TRICI-Law
RESEARCH PAPER SERIES

THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

2023 TRICI-Law Draft Guiding Principles on the Interpretation of Rules of Customary International Law with Commentaries

Paper No. 010/2023

By Panos Merkouris, Sotirios-Ioannis Lekkas, Marina Fortuna and Nina Mileva

university of groningen
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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).

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Panos Merkouris, Sotirios-Ioannis Lekkas, Marina Fortuna and Nina Mileva[*]

Introduction

[1] Customary international law, alongside treaties and general principles of law, is one of the three primary sources of international law. Rules of customary international law are a central feature of the international legal system, comprising both some of the oldest foundational rules of the system and new rules which have emerged recently in the practice of states and other international actors.

[2] To determine the existence of a rule of customary international law, it is necessary to ascertain that there is a general practice accepted as law.[1] This corresponds to what has become known as the two elements of customary international law, namely general practice and *opinio juris*.

[*] These draft Guiding Principles with Commentaries are 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).
The TRICI-Law team would like to thank all the contributors and participants to the various conferences and workshops organises and co-organised by TRICI-Law for their contributions and ideas. The TRICI-Law team would also like to express its gratitude especially to all the contributors of the last TRICI-Law, AthensPIL and UoA Conference, who discussed and provided feedback for the improvement of these draft Guiding Principles with Commentaries, Prof. Fay Pazartzis, Prof. Linos-Alexander Sicilianos, Prof. Hélène Ruiz Fabri, Mrs. Maria Telalian, Prof. Malgosia Fitzmaurice, Dr. Andre de Hoogh, Prof. Frans Nelissen, Dr. Efthymios Papastavridis, Prof. Vaios Koutroulis, Dr. Stravros Pantazopoulos, Prof. Marcel Brus, Prof. Patrícia Galvão Teles, Dr. Georgios Kyriakopoulos, Prof. Jan Wouters, Dr. Andreas Kulick, Dr, Jenny Stavridi, Prof. Concepción Escobar Hernández, Prof. Maria Gavouneli, Prof. Alessandra Gianelli and Dr. Anastasios Gourgourinis. Special thanks also go out to Mr. Emmanuel Giakoumakis, Mr. Nikiforos Panagis, Dr. Nikolaos Voulgaris, Mr. Ivo-Tarik de Vries-Zou, Mr. Konrad Turnbull, Dr. Jörg Kammerhofer, Dr. Noora Arajärvi, Dr. Riccardo di Marco, Prof. Pauline Westerman and Prof. Alette Smeulers, for their comments on and suggestions for these draft Guiding Principles with Commentaries. Naturally, all the views expressed here are the authors' alone. Parts of the text of these Commentaries have appeared in the various publications of TRICI-Law (here), most notably, P Merkouris, *Interpretation of Customary International Law: of Methods and Limits* (Brill 2024) (here), S-I Lekkas, 'Handbook on Rules of Interpretation in International Adjudication' (TRICI-Law Paper Series 003/2023) (here), M Fortuna, *Interpretation of Customary Law in International Courts* (University of Groningen 2023) (here), and N Mileva, *A Theory of Interpretation for Customary International Law* (University of Groningen 2023) (here).

[1] International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YILC 122, Draft Conclusion 2.

[3] There has also often been a conflation between the process of identification and interpretation of customary international law.[2] The question of the interpretation of rules of customary international law has received limited attention. While the possibility to interpret such rules has frequently been acknowledged,[3] it is only more recently that the phenomenon of interpretation has been examined in more depth in the context of customary international law.[4] At the same time, the interpretation of rules of customary international law can frequently be found in the reasoning of both national and international courts and tribunals.[5] Thus, interpretation of a rule of customary international law is a process that is and should be distinguished from that rule's identification.

[4] Furthermore, apart from the multitude of problems with the classical two-element approach, (such as circularity, selectivity etc.)[6] an element that should not be forgotten is the oft-repeated criticism that, in the construction of a modern global society, where the world system rests, 'Third World' voices have not been heard, have been ignored or relegated.[7] In the case of customary international law, it is crucial to clarify, bolster and/or create means to compel the system to listen to said voices and not to repeat mistakes of the past. This would result in more legitimate outcomes and interpretation can be such a legitimizing tool. Accounting for the interpretation of customary international law is therefore both practically necessary and theoretically relevant.

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[2] See in more detail *infra*, draft Guiding Principle 3 and accompanying Commentary; cf ILC (n 1) Commentary to Draft Conclusion 1 [4].

[3] CK Allen, *Law in the Making* (6th edn, OUP 1958) 109-10; C de Visscher, *Problèmes d' interprétation judiciaire en droit international public* (Pedone 1963); R Bilder et al, 'Disentangling Treaty and Customary International Law: Remarks' (1987) 81 ASIL Proceedings of the Annual Meeting 157, 159; A Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht' (1977) 37 ZaöRV 504, 521-8; ; F Capotorti, 'Cours général de droit international public' (1994) 248 RdC 17,121; IML de Souza 'The Role of Consent in the Customary Process' (1995) 44/3 ICLQ 521, 528; I Lukashuk, 'Customary Norms in Contemporary International Law' in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzysztof Skubiszewski* (Kluwer Law International 1996) 499.

[4] R Kolb, *Interprétation et création du droit international: esquisses d'une herméneutique juridique moderne pour le droit international public* (Bruylant 2006) 219-31; A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 496-511; S Sur, 'La créativité du droit international' (2013) 363 RdC 9; P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 ICLR 126; O Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31/1 EJIL 235; P Merkouris, *Interpretation of Customary International Law: of Methods and Limits* (Brill 2024), available here.

[5] See case-law cited in the Commentaries herein.

[6] Which the interpretation of customary international law, can also help addressing.

[7] E Said, *Orientalism* (25th anniversary edn, Penguin 2003) Preface; ('In the process the uncountable sediments of history, a dizzying variety of peoples, languages, experiences, and cultures, are swept aside or ignored, relegated to the sandheap along with the treasures ground into meaningless fragments that were taken out of Baghdad').

[5] The work of the TRICI-Law project has yielded an overview of the interpretation of rules of customary international law by national and international courts. Furthermore, it has engaged in a detailed study of the concept of interpretation in international law, showing that there are no theoretical obstacles to the application of this concept to a source such as customary international law. Finally, it has shown that there are marked methodological similarities in the way customary rules and other rules of international law are interpreted, while also discovering relevant points of difference. The following draft Guiding Principles[8] and Commentaries are the product of this research.

Guiding Principle 1

Scope

The present Guiding Principles concern the manner in which rules of customary international law are to be interpreted.

Commentary

[1] Draft Guiding Principle 1 is introductory in nature. It provides that the present draft Guiding Principles concern the manner in which rules of customary international law are to be interpreted.

[2] In this sense, the present draft Guiding Principles and accompanying Commentaries concern the methodology for the interpretation of rules of customary international law, as well as the nature of the interpretive exercise in this context.

[3] These draft Guiding Principles differentiate between the process of identification of rules of customary international law and that of their interpretation. The present draft Guiding Principles are not concerned with the identification of rules of customary international law. While traditionally, the question of the interpretation of customary international rules has been subsumed under the question of identification, and the two processes have been treated jointly, these draft Guiding Principles separate the two issues, focusing exclusively on interpretation.

[8] On a detailed analysis of the differences and potential underlying choices and consequences between terms such as 'articles', 'conclusions', 'guidelines' and 'guiding principles' in the work of the International Law Commission, see K van Douwen, 'The International Law Commission Performs: an Article is not a Conclusion is not a Guideline is not a Principle?' (2023, on file with the authors).

[4] The reasons for and importance of treating identification and interpretation as two distinct legal processes covered by different rules are dealt in much more detail under draft Guiding Principle 3 and its accompanying Commentary.

Guiding Principle 2

Interpretability of Rules of Customary International Law

Rules of customary international law are subject to interpretation.

Commentary

[1] Rules of customary international law are subject to interpretation, and there are no inherent traits of customary rules that prevent the application of interpretation to these rules. Arguments against the interpretability of rules of customary international law are not persuasive, and do not find support in the practice of states, national or international courts or other international actors.

[2] The unwritten character of customary rules does not exclude or prevent the need for their interpretation. The claim that rules of customary international law are not interpretable because of their unwritten character is anchored both in the more obvious quality of customary international law as *lex non scripta*, and a deeper underlying understanding of customary rules as norms which are not couched in words – *sine litteris*.[9] Concerning the unwritten character of rules of customary international law, the argument is that '[e]ven though language is necessary to communicate their content, expression through language is not an indispensable element of customary international law rules. This irrelevance of linguistic expression excludes interpretation as a necessary operation in order to apply them'.[10] This reasoning is problematic. Firstly, it is not entirely clear why the absence of a written textual manifestation in the context of customary rules would imply that a rule of customary international law should not be subject to interpretation. An absence of a written manifestation does not deprive this rule of other forms of linguistic expression (such as for instance oral expression) or of content, and consequently

[9] On this expression see J Kammerhofer, *International Investment Law and Legal Theory: Expropriation and the Fragmentation of Sources* (CUP 2021) 76-7.
[10] T Treves, 'Customary International Law' [2006] MPEPIL 1393 [2].

of the need to clarify this content for the purpose of application in a given legal and factual context.[11]

[3] Furthermore, in international law it is not at all uncommon to interpret unwritten rules, and 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 Declarations of States'[12] the International Law Commission (ILC) established that unilateral declarations, which may be formulated orally[13] and are thus sometimes unwritten, may be subject to interpretation if their content is unclear.[14] On this point, and taking a cue from the reasoning of the International Court of Justice (ICJ), the ILC clarified that the Vienna Convention on the Law of Treaties' (VCLT) rule of interpretation may apply *mutatis mutandis* to the interpretation of unilateral declarations as well.[15] The possible application of the VCLT rule of treaty interpretation to the interpretation of customary rules is revisited in the draft Guiding Principles and Commentaries below. Similarly, with respect to general principles of international law, which are also themselves unwritten,[16] it is acknowledged that this source of law can be subject to interpretation.[17] A third example that can be offered here is that regarding the interpretability of oral treaties, or verbal treaties or verbal/oral agreements as they are sometimes called.[18] Their binding character has been well recognised in international jurisprudence, as was the case in *Mavrommatis Jerusalem Concessions*.[19] Their binding character was also uncontroversial during the ILC discussions on the law of treaties.[20] Although Article 2(1)(a) VCLT makes no specific reference to such

[11] On this point, it is important to highlight that in academic scholarship it has been pointed out that in law 'the word "text" is not limited to a written text. For purposes of interpretation, any behavior that creates a legal norm is a "text"'; A Barak, *Purpose Interpretation in Law* (Princeton University Press 2005) 3.
[12] ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations with Commentaries Thereto' (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10 reproduced in [2006/II – Part Two] YILC 160, 164.
[13] ibid 163 (Guiding principle 5).
[14] ibid 164 (Guiding principle 7).
[15] ibid 165 [3].
[16] A Pellet and D Muller, 'Article 38' in A Zimmermann and CJ Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 924 [255].
[17] See indicatively PG Staubach, *The Rule of Unwritten International Law: Customary Law, General Principles, and World Order* (Routledge, 2018) 155-99; M Cherif Bassiouni, 'A Functional Approach to General Principles of International Law' (1990) 11 Michigan Journal of International Law 767, 771.
[18] The use of the term agreement is sometimes preferred to avoid the connection with the term treaty as specified in the VCLT, which has as a required element the written form as per Art 2(1)(a) VCLT.
[19] *The Mavrommatis Jerusalem Concessions (Greece v the United Kingdom)* [1925] PCIJ Rep Ser A No 5, 37.
[20] ILC, 'Draft Articles on the Law of Treaties with Commentaries' (4 May–19 July 1966) UN Doc A/CN.4/191, reproduced in [1966/II] YILC 187, 190, Commentary to Draft Article 3 [3]; ILC, 'First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur' (26 March 1962) UN Doc A/CN.4/144 and Add.1 reproduced in [1962/II] YILC 27, 35 [2].

treaties, focusing rather on treaties in written form,[21] a choice mandated for reasons of clarity and simplicity,[22] Article 3 VCLT clearly stipulates that although the VCLT does not apply to international agreements not in written form, this does not affect the binding effect of such agreements or the application to them of customary rules on the law of treaties.[23] Since, then, the customary rules on the law of treaties are applicable to oral treaties as long as they are not affected by their non-written nature, and since interpretation is far from entirely based on textuality,[24] the customary rules on treaty interpretation would be equally applicable *mutatis mutandis.*[25] A third example, Thus, the argument that rules of customary international law may not be subject to interpretation simply because they are unwritten is not persuasive. Moreover, it is reasonable to assume that unwritten sources as opposed to written ones contain a higher degree of vagueness and generality as a result of their unwritten character. This is certainly the case with customary international law, where it is often acknowledged that rules of customary international law tend to be more general or that this source of law is inherently more abstract.[26] 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.[27]

[21] Although it has taken a rather broad approach as to the 'written form' requirement. For instance, even oral agreements that are evidenced in writing, as in the case of an oral agreement that is documented by a third party, so authorized by the parties to the agreement are considered to satisfy the 'written form' requirement; P Gautier, 'Article 2 – Convention of 1969' in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP 2011) 33, 39 [16]. However, if no such authorized transcription exists (the examples usually given are those of (video)-taped understandings or oral answers to written proposals) these remain oral agreements; ILC, 'Report on the Law of Treaties by Mr GG Fitzmaurice' (14 March 1956) UN Doc A/CN.4/101 reproduced in [1956/II] YILC 104, 117 note 4.

[22] ILC, 'Draft Articles on the Law of Treaties' (24 April–29 June 1962) UN Doc A/5209 reproduced in [1962/II] YILC 161, 163 [10]; K Schmalenbach, 'Article 2' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 29, 36 [19]; M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill/Nijhoff 2008) 80 [15]; M Fitzmaurice, 'The Identification and Character of Treaties and Treaty Obligations Between States in International Law' (2002) 73 BYIL 141, 149; Y le Bouthillier and J-F Bonin, 'Article 3 – Convention of 1969' in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP 2011) 66, 71.

[23] Article 3 VCLT; see also ILC, 'Draft Articles on the Law of Treaties with Commentaries' (n 20) 189 [7].

[24] See Articles 31-3 VCLT.

