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Introduction to the Series: Customary Law
Interpretation as a Tool

by Panos Merkouris & Nina Mileva



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'Customary Law Interpretation as a Tool' Series

Introduction to the Series: Customary Law Interpretation as a Tool

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Introduction

Customary international law (CIL) is one of the three primary sources of international law. Historically, CIL is considered one of the cornerstones of the international legal order, and it is the process through which some of the foundational rules of international law have come into existence. In scenarios where various international legal regimes might conflict or intersect, customary rules can provide a proverbial 'least common denominator' of the legal obligations at play. Moreover, since CIL rules are the organic product of the interactions that take place within the international legal system, they are capable of evolving alongside the community in which they operate. In this sense, CIL is a Janus-like source, not in the derogatory sense of the term, but rather in the original sense attributed to the Roman deity. It has one face looking to the past where some of the oldest rules that regulate international law emerged and another looking forward to emerging rules that are developed as state conduct evolves.

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The Janus analogy could be pressed even further by referring to the duality of elements required for the emergence of CIL ‘as evidence of a general practice accepted as law.’ This formulation, enshrined in Art. 38 of the Statute of the Permanent Court of International Justice and copied *verbatim* to that of the International Court of Justice (ICJ), has been taken to imply that two constitutive elements need to be present for a customary rule to form: state practice and *opinio juris*. The customary rule is then identified through an inductive evaluation of these two elements.

While CIL identification has been widely studied, relatively less attention has been paid to what happens to a CIL rule once it has been identified. In its 2018 Draft Conclusions on Identification of Customary International Law, the International Law Commission (ILC) seems to have accepted that there can be a distinction between a customary rule’s existence and its content determination,¹ a point raised more forcefully by the Netherlands in its comments to the Draft Conclusions.² In the ILC’s view this was especially apparent when ‘in some cases it is accepted that the rule exists but its precise content is disputed’.³ Nevertheless, the ILC remained silent on what this distinction might imply. Similarly, while acknowledging that customary rules may change or evolve over time, it excluded further consideration of these issues from its inquiry.⁴

We depart from the premise that what happens in the aftermath of the identification of the existence of a CIL rule is an act of *interpretation*. Once a CIL rule is identified through an analysis of state practice and *opinio juris*, its existence is not a static but a continuous one. The content determination of that rule now becomes a matter of *interpretation* within the given legal and factual contexts of the situations to which it may apply. In fact, recent scholarly engagement with the subject demonstrates that interpretation is ubiquitous among courts engaging with customary rules, and that interpretation does in fact contribute to the continued existence and evolution of customary rules.⁵ Taken together, these considerations raise a foundational question: What is interpretation in the context of CIL, and what role does it play?

This Reflection introduces a broader thematic series hosted by ESIL Reflections on *The Role of Interpretation in the Practice of Customary International Law*. The series addresses the topic of CIL interpretation from both a practice-oriented and a theoretical perspective. What unites the different Reflections of the series is their analytical lens, i.e. ‘interpretation as a tool’. The term ‘tool’ in this context reflects the instrumentality of interpretation. It implies an active understanding of interpretation as not only entailing the concretization of the content of a rule but also allowing for its evolution. This approach captures the multifaceted nature of interpretation as an operation in the context of CIL. The

¹ 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, 124, para. 4.

² The Netherlands, ‘ILC Draft Conclusions on Identification of Customary International Law - Comments and Observations by the Kingdom of the Netherlands’ (2018) 1, para. 5, available at <https://legal.un.org/ilc/sessions/70/pdfs/english/icil_netherlands.pdf>.

³ ILC (n 1) 124, para. 4.

⁴ ILC (n 1) 122-124.

⁵ See, for example, Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (CUP 2022).

thematic series thus maps the various roles that interpretation plays in the 'life-cycle' of customary rules.

