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Customary International Law: Interpretation from Beginning to End

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Abstract

Does interpretation have a role to play with respect to customary international law? Common wisdom suggests that, because customary legal norms are unwritten, they need not be interpreted prior to their application. Instead, it is assumed that once one has identified such a norm, one also knows its content. This approach glosses over a series of critical questions: what interpretative choices are made when describing the practice leading to the formation of legal norm in a certain way as opposed to another? What choices are made when interpreting a given practice so as to infer norms of a general import? And what leeway is then left for interpreting norms already identified so as to clarify their meaning? Tackling these questions, this article argues that interpretation in fact can play a role at every stage in the life of custom. As such, interpretation calls us to rethink our operating assumptions about this fundamental source of international law by putting front and centre two neglected theoretical problems: custom's inherent plasticity and the difficulty of clearly individuating its legal rules.

1 Introduction: Neither Art nor Science? The Neglected Question of Interpretation in Theorizing Customary International Law

International lawyers seldom think of customary law and interpretation under the same heading. Even as both custom and interpretation form classic topics of international legal scholarship, major studies of interpretation with respect to custom are

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very few and far between. Instead, the dominant approach has largely reduced the analysis of customary international law to its identification through the collection of appropriate evidence. In this article, I argue that the discipline's neglect to engage with interpretation regarding custom is misplaced. It leaves outside our radar the interpretative choices that are made before and after the identification of customary legal norms has taken place. Ultimately, this article suggests, incorporating the concept of interpretation in our theories of customary law raises some difficult questions, but it can also yield a more convincing theoretical model about it than those currently on offer.

At first glance, the discipline's inattention to the role of interpretation with respect to customary law may seem puzzling. After all, international lawyers often face what would otherwise seem to qualify as questions of interpretation regarding custom. For example, when asking whether international organizations, such as the World Bank or the International Monetary Fund, are bound by the same human rights as states, we are not asking, or at least not asking only, whether a separate rule of customary international law has evolved with respect to these organizations by bringing new practice and *opinio juris* to our pool of evidence. Rather, we are inquiring whether existing legal standards regarding human rights can be interpreted in such a way as to engulf not only states but also international organizations. Likewise, when we inquire whether the laws of armed conflict extend to cyberspace operations or whether heads of state such as Omar Al-Bashir enjoy immunity before international courts, we are not necessarily looking for new rules; rather, we are also asking whether (and when) we can extend the application of existing rules to seemingly new factual circumstances.

How can it be that seemingly typical questions of interpretation are ubiquitous in practice, and, yet, interpretation with respect to custom has received as such almost no sustained theoretical attention? The reason appears to be at its base conceptual. In contrast to the adage that the interpretation of treaties is more art than science, the interpretation of customary international law has mostly been treated as neither art nor science but, instead, as a misnomer.[1] Epitomizing this stance, a prominent encyclopaedia's entry on customary international law claims that 'the irrelevance of linguistic expression excludes interpretation as a necessary operation in order to apply [customary rules]'.[2]

Largely ignoring the notion of interpretation, doctrinal analyses of custom have been confined mostly to the classic two-element approach with respect to its formation and identification – the focus of the seminal International Law Commission's and

[1] See, e.g., M. Bos, *A Methodology of International Law* (1984), at 109; Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication', 2(1) *Journal of International Dispute Settlement* (2011) 31, at 36; see also Bernhardt, 'Interpretation in International Law', in R. Bernhardt and R.L. Bindschedler (eds), *Encyclopedia of Public International Law* (1984), vol. 7, 318, at 319.

[2] T. Treves, 'Customary International Law', in *Max Planck Encyclopedia of International Law* (*MPEIL*), November 2006, para. 2, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?prd=EPIL.

International Law Association's studies[3] – looking for an element of practice plus a belief that this practice is required by law. This virtually exclusive scholarly focus on formation and identification has left unattended other avenues of theoretical inquiry with respect to custom. In practice, the determination of the content of customary rules is mostly collapsed to their identification, and the latter is largely reduced to the collection and evaluation of the appropriate evidence of state practice and *opinio juris*.

This article calls the received wisdom of this dominant approach into question. It argues that the assumed non-interpretability of custom rests on an unnecessarily stringent and philosophically outdated view of interpretation. As legal theorists and philosophers have long recognized, interpretation – that is, the exercise of ascribing meaning to something – can be applied not just to words and text but also to social practices and unwritten rules.[4] Employing insights from the philosophy of science, analytical jurisprudence and the theory of concepts, this article examines the role of interpretation at every juncture of the life of custom, from identification to application.

Once we let go of the notion that all there is to custom is its identification through the collection and evaluation of sufficient evidence, a richer analytical picture of that source emerges. This picture is dominated by the possibility of interpretative choices at every juncture of custom's life: when describing the building materials of practice and *opinio juris,* when interpreting them so as to establish what legal norms they put forward and when interpreting the norms that were identified at the previous stage before applying them.[5] In turn, acknowledging the pervasive role of interpretation in the life of custom can help us grasp a set of hitherto downplayed challenges to our operating theories of that source: the challenge of plasticity and the challenge of individuation.

Plasticity refers to the notion that customary law can be moulded into different shapes via interpretation throughout its life. As a result, legal analysis may

[3] International Law Commission (ILC), Identification of Customary International Law: Text of the draft conclusions as adopted by the Drafting Committee on Second Reading, UN Doc. A/CN.4/L.908, 17 May 2018; International Law Association (ILA), Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law, Report of the 69th Conference (2000), at 712–718. Commenting on theoretical underpinnings as well as the persuasiveness of the two-element approach in ascertaining the existence of rules of customary international law is beyond the purview of this article. For a useful categorization of existing approaches in that regard, see Blutman, 'Conceptual Confusion and Methodological Deficiencies: Some Ways That Theories on Customary International Law Fail', 25 *European Journal of International Law* (*EJIL*) (2014) 529, at 530–531. For an analysis on the history of the two-element approach claiming that, despite appearances, the ILC has come full circle back to a more 'monolithic' approach whereby the two elements can be identified through the same act, see d'Aspremont, 'The Four Lives of Customary International Law', 21 *International Community Law Review* (2019) 229.

[4] See, e.g., P. Lamarque, *Work and Object: Explorations in the Metaphysics of Art* (2010), at 154; J. Raz, *Between Authority and Interpretation* (2009), at 245.

[5] This article remains agnostic as to whether interpretation at these stages is subject to any formal rules of interpretation, even as it takes off the premise that legal reasoning and rules of logic do have a role to play in any interpretative process. Instead, this article is more interested in highlighting that such interpretative choices can be, and often are, made and in investigating what this means for our understanding of customary law.

theoretically yield rules of different *ratione materiae* and *ratione personae* scope while using the exact same evidence. This makes it analytically possible to construct, and potentially reconstruct, a putative rule without adding even an iota of new practice and *opinio juris* to our pool of evidence.

Although seldom flagged as such, the theoretical ambiguity around this plasticity underpins key debates in international law. For example, one can understand in these terms the protracted disagreement over the extent to which international organizations are bound by customary international law;[6] if – and this is a big if – it can be convincingly shown that such organizations qualify as 'states' for the purposes of applying customary international law, then there is no need to argue for the existence of separate rules of custom governing specifically international organizations, and, consequently, there is no need to look for separate practice in that regard. Building upon examples such as this one, this article shows how interpretative moves that establish the level of abstraction at which rules of custom are pitched are just as important as arguing about the presence or absence of the requisite evidence to support a putative rule. All in all, plasticity serves to show that the process of content determination cannot be simply reduced to the collection and evaluation of practice and *opinio juris*.

The problem of individuation points to the other side of the coin: given custom's plasticity, how are we to know which rules are the right candidates for the identification and application of customary law in a given instance? Although seldom couched in these terms, the problem of individuation lies behind many topical questions with respect to custom. The recent *Chagos* advisory opinion, for example, largely revolved around whether the principle of territorial integrity of non-self-governing territories needed to be identified as a separate norm of customary law or whether it could be derived from the right of self-determination.[7] Similarly, the much-discussed *Al-Bashir* case turned, in part, on whether head-of-state immunity before international courts needed to be identified as a separate rule or whether invoking the existing rule of head-of-state immunity would suffice.[8] In sum, the problem of individuation calls international lawyers to investigate the ways in which the boundaries upon which the identification of separate rules is to proceed are drawn.

In the end, factoring interpretation into our theories of custom makes all the more apparent the inherent difficulties of our prevailing analytical models of custom. Ultimately, however, this article argues that interpretation poses less of a challenge to

[6] Of course, it is not disputed that, as a matter of principle, customary international law applies to international organizations. See *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73, at 89–90: 'International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law'. Note that this often-quoted passage does not by itself answer the question as to which obligations under customary international law are indeed 'incumbent upon' these institutions.

[7] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports (2019) 1, at 38.

[8] Judgment, *Jordan Referral re Al-Bashir Case* (ICC-02/05-01/09 OA2), Appeals Chamber, 6 May 2019, paras 1–2, paras 114–117.

the concept of customary international law and more of one to international lawyers to reimagine their working theories about it.

