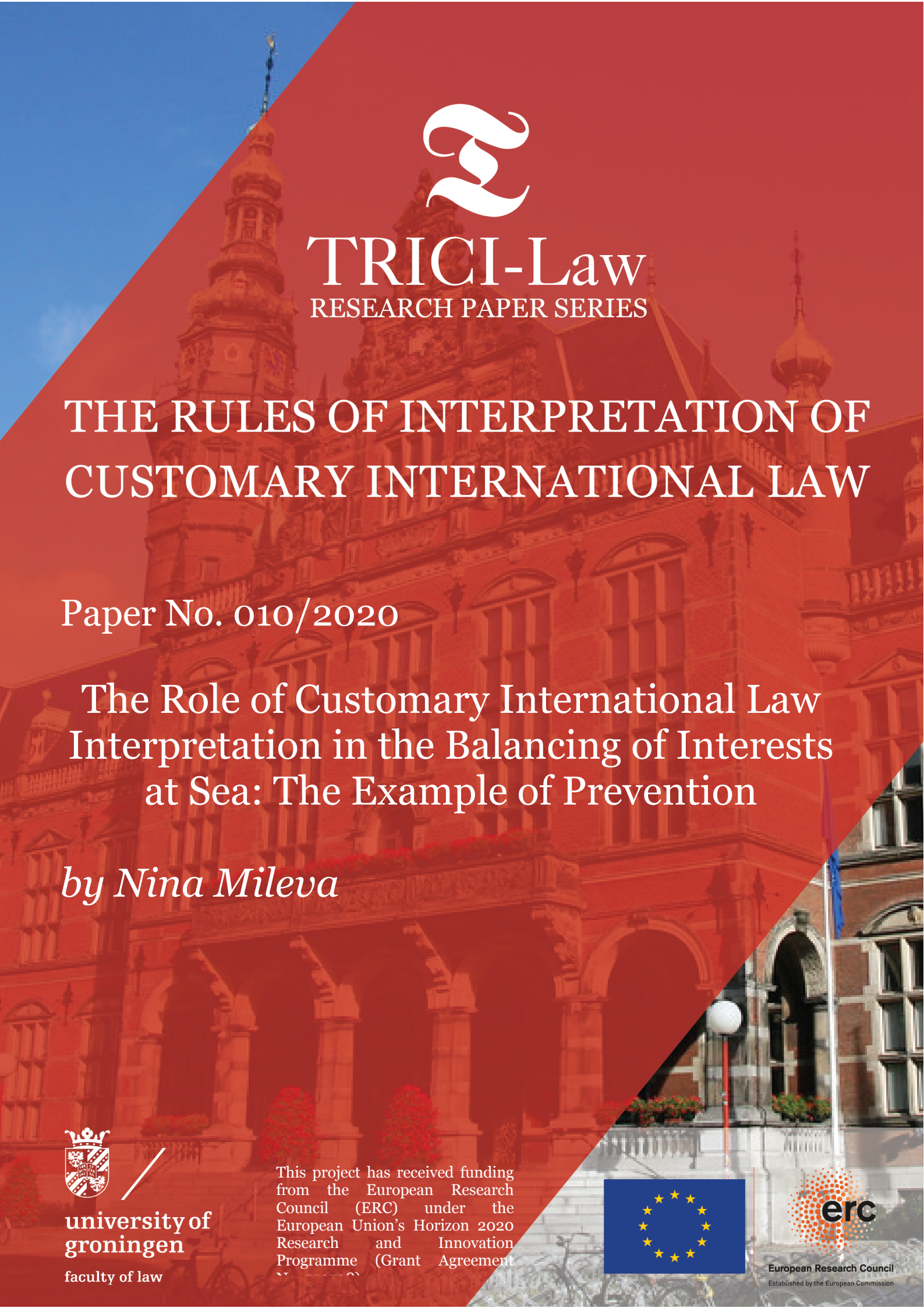

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THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

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The Role of Customary International Law Interpretation in the Balancing of Interests at Sea: The Example of Prevention

by Nina Mileva

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The Role of Customary International Law Interpretation in the Balancing of Interests at Sea: The Example of Prevention

Nina Mileva*

1. Introduction

Prevention is well established as a customary rule of international law (CIL).[1] However, while nowadays there is little contention around the status of prevention as a rule of CIL, the content of prevention as a customary obligation is still open to interpretation.[2] This is at least in part because the customary rule of prevention is a general obligation which emerges in various different contexts, and as such is subject to interpretation that may vary according to the context to which it applies. Generally, the formulation of prevention as a customary rule is understood to be reflected[3] in the wording of Principle 21 of the Stockholm Declaration on the Human Environment[4] and its successor Principle 2 of the Rio Declaration on Environment and Development.[5] These instruments, while formally non-binding, reflect a process of negotiation and consensus among states and as such may be considered indicative of the state of customary international law. Moreover, subsequent scholarship,[6] codification efforts,[7] as well as jurisprudence[8] focused on prevention as a customary rule all point to a formulation of the rule in the terms of these two principles. As indicated above however, while this formulation may be considered a general expression of the customary rule of prevention, the specific content of the rule remains open to determination.