In this Reflection, we discuss the analytical framework of the series in more detail and introduce the way we conceptualize CIL interpretation. We argue that interpretation plays two functions in the continued existence of CIL rules: a concretizing/collapsing and an evolutive function. In this sense, interpretation can be both a tool for the solidification of customary rules and a tool for their maintenance and 'updating', without each function being prohibitive of the other. We begin this discussion with a brief description of the way we conceptualize interpretation and the type of interpreter we have in mind. We then delve into the two functions of interpretation in the practice of CIL and discuss the aspects which make interpretation a 'tool'. It is here that we also introduce the contributions of the other authors of the special series. We conclude by bringing all the arguments together.

The Interpretation of Customary Law

Interpretation may be broadly described as the act of attributing meaning to the things that we perceive. In this sense interpretation is ubiquitous in our daily lives, as we constantly perceive objects, acts, or phenomena, and assign meaning to them so as to render them comprehensible. In the legal context, interpretation is the operation of determining the content and scope of legal rules. Interpretation is distinguishable from rule-ascertainment or identification, which is an operation concerned with a rule's (non-)existence. Thus, interpretation is the process of discerning or clarifying the meaning of an existing legal rule and takes place when a general rule is brought to bear upon particular facts.

In international law, traditionally, there exist two opposing views on the nature and role of interpretation. On the one hand, there are the more deterministic approaches, which treat interpretation as the process of retrieving the pre-existing meaning of legal texts in its entirety, while clearly delineating this process from a rule's creation. This school of thought takes an endurantist perspective as to a rule's existence and content. On the other hand, there are the non-deterministic approaches, which are skeptical of stable meanings and treat interpretation as a constructive exercise, with no definite content and whose outcome can and does depend on the interpreter. When we examine how interpretation operates in the practice of international law, however, what emerges is an image of a process less on the extreme ends and much more in the middle of this dichotomy. That is to say, rules and their content do not endure but rather perdure or exdure.⁶ Thus, while interpretation is certainly guided by rules and limited by the inner logic of the international legal system, it is not merely an exercise of retrieving pre-existing meaning. Similarly, while interpretive outcomes may fluctuate depending on who does the interpreting and to which interpretive community they belong, it is certainly not the case that anything goes. Rather, the existence of commonly agreed parameters

⁶ On these concepts see: Katherine Hawley, 'Temporal Parts', *Stanford Encyclopedia of Philosophy* (5 May 2020) <https://plato.stanford.edu/entries/temporal-parts/>; Yuri Balashov, 'Persistence' in Craig Callender (ed), *The Oxford Handbook of Philosophy of Time* (OUP 2011) 13. For a discussion of these theories in international law, see Panos Merkouris, '(Inter)Temporal Consideration in the Interpretative Process of the VCLT: Do Treaties Endure, Perdure or Exdure?' (2014) 45 *Netherlands Yearbook of International Law* 121.

within the interpretive community limits the interpretive process and demarcates which outcomes are acceptable and fall under the umbrella of interpretation. These parameters may include rules of interpretation, commonly agreed limits to interpretation, or a shared professional language and context. All these may serve as outer limits to the interpretive process and reign in creative tendencies.

An aphorism often used in connection with interpretation is that it is an art, not a science. There are a number of insidious assumptions in this statement. First, it is based on the premise that 'art' and 'science' are two notions with no overlap. This is, in our understanding, an erroneous assumption; as Brecht bitinglly noted, such utterances demonstrate a lack of comprehension of either art or science.⁷ Second, this attempted dichotomy between art and science is fueled by an attempt to argue that interpretation is not and cannot be governed by rules, and thus anything goes. But again, this fails to explain on what grounds art is 'rule-less.' Interpretation is thus neither pure art nor pure science, but both.⁸ This is also evident in the interpretation of CIL.

Before delving into a discussion of the ins and outs of CIL interpretation, one small caveat is in order. In this Reflection, and throughout the special series, the focus is on the judicial interpretation of CIL. Formally, international law does not allocate interpretive authority to a single type of actor, such as courts. Depending on the circumstances, a court, a state, or even a non-governmental entity may have interpretive authority.⁹ All these actors together form the interpretive community of international law and contribute to the way legal rules are interpreted.¹⁰

Nonetheless, judicial interpretation holds a prominent role in international law. First, in practice, questions of interpretation tend to arise in the context of disputes and tend to be formulated with a judge or arbitrator in mind.¹¹ In this regard, the majority of CIL interpretation examples are found in the decisions of various courts, both international and domestic. Second, because in international law judicial decisions possess a so-called 'centrifugal normative force', other legal actors tend to follow judicial reasoning, and judicial decisions can be constitutive of international law.¹² This normative effect is even more pronounced when it comes to unwritten law such as CIL. As **Anne van Aaken's** contribution to this series demonstrates, international courts are influential 'veto players' in the finding

⁷ Bertold Brecht, *L'achat du cuivre* (1945).