This article is divided into five parts. After a short review of existing approaches to the problem of interpretation and custom, Part 2 develops a theoretical framework for showing how interpretation is relevant to the identification and application of customary law. Part 3 brings the plasticity of customary international law into focus, applying the theoretical framework of the previous part to international legal arguments relating to three topical areas: the application of human rights obligations to non-state actors, humanitarian intervention and *uti possidetis juris*. Part 4 reorients the discussion, drawing inspiration from the discourse on the individuation of laws in legal theory. It suggests that customary international law cannot be easily individuated in the same manner as other legal materials that international lawyers are used to employing. It then discusses under this light some problems that our current theoretical models about custom might create in practice. Part 5 concludes.

2 Identification and Application of Customary International Law: Interpretation All over the Place

A *Current Approaches to Custom and Interpretation*

There is little new in saying that interpretation is omnipresent in international legal discourse. Still, even as international lawyers are increasingly coming to grips with the notion of interpretation at a general theoretical level, much less attention has been paid to the role of interpretation with respect to customary international law.[9] Quite tellingly, a recent 400-page edited volume on interpretation in international law mentions the interpretation of custom only in its concluding chapter and even then only briefly.[10] Curiously, while claiming that 'interpretation permeates all of legal life',[11] or, indeed, that it is 'ubiquitous'[12] in whatever international lawyers do, is not breaking new ground, arguing that interpretation permeates the life of customary law remains a surprisingly underexplored notion.

What is interpretation? At its core, interpretation can be understood as an answer to the question 'what do you make of this?', as well as the process of coming up with such an answer.[13] As per this basic account, interpretation consists in ascribing

[9] See, e.g., A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (2015); I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012); R. Kolb, *Interprétation et Création du Droit International: Esquisses d' une Herméneutique Juridique Moderne pour le Droit International Public* (2006).

[10] Allot, 'Interpretation: An Exact Art', in Bianchi, Peat, and Windsor, *supra* note 9, 373, at 385.

[11] Hernandez, 'Interpretation', in J. Kammerhofer and J. d'Aspremont, *International Legal Positivism in a Postmodern World* (2014) 317, at 348.

[12] D'Aspremont, 'The Multidimensional Process of Interpretation', in Bianchi, Peat, and Windsor, *supra* note 9, 111, at 113–114: '[I]nterpretation is a ubiquitous phenomenon, with all practices and discourses about international law having an interpretive dimension' (footnotes omitted).

[13] Endicott, 'Putting Interpretation in its Place', 13 *Law and Philosophy* (1994) 451, at 451.

meaning.[14] Of course, meaning has to be attached to something. Yet, the object of interpretation need not be necessarily in written form, as agreements and statutes usually are. As Joseph Raz explains, 'interpretation is the elucidation of meaning, and what has meaning which is not trivially obvious can be interpreted'.[15] Accordingly, the activity of interpretation can encompass not only legislation but also other forms of social behaviour, including practices and customs.[16] Interpretation in the present article will be employed in this common notion – namely, as the ascription or elucidation of meaning.[17]

Only a handful of contributions have dealt explicitly with the possibility of interpretation with respect to customary international law from an analytical perspective.[18] This includes studies by Alexander Orakhelashvili and Panos Merkouris in English as well

[14] See A. Marmor, *Interpretation and Legal Theory* (2nd edn, 2005), at 25: '[I]nterpretation is the imposition of meaning on an object' and 'interpretation can be defined as an understanding or explanation of the meaning of an object' (at 9); Lamarque, *supra* note 4, at 154: '[T]o interpret something is to make sense of it'; Raz, *supra* note 4, at 241: '[I]nterpretation is a display or an explanation of the meaning of an original' and 'Interpretation is the elucidation of a meaning' (at 250). What exactly it means to ascribe meaning to something is, as one would expect, an area of intense philosophical investigation. See, e.g., Marmor, *ibid.*, at 21–27.

[15] Raz, *supra* note 4, at 250. Notice the 'can' part of Raz's wording. The fact that everything can be interpreted does not mean that everything is actually interpreted all of the time, as opposed to being simply understood. See also Lamarque, *supra* note 4, at 155.

[16] Raz, *supra* note 4, at 245; see also F. Schauer, *Playing by the Rules* (1993), at 209–210; Edicott, *supra* note 13, at 456–457; see also Marmor who in the second edition of his classic work accepted that forms of behaviour and social practices are capable of bearing meaning and therefore could be seen as distinct objects of interpretation. Marmor, *supra* note 14, at 9.

[17] The rather broad notion of interpretation employed here entails the claim that legal interpretation is not synonymous with uncovering the intentions of the authors of a communicative act, as some legal theorists have suggested. According to this narrower view of interpretation, working out the requirements of abstract legal provisions, including determining their scope, can be best seen as engaging in legal reasoning as opposed to interpretation. In this vein, for example, Timothy Endicott suggests that the European Court of Human Rights in its famous *Banković* decision erred in approaching the question of what jurisdiction meant under Article 1 of the European Convention on Human Rights as a question of interpretation. ECtHR, *Banković and Others v Belgium*, 55207/99, Grand Chamber, Decision of 12 December 2001, paras 54-82. Decision available at http://hudoc.echr.coe.int/. According to him, '[n]o interpretation – that is, no explanatory account of what the states had done by subscribing to the convention – can answer the question of what the jurisdiction is'. Endicott, 'Legal Interpretation', in A. Marmor (ed.), *The Routledge Companion to Philosophy of Law* (2012) 109, at 113. This is admittedly a narrow conception of interpretation. Even though some types of legal reasoning may be thought as not being strictly interpretative – the application of maxims such as *lex posterior* may come to mind – interpretation itself often involves legal reasoning. Therefore, siding with Raz's view that the object of interpretation is not always to uncover authorial intent (see Raz, *supra* note 4, at 245), this article proceeds on the basis of a broader notion of interpretation. For Endicott's narrower view of interpretation, see Endicott, *ibid.*, at 113. In any event, regardless of where, or whether, one draws a distinction between legal reasoning and interpretation, the basic point of this article – namely, that determining the content of customary law cannot be reduced to its identification through the collection of evidence – remains unaffected.

[18] For the different notion that interpretation plays a crucial role when applying the doctrine of sources of international law, answering questions such as what types of action count as practice, see Hollis, 'The Existential Function of Interpretation in International Law' in Bianchi, Peat, and Windsor, *supra* note 9, 78, at 79; see also d'Aspremont, *supra* note 12, at 117–118. D'Aspremont explicitly excludes facts having a law-ascertaining value in the process of identifying customary international law from his notion of interpretation.

as by Denis Alland in French.[19] These works make the important point that customary international law can be interpreted and that content determination of customary international law extends into the realm of interpretation once the existence of a norm has been established. Nevertheless, these studies offer little discussion of the different interpretative stages that are inherent in any analysis of custom: interpretation before application has received little sustained theoretical treatment, and the interpretation of state practice, in particular, has received almost no attention in itself.[20] Moreover, even those authors who accept that interpretation has a role to play in the legal analysis of custom tend to recognize such a role only once the rules have been clearly identified, but not at any point before that.[21] By contrast, this article argues that interpretation pervades all stages of the life of customary law.[22] On that basis, it then examines how interpretation may inform our overarching theoretical understanding of that source of law and help look at existing puzzles from practice under a better light.

B *Identification and Application of Customary International Law in Three Stages of Interpretation*

1 Interpretation in Deriving Norms from a Given Practice

A basic example can set the stage for illuminating the role that interpretation plays in the identification and application of custom. Say a man opens the door for a woman,

[19] A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008), at 496–510; P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (2015), at 231–263; Merkouris, 'Interpreting the Customary Rules on Interpretation', 19 *International Community Law Review* (2017) 126; D. Alland, *L'emprise de l'interprétation sur le droit international*, Collected Courses of the Hague Academy of International Law (2012), at 74–88.

[20] For a brief but clear account of the difficulties arising from the interpretation of state practice in international law, see Blutman, *supra* note 3, at 543–544. On some of the problems that the interpretation of acts and rule statements poses for customary law in general, see J.B. Murphy, *The Philosophy of Customary Law* (2014), at 59–87; Postema, 'Custom, Normative Practice, and the Law', 62 *Duke Law Journal* (2012) 707; Schauer, 'Pitfalls in the Interpretation of Customary Law', in A. Perreau-Saussine and J.B. Murphy (eds), *The Nature of Customary Law* (2007) 13; see also ILC, *supra* note 3, at 126–128, paras 3–5, Commentary to Conclusion 3 (referring to the 'assessment' of evidence).

[21] Merkouris, 'Interpreting', *supra* note 19, at 138–139.

[22] This theoretical inquiry should be distinguished from the debate between the so-called 'inductive' and 'deductive' approaches to the identification of customary international law. For the latter, see Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', 16 *Oxford Journal of Legal Studies* (1996) 85; Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *American Journal of International Law* (*AJIL*) (2001) 757. The induction versus deduction debate is usually couched in terms of the identification of custom, whereas the concern here is also with the application of custom as well as with the analytical separation between the role that interpretation plays in each of those stages. In addition, this article is more concerned with the construction of generalities in legal reasoning about customary norms as such rather than with the question of whether these generalities lie at the beginning or at the end of the analytical syllogism. As far as the analytical stakes of the induction versus deduction debate are concerned, this article follows William Worster who has argued that in fact both 'deduction' and 'induction' are omnipresent throughout the stages of customary international law identification. Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches', 45 *Georgetown Journal of International Law* (2014) 445; see also ILC, *supra* note 3, at 126, para. 5, Commentary to Conclusion 2.

what possible rules may we formulate from observing this instance of conduct?[23] Even what initially seems like a straightforward set of factual circumstances gives rise to an indefinite number of formulations of logical propositions describing the norm that we might infer from such conduct. Think of the following possibilities: 'one should always assist others who may benefit from such assistance'; '*a man* should always assist *women who* may benefit from such assistance'; '*one* should open the door for others'; '*a man* should open the door for *others*/*women*' and so on and so forth. In other words, the same set of data can support an almost indefinite series of statements about what is the content of a norm, leading to the obvious problem of which statement (if any) should be thought as the correct one.