[25] K Schmalenbach, 'Article 3' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 55, 58 [7]; M Herdegen, 'Interpretation in International Law' [2013] MPEPIL 723 [2].

[26] International Law Association, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (Report of the Sixty-Ninth Conference, London, 2000) 2; F Schauer, 'Pitfalls in the Interpretation of Customary Law' in A Perreau-Saussine and JB Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (CUP 2007) 13; P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato's Cave* (Brill 2015) 233.

[27] See on this point Judge Higgings who noted '[i]t is exactly the judicial function to take principles of general application, to elaborate their meaning, and to apply them to specific situations'. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (Dissenting Opinion of Judge Higgins) [1996] ICJ Rep 226 [32].

[4] The fact that customary rules are subject to interpretation also finds strong support in the jurisprudence of the ICJ.[28] The interpretation of rules of customary international law can similarly be found in the practice of international criminal courts and tribunals, arbitral tribunals, human rights courts, and various national courts.[29]

[5] A more serious challenge to the claim for interpretability is posed by the second variety of the "linguistic irrelevance" argument, which perceives customary rules as norms *sine litteris*. On this view, customary rules are not only unwritten, but are more fundamentally norms which do not take the form of words.[30] Rather, they are introduced by usage which is not embodied either in writing or in words but in facts.[31] As a result, customary law is wordless and only the scholarly or judicial reconstruction of its content can be made of words.[32] There are two main issues with this line of argumentation. Firstly, this view seems to operate on a somewhat radical understanding of custom as regularity of conduct, whereby such conduct may contribute to the formation of legal rules but may not be expressed linguistically in words for the purpose of

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[28] See indicatively *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep 554 [20]; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 [53-4]; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14; *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 [104]; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep. 95 [159-60]; *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)* (Judgment) <https://www.icj-cij.org/sites/default/files/case-related/162/162-20221201-JUD-01-00-EN.pdf> [95] (last accessed 1 October 2023).

[29] See indicatively: F*ormer Consular Employee at the Consulate General of Croatia in Stuttgart v Croatia* (23 October 2014) Higher Regional Court of Stuttgart, Second instance order, Case No 5 U 52/14, ILDC 2428 (DE 2014) 5 U 52/14, ILDC 2428 (DE 2014) [43]; *Unidentified Holders of Greek Government Bonds v Greece* (19 December 2017) Federal Court of Justice of Germany, Appeal decision, XI ZR 796/16, ILDC 2881 (DE 2017) [16]; *Germany v Prefecture of Voiotia (Representing 118 persons from Distomo village)* (4 May 2000) Supreme Court of Greece, Petition on cassation against default, no 11/2000, (2000) 49 Nomiko Vima 212, ILDC 287 (GR 2000) [10-12]; *Ferrini v Germany* (11 March 2004) Supreme Court of Cassation of Italy, Appeal decision, Cass no 5044/04, ILDC 19 (IT 2004) [9.1 -9.2]; *Germany v Mantelli and ors* (29 May 2008) Supreme Court of Cassation of Italy, Preliminary Order on Jurisdiction, Case No 14201/2008, (2008) Riv Dir Int 896, ILDC 1037 (IT 2008) [11]; *Case No 2016 Ga-Hap 505092* (8 January 2021) Central District Court of Seoul [3.C.3.6-3.C.3.7] <https://womenandwar.net/kr/wp-content/uploads/2021/02/ENG-2016_Ga_Hap_505092_23Feb2021.pdf?ckattempt=1> (unofficial translation by Woohee Kim, The Korean Council for Justice and Remembrance for the Issues of Military Sexual Slavery by Japan) (last accessed 1 October 2023) (hereinafter *'Comfort Women'* case); *A v Swiss Federal Public Prosecutor and ors* (25 July 2012) Federal Criminal Court of Switzerland, Final appeal judgment BB. 2011.140, TPF 2012 97 ILDC 1933 (CH 2012) [5.4.3]; *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors* (13 December 2006) Supreme Court of Israel, HCJ 769/02 [28-35]; *Prevention of the Use of Ramstein Air Base for United States Armed Drone Strikes in Yemen, Yemini Citizen Living in Sana'a and ors v Germany* (19 March 2019) German Higher Administrative Court of North Rhine-Westphalia, Appeal, 4 A 1361/15, ILDC 3059 (DE 2019) [212-19]; *Institute of Cetacean Research and ors v Sea Shepherd Conservation Society and Watson* (24 May 2013) United States Court of Appeals 9th Circuit, Appeal judgment, 725 F3d 940 (9th Cir) ILDC 2176 (US 2013) [5-7].

[30] Kammerhofer (n 9) 76-7.

[31] ibid, citing to an earlier version of this understanding of custom by Francisco Suárez, *De legibus ac Deo legislatore* (1612) lib 7 cap 2, sect 2.

[32] ibid 77.

pointing to the particular rule. It is difficult to grasp what exactly is the outcome of such an understanding, since in order to use customary rules, we must by necessity be able to express them linguistically. Moreover, the regularity of conduct which contributes to the customary rule and the customary rule are not one and the same.[33] The customary rule is a particular legal normative formulation which derives from the regularities of conduct,[34] and it necessarily comes couched in language. Any observation of regularities of behavior and a subsequent grouping of them in a prescriptive rule will involve the use of words to express the prescription emerging from this conduct. Secondly, and relatedly, it may indeed be the case that it is the scholarly or judicial reconstruction which gives customary rules their words and their expression in language. However, without this linguistic formulation there is no other way to express the rule and subsequently apply it.[35] Moreover, this is not merely scholars or judges putting descriptive words to a perceived regularity of conduct. Rather, when a customary rule is linguistically expressed pursuant to an analysis of general practice and *opinio juris* this expression reflects for all intents and purposes the customary rule. Consequences flow from this formulation, and various conditions (such as the two-element approach) restrict the manner in which this formulation may be performed.

[6] This is particularly evident in the judicial context, when a dispute concerning the existence of a customary rule is resolved by a judicial proclamation that said rule either exists or does not. A proclamation that the rule exists is almost always followed by a formulation of that rule in language. These formulations tend to be general, as customary rules are by their nature quite general and broad. Examples such as the customary prohibition on the use of force, the customary rule of prevention of transboundary harm, or the customary rule on state immunity illustrate this. Importantly, these formulations of the rule do not remain confined to the case in which they were first expressed. More often than not, when subsequent cases revolve on the same customary rule the court or tribunal in question will refer to past cases to establish the existence and formulation of the rule, and then proceed to apply and interpret it in

[33] See Danilenko who argues that 'both from the theoretical and practical point of view, it is necessary to distinguish between custom as the process of creation of international legal rules and custom as the result of this process, *i.e.*, custom as a legally binding rule of conduct established by interstate practice'. GM Danilenko, 'The Theory of International Customary Law' (1988) 31 GYIL 9, 10.

[34] See on this point the ILC Draft Conclusions which specify that '[c]ustomary international law is unwritten law *deriving* from practice accepted as law'. ILC (n 1) 122 [3].

[35] See Danilenko who points out that if custom is to be treated as the usual or habitual course of action taken by states then a court cannot apply this to a specific case. 'The Court can only apply a legal norm created by custom'. Danilenko (n 33) 10.

the new context.[36] This happens both within international courts and tribunals[37] and between them.[38]

[7] While this is perhaps most explicit in the judicial context, it is also evident when other actors attempt to formulate a claim as to the existence of a customary rule. For instance, when states express a claim that a customary rule exists this rule comes in a particular linguistic formulation. If the claim for this rule's customary status is undisputed that formulation will likely be taken on by other actors thereby perpetuating the status of that particular linguistic formulation as reflecting the rule.[39] Put differently, it is difficult to think of customary rules independently of any linguistic expression or so called 'lexical garment'.[40] Moreover, even if one accepts that all we ever interpret is a rendition of the customary rule in language (rather than the norm that the rule reflects) this would not offer a distinction between the interpretation of customary international law and other types of law.[41]

[8] The possibility and need to interpret customary rules is similarly not precluded by the process of identification. The process of identification of customary rules does not also automatically delineate the content of the rule in its entirety, and interpretation is necessary after identification to determine the meaning, scope, and content of customary rules.

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[36] R Higgins, 'The ICJ, the ECJ, and the Integrity of International Law' (2003) 52/1 ICLQ 1, 7-9; A Alvarez-Jimenez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000-2009' (2011) 60/3 ICLQ 681, 683-5. See also V Lanovoy, 'Customary International Law in the Reasoning of International Courts and Tribunals' in P Merkouris, J Kammerhofer, and N Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (CUP 2022) 231, 247-9.

[37] See indicatively the ICJ jurisprudence on the customary rule of prevention. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [29]; *Gabčíkovo-Nagymaros Project (HungarylSlovakia)* [1997] ICJ Rep 7, [140]; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14 [101]; *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 [104].

[38] See for example the ITLOS Chamber referring to the ICJ's formulation of the customary rule of prevention in its Pulp Mills judgment. *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep. 2011, 10 [147-8].

[39] On this point see Adil Haque's discussion of the iterative quality of the customary process at the TRICI-Law workshop 'The Role of Interpretation in the Practice of Customary International Law'. A Haque, 'Panel 1: Interpretation as a Tool in the Construction of CIL rules' (5 November 2021) https://www.youtube.com/watch?v=iG4IUuTAfyQ (last accessed 1 October 2023)

[40] D Alland, 'L' interprétation du droit international public' (2013) 362 RdC 1; Sur (n 4) 83, and more generally 83-88. See also Lekkas who demonstrates that international courts and tribunals use ILC outputs as 'the written artefact' of customary rules. S-I Lekkas, 'The Use of the Outputs of the International Law Commission in International Adjudication: Subsidiary Means or Artefacts of Rules?' (2022) 69 NILR 327.

[41] See Chasapis Tassinis who argues that 'If customary international law is itself never the object of interpretation because all we interpret is the statement through which custom's legal norms are communicated, the same can be said for other legal materials such as treaties and legislation' Chasapis Tassinis (n 4) 245, note 36; see also at 258-62.

[9] Among proponents of the view that the process of custom identification precludes the need for interpretation, the argument is that the content of a customary rule is already determined in the course of identification via the evaluation of general practice and *opino juris*, and thus the processes of determining content and ascertaining existence are merged.[42] Furthermore, it is argued that rules of customary international law cannot be subject to interpretation, because if an attempt is made to interpret an unwritten source such as customary law the interpretative reasoning will inevitably need to refer back to the elements of the lawmaking process and as such be circular.[43].

[10] These arguments are dealt in more detail in draft Guiding Principle 3 and its accompanying Commentary. It is worth mentioning here, however, that, while the exercise of identification of a rule of customary international law may, in fact, also contain interpretative reasoning, and some basic content determination, this is a separate legal process governed by different rules, compared to interpretation proper of the identified customary rule.[44] In the case of the former, the interpretation is exercised over the pieces of evidence of general practice and *opinio juris* in order to evaluate whether they can count towards the formation of a customary rule, and if yes, how much weight should be given to them. In the latter, the interpretation is exercised over a legal rule. An analogy can be drawn here with the differentiation between the exercise of determining whether a document is a treaty or not pursuant to the definition contained in Article 2(1)(a) VCLT (treaty identification) and the separate subsequent exercise of treaty interpretation. In the process of treaty identification, courts examine the text and the language of a document in order to determine whether an intent to be bound can be discerned. '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)'.[45] In the case of identification of a rule of customary international law, it is similarly the case that the reasoning may contain some interpretive features leading to some rudimentary content determination. Nevertheless, this must be differentiated from the interpretation proper of the

[42] M Bos, *A Methodology of International Law* (Elsevier Science Publisher 1984) 109; J d'Aspremont, 'The Multidimensional Process of Interpretation' in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (OUP 2015) 111, 118.
[43] A Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2(1) JIDS 31, 56.
[44] See the further discussion on this in the Commentary to draft Guiding Principle 3 *infra*.
[45] P Merkouris and N Mileva, 'Introduction to the Series "Customary Law Interpretation as a Tool"' (2022) 11/1 ESIL Reflections 1, 5.

rule. Thus, it is not in fact the case that the in the context of customary rules the determination of their content merges or is the same as the establishment of their existence.

[11] In light of these considerations, it must be concluded that the process of identification does not also automatically delineate the content of customary rules, and does not preclude the need for their interpretation. This view finds support in the jurisprudence of both international and domestic courts..[46]

Guiding Principle 3

Identification and Interpretation of Rules of Customary International Law

1. **The identification of a rule of customary international law is a legal process distinct from the interpretation of that rule.**
2. **Identification focuses on determining the existence of a rule of customary international law on the basis of relevant general practice and its acceptance as law (*opinio juris*). Interpretation focuses on determining the content of the rule. Each of these processes is governed by different rules.**

Commentary

[1] The interpretation of a rule of customary international law is a process which determines the specific meaning, scope and content of the rule in question. It requires that a customary rule has been formed and its existence identified. It is also crucial for the continuous existence and operation of rules of customary international law.

[2] The term 'interpretation' is sometimes used to refer also to the 'interpretation' of general practice (or of both elements).[47] As analysed in the Commentary to draft Guiding

[46] See cases cited in these draft Guiding Principles with Commentaries. notably *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 [104]; *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)* (Judgment) <https://www.icj-cij.org/sites/default/files/case-related/162/162-20221201-JUD-01-00-EN.pdf> [95]; *Questions of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaragua Coast (Nicaragua v Colombia)* (Dissenting Opinion of Judge Charlesworth) < https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-00-en.pdf> [11] (last accessed 1 October 2023).

[47] See Sur, who clearly distinguishes between the *interpretation of the practice leading to the establishment of a customary rule*, on the one hand, and *the interpretation of the already established rule*, on the other hand; S Sur,

Principle 2, this terminology is not an argument against the interpretability of customary international law, if anything this is an argument in favour of it, as it suggests that interpretation is ubiquitous in all the stages of law-ascertainment and content-determination of a rule of customary international law.[48] By accepting the interpretability of general practice, one is compelled logically to accept the interpretability of the customary rule.

[3] Some accounts of custom identification do in fact employ the term 'interpretation' to describe the reasoning that take place at this stage. For instance, the 'reflective interpretive approach' to customary international law speaks of multiple eligible *interpretations* of the evidence (general practice and *opinio juris*) which present themselves with respect to the existence or not of a customary rule.[49] The reflective interpretive approach is aimed at balancing the evidence of the two elements in order to arrive at the most coherent explanation in the case of multiple eligible *interpretations.*[50] It is clear that here the term 'interpretation' is employed in relation to identificatory reasoning.

