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International Legal Custom as an Object of Interpretation: Modern Approaches and Discussions

Svitlana Karvatska[1]
Doctor in Law (LL. D)
Associate Professor
Department of European Law and Comparative Law Studies
Yuriy Fedkovych Chernivtsi National University
Ukraine
ORCID ID: 0000-0001-9948-4866
Ukraine

ABSTRACT

The article determines that the transition from a liberal state system to a welfare state system has adapted the concept of international legal custom and the correlation between its two elements. With the emergence of new members of the international system, a new environment has emerged where there is no clear common understanding of the definition and content of international law rules. The lack of an effective, consistent method of identifying international custom dictates the requirement to seek an effective methodology for interpreting international legal customs actively.

The article finds out that often competing interpretations arise about the same practice. Therefore, it is necessary to find the interpretation offering more tools for practice, with other things being equal. If a deductive methodology seeks a connection between principle and law, an inductive one looks for social facts that support common practice. It is proved that a qualitatively new constructive interpretation has the potential to provide a better interpretation of international community practice. In conclusion, it is stated that the result of constructive interpretation should be the orientation of the goal into practice.

Keywords: customary international law, "practice", "opinio juris", constructive interpretation, methodology for interpreting.

1. Introduction

Interpretation of customary international law (CIL) is a process that differs both from treaties interpretation and "interpretations of state practice". This process, combining two components the practice of the state and "opinio Juris", is carried out after the formation of CIL based on the rules of certain interpretations of CIL. One of the peculiarities of the norms of customary international law consists in the fact that they are heterogeneous, both in the methods of formation and in law enforcement practice. The Vienna Convention on the Law of Treaties (VCLT) is devoted to international agreements "concluded in writing" (paragraph 1 (a) of Article 2 of the VCLT). The norm of customary law is also a treaty but concluded orally. But the VCLT does not apply to international agreements concluded: "not in written form" (Article 3 of the VCLT). Using the rules of Articles 31, 32, 33 of the VCLT to interpret international custom, it should be noted that they are a codification of customary rules of international law, which are binding even for states that for any reason have not ratified it. The preamble to the VCLT states that "the rules of customary international law will continue to govern matters which have not been settled in the provisions of this Convention". This point is the core of many years of discussions among experts in international law. Still, in the context of our study, one speaks not only about the status of customary international law but also about an even more complex issue the interpretive mechanism of the customary international law (CIL).

2. Materials and Methods

The methodology is based on a comprehensive approach to the analysis of the object of study, covering a wide range of philosophical, general scientific, and legal methods. The study's methodological basis was the dialectical method of cognition, which provided a comprehensive study of the integral connection of doctrine with practice.

On a foundation of the system-structural method system, connections in the system of international legal customs were studied and substantiated. The historical method allowed us to trace the evolution of the formation of CIL interpretation rules. The author's conclusions are largely built upon results of a scientific analysis of international courts' significant law enforcement practice, carried out using the empirical method of research. A logical way to construct the research was used to study the evolution of CIL.

Legal research methods were also used in this analysis. The formal-legal method was used to analyze the practice of international justice. The comparative legal method made it possible to compare the elements of a

[1] Correspondence to: Svitlana Karvatska, Yuriy Fedkovych Chernivtsi National University Email: svitlana.karvatska288822@gmail.com

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constructive international legal custom interpretation.

3. Results and discussions

3.1. Nature of international legal custom

In essence, CIL can be considered as a form of an implicit agreement. States are willing to behave in a certain way about each other, guided by this agreement in their future behavior, and recognizing its binding nature. Such a view, based on voluntarist or consensus theories of the nature of international law, according to which the legally binding force of legal norms is based on the joint consent of states, has some theoretical shortcomings. Among them is the uncertainty of why states should harmonize their behavior with existing customary international law, to which they have agreed to be "bound". Although this approach raises many questions, it is still followed by the ICJ.