This paper is interested in examining the role of prevention as a customary rule in the context of activities at sea. One might wonder what is the relevance of prevention as a customary rule in a context where many of the activities which engage the protection of the environment are regulated by a multiplicity of

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[1] L Duvic Paoli and J E Viñuales, 'Principle 2: Prevention' in J E Viñuales (ed.) *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015) 107, 120

[2] L Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge University Press, 2018) 91

[3] On this point see: Duvic-Paoli and Viñuales (n 1) 120-121*; Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 [1996] ICJ Rep. 226, paras. 27-29

[4] Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 192) UN Doc A/CONF 48/14/Rev. 1, Principle 21, which reads: States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction

[5] Rio Declaration on Environment and Development, (Rio, 13 June 1992) A/CONF.151/26 (Vol. I), Principle 2, which reads: States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

[6] See indicatively: Y Tanaka, 'Principles of International Marine Environmental Law in R Rayfuse (ed.) *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing, 2017) 31, 33; Duvic Paoli (n 2)

[7] See indicatively: International Law Commission, "Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries" reproduced in Yearbook of the International Law Commission [2001] Vol. II, Part Two, 148

[8] See Section 3 below

treaties and instruments. Indeed, scholars have observed that while many relevant rules in the context of environmental protection are of a customary character, CIL might only have a residual role to play "by imposing basic duties where no more specific agreement has been forthcoming".[9] At the same time however, it has also been observed that the presence of multiple instruments and institutions which regulate activities at sea pose a challenge for the holistic protection of the environment, because they are decentralized and at times fragmented or address diverse actors and activities.[10] In light of this, this paper contends that customary law in general, and prevention as a CIL rule in particular, does in fact continue to play a relevant role. The reason for this is because, unlike treaties which often have a limited substantive scope or varying membership, CIL is general and applies across the board. Thus, customary rules bind all relevant actors which may be engaged in a particular activity, and offer what might be considered a proverbial "least common denominator" of legal obligations. Moreover, as will be discussed in more detail in Section 3 and 4 below, given the more general nature of customary rules, interpretation plays a crucial role in the determination of the rule's content. Thus, the interpretation of prevention as a customary rule bears continuous relevance for both the determination of the content of the obligation and its continued application. This is particularly so in areas where there is an interplay between the protection of the environment and other relevant interests, and where interpretation may prove key in the balancing of interests.

Bearing all of these considerations in mind, this paper asks the question: *what is the role of interpretation of the customary rule of prevention in the balancing of interests at sea?* The paper focuses on the interpretation of prevention as CIL for two reasons. Firstly, as already mentioned, because unlike treaties, customary rules are general and binding on all. In this sense, customary rules offer a common ground in a context where a multiplicity of regimes and actors interact, and their interpretation can play a role in the reconciliation of varying interests. Secondly, because the way a customary rule is interpreted in one instance informs the content of the rule overall. Thus, it may influence how the rule is interpreted and applied in subsequent contexts. As will be shown in more detail in the following sections, what this means for our inquiry into prevention is that interpretation plays a crucial role in how we understand and apply the customary rule.

The paper is organized along three substantive sections, and two sections which contain the introduction and concluding remarks. Section 2 briefly discusses the notion of 'CIL interpretation' as understood for the purposes of this paper. The aim behind this is to familiarize the reader with what is meant by the reference to interpretation in the context of customary international law, before delving into an examination of the jurisprudence. The paper then turns to an examination of the jurisprudence of the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS) in order to examine cases where prevention has been identified and interpreted as an obligation under customary law (Section 3). The cases considered include both cases which explicitly deal with activities at sea and cases which address legal issues from other contexts, but nonetheless identify and assess prevention and its elements as a rule of CIL. This latter category is examined because prevention as a customary rule exists across the board, and its interpretation across a variety of regimes contributes to the overall content of the rule. Thus, the way that prevention is interpreted in cases which do not concern activities at sea still has a bearing on the way prevention is interpreted in cases which do (for example the reliance on some of the reasoning of the *Pulp Mills* case concerning prevention in the reasoning of the Seabed Disputes Chamber's *Advisory Opinion on Activities in the Area*). Based on an examination of the jurisprudence, the

[9] J Harrison, *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment* (Oxford University Press, 2017) 7
[10] Ibid, 275

paper identifies two functions of CIL interpretation. (Section 4). Firstly, interpretation has a constitutive function with respect to the customary obligation of prevention, in the sense of content determination. Namely, following the identification of prevention as a customary obligation, courts rely on interpretation to concretize the content of prevention and to identify the specific (sub)obligations that fall under the general obligation of prevention. Secondly, interpretation has the function of determining the contexts to which the application of prevention may be extended. It is through this second function that the role of CIL interpretation in the balancing of interests is particularly evident. The paper then briefly summarizes the findings and makes some concluding observations with respect to further research (Section 5).

2. The Interpretation of Customary International Law

Unlike treaty rules, whose interpretation is guided by relevant provisions of the Vienna Convention on the Law of Treaties (VCLT)[11] and their customary counterparts, we currently have no rules or guidelines which regulate the interpretation of CIL. Nonetheless, we do regularly find examples in jurisprudence where judges or arbitrators engage in CIL interpretation, both on the international[12] and domestic[13] levels. For its part, scholarship is currently engaged in a debate whether a source like CIL could be subject to interpretation, and research is ongoing on the viability and function of interpretation in the context of CIL.

Scholars arguing against the viability of CIL interpretation claim that CIL's unwritten character excludes the need for its interpretation.[14] It is further posited that CIL rules do not require interpretation because the mere process of their identification delineates their content as well.[15] However, the argument that CIL is not subject to interpretation because it is unwritten is problematic. In international law there is no universal approach which dictates that the unwritten character of a particular source automatically precludes it from interpretation. For instance, in its "Guiding Principles applicable to Unilateral

[11] Vienna Convention on the Law of Treaties, 1969, Articles 31-33

[12] See indicatively: *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment of 20 February 1969 [1969] ICJ Rep. 3, Dissenting Opinion of Judge Tanaka, at 181; *Case concerning the Frontier Dispute* (Burkina Faso/Republic of Mali), Judgment of 22 December 1986, [1986] ICJ Rep.554, paras. 22-23; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Merits Judgment [1986] ICJ Rep. 14, paras.193-195; *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium) Judgment of 14 February 2002 [2002] ICJ Rep. 3, paras. 53-54; *Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura* (Decision on Interlocutory Appeal challenging Jurisdiction in Relation to Command Responsibility) IT-01-47-AR72 (16 July 2003) Partial Dissenting Opinion of Judge Shahabuddeen paras 9-10; WTO, EC — Approval and Marketing of Biotech Products – Reports of the Panel (29 September 2006) WT/DS291/R paras. 7.68-7.72

