cir), ILDC 2176 (US 2013), 24th May 2013, United States; Court of Appeals (9th Circuit) [9th Cir]. See on the interpretation of treaty rules and CIL rules with the same content also Merkouris 2015, p. 246.

[75] *Institute of Cetacean Research and ors v Sea Shepherd Conservation Society and Watson*, Appeal judgment, 725 F3d 940 (9th Cir), ILDC 2176 (US 2013), 24th May 2013, United States; Court of Appeals (9th Circuit) [9th Cir].

[76] *Id*., para. 6 (emphasis added).

[77] "San Remo Manual on International Law applicable to Armed Conflicts at Sea" (ed. Louise Doswald-Beck), Grotius Publications, Cambridge University Press, Cambridge, 1995.

the case, derived from CIL.[78] The Court then proceeded to find that most states required legal adjudication for an act of confiscating a vessel and also required a speedy court procedure,[79] thereby apparently *interpreting* the provisions of the San Remo Manual on prize law (which do not set forth a court procedure) by resorting to subsequent practice. Admittedly, the Court itself did not use the term interpretation, but the ILDC commentator did, observing, in addition, that ´any maritime court would have to address the potential impact of human rights law on the *interpretation* of the right to capture blockade-runners under traditional prize law´ (thus favoring systemic interpretation taking into account other norms of international law).[80] The Israeli Court decision suggests that law interpreters may consider CIL norms that have been laid down in authoritative nonbinding documents to lead a relatively stable existence, and thus to be amenable to interpretation.

## 4. Concluding observations

By and large, domestic courts, just like international courts, hew to the fiction that they *find/identify/ascertain* CIL. Earlier research has demonstrated, however, that domestic courts have only limited agency in identifying CIL.[81] Instead, they tend to simply *apply* pre-existing CIL. When domestic courts apply CIL, out of necessity, they may also *interpret and develop* CIL.[82] Thus, domestic courts may well engage in *CIL interpretation*, even if they largely refrain from using that term. The analysis in this contribution, based on extensive data collection, bears out that in rare cases domestic courts do engage in the interpretation of CIL. Sometimes they interpret CIL autonomously, other times they defer to and validate international courts' CIL interpretations, or they interpret written documents, such as treaties, codifying CIL norms. Such practices bear out that domestic courts may consider some core CIL norms to be relatively stable and amenable to further refinement through interpretation. When interpreting CIL, domestic courts appear to resort mainly to systemic interpretation and interpretation on the basis of subsequent state practice.[83] In future cases, domestic courts deciding cases on the basis of CIL may want to be more explicit regarding whether they engage in *de novo* customary norm-*identification* or rather in the *interpretation* of pre-existing and stabilized customary norms.

[78] *Israel v 'Estelle'*, Original petition, Claim In Rem 26861-08-13, ILDC 2299 (IL 2014), 31st August 2014, Israel; Haifa (District); Haifa; District Court, paras. 42, 43.
[79] *Id.*, paras. 48/49.
[80] *Id.*, A6 (emphasis added).
[81] Ryngaert and Hora Siccama, above note 3.
[82] See on the link between application, interpretation and development of international law by domestic courts: A. Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts', *Loyola of Los Angeles International and Comparative Law Review* 34 (2011): 133– 68, 135.
[83] Compare Merkouris 2015, above note 15, at 264-268 (arguing that international judges prefer 'to employ teleological and systemic interpretation instead, which are more easily distinguishable from the process of formation of customary international law', and discounting textual interpretation as well as interpretation based on the intention of the parties).