[4] Similarly, the notion of 'constructive interpretation' is used to denote a process where general practice and *opinio juris* are evaluated as interwoven elements, which jointly formulate a customary rule. The idea behind the notion of 'constructive interpretation' is to contextualize a practice so as to arrive at an interpretative outcome which 'proposes the most value for the practice all other things being equal'.[51] Once again, here 'interpretation' is used to refer to the reasoning which takes place at the stage of identification of a customary rule, and the reasoning that is exercised with respect to the evaluation of general practice and *opinio juris* as elements of that rule.

[5] In a similar vein, the notion of 'existential interpretation' has been employed to describe the process of deciding whether or not the subject of interpretation exists or has validity.[52] In the context of customary international law this refers to the decision whether a customary rule

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L' interprétation en droit international public (LGDJ 1974) 189–90. Authors who approach CIL interpretation mainly from the angle of interpretation of State practice are: VP Tzevelekos, '*Juris dicere*: Custom as a Matrix, Custom as a Norm, and the Role of Judges and (their) Ideology in Custom Making' in N Rajkovic, TE Aalberts and Th Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and their Politics* (CUP 2016) 188; Chasapis Tassinis (n 4); see also J d' Aspremont, *The Discourse on Customary International Law* (OUP 2021).

[48] 'Law ascertainment' is understood as the identification of the legal act, while 'content-determination' as the identification of its content or meaning; in more detail d' Aspremont (n 42) 112.

[49] A Roberts, 'Traditional and Modern Approaches to Customary International Law' (2001) 95 AJIL 757, 781-2.

[50] ibid 781-2.

[51] Nadia Banteka, 'A Theory of Constructive Interpretation for Customary International Law Identification' (2018) 39/3 MichJIntlL 301, 304.

[52] DB Hollis, 'The Existential Function of Interpretation in International Law' in A Bianchi, D Peat, and M Windsor (eds), *Interpretation in International Law* (OUP 2015) 78, 79.

exists or not, i.e., identification. Existential interpretation is an inherently binary inquiry, the structure of which assumes only one of two possible answers – either yes the subject exists and is valid for further interpretive processes, or no the subject does not exist and is excluded from further legal interpretation.[53] In the context of CIL, the existential inquiry asks if a particular act constitutes 'general practice' or not. The answer 'yes' legitimizes the evidence for purposes of further exposition (what does a particular example of general practice mean?) or relational analysis (what's the probative value of the evidence; how strong or weak is the evidence given other examples?). The answer 'no' means that the evidence cannot be given weight or relevance for the purposes of establishing a customary rule.[54] Thus, here once again we see the term 'interpretation' employed in relation to identificatory reasoning.[55]

[6] If by 'interpretation of general practice' one refers to the assessment of whether there is sufficient, widespread, representative, constant and virtually uniform practice, or the manner in which such practice is selected and the *gravitas* awarded to it, then indeed a form of interpretive reasoning may also take place at the stage of identification, in the sense of assessment of the relevant practice and *opinio juris*. The identification exercise includes choices in the selection of certain custom-formative practices over others in order to infer the general rule, as well as choices in how we describe these practices which lead to the identification of the rule.[56] The reasoning employed in these choices and descriptions is by necessity partially interpretive. Although there may be some overlap, and necessarily any determination regarding the existence or not of a rule of customary international law will have some interpretative aspects, these two processes should not be confused, because not only are they not identical but they also have different objectives, and are governed by different rules.[57]. What happens at the stage of identification is an evaluation of the evidence general 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.[58]

[7] While we might call the reasoning that takes place at the phase of identification 'interpretation', it would have to be borne in mind that this may only be done if we conceive

[53] ibid 87.
[54] ibid 87.
[55] Interestingly, the way in which the notion of 'existential interpretation' is formulated in the context of customary international law seems to also allow for a subsequent different form of interpretation of a customary rule, by acknowledging that after the 'yes or no' outcome of existential interpretation the material may go forward onto further legal interpretation. See on this possibility Hollis (n 52) 85-6.
[56] Chasapis Tassinis (n 4) 240-4.
[57] See on this point, Merkouris (n 4) Section II.
[58] On this point see for more details ILC (n 1) Draft Conclusion 6 and 10.

of ‘interpretation’ as a broad descriptive term rather than a term that denotes the interpretation of a legal rule *stricto sensu*.[59] More importantly, whichever term we choose for the evaluation of general practice and *opinio juris* for purposes of identification, the crucial point is that a distinction must be maintained between this and the interpretation of a customary rule once it has been identified. This is because these two operations are substantively 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 general practice and *opinio juris*, and the final outcome of this reasoning is a binary one – a customary rule is either determined to exist or it is not. The reasoning employed at the stage of interpretation is concerned with the determination of the content and scope of a legal rule (in this context a customary rule) and how this rule applies to the case at hand, and this reasoning may have a variety of outcomes depending on the rule being interpreted and the legal and factual circumstances in which it is being interpreted. Therefore, even if one would like to dub the evaluation of general practice and *opinio juris* for the purpose of identification as ‘(existential) interpretation’ in the way this term is employed in the approaches described above, this must be distinguished from the interpretation of a formulated CIL rule, which only takes place after identification.

[8] Using the term ‘interpretation’ to describe both of the aforementioned processes, leads to a conflation of two vastly different concepts and processes. An example of this is Draft Conclusion 3 of the ILC Draft Conclusions on CIL Identification which seems to suggest that ‘interpretation of general practice’ may be involved in the assessment of the existence of a rule of CIL. However, all the examples cited refer to the *telos* or system of a rule, not its practice, thus, demonstrating that what is actually occurring is interpretation of a postulated CIL rule, and not of just general practice.[60] An additional example is again from the ILC’s ‘Guiding Principles on Unilateral Declarations’. While, the VCLT rules of interpretation were considered to apply *mutatis mutandis* to unilateral declarations, Guiding Principle 7 provides that ‘[a] unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. *In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner*. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated’. The

[59] Merkouris (n 26) 138.
[60] ILC (n 1) Commentary to Draft Conclusion 3 [3] note 682.

second sentence, promoting an *in dubio mitius* approach seems to be in stark contrast both with the third sentence of the Guiding Principle and the general customary rule of interpretation as enshrined in Article 31 VCLT. If, however, this is read as referring to two different processes, then all these issues are resolved. The second sentence refers to the identification of whether an obligation exists or not. Whereas the third sentence refers to interpretation proper.

[9] The same result is arrived at if one takes the 'interpretation of general practice' to its logical conclusion. If one includes in the 'interpretation of general practice' tools that are well established in legal interpretation, such as teleology, systemic integration etc, then we have left the realm of evaluating general practice, the 'pre-interpretative stage' as Dworkin would call it,[61] and entered into that of legal interpretation proper. The reason is quite simple. Can teleology be truly relevant in the interpretation of general practice in its proper sense? Of what is the *telos* that the interpreter is looking for? Is it the *telos* of State practice or the *telos* of an alleged rule? If the latter, then we are clearly in the realm of interpretation of a CIL rule, and not of general practice. So then, the only option left is that the interpreter is examining the *telos* of general practice. Here two are the potential scenarios: i) that the interpreter is examining the *telos* of a particular instance of State practice; or ii) the interpreter is examining the *telos* of the wider set of relevant practice. In scenario (i) that still does not help. The *telos* found and applied is that of a singular instance of practice. It is not a given that this is the same *telos* shared by all other instances of general practice, even less so that it can be extrapolated to such a degree. Unavoidably, the interpreter would have to repeat the process when all relevant examples of general practice are taken into account. Which inexorably leads to scenario (ii). However, even here, the interpreter is not interpreting a collection of instances of general practice, but rather general practice as a reflection of a presumed or alleged CIL rule. Without this postulate it is impossible to search for the *telos*. The interpreter is not looking for the *telos* of the practice, but rather the *telos* of a rule. Although this may not always be put in writing in judgments, the judges, when referring to teleology refer to teleology of a CIL rule, not of mere general practice. Even if they have not affirmatively established the existence of a CIL rule, they will always have a virtual representation of a CIL rule, a 'virtual Urtext'[62] the validity and limits of which they will test against its *telos*, 'normative environment/context' and potential limits (such as

[61] DB Hollis, 'Sources in Interpretation Theories: An Interdependent Relationship' in S Besson and J d' Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017) 422.
[62] To borrow Allot's terminology; P Allot, 'Interpretation – an Exact Art' in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (OUP 2015) 373, 386.

jus cogens). Consequently, to say that in such cases what we are dealing with is 'interpretation of general practice' is rather a misnomer.

[10] The examples offered in the previous paragraphs (paras 8-9) of the Commentary to Guiding Principle 3 illustrate why it is essential to distinguish between the two processes. Appropriate terms could be 'evaluation', 'qualification' or 'assessment' of general practice, to distinguish it properly from legal interpretation of a rule.[63] It is only by distinguishing between these two ways of using the term 'interpretation' (and preferably using 'interpretation' only for the latter operation) that we may accurately account for the different types of reasoning that take place in each stage. Moreover, it is only by distinguishing between 'identification' and 'interpretation' that we accurately capture the fact that the interpretation of a rule of customary international law is a process which manifests in a different and separate way from the evaluation of general practice and *opinio juris* for purposes of identification, and a process which is subject to a separate *interpretive* methodology.

Guiding Principle 4

Interpretation as a Single Combined Operation

1. **A rule of customary international law, as previously identified, , shall be interpreted in good faith in accordance with its object and purpose, its normative context and in a manner that does not deprive it of its effectiveness, as set out in the present Guiding Principles.**
2. **The interpretation of a rule of customary international law is a single combined operation, which places appropriate emphasis on the various means of interpretation indicated in the present Guiding Principles.**

Commentary

[63] Merkouris (n 26) Ch 4; see also M Fortuna, 'Different Strings of the Same Harp: Interpretation of Customary International Rules, their Identification and Treaty Interpretation' in P Merkouris, J Kammerhofer and N Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) Ch 18; similarly Ryngaert who talks about 'evidentiary interpretation' and considers this as a false positive; C Ryngaert, 'Customary International Law Interpretation: The Role of Domestic Courts' in P Merkouris, J Kammerhofer and N Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) Ch 22.

[1] Article 31 VCLT is entitled a 'general rule of interpretation'. 'Rule' is used in the singular and this is deliberate. As the ILC underlined in its 1966 Commentary to the Draft Articles on the Law of Treaties, it

> intended to indicate that the application of the means of interpretation in the article would be a *single combined operation*. *All the various elements*, as they were present in any given case, would be *thrown into the crucible*, and their *interaction* would give the legally relevant interpretation. Thus, […] the Commission desired to emphasize that the *process of interpretation is a unity* and that the provisions of the article form a *single, closely integrated rule*.[64]

Courts and tribunals have consistently affirmed this 'holistic' or 'crucible' approach, and that there is no 'hierarchy between the various aides to interpretation outlined in [Art. 31 VCLT]'[65] but rather that the process of interpretation is one of 'progressive encirclement', whereby the interpreter 'iteratively closes in on the proper interpretation.'[66] In sum, the process of interpretation is a 'single combined operation'.

[2] The same approach is applicable in the case of interpretation of customary international law. As evinced in both domestic and international case-law referred to in the Commentaries to draft Guiding Principles 5-11, there does not exist any hierarchy between the various rules of interpretation employed by courts and tribunals. Although there is a preponderance of practice surrounding the means described in draft Guiding Principles 5-9, there has been no indication in said case-law of a hierarchy between these means of interpretation. In fact, in most instances courts and tribunals resort to more than one means, without any discussion of preferring one over the other(s).

[3] The interpretation of a rule of customary international law needs to be conducted in good faith. Such 'good faith' interpretation, well-established in the context of treaty interpretation is meant to avoid perfidious-type of interpretations. In the context of

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[64] ILC (n 20) 219-20 [8] (emphasis added).
[65] *Hrvatska v Slovenia*, ICSID Case No ARB/05/24, Decision on the Treaty Interpretation Issue, 12 June 2009 [164].
[66] *Aguas del Tunari v Bolivia*, ICSID Case No ARB/02/03, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 [91]. For a position rejecting the 'crucible' or 'holistic' approach see C Brower, D Bray and P Chhoden Tshering, 'Competing Theories of Treaty Interpretation and the Divided Application by Investor-State Tribunals of Articles 31 and 32 of the VCLT' in E Shirlow and K Nasir Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes* (Wolters Kluwer 2022) 109, 118 et seq, although it would seem that their objection is steered against the argument that there is no clear hierarchy between Articles 31 and 32, wwithout clarifying whether their objections apply within the elements of Article 31 VCLT.

interpretation of a customary rule, the award on jurisdiction in *ST-AD* is telling as to this general point of good faith interpretation. In this case, the tribunal enunciated that 'every rule … of international law must be interpreted in good faith'.[67] Applying this to the requirement of exhaustion of local remedies under customary international law,[68] the tribunal found that '[t]his rule is interpreted to mean that applicants are only required to exhaust domestic remedies that are available and effective'.[69] In this case, the tribunal not only identified the means for the interpretation of the rule of unwritten international law, but also explicitly stated that such interpretation was mandated by a good faith interpretation.

[4] Draft Guiding Principle 4(1) provides that, additionally to good faith, a rule of customary international law 'shall be interpreted … in accordance with its object and purpose, its normative context and in a manner that does not deprive it of its effectiveness, as set out in the present Guiding Principles'. There is explicit mention of the means provided for in draft Guiding Principle 5 – Teleological Interpretation ('object and purpose'), draft Guiding Principle 6 – Principle of Systemic Integration ('normative context'), draft Guiding Principe 7 – Principle of Effectiveness ('in a manner that does not deprive it of its effectiveness'). These means of interpretation are analysed in more detail in the respective draft Guiding Principles and corresponding Commentaries.

[5] The means in draft Guiding Principles 5(2), 7 and 8, although not explicitly mentioned in draft Guiding Principle 4(1), are included in both 'as set out in the present Guiding Principles' (draft Guiding Principle 4(1)) and 'various means of interpretation indicated in the present Guiding Principles' (draft guiding Principle 4(2)). The reason for their non-explicit inclusion is not, due to lesser importance, after all interpretation is a 'single combined operation', but rather because those means may not always be present in a a particular case. It is for this reason that in the respective draft Guiding Principles the term 'may' has been used.