[13] See indicatively: *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors*. HCJ 769/02 (Israel Supreme Court, 2006) ILDC 597 (IL 2006); *Katet Nchoe & another v Republic*, Criminal Appeal No. 115 of 2010 (High Court of Kenya, 2011); For a more detailed discussion on CIL interpretation in domestic courts see: C Ryngaert, Customary International Law Interpretation: The Role of Domestic Courts in P Merkouris, J Kammerhoffer & N Arajärvi (eds), N Mileva (ass ed), *The Theory and Philosophy of Customary International Law and its Interpretation* (Cambridge University Press, forthcoming 2021); N Mileva, 'The Role of Domestic Courts in the Interpretation of Customary International Law: How can we Learn from Domestic Interpretive Practices?' in P Merkouris, J Kammerhoffer & N Arajärvi (eds), N Mileva (ass ed), *The Theory and Philosophy of Customary International Law and its Interpretation* (Cambridge University Press, forthcoming 2021)

[14] A Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2(1) Journal of International Dispute Settlement 31, 35-36; T Treves "Customary International Law" (Max Planck Encyclopaedia of Public International Law 2010) 2; M Bos, A Methodology of International Law (Elsevier Science Publisher B.V, 1984) 106-110

[15] Bos (n 14) 109

Declarations of State"[16] the International Law Commission (ILC) has established that unilateral declarations, which may be formulated orally[17] and are thus sometimes unwritten, may be subject to interpretation if their content is unclear.[18] Similarly, with respect to general principles of international law, which are also themselves unwritten,[19] scholars acknowledge (albeit in a more limited manner) that this sources of law may be subject to interpretation.[20] Thus, the argument that CIL may not be subject to interpretation simply because it is unwritten is not persuasive. Moreover, it is reasonable to assume that unwritten sources as opposed to written ones contain a higher degree of vagueness as a result of their unwritten character. This is certainly the case with CIL, where it is often acknowledged that CIL rules tend to be more general or that this source of law is inherently more abstract.[21] Thus, rather than not being subject to interpretation, unwritten sources seem to require precisely the exercise of interpretation in order to grasp their otherwise elusive content. The argument that CIL rules do not require interpretation because the mere process of their identification delineates their content as well is similarly unpersuasive. For one, this position is regularly negated in the practice of international courts and tribunals, where judges routinely engage in the process of interpreting a CIL rule separate from its identification.[22] On this point, a bench of the ICJ has even acknowledged that customary rules are distinguishable from treaty rules by, among others, the methods that are appropriate for their interpretation.[23] Moreover, in its recent "Draft Conclusions on Identification of Customary International Law"[24] the ILC acknowledges that sometimes there might be agreement as to the existence of a customary rule but at the same time disagreement or uncertainty about its content as applicable to a particular case or in the context of potential exceptions.[25] Thus, while not directly speaking of interpretation, the ILC here seems to acknowledge that there is something separate from identification which happens when it comes to the determination of the content of an established CIL rule. The present author would argue that this describes at least in part the process of CIL interpretation.

Beyond pointing out examples where the interpretation of CIL is found in the practice of international law, accounting for the process of CIL interpretation bears a lot of theoretical relevance as well. In the absence of an interpretive process, there is no explanation about what happens to a CIL rule after it has been identified. Once a customary rule is identified for the first time through an assessment of state practice and *opinio juris*, the existence of that rule is not restricted to the case where it was first identified

[16] International Law Commission, "Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with commentaries thereto" reproduced in Yearbook of the International Law Commission [2006] Vol. II, Part Two, 161
[17] Ibid, 163 (Guiding principle 5)
[18] Ibid, 164 (Guiding principle 7)
[19] Allan Pellet and Daniel Muller, 'Article 38' in Andreas Zimmermann and Christian J. Tams (eds.) The Statute of the International Court of Justice: A Commentary (OUP 2019) 924, para. 255
[20] See indicatively Peter G. Staubach, The Rule of Unwritten International Law: Customary Law, General Principles, and World Order (Routledge, 2018) 155-199; Mahmoud Cherif Bassiouni, 'A Functional Approach to General Principles of International Law' [1990] 11 Michigan Journal of International Law 767, 771
[21] International Law Association Committee on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law (London Conference, 2000) 2; Frederick Schauer, 'Pitfalls in the Interpretation of Customary Law' in Amanda Perreau-Saussine and James B. Murphy (eds.) The Nature of Customary Law: Legal, Historical and Philosophical Perspectives (Cambridge University Press, 2007); P Merkouris, Article 31(3)(c) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato's Cave (Brill 2015) 233
[22] See supra (n 12)
[23] *Military and Paramilitary Activities in and against Nicaragua* (n 4) para. 178
[24] International Law Commission, Draft Conclusions on Identification of Customary International Law, with commentaries" reproduced in Yearbook of the International Law Commission [2018] Vol. II, Part Two, 122
[25] Ibid, 124, para. 4 (Commentary to Draft Conclusion 1)

but is rather a continuous one. When the same rule is invoked in subsequent cases before the same of a different judicial body, that judicial body does not usually go into the exercise of re-establishing that the rule in question exists as a rule of CIL.[26] Instead, the rule is interpreted within the given legal and factual context of the case at hand. In this sense, it is the present author's contention that interpretation allows us to account for the continued existence and operation of a customary rule.

