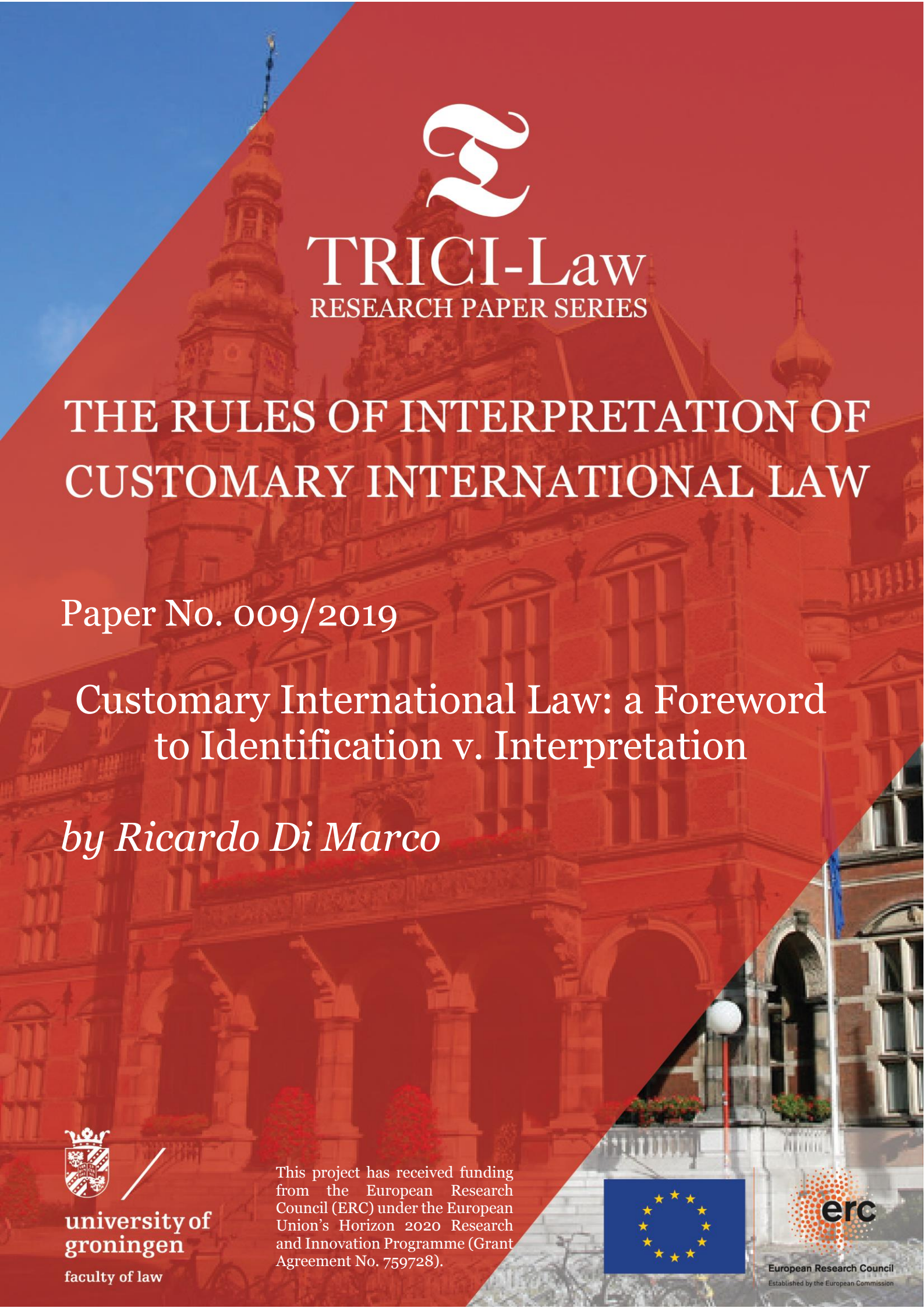

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THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

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Customary International Law: a Foreword to Identification v. Interpretation

by Ricardo Di Marco

university of groningen
faculty of law

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Customary international law: a foreword to Identification v. Interpretation

Riccardo Di Marco*

Abstract: Traditionally, academic authors working on the interpretation of public international law focus on written sources of law. Therefore, as far as treaty law is concerned, processes of interpretation and identification are distinguishable. Treaties are generally easy to identify and, in most cases, once the identification is carried out, it is possible to subsequently interpret such treaties. On the contrary, with respect to general international law, it is often argued that the process of its interpretation is inherent to its identification. Since customary law is typically unwritten, it is difficult to distinguish its identification from its interpretation. In legal literature, the relation between rules of interpretation and customary international law has never been specifically studied. Bearing in mind the horizontal nature of the international legal system as well as the important role played by customary rules in public international law, this paper aims to discuss whether it is possible to interpret customary international law. The Author will examine, first, both the recent draft conclusions and the discussions in U.N. General Assembly of the International Law Commission works on the identification of customary rules; secondly, the jurisprudence of the International Court of Justice that seems to admit the possibility to interpret customary international law. Finally, the Author will briefly focus on the differences and similarities between the process of identification and the process of interpretation of an international rule.