The problem cannot be resolved by resorting to the individual attitudes of the participants or their *opinio juris*, to use the language of customary law.[24] To begin with, it is seldom clear on the basis of which maxim exactly someone may engage in a certain practice. In fact, it may not even be precisely defined in the mind of the person herself, even as her practice may be dictated from a sense of social or legal obligation. Even more important, interpreting practice for the purposes of identifying a norm of customary international law cannot be reduced to figuring out the precise mental states of the actors involved, even if that was somehow possible. As Ronald Dworkin has observed, participants in a common practice may have, and often do have, different views about the exact rules animating their practice, but they still engage with it out of a sense of social or legal obligation. Yet disagreements can arise between them regarding these rules, and, where there is such a dispute, the rules in their minds do indeed diverge. If we were to accept that the minds of the participants had to converge on the same rule exactly, that would lead us to the absurd conclusion that wherever there is a disagreement there is no rule to begin with.[25] Therefore, while we can uncover the meaning of practice only from within the practice – the so-called internal point of view – the meaning of the practice cannot be reduced to the representational mental states of the individuals concerned.[26]

2 Interpretation in Describing Practice

As we just saw, interpretation plays a necessary analytical role in deriving a putative norm of conduct from a given practice. But how did we arrive at the conclusion that a certain practice is 'given' in the first place? It seems that, even at the level of trying to derive a norm of conduct from practice, we are already at the second stage of interpretation, having previously described a practice from which this norm can be derived. In

[23] For a brief discussion of similar examples in the context of Jeremy Bentham's critique of common law, see Murphy, *supra* note 20, at 83.

[24] Postema, *supra* note 20, at 716.

[25] R. Dworkin, *Taking Rights Seriously* (2nd edn, 1997), at 46–80. In addition, propositional maxims according to which someone acts may also be open to interpretation; see also Postema, *supra* note 20, at 715–718.

[26] Postema, *supra* note 20, at 716.

other words, we can distinguish the various ways in which a set of data may be interpreted as producing norm X or Y from the ways in which a set of observations may produce a set of data by inclusion of some and the exclusion of others.

The description of the data itself is based on our capacity for what John Searle refers to as perceptual interpretation: the ability to see things as certain sorts of things.[27] In turn, perceptual interpretation is possible owing to our use of concepts. As Herman Koningsveld suggests, concepts themselves are a method of observation; they enable us to observe the world in a certain directed way or from a certain point of view.[28] Concepts structure the world as it appears to us at a fundamental level through domain classifiers and notions of what is relevant and what is irrelevant.[29] At the same time, in structuring the world, concepts also abstract from it; by creating the classifications that make the world intelligible to us, concepts also assume a non-local meaning. This meaning endows concepts with a transcendent function, as it permits them to be applied not just to observational processes already realized but also to new ones.[30] Thus, seeing a man opening the door for a woman is premised on applying concepts such as 'man', 'woman' and 'door' so as to correspond to elements of the underlying physical reality. Ultimately, this reality cannot speak for itself. It becomes intellectually accessible to us only through our concepts and theories of it. Observation is then itself theory-laden, to employ a familiar notion from the philosophy of science.[31]

The implication for the purposes of our discussion is not only that 'given' descriptions of practices are not inherent in the physical reality that they purport to be observing but also that there is actually an essentially infinite number of ways to describe the same occurrence of physical acts. Think of some simple ones with respect to our previous example: 'George opened the door for Mary'; 'George opened a door and stood still; a few seconds later Mary passed through the door'; 'a man opened a door for a woman in Latin America'; 'a man opened the door for a woman in Latin America. It was a Tuesday and it was the 13th of December 1960' and, finally, 'one human being opened the door for another human being'. In epistemological terms, the relationship

[27] J. Searle, *The Construction of Social Reality* (1995), at 133–134. As Searle clarifies, perceptual interpretation normally does not involve any conscious act of interpretation. See also H. Radder, *The World Observed/The World Conceived* (2006), who talks of 'conceptual' interpretation.

[28] H. Koningsveld, *Empirical Laws, Regularity and Necessity* (1973), at 11.

[29] Radder, *supra* note 27, at 93.

[30] *Ibid.*, at 104.

[31] For a brief discussion of theory-laden observation in the field of customary law, see Schauer, *supra* note 20, at 21. This stage should be distinguished from what some international lawyers, inspired by the work of Ronald Dworkin, have identified as the pre-interpretative stage. In most analyses, this involves identifying what types of materials count as an instance of practice for the purposes of then identifying a rule of international custom. In that sense, the idea of pre-interpretation seeks to clarify which types of factual patterns we should take into account (for example, state practice as opposed to the practice of non-state actors). Although the nature of this inquiry is different, it should be noted that, even at this stage, a commitment to a description of the world is involved since at the end of the day one sees state officials instead of just human beings. See also Roberts, *supra* note 22, at 757, 774; Banteka, 'A Theory of Constructive Interpretation for Customary International Law Identification', 39 *Melbourne Journal of International Law* (2018) 301, at 316; Hollis, *supra* note 18, at 90–95.

between the data and their interpretation is one of underdetermination: for any theory describing the data in a certain way, there is at least one rival theory that can be supported by the given evidence and that can be logically maintained.[32]

For the purposes of international law, we could classify describing practice and inferring a norm from it as interpreting state practice *lato* and *stricto sensu*. Crucially, this is a different exercise from the classic problems underpinning theoretical debates on customary law identification – namely, the question of who can contribute to the formation of custom, what forms may practice and *opinio juris* take, what types of materials can be consulted for their identification, what threshold of generality that practice must meet and so on and so forth.[33] These are all important inquiries, but none of them can dispense with the need to (i) describe the material that is collected at some level of abstraction and (ii) infer norms of conduct from this description.[34] Accordingly, these two stages should be understood as involving more than the mere collection and evaluation of evidence and extend to their interpretation.[35] In sum, there are multiple ways to describe what is going on in the world, and there are multiple norms that can be inferred from a different description.

3 Interpreting Customary Norms Already Identified

Crucially, however, there are also multiple ways to interpret a norm inferred from a given description.[36] The need for such interpretation results from the presence

[32] This relationship is known as contrastive underdetermination as it calls into question the ability of the evidence to buttress any theory against other alternatives. See Stanford, 'Underdetermination of Scientific History', in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2017), available at https://plato.stanford.edu/archives/win2017/entries/scientific-underdetermination/.

[33] On these, see generally ILC, *supra* note 3.

[34] Note that both processes take place regardless of whether one adopts a so-called inductive or deductive approach to custom identification. Even if one begins with a general statement of the law in mind, they still have to interpret existing practice so as to determine whether it conforms to that pre-conceived idea.

[35] In that sense, the inquiry here can be understood more in terms of the ILC's requirement that the practice must be assessed bearing in mind the 'overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found'. ILC, *supra* note 3, at 126–129, Conclusion 1 and Commentary thereto; see also ILA, *supra* note 3, at 36–37, entertaining the notion that state conduct may be ambiguous and, thus, one might add, in need of some interpretation. *Cf.* Merkouris, who has argued that the aforementioned stages do not really entail interpretation but merely 'evaluation' of state practice, and that this process should be sharply distinguished from the interpretation of already formed rules of customary international law. This seems right insofar as it claims that interpretation at these stages (what he calls 'evaluation' of state practice) needs to be viewed as an analytically distinct stage from that of interpreting already existing rules. However, as has been shown, interpretation is already omnipresent at the stage of identifying a rule, and it consists in much more than simply collecting the relevant materials (for example diplomatic exchanges, voting records, juridical decisions etc.) and examining their gravity. See Merkouris, *Article 31(3)(c) VCLT*, *supra* note 19, at 231–263; Merkouris, 'Interpreting', *supra* note 19, at 138–139.

[36] There may be some theoretical ambiguity over what exactly is interpreted at this stage. Is it the norm that we have identified or the statement of the norm that we have formulated? Even though in practice the difference may be barely noticeable, the better view seems to be that, when applying customary international law, it is the norm – itself an organic part of customary international law – that is interpreted and not merely the statement that purports to reflect it. The latter, as will be analyzed below, is better

in the purported norm of the same concepts that made its intellectual construction possible by separating the relevant from the irrelevant. As we just saw, the abstraction that comes with our structuring of the world through the use of concepts entails an element of vagueness. This vagueness permits concepts to transcend the set of circumstances from which one has come to learn them, making them applicable to fresh situations. Still, this application is not automatic; it implicates 'our competency as learned participants in the practice, which involves a shared sense of what is relevant and what counts as similar'.[37] This interpretation will therefore involve the reasoned extension, or not, of classification schemes and, thus, the determination of the exact scope of rules that are to be applied.[38] For the purposes of international law, this third stage comprises an interpretation of customary law as opposed to the interpretation of state practice (*lato* and *stricto sensu*).