[6] The case-law referred to in the Commentaries to draft Guiding Principles 5-11, , demonstrates that, on occasion, there can be an (full or partial) overlap between the various means of interpretation of rules of customary international law. This is discussed in more detail in the respective Commentaries. This overlap is not endemic to interpretation of customary

[67] *ST-AD v Bulgaria* (Decision on Jurisdiction of 18 July 2013) PCA Case No 2011-06 [364].
[68] ibid [364] citing, among other sources, Article 44(b) ARSIWA.
[69] ibid [365].

international law alone, as it is also a common theme in treaty interpretation,[70] and is also reinforcing of the view that interpretation is a 'single combined operation'.

[7] Apart from the means of interpretation outlined in draft Guiding Principles 4-9, other means which mostly could fall under the general umbrella term of 'logical interpretation', are, on occasion, referred to by the interpreter. Such means include, interpretation by necessary implication, consequentialist interpretation, *a contrario, per analogiam, ad absurdum,*[71] and *a fortiori* interpretations to name a few. With respect to such means the same issues as with respect to their use in treaty interpretation, ie whether they are *praeter-VCLT* interpretative means or whether they are already included in the existing framework,, apply as well.[72] In the vast majority of cases, such interpretations are usually either descriptive of the outcome arrived at through an application of the means identified in these draft Guiding Principles, or manifestations of the same draft Guiding Principles. Naturally, there is nothing to prevent these means to acquire a content and import of their own for the purposes of interpretation of customary rules, if they meet the requirements set out for the emergence of customary rules or general principles. In the following paragraphs, some notable examples and their connections to the present draft Guiding Principles will be touched upon.

[8] The principle of necessary implication was part and parcel of the drafting process of the principles of treaty interpretation. According to the third report on the law of treaties, the 'principle has special significance as the basis upon which it is justifiable to *imply* terms in a treaty for the purpose of giving efficacy to an intention *necessarily to be inferred* from the express provisions of the treaty'.[73] The same principle had been previously used by Sir Gerald Fitzmaurice when he outlined the principles of treaty interpretation. He referred to it as 'necessary inference' and emphasized that 'only inferences having a compelling character can properly be drawn, and that this compelling character must arise from the text itself rather than from factors outside it'.[74] While definitionally necessary implications are premised on the existence of a text that implies an array of meanings other than those directly conveyed by the text, necessary implications may also point to a special logical relationship between two or

[70] See in detail, J Klingler, Y Parkhomenko and C Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2018).
[71] Which is closely connected to *ut res magis valeat*/principle of effectiveness constructions.
[72] Klingler, Parkhomenko and Salonidis (n 70).
[73] ILC, 'Third Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur' (3 March, 9 June, 12 June and 7 July 1964) UN Doc A/CN.4/167 and Add.1-3, reproduced in [1964/II] YILC 5, 61 [29] (emphasis added).
[74] G Fitzmaurice, 'Hersch Lauterpacht – The Scholar as Judge. Part III' (1961) 39 BYIL 133, 154.

more statements, where the second statement is a logical consequence of the first. Whereas in treaty interpretation necessary implications are primarily based on the text,[75] in the case of interpretation of customary rules they may be based either on the 'lexical garment' of the rule (see draft Guiding Principle 9 on 'by proxy' textual interpretation),[76] or on the logical relationship between the rule and another rule.[77] The issue that might be raised by the use of necessary implications in interpretation of customary rules is that necessity is supported where there is none.

[9] Consequentialist interpretative arguments may also be employed in interpretation of customary rules. Consequentialist arguments or reasoning focus on the consequences that will ensue, should an alternative interpretation be adopted.[78] A notable example is the interpretation given in the *Prosecutor v Tadić* case when the Appeals Chamber of the ICTY had to establish which degree of control by a state over specific individuals qualified them as *de facto* state officials. The Appeals Chamber engaged in a teleological interpretation of the rule by reference to the rationale of the rule.[79] At the same time, the Appeals Chamber supported its interpretation by relying on a consequentialist argument when it stated that:

> Clearly, the rationale behind this legal regulation is that *otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility*.[80]

Relying on the consequence of what might happen if an alternative interpretation is adopted, enhances the persuasiveness of the teleological argument advanced by the Appeals Chamber, and also demonstrates potential overlap with draft Guiding Principles 5 and 7.

[10] In the same vein, in the *'Comfort Women'* case, the South Korean District Court had this to say about the manner in which the customary rule on State immunity should be interpreted.

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[75] Indicatively: *Interpretation of Peace Treaties Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221, 241; *Case concerning Aerial Incident of 27 July 1955 (Israel v Bulgaria)* (Preliminary Objections) [1959] ICJ Rep 127, 144; *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) [2012] ICJ Rep 624 [117].
[76] Keeping in mind that even if the rule is unwritten we understand its content by way of its linguistic formulation.
[77] Which may point at a connection with interpretation through the process of teleological interpretation and/or systemic integration (draft Guiding Principles 6 and 7, respectively).
[78] See F Carbonell, 'Reasoning by Consequences: Applying Different Argumentation Structures to the Analysis of Consequentialist Reasoning in Judicial Decisions' in C Dahlman and E Feteris (eds) *Legal Argumentation Theory: Cross-Disciplinary Perspectives* (Springer 2013) 1-19.
[79] *Prosecutor v Tadić* (Appeal Judgment of 15 July 1999) ICTY Appeals Chamber, Case no. IT-94-1-A [117].
[80] ibid [123].

> When interpreting and applying law [in this case the law on State immunity*], the results should be considered and if the interpretation leads to an unreasonable or unjust conclusion, measures should be taken to seek ways to exclude such interpretations*. To do so, several interpretative methods such *as logical and systematic interpretation*, historical interpretation, and *purposive interpretation* are utilized. … Interpreting that the Defendant is exempt from jurisdiction in a civil suit that was chosen as a forum of last resort in a case where the Defendant state destroyed universal values of the international community and inflicted severe damages upon victims *would result in unreasonable and unjust results*.[81]

[11] This is far from the only domestic court that has argued on the basis of logic and reasonableness. With respect to immunities for *jus cogens* violations the court in *A v Swiss Federal Public Prosecutor* was also of the view that '*it would be both contradictory and futile* if, on the one hand, we affirmed that we wanted to fight against these serious violations of the fundamental values of humanity, and, on the other hand, we allowed a broad interpretation of the rules of functional immunity'.[82] In *Her Majesty the Queen in Right of Canada v Edelson and others*, the court held that the purpose criterion, as distinct from that of legal nature, was not the appropriate one for distinguishing between *acta jure imperii* and *acta jure gestionis* because it would result in obliterating the distinction between private and State acts, and thus be absurd.[83] Finally, in the *Sea Shepherd* case the District court held that a broad interpretation of 'piracy' '[a]mong *other nonsensical results*, … would allow any seaman with a special affinity for a sea creature—say, a tuna—to state a piracy claim against a fisherman'.[84] Once again, in all these cases, the connection with draft Guiding Principles 5 and 7 is evident.

[12] As far as *per analogiam* interpretations of CIL rules are concerned, in the recent *Re Al M (Immunities)*, given that the immunities of Heads of Government are neither codified in any UK legal instrument or international treaty,[85] the UK High Court had to 'wade into the murky

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[81] *'Comfort Women'* case [3.C.3.6] (emphasis added).
[82] *A v Swiss Federal Public Prosecutor and ors* (25 July 2012) Federal Criminal Court of Switzerland, Final appeal judgment BB. 2011.140, TPF 2012 97 ILDC 1933 (CH 2012) [5.4.3] (emphasis added).
[83] *Her Majesty the Queen in Right of Canada v Edelson and ors* (3 June 1997) Supreme Court of Israel, Final appeal judgment, PLA 7092/94, 51(1) PD 625, ILDC 577 (IL 1997) [26] and [28]. A combined version of logical, teleological and systemic interpretation can also be seen in [22] and [26].
[84] *Institute of Cetacean Research v Sea Shepherd Conservation Society*, 153 F.Supp.3d 1291 (WD Wash 2015) 1319.
[85] Unlike the immunities of Heads of State which are regulated under Sections 1, 14 and 20 of the State Immunity Act (1978) <https://www.legislation.gov.uk/ukpga/1978/33> (last accessed 1 October 2023).

waters of customary international law'.[86] The High Court rejected the comparison between the immunities of, on the one hand, diplomatic and consular agents, and on the other hand, the *troika*, ie Head of State, Head of Government and Minister of Foreign Affairs, because the scope of the respective immunities was different in at least one key aspect. The immunities of the former, save when in transit to or from a posting, apply only to one foreign State — the receiving State.[87] Furthermore, in the High Court's view '[t]here can be no automatic assumption that a Head of Government is entitled in every foreign State to immunities of precisely the same scope as are accorded by the receiving State to the head of a diplomatic mission while posted in that State'.[88] Following on this, the High Court then examined whether an analogy could be made between the immunities accorded to Ministers of Foreign Affairs and those to Heads of Government. Referring to the *purposes* of such immunity (again an indication of teleological considerations being integral to the interpretation of customary rules), it concluded that 'applying the same logic', while inviolability of Heads of Government may be required, the fact that inviolability is not the same as immunity from civil jurisdiction and that the immunity of a Head of Government is 'functional' 'then, provided he or she is personally inviolable while on official visits, we would incline to the view that the complete immunity from civil jurisdiction is not required to serve the purposes identified in the *Arrest Warrant* case'.[89] The Court of Appeal upheld the High Court's findings and noted that 'there is no exact equivalence between a Head of Government and Head of State, no matter how logical a development that might be'.[90] In the case of *per analogiam* constructions, one can see again the overlaps with draft Guiding Principles 5 and 6.

[13] *A fortiori* reasoning may be found, for instance, in the practice of the Hague Appeal Court concerning the customary rule on functional immunity of Heads of State. In particular, when asked to decide on the existence of an exception to functional immunity of Heads of State in the case of alleged war crimes, the court interpreted the rule in the following way (revealing again the ties with draft Guiding Principles 5, 6 and 7):

[86] P Webb, 'The Weakest Link of the Troika? The Immunity of Heads of Government in Customary International Law' (*EJILTalk!*, 27 October 2021) <https://www.ejiltalk.org/the-weakest-link-of-the-troika-the-immunity-of-heads-of-government-in-customary-international-law/> (last accessed 1 October 2023).
[87] *Re Al M (Immunities)* (19 March 2021) High Court of Justice [2021] EWHC 660 (Fam) [48].
[88] ibid [48].
[89] ibid[49-50]; citing also in support J Foakes, *The Position of Heads of State and Senior Officials in International Law* (OUP 2014) 125.
[90] *Re Al M (Permission to Appeal)* (9 June 2021) Court of Appeal [2021] EWCA Civ 890 [23].

The rationale behind functional immunity is therefore the same as the rationale behind the immunity of the State itself, namely that the courts of one State should not adjudicate on the conduct of another State (*par in parem non habet imperium*). Against this background, it is difficult to see why, now that there is no exception to the immunity from jurisdiction for the State itself in civil proceedings for – in short – war crimes (see the *Jurisdictional Immunities* case), such an exception would apply to the (former) officials of that State.[91]

Guiding Principle 5

Teleological Interpretation

1. **A rule of customary international law shall be interpreted with reference to its object and purpose.**
2. **The interpretation of a rule of customary international law may also take into account the object and purpose of the branch of law to which the rule of customary international law belongs.**

Commentary

[1] Rules o customary international law may, similarly to treaties, be interpreted teleologically.

[2] The language of teleological interpretation of customary rules encompasses the use of terms, such as 'purpose',[92] 'teleology',[93] 'rationale',[94] 'spirit'.[95] The variation of the language

[91] A*ppellant v Respondent 1 and Respondent 2* (7 December 2021) Gerechtshof Den Haag, Zaaknummer C/09/554385/HA ZA 18/647, ECLI:NL:GHDHA:2021:2374 [3.7].
[92] *Case Concerning the Barcelona Traction, Light and Power Company Limited (New Application: 1962, Belgium v Spain)* (Preliminary Objections, Second Phase) [1970] ICJ Rep 3 Separate Opinion of Judge Tanaka 127; *Prosecutor v Orić* (Judgment of 3 July 2008) ICTY Appeals Chamber, Case no. IT-03-68-A, Partially Dissenting Opinion Judge Schomburg [16]; HRC, *Sechremelis v Greece*, Individual opinion by Committee members Mr Lazhari Bouzid, Mr Rajsoomer Lallah and Mr Fabian Salvioli concerning merits (dissenting), 12.
[93] *Case Concerning the Barcelona Traction, Light and Power Company Limited (New Application: 1962, Belgium v Spain)* (Preliminary Objections, Second Phase) [1970] ICJ Rep 3 Separate Opinion of Judge Tanaka 127.
[94] *Ntaganda Second Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC, Case no.* ICC-01/04-02/06-1707, Decision of 04 January 2017 [48]; *Prosecutor v Tadić* (Appeal Judgment of 15 July 1999) ICTY Appeals Chamber, Case no. IT-94-1-A [121].
[95] *Ntaganda Second Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6*

of teleological interpretation should not be regarded as pointing to different methods of interpretation. Instead, similarly as in treaty interpretation, these terms are used interchangeably to convey the same meaning and point to a single method of interpretation of a rule of customary international law.

[3] Whereas in treaty interpretation, at least according to the general rule of interpretation contained in Article 31 VCLT, the object and purpose illuminates the ordinary meaning of the term taken in context, in the interpretation of a rule of customary international law the purpose of the rule is a self-standing reference point in interpretation.

[4] Among international courts, teleological interpretation of customary rules is particularly prevalent in the case-law of international criminal courts and tribunals. Notable examples of case-law include the *Prosecutor v Furundžija,*[96] *Prosecutor v Tadić,*[97] *Prosecutor v Orić,*[98] *Ntaganda Second Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9*[99] cases.

[5] Among national courts, teleological interpretation is one of the methods most frequently employed in the interpretation of both international and national customary rules. This is evident from the courts' reliance on the underlying rationale of the customary rules in

and 9, ICC, Case no. ICC-01/04-02/06-1707, Decision of 04 January 2017 [48]; *Prosecutor v Orić* (Judgment of 3 July 2008) ICTY Appeals Chamber, Case no. IT-03-68-A, Separate and Partially Dissenting Opinion of Judge Schomburg [16].

[96] *Prosecutor v Furundžija*, ICTY, Case no. IT-95-17/1-T Trial Chamber Judgment of 10 December 1998 [252-4].