The approach of the doctrine of natural law considers custom not as a source of law, but only as evidence of existing legal norms. The positivist approach is that CIL, like all law in general, should be seen as a product of the human will that governs its creation. It is an independent procedure of international law-making, which leads to the formation of norms of both generals (obligatory for all states) and particular (valid among a limited number of participants) international law.

However, as M. Hnatovsky (2006 (2), 17–22) notes, clarifying a customary legal nature of norms is not only of doctrinal interest. In considering, for example, a particular case in the ICJ, it may be necessary to determine whether certain rules of multilateral treaties comply with general customary international law (for example, such a need arose during the consideration of the case on *Military and paramilitary proceedings in Nicaragua and against Nicaragua*).

International legal custom can be defined as a legally binding rule of conduct based on states' stable practice. According to O. V. Butkevych (2008, 235), custom as a legal source arose first to regulate international relations. Only later its effect extended to relations <…> regulated not by legal but by moral, ethical, and religious norms.

However, international law has long recognized that the very existence of sustainable practice is not a sufficient condition for the formation of legal norms. This requires the practice to be accompanied by a psychological or subjective element - the belief in its legitimacy and necessity. Such a combination is traditionally called the "theory of two elements", according to which the emergence of CIL requires two components: on the one hand a common, identical, repetitive practice of states, and on the other - this practice must be based on *opinio Juris*, ie. conviction that it complies with international law. Also, "in the event of new international problems that require international legal settlement, customary law may arise based on a single precedent without prior practice" (Lukashuk: 1980, 90).

The definition and scope of CIL have been discussed since the creation of international law. According to the Charter of the ICJ and ICJ`s case law, CIL emerges from the general state practice and opinio Juris. Since then, CIL has been dualistic, interpreted in a system that contains two elements: the first is quantitative, objective, and material, based on how states have acted in the past; the second is qualitative, subjective, and psychological, based on the concept of a legal obligation or the law. Due to the emergence of new members of the international system, a new environment has emerged where there is no clear common understanding of the definition of CIL norms as well as the content of these norms (Banteka, 2018). Therefore, due to the lack of a consistent identification method of CIL that provides legal certainty, the current state of uncertainty of CIL is understandable. And this makes CIL quite vulnerable to criticism because CIL as a legitimate source of international law in today's decentralized world order must reflect a wide range of common values.

3.2. Bivalence of international legal custom as a reflection of its content

The relationship between the two elements, the state practice of CIL and opinion Juris, has many nuances. For example, in the Asylum Case (Colombia v. Peru) (1950), the ICJ resorted to the interpretation of customary international law. The decision, in this case, confirms the importance of the practice of states as a mandatory element of customary law. Colombia, which granted asylum in the territory of its diplomatic mission to Peruvian citizen Víctor Raúl Haya de la Torre, accused of coup d'etat, claimed that it acted by the institution of asylum. The Court noted that it could not accept that the Colombian Government had proved the existence of a custom, in other words, that the used rule of law was consistent with the constant and uniform application in the States concerned (Asylum Case:1950, 266, 274).

In the Fisheries Case (the United Kingdom v. Norway) (1951), the ICJ established that the delimitation of maritime borders by the Norwegian government in 1935 was conducted under international law. The United Kingdom

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insisted that the borders had not been drawn by international law (with the rule that changes should be reflected in maritime borders if the bay is more than 10 km deep). Norway did not deny the existence of such a rule but stressed that its application was unacceptable to it. The ICJ has established that in the absence of unanimous states' practice, this rule cannot be recognized as a customary norm, emphasizing the importance of unanimity of states' practice for the existence of an international customary norm. In the aforementioned cases, the ICJ considered both elements of state practice and *opinio Juris* and confirmed this approach in the case concerning rights of Nationals of the United States in Morocco (France v. the United States of America, 27 August 1952, 176, 189). The ICJ has sometimes interpreted customary rules of interpretation. Still, with the adoption of the VCLT, international courts and tribunals have begun to undertake such interpretive operations more frequently. Customary rules of interpretation are consistently interpreted in international practice. The process of interpretation has some similarities with treaties interpretation. It is not surprising, therefore, that there is no other part of the law of treaties that is approached with greater interest than the question of interpretation. Panos Mercuris (2017, 126) notes that this is interesting because within the law of treaties one interprets: 1) the rules of interpretation, and 2) customary law, the interpretation of which has not been the subject of critical analysis. The author not only proves that the interpretation of customary rules of interpretation is by no means problematic (neither tautological nor impossible). It is also completely different from the process of formation of national law (Merkouris, 2017).