Keywords: Customary international law – Interpretation – Identification – International Court of Justice – International Law Commission

1. Introduction

When dealing with a difficult issue as is 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? Each doctrinal orientation would give a different answer. Some scholars consider that interpretation is an intellectual operation;[2] some others define interpretation as a creative activity.[3] Furthermore, still others argue that interpretation is a linguistic issue, maybe even a methodological one, but, in any case, not a legal matter.[4] On the contrary, some other scholars incorporate the study of interpretation into positive law:[5] by perceiving the legal character of the object, they act on the ground of the so-called "rules of interpretation". It is impossible

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[1] A complete bibliography on legal interpretation is almost impossible to collect, since so extensively it has been studied throughout time. Therefore, only those which seem most useful to understand the current problems will be indicated below among the various works: Emilio Betti, *L'interpretazione della legge e degli atti giuridici* (Giuffrè 1949); Salvatore Pugliatti, *Conoscenza e diritto* (Giuffrè 1961); HLA Hart, *The concept of law* (Clarendon press 1963); Giovanni Tarello, *Diritto, enunciati, usi. Studi di teoria e metateoria del diritto*, (il Mulino 1974); Norberto Bobbio, *Per un lessico di teoria generale del diritto*, (CEDAM 1975); Giovanni Tarello, *L'interpretazione della legge* (Giuffrè 1980); Hans Kelsen, *Sulla teoria dell'interpretazione* (Giappichelli 1989); Emilio Betti, *Teoria generale dell'interpretazione* (Giuffrè 1990); Riccardo Guastini, *Le fonti del diritto e l'interpretazione* (Giuffrè 1993); Franco Modugno, *Interpretazione giuridica* (CEDAM 2012).

[2] Santi Romano, *Frammenti di un dizionario giuridico* (Giuffrè 1947).

[3] Hans Kelsen, *La dottrina pura del diritto* (Einaudi 1952).

[4] See Martin Heidegger, *Essere e tempo* (Bocca 1953); Hans-Georg Gadamer, *Verità e metodo* (Bompiani 2000).

[5] See Norberto Bobbio, *Il positivismo giuridico* (Giappichelli Editore 1996).

to give an exhaustive picture of such a debate in only a few lines.[6] I will confine myself to note that international law writers consider the matter under a different light from the one considered by 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[7] (the "VCLT") that, while codifying the law of treaties,[8] included certain *rules* of interpretation.[9] Now, these rules of interpretation have been constantly applied by international tribunals.[10] The internationalists, usually hindered by the soft formalism of the international legal order, in this case enjoy a privileged position with respect to scholars of other legal systems.

To interpret a rule means to seek and understand its exact meaning, and, as a consequence, to determine its content, 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 content of a rule, thus, the interpreter must accomplish a task of both creation and cognition (or recognition).[11] This activity also raises practical issues: to which types of rules can interpretation be applied? In which cases is it possible to interpret a rule? Who can interpret a rule? How can a rule be interpreted? Which theoretical-methodological tools should the interpreter use? In this paper, I will merely present a few general remarks that could apply to all unwritten rules and, in particular, to customary international law.

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

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

[8] See among others Francesco 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 Recueil des Cours de l'Académie de Droit International 297; Giorgio Gaja, 'Trattati internazionali', Digesto delle Discipline Pubblicistiche XV UTET (1988) 344.

[9] On treaty interpretation, *ex multis*, see Dioniso Anzilotti, Efficacia ed interpretazione dei trattati [1912] Rivista di diritto internazionale 520 ; H Lauterpacht, 'Les travaux preparatoires et l'interprétation des traités' (1934) 48 Recueil des Cours de l'Académie de Droit International 709; Hersch Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness [1949] British Yearbook of International Law 48 ; Sergio Neri, *Sull'interpretazione dei trattati nel diritto internazionale* (Giuffrè 1958); Charles De Visscher, Remarques sur l'interprétation dite textuelle des traites internationaux [1959] Nederlands Tijdschrift voor Internationaal Recht 383; Antonio Malintoppi, Mesures tendant à prévenir les divergences dans l'interprétation des règles de droit uniforme [1959] Annuaire Unidroit 249; Francesco Capotorti, Sull'interpretazione uniforme dei trattati europei [1960] Rivista di diritto internazionale 3; Antoine Favre, L'interprétation objectiviste des traités internationaux [1960] Annuaire suisse de droit internationale 75; Vladimir Djuro Degan, *L'interprétation des accords en droit international* (Martinus Nijhoff 1963) ; Riccardo Monaco, I principi di interpretazione seguiti dalla Corte di Giustizia delle CC.EE. [1963] Rivista di diritto europeo 3; M K Yasseen, 'L'interprétation des traités d'après la convention de Vienne sur le droit des traités' (1976) 151 Recueil des Cours de l'Académie de Droit International 1; Stefania Bariatti, *L'interpretazione delle Convenzioni internazionali di diritto uniforme* (CEDAM 1986); Malgosia Fitzmaurice, Olufemi Elias, Panos Merkouris, *Treaty interpretation and the Vienna Convention on the law of the treaties: 30 years on* (Martinus Nijhoff Publishers 2010).

[10] For certain categories of treaties, the international jurisprudence has developed specific interpretative approaches which partially follow the VCLT's criteria. This is the case of both human rights treaties (see Rudolf Bernhardt, Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights [1999] German Yearbook of International Law 11) and constitutive treaties of international organization (see Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body [2010] European Journal of International Law 605 and Giorgio Gaja, Does the European Court of Human Rights Use its Stated Methods of Interpretation? [1999] Divenire sociale e adeguamento del diritto. Studi in onore di Francesco Capotorti 213). Moreover, the literature on the interpretation of two other types of written acts must be mentioned: referring to the Security Council resolutions, see Sir Michael Wood, The interpretation of Security Council resolutions, revisited [2016] Max Planck yearbook of United Nations law 3; with respect to the ILC's draft articles, see Giorgio Gaja, Interpreting Articles Adopted by the International Law Commission [2015] British Yearbook of International Law 10.