[97] *Prosecutor v Tadić* (Appeal Judgment of 15 July 1999) ICTY Appeals Chamber, Case no. IT-94-1-A [117], [121], [123].

[98] *Prosecutor v Orić* (Judgment of 3 July 2008) ICTY Appeals Chamber, Case no. IT-03-68-A, Separate and Partially Dissenting Opinion of Judge Schomburg [16]; *Prosecutor v Orić* (Judgment of 3 July 2008) ICTY Appeals Chamber, Case no. IT-03-68-A, Partially Dissenting Opinion and Declaration of Judge Liu [30].

[99] *Ntaganda Second Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC, Case no.* ICC-01/04-02/06-1707, Decision of 04 January 2017 [48].

question,[100] the reference to the purpose of the rules,[101] or the invocation of common values that should be preserved when the rules are applied.[102]

[6] As reflected in Guiding Principle 5(2), the practice of international courts and tribunals shows that it is not only the purpose of the customary rule that may serve as a reference point in interpretation, but also the *branch of international law or the legal institution to which it belongs* can be taken as a reference point in interpretation.[103] In such cases, teleological interpretation may overlap with interpretation through the principle of systemic integration (draft Guiding Principle 6) as resorting to the object and purpose of the branch for the purposes of interpreting a rule of customary international law, will, on occasion, require taking into account relevant rules of the branch in question.

[7] This trend is strong in the practice of national courts, where it can be observed that courts evince the purpose of the customary rule in question from the broader legal regime in which the rule is situated. This may involve a reference to broader objectives pursued in the particular legal regime, or a reference to other relevant rules or principles in the specific regime or the broader legal system. For instance, in the interpretation of rules of state immunity, national courts considered the general principles of sovereign equality and *par in parem non habet imperium*, as well as the broader aims of maintaining equality and stability in the legal system.[104] For the customary rule on direct participation in hostilities, courts looked at the overall purpose of the international humanitarian law (IHL) regime,[105] or the narrower

[100] See indicatively *Unidentified holders of Greek government bonds v Greece* (19 December 2017) Federal Court of Justice of Germany, Appeal decision, XI ZR 796/16, ILDC 2881 (DE 2017) [16]; *A and B* (6 May 2020) Constitutional Court of Germany, Decision on admissibility of constitutional complaint, 2 BvR 331/18, ILDC 3159 (DE 2020) [18-20].

[101] See indicatively *Former Consular Employee at the Consulate General of Croatia in Stuttgart v Croatia* (23 October 2014) Higher Regional Court of Stuttgart, Second instance order, Case No 5 U 52/14, ILDC 2428 (DE 2014) 5 U 52/14, ILDC 2428 (DE 2014) [43]; *VČ v Embassy of the Russian Federation to Latvia* (12 December 2007) Supreme Court of Latvia, Appeal decision on Jurisdiction, Case No SKC-237, No 10 (514), ILDC 1063 (LV 2007) [40]; *Bostadsrättsföreningen Villagatan 13 v Belgium* (30 December 2009) Supreme Court of Sweden, Judgment, Ö 2753-07, NJA 2009 s 95, ILDC 1672 (SE 2009) [11]; *TC1.бр.7613* (2013) Veles Court of First Instance, North Macedonia, 21;

[102] See indicatively *Ferrini v Germany* (11 March 2004) Supreme Court of Cassation of Italy, Appeal decision, Cass no 5044/04, ILDC 19 (IT 2004) [9.1]; *Germany v Milde (Max Josef)* (13 January 2009) Supreme Court of Cassation of Italy, Appeal Judgment, Case no 1072/2009, (2009) 92 Riv Dir Int 618, ILDC 1224 [4].

[103] *Ntaganda Second Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC, Case no.* ICC-01/04-02/06-1707, Decision of 04 January 2017 [48].

[104] *Germany v Prefecture of Vojotia representing 118 persons from Distomo village and Presidency of the Council of Ministers of Italy* (20 May 2011) Final appeal judgment (opposition to enforceability of a foreign ruling in Italy) No 11163/2011, ILDC 1815 (IT 2011) (*Voiotia 2*) [46].

[105] See indicatively *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors* (13 December 2006) Supreme Court of Israel, HCJ 769/02 [35]; *Prevention of the Use of Ramstein Air Base for United States Armed Drone Strikes in Yemen, Yemini citizen Living in Sana'a and ors v* Germany (19 March 2019) German Higher Administrative Court of North Rhine-Westphalia, Appeal, 4 A 1361/15, ILDC 3059 (DE 2019) [212].

rationale of the principle of distinction.[106] Furthermore, in some of the cases, courts have looked at 'recognized values' of the international community that should be protected in the application of the rule.[107] Finally, courts have also looked at subsequent state practice in the application of the rule in order to see what aims were pursued by the courts of other states when applying the customary rule.[108]

[8] A teleological interpretation of a rule of customary international law is often intertwined with considerations of reasonableness. International case-law is rife with instances where reference is made to 'logical and teleological'[109] or 'purposive and reasonable'[110] interpretation of customary rules. This may point to a possible overlap (or even identity) of the different means of interpretation of rules of customary international law, where the purpose of the rule must be understood together with a logical or reasonable meaning[111] of the rule which echoes the role of the ordinary meaning of the rule in the interpretation of treaties in relation to the object and purpose of the treaty.

[9] In a similar vein, when interpreting customary rules, national courts at times resort to effective interpretation, by referring first to the overall purpose of the rule and proceeding to interpret it in a way that would not be unreasonable or render the rule inoperable in light of its purpose.[112] This focus on effectiveness corresponds to expectations articulated in earlier scholarship on customary law interpretation, which anticipated teleological interpretation of custom to revolve around outcomes that 'best suit the objectives of the legal norm'.[113] Once again, here the connection between teleological interpretation (draft Guiding Principle 5) and the principle of effectiveness (draft Guiding Principle 7) is evident.

[10] When courts interpret customary law teleologically, overall they consult *mutatis mutandis* similar materials as they would when interpreting treaties. More specifically, where in treaties one would look for the object and purpose of the rule in the intention of the parties

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[106] See indicatively *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors* (13 December 2006) Supreme Court of Israel, HCJ 769/02.
[107] See indicatively *Ferrini v* Germany (11 March 2004) Supreme Court of Cassation of Italy, Appeal decision, Cass no 5044/04, ILDC 19 (IT 2004) [7]. See also *TC1.бр.7613* (2013) Veles Court of First Instance, North Macedonia, 21 for a similar reference to broader values in the context of the domestic legal system.
[108] *'Abu Omar' case, General Prosecutor at the Court of Appeals of Milan v Adler and ors* (29 November 2012) Supreme Court of Cassation of Italy, Final appeal judgment, No 46340/2012, ILDC 1960 (IT 2012) [23.7].
[109] *Prosecutor v Furundžija*, ICTY, Case no. IT-95-17/1-T Trial Chamber Judgment of 10 December 1998 [253].
[110] *Prosecutor v Delalić*, ICTY, Case no. IT-96-21-T Trial Chamber Judgment, 16 November 1998 [170].
[111] Reasonable interpretations may, in turn, be also connected to the principle of effectiveness, as discussed in draft Guiding Principle 7 and its accompanying Commentary.
[112] See indicatively *'Comfort Women'* case [3].
[113] Bleckmann (n 3) 528.

as manifested in the preamble of a treaty or the text of the rule, when interpreting a rule of customary international law, courts would look for the purpose of the rule as manifested in the professed objectives of the legal regime the rule is a part of. These objectives are found by looking to the rationales that underlie the legal regime (eg sovereign equality in the interpretation of state immunity); to other rules or principles that are part of the regime (eg the principle of distinction in the interpretation of the customary rule of direct participation in hostilities); or to the attitudes of states professed in their practice (eg the reasoning of other national courts concerning the definition of piracy in the interpretation of the customary prohibition of piracy). Taken together, these materials may demonstrate what has been dubbed 'the common conviction' of states.

[11] In the interpretation of domestic customary rules, comparable patterns emerge. The courts (re)construct the purpose of customary rules by reference to broader rationales that underlie the legal regime (eg conscientiousness and honesty in the interpretation of business customs) and other rules or principles that are part of the regime (eg requirement of proportionality of contractual penalties in the interpretation of business customs). This transmutation of the means of teleological interpretation to fit the particularities of customary rules is also in conformity with the ICJ's pronouncement in *Fisheries Jurisdiction*, according to which the origin and nature of the object to be interpreted should dictate how methods of interpretation are applied to it.[114]

Guiding Principle 6

Principle of Systemic Integration

The interpretation of a rule of customary international law shall take into account any relevant rules of international law.

Commentary

[1] The relevance of the principle of systemic integration for the purposes of interpretation of rules of customary international law and its connection to other means of interpretation, such

[114] *Fisheries Jurisdiction Case (Spain v Canada)* (Jurisdiction) [1998] ICJ Rep 432 [46-9].

as teleological interpretation, principle of effectiveness, evolutive interpretation and 'by proxy textual interpretation' is analysed in more detail in the corresponding Commentaries to draft Guiding Principles 5, 6, 8 and 9.

[2] It is worth noting that the tendency of international and domestic courts and tribunals to compensate for the lack of text of rules of customary international law, by using codificatory documents as a substitute, ie by resorting to 'by proxy' textual interpretation, especially when the codificatory instruments are binding legal instruments is an example of utilization of the principle of systemic integration.[115] Such instruments are for all intents and purposes 'relevant rules' for the interpretation of the customary rule in question.[116]

[3] The principle of systemic integration does not manifest itself only through the 'by proxy' textual interpretation. In *Continental Shelf (Tunisia/Libya),*[117] the Court held that the consideration of the CIL rules 'may lead to widely differing results according to the way in which those principles and rules *are interpreted* and applied' and later on that 'the term "equitable principles" *cannot be interpreted in the abstract*; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result'.[118] This last part is a direct reference to the principle of systemic integration. References to legal trends, may depending on the context be a reference to the principle of systemic integration. [119] Domestic courts have also relied on the principle of systemic integration (sometimes also referred to as 'principle of harmonization'),[120] although this harmonization sometimes can focus on domestic law rather than the system in which the rule had emerged, ie international law. [121] This raises legitimate concerns, as to a possible overstepping of the limits of the interpretative exercise as enshrined in Guiding Principle 10.

[4] Additionally, *jus cogens* rules, if relevant for the interpretation of a customary rule would fall under the principle of systemic integration. ILC's Draft Conclusion 20 on *jus cogens*

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[115] Of a more expansive fashion than that of the principle enshrined in Article 31(3)(c) VCLT.
[116] See, in more detail Commentary to draft Guiding Principle 9 and cases cited therein.
[117] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18.
[118] ibid [38] and [70].
[119] ibid Separate Opinion of Judge de Arechaga [33]; *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)* (Merits) [2012] ICJ Rep 99, Separate Opinion Judge Bennouna [19]; see also *infra* Commentary to Guiding Principle 8 [7-10].
[120] *'Comfort Women'* case [3.C.3.6]. *Her Majesty the Queen in Right of Canada v Edelson and ors* (3 June 1997) Supreme Court of Israel, Final appeal judgment, PLA 7092/94, 51(1) PD 625, ILDC 577 (IL 1997) [26] and [28]. A combined version of logical, teleological and systemic interpretation can also be seen in [22] and [26]; See indicatively *Germany v Milde (Max Josef)* (13 January 2009) Supreme Court of Cassation of Italy, Appeal Judgment, Case no 1072/2009, (2009) 92 Riv Dir Int 618, ILDC 1224 (IT 2009) [6].
[121] *'Comfort Women'* case [3.C.3.6].

tackles the interpretation and application of rules in a manner consistent with peremptory norms of general international law, and provides that '[w]here it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former'.[122]

[5] Similarly, *Special Rapporteur* Concepción Escobar Hernández's fifth report on 'Immunity of State Officials from Foreign Criminal Jurisdiction' acknowledges that '*peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts*'.[123] Furthermore, as noted both by the ILC in the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and *Special Rapporteur* Hernández in 2016, *jus cogens* norms 'generate strong interpretative principles' and '[t]his type of "conforming interpretation" could therefore be of particular importance … for the purpose of finding an appropriate balance among various primary norms'.[124] In this sense, *jus cogens* norms not only function as an interpretative limit that can resolve most apparent conflicts, but also and at the same time are part of the normative environment that shall be taken into account when interpreting customary rules, ie are 'relevant rules' in the version of 'systemic interpretation' provided in draft Guiding Principles 6.

[6] Finally, as analysed in the Commentary to Guiding Principle 3, the ILC in its Conclusions on the *Identification of Customary International Law* somewhat conflates the two stages of identification and interpretation. The reference in Draft Conclusion 3 to the fact that the 'in the assessment of State practice', '*regard must be had to the overall context*',[125] is a fairly straightforward reference to taking into account the normative environment/normative context of the rule, ie the 'relevant rules', in determining not its existence but its content. Thus, it falls squarely within the ambit of the principle of systemic integration.

[122] ILC, 'Peremptory Norms of General International Law (*jus cogens*): Text of the Draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Committee on First Reading' (29 May 2019) UN Doc A/CN.4/L.936, Draft Conclusion 20 [10(3)] and [17(2)].
[123] ILC, 'Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur' (14 June 2016) UN Doc A/CN.4/701 [136] citing also ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, reproduced in [2001/II – Part Two] YILC 31, 85, Commentary to Article 26 [3] (hereinafter ARSIWA) (emphasis added).
[124] ILC, 'Fifth Report' (n 123) [136].
[125] ILC (n 1) Draft Conclusion 3.

[7] As can be seen from its interplay and overlap with other means of interpretation identified in the present draft Guiding Principles, as well as from the relevant domestic and international case-law, the principle of systemic integration plays an important role in the process of interpretation of rules of customary international law. Its role seems to be more pronounced than in the case of its equivalent in treaty interpretation, namely Article 31(3)(c) VCLT. Whereas, Article 31(3) VCLT provides that '[t]here shall be taken into account, together with the context …', thus distinguishing contextual interpretation from the principle of systemic integration, that is not the same as far as interpretation of rules of customary international law is concerned. In the latter, 'any relevant rules' function as the normative environment, the normative context of the rule, and plays a similarly crucial role in the interpretation of customary rules.[126]

Guiding Principle 7

Principle of Effectiveness

A rule of customary international law shall be interpreted in such a manner that does not deprive it of its effectiveness.