4 Distinguishing between the Interpretation of Practice and the Interpretation of Norms of Customary Law

While, in practice, it may be hard to distinguish between identifying the existence of a customary legal norm and determining its exact meaning, it would be false to assume that a complete identification will leave no grey areas to be interpreted as a matter of analytical necessity.[39] This might be easier to grasp on the basis of a minor thought experiment that lets go of the empirical circumstances that normally surround custom identification and content determination. Envisage a division of labour whereby the task of deriving norms from a practice and the task of applying them are allocated to two different persons located in two separate

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conceptualized as an epistemic approximation of the legal norm rather than as a valid legal rule or self-standing 'law' (see subpart 4.B). On a more general note, there are indeed some legal theorists who claim that interpretation always refers solely to the medium through which the norm is conveyed and never to the norm itself, meaning that in this case we would be interpreting the formulation of the norm rather than the norm itself. See, e.g., Endicott, *supra* note 13, at 478. Nevertheless, the view that norms as abstract entities can themselves be interpreted when their meaning needs to be specified with respect to a given situation seems convincing. For an eloquent defence of this position, see Brunet, 'Aspects théoriques et philosophiques de l'interprétation normative', 115 *Revue Générale de Droit International Public* (2011) 311. However, even if one accepts that all that we ever interpret is the rendition of a rule in language and not the norms that this rule reflects, this does not offer a category distinction between customary international law and other types of law. 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.

[37] Carlos, 'Why Is Legal Reasoning Defeasible?', in A. Soeteman (ed.), *Pluralism and the Law* (2001) 327, at 345.

[38] For the notion that legal interpretation includes the inquiry of whether certain objects fall within the scope of a rule, see Brunet, *supra* note 36, at 319: 'Et c'est au cours de cette application qu'on éprouvera le besoin de "clarifier" son sens. Ce faisant, on cherchera à identifier son extension ou son intension à partir de l'extension ou de l'intension des termes qui le constituent, bref, en s'interrogeant sur les objets susceptibles de relever de son champ d'application et sur les caractéristiques communes à ces objets.'

[39] See, e.g., Mendelson, 'The Formation of Customary International Law', 272 *Recueil des Cours* (1998) 159, at 174–175; Bos, *supra* note 1, at 109.

and sealed off chambers. Imagine that the second person is given the interpretative results produced by the first person and then called to apply them in a specific case but that no other communication is allowed between them. Imagine now that the person in the second room is given a properly identified norm to the effect that 'a man should always open the door for a woman' and then asked to determine whether a boy named John should open the door for Mary. Notice how at this stage, by definition of our thought experiment, the second person cannot add or remove qualifications from the rule nor move to higher levels of abstraction: she is confined to making sense of what has been handed to her. In other words, she is called upon to interpret whether and when the personal scope of the rule should include boys or not. Crucially then, there is nothing precluding her from reaching a conclusion on this question just by virtue of her not partaking in the process of identifying the norm. Thus, even though, in practice, these two exercises will often be performed by the same person and thus be barely distinguishable from each other, content determination with respect to custom cannot be reduced to norm identification.

The fact that these stages are distinguishable in principle can have practical consequences. For example, we may not have precedent data about a specific category of persons – think, for example, of ways in which people may vary based on age, sex and so on – at the stage of data gathering, and we may still infer a legal norm that also covers them at the stage of deriving a norm from the data or even find that such persons are governed by an existing norm at the stage of interpretative application. In conclusion, the third stage is properly conceptualized as interpretation in the application of customary international law with respect to a specific set of factual circumstances, a process that is distinct from identification.[40] Interpretation not only provides a shortcut to content determination but also forms a fundamental component of it. The complete three-stage analysis can be summarized in Figure 1.[41]

[40] For the notion that every application of a rule entails its interpretation, see F. Schauer, *Playing by the Rules* (1993), at 207.

[41] Breaking up interpretation in three stages echoes the way in which Ronald Dworkin analysed interpretation in a pre-interpretative, an interpretative and a post-interpretative stage, but differs from it in two important ways. First, for the purposes of the present analysis, what would be Dworkin's first stage does not entail only selecting the instances of practice that are to be interpreted but also describing them. Thus, Dworkin's pre-interpretative stage would consist in choosing what types of materials one should consult, whereas the first stage here amounts to interpreting what the materials actually say. Second, Dworkin's third stage of post-interpretation consists in the interpreter 'adjusting the sense of what the practice "really requires" so as better to serve the justification he accepts at the interpretative stage' and not in interpreting an already existing and identified rule of law. See R. Dworkin, *Law's Empire* (1998), at 65–66. These asymmetries between the two accounts only show the different ambit of the project pursued in Dworkin's *Law's Empire* and the set of problems discussed here, but the distinction is worth clarifying given that international lawyers frequently draw upon Dworkin's work when discussing theories of customary international law.

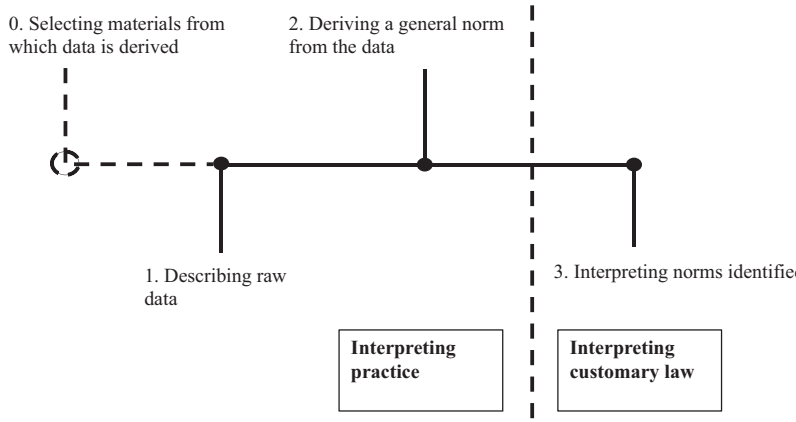

Figure 1: *Three stages of interpretation*

3 A Feature, Not a Bug: The Plasticity of Customary International Law

A *Plasticity in the Theory of Custom*

The previous part illuminated the interpretative checkpoints that are inherent in the process of identifying and applying customary international law. Doing so, it has challenged two rough assumptions of the discipline regarding that source of law. The first is that the analysis of custom can be essentially reduced to its identification. The second is that, practically, all there is to identification is piecing together the right materials, perhaps also inquiring what are the 'right' materials that may be consulted and what counts as sufficient evidence. Letting go of these two rough assumptions helps construct a more comprehensive analytical picture of custom and obtain a better grasp of some problems that lie at the foundations of our current theories about it.

The key idea that I will be employing in constructing such a picture is plasticity. Quite literally, plasticity signifies the ability to be easily moulded.[42] For the purposes of our discussion, the notion will refer to the quality of custom to be moulded into different shapes and lead to rules of different scope, without the need to add new state practice and *opinio juris* to our pool of evidence each time. Custom owes this feature to the fact that it is open to interpretation throughout data description, norm extraction and norm application. At the stage of describing the available data, plasticity can be understood as the openness of a description both to picking up qualifying factors (George opened a door *in Latin America*, George opened a door *on a Tuesday*) as well as moving between levels of abstraction within a set of qualifying factors (*George* opened a door, *a man* opened a door, *a human* opened a door and so on).[43] At the stage of extracting norms from given descriptions and of interpreting these norms in the

[42] *Oxford English Dictionary*, available at www.oed.com.

[43] It should be noted that this process is distinct from inductive reasoning as a logic of evidentiary support. Legal reasoning in the identification, interpretation and application of customary law is about what ought to be done, not about predicting what is likely to be the case. An inductive line of reasoning in the

application of custom, plasticity also entails moving between levels of abstraction as well as, potentially, dropping qualifying factors. Thus, at this stage, it is theoretically possible to infer from the data that 'George opened a door for another person in Latin America' and that 'John opened a door for another person in Antarctica' that people in general should open the door for others.

International legal theory poses little, if any, *a priori* limits to the shape that legal norms of customary international law may take. One might be hard-pressed to find any preset rules for which qualifying factors are relevant and which are not or for what is the definite level of abstraction at which international legal norms need to be formulated. This is true regarding both the personal and the material scope of such norms. To begin with, customary international law generally refers to states but not exclusively so. As is also well known, customary international law may in principle refer to other actors, ranging from individuals to intergovernmental organizations. In addition, international law in theory admits particular, geographically defined, or not, as well as universal varieties of custom.[44] Customary international law also operates at varying levels of abstraction with respect to its material scope, admitting in theory rules as specific as those that would result in the prohibition of a specific type of weapon or as abstract as the principle of prevention.[45] International legal theory also apparently accommodates rules of custom anchored to a specific historical context, such as decolonization.[46] All in all, there seem to be few if any abstract conceptual constraints in the drawing up of norms of customary international law. That being said, as we shall see in the next part, it would be a mistake to consider that the various classificatory distinctions that anchor different customary norms are themselves entirely random or arbitrary or that drawing them lies within the sole discretion of law appliers.