This paper accounts for the process of CIL interpretation through the illustrative tool of a 'CIL timeline' (Figure 1).[27] The CIL timeline begins with the formation of a customary rule through the two constitutive elements of state practice and *opinio juris*. The rule is then identified by a relevant authority, usually through an inductive evaluation of the two elements. It is important to note that a form of interpretation may also take place at this stage of identification, in the sense of assessment of the relevant practice and *opinio juris*. However, this is not interpretation of the customary rule because this rule has not been confirmed to exist yet. Rather, what happens at the stage of identification is an evaluation of the evidence of state practice and *opinio juris* in order to assess whether they qualify for the purposes of establishing a customary rule and whether they in fact point to the existence of a customary rule.[28] It has been persuasively argued that interpretation permeates all the stages of the timeline of a CIL rule, both before and after the identification of a CIL rule.[29] However, it is crucial to maintain the distinction between the interpretation of (evidence of) state practice and *opinio juris* at the stage of identification vs. the interpretation of a CIL rule once it has been identified. This is because once a rule is identified by a relevant authority, every subsequent invocation of that rule in following cases is not an exercise of re-identification but rather of application and interpretation. Thus, in the context of the present paper the term interpretation is used in this latter way and refers to the interpretation of an established CIL rule. In the current illustration of the CIL timeline there is a question mark (?) standing over the stage of interpretation. This is because, research is currently ongoing to determine what exactly is entailed in the process of CIL interpretation, and what are the rules or methods which guide this process. The present paper is part of this ongoing research effort, and as such contributes to our further understanding of CIL interpretation.

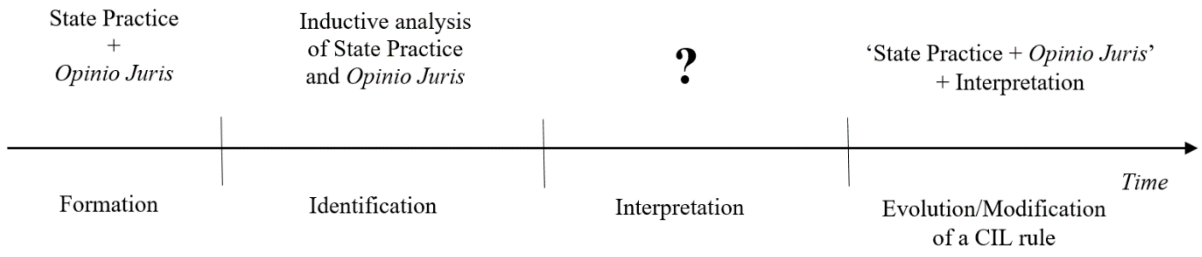

Figure 1: The CIL Timeline

[26] Merkouris (n 21) 241

[27] For a similar discussion on the interpretation of CIL by reference to the CIL timeline see Mileva (n 5); N Mileva and M Fortuna, 'Emerging Voices: The Case for CIL Interpretation–An Argument from Theory and an Argument from Practice' (Opinio Juris, 23 August 2019) https://opiniojuris.org/2019/08/23/emerging-voices-the-case-for-cil-interpretation-an-argument-from-theory-and-an-argument-from-practice/ accessed 15 October 2020.

[28] On this point see for more details ILC Draft Conclusions (n 16) Conclusion 6, Conclusion 10

[29] O Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' [2020] 31(1) European Journal of International Law 235

3. Prevention as a Customary Rule in the Jurisprudence

For this section the paper examines cases in the jurisprudence of the ICJ and ITLOS where prevention has been identified as an obligation under customary international law. These courts were chosen because their case law deals both with prevention generally and with prevention particularly in the context of activities at sea. Moreover, with respect to the ICJ, it has been argued persuasively that by deciding specific cases it provides the "bricks" and hard material of public international law, and as such participates substantively in the development of international law alongside other relevant actors.[30] For its part, the ITLOS is a central authority in the settling of disputes which concern activities at sea, and has made a number of contributions with respect to customary environmental law.[31]

i. Prevention as a Customary Rule in the Jurisprudence of the ICJ

Early elaborations of prevention as CIL are evident in the jurisprudence of the ICJ in the *Nuclear Weapons Advisory Opinion* and the *Gabčikovo Nagymaros* cases. In the *Nuclear Weapons Advisory Opinion*, the Court expressed the view that: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[32] In the *Gabčikovo Nagymaros* case, on the topic of environmental protection, the Court observed that "vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage."[33] In both of these cases however, prevention as CIL was formulated quite broadly, and some might argue even ambiguously.

A much more explicit and definitive recognition of prevention as a customary rule took place in the *Pulp Mills on the River Uruguay* case. Here, the Court unambiguously recognized that prevention is a customary rule, and made the following observation:

> "The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory […]"[34]

Furthermore, the Court observed that cooperation between the parties is also an element which is necessary in order to fulfil the obligation of prevention:

> In the view of the Court, the obligation to inform CARU allows for the initiation of co-operation between the Parties which is necessary in order to fulfil the obligation of prevention […]"[35]

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[30] V Lowe and A Tzanakopoulos, 'The Development of the Law of the Sea by the International Court of Justice' in C J Tams and J Sloan (eds.) The Development of International Law by the International Court of Justice (Oxford University Press, 2013) 177, 187

[31] T Treves and X Hinrichs, 'The International Tribunal for the Law of the Sea and Customary International Law' in L Lijnzaad and Council of Europe (eds.) *The Judge and International Custom* (Brill, 2016) 25, 44-45

[32] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 [1996] ICJ Rep. 226, para. 29

[33] *Case concerning the Gabčikovo Nagymaros Project* (Hungary/Slovakia) Judgment of 25 September 1997 [1997] ICJ Rep. 7, para. 140

[34] *Case Concerning Pulp Mills on the River Uruguay* (Argentina v Uruguay) Judgment of 20 April 2010 [2010] ICJ Rep. 14, para. 101

[35] Ibid, para. 102

Finally, in this case the Court made its seminal pronouncement that the duty to conduct an environmental impact assessment (EIA) is a customary one:

> "[…] it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, **due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised**, if a party planning works liable to affect the régime of the river or the quality of its waters **did not undertake an environmental impact assessment** on the potential effects of such works."[36] [emphasis added]

Importantly, having established that the duty to conduct an EIA is a customary one, the Court went on to observe that the duty of vigilance and prevention would not be exercised if a State did not conduct an EIA, thereby subsuming the customary obligation to conduct an EIA under the general rule of prevention. It has been observed that with its reasoning in the *Pulp Mills on the River Uruguay* case, the Court developed the content of prevention.[37] As will be argued in more detail in Section 4 below, it is this author's contention that what the Court did in Pulp Mills is in fact *interpret* the customary rule of prevention and through this specified the content of the rule.