[11] See Matthias Herdegen 'Interpretation in International Law' Max Planck Encyclopedia of Public International Law (2013). It should also be mentioned the debate between cognitive and creative theories of interpretation. Namely, between those that reduce the interpretative activity to the ascertainment of already manifested norms and those that extensively conceive this activity like a full-fledged creation. For a concise, but complete, exposition of the issue see Modugno (n 1).

As far as the main subject of this essay is concerned, it is worth mentioning that the role of interpretation is closely related to the legal system taken under consideration. The more homogeneous the legal system is, consisting of harmonized 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 centralized: 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.

Bearing in mind the horizontal nature of the international legal system 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 interpret customary international law or can it only be identified? The recent codification promoted by the United Nations, in relation to the identification of customary rules,[12] has prompted the Author to reflect about such questions.[13] It is worth noting that in legal literature the relation between rules of interpretation and customary international law has never been specifically studied. International law rules of interpretation are in fact mainly applied to written rules.

The Author will examine, first, both the recent draft conclusions and the discussions in U.N. General Assembly of the International Law Commission (ILC) works on the identification of customary rules; secondly, the case-law of the International Court of Justice (ICJ) that seems to admit the possibility to interpret

[12] 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.

[13] The doctrine on the subject under examination is very broad considering that every book of public international law dedicates at least one chapter to customary international law. However, for an exhaustive overview of the relevant doctrine, the following should be consulted: Arrigo Cavaglieri, *La consuetudine giuridica internazionale* (CEDAM 1907); Tomaso Perassi, Teoria dommatica delle fonti delle norme giuridiche di diritto internazionale [1917] Rivista di diritto internazionale 195; Giorgio Balladore Pallieri, La forza obbligatoria della consuetudine internazionale [1928] Rivista di diritto internazionale 338; Hans Kelsen, 'Théorie du droit international coutumier' [1939] Revue internationale de la théorie du droit 253; Norberto Bobbio, *La consuetudine come fatto normativo* (Giappichelli 1942); Piero Ziccardi, *La costituzione dell'ordinamento internazionale* (Giuffrè 1943); Max Sørensen, *Les sources du droit international: étude sur la jurisprudence de la Cour permanente de justice internationale* (Munksgaard 1946); Roberto Ago, *Scienza giuridica e diritto internazionale* (Giuffrè 1950); Josef Laurenz Kunz, The Nature of customary international law [1953] American Journal of International Law 662; Giuseppe Barile, *Diritto internazionale e diritto interno* (Giuffrè 1957); Piero Ziccardi 'Consuetudine (diritto internazionale)' Enciclopedia del diritto IX (1961); Norberto Bobbio, 'Consuetudine (teoria generale)' Enciclopedia del diritto IX (1962) 426; Bin Cheng, UN Resolution on Outer Space: «Instant» International Customary Law [1965] Indian Journal of International Law 23; Grigory Tunkin, *Droit international public : problémes théoriques* (Pedone 1965); Norberto Bobbio, 'Fatto normativo' Enciclopedia del diritto XVI (1967) 988; Gaetano Morelli, A proposito di norme internazionali cogenti [1968] Rivista di diritto internazionale 108; RR Baxter, 'Treaties and Custom' (1970) 129 Recueil des Cours de l'Académie de Droit International 31; Anthony A. D'Amato, *The concept of custom in international law* (Cornell University Press 1971); René-Jean Dupuy, Coutume sage et coutume sauvage [1974] Mélanges Rousseau 75; Luigi Condorelli, Il 'riconoscimento generale' delle consuetudini internazionali nella Costituzione italiana [1979] Rivista di diritto internazionale 5; M Lachs 'The development and general trends of international law in our time' (1980) 169 Recueil des Cours de l'Académie de Droit International 9; Tullio Scovazzi, Precedenti ed evoluzione della consuetudine internazionale [1984] Scritti in onore di G. Sperduti 301; Georges Abi-Saab, La coutume dans tous ses états. Ou le dilemme du développement du droit International général dans un monde éclaté [1987] Etudes en l'honneur de Roberto Ago 53; Gaetano Arangio-Ruiz, 'Consuetudine internazionale', Enciclopedia Giuridica VIII (1988); Alain Pellet, The Normative Dilemma: Will and Consent in International Law-Making [1988] Australian Yearbook of International Law 22; Luigi Condorelli, 'Consuetudine internazionale' Digesto delle discipline pubblicistiche III (1989) 490; Gaetano Arangio-Ruiz, Customary law: a few more thoughts on the theory of 'spontaneous international' custom [2007] Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon 93; Stefan Talmon, Determining customary international law: The ICJ's Methodology between Induction, Deduction and Assertion [2015] European Journal of International Law 417; Alessandra Gianelli, 'Consuetudine (diritto internazionale)' Diritto on line (2017) http://www.treccani.it/enciclopedia/consuetudine-dir-int_%28Diritto-on-line%29/ accessed 15 September 2019.

customary international law. Finally, the Author will briefly focus on the differences and similarities between the process of identification and the process of interpretation of an international rule.

2. ILC work on customary international law

As everybody knows, the ILC has recently decided to deal with the formation process of customary international law.[14] In 2011 this topic was included in the long-term work program of the ILC,[15] which approved a proposal put forward by Sir Michael Wood .[16] In this proposal, he wrote:

"Notwithstanding the great increase in the number and scope of treaties, customary international law remains an important source of international law. The ideal of a fully codified law, rendering customary international law superfluous, even if it were desirable, is far from becoming a reality. In the past, much was written on the subject of customary international law. In recent years there has been a tendency in some quarters to downplay its significance. At the same time, ideological objections to the role of customary international law have diminished. There now appears to be a revival of interest in the formation of customary international law, in part stimulated by the attempts, sometimes quite controversial, of domestic courts to grapple with the issue. The formation of customary international law now has to be seen in the context of a world of nearly 200 States, and numerous and varied international organizations, both regional and universal."[17]

In 2012, the ILC decided both to include the topic in its work program under the title "*Formation and evidence of customary international law*" and to appoint Wood as Special Rapporteur.[18] The Commission thus proposed to catalogue the practical tools for obtaining evidence of a customary rule, by investigating the very concept of evidence of the existence of this unwritten rule. By so doing, the ILC committed itself to research the rules and principles that shape the ascertainment of customary international law.