Commentary

[1] Effective interpretation, or the principle of effectiveness (*ut res magis valeat quam pereat*) refers to the principle that a legal provision ought to be interpreted with a view to achieving its intended effect. Put differently, this principle entails the view that a legal provision should not be interpreted in a way that renders is ineffective. In scholarship and case-law the principle of effectiveness is viewed as having two manifestations; one avoiding rendering a provision meaningless/ineffective,[127] and the other being a more teleological and/or expansive approach to the scope of the provision.[128] In the context of treaty interpretation, it is

f[126] This may also explain, why the principle of systemic integration in the interpretation of customary rules is not bogged down by the discussions on 'parties' as in the case of treaty interpretation, and seems to align itself more closely to *in pari materia* considerations.

[127] The one promulgated by Sir Gerlad Fitzmaurice in his seminal series of articles in the British Yearbook of International Law.

[128] see C Braumann and A Reinisch, '*Effet Utile*' in J Klingler, Y Parkhomenko and C Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2018) 47.

recognized that the VCLT articles on interpretation encompass effective interpretation as a foundational principle.[129]

[2] In *Devas*, for example, the tribunal had to tackle the issue of the attribution of conduct of a State-owned company to India. The tribunal remarked that 'it would make no sense to impose a restrictive interpretation [to the customary rule reflected in Article 8 ARSIWA] that would allow a State to circumvent the rules of attribution by sending its direction or instruction to a corporate entity rather than a physical person or group of physical persons'.[130] Instead, it opted for a different interpretation noting that even in the case of corporations the instructions or direction would be received and acted upon by natural persons (ie the directors and agents of the corporation).[131] In essence, the tribunal chose out of two available interpretations the one that gave full effect to Article 8 ARSIWA in what appears to be a straightforward application of the principle of effectiveness (*ut res magis valeat quam pereat* or *effet utile*).[132]

[3] In the practice of national courts, effective interpretation can also be found hand in hand with teleological interpretation, ie the second manifestation. In particular, when interpreting customary rules, national courts at times resort to effective interpretation by referring to the overall purpose of the rule and proceeding to interpret it in a way that would not be unreasonable or render the rule inoperable in light of its purpose.[133] Similarly, examples can be found of national courts resorting to effective interpretation in order to appease a perceived normative conflict between two customary rules, and construct the relationship between the competing customary rules in a way that would ensure the most coherent outcome.[134]

[129] ILC (n 20) 219 [6]. '[. . .] in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 27, paragraph 1, which requires that a treaty shall be interpreted in *good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose*. When a treaty is open to two interpretation one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted'.

[130] *Devas v India* (Decision on Jurisdiction and Merits of 25 July 2016) PCA Case No 2013-09 [280].

[131] ibid.

[132] cf, eg, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70 [133]; *Free Zones of Upper Savoy and the District of Gex (France/Switzerland)* (Order) [1929] PCIJ Ser A No 22, 13.

[133] See indicatively *'Comfort Women'* case [3].

[134] *Germany v Milde (Max Josef)* (13 January 2009) Supreme Court of Cassation of Italy, Appeal Judgment, Case no 1072/2009, (2009) 92 Riv Dir Int 618, ILDC 1224 [4].

[4] This resort to effectiveness corresponds to expectations articulated in earlier scholarship on customary law interpretation, which anticipated teleological interpretation of customary rules to revolve around outcomes that 'best suit the objectives of the legal norm'.[135]

[5] Additional case-law in support of the first and second manifestation of the principle of effectiveness and its connections with teleological and 'by proxy' textual interpretation is analysed in the respective Commentaries of draft Guiding Principles 5 and 9.

Guiding Principle 8

Evolutive Interpretation

A rule of customary international law may, where appropriate, be interpreted evolutively.

Commentary

[1] Rules of customary international law may, similarly to treaties,[136] be interpreted evolutively.

[2] In treaty interpretation an evolutive interpretation is typically justified on the basis of the presumed intention of the parties as it is reflected in the text or nature of the treaty. In the case of rules of customary international law, tying the evolutive interpretation of the rule to such a presumed intention or the 'generic' nature of a term may seem at first glance, due to the lack of text, challenging, but that is not the case.

[3] As shown in the Commentary to draft Guiding Principle 2, it is difficult to envisage a rule of customary international law, without a 'lexical garment'. This is buttressed even further in draft Guiding Principle 10 and its accompanying Commentary on the reliance, during interpretation of rules of customary international law, on the linguistic expression of such rules in instruments reflecting customary international law.

[135] Bleckmann (n 3) 528.
[136] M Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties – Part I' (2008) 21 HYIL 101; M Fitzmaurice, 'Dynamic (Evolutive) Interpretation of treaties – Part II' (2009) 22 HYIL 3.

[4] Many tribunals have held that customary international law is not frozen in time.[137] So, for instance, in *Pope and Talbot*, the tribunal cited with approval ICJ's finding that '[a]rbitrariness…is a wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety'. It then went on to discuss the applicable rule of customary international law in the following terms: 'the concept of "due process" perforce makes the formulation more dynamic and responsive to evolving and more rigorous standards for evaluating what governments do to people and companies.'[138] Along similar lines, in *Mondev*, the tribunal held that:

> [i]t is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to *what those terms—had they been current at the time—might have meant* in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.[139]

These findings mirror to a considerable extent approaches in the context of treaty interpretation that accord terms an evolutive meaning.[140] Having narrowed down the core content of the applicable rule of customary international law by reference to a written source, these tribunals have interpreted the rule in an evolutive manner.[141]

[5] Domestic courts seem to share this view, with domestic courts recognising the dynamic/evolutive character of customary international law, thus, naturally opening the door to evolutive interpretation.[142] This was explicitly stated in *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and others*. where the Israel Supreme Court held that '[r]ules developed against the background of a reality which has changed *must take on dynamic interpretation which adapts*

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[137] *Merrill & Ring v Canada* (Award of 31 March 2010) ICSID Administered Case No UNCT/07/1 [103].
[138] *Pope and Talbot Inc v Canada* (Award on Damages of 31 May 2002) UNCITRAL [64].
[139] *Mondev International Ltd v United States of America* (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2 [116]; also eg *ADF v US* (Award of 9 January 2003) ICSID Case No ARB(AF)/00/1 [180].
[140] See S-I Lekkas, 'Handbook on Rules of Interpretation in International Adjudication' (TRICI-Law Research Paper Series 003/2023) notes **Error! Bookmark not defined.-Error! Bookmark not defined.**.
[141] Similarly, G Vidigal, 'Evolutionary Interpretation and International Law' (2020) 24 JIEL 203, 215-6.
[142] *'Comfort Women'* case [3.C.3.3]; *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (17 March 2005) Federal Court of Australia [2005] FCAFC 42 [47]. This is also true for domestic customary law; see, for instance, *Martha Wanjiru Kimata and another v Dorcas Wanjiru and another* (24 February 2015) High Court of Kenya [2015] eKLR, Civil Appeal No 94 of 2014 [14] <http://kenyalaw.org/caselaw/cases/view/106319/> (last accessed 1 October 2023).

them, in the framework of accepted interpretational rules, to the new reality'.[143] Similar views on State immunity were also expressed in *'Comfort Women'*.[144]

[6] Customary rules may also be interpreted evolutively on the basis of subsequent practice. Here, subsequent practice is regarded as different from the core general practice which is necessary to establish the rule in the first place. At the same time, an evolutive interpretation based on subsequent practice might raise the issue of drawing the line between evolutive interpretation and modification of the rule. However, as can be seen in the analysis provided in the Commentary to draft Guiding Principle 10(2)(b), this is an overarching issue and limit of interpretation, in general, rather than a problem particular to evolutive interpretation.

[7] In addition to the above, customary rules can be interpreted evolutively in light of subsequent developments in law, which may include the emergence of new legal rules. In such scenarios, the evolutive interpretation of older customary rules may include the consideration of newer relevant rules. In these scenarios, the interpretive outcome may yield an adaptation of the scope of the customary rule in question, including the broadening or the narrowing of the scope of the rule. In such a case, evolutive interpretation would overlap with interpretation through the principle of systemic integration.[145]

[8] An interesting application of a potentially evolutive interpretation is an interpretation in consonance with emerging legal trends. A statement in support of the use of trends as an interpretative element was made by the ICJ Judge de Arechaga in the *Case Concerning the Continental Shelf (Tunisia/Libya)* where he stated that

> even if a new trend does not qualify as a rule of customary law, it still may have a bearing on the decision of the Court, not as part of applicable law, but *as an element in the interpretation of existing rules or as an indication of the direction in which these rules should be interpreted*.[146]

[143] *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and others* (13 December 2006) Supreme Court of Israel, HCJ 769/02 [28]; see in more detail 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 Kammerhofer and N Arajärvi, *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) Ch 21.
[144] *'Comfort Women'* case [3.C.3.6-3.C.3.7].
[145] See Commentary to draft Guiding Principle 6.
[146] *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep 18 Separate Opinion of Judge de Arechaga [33].

[9] This position was subsequently reiterated by Judge Bennouna in his Separate Opinion to the *Jurisdictional Immunities* judgment, where he stated that

> […] it falls to the Court, when considering the cases submitted to it, to revisit the concepts and norms debated before it and to indicate, if appropriate, *any emerging new trends* in their *interpretation and in the determination of their scope.*[147]

[10] For the purposes of interpretation of a rule of customary international law, an evolutive interpretation in line with the emerging legal trends may involve an inquiry into elements, which would otherwise, for the purposes of identification of customary international law, be considered as general practice, but which do not refer to an unchartered terrain, but rather to new practices pertaining to the core of a previously established customary rule. What amounts to legal trends then does not have to be coupled with a collective *opinio juris* because we are in the realm of interpretation rather than the realm of identification.

[11] It is important, here, just like in the case of evolutive interpretation based on subsequent practice, to be cautious. Given the fine line between evolutive interpretation and modification, it can be imagined that the use of legal trends might hide a modification beneath the veneer of evolutive interpretation and that is a limit that cannot be overstepped, as indicated in draft Guiding Principle 10(2)(b) and the accompanying Commentary.

[12] As a final point, it needs to be noted that the evolutive interpretation of customary rules may also manifest as an overarching, or descriptive of the outcome, interpretive attitude, whereby the interpreter employs other interpretive methods while simultaneously engaging in evolutive interpretation. In such cases, what can be observed is a combination/overlap of evolutive interpretation with other means of interpretation such as teleological,[148] systemic,[149] or 'by proxy' textual interpretation.

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[147] *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)* (Merits) [2012] ICJ Rep 99, Separate Opinion Judge Bennouna [19].

[148] See *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors* (13 December 2006) Supreme Court of Israel, HCJ 769/02 [28]; *Ferrini v Germany* (11 March 2004) Supreme Court of Cassation of Italy, Appeal decision, Cass no 5044/04, ILDC 19 (IT 2004) [9.1]; *Her Majesty the Queen in Right of Canada v Edelson and ors* (3 June 1997) Supreme Court of Israel, Final appeal judgment, PLA 7092/94, 51(1) PD 625, ILDC 577 (IL 1997) [26-30]; *García de Borrisow v Embassy of Lebanon* (13 December 2007) Supreme Court of Justice of Colombia, Decision on Admissibility, Case No 32096, ILDC 1009 (CO 2007) [20-25].

[149] See indicatively *Germany v Milde (Max Josef)* (13 January 2009) Supreme Court of Cassation of Italy, Appeal Judgment, Case no 1072/2009, (2009) 92 Riv Dir Int 618, ILDC 1224 (IT 2009) [6].

Guiding Principle 9

'By proxy' Textual Interpretation

1. **Textual interpretation, in the strict sense, is not applicable to the interpretation of rules of customary international law.**
2. **In the interpretation of a rule of customary international law recourse may be had to a form of 'by proxy' textual interpretation, that is relying on the terms of a written text including, *inter alia*, provisions in treaties or other codifying instruments reflecting rules of customary international law.**

Commentary

[1] One of the main arguments against the interpretability of customary international law is the lack of text.[150] Although, the lack of text *eo ipso* is not a bar to the interpretability of customary international law, one would still expect grammatical/textual interpretation to not be relevant. This may be true for grammatical/textual interpretation *stricto sensu*, ie where the interpreter interprets a rule which is embodied in a written instrument. However, given the increased codification of customary rules and the fact that every customary rule is shrouded in a 'lexical garment', there is a role for a 'by proxy' grammatical/textual interpretation,[151] where this 'lexical garment', the codificatory instrument is used as a 'written artefact',[152] which can be utilised as a substitute for the lack of text.

[2] Such instruments can be either binding treaties (although sometimes not binding on even the parties to the dispute)[153] or non-binding documents (such as draft conventions[154] or the ARSIWA).[155] Evidently, this practice cannot qualify as textual interpretation *stricto sensu*. When it comes to binding treaties, it could resemble an application of the 'principle of systemic integration' as enshrined in Article 31(3)(c) VCLT, albeit in some cases in a more expansive

[150] See *supra* draft Guiding Principle 2 and accompanying Commentary.
[151] Merkouris (n 4). For a different approach, where customary rules are treated as hypertext, see A Kulick, 'Custom as Hypertext' (on file with the authors).
[152] Lekkas (n 40) 327. See also Allot's note that in the case CIL, judges treat the *Untext* into a virtual *Urtext*; Allot (n 62) 386, and more generally 382-4.
[153] See, for instance, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products – Report of the Panel* (21 November 2006) WT/DS291/R 847, WT/DS292/R and WT/DS293/R [2006/III] DSR 847, where neither the United States nor the European Communities were parties to the VCLT (hereinafter *EC-Biotech* case).
[154] See, indicatively, *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA)* (Merits) [184] ICJ Rep 246.
[155] See, indicatively, *Tulip v Turkey* (Award of 10 March 2014) ICSID Case No ARB/11/28 [281].

fashion, and/or *in pari materia* interpretation.[156] In such a case, this would potentially overlap with the principle of systemic integration as an interpretative element in the interpretation of rules of customary international as described in draft Guiding Principle 6 and the accompanying Commentary. As far as non-binding instruments are concerned, it could be argued that these are not 'rules' in the strict sense, so either we are strictly and solely in the ambit of a 'by proxy' textual interpretation in and of its own right, or the principle of systemic integration in the context of interpretation of customary rules is much wider and encompasses such material as well.