The Court further contributed to the content determination of the customary rule of prevention in its 2015 Joint Judgment in the *Certain Activities and Construction of a Road* case. Firstly, the Court here reaffirmed the obligation to conduct an EIA as an element of prevention, finding that this was not only narrowly applicable to the *Pulp Mills* context but was rather a generally applicable obligation.

> Although the Court's statement in the *Pulp Mills* case refers to industrial activities, the underlying principle **applies generally** to proposed activities which may have a significant adverse impact in a transboundary context. Thus, **to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm**, a State **must**, before embarking on an activity […] a**scertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment**".[38] [emphasis added]

Secondly, and more interestingly, the Court further observed that if the EIA confirms that there is a risk of harm, in order to comply with its due diligence obligation of prevention the State has to notify and consult with the potentially affected State.

> "[…] **If** the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, **to notify and consult in good** faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk".[39] [emphasis added]

It seems like here the Court identifies a sequential order in which the obligations need to be exercised in pursuance of prevention. First, the state needs to ascertain whether a planned activity has the potential to cause harm. If it does, the state needs to conduct an EIA. If the EIA confirms that there is a risk of significant harm, the state then needs to notify and consult the other concerned state in order to find

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[36] Ibid, para. 204
[37] Duvic Paoli and Viñuales (n 1) 127
[38] *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v Costa Rica), Judgment of 16 December 2015 [2015] ICJ Rep. 665, para. 104
[39] Ibid

appropriate measures to prevent or mitigate the harm. In this sense, the Court here further clarified the customary obligation of prevention by interpreting it as a set of separate-but-related consecutive obligations.[40]

ii. Prevention as a Customary Rule in the Jurisprudence of the ITLOS

In the jurisprudence of the ITLOS the interpretive reasoning with respect to the customary rule of prevention has been less elaborate, and this may be owed to the fact that most of the cases coming before the Tribunal concern more the application of treaty rules rather than rules of CIL. Nonetheless, the Tribunal has made pronouncements based on prevention as a customary rule in the following cases.

In the *MOX Plant* case between Ireland and the UK, the Tribunal was asked to consider a request for provisional measures by Ireland. Ireland had requested that the operation of the MOX Plant is suspended and that the UK ensure that there is no movement of radioactive substances, materials or wastes via its sovereign waters.[41] The UK on its part had asked that Ireland's request for provisional measures be rejected.[42] With respect to prevention as CIL, the Tribunal observed:

> "Considering, however, that **the duty to cooperate is a fundamental principle in the prevention** of pollution of the marine environment under Part XII of the Convention **and general international law** and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention".[43] [emphasis added]

Thus, the Tribunal essentially indicated that the duty to cooperate is a part of the obligation of prevention under, among other, customary international law. The Tribunal further observed that:

> "in the view of the Tribunal, **prudence and caution require that Ireland and the United Kingdom cooperate** in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate".[44] [emphasis added]

On this reasoning, the Tribunal eventually prescribed that Ireland and the UK shall cooperate and enter into consultations in order to exchange further information, monitor risks and devise appropriate measures to prevent pollution.[45]

Further light is shed on the Tribunal's reasoning with respect to the content of the customary rule of prevention in the various separate opinions published next to the Order. For instance, in his Separate Opinion Judge Wolfrum observed that

> "The obligation to cooperate with other States whose interests may be affected **is** a Grundnorm of Part XII of the Convention, **as of customary international law for the protection of the environment**. […] I fully endorse […] paragraphs 82 to 84 of the Order, considering that the

[40] For an earlier version of this argument see: N Mileva and M Fortuna, 'Environmental Protection as an Object of and Tool for Evolutionary Interpretation' in G Abi Saab, K Keith, G Marcea and C Marquet (eds.), *Evolutionary Interpretation and International Law* (Hart Publishing 2019) 152

[41] *MOX Plant* (Ireland v United Kingdom) Provisional Measures, Order of 3 December 2001, ITLOS Rep. 2001, 95, para. 27

[42] Ibid, para. 29

[43] Ibid, para. 82

[44] Ibid, para. 84

[45] Ibid, para. 89

obligation to cooperate is the overriding principle of international environmental law, in particular when the interests of neighboring States are at stake".[46] [emphasis added]

That the Court reasoned based on the customary version of prevention is even more strongly expressed in the Separate Opinion of Judge Anderson, who expresses criticism that some of the measures prescribed go beyond the scope of conventional duties and are based on customary obligations:

> "The type of broad consultation prescribed […] whilst valuable in itself, goes beyond the scope of articles 123 and 197 of the Convention, **being based also on duties to cooperate under general international law**, as indeed is expressly noted in paragraph 82 of the Order. The situation is similar to that identified by the International Court of Justice in the *Nicaragua* case, where it stated that: Principles such as those of the non-use of force ... and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated […] In particular, the matters identified in paragraph 84 for consultations **relate more to broad duties under customary law** than to subjects falling within the scope of articles 123 and 197".[47] [emphasis added]

Thus, it seems that in *MOX Plant*, the Tribunal read, or rather interpreted, into the general customary obligation to prevent environmental harm the more specific duty to cooperate, and moreover prescribed very specific forms of cooperation based on this reasoning.