3.3. Paradox of international legal custom as a reflection of its essence

It is also paradoxical that the rules to be interpreted are, in fact, the rules of interpretation themselves, but not only the rules of the VCLT on interpretation but also the rules of customary law. Since the latter ones determine the existence of customary rules, and therefore it must "fight" with "practice" and "opinio Juris", the interpretation of customary rules applies to the rules after their formation. Thus, the interpretation of customary norms is not related to "practice" and "opinio Juris", and therefore customary rules can develop in the same way as treaty rules. Panos Mercuris (2017) argues that customary rules of interpretation are consistently interpreted in international practice, and the process of interpretation is based on mutatis mutandis on the same rules used to interpret the rules of the treaty.

In this context, it would be appropriate to consider the practice, and most importantly, the methodology, by which the ICJ identifies, applies and interprets customary international law. The criteria for identifying a particular custom are quite relative. Thus, in its decision in the Fisheries Case (the United Kingdom v. Norway, 18 December 1951, 116, 131) in 1951, the ICJ identified two concepts that crystallized as customary international law: the concept of a 12-mile fishing zone within which states have exclusive jurisdiction, and the concept of preferential rights of coastal States for fishing in coastal waters. In its interpretation, the Court pointed out that these concepts were formed as a result of the consensus reached in 1960 at the Geneva Conference on the Law of the Sea (the participants in the Conference never reached an agreement on fisheries rights. The court also stated that it was "aware that many States had expanded the boundaries of the fishing zone" (Fisheries Jurisdiction Case (the Federal Republic of Germany v. Iceland, 25 July 1974, 52 -53). However, the Court did not cite examples from practice and did not explain which countries were in question. In 1986, while considering the Nicaragua v. United States of America case (Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. the United States of America), 27 June 1986, 184–188), the Court abandoned the classical criteria for identifying customary international law in terms of its confirmation by the practice of States, supported by opinio Juris, stating that in the present case UN General Assembly resolutions should be considered as opinio Juris. In this case, the Court did not take into account the differences between the practice of some States and the description given in the resolutions. But in 1996, in issuing an Advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court analyzed both the practice of States and UN General Assembly resolutions as opinio Juris evidence. States' practice was negative (nuclear weapons have not been used since the Second World War). In this regard, the Court explained that it was not certain that States had not used nuclear weapons because of their illegality and not because they had chosen a policy of deterrence in the issue of nuclear weapons. The Court, therefore, insisted in its legal position that "the existence of an opinio Juris on the illegality of the use of such weapons is insufficiently substantiated "(Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion. ICJ Reports: 8 July 1996, 71). Thus, in the decision in the Nicaragua v. United States of America case and in the Advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, different interpretive methodologies for establishing *opinio Juris* were applied.

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Before demonstrating that customary rules of interpretation can be interpreted, it is necessary to clarify the main directions of the discourse on the definition and identification of CIL and identify the main errors of previous attempts to determine the status of CIL and its interpretation. The existence of CIL as a formal source of international law has been confirmed by the ICJ, particularly in the case of the North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 20 February 1969, 151-170) and consistently enshrined in international practice by studying two elements - the practice of the state and opinio Juris. This process, which goes from specific cases to the definition of a more general rule, is inductive. But in all cases, practice will not be able to answer whether it is possible to assume that a certain situation falls within the scope of the concept of CIL.