⁸ Panos Merkouris, 'Interpretation is a Science, is an Art, is a Science' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the VCLT: 30 Years On* (Brill 2010) 1; Matthias Herdegen, 'Interpretation in International Law', Max Plank Encyclopedia of Public International Law (November 2020) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e723>> 723, para. 1.

⁹ See, for example, Azaria who speaks of the ILC's interpretive authority; Danae Azaria, 'Codification by Interpretation: The International Law Commission as an Interpreter of International Law' (2020) 31 EJIL 171.

¹⁰ Andrea Bianchi, 'Epistemic Communities' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 251; Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 147; Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12 MichJIntlL 371; Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 12.

¹¹ Andrea Bianchi, 'The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle' in Bianchi et al (n 9) 34.

¹² Gleider Hernandez, 'Interpretative Authority and the International Judiciary' in Bianchi et al (n 9) 166; see also Andraž Zidar, 'Interpretation and the International Legal Profession: Between Duty and Aspiration' in *ibid* 133; Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 354-355.

and interpretation of CIL. Their pronouncements create baselines against which future analyses about CIL are measured. This affects both the behaviour of other actors, and that of courts themselves. In this regard, van Aaken argues that international courts are mindful of how their pronouncements are received by the larger legal community, and thus apply a 'strategic calculus' when interpreting CIL.

To understand the role of CIL interpretation, we must situate interpretation within a timeline of the existence of a customary rule. This timeline begins with a formation period, which is broadly the period preceding the emergence of a binding customary rule. During this period there is no customary rule to speak of. States rather engage in conduct which may be considered in the rule's identification at a later moment. This period is followed by that of the emergence of the customary rule. Once State practice and *opinio juris* have reached critical mass, their analysis can give rise to the identification of a CIL rule. This emergence does not necessarily require a precise law-creating/law-making moment. Rather, it should be viewed as a type of *sorites*. As in the case of *sorites* the precise moment of transition from one state (grain of sand) to another state (*sorites*) is almost impossible to pinpoint, so in the case of CIL the precise moment of transition from non-binding practice to a binding CIL rule may not be precisely identifiable, but there is a point, or a period to be more precise, when this has become undeniable.¹³

It is important to acknowledge that at the stage of CIL identification, a variation of interpretive reasoning also takes place, insofar as the evaluation of evidence of state practice and *opinio juris* is concerned. However, this is not legal interpretation *stricto sensu*. A look at how courts examine whether a document is a treaty or not may shed light on this crucial distinction. In applying Art. 2(1)(a) Vienna Convention on the Law of Treaties (VCLT), courts also examine the text and the language employed in order to determine whether the states involved intended to create binding obligations.¹⁴ This process has some interpretative features and undeniably leads to some rudimentary content determination, but no court has ever argued that this is legal interpretation in the strict sense. When they seek to interpret, they apply Arts. 31-33 VCLT, not Art. 2(1)(a). Similarly, in the case of CIL, at the stage of rule-identification some interpretative features may appear and a rudimentary content determination may unavoidably occur, but this should be distinguished from *legal* interpretation proper.

It is critical to highlight this distinction between the identification and interpretation of CIL, because these two operations are different with respect to both their content and their outcome. The reasoning employed at the stage of identification is concerned with questions about the relevance and weight to be given to evidence of state practice and *opinio juris*, and the outcome of this reasoning is a binary one – a CIL rule is determined to either exist or not. The reasoning employed at the stage of interpretation is concerned with the determination of the content of the CIL rule and how this rule applies to the case at hand. It may have a variety of outcomes depending on the rule being interpreted and the legal and factual circumstances that surround it.

