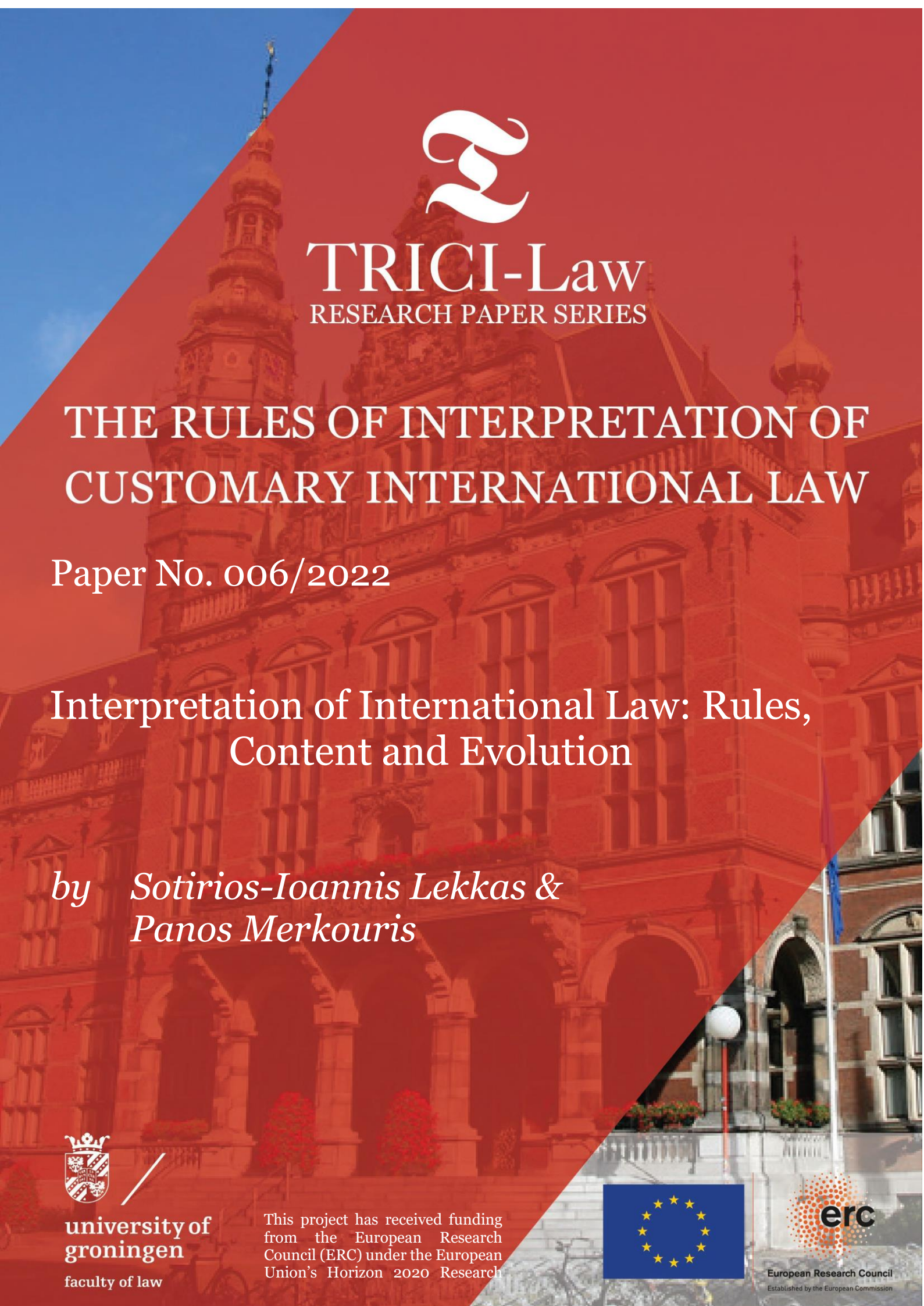

TRICI-Law
RESEARCH PAPER SERIES

THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

Paper No. 006/2022

Interpretation of International Law: Rules, Content and Evolution

by *Sotirios-Ioannis Lekkas & Panos Merkouris*

university of groningen
faculty of law

This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research

European Research Council
Established by the European Commission

Interpretation of International Law: Rules, Content and Evolution

by Sotirios-Ioannis Lekkas & Panos Merkouris

available at:

S-I Lekkas & P Merkouris, 'Interpretation of International Law: Rules, Content and Evolution' (2022) 69 Netherlands International Law Review 183-189

https://link.springer.com/article/10.1007/s40802-022-00226-w

The TRICI-Law project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

university of groningen
faculty of law

TRICI-Law

erc
European Research Council
Established by the European Commission

Introduction to the Special Issue

Interpretation of International Law: Rules, Content, and Evolution

Sotirios-Ioannis Lekkas and Panos Merkouris[1]