A similar approach is evident in the Tribunal's reasoning in the *Straits of Johor* case. Here, the Tribunal was asked to decide on a request for provisional measures by Malaysia concerning land reclamation works executed by Singapore in contested areas, asking more specifically that all works are suspended, that Singapore provide full information as to the current and projected land reclamation works, that Malaysia be allowed to comment on all works, and that Singapore agree to negotiate any remaining unresolved issues.[48] On its part, Singapore requested that the Tribunal dismiss Malaysia's request for provisional measures.[49] The Tribunal, reproducing its reasoning from the *MOX Plant* case verbatim, found that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under both conventional and customary law.[50] The Tribunal further considered that an impact assessment had not been undertaken by Singapore, that the land reclamation works might have an adverse effect on the marine environment, and that thus far the cooperation between the parties had been insufficient.[51] Moreover, the Tribunal found that:

> "given the possible implications of land reclamation on the marine environment, prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned".[52]

On this reasoning, the Tribunal eventually ordered Malaysia and Singapore to cooperate and enter into consultations with the view to establishing a group of experts which would conduct a study into the

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[46] *MOX Plant* (Ireland v United Kingdom) Provisional Measures, Order of 3 December 2001, Separate Opinion of Judge Wolfrum, ITLOS Rep. 2001, 131, 135
[47] *MOX Plant* (Ireland v United Kingdom) Provisional Measures, Order of 3 December 2001, Separate Opinion of Judge Anderson, ITLOS Rep. 2001, 124, 126
[48] *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v Singapore) Provisional Measures, Order of 8 October 2003, ITLOS Rep. 2003, 10, para. 23
[49] Ibid, para. 24
[50] Ibid, para. 92
[51] Ibid, paras. 95-97
[52] Ibid, para. 99

effects of the reclamation work, exchanging information and assessing risks.[53] Commentators have observed that both in this case and in its *MOX Plant* reasoning on provisional measures, the Tribunal has proactively sought to prevent environmental harm, while at the same time contributing to the clarification of the content of the obligation, in particular, by underlining the importance of impact assessments, cooperation and information exchange.[54] Indeed, as will be discussed in more detail in Section 4 below, both with the reasoning in the main dispositive of the orders and the separate opinions by various judges, the Tribunal has contributed to the clarification of the content of prevention as CIL and has shed light on the role of interpretation in the balancing of interests.

Turning to the Advisory Opinion of the Seabed Disputes Chamber on Responsibilities and Obligations of States with Respect to Activities in the Area (*Advisory Opinion on Activities in the Area*), several observations of the Chamber contribute to our understanding of prevention as a customary rule. The Chamber initially discussed prevention predominantly as a conventional obligation pursuant to Art. 194(2) of the United Nations Convention on the Law of the Sea (UNCLOS). However, at the same time the Chamber also commented on the customary counterpart of prevention. Firstly, the Chamber observed that "the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law".[55] The Chamber then proceeded to evaluate the conventional duty on the one hand,[56] and the customary duty on the other.[57] With respect to the latter, the Chamber drew on the reasoning of the ICJ in the Pulp Mills on the River Uruguay case, where it was found that the duty to undertake an EIA is part of customary international law and that the duty of prevention would not be considered to have been exercised if a party planning work does not conduct an EIA.[58] Thus, here the Chamber restated the interpretation which views the duty to conduct an EIA as a sub-obligation of the customary duty of prevention. Taking this reasoning further, the Chamber observed that:

> "Although aimed at the specific situation under discussion by the Court, the language used seems broad enough to cover activities in the Area even beyond the scope of the Regulations. The Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to "shared resources" may also apply to resources that are the common heritage of mankind. Thus, in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to "resource deposits in the Area which lie across limits of national jurisdiction".[59]

Here essentially the Chamber extended the customary duty to conduct an EIA to areas beyond national jurisdiction by analogy, thereby arguably broadening the conventional duty of prevention by reference to elements of the customary duty of prevention as well.

A final case worth mentioning in this context is the Advisory Opinion submitted to the Tribunal by the Sub-Regional Fisheries Commission (*Sub-Regional Fisheries Advisory Opinion*). In this Opinion, while the majority of the reasoning concerned conventional obligations rather than customary ones, the Tribunal

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[53] Ibid, para. 106
[54] Duvic Paoli (n 2) 154
[55] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Rep. 2011, 10, para. 145
[56] Ibid, para. 146
[57] Ibid, para. 147
[58] *Pulp Mills on the River Uruguay* (n 34) para. 204
[59] *Advisory Opinion on Activities in the Area* (n 55) para. 148

made a brief pronouncement with respect to prevention as an obligation under CIL. Namely, in discussing obligations with respect to cooperation, the Tribunal observed:

> "The Tribunal wishes to recall that, as stated in the MOX Plant Case, **the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment** under Part XII of the Convention **and general international law**… (MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at p. 110, para. 82) The Tribunal holds that **this obligation extends also to cases of alleged IUU fishing activities**".[60] [emphasis added]

Thus, here it seems that the Tribunal engaged in something similar to what took place in the *Advisory Opinion on Activities in the Area*, where a conventional duty was broadened by reference to CIL, or n the very least, where a conventional duty was interpreted alongside customary obligations.

4. Two Functions of Interpretation

Based on the survey of these cases two functions of CIL interpretation emerge. Firstly, interpretation has a constitutive function in the sense of content determination and concretization. In this sense, interpretation plays the role of "fleshing out" from the general customary obligation of prevention several more concrete (sub)obligations. This is relevant to our present inquiry because it enables us to see the various duties which fall under the obligation of prevention, and thus to identify points in the jurisprudence where the balancing of interests may take place through the act of interpretation. Secondly, interpretation has a balancing function, which refers to the balancing of various interests of the parties involved. In this sense, interpretation has the function of determining the contexts to which the application of prevention as a customary rule may be extended, and how the various duties which emerge under the general obligation of prevention play out. This section now turns to an elaboration on these two functions.

i. Constitutive Function

The constitutive function of CIL interpretation refers to the role of interpretation in the concretization of the content of a customary rule. In the context of prevention, based on a survey of the jurisprudence we may observe that through interpretation the content of the general customary rule of prevention has been defined as a due-diligence obligation which consists of the duties to conduct an EIA, to notify and consult, and to cooperate. In the jurisprudence of the ICJ this is particularly evident in the *Pulp Mills on the River Uruguay* case where the Court characterizes prevention as a due diligence obligation[61] of which cooperation is a necessary element,[62] and which would not be considered to be fulfilled if an EIA is not conducted.[63] That the Court here engaged in interpretation and content-determination as opposed to identification, is evidenced by the fact that the Court first separately established the existence of the customary rule of prevention[64] and then proceeded to interpret it in the manner described. This content of the customary rule of prevention is largely confirmed in the *Certain Activities and Construction of a Road* case, where the Court takes its interpretation of prevention even further and seems to envisage the