¹³ On the fallacy of the law-creating moment argument and why the *sorites* paradox is an apt analogy for the emergence of CIL, see Panos Merkouris, 'Interpretation of Customary International Law: of Methods and Limits' [2022] *BRILL Research Perspectives in International Legal Theory and Practice* (forthcoming).

¹⁴ See, for instance, *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections) [2017] ICJ Rep 3, paras. 36-50.

Interpretation of a CIL rule takes place after a general CIL rule has emerged, and in this regard it performs two main functions. The first is a concretizing/collapsing function whereby interpretation is a tool for the concretization of the content of general CIL rules. The second is an evolutive function whereby interpretation is a tool for the adaptation of CIL rules to new developments of fact or law.

Interpretation as a Tool for Concretization/Collapsing

Interpretation plays a concretizing role in customary rules, as it specifies the content of customary rules. Since customary rules are general by their nature, the act of interpretation is necessary to formulate them more concretely. As such, it is through interpretation that we may arrive at more specific sub-elements of a general customary rule or more specific sub-obligations that flow from it. Alternatively, this may also be described as a collapsing function. This alludes to an analogy with quantum mechanics, where a particle (in our case a CIL rule, or at least the disputed part of its content) exists in a state of superposition of several *eigenstates* until it is measured. At the moment of measurement, the wavefunction *collapses* into a single eigenstate and is thus 'pinned down' or concretized. We suggest that interpretation in the case of CIL performs much the same function.¹⁵ Elaborating on this analogy would go way beyond the scope of this Reflection,¹⁶ so borrowing a page (or to be precise a page-margin) from Fermat's playbook, we will simply say that 'I have discovered a truly remarkable proof of this ... which this margin is too small to contain!' This concretizing/collapsing function of interpretation is in part due to the 'inherent plasticity' of CIL rules.¹⁷ Customary rules are identified in terms of general prescriptive rules, which may apply to a variety of contexts. Interpretation is then necessary in order to formulate a statement that specifies their content and meaning.¹⁸ In this sense, CIL interpretation entails the clarification of 'the modes and details of applicability of general customary rules to specific situations to which they are designed to apply due to their general scope'.¹⁹

Consider the example of the customary rule on the prevention of transboundary harm. Early elaborations of the rule can be found in *Nuclear Weapons*²⁰ and *Gabčíkovo Nagymaros*²¹, where the ICJ established its existence. In subsequent cases, the Court no longer engaged in an evaluation of practice and *opinio juris* to establish whether the rule (still) existed or had changed. Rather, it interpreted the rule in order to flesh out its content. For instance, in *Pulp Mills* the Court specified that prevention is a due diligence obligation, which involves a duty to inform and a duty to conduct an

¹⁵ The analogy seems to hold up irrespective of whether one adheres to the, for our purposes serendipitously named, Copenhagen interpretation or alternative theories, such as the 'pilot wave' theory.

¹⁶ This is analysed in the authors' upcoming publications. For preliminary thoughts on this topic, the distinction between 'correct'/'permissible' interpretation and interpretation as a Mandelbrot set, see Panos Merkouris, 'The "Correct Interpretation" Premise in International Adjudication' in Pauline Westerman, Kostiantyn Gorobets, Andreas Hadjigeorgiou (eds), *Conceptual (De)Constructions of International Law* (Edward Elgar forthcoming 2022).

¹⁷ Orfeas Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 EJIL 235.

¹⁸ Serge Sur, 'La créativité du droit international' (2013) 363 RdC 21, 295.

¹⁹ Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 496.

²⁰ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para. 29.

²¹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, para. 140.

environmental impact assessment (EIA).²² Subsequently, in *Certain Activities and Construction of a Road* the Court further elaborated the rule's content by finding that a set of separate-but-related activities need to be undertaken 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 needs to notify and consult the other concerned state in order to adopt appropriate measures to prevent or mitigate harm.²³ This example illustrates how specific content and sub-obligations were particularized out of a general customary rule by means of interpretation. Interpretation here served as a tool of concretization in the sense that through interpretive reasoning the content of a general rule was made more specific and concrete. This concretization carried over in subsequent treatments of the customary rule. Therefore, the conclusion that prevention includes a duty to conduct an EIA was not limited to the *Pulp Mills* case; this duty carried over to the next case and was supplemented by further findings as to the content of the customary rule.