Nevertheless, this work, initially concentrated on the "*Formation and evidence of customary international law*", subsequently focused on the "*Identification of customary international law*".[19] In fact, in 2013, the Commission decided to change the title of the topic, by removing the terms originally chosen, in order to refer exclusively to the identification of customary international law.[20] The ILC was very much aware of the difficulties inherent in an effort to "*codify the relatively flexible process by which rules of customary international law are formed*".[21]

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[14] On the formation process of customary international law see: M H Mendelson 'The formation of customary international law' (1998) 272 Recueil des Cours de l'Académie de Droit International 155. For a detailed description of the topic under consideration, with examples taken from the practice see Tullio Scovazzi, *Corso di diritto internazionale – Parte II: Le norme generali e le altre categorie di norme*.

[15] ILC, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10 289 para 365.

[16] ILC (n 15) 305.

[17] ILC (n 15) 2.

[18] ILC, 'Report of the International Law Commission on the Work of its 64th Session' (7 May–1 June and 2 July–3 August 2012) UN Doc A/67/10 108 para 157.

[19] ILC, 'Report of the International Law Commission on the Work of its 65th Session' (6 May–7 June and 8 July–9 August 2013) UN Doc A/68/10 93 para 65.

[20] On the identification process of a customary international rule see Giorgio Gaja, Sull'accertamento delle norme internazionali generali da parte della Corte Costituzionale [1968] Rivista di diritto internazionale 315; L Ferrari-Bravo 'Méthodes de recherche de la coutume internationale dans la pratique des États' (1985) 192 Recueil des Cours de l'Académie de Droit International 233;

[21] Michael R Anderson, *The International Law Commission and the Future of International Law* (British Institute of International and Comparative Law 1998).

It is important to notice that, at first, the Commission considered that this change of title would not have been an obstacle to dealing with the requirements of the formation of customary rules. Indeed, despite the elimination of the reference to the "formation" of customary international law, among members of the ILC remained widespread the belief that the two matters were linked by an indissoluble bond.[22] This - it was argued - because it would be unthinkable to correctly proceed to the identification of customary international law "*without gaining at least a general conception of its formation*".[23] Thus, the Commission shared the opinion of Special Rapporteur Wood, according to which the amendment of the title would not have affected the issues to be dealt with, because "*both [formation and evidence] issues would resolve themselves as the work proce*eded".[24]

Similarly, States have positively welcomed the simplification of the title by seeing in it the sign of a more "practical" orientation of the ILC work. Indeed, this new orientation, although mainly concentrated on the evidentiary aspects of customary international law, still seemed to be focused on the formation process of customary rules. This was considered essential, since the analysis of the formation process of a custom would be inevitable for those who want to establish the means of the rules arising from it. Some States claimed that, despite the amended title, the ILC work should have included both an examination of the requirements for the formation of rules of customary international law and the material evidence of such rules. They, in fact, maintained that in order to establish whether a custom exists, it is compulsory to take into account the requirements for the formation of a rule of customary international law as well as the type of evidence that determine the fulfillment of those requirements.[25] Additionally, according to the majority of States, the connection between both the concepts of formation and identification of a customary rule would be so strong, that the Commission could have dealt exclusively with the identification of the formation and evidence of customary international law.

This brief analysis of the ILC works shows that the Commission decided to change the title of its work because both the States and the ILC itself wished to reach "more practical" draft conclusions. Members of the Commission as well as States agreed that the outcome of the project should have been of an essentially practical nature. It was not their intention to seek to resolve mostly theoretical controversies. Nor, obviously, was the topic concerned with the substantive rules of customary international law. Therefore, the topic should have dealt only with the methodology for identifying such rules.

As a result, it seems that what was wanted was a work drawn up specifically for the practitioners of international law: a sort of analytical guide on the identification techniques of customary international law. In fact, both the conclusions and the commentaries aim to offer practical guidance on how the existence (or non-existence) of rules of customary international law is to be established. The ILC agreed that it needed to examine the position of customary international law among other sources of international law and, primarily, its relationship to the treaties and general principles of law.

In the end, the ILC, while able to avoid some of the theoretical debates connected with the formation of customary international law given its focus on identification, has recognized that in practice the formation and identification cannot be distinguished. This notwithstanding, the analysis of the formation process of

[22] ILC, 'Summary record of the 3151st meeting' (27 July 2012) 168 para 52 (Nolte); ILC, 'Summary record of the 3183rd meeting' (19 July 2013) 92 para 18 (Hmoud); ILC, 'Summary record of the 3185th meeting' (24 July 2013) 103 para 14 (Singh).
[23] ILC, 'Summary record of the 3182nd meeting' (18 July 2013) 88 para 28 (Tladi).
[24] ILC, 'Summary record of the 3186th meeting' (25 July 2013) 108 para 20.
[25] *Ex* multis, statements of Austria and Indonesia, November 4th, 2013. Interventions by States during the 68th session of the International Law Commission can be found by accessing the UN "PaperSmart" website: https://papersmart.unmeetings.org/ga/sixth/68th-session/programme.