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[60] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, ITLOS Rep. 2015, 4, para. 140
[61] Pulp Mills on the River Uruguay (n 34) para 101
[62] Ibid, para 102
[63] Ibid, para 204
[64] Ibid, para. 101

fulfillment of these sub-duties in a sequential order. Thus, here the Court found that in order to comply with its customary obligation to prevent environmental harm a state should first ascertain whether a planned activity has the potential to cause harm, then (if the potential of harm is confirmed) conduct an EIA, and then if the EIA confirms that there is a risk of significant harm, notify and consult with the other concerned state with a view to further cooperation.[65] Here similarly, the Court engaged in interpretation as an activity separate from identification, and relied on earlier reasoning to establish the existence of prevention in CIL before proceeding to interpret it.[66] It is uncertain whether the sequential order of the duties which was established in the context of the *Certain Activities and Construction of a Road* case could be extrapolated on the general level for the customary rule of prevention, and in fact there is currently no other example in the jurisprudence which has interpreted the rule in this particular way. Nevertheless, the relevant take-away of this case for the purposes of our present examination is the fact that the Court interpreted the general rule of prevention as consisting of the more specific sub-duties to conduct an EIA, to notify and consult, and to cooperate.

In the jurisprudence of the ITLOS, the constitutive function of interpretation is less elaborate, and here it is also more difficult to discern the acts of identification and interpretation. This may be owed at least in part to the fact the Tribunal tends to simply pronounce the existence of prevention as CIL and then proceeds to interpret it,[67] or sometimes relies on pronouncements of other courts (such as the ICJ) for their establishment of customary status and then proceeds to interpret.[68] Nevertheless, from the examined ITLOS jurisprudence it emerges that the Tribunal has arrived to the conclusion that the customary duty of prevention consists of the duty to cooperate[69] and the duty to conduct and EIA.[70]

Commentators have already observed that with its reasoning on prevention as CIL courts and tribunals have given a more precise content to the customary rule.[71] What this paper would like to put forth however, is that more than a passing observation that judicial reasoning might give a more precise content to customary rules, this is in fact the act of interpretation of custom and it plays a central role in the continued existence of a customary rule. Understanding it in this way enables us to account for customary rules not as rules which exists in snapshot moments where they are identified and applied in particular cases, but as rules who have a continuous existence in the international legal complex and continuously regulate activities in various regimes. This is important because understood in this way, interpretation informs us of concrete sub-obligations which arise from customary rules which are often formulated as general rules. We see this clearly in the context of prevention as a customary rule, where the analysis illustrates that it is through interpretation that we have arrived at an understanding of the general rule of prevention as a collection of the more specific sub-obligations to conduct an EIA, to notify and consult, and to cooperate. Thus, through interpretation the obligations that are incumbent upon relevant actors under CIL are clarified, and actors are put on notice about what these obligations may be in the future. In

[65] *Certain Activities and Construction of a Road* (n 38) para. 104
[66] Ibid
[67] This seems to be the case in the *MOX Plant* and *Straits of Johor* cases
[68] This is evident in the *Advisory Opinion on Activities in the Area* para.147 where the Chamber relies on the ICJs reasoning to establish the existence of a customary duty to conduct an EIA, and then proceeds to interpret this duty in the context of activities in areas beyond national jurisdiction in para. 148
[69] *MOX Plant* (n 41) para. 82; *Straits of Johor* (n 48) para. 92; *Sub-Regional Fisheries Advisory Opinion* (n 60) para. 140
[70] *Advisory Opinion on Activities in the Area* (n 55) para. 148
[71] T Scovazzi, 'Where the Judge Approaches the Legislator: Some Cases Relating to Law of the Sea' in N Boschiero et al. (eds.) *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Springer, 2013) 299, 306-309; Duvic Paoli (n 2) 137

this sense, with the constitutive function of interpretation a customary rule is made more tangible and capable of application.

ii. Balancing Function

The balancing role of CIL interpretation refers to the balancing of interests of the involved parties through the exercise of interpretation.

In the jurisprudence of the ICJ we see an interesting pronouncement on the balancing function in one of the observations of the Court in the *Gabcikovo Nagymaros* case:

> "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".[72]

It must be acknowledged that this is a somewhat broad and ambiguous statement. In part because it is rather unclear whether the court here is referring to prevention as a conventional rule, or prevention as a more general customary rule.[73] Nevertheless, commentators have observed that with this statement the Court seems to place prevention as a constraint on economic growth.[74] Thus, any interpretation of the obligation of prevention would necessarily include a balancing of economic interests against environmental protection.

In the jurisprudence of the ITLOS, we observe the balancing function in the *MOX Plant* and *Straits of Johor* cases. In the *MOX Plant* order on provisional measures, the Tribunal was asked to consider a request by Ireland that the operation of the MOX Plant is suspended and that the UK ensure that there is no movement of radioactive substances, materials or wastes via its sovereign waters, as opposed to a request by the UK to dismiss Ireland's request in its entirety. The Tribunal granted neither of these two requests, opting instead for a middle ground approach based in the Tribunal's interpretation of the duty to cooperate as an element of the general obligation of prevention. Thus, the Court ordered the parties to cooperate and enter into consultations to exchange information, monitor risk, and devise measures to prevent pollution.[75] In his separate opinion, Judge Wolrfum elaborates on the reasoning of the Tribunal and provides significant insight into interpretation as a balancing exercise. In particular, the following observation is informative:

> "I fully endorse […] paragraphs 82 to 84 of the Order, considering that the obligation to cooperate is the overriding principle of international environmental law, in particular when the interests of neighboring States are at stake. The duty to cooperate denotes an important shift in the general orientation of the international legal order. **It balances the principle of sovereignty of States and thus ensures that community interests are taken into account vis-à-vis individualistic State interests**. It is a matter of prudence and caution as well as in keeping with