A similar rationale can be found in *Gulf of Maine*, where the Court observed that '[a] body of detailed rules is not to be looked for in customary international law ... It is therefore unrewarding, especially in a new and still unconsolidated field to look to general international law to provide a readymade set of rules that can be used for solving any delimitation problems that arise.' In the Court's view, '[a] more useful course is to seek a better formulation of the fundamental norm on which the Parties were fortunate enough to be agreed',²⁴ which seems to be a clear allusion by the Court that this is to be done via interpretation. International and domestic case-law is peppered with examples of the interpretative concretization/collapsing of CIL rules.²⁵

The awareness of this concretizing/collapsing function of interpretation begs the question how courts arrive at more concrete findings about the content of general CIL rules, and what (if any) rules guide this process. In his contribution to this series, **Ivo Tarik de Vries Zou** discusses how teleological interpretation and interpretation focused on intent operate in the case of CIL. He argues that it is perhaps more appropriate, when discussing and interpreting CIL rules, to refer to a so-called 'common conviction' of states rather than intent. In the light of this 'common conviction', judges aim to construct the meaning and purpose of a CIL rule. **Wouter Werner** considers these questions through the examples of customary rules reproduced in restatements by expert bodies. He contends that customary rules are given a textual existence when they are restated in various kinds of restatement reports by expert committees. Through this exercise of restating, customary rules are transformed and solidified. This results in a textual manifestation of CIL rules which itself can later be used for purposes of interpretation.²⁶

²² *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, paras. 101-102 and 204.

²³ *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) [2015] ICJ Rep 665, para. 104.

²⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA)* (Merits) [1984] ICJ Rep 246, para. 111 (emphasis added).

²⁵ For examples and analysis, see Merkouris (n 13).

²⁶ As was the case in both the Award and Annulment Decision in *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award 2014, Decision on Annulment 2015.

It is important to note that while the concretizing function of interpretation is particularly evident in the context of CIL rules, the manner in which such interpretation manifests itself is neither 'rule-less' nor limitless. For instance, **Luiza Leao Soares Pereira** argues that even in the promotion of progressive causes there are inherent limits as to how far individuals can pursue progressive interpretations of CIL. Furthermore, the extent to which CIL rules may be constructed through interpretation is limited by the inherent boundaries of the judicial function. Judges may not create law and their interpretation of customary rules cannot transgress into lawmaking, as De Vries Zou's argument concerning the reconstruction of states' 'common conviction' aptly illustrates. Finally, the concretizing/collapsing function of interpretation can be limited by rules of CIL interpretation. While no such rules have yet been identified, research on the subject demonstrates that there are discernable methodological patterns among courts and tribunals engaging in CIL interpretation.²⁷ The standardization of such rules can contribute significantly to a clear demarcation of the interpretive function in the context of CIL and can increase the predictability of the interpretive process.

Interpretation as a Tool for Evolution

Interpretation is a crucial operation in the evolution of customary rules. In fact, interpretation is essential for it to be possible for a customary rule to be adjusted to new developments of fact or law in the international legal community. Contrary to some views, customary rules are not static, rigid legal rules which have no place in modern legal systems. Rather, customary rules are by their nature dynamic because they move together with the community from whose conduct they emerge. As such, they require interpretation in order to be able to respond to emerging new circumstances.

An interesting illustration of this comes from a recent position paper by Germany on the application of international law in cyberspace. In it, Germany espouses the view that international law as it currently stands, including CIL, can provide legal guidance with regard to cyberspace. 'Uncertainties as to how international law might be applied in the cyber context can and must be addressed by having recourse to the established methods of interpretation of international law'.²⁸ Interpretation is thus recognized as a crucial tool for the evolution of customary rules and their adaptation to new contexts. In international case law, the evolutive function of CIL interpretation can be found in various regimes. In his contribution to this series, **Johannes Fahner** illustrates how the content of the customary international standard for minimum treatment has evolved through interpretation by various arbitral tribunals. Fahner argues that these tribunals have expanded the standard's scope and content have been expanded by tribunals, resulting in enhanced investment protection due to evolutive interpretation. A similar tendency towards evolutive interpretation is noticeable among domestic courts dealing with CIL. For instance, when applying the customary rule pertaining to civilians taking direct part in hostilities, the Israeli Supreme Court observed: 'new reality at times requires new interpretation. Rules developed against the background of a reality which has changed must take on dynamic interpretation