[3] Reference to such rules and instruments is not in and of itself problematic, however, great care and methodological rigour needs to be exercised when resorting to ''by proxy' textual interpretation to avoid violating the limits enshrined in draft Guiding Principle 10 (2)(b)-(c). The reason is that when relying on such codificatory instruments there is a tendency to expand reliance on text and provisions, which may not be reflective of customary international law. There are several instances, where courts and tribunals starting from a 'by proxy' textual interpretation have continued then on to apply textual and contextual interpretation on the basis of the specific language adopted in those documents, both in provisions that are reflective of customary international law and in those that are not. This raises major methodological concerns.

[4] In *EC-Biotech*, for instance, the World Trade Organization (WTO) Panel when interpreting the customary rules on interpretation, relied heavily on the text and context of the VCLT.[157] Of note is that several of the parties to the dispute were not parties to the VCLT.[158] In *Gulf of Maine* Judge Gros was of the opinion that '[t]he Court had … revised the [judgment in *North Sea Continental Shelf*] so far as delimitation of the continental shelf was concerned, *by interpreting customary law in accordance with the known provisions of the draft convention produced by the Third United Nations Conference*'.[159] Again here the text used belonged to a document that was still at a draft stage.

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[156] Which, as far as treaties are concerned, could signify an overlap with supplementary means under Article 32 VCLT. On in *pari materia* interpretation see see PF Henin, '*In Pari Materia* Interpretation in J Klingler, Y Parkhomenko and C Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2018) 211. See also draft Guiding Principle 6 and accompanying Commentary.

[157] *EC-Biotech* [7.68-7.72].

[158] The *EC-Biotech* case and its methodological *faux pas* are analysed in more detail in Merkouris (n 4) Section IX.1.

[159] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA)* (Merits) [184] ICJ Rep 246, Dissenting Opinion of Judge Gros [8].

[5] In *Tulip*, the investment Tribunal in order to determine whether the acts of a company owned predominantly by a State agency was attributable to Turkey, referred to the ARSIWA as a codification of customary international law.[160] In fact, it relied so much on the text of the ARSIWA that its interpretation of the customary rule on attribution revolves around the linguistic and syntactical choices of Article 8. According to the Tribunal, '[p]lainly, the words "instructions", "direction" and "control" are to be read disjunctively'.[161] It further buttressed this interpretation by reference to the ILC's Commentary.[162] The fact that the Tribunal engaged in an interpretation of a rule of customary international law was also acknowledged in the subsequent annulment decision, where the committee clarified that 'the tribunal, in *interpreting Article 8*, took into account the ILC Commentary' and found that the tribunal 'correctly *interpreted Article 8*'[163].[164]

[6] Most recently, the ICJ in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* in interpreting the rule enshrined in Article 76(1) of the United Nations Convention on the Law of the Sea (UNCLOS), relied on the text of provisions constituting the context of that provision, mainly Article 82(1) and Article 76(4)-(9) UNCLOS, which, however, are of a disputed customary nature.[165]Although such 'by proxy' textual interpretation is not uncommon, it needs to be exercised with great care to avoid overstepping the limits described in draft Guiding Principle 10(2)(b)-(c), as happened in this case. The fact that this was an issue of interpretation of a rule of customary international law rule was rightly pointed out, and the lack of methodological rigour on the Court's part was criticised in Judge Charlesworth's dissenting opinion.[166]

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[160] *Tulip v Turkey* (Award of 10 March 2014) ICSID Case No ARB/11/28 [281].
[161] ibid [303].
[162] Ibid [306] citing ARSIWA (n 123) Commentary to Article 8 [6].
[163] *Tulip v Turkey* (Decision on Annulment of 30 December 2015) ICSID Case No ARB/11/28 [187-8] (emphasis added).
[164] For a more detailed analysis of *Tulip* and other investment cases interpreting the customary rules on State responsibility see S-I Lekkas, 'The Uses of the Work of the International Law Commission on State Responsibility in International Investment Arbitration' in P Merkouris, A Kulick, JM Alvarez-Zarate and M Zenkiewicj (eds), *Custom and its Interpretation in International Investment Law* (CUP 2022).
[165] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicaragua v Colombia) Judgment of 13 July 2023, available at: <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-00-en.pdf> (last accessed 1 October 2023).
[166] Ibid, Dissenting Opinion of Judge Charlesworth [11-23]. For further criticisms regarding the Court's approach in the Judgment see also ibid, Dissenting Opinion of Judge Tomka <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-01-en.pdf> (last accessed 1 October 2023).

[7] In sum, such overreliance on codificatory instruments in their entirety runs the danger of being methodologically inaccurate and leading to violations of the limits enshrined in draft Guiding Principle 10(2)(b)-(c).

Guiding Principle 10

Limits to Interpretation

1. **There are limits to the interpretation of rules of customary international law.**
2. **Such limits include:**
   a) **An interpretation of a rule of customary international law may not, as far as possible, lead to an outcome that conflicts with a *jus cogens* rule.**
   b) **An interpretation of a rule of customary international law may not lead to an outcome that modifies the rule being interpreted.**
   c) **An interpretation of a rule of customary international law may not go beyond the principles of interpretation, as set out in these Guiding Principles.**
3. **Guiding Principle 10 is without prejudice to the development of additional limits.**

Commentary

[1] It is generally acknowledged that there are certain inherent limits to interpretation. As Lord Sankey opined in *Edwards v. Attorney-General for Canada*,[167] although legal rules are 'living tree[s] capable of growth and expansion' nonetheless such growth and expansion should be 'within [the rule's] natural limits'.[168] In the context of international law and treaties, in particular, Judge Bedjaoui referred to such limits as 'precautions'.[169] These treaty interpretation limits/'precautions' are reflections of the restrictions imposed by the nature either of the system or of the rule itself.

[2] In the group of limits/'precautions' imposed by the system, one can find the limit of draft Guiding Principle 10(2)(a), ie that of *jus cogens.* An interpretation cannot lead to an outcome that conflicts with a *jus cogens* rule. This logically stems from the very definition of

[167] Albeit while interpreting a domestic instrument.
[168] *Edwards v Attorney-General for Canada* (18 October 1929) Judicial Committee of the Imperial Privy Council [1930] AC 124, 136 per Lord Sankey.
[169] *Gabčíkovo-Nagymaros Project (HungarylSlovakia)* [1997] ICJ Rep 7, Separate Opinion of Judge Bedjaoui [5].

jus cogens, ie a rule from which no derogation is possible. With respect to treaty rules it has been regularly identified as a limit of interpretation.[170]

[3] The *Institut de Droit International* has confirmed this in its exploration of whether there are limits to the dynamic interpretation of the constitution and statutes of international organizations by their respective internal organs. Both in the 2021 Resolution and the 2019 Report the Institut's Seventh Commission emphasised 'that the dynamic interpretation by international organizations of their constituent instruments may not violate *jus cogens* [norms]'.[171]

[4] *Jus cogens* as an interpretative limit is transposable to the interpretation of customary rules. Apart from the fact that such a transposability stems logically and effortlessly from the definition of *jus cogens* rules, ie rules from rules from which no derogation is permissible and their consequent hierarchically superior normativity, there is additional evidence that supports this. The *Institut de Droit International* in its 1975 resolution on 'Intertemporal Law', considered it such a fundamental limit that 'States and other subjects of international law [although having] the power to determine by common consent the temporal sphere of application of norms … [such power is] subject to any imperative norm of international law which might restrict [it]'.[172] Although the it was examining cases of treaty interpretation, the rationale behind the *Institut's* relevant provision does not seem to be source-specific.

[5] The ILC has confirmed this, and overall the function of *jus cogens* rules as an interpretative limit, for all rules irrespective of their source, in a number of reports produced in the context of several of its research topics. Draft Conclusions 14 and 20 proposed by the Drafting Committee on the ILC's work on '*Jus cogens*' take a cradle to grave approach as to how *jus cogens* rules affects customary international law in all the stages of its life-cycle, ie

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[170] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, Joint Declaration of Judges Shi and Koroma [2]; *South-West Africa (Second Phase) (Liberia and Ethiopia v South Africa)* [1966] ICJ Rep 6, Dissenting Opinion of Judge Tanaka 293-5; see also M Kotzur, 'Intertemporal Law' [2008] MPEPIL 1433 [13]; T Georgopoulos, 'Le droit 41ntertemporal et les dispositions conventionelles évolutives – quelle thérapie contre la vieillesse des traités?' (2004) 108/1 RGDIP 123, 146.

[171] Institut de Droit International, '7th Commission – Report: Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)? – Rapporteur M Arsanjani' (*IDI*, 2021) 30, Draft Resolution [5] <https://www.idi-iil.org/app/uploads/2021/05/Report-7th-commission-interpretation-statutes-international-organizations-vol-81-yearbook-online-session.pdf> (last accessed 1 October 2023). The *Institut* also noted 'internationally protected fundamental human rights'. The disjunctive constructive of the sentence would imply that these would be fundamental human rights that have not achieved *jus cogens* status.

[172] Institut de Droit International, 'Resolution of 11 August 1975: The Intertemporal Problem in Public International Law' (1975) 56 AIDI 536 [3].

not only with respect to its emergence and termination (Draft Conclusion 14) but also its interpretation (Draft Conclusion 20). Draft Conclusion 20 tackles the interpretation and application of rules in a manner consistent with peremptory norms of general international law, and provides that '[w]here it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former'.[173] Draft Conclusion 20 not only does not differentiate on the basis of source, but this was an intentional deviation to earlier versions of conclusions, which adopted somewhat different wording depending on the source.[174]

[6] Similarly, in *Special Rapporteur* Concepción Escobar Hernández's fifth report on 'Immunity of State Officials from Foreign Criminal Jurisdiction' there is reference to *jus cogens* as an interpretative limit.

> In its reasoning, the Commission also includes another element of considerable interest in relation to the primacy of peremptory norms, noting that sometimes a conflict between primary norms need not be resolved by means of the secondary rules concerning responsibility. On the contrary, '[w]here there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. *The processes of interpretation and application should resolve such questions*', given that '*peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts*'.[175]

[7] The nature of *jus cogens* as rules from which no derogation is permissible has as a logical corollary that no interpretation of primary norms of a *non jus cogens* nature can arrive at such an interpretative outcome that it would lead to a conflict with a *jus cogens* rule. In this context, the Central District Court of Seoul in the 2018 *'Comfort Women'* case, used *jus cogens* as a limit when interpreting the law of State immunity. In its judgment it held that given the consensus of the international community required for the emergence of a rule of *jus cogens* 'it can be said that a distinction exists between peremptory norm (*jus cogens*), which is a higher

[173] ILC (n 122) Draft Conclusion 20 [10(3)] and [17(2)].
[174] Cf ILC, 'Third Report on Peremptory Norms of General International Law (*jus cogens*) by Dire Tladi, Special Rapporteur' (12 February 2018) UN Doc A/CN.4/714, proposed Draft Conclusions 10, 15 and 17.
[175] ILC, 'Fifth Report' (n 123) [136] citing also ARSIWA (n 123) 85, Commentary to Article 26 [3] (emphasis added).

norm, and a lower norm. The lower norm should not deviate from *jus cogens*'.[176] The same logic was also followed in *A v Swiss Federal Public Prosecutor*.[177]

[8] As noted both by the ILC in the 2001 ARSIWA and *Special Rapporteur* Hernández in 2016, *jus cogens* norms 'generate strong interpretative principles' and '[t]his type of "conforming interpretation" could therefore be of particular importance … for the purpose of finding an appropriate balance among various primary norms'.[178] In this sense, *jus cogens* norms not only function as an interpretative limit that can resolve most apparent conflicts, but also and at the same time are part of the normative environment/context that shall be taken into account when interpreting customary rules, ie are 'relevant rules' in the version of 'systemic interpretation' provided in draft Guiding Principle 6.

[9] Draft Guiding Principle 10(2)(b) tackles the rule-oriented limit that interpretation should not lead to an amendment/modification of the rule being interpreted. This distinction is nothing new under the sun, although the boundaries between the two processes have never been easy to discern.[179] Despite this difficulty, the ILC recently has reaffirmed that notwithstanding the inherent problems of distinguishing between the two processes, one should not bleed into the other. The ILC in its Draft Conclusion 7(3) on 'Subsequent Agreements and Subsequent

[176] *'Comfort Women'* case [3.C.3.5].
[177] *A v Swiss Federal Public Prosecutor and ors* (25 July 2012) Federal Criminal Court of Switzerland, Final appeal judgment BB. 2011.140, TPF 2012 97 ILDC 1933 (CH 2012) [5.4.3].
[178] ILC, 'Fifth Report' (n 123) [136].
[179] ILC, 'Report of the International Law Commission Covering the Work of its Sixteenth Session' (11 May – 24 July 1964) UN Doc A/5809 reproduced in [1964/II] YILC 173, 198 [2]; ILC, 'Summary Record of the 766th Meeting' (15 July 1964) UN Doc A/CN.4/SR.766 [122] (Waldock); ILC, 'Summary Record of the 767th Meeting' (16 July 1964) UN Doc A/CN.4/SR.767 [37] (Verdross), [39] (Waldock), [41] (Pal), [43] (Ago), [44–5] (Yasseen), [46–50] (Tunkin); *Re Al M (Immunities)* (19 March 2021) High Court of Justice [2021] EWHC 660 (Fam) [25]; ILC, 'Report of the International Law Commission Covering the Work of its Sixteenth Session' (11 May – 24 July 1964) UN Doc A/5809 reproduced in [1964/II] YILC 173, 198 [2]; ILC, 'Summary Record of the 866th Meeting' (9 June 1966) UN Doc A/CN.4/SR.866 [4] (Castrén), [7–8] (Jiménez de Aréchaga), [11] (Ago), [26] (Briggs), [36] (Yasseen). Against: ILC, 'Summary Record of the 767th Meeting' (16 July 1964) UN Doc A/CN.4/SR.767 [35] (Verdross), [36] (de Luna); ILC, 'Report of the International Law Commission on the Work of its Eighteenth Session' 4 May – 19 July 1966) UN Doc A/6309/Rev.l, reproduced in [1966/II] YILC 172, 300 (Israel); D Tladi, 'Is the International Law Commission Elevating Subsequent Agreements and Subsequent Practice?' (*EJILTalk!*, 30 August 2018) <https://www.ejiltalk.org/is-the-international-law-commission-elevating-subsequent-agreements-and-subsequent-practice/> (last accessed 1 October 2023); the ILC also has recognised that especially in the case of bilateral treaties it may be difficult to distinguish whether subsequent practice amounts to modification (referring to the example of the *Air Transport Services Agreement* case [*Case Concerning the Air Service Agreement of 27 March (USA v France)* (1978) 18 UNRIAA 417]) or an authentic interpretation of the treaty (referring to the example of the *Temple of Preah Vihear* case [*Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6]); ILC, 'Report of the International Law Commission Covering the Work of its Sixteenth Session' (11 May – 24 July 1964) UN Doc A/5809 reproduced in [1964/II] YILC 173, 198 [2]; 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/II] YILC 51, 87–91 [1–15] and in particular [8]; ILC, 'Report of the International Law Commission on the Work of its Eighteenth Session' 4 May – 19 July 1966) UN Doc A/6309/Rev.l, reproduced in [1966/II] YILC 172, 236 [1].