Interpretation is ubiquitous in legal thought and practice. In international law, the law and method pertaining to the process of interpretation continues to generate rich debates amongst legal scholars and to pose perplexing questions in international legal practice. The Vienna Convention on the Law of Treaties ('VCLT') reflects the premise that interpretation is, or at least can be, a normative process, that is, a formal process based on legal rules.[2] Yet, whilst the VCLT rules are increasingly accepted and relied upon by international courts and tribunals, this does not mean that the law on treaty interpretation is static. In fact, the law of treaty interpretation is still undergoing a process of refinement and progressive development, as attested by recent initiatives within the United Nations International Law Commission ('ILC').[3] In parallel, the current re-focus on the building blocks of international law that is evinced by the work of the ILC calls for a re-appraisal of legal interpretation in connection to non-treaty rules. The ILC's earlier work on unilateral acts of states addressed specifically the topic of interpretation and adopted a Guiding Principle to that effect,[4] while in other areas of research such as '*Jus Cogens*'[5] and the 'Immunity of State Officials from Foreign Criminal Jurisdiction'[6] interpretation of non-written rules has coloured part of the ILC members' deliberations. Finally, the ILC's recently completed work on the 'Identification of Customary International Law', and the ongoing inquiry into 'General Principles of Law' raise similar questions as to the interpretability of rules emanating from these respective sources and the possibility of development of rules of interpretation in that space.

This Special Issue takes a closer look to this formal approach to interpretation. How do rules of interpretation come about and how effective are they in streamlining determinations about the content of rules of international law? Have rules of treaty interpretation changed over time and, if so, in which way? What kind of rules or methods of interpretation apply to rules emanating from sources of international law other than treaties?

---

[1] This paper is based on research conducted in the context of the project 'The Rules of Interpretation of Customary International Law' ('TRICI-Law'). This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No 759728). All weblinks were last accessed 17 March 2022.

[2] Arts 31-33, Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331 ('VCLT').

[3] ILC, 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties', annexed to UNGA Res 73/202 (3 January 2019).

[4] ILC, 'Guiding Principles to Unilateral Declarations of States Capable of Creating Legal Obligations' (2006) II(2) YbILC 161 *ff* (paras 176-177), Principle 7.

[5] ILC, 'Peremptory Norms of General International Law (*jus cogens*): Texts of the Draft Conclusions and Annex adopted by the Drafting Committee on Second Reading' (2022) UN Doc A/CN.4/L.967, Draft Conclusion 20.

[6] ILC, 'Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur' (2016) UN Doc A/CN.4/701 paras 136, 142, 147(d) and 150.

At the crux of the VCLT approach lies a normative claim that legal rules can instill legal certainty and predictability in the process of interpretation of international law.[7] The first two contributions in this Special Issue interrogate this claim from complementary perspectives. The opening contribution by Gleider Hernández draws from legal theory to examine the 'mechanisms of determinability' in international law.[8] The indeterminacy of international law—broadly understood as the inconclusiveness of hermeneutics in establishing an objective meaning of international legal rules compounded by the pursuit of contradictory normative objectives by the international legal system—[9]'opens a space…for specific actors to *claim* authority for the interpretation and application of international law'.[10] Law-applying officials, who are vested with content-independent interpretive authority, that is, regardless of the content or merit of their command, are necessary but also constitutive of a legal system so as to ensure a degree of determinability.[11] Hernández builds upon these insights to question the strategies through which these officials come to be identified. Rather than mere systemic necessity, the validity of claims to interpretative authority are co-contingent upon recognition by the interpretive community of international lawyers and the appeal to common discourse rules that constitute the fabric of international law including rules of interpretation.[12]

Daniel Peat's contribution draws on the same theme from a historical and practical perspective. It examines whether the rules of interpretation in the VCLT can be considered 'disciplining rules' in the sense that they can allow a determination of 'whether an interpretation is correct or not, and whether an interpreter has crossed the bounds into the impermissible or illegal'.[13] Drawing from the drafting history of Arts 31-32 VCLT and an illustrative example from the ICSID context, Peat argues that the VCLT rules were not intended to be 'disciplining rules' nor do they operate like such in practice. Instead, he proposes that the VCLT rules have a 'thin' evaluative dimension in that they 'd[o] not provide directive guidance…but rather stak[e] out the boundaries of permissible behaviour of actors'.[14] In so doing, the VCLT rules of interpretation operate to 'distingui[sh] those within from those outside the discipline'.[15]

Another implication of the formal approach to interpretation is that rules of interpretation, much like any other rule of international law, are amenable to evolution by being