customary rules, although being implied in the term "identification", does not seem to have had the space that it might have deserved. Furthermore, the ICL works have not even individually dealt with the determination of the content of a customary rule after it has been identified (i.e. the possibility for this particular unwritten rule to be interpreted). According to both the ILC and the States, indeed, the determination of the existence of a rule of customary international law and of its content would be simultaneous processes. In fact, broadly speaking, the U.N. 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*."[26]

3. Can customary international law be interpreted? A preliminary jurisprudential analysis

The interpretation of international law in general[27] poses a multitude of challenges:[28] one of these is that its rules are often extremely indeterminate. In fact, sometimes they are unwritten,[29] like customary international law. Unwritten rules present a peculiar issue of interpretation, especially in public international law. One example of the practical relevance of this matter can be found when the interpreter is bound to apply an unwritten rule to a situation which has no precedents.[30] The primary goal of interpretation of any rule, in any legal system, is in fact to determine whether - once either its content and its general and abstract scopes are established - it can be applied to the circumstances of the particular case. Furthermore, it can also be admitted that every application of law (written or unwritten) requires an interpretative activity. As it is widely known, to interpret a rule means to determine the content of this rule. This operation is usually accomplished with the aim of obtaining a certain form of understanding of the rule.[31] The main task of the judge is, therefore, to investigate the legal meaning of the applicable rule and the scope of its application. Dealing with customary international rules, is it possible to proceed to their interpretation?

As is well known, international case-law can considerably contribute to the clarification and the development of international law. This is even more evident with respect to both judgments and advisory opinions rendered by the ICJ, which seem to have resorted to the interpretation of a customary rule on several occasion.

It is not unusual for a customary international rule to be challenged. Actually, its contents are often subjected to debate, as it happened, for example, in the *Land, Island and Maritime Frontier Dispute*.[32] In this case, both El Salvador and Honduras recognized the existence and the applicability of the customary rule of

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[26] ILC, 'Draft conclusions on identification of customary international law' UN Doc A/73/10 para 65 conclusion 16.
[27] For a detailed analysis, see for instance : Ludovico Matteo Bentivoglio, 'Interpretazione delle norme internazionali' Enciclopedia del diritto XXII 310; Ludovico Matteo Bentivoglio, *La funzione interpretativa nell'ordinamento internazionale* (Giuffrè 1958); Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons, Ltd 1958); Charles De Visscher, *Problèmes d'interpretation judiciaire en droit international public* (Pedone 1963); Serge Sur, *L'interprétation en droit international public* (LGDJ 1974); Robert Kolb, *Interprétation et création du droit international* (Editions Bruylant 2006); D Alland, 'L'interprétation du droit international public' (2014) 362 Recueil des Cours de l'Académie de Droit International 41.
[28] See Emilio Betti, *Problematica del diritto internazionale* (Giuffrè 1956).
[29] See Piero Ziccardi, 'La consuetudine internazionale nella teoria delle fonti giuridiche' [1958] Comunicazioni e studi 190.
[30] See Lorenzo Gradoni, Consuetudine internazionale e caso inconsueto [2012] Rivista di diritto internazionale 704.
[31] See Matthias Klatt, *Making the Law Explicit: The Normativity of Legal Argumentation* (Oxford University Press 2008).
[32] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)* [1992] ICJ Rep 351.

uti possidetis[33] to their border dispute; however, at the same time, they both contested the scope of this custom, due to their behavior. Eventually, in its judgment, the ICJ seemed to define the content of *uti possidetis*.[34] The issue may be rephrased as follows: once the existence of a custom is not questioned, is it conceivable to admit a subsequent determination of its content?

The contribution of the ICJ to the impervious issue of the interpretation of customary rules is particularly relevant. As far as a particular (or regional) custom is concerned, for example in the *Asylum* case,[35] 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 considered to be general principles of international law*".[36]

Moreover, 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,[37] the ICJ declared that it was possible to distinguish treaty law and customary international law "*by reference to the methods of interpretation and application*".[38] In so doing, the Court acknowledged that even if with different methods, interpretation would be possible also in relation to customary rules.

The *Barcelona Traction* case is another landmark dispute before the ICJ, in which the Court in The Hague explicitly points out the possibility to interpret a customary rule: here, the one concerning the diplomatic protection:[39]

> "*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*

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[33] On the principle of *uti possidetis iuris* see for instance Charles De Visscher, *Problèmes de confins en droit international public* (Pédone 1969); Giuseppe Nesi, *L'uti possidetis iuris nel diritto internazionale* (CEDAM 1996); Malcolm Nathan Shaw, The Heritage of States: the Principle of Uti Possidetis Juris Today [1996] British Yearbook of International Law 75; L I Sánchez Rodríguez, 'L'uti possidetis et les effectivités dans les contentieux territoriaux et frontaliers' (1997) 263 Recueil des Cours de l'Académie de Droit International 149; Georges Abi-Saab, Le principe de 'l'uti possidetis': son rôle et ses limites dans le contentieux territorial international [2007] 'Liber Amicorum' Lucius Caflisch 657.

[34] In fact, the Court, after acknowledging that "*some forms of activity, or inactivity, might amount to acquiescence in a boundary other than that of 1821*", proceeded to delimit the borders between the two States: "*the Chamber finds that the conduct of Honduras from 1881 until 1972 may be regarded as amounting to such acquiescence in a boundary corresponding to the Tepangüisir lands granted to Citala and those of Ocotepeque* " (*Land, Island and Maritime Frontier Dispute* (n 32) para 80).

[35] *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)* [1950] ICJ Rep 266.

[36] Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons Ltd 1958).

[37] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14.

[38] *Military and Paramilitary Activities in and against Nicaragua* (n 37) para 178.