For the time being, however, let us note that there are some logical limits as to how far plasticity can go. For example, if the data we are working with is that 'a man opened the door for a woman', then the norm that 'a man should open the door for others' could logically follow from it, whereas the norm that 'in Latin America a man

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latter sense would look at George opening the door for Mary, Alice opening the door for John and so on and induce a rule about what human beings do or are likely to do. By contrast, at this point, we are at a more fundamental level, being concerned with the description of a single set of data. For the problem of deciding the level of generality that an inductive analysis is to be carried out, see Kolb, 'Selected Problems in the Theory of Customary International Law', 50 *Netherlands International Law Review* (2003) 119, at 130–131.

44 ILC, *supra* note 3, at 154, Conclusion 16 and Commentary thereto.

45 On the notion that customary international law could theoretically develop so as to ban the use of a specific type of weapon, see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, at 247. On the principle of prevention as a part of customary international law, see *Pulp Mills (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Reports (2010) 14, at 55–56.

46 See, e.g., J. Crawford, *The Creation of States in International Law* (2nd edn, 2005), at 415: '[O]utside the colonial context, the principle of self-determination is not recognized as giving rise to unilateral rights of secession by parts of independent States.' See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403, at 438, where the Court, while not taking a position whether such a right exists outside the context of decolonization, crucially framed the inquiry of identifying such a rule in terms of a line drawn between the decolonization and subsequent contexts.

should open the door for others, but we do not know whether such a rule holds in other parts of the world' does not. This is because the latter adds a location qualifier that cannot be logically derived from our data, due to the fact that the data does not include a reference to the locus of the practice to begin with. In other words, every referent of the higher level must correspond to a referent of the lower one even if it may abstract from it. On the other hand, not every referent of the lower level must find a place at the higher level.

In many ways, the absence of preset disciplinary boundaries – save for the ones produced by logic – characterizes many contemporary debates in international law. Two common but antithetical theoretical moves stand out in that regard. The first consists in grouping together instances of seemingly disparate practice under an abstract-enough description so as to make up for the apparent lack of practice with respect to a more specific norm. The second consists in isolating elements of a practice by claiming that they, in fact, correspond to different descriptions, thus implying that the part of the purported norm where there is less practice cannot draw structural support from the better documented one.

Appreciating the feature of plasticity calls international lawyers to pay attention to these moves and to grapple with a seldom recognized area of contestation in customary international legal discourse – namely, that of specificity and abstraction. Doing so opens a largely uninvestigated intellectual space by throwing new light on argumentative patterns and moves spanning across distinct subfields of customary international law. This article will now move to examine three prominent examples under this light: non-state actors and human rights, humanitarian intervention and *uti possidetis juris*.

B *Non-State Actors and Human Rights*

A long debate has featured in international legal discourse over whether non-state actors have human rights obligations.[47] One key question that we may ask regarding this debate is whether indeed we need to identify separate customary legal norms that extend human rights obligations of states to non-state actors. Let us examine the various possibilities based on our foregoing analysis. To begin with, we may consider the possibility that there is actually enough data out there to support a legal norm to the effect that 'non-state actors have a duty under customary international law to observe human rights'.[48] If that is the case – namely, if there is enough evidence to identify a separate norm regarding non-state actors – then there is no need to go any further.

[47] See, e.g., A. Bianchi (ed.), *Non-State Actors and International Law* (2009); P. Alston (ed.), *Non-State Actors and Human Rights* (2005); A. Clapham, *Human Rights Obligations of Non-State Actors* (2006).

[48] Note that under the standard doctrine of sources in international law, the data giving rise to such a norm would have to implicate the state in some form or another. According to this view, data such as 'multinational corporations regularly observe human rights' would not lead to the creation of an international legal standard on corporations and human rights. Rather, the data would have to look something like 'states regularly hold corporations accountable for human rights violations'. see ILC, *supra* note 3, at 130, Conclusion 4.

But let us assume that there is no data that would, couched in these terms, support this kind of statement. We thus need to explore other options in order to determine whether non-state actors are bound by human rights or not. Assume, for example, that even if such data does not exist for non-state actors specifically, there is an abundance of data regarding the practice of states. Three possibilities arise. First, we might think that whether the data refers to states or to non-state actors is a qualification that is immaterial for the purpose of the inquiry undertaken. To go back to our example of a man opening a door for a woman, there are things that we care about and things that we do not: we might not care if the man is young, short, white and so on; we might care that he is a human, Latin American and so on. In the same manner that we do not describe the data in our hypothetical scenario as 'George, an old and short man, opened the door for Mary, a young and tall woman' but, instead, focus only on what is deemed relevant, we could in the case of human rights describe the data as 'France, a European state and a constitutional democracy, respects those rights that are considered human rights' or as 'a state respects human rights' or as 'someone exercising public power respects human rights' or, indeed, as 'someone exercising power over others respects human rights'. In the latter case, we would have surmised a norm potentially applicable to non-state actors, even in the absence of specific evidence about those actors (to be exact, in reality, there would be no such absence because the state/non-state character of an actor would have not been dealt with as a relevant descriptive qualification to begin with).

A second, closely related possibility is that we describe existing data in terms of states but infer from it a more general legal norm, in the same way that we may infer from observing a man opening a door for a woman both a rule that 'men should open the door for women' as well as 'one should open the door for another' and even more general rules like 'one should offer others assistance when it may be beneficial to them'. Likewise we may conclude, based on the observation that 'states respect human rights' that 'states should respect human rights' or that 'everyone exercising power over others should respect human rights' or even that 'everyone should respect human rights'.[49] In the latter case, it would follow naturally that non-state actors, as

[49] Indeed, claiming that human rights are general principles may seem very close to arguing exactly that. See Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of International Law* (1988) 82. Theoretically, we could also think of a rule to the effect that 'all international legal persons should respect human rights' or that 'all self-governing or autonomous international legal subjects should respect human rights'. Note that, for the purposes of our example, the observational data underpinning our rule is presented here in a simplified form ('states respect human rights'). Of course, one could infer a customary obligation with respect to states and human rights from less consistent practice regarding the observance of such rights. See ILC, *supra* note 3, at 137–138, para. 4, Commentary to Conclusion 8. As the International Court of Justice (ICJ) has held in this regard, '[i]f a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule'. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Merits), 27 June 1986, ICJ Reports (1986) 14, at 98. The same considerations apply with respect to the upcoming examples regarding humanitarian intervention and *uti possidetis juris*.

part of 'everyone', or at least some non-state actors as part of 'everyone exercising power over others', fall within the ambit of the rule.[50]

A final, more limited possibility is to try to fit an actor at the interpretative stage, once the norm has been identified. If, for example, our identified rule is that 'everyone exercising power over others should respect human rights' then we need to interpret whether and which non-state actors indeed exercise such power and would thus fall under it. However, if the rule is that 'states should respect human rights' then it seems practically impossible to interpret into it entities that are not themselves states, such as transnational business corporations.[51] It should be noted that analogy cannot carry the day at this stage: if through sound legal reasoning we have reached the conclusion that it is 'states' that 'should respect human rights', employing the analogy beyond this point would essentially be advising for the future direction that the law should follow rather than arguing as to where it currently stands.[52]

Figures 2 and 3 showcase some of the possibilities for constructing a legal norm about non-state actors and human rights.

[50] An argument against the automatic application of customary international law to non-state actors can be provided by the Kosovo advisory opinion, where the ICJ deemed that the principle of territorial integrity was applicable only between states and does not impose any obligations on non-state actors: 'Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States.' See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403, at 437.

[51] On the other hand, an argument could be made that international governmental organizations qualify as 'states' under our putative rule, in the sense that they are made up of states. *Cf.* Wood, 'Do International Organizations Enjoy Immunity under Customary International Law?', 10 *International Organizations Law Review* (2014) 287, at 295. Arguably, the equation of international organizations with states on account of the composition of their membership would have to puzzle out how international organizations can be reduced to their component parts – namely, states – and yet remain analytically separate from their member states. The problem of the conceptual relationship between international organizations and states has underpinned lengthy discussions in the ILC, especially over whether primary rules regarding states could be extended to these institutions. For example, when preparing the draft Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, 25 ILM 543 (1986), the question arose within the ILC whether international organizations were bound by the prohibition of the use of force in the context of drafting Article 52 on coercion. Special Rapporteur Paul Reuter argued that since the UN General Assembly's Resolution on the Definition of Aggression provided that the term 'State' included the concept of 'a group of States', it should also be the case that international organizations were included in the definition and thus bound by the prohibition (see 1 *ILC Yearbook* (1979) 74, para. 38). This rationale was not followed some years later in the context of the ILC's work on the international responsibility of international organizations, when many members of the commission argued that the right of self-defence could not be extended automatically to international organizations (see, e.g., Doc. A/CN.4/2876 [summary record of the 2876th meeting, 16 May 2006] and Doc. A/CN.4/2877 [summary record of the 2877th meeting, 17 May 2006]). In the end, the 2011 draft articles included a provision on self-defence as a circumstance precluding wrongfulness 'for reasons of coherency' with the caveat that the conditions of exercise of that right pertained to primary rules and were thus outside the scope of the draft articles. See International Law Commission, Articles on the Responsibility of International Organizations, with Commentaries, Doc. A/66/10 (2011), at 71, Article 21 and Commentary thereto.