---

[7] ILC, 'Draft Articles on the Law of Treaties with Commentaries'(1996) II YbILC 187, 218-219 (para 5); *Special Rapporteurs* and members of both the ILC and the *Institut de droit international* as well as states have on multiple occasions also intimated that these rules aim to lead to the 'correct interpretation' of a rule; ILC, 'Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' (11 March-14 June 1966) UN Doc A/CN.4/186 and Add.1-7 reproduced in (1966) YbILC 51, 90 (para 9), 93, 99-100 (paras 19-20); ILC, 'Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' (3 March - 7 July 1964) UN Doc A/CN.4/167 and Add.1-3 reproduced in (1964) II YbILC 5, 55, 90 (para 9); Insitut de Droit International, 'IV. Délibérations de l' Institut en séances plénières: Quatriéme Question – De l' interprétation de traités' (1956) 46 AIDI 317, 321, 328-329 and 330.

[8] See, in the present issue, Hernández (2022)

[9] ibid.

[10] ibid.

[11] ibid.

[12] ibid.

[13] See, in the present issue, Peat (2022).

[14] ibid.

[15] ibid.

themselves subject to interpretation, modification, or displacement by other rules of interpretation. Whilst the VCLT rules are increasingly accepted and relied upon by international courts and tribunals, this does not necessarily imply either that they are the final word on the matter,[16] not that the law on treaty interpretation was and remains static, despite the fact that such a narrative may be sometimes employed by international courts and tribunals as a 'heuristic hermeneutic' device . The internal relationship between the different elements of the rule of interpretation enshrined in Articles 31-33 of the VCLT and the external relationship of the VCLT rule with other methods, maxims, or special rules of treaty interpretation continue to pose vexing theoretical and practical questions. In fact, the law of treaty interpretation is still undergoing a process of refinement and progressive development. Most conspicuously, in 2018, the International Law Commission ('ILC') completed its work on 'Subsequent Agreements and Practice in Relation to the Interpretation of Treaties'.[17] Moreover, the ongoing work of the Study Group of the International Law Association on the 'Content and Evolution of the Rules of Interpretation' is a further attestation to the continuing relevance and dynamism of this area of law.[18]

In light of these developments, two contributions flag up challenges or gaps in the process of interpretation as regulated by the VCLT that have proven particularly salient in practice. Irina Buga's contribution focuses on the complicated impacts that subsequent practice can have on treaties. Subsequent practice can induce treaty change not only as an element of treaty interpretation under Article 31 VCLT, but also as a constitutive element of customary international law. The VCLT is largely silent on the issue of treaty modification by subsequent customary international law and the limits of treaty interpretation in light of subsequent practice.[19] Buga maps out the intricate interactions between treaty rules and rules of customary international law formed after the entry into force of a treaty. She argues that treaty modification by subsequent customary international law is permissible under strict requirements in light of the general presumption against change.[20] On the one hand, there needs to be a 'genuine' conflict between the treaty rule and the subsequent rule of customary international law, that is, a conflict that cannot be resolved through the use of interpretative means including harmonious interpretation or systemic integration under Art 31(3)(c) VCLT.[21] On the other hand, the practice of the treaty parties must not only confirm the content of the rule of customary international law, but also evidence their intention to modify the treaty rule.[22] Only once these requirements are met is treaty modification by subsequent customary international law possible.

Kirsten Schmalenbach turns to the multifaceted roles of acts of international organizations as extraneous material in the process of treaty interpretation. Schmalenbach identifies with precision different categories of acts of international organizations and their relation to the rules of treaty interpretation as reflected in Arts 31-32 VCLT. Her doctrinal analysis and illustrative examples of judicial practice in relation to acts of international

16 Nor even an absolutely clear word on the matter.

17 ILC , 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties', annexed to UNGA Res 73/202 (3 January 2019).

18 eg Merkouris and Peat (2018).

19 See, in the present issue, Buga (2022).

20 ibid.

21 ibid.

22 ibid.

organizations with diverse functional expertise confirms her astutely formulated premise: 'it is not the intrinsic or extraneous property of the material in relation to the primary treaty text that qualifies or disqualifies it for the purpose of treaty interpretation, rather [its] affiliation with the parties to the treaty'.[23] Whilst it is theoretically possible for a special rule of interpretation to arise in customary international law with respect to acts of international organizations, Schmalenbach concludes that such development is not forthcoming.