[72] Gabcikovo Nagymaros (n 33) para. 140

[73] This latter option is supported by the fact that immediately before this paragraph the Court speaks of vigilance and prevention as general notions in the field of environmental protection

[74] Duvic-Paoli (n 2) 141

[75] *MOX Plant* (n 41) para. 89

> the overriding nature of the obligation to co-operate that the parties should engage therein as prescribed in paragraph 89 of the Order".[76] [emphasis added]

Here we see the duty to cooperate as an element of prevention placed as a balanced choice between on the one hand state sovereignty and on the other community interests of environmental protection. That the Court was relying on and interpreting the customary rule of prevention rather than a conventional duty is evident in the comments of Judge Anderson, who in his separate opinion actually criticizes the majority decision for imposing broader duties of cooperation based on a customary law rationale.[77] Whether it is normatively desirable for courts and tribunals to rely on the interpretation of customary rules to broaden conventional duties in the context of prevention of environmental harm is a discussion which is beyond the scope of this paper. What is relevant to our present inquiry is that it seems that here the interpretation of the customary rule of prevention played a balancing function in the decision between the more far-fetched provisional measures requested by Ireland and the no-measures at all requested by the UK. Thus, the Tribunal placed duties on the parties stemming from the customary obligation of prevention as a balanced alternative to the more extreme requests.

A similar role of CIL interpretation in the balancing of interests is seen in the *Straits of Johor* case, where the Tribunal was asked to decide between on the one hand far-fetching provisional measures requested by Malaysia and 'no-measures' requested by Singapore.[78] Here once again the Tribunal granted neither of these two, and instead opted for a more middle ground approach by ordering the parties to cooperate by establishing a group of experts, exchanging information and jointly assessing risks.[79] In his separate opinion, Judge Lucky aptly describes the balancing exercise involved in the Tribunal's determination:

> "The burden of proof required in a case for provisional measures is relatively high. The Tribunal is being asked to make mandatory orders, inter alia to cease work on a project which is elaborate, expensive and of considerable magnitude. Therefore, several factors have to be considered: **the balance of convenience or inconvenience to each side; the status quo as to whether the works are reversible; whether the decision would cause prejudice**; and, **whether there will be serious harm to the environment**".[80] [emphasis added]

While not explicitly commenting on the provisional measures prescribed in the order, this comment confirms the view that in its interpretation of the rule of prevention the Tribunal had to balance between the interests of the two parties, as well as between the interest of the parties and the prevention of environmental harm more generally. Thus, the decision to order cooperation as a middle ground between the more extreme requests of the parties reflects the balancing that is inherent in the interpretive exercise. This reading of the Court's reasoning is supported by the comments of Judge Cot, who in his separate opinion observers that

> "The provisional measures prescribed by the Tribunal go further than and at the same time fall short of the suspension requested by Malaysia. On the one hand, operative paragraph 1(c) prescribes that the parties should consult with a view to reaching a prompt agreement on measures […]; the text therefore adds an obligation of immediate cooperation, so that the parties agree on the measures to be taken".[81]

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[76] *MOX Plant* Sep. Op. Judge Wolfrum (n 46) 135
[77] *MOX Plant* Sep. Op. Judge Anderson (n 47) 126
[78] *Straits of Johor* (n 48) paras. 23-24
[79] Ibid, para. 106
[80] *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v Singapore) Provisional Measures, Order of 8 October 2003, Separate Opinion of Judge Lucky, ITLOS Rep. 2003, 59, para. 11
[81]

Overall, the two functions of CIL interpretation – constitutive and balancing – must be understood as going hand in hand. This is so because the constitutive function enables both the interpreter (in our case the courts) and the wider audience (states, commentators, other relevant actors) to grasp the more specific content of general customary rules, thereby making these rules tangible and operational. Once construed thus, a customary rule may be applied to a particular case and it is here that the balancing role comes in. From the jurisprudence examined in this paper with respect to the customary rule of prevention, we see that courts have generally relied on elements of the rule arrived at through interpretation to place them as balanced alternatives between more extreme requests by parties. We also see that the overall exercise of interpretation is inherently an exercise of balancing, as judges need to consider both the interests of the parties placed against each other, as well as the interests of the parties placed against environmental protection more generally.

It has been observed by commentators that the customary rule of prevention might enable actors other than states (such as individuals, collectives including indigenous people, communities and civil-society groups, or international organizations) to bring forth claims for environmental harm.[82] Perhaps even less controversially, it has also been observed that the customary rule of prevention may impose an obligation on states to prevent environmental harm in their domestic territory.[83] In both of these contexts, the constitutive and balancing function that CIL interpretation performs are crucial. This is particularly so if we envisage a context where various actors may bring claims for environmental protection in the context of activities at sea and their interests may need to be balanced against commercial or territorial interests of states; or a context where states must organize their activities according to the customary obligation of prevention, and thus need to know what specific duties arise from this general obligation.

[82] Duvic-Paoli and Viñuales (n 1) 113
[83] Ibid, p. 119

5. Concluding Remarks

This paper has sought to examine the role of CIL interpretation in the balancing of interests at sea through the example of the customary rule of prevention as interpreted in the jurisprudence of two international courts. Overall, the paper found that interpretation of CIL has a twofold function, namely, i) the constitutive function of determining and concretizing the content of the customary rule and ii) the function of balancing both the interests of parties against one another as well as more generally the interests of the parties against the common interest of environmental protection. It must be observed that the conclusions of the paper concerning the function of CIL interpretation are limited by the fact that the paper only considered the example of one customary rule (prevention), and only considered the interpretation of this customary rule in the jurisprudence of two tribunals (ICJ and ITLOS). Nevertheless, these conclusions provide us with insight into the role of interpretation in the determination of content of the rule of prevention, as well as the in the balancing of interests in adjudication. These findings open an avenue for further research into the role of interpretation which may look into how other customary rules related to activities at sea are interpreted, or how interpretation plays out in the jurisprudence of other tribunals.