[52] This does not mean that analogy is an irrelevant analytical tool for other purposes. Indeed, *per analogiam*, arguments can serve as inspiration in the context of the codification and progressive development of international law. See F. Bordin, *The Analogy between States and International Organizations* (2018).

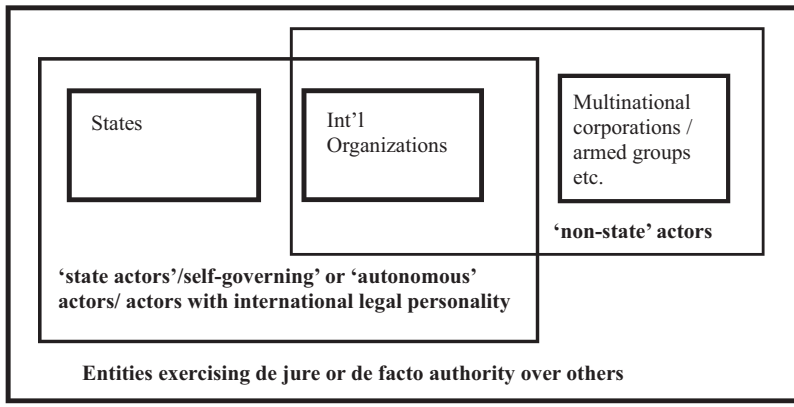

Figure 2: *Different ways of grouping international actors for the purposes of identifying the extent of their obligations under human rights law*

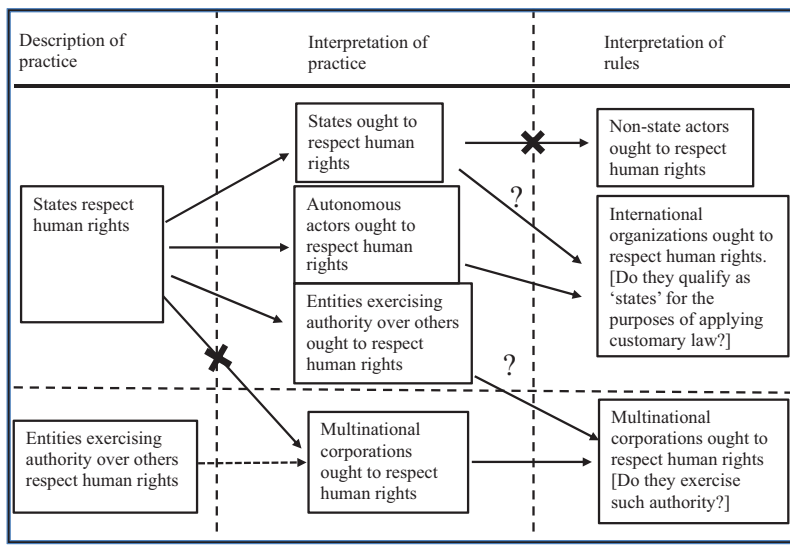

Figure 3: *Constructing a customary legal norm about non-state actors and human rights*

C *Humanitarian Intervention*

Similar issues arise, this time with respect to the material scope of putative legal norms of customary international law, if one looks at the familiar debates surrounding humanitarian intervention. At least three possibilities arise in this respect. First, there could be enough data supporting a legal norm permitting the unilateral use of force in order to stop gross human rights abuses such as ethnic cleansing, genocide and so on. If that was the case, as with the case of non-state actors and human rights, we would arguably not need to look any further (leaving to the side the question of how such a norm would then relate to the prohibition of the use of force as a *jus cogens* norm and as a norm enshrined in the UN Charter).

The real problem, of course, is that such data is either open to interpretation or altogether missing. For example, Simon Chesterman has argued that the most often cited examples of unilateral humanitarian intervention can be best described as instances of self-defence or protecting nationals abroad.[53] Note how the 'protecting nationals abroad' is carved out as a separate qualifier of action but could also fall under the qualifier 'unilateral use of force to protect lives', and, indeed, some authors have viewed it in this latter sense.[54] Accordingly, the practice may be inflated or deflated depending on what one considers the relevant selection criteria to be. And, again, there could be a gap between the raw data as selected (for example, India intervened unilaterally in Bangladesh to save millions of lives; Vietnam intervened unilaterally in Kampuchea to save hundreds of thousands of lives) and the norm that we come up with that describes this data (states should have a right to intervene unilaterally in order to save human beings from genocide/extermination/widespread human rights abuses and so on and so forth).

A second possibility is that, instead of looking for a separate customary norm of 'unilateral' intervention, we describe existing data in a different light, dropping the qualifier 'unilateral' at the stage of data selection and norm identification, as we did in our previous example with the qualifier 'non-state'. Looking at the data on the basis of a different organizing concept, we may search for cases in which 'actors in the international community' responded with force in order to stop widespread atrocities, regardless of whether this action was authorized by the United Nations (UN) Security Council or not.[55] We may then infer a norm that 'the international community has a right to intervene in order to prevent widespread atrocities' and then argue at the level of interpreting this norm that the 'international community' includes states acting unilaterally when it has not been possible to secure a decision authorizing such action by the UN Security Council or the UN General Assembly[56] or, more specifically, where securing such authorization was withheld due to the persistent veto of a permanent member of the Security Council.[57] Lastly, we may turn the whole inquiry on its head; instead of asking whether there is a legal norm regarding intervention for humanitarian purposes and what its limits are, we may inquire as to the scope of non-intervention and explore whether that legal norm has anything to say about interventions with a humanitarian aim.[58]

[53] S. Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (2001), at 63–87.

[54] See, e.g., Schachter, 'The Right of States to Use Armed Force', 82 *Michigan Law Review* (1984) 1620, at 1628–29.

[55] See, e.g., Thomas Franck who discussed UN-authorized humanitarian interventions along with unilateral interventions as forming one category of acts, unified by the fact that they are *prima facie* inconsistent with the prohibition of the use of force as enshrined in the Charter. Franck, 'Interpretation and change in the Law of Humanitarian Intervention', in J.L. Hozgrefe and R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (2009) 216.

[56] See, e.g., O. Schachter, *International Law in Theory and Practice* (1991), at 126.

[57] See, e.g., Koh, 'Syria and the Law of Humanitarian Intervention: Part II', *Just Security*, 2 October 2013, available at www.justsecurity.org/1506/koh-syria-part2/.

[58] Usually this inquiry is pursued with respect to the interpretation of Art. 2(4) of the UN Charter, but it could also be followed with respect to the interpretation of the customary prohibition of the use of force. See, e.g., Franck, *supra* note 55, at 216; Chesterman, *supra* note 53, at 45–83.

D *Uti Possidetis Juris*

Finally, consider *uti possidetis juris*. *Uti possidetis* was initially thought to refer to a regional legal norm, whereby the territorial boundaries of newly independent states in Latin America had to be drawn along the administrative boundaries of the former Spanish colonies.[59] For some time, *uti possidetis* appeared to be accepted under this formulation – that is, with the *ratione materiae* qualifier that it applied to 'territorial' boundaries and with the *ratione personae* qualifier that it applied to 'ex-Spanish colonies in Latin America'.[60] In other words, these two qualifiers were understood as part of the legal norm.

If we discount the possibility of interpreting state practice or the legal norms that can be inferred from it, then applying *uti possidetis* without these two qualifiers should have been theoretically impossible without arguing for a new rule to that effect and adducing the relevant evidence. According to this line of thinking, *uti possidetis* is pinned at a specific level of abstraction, and new state practice and *opinio juris* are needed if we are to apply it, for example, to a case of decolonization in Africa as opposed to Latin America or to maritime, as opposed to territorial, boundaries. And, indeed, there is some arbitral practice pointing to the impermissibility of moving between levels of abstraction when it comes to *uti possidetis*, questioning the applicability of the doctrine to other historical contexts and other geographical regions.[61]

Yet, as is well known, an International Court of Justice (ICJ) Chamber adopted a different methodology in the *Burkina Faso/Mali Frontier* dispute, arguing that *uti possidetis* had a general scope and could be applied to cases outside Latin America as well as Africa: '[T]he principle [of *uti possidetis juris*] is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.'[62] This was the result of interpreting the practice of African states as suggesting a legal norm of general application instead of one confined in that continent.[63] The Chamber arguably did not apply the Latin American

[59] G. Nesi, 'Uti possidetis Doctrine', in *MPEIL*, February 2018, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1125.

[60] That much was accepted by three ICJ judges siting as arbitrators in the *Beagle Channel* arbitration. See *Dispute between Argentina and Chile Concerning the Beagle Channel*, Decision, 18 February 1977, reprinted in UNRIAA, vol. 21, 53, at 81, claiming that '[t]his doctrine – possibly, at least at first, a political tenet rather than a true rule of law – is peculiar to the field of the Spanish-American States whose territories were formerly under the rule of the Spanish Crown'. See also Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', 26 *EJIL* (2015) 417, at 439.

[61] *Eritrea/Yemen Arbitral Award* of 9 October 1998, Phase One, reprinted in UNRIAA, vol. 22, 209, at 236–237: 'Added to these difficulties is the question of the intertemporal law and the question whether this doctrine of uti possidetis, at that time thought of as being essentially one applicable to Latin America, could properly be applied to interpret a juridical question arising in the Middle East shortly after the close of the First World War.'