A third question arising from the formal approach to interpretation is its prospects and limitations for the development of international law. In particular, broader developments with respect to the law relating to the sources of international law call for a more careful evaluation of the role of interpretation of international law beyond treaties. Notably, the ILC completed recently its work on the 'Identification of Customary International Law',[24] whereas its work on 'General Principles of Law' is still ongoing.[25] It is still an open question whether there is space for the development of rules of interpretation in that context. To illustrate this point, the ILC's Conclusions on customary international law explicitly distinguished the process of identification of customary rules from the process of determining the content of customary rules whose existence is undisputed. Nonetheless, the Conclusions remain largely agnostic as to the practical implications of this distinction.[26] This approach can be contrasted with the ILC's previous work on unilateral acts of states in which it provided explicit guidance on issues of interpretation.[27] Moreover, the Commission explicitly excluded from the scope of its Conclusions the evolution of rules of customary international law through time.[28]

Against this background, two contributions in this Special Issue explore rules or methods of interpretation with respect to international law beyond treaties and the ways in which they compare to the rule(s) of treaty interpretation and to each other. Eva Kassoti delves into the theory and practice of interpretation of unilateral acts of states *qua* sources of international law. According to Kassoti, the interpretation of the act in question is necessary in order to ascertain its binding force (law determination) and its content (content determination).[29] However, the means of interpretation in each context is not necessarily the same. With respect to interpretation for the purposes of law determination, it is key to establish the intention of the declaring state to be bound by the act.[30] Whilst in this context intention refers to the objective or manifest intention of the state, there are a number of indicators alongside the text which may evidence such intention (including the circumstances

---

23 In this issue, Schmalenbach (2022).

24 ILC, 'Identification of Customary International Law', annexed to UNGA Res 73/203 (13 January 2019).

25 ILC, 'Report of the International Law Commission—Seventy-first session (29 April–7 June and 8 July–9 August 2019) General Assembly Official Records Seventy-fourth Session Supplement No 10 (A/74/10) paras 202-262.

26 ILC, 'Conclusions on the Identification of Customary International Law' in ILC, 'Report of the International Law Commission—Seventieth session (30 April-1 June and 2 July-10 August 2018)' General Assembly Official Records Seventy-third Session Supplement No 10 (A/73/10) para 66, Commentary to Conclusion 1, para (4).

27 ILC, 'Guiding Principles to Unilateral Declarations of States Capable of Creating Legal Obligations' (2006) II(2) YbILC 161 *ff* (paras 176-177), Principle 7.

28 ibid, Commentary to Conclusion 1, para (5).

29 In this issue, Kassoti (2022).

30 ibid.

and author of the unilateral act).[31] When it comes to interpretation for the purposes of content determination, practice is less clear but tends to favour a more textual approach.[32]

Sotirios-Ioannis Lekkas then focuses on the practice of international courts and tribunals relating to the use of ILC outputs in the context of treaty interpretation and determination of customary international law and general principles of law. He argues that the value of ILC outputs is not necessary 'subsidiary' in nature, but varies depending on the context and specific output in question.[33] In the context of treaty interpretation, the contribution argues that Arts 31-32 VCLT not only provide a justification for their use, but also entails a methodology for their use depending on their usefulness for the establishment of the common intention of the parties to the treaty.[34] Furthermore, Lekkas discerns a two-pronged methodology for the use of ILC outputs for the purpose of determination of customary international law and general principles of law. As a starting point, international courts and tribunals justify their reliance on ILC outputs as evidence by reference to the rules on the identification of customary international law or general principles of law, as the case might be.[35] International courts and tribunals then proceed to resolve any outstanding ambiguities by employing methods of interpretation akin to treaty interpretation with respect to such outputs. In so doing, they end up treating normative propositions of the ILC as 'written artefacts' of rules of unwritten international law and as such as objects of interpretation.[36]

What all the contributions of this Special Issue have in common, apart from the obvious theme of interpretation, is the engagement with the continuous development and refinement of the rules of interpretation across sources and through time. The tribunal in *Aguas del Tunari v Bolivia* famously characterized the iterative process of refinement inherent in the interpretation of any legal rule as one of 'progressive encirclement'.[37] The present contributions have engaged in a similar process of 'progressive encirclement' of the rules of interpretation. In such a debate, it is immaterial whether there is a finite point of refinement in sight or at the end, or whether the level of precision/refinement can be infinite *à la* zooming in a Mandelbrot set. What is important is to continue engaging in this process and debate as it is revelatory not only of the process of interpretation, but of how the legal system of international law functions and perchance should function.

---

31 ibid.

32 ibid.

33 In this issue, Lekkas (2022).

34 ibid.

35 ibid.

36 ibid.

37 *Aguas del Tunari v Bolivia* (Decision on Respondent's Objections to Jurisdiction of 21 October 2005) ICSID Case No ARB/02/03, para 91.

Panos Merkouris and Daniel Peat, 'ILA Study Group on the Content and Evolution of the Rules on Interpretation—Interim Report—19-24 August 2018, Sydney' (2018) 78 ILARC 1125*ff*.