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THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

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What is the Point of the Theory, Practice and Interpretation of Customary International Law?

by Panos Merkouris & Jörg Kammerhofer

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EMERGING VOICES: THE CASE FOR CIL INTERPRETATION–AN ARGUMENT FROM THEORY AND AN ARGUMENT FROM PRACTICE

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In international law interpretation is the process through which the interpreter attempts to determine the true meaning of the rule that is being interpreted. Most cases brought before international courts and tribunals deal one way or another with questions of interpretation. While for international treaties the process of interpretation is guided by Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT), there is currently no such guidance for the interpretation of customary international law (CIL). Nonetheless, CIL is regularly invoked in international disputes, and instances of its interpretation abound in the jurisprudence of international courts and tribunals. Moreover, whereas in the application of treaties the process of interpretation is one that always yields a solution, with respect to CIL the rules for its interpretation have not yet been identified or examined. This existing gap in legal scholarship is what inspired the development of our research projects, dedicated to the examination of the various issues which surround CIL interpretation. This post will briefly introduce the questions that our respective research projects examine, illustrating why the study of CIL interpretation is so relevant in today's academic landscape.

An argument from theory

In the current academic discourse on the application of CIL, there is as of yet an unresolved question asking whether CIL is open to interpretation. Authors arguing against the interpretability of CIL claim that CIL's unwritten character excludes the need for or possibility of its interpretation (Treves 2010), or that CIL rules do not require interpretation because the mere process of their identification delineates their content as well (Bos 1984). However, several authors have successfully illustrated that CIL is regularly interpreted by international

courts and tribunals (Merkouris 2015, Orakhelashvili 2008), and that international legal theory more generally allows for this kind of interpretation (Merkouris 2017, Talmon 2015). Beyond the identification of examples where judges engage in the interpretation of CIL, accounting for the process of CIL interpretation also bears a lot of theoretical relevance. In the absence of an interpretative process, there is no explanation about what happens to a CIL rule after it has been identified. Namely, once a CIL rule is identified for the first time through an assessment of state practice and *opinio juris*, it is reasonable to assume that in subsequent cases judges will not need to reassess these elements in order to identify the rule once again, but will rather need to apply the rule to the case at hand and interpret it within the given legal and factual context. Arguing that CIL is not subject to interpretation thus fails to account for the continued existence and operation of a CIL rule after its first identification, and rather operates from the paradoxical premise that a rule of CIL should be identified each and every time anew. The process of CIL interpretation may be accounted for through the illustrative tool of a 'CIL timeline'. The 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 an inductive analysis of these two elements, usually by a relevant judicial authority. It is important to note that a form of interpretation also takes place at this phase of identification. However, at this phase the relevant judicial authority does not interpret a customary rule, but rather interprets the evidence of state practice and *opinio juris* in order to ascertain whether a customary rule has been formed. This distinction is particularly important for the purposes of the present discussion, because, when speaking of interpretation, we refer not to the evaluation of state practice and *opinio juris* for the purpose of identification, but rather to the interpretation of an already identified CIL rule. In this context, interpretation of state practice may take two different forms: i) an evaluation of whether an instance of state behavior may count for the purposes of CIL identification, or ii) a qualification of state practice when determining if it is consistent, uniform, widespread and representative. Interpretation of a CIL rule, on the other hand, is what we consider to be the 'true' question of interpretation, arising with regard to an already identified customary rule the content of which is unclear. Once a rule is identified, every subsequent application of that rule in subsequent cases is not an exercise of re-identification but rather of interpretation. Overall, while there are scholars who question or negate the interpretability of CIL, this is not the view that dominates the discourse (Merkouris 2015).

An argument from practice

The practice of international courts and tribunals is a source replete with instances of CIL interpretation, which, again, dispels the myth of the non-interpretability of CIL. Both courts with general jurisdiction and those with specialized jurisdiction have engaged in the interpretative exercise of CIL. At the International Court of Justice (ICJ), customary law was interpreted in the Courts' landmark cases: *North Sea Continental Shelf* (the principles of equitable martime delimitation), *Barcelona Traction* (the rule concerning diplomatic protection), *Tunisia/Libya Continental Shelf* (the principles of equitable martime delimitation), and *Advisory Opinion on Nuclear Weapons* (the rule concerning methods and means of warfare)as well as in more recent casessuch as *Arrest Warrant (*immunity of ministers for foreign affairs) and*Jurisdictional Immunities* (state immunity). In the jurisprudence of international criminal tribunals judges interpreted norms of customary humanitarian international law in the *Furundžija* (rape as a war crime), *Hadzihasanović*, *Orić* (command responsibility), and *Stakic* (deportation of civilians as a war crime) cases, to name but a few.

In some of these cases judges explicitly label the operation they engage in as 'interpretation'. For instance, this was the case in the Dissenting Opinion of Judge Gros in the *Gulf of Maine* case, on the delimitation of the continental shelf, where the judge stated:

'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 (e.a.) in accordance with the known provisions of the draft convention produced by the Third United Nations Conference.'

However, in many of the cases this process is not expressly acknowledged. In the latter cases it is the language of treaty interpretation that aids the recognition of CIL interpretation. By 'language of treaty interpretation', we mean the keywords that are contained in the rules of interpretation within and outside Article 31 of the VCLT. For instance: 'object and purpose', 'rationale', 'intention', 'relevant rules'. A recent example in this sense is the *Ntaganda Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9*. In this case, the ICC interpreted the scope of the prohibition of rape and sexual slavery in international humanitarian law to determine whether such acts may be regarded as war crimes when they are committed by armed forces against fellow members and not against the opposing party. The Defendant was indicted on the basis of Article 8 of the Statute of the ICC on, among

others, charges of rape and sexual violence. Given the wording of the *chapeaux* of Article 8 para 2 (b) and (e), the Trial Chamber had to look at the established framework of international humanitarian law to determine whether the indictment on charges of rape and sexual violence committed against one's own military forces was possible. The established framework of international law should be understood as referring both to treaties, but also customary international law, between which the Court did not distinguish. Though the Court did not explicitly mention 'interpretation', this conclusion emerges from the reference of the Court, first, to 'scope of action' which means that what it investigated the *content* of the prohibition. Second, it transpires from the Court's use of interpretative criteria similar to those used in the VCLT (teleological interpretation), when the Court noted that 'limiting the scope of protection in the manner proposed by the Defense is contrary to the rationale of international humanitarian law' (para 48).

It is evident that the practice of international courts and tribunals delivers ample material for the analysis of CIL interpretation. Moreover, this practice shows that the results of the interpretive process may be decisive both for the outcomes of cases and for the further development of CIL. This, in turn, strongly influences the development of international legal theory, and further emphasizes the relevance of studying CIL interpretation and identifying the rules which govern this process.

Concluding Remarks

To fully grasp the importance of this research subject, we should see it in light of the history of the development of Articles 31-33 of the VCLT. The codification of the rules of treaty interpretation led to the development of a common language and thought-process with respect to treaty interpretation in international adjudication. Considering the theoretical plausibility of CIL interpretation along with its persistent presence in the practice of international courts and tribunals, a similar development to that of treaty interpretation should happen with respect to CIL as well. Our research projects aim to initiate discussions that will affect our understanding and application of CIL not only in the field of legal theory, but also in the fields of international legal practice and adjudication.