[39] For more about diplomatic protection see P De Visscher, 'La protection diplomatique des personnes morales' (1961) 102 Recueil des Cours de l'Académie de Droit International 395; Alessandra Gianelli, La protezione diplomatica di società dopo la sentenza concernente la Barcelona Traction [1986] Rivista di diritto internazionale 762; Luigi Condorelli, La protection diplomatique et l'évolution de son domaine d'application actuelle [2003] Rivista di diritto internazionale 5; Pietro Pustorino, Recenti sviluppi in tema di protezione diplomatica [2006] Rivista di diritto internazionale 68.

> *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*". [40]

The ICJ stated very clearly that interpreting customary rules is one of its tasks. Furthermore, in his dissenting opinion in the *Advisory Opinion on Nuclear Weapons* case[41], Judge Shahabuddeen,[42] stated that:

> "*the purpose of the Martens Clause[43] was confined to supplying a humanitarian standard by which to interpret separately existing rules of conventional or customary international law on the subject of the conduct of hostilities*".[44]

In the above-mentioned cases, the ICJ clearly admitted the possibility to interpret customary international law. As a consequence, once the existence of a customary rule is not called into question, the interpreter 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. He affirmed the need to determine the contents 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*".[45]

Similarly, in his dissenting opinion in the same case, Judge Tanaka acknowledged the possibility to interpret customary rules through the same method applicable to conventional rules:

> "*Customary law, being vague and containing gaps compared with written law, requires precision and completion about its content. This task, interpretive by nature, would be incumbent upon the Court. The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law*".[46]

Both judges confirmed that identification and interpretation of a customary rule are two distinguished operations, not always contextual[47].

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[40] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* [1970] ICJ Rep 3 para 54.

[41] On nuclear weapons in general see Georges Fisher, *La non-prolifération des armes nucléaires* (LGDJ 1969); James Crawford, Legal aspects of a nuclear weapons convention [1998] African yearbook of international law 153. For a detailed study of the Advisory Opinion on Nuclear Weapons see Ronzitti, La Corte Internazionale di Giustizia e la questione della liceità della minaccia o dell'uso delle armi nucleari [1996] Rivista di diritto internazionale 861.

[42] *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ, Dissenting Opinion of Judge Shahabuddeen 375.

[43] Introduced into the preamble to the 1899 Hague Convention II (Laws and Customs of War on Land (Hague II) signed 29 July 1899), according to which civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience.

[44] *Legality of the Threat or Use of Nuclear Weapons* (n 42) 408.

[45] *North Sea Continental Shelf (Federal Republic of Germany v. Denmark)* [1969] ICJ, Dissenting Opinion of Judge Morelli 198.

[46] *North Sea Continental Shelf* (n 45), Dissenting Opinion of Judge Tanaka 172.

[47] Some authors argue that the procedure for determining the content of a customary rule cannot be distinguished from the procedure for establishing its existence. Among those who argue that the process of interpretation of a customary rule is absorbed by the process of its identification see Giuseppe Barile, *I principi fondamentali della comunità statale ed il coordinamento tra sistemi* (CEDAM 1969); Herdegen (n 11).

More evidence of this approach can be found in other cases before the Hague Court. For example, recently, in its Advisory Opinion in the *Chagos* case[48], the ICJ first admitted the possibility to interpret a customary rule, then affirmed that identification and interpretation may not be simultaneous. While trying to establish "*when the right to self-determination crystallized as a customary rule binding on all States*",[49] the Court clearly asserted the possibility to define the content and the scope (i.e. to interpret) a customary international rule. After maintaining that:

> "*the General Assembly had affirmed on several occasions the right to self-determination (resolutions 637 (VII) of 16 December 1952, 738 (VIII) of 28 November 1953 and 1188 (XII) of 11 December 1957) and a number of non-self-governing territories had acceded to independence*",[50]

the ICJ stated that only after General Assembly resolution 1514 (XV) of 14 December 1960 "*the content and scope of the right to self-determination*"[51] 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 determination of its content. By ascertaining the customary character of the right to self-determination, the Court referred to UNGA resolution 1514 (XV) of 14 December 1960, not only to interpret this customary rule, but also as evidence of an already existing custom in question.[52] This means that, according to the Court, a customary rule can be interpreted also after its formation/identification process.

In this regard, the *Gulf of Maine* case should also be mentioned.[53] On this occasion, the ICJ, referring to the delimitation of the maritime boundary dividing the continental shelf and fisheries zones of Canada and the United States in the Gulf of Maine area, stated

> "*It is therefore unrewarding, especially in a new and still unconsolidated field like that involving the quite recent extension of the claims of States to areas which were until yesterday zones of the high seas, to look to general international law to provide a readymade set of rules that can be used for solving any delimitation problems that arise. A more useful course is to seek a better formulation of the fundamental norm, on which the Parties were fortunate enough to be agreed, and whose existence in the legal convictions not only of the Parties to the present dispute, but of all States, is apparent from an examination of the realities of international legal relations*".[54]

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. 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,

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[48] For a preliminary analysis of the issue see Jing Lu, Reflections on the questions regarding Chagos Archipelago put to the ICJ [2018] Archiv des Völkerrechts 361; Marko Milanovic, ICJ Delivers Chagos Advisory Opinion, UK Loses Badly at https://www.ejiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly/; Stephen Allen, The Chagos Advisory Opinion and the Decolonization of Mauritius at https://www.asil.org/insights/volume/23/issue/2/chagos-advisory-opinion-and-decolonization-mauritius.

[49] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* [2019] ICJ Rep 1 para 148.

[50] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (n 49) para 150.

[51] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (n 49) para 150.

[52] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (n 49) para 152.

[53] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 246.

[54] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (n 53) para 111.

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 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*".[55]

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 analyze its content.