3.4. Customary rules of interpretation as an object of interpretation

As for another formal source of international law treaties, this problem is solved by a deductive interpretation process, which overcomes the distance between the existence of the treaty and its application. If one denies the possibility that CIL is to be interpreted like treaties, one will end up with an absurd result. Because in this case, CIL must be identified each time it is applied. And the international judge must always find appropriate state practice and opinio Juris in every case that may be affected by CIL's rules. This contradicts any notion of rules because both the treaty and the customary norm change, develop over time, have a certain degree of flexibility of content, and adapt to changing social and legal conditions. Besides, if one assumes that CIL cannot be interpreted, this will require a certain degree of specificity for each CIL rule (unwritten rule), which is not typically inherent for treaties (written texts). Such a discrepancy inevitably leads to absurd conclusions, and therefore, an attempt to deny the interpretation of CIL is a false condition (Merkouris, 2017).

To address the aforementioned problems, various scholars have learned in favor of a deductive approach to identifying CIL (Talmon: 2015, 26 (2), 417; Roberts: 2001, 95 (4), 758; & Alvarez-Jiménez: 2011, 60 (3), 686–689), using methods other than references to state practice and *opinio Juris* to determine ways to form a CIL rule. Unlike the inductive requirement, the deductive process begins with general rules, not specific cases from practice. However, these two methods represent two opposite ends of the spectrum (Simma, & Alston:1989, 12, 82, 89). For its part, international law must systematically "cooperate" with the various methodological approaches contained in this spectrum.

Proponents of the "flexible" deductive approach argue for the existence of such an approach as a methodological tool, as the alternative method of identifying CIL contrasts with the classical inductive method of studying the practice of states and opinio Juris. It should be emphasized that the interpretation of CIL in methodological terms is fundamentally different. The problem of interpretation of CIL and identification of the content of CIL rules arose after the actual appearance of CIL in time. The fact that international judges sometimes use the inductive process does not mean that the use of the deductive process of interpretation should be mistakenly considered as a question of methodological choice. CIL rules do not have an "instant life": they produce legal consequences over a long period. This, according to Panos Mercouris (2017), is the difference between the inductive and deductive approaches to CIL. While the inductive process of establishing the existence of state practice and opinio Juris was necessary to determine the existence of the CIL rule, its direct application in various cases reflected the deductive process of interpretation. Thus, inductive and deductive processes were not just methodological interchangeable tools used by necessity and interchangeable but were reflections of different stages of the "life cycle" of the rule. The induction process is inherent in the stage of determining the existence of the rule. In contrast, the deductive process of interpretation is used to determine the content of the rule after it arose. The inductive approach focuses on CIL formation, in particular, the emphasis is on how CIL comes to life. However, when CIL is formed, its further manifestation and application in a particular case will depend on the deductive process of interpretation. Thus, the interpretation focuses on which rule should be applied after the rule has arisen (Merkouris, 2017).

The two-element approach is often called "inductive" as opposed to possible "deductive" approaches, within which the existence of norms can be established not by empirical evidence of general practice and its recognition as a legal norm (*opinio Juris*), but by other methods. However, the two-element approach does not preclude a degree of deduction as an ancillary tool to be used with caution in applying the two-element approach, especially when considering possible customary international law rules that operate against the background of rules with more general wording and reflect general practice, recognized as a legal norm (on Pulp Mills on the Uruguay River (20 April 2010, 14, 55–56, Para 101).

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The two-element approach is used to identify the existence and content of customary international law in all areas of international law. This is confirmed by states' practice and the practice of international judicial bodies and is in tune with the idea of unity and integrity of international law as a single legal system. While in the application of treaties, the interpretation process should always provide a single solution, uniform rules for the interpretation of customary rules are not considered for CIL. Recognizing a single rule as a valid methodological tool for identifying the minimum wage would be equivalent to recognizing that international judges make law (*pouvoir de légiférer*) (*Légiférer traduction légiférer définition légiférer dictionnaire. The Free Dictionary by Farlex*).