[62] *Frontier Dispute (Burkina Faso/Mali)*, Judgment, 22 December 1986, ICJ Reports (1986) 554, at 565.

[63] *Ibid.*, at 566: 'The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.'

version of *uti possidetis* to Africa or to the rest of the world. Instead, it seems to have argued that a separate legal norm of similar content developed in Africa. Whereas the previous norm's field of application was confined to Latin America, this new one applied without geographical restrictions. But, then again, the Chamber also referred to *uti possidetis* as a principle 'logically connected with ... decolonization wherever it occurs', suggesting a logical, rather than a strictly evidentiary, connection between the practice and the principle.[64] In a 2007 judgment, the Court went even further, suggesting that the principle could 'in certain circumstances' be applied with respect to maritime delimitation, 'such as in connection with historic bays or territorial seas', without furnishing any new evidence as to the application of the legal norm in such cases.[65]

In sum, the case of *uti possidetis* showcases how an apparently localized practice can create a legal norm of general application without the addition of new state practice and *opinio juris* as well as how the material scope of existing norms can be expanded in practice, again without adding new state practice and *opinio juris* to our pool of evidence (see Figure 4).

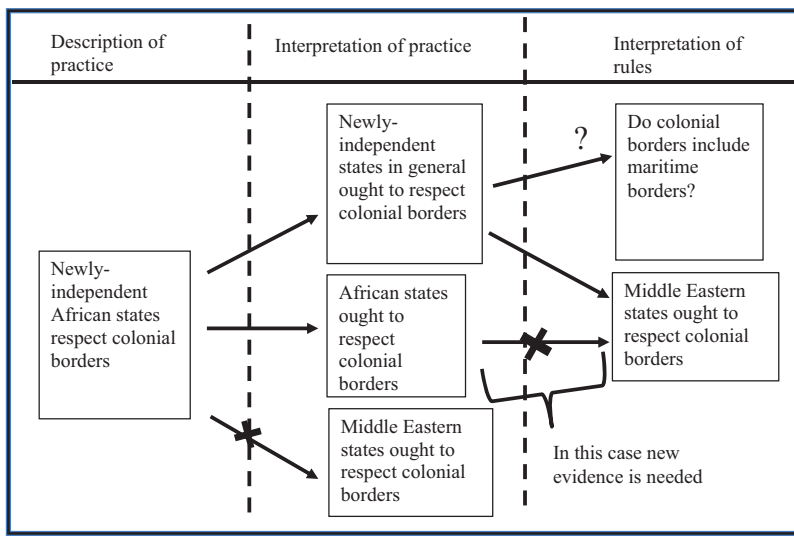

Figure 4: *Permissible and impermissible ways of constructing a rule of uti possidetis following burkina faso v. mali.*

[64] *Ibid.*, at 566.

[65] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, 8 October 2007, ICJ Reports (2007) 659, at 728.

4 The Problem of Individuation in the Identification of Customary Law

A *Plasticity and Modelling Custom as a Set of Rules*

Our discussion so far prompts important questions: what marks the boundaries between two putative legal norms of customary international law, so that each of them would need to be supported separately by state practice and *opinio juris*? And when do we have to identify a legal norm as 'new' as opposed to thinking that we are interpreting one that already exists? Both of these questions rest on the assumption that we can draw clear lines of individuation between putative customary legal rules – that is, clear boundaries that separate one rule from another and delineate them as distinct objects of legal analysis. Although this is an assumption that corresponds to our rough intuitions about the nature of customary international law, things are more complicated in this regard than what they may seem at first.

Drawing the boundaries along which customary rules are singled out as candidates for identification is an omnipresent activity in international adjudication. Given our discussion of plasticity – and the argument that there are hardly any abstract theoretical limits to how rules of custom may be formulated – it may seem surprising that, when applying customary law, international courts constantly come up with actual hard limits as to how their rules are supposedly formulated and strict confines in which the identification of customary legal norms is to take place. Even though rarely seen as an area of contestation in its own regard, the proper individuation of customary rules often forms the battlefield where the outcome of the identification process is quietly decided.

Take, for example, the recent International Criminal Court's (ICC) judgment in the *Jordan Referral re Al Bashir* appeal. In this case, the Appeals Chamber held, among other things, that head-of-state immunity from jurisdiction applied before national courts but not before international ones.[66] According to the Appeals Chamber, a putative legal norm of immunity before international courts needed to be identified separately. Immunity before international courts occupied, so to speak, a different legislative slot from immunity before national courts. This was critical with respect to the Court's finding regarding the status of customary international law on that point, as no sufficient corresponding evidence could be adduced with respect to immunity before international courts.[67]

Zeroing in on the ICC's decision, we can notice the following: once the boundaries between two putative legal norms are set – and, thus, the space that each one may occupy is clearly defined – then the outcome of the identification process may have been decided already owing to the lack of more specific evidence about one of these suggested rules. But what rationale led the court to carve out the legislative space in the way that it did in the first place? What makes it analytically necessary to identify a separate norm of immunity before international courts in the first place? This is a type of inquiry that international legal theory has engaged with only on a case-by-case

[66] *Al-Bashir case*, *supra* note 8, para. 116.

[67] *Ibid.*

basis, if at all. Mapping the space in which identification is to take place has not been generally seen as a subject of contention in its own regard.

In tackling this problem, we might inquire into the nature of these invisible lines that are supposed to separate one putative legal norm of custom from another. In the *Bashir* case, for example, these boundaries purport to delineate rules of customary law much in the same way that we might individuate domestic laws or international agreements. They mark where one rule ends and where the available space for the identification of another begins. Employed in this manner, they are supposed to reflect a deeper analytical truth about the structure of customary law itself. In this way, the ICC may deem that immunity before domestic courts occupies different legislative space from immunity before international courts, if only to find insufficient evidence with respect to the latter. It is almost as if there existed a specific ordinance covering immunity before domestic courts and a similar ordinance on immunity before international courts that was at best still in the drafting process or that had just been voted down by Parliament.

Whether one agrees or disagrees with the Court's conclusion, the fact remains that the underlying theoretical model of custom that the Court employed largely corresponds to the way that the discipline conceptualizes that source of law. One could even venture to say that, according to the prevalent understanding of custom, it is not only that content determination can be practically reduced to rule identification but also that custom itself is the sum of such individual rules, which in turn approximate different 'laws'.[68] Following this view, international custom can be thought to be made up of rules more or less in the same way that a wall is made out of bricks.[69] This makes customary law comparable to treaty law or domestic legislation at a structural level, despite differences that may exist in how custom is produced or its scope of application.[70]

The identification of rules of customary law then becomes the equivalent of identifying separate laws or agreements. Even as their method of production and scope of application are theorized differently, scholars conceptualize the outcome in similar form. In the case of custom, identification is thought to rest on piecing together the requisite evidence, which is stacked together to produce what customary international law amounts to at a given moment.[71] In other words, the bricks of our wall

[68] See, e.g., Treves, *supra* note 2, defining customary international law as 'the process through which certain rules of international law are formed, and ... the rules formed through this process'; see also ILA, *supra* note 3, at 723: 'In this Statement, "customary (international) law" refers to the corpus of such individual rules.'

[69] In that respect, it makes no difference whether it follows the so-called inductive or deductive method in the identification of custom, as the end result of that process is conceptualized in the same form.

[70] See, e.g., Orakhelashvili, *supra* note 19, at 496. International lawyers, of course, acknowledge that custom differs from legislation in being a decentralized form of law-making and also from treaties in that it can bind actors even without their consent. See, e.g., H. Kelsen, *General Theory of Law and State* (1949), at 351–352; H. Thirlway, *The Sources of International Law* (2nd edn, 2019), at 61.

[71] For example, the recent study of the ILC on the identification of international law defines the scope of its work as concerning 'the way in which *the existence and content* of rules of customary international law are to be determined', see ILC, *supra* note 3, at 123, Conclusion 1 (emphasis added). By separating the notions of existence and content, the ILC implies that despite a rule's existence being accepted, its content might be disputed. However, the commentary does not delve into the nature of this dispute and how it could be resolved. See ILC, *supra* note 3, at 124, para. 4, Commentary to Conclusion 1.

are thought to correspond to separate batches of evidence. Crucially, this image also underpins the way we understand the absence of rules as holes in the wall: no state practice and *opinio juris*, no rule. This is no doubt a familiar picture. At closer glance, however, there is room to question whether it accurately reflects the nature of customary international law. To understand why, it is worth taking a step back and looking at the topic of individuation of laws in its own regard.

B *The Problem of Individuation in Legal Theory*

In a general philosophical sense, to individuate is to single out an entity as a distinct object of perception, thought or linguistic reference.[72] In turn, what individuates an entity is that which makes it the single entity that it is, whatever it is that makes it one entity and distinguishes it from others.[73] More specifically, the individuation of laws has given rise to considerable debates amongst legal theorists in the past.[74] The discussion is not aimed to resolve these debates but, rather, to show why it is extremely difficult to apply any set of individuation criteria to rules of customary law and what this problem may reveal about the nature of customary international law itself.