The practical relevance of this matter is also particularly evident with regard to the *Jurisdictional Immunities of the State* case,[56] where the difficulty to separate the two processes seemed to be manifest. In fact, this case has probably given a new impulse to the debate. The object of the litigation dealt with contents of the customary rule, recognized by Italy as well as by Germany, regarding foreign State's immunity from civil jurisdiction.[57] In addition, the International Court of Justice decided about the so-called "tort exception", i.e. the absence of immunity in case of actions having caused death, personal injury or damages in the territory of the host State.[58] Italy invoked the application of such exception of customary international law also in relation to *acta jure imperii*. In this case, the ICJ task could be intended not only as identification of the existence of an exception from the general rule, but also as an interpretation of such rule.[59] The ICJ affirmed:

> "*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"*.[60]

One may ask what the Court did in this case. Did it identify a customary rule, or did it interpret it? In other words, did the ICJ determine the existence of the customary rule under consideration, or did it establish its content? The Italian Constitutional Court replied to the ICJ in judgment No.238/2014,[61] by recognizing that

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[55] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (n 53), Dissenting Opinion of Judge Gros 360 para 8.

[56] *Jurisdictional Immunities of the State (Germany/Italy, Greece intervening)* [2012] ICJ Rep 99.

[57] Regarding the foreign State's immunity from the jurisdiction see among others Rolando Quadri, *La giurisdizione sugli Stati stranieri* (Giuffrè 1941); Gaetano Morelli, *Diritto processuale civile internazionale* (CEDAM 1954); Riccardo Luzzato, *Stati stranieri e giurisdizione nazionale* (Giuffrè 1972); Alessandra Gianelli, Crimini internazionali ed immunità degli Stati dalla giurisdizione nella sentenza Ferrini [2004] Rivista di diritto internazionale 643; Christian Tomuschat, L'immunité des Etats en cas de violations graves des droits de l'homme [2005] Revue générale de droit international public 194; Natalino Ronzitti and Gabriella Venturini (edited by), *Le immunità giurisdizionali degli Stati e degli altri Enti internazionali* (CEDAM 2008). For a critical analysis of the ICJ judgment on the Jurisdictional Immunities of the State case (Germany v. Italy: Greece intervening) see Benedetto Conforti, The judgment of the International Court of Justice on the immunity of foreign States: a missed opportunity [2012] Italian Yearbook of International Law 135.

[58] For a deep investigation on this subject see Andrew Dickinson, Germany v. Italy and the territorial tort exception [2013] Journal of international criminal justice 147.

[59] Gianelli (n 13).

[60] *Jurisdictional Immunities of the State (Germany/Italy, Greece intervening)* (n 56) para 55.

[61] For an indicative literature on this landmark judgment of the Italian Constitutional Court regarding the conflict between general international law and the Italian legal order see Pasquale De Sena, The judgment of the Italian Constitutional Court on State immunity in cases of serious violations of human rights or humanitarian law: a tentative analysis under International law [2014] Questions of International Law 17 available at http://www.qil-qdi.org/wp-content/uploads/2014/12/03_Constitutional-Court-238-2014_DE-SENA.pdf; Robert Kolb, The relationship between the international and the municipal legal order: reflections on the decision No 238/2014 of the Italian Constitutional Court [2014] Questions of International Law 5 available at http://www.qil-qdi.org/wp-content/uploads/2014/12/02_Constitutional-Court-238-2014_KOLB.pdf; Paolo Palchetti, Judgment 238/2014 of the

the ICJ had carried out an interpretation of customary international law. Indeed, the Italian Constitutional Court stated that:

> "*the interpretation by the ICJ of the customary law of immunity of States from the civil jurisdiction of other States for acts considered jure imperii is particularly qualified and does not allow further examination by national governments and/or judicial authorities, including this Court*".[62]

The highest Italian court in matters of constitutional law, in its judgment regarding the conflict between general international law and the fundamental values of the Italian legal system,[63] similarly believes that the ICJ not only identifies but also interprets customary international law.

Even after such a short examination of international case-law, it is clear that the International Court of Justice faced more than one time the complex issue of the interpretation of customary international law. This, in various areas of customary international law, namely: law of the sea, state responsibility, international humanitarian law, diplomatic protection, state immunity, etc. This means that the possibility to interpret a customary rule could involve every field of international law, and not only a specific one.

4. Identification v. Interpretation

Both interpretation and identification processes have been the object of formalization 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 interpretive process. It is worth mentioning that the process of such formalization 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. On the other hand, as to identification, recent woks of the ILC on "*Identification of customary international law*" can be considered the embodiment of such an attempt to formalize the recognition methods of customary law.

The suggested dichotomy already appears to imply a practical discrepancy between interpretation and identification. Each of these processes accomplishes a particular operation. The former seeks to explicate the meaning of rules with a view to establishing the standard of conduct. The latter intends to determine how and

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Italian Constitutional Court: In Search of a Way Out [2014] Questions of International Law 44 available at http://www.qil-qdi.org/wp-content/uploads/2015/02/05_Constitutional-Court-238-2014_PALCHETTI_FIN pdf; Christian Tomuschat, The National Constitution Trumps International Law [2014] Italian Journal of Public Law 189; Enzo Cannizzaro, Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court no. 238 of 2014 [2015] Rivista di diritto internazionale 126; Benedetto Conforti, La Corte costituzionale e i diritti umani misconosciuti sul piano internazionale [2015] Giurisprudenza costituzionale 1; Attila Tanzi, Un difficile dialogo tra Corte internazionale di giustizia e Corte costituzionale [2015] La Comunità internazionale 13 available at http://campus.unibo.it/185488/1/AT_Un%20difficile%20dialogo%20tra%20CIG%20e%20Corte%20costituzionale.pdf.