3.5. Constructive interpretation as a result of rethinking the modern methodology of international legal custom

Both approaches today need some rethinking, so obviously there is a critical gap in the study of CIL and in understanding how CIL can be applied in some cases after its formation. This gap can only be filled through the CIL interpretation process (Lauterpacht, 1958; Gardiner, 2015; Kolb, 2006; Fitzmaurice, & Elias, 2005).

Similar to treaties, in international jurisprudence, the evidence for CIL interpretation can be found in the two most notable examples - the case of Nicaragua v. the United States of America and the case of the North Sea Continental Shelf. In the first one, the Court noted that the evidence "those which are identical in the law of treaties and customary international law also differ in the methods of interpretation and application", thus clearly recognizing the fact that rules are governing CIL interpretation (although they, due to the nature of CIL will be different from those relating to treaties). This was stated more clearly in the North Sea Continental Shelf case when Judge Tanaka expressed himself in the following way: Customary law, being vague, contains gaps compared to written law, requires precision and refinement of its content. This, in its essence, the interpretive task will be assigned to the Court. The method of logical-teleological interpretation can be applied in the case of customary law, as in the case of the written law (the North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 1969, 151–170). These two examples alone are sufficient to disprove any arguments concerning the impossibility of CIL interpretation. But the practice has other similar examples coming from different international courts and tribunals and relating to different areas of international law. For example, cases *Qatar v. Bahrain, EC-Biotech case (European Communities-Measures Affecting the Approval and Marketing of Biotech Products, (United States of America, Canada, and Argentina v. European Communities); Peru (Certain Agricultural Products) Case (Peru-Additional Duty on Imports of Certain Agricultural Products*).

The case of Nicaragua v. the United States of America is one of the most notable cases in the International Court of Justice case-law. It continues to shed light on several central issues regarding international law, including sources of international law and norms on force use. However, the Court's methodology in resolving the issue of non-interference has recently come under some criticism. Thus, N. Banteka (Tilburg International Institute, Yale Law School) formulates a new methodological approach to identifying CIL-the method of constructive interpretation on the example of the analysis of the decision in Nicaragua v. United States of America case. Constructive interpretation begins with constructing a theory that best substantiates practice through the measurement of legitimacy, while the measurement of suitability defines and describes this practice. Suitability and legitimacy are not two separate points in the interpretation process, but, on the contrary, two related concepts that perform different functions: descriptive and normative. This marks a new systematic, methodological paradigm that justifies the critique of Nicaragua's decision to identify customary international law (Banteka: 2017, 41).

This method includes descriptive accuracy with normative validity and seeks to balance these elements. The author argues that the interpretive approach leads to a better understanding of compliance (state practice) and justification (opinio Juris) and proposes a specific method of coordination in identifying CIL. Reviewing one of the classic cases in the international law of Nicaragua v. the United States, N. Banteka (2018) argues that the Nicaraguan Court raised the question of the existence of a rule of customary international law, namely the rule of non-interference, and accordingly developed two different possible interpretations to answer to this question. First interpretation: there is a norm of customary international law on non-interference; second interpretation: there is a rule of customary international law authorizing foreign intervention. As a result, by engaging in a reflective process of assessing the amount of compliance and justification, the Court has reached a reflective balance as to the existence of a rule of non-interference (Banteka: 2018, 39 (3), 301–341).