Practice in Relation to Interpretation of Treaties', erred on the side of caution, opting for a presumption in favour of interpretation rather than amendment/modification, namely in the form that '[i]t is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it.'[180] In the ILC's view, if the interpretative limits are crossed then we find ourselves in treaty modification territory.[181] The *Institut* for its part, citing Hexner, also shared the view that interpretation should not amount to amendment, although, similarly to the ILC, it acknowledged that clearly outlining such boundaries would be a difficult task indeed.[182] Furthermore, in the same vein as the ILC, it also went for an interpretative presumption in operative paragraph 7 of its Draft Resolution, where it suggests that 'unless otherwise provided in the constituent instrument of the international organization, when there is a general agreement among the membership of the international organization as to an interpretation, the interpretation should be presumed to be lawful and *intra vires*'.[183] Along the same line of thinking as the ILC, the *Institut* opted for a solution where the (rebuttable) presumption is that the subsequent agreement of the parties as to an interpretation, should be considered as exactly that an interpretation and not an amendment, the latter being *ultra vires*.

[10] In the context of interpretation of rules of customary international law, modification as an interpretative limit has been a common recurring theme in a number of domestic cases. UK courts have consistently held that '[i]t is not for a national court to "develop" international law

[180] ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' [2018/II – Part Two] YILC 16, 58.
[181] Although it admitted that clear boundaries between the two processes may be difficult to draw and refused to take a clear position as as to whether modification of a treaty by subsequent practice of the parties was customary law; ILC (n 180) 58-9.
[182] The *Rapporteur* elaborated on this in the Report by referring again to Hexner, who touches upon the critical issue of interpreting the interpretive limits and also the amendment procedures: 'The question may be asked whether the interpretative power includes the right to determine the limits of the interpretative power, and whether it extends to interpretation of provision relative to amendments of the Agreement (Article XVII). The answer to this question is in the affirmative, subject, of course, to the fact that matters touching on *compétence de la compétence* frequently border on political aspects and involves problematical elements of *ultra vires* actions'; Institut de Droit International, '7th Commission – Report: Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)? – Rapporteur M Arsanjani' (2019) 78 AIDI 87, 198 citing P Hexner, 'Interpretation by Public International Organizations of their Basic Instruments' (1959) 53 AJIL 341, 350.
[183] [183] Institut de Droit International, '7th Commission – Report: Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)? – Rapporteur M Arsanjani' (*IDI*, 2021) 31, Draft Resolution [7] <https://www.idi-iil.org/app/uploads/2021/05/Report-7th-commission-interpretation-statutes-international-organizations-vol-81-yearbook-online-session.pdf> last accessed 1 October 2023..

by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states'.[184]

[11] Along similar lines, judge *ad hoc* Kreća's criticism of the methodology and conclusions arrived at by the International Criminal Tribunal for the former Yugoslavia (ICTY) in a number of cases, refers to the ICTY mis-applying the teleological approach to interpretation, and ending with a content of customary rules that went beyond their natural limits. In Kreća's view, the judges had ended up revising/amending the customary rules in question, thus exercising a *pouvoir de légiférer*.[185]

[12] Revision/modification as an interpretative limit of a customary rule is to be found in *Hadžihasanović*. While Judge Shahabuddeen was of the view that a teleological interpretation was appropriate,[186] the Tribunal was of the view that there did not exist sufficient practice and *opinio juris* to warrant such a conclusion and that, extending the rule of command responsibility to cover situations such as those in *Hadžihasanović* would amount to extending the rule beyond its natural limits, ie modifying it.[187]

[13] Both *Croatia-Serbia Genocide* and *Hadžihasanović* highlight the wider *problématique* of where the line is to be drawn between, on the one hand, interpretation and, on the other hand, revision/modification. This is, indeed, an extremely complex issue that lies at the very heart of content-determination. However, as has been shown multiple times in the preceding draft Guiding Principles and Commentaries, this it is not a problem that is specific to customary international law alone. Rather, it cuts through all sources of international law. The ILC confirmed this in its Draft Conclusion 7 on 'Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties' and the corresponding commentary. Although it

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[184] *Re Al M (Immunities)* (19 March 2021) High Court of Justice [2021] EWHC 660 (Fam) [15]; *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2019] 2 WLR 578 [19] both citing *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2007] 1 AC 270 [63] (Lord Hoffmann).

[185] The criticism goes as follows:t he content-determination of the customary rules in question resembled 'a quasi-customary law exercise based on deductive reasoning driven by meta-legal and extra-legal principles … [that] has resulted in judicial law-making through purposive [ie teleological], adventurous interpretation'; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v Serbia*) (Merits) [2015] ICJ Rep 3, Separate Opinion of Judge *ad hoc* Kreća [91-2]; citing also in support M Swart, 'Judicial Law-Making at the *Ad Hoc* Tribunals: The Creative Use of Sources of International Law and "Adventurous Interpretation"' (2010) 70 Heidelberg Journal of International Law 459, 463-8, 475-8.

[186] *Prosecutor v Enver Hadžihasanović, Mehmed Alagić and Amir Kubura* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility of 16 July 2003) ICTY Appeals Chamber, Case No IT-01-47-AR72, Partial Dissenting Opinion of Judge Shahabuddeen [9-10] (emphasis added); similarly see ibid, Dissenting Opinion of Judge Hunter [10] and [39-40].

[187] In detail see M Fortuna, 'Different Strings of the Same Harp: Interpretation of Customary International Rules, their Identification and Treaty Interpretation' in P Merkouris, J Kammerhofer and N Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) Ch 18.

admitted that a clear line may be difficult to draw, nonetheless such a distinction should not be overlooked nor cast aside as a mere technicality. As the ILC highlights 'States and international courts are generally prepared to accord parties a rather wide scope for the interpretation of a treaty by way of a subsequent agreement. … The recognition of this scope for the interpretation of a treaty goes hand in hand with the reluctance by States and courts to recognize that an agreement relating to the application of a treaty actually has the effect of amending or modifying the treaty'.[188] It is this necessity of a distinction between the two processes that prompted the ILC not only to include Draft Conclusion 7 in its final outcome, but also to adopt, in paragraph 3 of that Conclusion, the rebuttable presumption that the parties to a treaty intend, through subsequent agreements or practice, 'to interpret the treaty, not to amend or to modify it'.[189]

[14] Finally, draft Guiding Principle 10(2)(c) addresses the interpretative limit that any interpretation of a customary rule should always observe the general rules/principles apposite to the interpretation of such rules. Similarly, in treaty interpretation the same limit has been accepted and such elements would be found laid down in Articles 31-3 VCLT or their customary counterparts[190] (and their various elements, eg text, context, and intention).[191] A violation of this limit may lead to a misinterpretation due to methodologically incorrect application of the interpretative rules/principles[192] or in its extreme to a violation of another limit, namely that of interpretation amounting to a revision of the treaty,[193] ie the limit enshrined in draft Guiding Principle 10(2)(b).

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[188] ILC (n 180) Commentary to Draft Conclusion 7 [21].

[189] ibid, Draft Conclusion 7(3). On the importance of distinguishing between interpretation and amendment/modification see M Kohen, 'Keeping Subsequent Agreements and Practice in Their Right Limits' in G Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 34, 42–3; S Murphy, 'The Relevance of Subsequent Agreement and Subsequent Practice in the Interpretation of Treaties' in G Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 82, 89; R Moloo, 'When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation' (2013) 31/1 BerkJIntlL 39, 78.

[190] Unless, of course, the parties have agreed to different rules of interpretation, given the *jus dispositivum* nature of the rules of interpretation. In that case, the agreed upon interpretative rules form the new limit/'precaution'.

[191] *Gabčíkovo-Nagymaros Project (HungarylSlovakia)* [1997] ICJ Rep 7, Separate Opinion of Judge Bedjaoui [5] and [7]; *Soering v UK*, EctHR, App No 14038/88 (7 July 1989) [103];. *Al-Saadoon and Mufdhi v UK*, EctHR, App No 61498/08 (2 March 2010) [119]; *Albert and Le Compte v Belgium*, EctHR, App No 7299/75 (10 February 1983) Partly Dissenting Opinion of Judge Matscher [3]; *Feldbrugge v Netherlands*, EctHR, App No 8562/79 (29 May 1986), Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Evans, Bernhardt and Gersing [24].

[192] See Merkouris (n 4) Section IX.

[193] *Gabčíkovo-Nagymaros Project (HungarylSlovakia)* [1997] ICJ Rep 7, Separate Opinion of Judge Bedjaoui [5]; *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, Declaration of Judge Higgins [2]; *Case Concerning a Boundary Dispute between Argentina and Chile Concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy (Argentina v Chile)* (1994) 22 UNRIAA 3 [157] (hereinafter *Laguna del Desierto*); *Claude Reyes and others v Chile* (Merits, Reparations and Costs) IACtHR Series C No 151 (19 September 2006) Separate Opinion of Judge Ramírez [1] and [3].

[15] Examples of a violation of that limit, either alone or in conjunction with the limit of draft Guiding Principle 10(2)(b) can be found in both international case-law, such as *EC-Biotech* (WTO DSB)[194] and *Vattenfall AB and Others v Germany* (investment tribunal),[195] and in domestic case-law, such as the *'Comfort Women'* judgment (delivered by the Central District Court of Seoul),[196] and *Her Majesty the Queen in Right of Canada v Edelson and others* (Supreme Court of Israel).[197] In domestic case-law, an oft -repeated pattern of misinterpretation is that of 'consistent interpretation' but flowing into the opposite direction, with a rule of customary international law being interpreted in a fashion to ensure that it conforms or is harmonised with the domestic regulations, be they the Constitution or other instruments of a lower order. This is known as 'reverse consistent interpretation'[198] or as Judge Nussberger characterised it in *Al-Dulimi v Switzerland* 'fake harmonious interpretation'.[199] Such 'reverse consistent interpretation' / 'fake harmonious interpretation' goes against the fact that the existence and content-determination of a rule of customary international law has to occur on the basis of the rules set by the system from which it emerged,[200] as also accepted by domestic courts.[201]

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[194] *EC-Biotech* [7.56-7.74].

[195] *Vattenfall AB and Others v Germany* (Decision on the *Achmea* Issue of 31 August 2018) ICSID Case No ARB/12/12 [155-62].

[196] *'Comfort Women'* case [3.C.3.6].

[197] *Her Majesty the Queen in Right of Canada v Edelson and ors* (3 June 1997) Supreme Court of Israel, Final appeal judgment, PLA 7092/94, 51(1) PD 625, ILDC 577 (IL 1997) [29-65].

[198] *Her Majesty the Queen in Right of Canada v Edelson and ors* (3 June 1997) Supreme Court of Israel, Final appeal judgment, PLA 7092/94, 51(1) PD 625, ILDC 577 (IL 1997 [58] ; C Ryngaert, 'Customary International Law Interpretation: The Role of Domestic Courts' in P Merkouris, J Kammerhofer and N Arajärvi, *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) Ch 22.

[199] *Al-Dulimi and Montana Management Inc v Switzerland* [GC] ECtHR, App No 5809/08 (21 June 2016) Dissenting Opinion of Judge Nußberger.

[200] See cases and analysis below; see also Ammann, who argues that '[d]omestic courts must take the characteristics of international lawmaking into account. Otherwise, they are not interpreting the *interpretandum*'; O Ammann, *Domestic Courts and the Interpretation of International Law* (Brill/Martinus Nijhoff 2020) 35; similarly, C Ryngaert, 'Customary International Law Interpretation: The Role of Domestic Courts' in P Merkouris, J Kammerhofer and N Arajärvi, *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) Ch 22.

[201] *Re Al M (Immunities)* (19 March 2021) High Court of Justice [2021] EWHC 660 (Fam) [12]; *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* (n 193) [16] (Arden LJ); *Mighell v Sultan of Johore* [1894] | QB 149, 159-60 (Lord Esher MR); *Aziz v Aziz* [2008] 2 All ER 501 [55-61]; *Harb v Asic* [2014] | WLR 4437 [14] (Rose J) and [2016] Ch 308, [35-9] (Aikens LJ); *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 201G-202A (Lord Browne-Wilkinson); *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777 [31]; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2007] 1 AC 270 [63] (Lord Hoffmann); *Sentenza No 238/2014* (22 October 2014) Italian Constitutional Court [3.1] (unofficial English translation available at <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf> (last accessed 1 October 2023). The Italian Supreme Court had this to say: '[i]nternational custom is external to the Italian legal order, and its application by the government and/or the judge … must respect the principle of conformity, ie must follow the interpretation given in its original legal order, that is the international legal order'.

[16] Draft Guiding Principle 10(3) notes that 'Guiding Principle 10 is without prejudice to the development of additional limits'. This recognises the possibility that additional limits or changes to the existing ones may emerge as a result of such relevant rules stemming from the formal sources of international law.

Guiding Principle 11

Lex specialis

These Guiding Principles shall be without prejudice to the interpretation of rules of customary international law that is governed by special rules of international law.

Commentary

[1] Draft Guiding Principle 11 provides that these Draft Guiding Principles are without prejudice to situations where the interpretation of a rule of customary international law is governed by special rules of international law. This reflects the maxim *lex specialis derogat legi generali*. Draft Guiding Principle 11 covers both 'strong' and 'weak' forms of *lex specialis*. In the former category, one would encounter situations where there is a special regime that provides for special rules on interpretation. The latter category would include situations where, for instance, a treaty (for example, a special agreement (*compromis*)) provides for special rules of interpretation of customary rules.