[62] Italian Constitutional Court Judgment No. 238/2014 para 3.1, English translation provided by the Italian Constitutional Court, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en pdf.

[63] On the relationship between domestic and international legal order see Dioniso Anzilotti, *Il diritto internazionale nei giudizi interni* (Zanichelli 1905); H Kelsen, 'Les rapports de système entre le droit interne et le droit international public' (1926) 14 Recueil des Cours de l'Académie de Droit International 227; Barile (n 13); A Cassese, 'Modern constitutions and international law' (1985) 192 Recueil des Cours de l'Académie de Droit International 331; Gaetano Arangio-Ruiz, Dualism Revisited: International Law and Interindividual Law [2003] Rivista di diritto internazionale 909. More specifically, on the relationship between italian and international legal system see Tomaso Perassi, *La Costituzione italiana e l'ordinamento internazionale* (Giuffrè 1958); Luigi Condorelli, Il 'riconoscimento generale' delle consuetudini internazionali nella Costituzione italiana [1979] Rivista di diritto internazionale 5.

whether a given rule can aspire to be part of the international legal order. This means that interpretation is supposed to create contents and a standard of behavior, while identification is meant to build a double architecture of ascertainment that differentiates law and non-law. Nevertheless, it seems likewise appropriate to admit that both processes of interpretation and identification of a customary rule share many comparable characteristics. Such similar features may justify the fact that they are often confused one for the other. The difficulty in categorizing them is also intensified by the fact that in practice they may be performed at the same time.[64]

As far as treaty law is concerned, interpretation and identification are two separate processes. Indeed, treaties are generally easy to identify and in most cases, once their identification is completed, it is possible to interpret such treaties with ease. Instead, with regard to customary rules, since they are unwritten, it is difficult to distinguish their identification from their interpretation. In fact, when dealing with unwritten rules, specifically with customary rules, the analysis concerns two groups of elements: those relevant to the emersion process of the rule (state practice and *opinio iuris*), on one side and the formulation of the rule (generally retrospective, but sometimes programmatic or even concomitant) defined by a number of actors (judges, diplomatic chancelleries, etc.), that spare no efforts to express with words the customary rule, on the other. When the judge deals with a customary rule, he is naturally led to take into consideration and try to harmonize the different formulations (juridical, diplomatic, etc.) of such rule. At least this seems to be the process followed.

As we have seen, the two concepts of interpretation and identification have points of contact and differences, both with respect to written rules and to unwritten ones. This gives rise to some questions that deserve to be more deeply examined: what has the ICJ done in its work? Has it always carried out an identification of the customary rules or, occasionally, has it proceeded to interpret them? Hence, how can the internationalist distinguish interpretation from identification? Has the ICJ provided some methodological tools in this regard?

5. Conclusions

The ICJ has openly admitted the possibility of interpreting customary rules in various cases. Interpretative activity is, in fact, essential to correctly determine the meaning 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 correctly determine its contents. As a consequence, it can probably be assumed that the State parties have clarified as much as possible the meaning that the rule would have had in the application phase in the concrete case. On the contrary, for an unwritten rule - and in particular, for a customary rule - this cannot happen. As is well known, in a legal system as little organized as that of the States, given 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 interpret the customary rule would seem to be much more important. In fact, States, by adopting a certain behavior, which then leads to the peaceful formation of

[64] See in more detail: Rolando Quadri, *Diritto internazionale pubblico* (Priulla 1949); Giuseppe Barile, La rilevazione e l'integrazione del diritto internazionale non scritto e la libertà di apprezzamento del giudice [1953] Comunicazioni e studi 143; Giuseppe Barile, Interpretazione del giudice ed interpretazione di parte del diritto internazionale non scritto [1954] Rivista di diritto internazionale 168; Barile (n 47); Maarten Bos, *A methodology of international law* (North-Holland 1984); Riccardo Monaco 'Interpretazione' Enciclopedia Giuridica VIII (1988); Tullio Treves 'customary international law' Max Planck Encyclopedia of Public International Law (2006); Herdegen (n 11). On the contrary, some authors acknowledge that the process of interpretation of customary international law can be separate from the one of its identification: see De Visscher (n 27); Kolb (n 27); Panos Merkouris, *Article 31(3)(c) VCLT and the principle of systemic integration* (Brill Nijhoff 2015); Panos Merkouris, Interpreting the customary rules on interpretation [2017] International community law review 126; Attila Tanzi, *Introduzione al diritto internazionale contemporaneo* (CEDAM 2019).

an international custom, do not always determine with precision and in an uncontested way the content and the scope of the same. As a result, it could even be said that, precisely because of the intrinsic characteristics of the customary rule (namely an unwritten rule), the content-search activity is even more crucial. International custom, in fact, has been in various cases the subject of international disputes regarding the scope of its content, also after its formation, at a time when its existence was not at all called into question.

It would seem that the ICJ's point of view intends to assure the maintenance of a reasonable flexibility in the application of custom. However, several doubts remain. For example, how did the ICJ deal with the issue of the interpretation of customary international law? Has it been differently addressed in the various cases, briefly taken into account here? According to the ICJ, what would it mean to interpret a customary rule? Has the Court in The Hague provided the theoretical-methodological tools needed to interpret a customary rule? What are the principles established in this regard by the ICJ? In the *Jurisdictional immunities of the State* case, for example, did the Hague Court interpret or identify the customary rule under consideration? Both stances could be convincingly supported. Further study and analysis of the topic might try to answer some of these questions.

My intention to stress the need for interpretation of customary rules does not amount to claim to find a solution to every question; it rather intends to supply useful instruments to sort things out.