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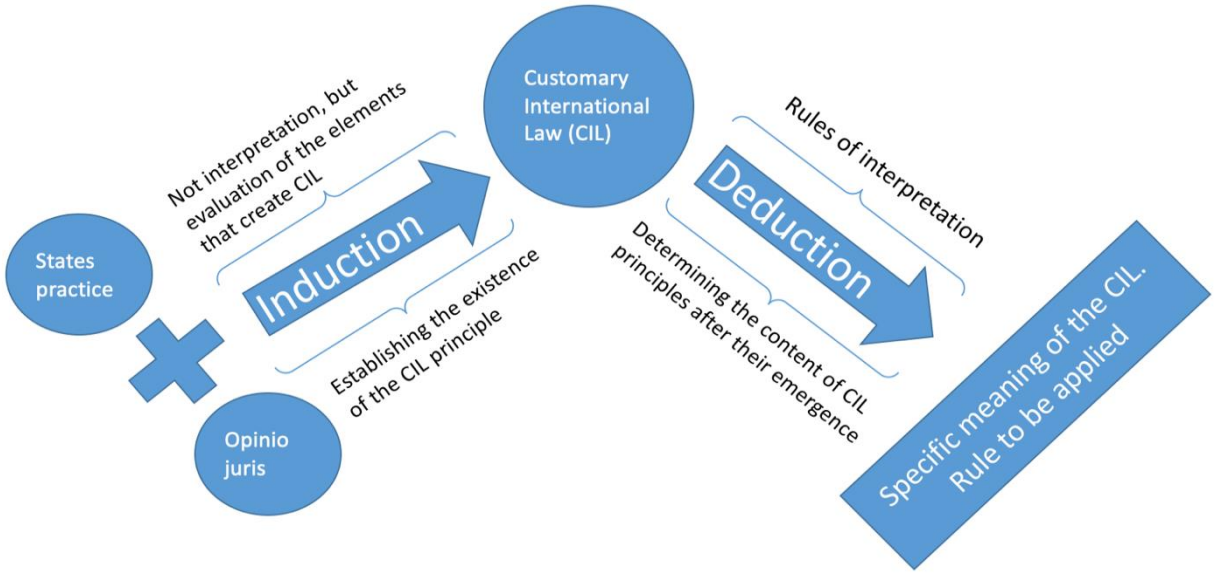
N. Banteka (2018) supposes that due to the Nicaragua case, the ICJ (as the author suggests, unintentionally) avoids the methodological "confrontation" of induction against deduction. That is why the Nicaragua case seems to be an endorsement of the interpretive theory of CIL identification. However, the analysis of the Nicaragua case through constructive interpretation is only one example of the possible application of the interpretive method in science or justice, such as issues of humanitarian intervention, the responsibility to protect, or the use of force.

Thus, it is obvious that the result of constructive interpretation should be the orientation of the goal into practice. Scheme A illustrates peculiarities and the methodology of constructive interpretation. It is obvious that a constructive interpretation successfully combines inductive and deductive methods of interpretation of CIL.



*Author: Svitlana Karvatska

4. Conclusions

It is important to note that a current resurgence of interest in CIL interpretation has its reasonable explanation. The definition and scope of customary international law have always been at the center of professional discussions. In large part, international law constantly transforms and expands, facing new challenges, the main of which is the need to reflect the changing realities of the international system by including new phenomena and actors in the process of maintaining a stable system. Analysis of recent research and international practice shows that the concept of CIL and the correlation between its two elements have changed the transition from state values to human values, as well as from a liberal state system to a welfare state system.

In our opinion, due to the emergence of new participants in the international system, a new environment has emerged where there is no clear common understanding of the definition and content of CIL rules. Therefore, due to the lack of a consistent method of identifying an international custom that provides legal certainty, the current state of its uncertainty is understandable. The latter dictates the requirement of an active search for an effective methodology for interpreting international legal custom.

Often, competing interpretations arise about the same practice; in that case, the interpretation that offers more tools for practice will be more effective, with other things being equal. Where deductive methodology seeks a connection between principle and law, inductive methodology seeks social facts that establish a common practice. Constructive interpretation argues that legal judgments are correct if they provide a better interpretation of community practice. The result of constructive interpretation should be the orientation of the goal into practice.

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