²⁷ See, for instance, Merkouris (n 13); Marina Fortuna, 'Different Strings of the Same Harp: Interpretation of Customary International Rules, their Identification and Treaty Interpretation' in Merkouris et al (n5).

²⁸ Germany, 'On the Application of International Law in Cyberspace – Position Paper' (March 2021) 16 <https://www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf>

which adapts them, in the framework of accepted interpretational rules, to the new reality'.²⁹ The court then proceeded to 'update' the rule through evolutive interpretation.³⁰

Luiza Leão Soares Pereira, in turn, takes these considerations even further, and examines how the nature of CIL as a source of law and the evolutive function of interpretation may be used to promote progressive causes. Pereira argues that legal professionals may utilize the dynamic nature of CIL to put forth arguments about its content, thereby affecting interpretive outcomes that 'weave ideas into the fabric of international law'.

While interpretation can indeed be a tool for normative evolution, it remains challenging difficult to clearly demarcate evolutive interpretation from the modification or emergence of a new CIL rule. In her contribution to this special series, **Başak Etkin** tackles these questions by relying on the age-old analogy of a river in flux. Etkin argues that one cannot adjudicate the same custom twice, as the content of the same customary rule may change over time. She analyses interpretation as part of this flux and as a process through which the rule's content may evolve.

As with the concretizing/collapsing function, interpretation as a tool for normative evolution has its limits too. While customary rules may be updated or extended to new contexts through evolutive interpretation, this must not be equated with modification. The latter may only happen through new or contrary practice. Nevertheless, in cases where a customary rule goes through a phase of modification, interpretation will play a role. More specifically, when faced with a claim that a certain customary rule no longer has the same content because of a change in practice or the emergence of contrary conduct, a court will necessarily need to engage in interpretation to delineate the content of the existing rule and assess it against emergent (contrary) practice. Thus, we speak of modification in cases of new or contrary practice, while we speak of evolutive interpretation in cases where there is no new practice and a rule is merely extended to a new context or updated in light of new developments. Of course, this distinction is not always easily maintained, and it may be difficult to draw the line when faced with practical examples. That said, there is nothing new under the sun, since similar demarcation difficulties exist in treaty law.

Concluding Remarks

While a few years ago the debate on CIL interpretation revolved around its plausibility, we can now safely say – knowing that interpretation can and does take place in the practice of CIL – that the focus has shifted towards a discussion of what CIL interpretation actually entails. In this Reflection, we examined two functions of CIL interpretation: a concretizing/collapsing function and an evolutive one. Interpretation can be considered a tool for the determination of the specific content of general customary rules, as well as a tool that enables customary rules to evolve over time and adjust to new

²⁹ *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Government of Israel et al* (14 December 2006) Supreme Court of Israel, HCJ 769/02, para. 28.

³⁰ *Ibid* paras. 29-40; see in detail Nina Mileva, 'The Role of Domestic Courts in the Interpretation of Customary International Law: How Can We Learn from Domestic Interpretive Practices?' in Merkouris, Kammerhofer and Arajärvi (n5).

and emerging contexts. Using this as a springboard, the contributors to this special series address CIL interpretation through the analytical lens of a 'tool' in a variety of contexts. In doing so, they focus on the role of international courts as veto players in CIL interpretation from a political economy perspective, the variety of methods that can and have been employed by international courts to interpret CIL in both a concretizing/collapsing and evolutive manner, and the utility and limits of CIL interpretation as a tool for evolution. Although they all tackle CIL interpretation from a different angle, these contributions all demonstrate that CIL interpretation is not only feasible but observable in international practice and that it imbues CIL with the vivacity and flexibility necessary in a constantly evolving international landscape.

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