An example inspired by Joseph Raz's discussion of the problem may serve as a good introduction to the aspect of the problem that concerns us here.[75] Think of a law with only one article providing that 'every person shall open the door for another person'. Indeed, this one law could be interpreted as including at least two legal norms: 'every man shall open the door for another person' and 'every woman shall open the door for another person'. However, the law, in the sense of the valid legal rule that has been posited by the legislator, is really only one: the rule that 'every person shall open the door for another person'.[76] In other words, a man not opening the door for another person is not violating a law that 'every man shall open the door for another person'.

[72] Lowe, 'Individuation', in M.J. Loux and D.W. Zimmerman (eds), *The Oxford Handbook of Metaphysics* (2005) 75, at 75.

[73] *Ibid.*

[74] See, e.g., J. Raz, *The Concept of a Legal System* (1980); J.W. Harris, *Law and Legal Science: An Inquiry into the Concepts 'Legal Rule' and 'Legal System'* (1979); Dworkin, *supra* note 25, especially at 97ff. For a brief discussion on the individuation of norms in the context of international law, see U. Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (2020), at 175–182.

[75] See Raz's discussion of Bentham's and Kelsen's theories on the individuation of laws. Raz, *supra* note 74, at 76.

[76] Note that this law is not to be equated with a specific statute or provision. One of the key insights of Jeremy Bentham's work, later to be expanded upon by Kelsen, was to distinguish the creation of norms from the enactment of statutes and ordinances by parliament and legislative authorities in general. See J. Bentham, *A Fragment on Government and an Introduction to Principles of Morals and Legislation* (1948), at 301; see also Raz, *supra* note 74, at 70–71. Of course, statutes and regulations do indeed create norms, or at least parts of norms, but a law itself, as a complete and unified canonical proposition regulating some conduct, is not identical with a statute or a section in a statute. As Kelsen would suggest, 'the different elements of a norm may be contained in very different products of the law-making procedure, and they may be linguistically expressed in very different ways [by the legislator]'. See Kelsen, *supra* note 70, at 45.

There is in fact no such law but only a corresponding putative rule emanating from the interpretation of a posited law. Instead, the man in question is violating the law that 'every person shall open the door for another person'.

Conversely, we may think of a legal order with two separate laws – one to the effect that 'every man shall open the door for another person' and another one saying that 'every woman shall open the door for another person'. In this scenario, a man not opening the door for another person does not violate some general law that 'every person shall open the door for another person', which does not exist as such in positive law, but the law that 'every man shall open the door for another person'.

The criterion of individuation in these examples is the formal validity of a piece of legislation. In the first example, 'every person shall open the door for another person' is taken to be a valid law of the legal order (that is, a law issued in accordance with the rule of recognition of that order), whereas the logical rule that 'every man shall open the door for another person' is not a valid law but, rather, an interpretation of a rule contained in a valid law (as the rule 'every sapient mammal shall open the door for another' could also be). In the second example, the valid laws are that 'every man shall open the door for another person' and 'every woman shall open the door for another person', but the putative rule that 'every person shall open the door for another person' is not.

Formal validity is not the only way of individuating legal matter. Naturally, the purpose of individuation depends on the context in which rules need to be formulated and separated from one another. This is crucial, as individuation also performs a major epistemic and practical role. As Raz explains, '[t]he principles of individuation are the method of carving small and manageable units out of the total legal material in a way which will promote our understanding of the law'.[77] In a similar vein, Hans Kelsen distinguished between descriptive and prescriptive statements about the law. Descriptive statements are produced by legal science for the purposes of representing and understanding the law. Prescriptive statements are statements about the law as it has been created by the law-making authorities – that is, statements about the actual legal rules.[78]

Distinguishing between prescriptive and descriptive statements of the law might seem a trivial exercise in domestic legal systems where individuating laws for the purposes of identifying and then applying them is based on the formal act on which their validity is anchored.[79] The picture resulting from such individuation indeed may resemble a wall of bricks where it is the formal boundaries and not the content of a rule that define its individuality. A valid law providing that 'every person shall open the door for another person' still counts as one brick, even though interpretatively we might break it down to more; two valid laws – one about men and one about

[77] Raz, 'Legal Principles and the Limits of the Law', 81 *Yale Law Journal* (1972) 823, at 831.

[78] Kelsen, *supra* note 70, at 45.

[79] Identification of the law at this point should be thought of as a different process from its creation or formation. On the separation of the two exercises as well as on the difficulty of drawing a line between them with respect to customary international law, see ILC, *supra* note 3, at 124, para. 5, Commentary to Conclusion 1. For some scepticism towards this position that custom is not only evidenced, but also formed, by state practice and *opinio juris*, see Worster, *supra* note 22, at 469.

women – still count as two bricks, even though interpretatively we might still talk about them as if there was only one general rule. Thus, from a bare ontological standpoint, the written legislation of a country can be conceptualized as the sum of the prescriptive statements about it that are valid at a given moment and that are anchored separately in distinct acts of law creation.

Arguably, this model of rules as structurally distinct objects does not correspond to the nature of customary international law.[80] At a closer glance, the peculiarity of custom stems not just from the fact that it is unwritten nor only from the fact that it binds actors even without their consent. Customary law is not only produced or expressed in a different manner but differs in more fundamental ways from rule making by agreement or legislation. As Mark Walters suggests, customary law involves 'a discourse of reason in which existing rules are understood to be specific manifestations of a comprehensive body of abstract principles from which other rules may be identified through an interpretive back-and-forth'.[81] The fact that customary law comes into being as part of an interpretative discourse within a given community creates a deeper analytical dependence between its past and future interpretations or 'rules'. This dependence is characterized by the fact that it obtains between 'rules' that theoretically exist at the same hierarchical level. Even as none of these 'rules' of customary law is *a priori* superior to any other 'rules', they often do operate at different levels of abstraction. This opens up the possibility for interpretation of existing legal standards to function as an incubator for seemingly new ones, allowing one legal standard to evolve as the interpretation of another.

This type of dependence in the creation of 'new' legal standards is absent with respect to other sources of law such as treaties or legislation that are frequently employed to conceptualize the structure of already identified customary international law. Even though two agreements or two laws may be part of the same legal system, and, thus, be interpreted or applied accordingly, they do not normally owe their formal validity to each other,[82] and they are not co-dependent at a deeper, structural level.[83] To put it differently,

[80] As James Penner suggests, the possibility of individuation itself is premised on the belief that 'the law already exists in particular packages, which are just waiting to be identified'. See J.E. Penner, *The Idea of Property in Law* (2000), at 39. James Harris' critique that 'rules are to systems, not as members to a club, but as slices are to a cake' seems particularly pertinent with respect to customary law. See Harris, *supra* note 74, at 84.

[81] Walters, 'The Unwritten Constitution as a Legal Concept', in D. Dyzenhaus and M. Thornburn (eds), *Philosophical Foundations of Constitutional Law* (2016) 33, at 35.

[82] Of course, as with all legal norms, their validity may depend on an antecedent legal norm that determines what counts as law in a given legal system. For this idea of dependence as a central tenet of legal positivism, see Green, 'Legal Positivism', in Zalta, *supra* note 32.

[83] This type of dependence may be thus distinguished from the prevalent idea that international law forms a system of rules. In that sense, indeed, few international lawyers would argue that any part of international law is completely independent. See, in this respect, the inclusion in Art. 31(3)(c) of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, amongst the means of treaty interpretation of 'any relevant rules of international law applicable between the parties'. Put differently, international law may be a system, but this does not mean that any part of it – for example, a treaty – derives its validity from another part of that system – for example, another treaty. What is meant here instead is that customary legal norms may not only derive meaning from other 'relevant' legal norms but also their validity from them.

treaties and legislation analytically resemble a bouquet of flowers, whereas the structure of customary international law can be better conceptualized as a tree with several branches – its legal norms – that gradually grow in different directions.[84]

This distinctiveness produces consequences for how we understand the problem of individuation in customary law. I argue that the absence of formally articulated legal material, or *a priori* defined 'packages' in which the law is contained, means that statements about rules of custom are best conceptualized as 'statements of legal science' – that is, descriptive statements about the content of customary law rather than formal legal rules in the sense of different laws or agreements.[85] Of course, customary legal norms may be at times expressed in written form, appearing to look like formal legal rules, but these expressions nonetheless remain descriptive rather than prescriptive, to use Kelsen's distinction.

Alfred Simpson's theorizing of the common law may be helpful in understanding the way that 'rules' of custom should be understood in this regard. Simpson argues that formulations of the normative content of custom should be 'conceived of as similar to grammarians' rules which both describe linguistic practices and attempt to systematize and order them'.[86] These rules may correspond to actual practice and norms, but they are not themselves the formal building blocks of customary law. Therefore, while the content of customary law can be described on the basis of rules – in the familiar image of other types of legal material – customary law itself is not structurally reducible to such rules.[87] In other words, even though custom may be described in terms of rules akin to laws, it is not the aggregate of these individual rules.[88]

[84] See also the famous example of the 'gradual formation of a road across vacant land' as a metaphor for the formation of rules of custom. This metaphor, however, has been employed mostly to underscore the difficulty of knowing exactly when the initial path becomes a proper road that is henceforth recognized as the regular way. In reality, this metaphor also echoes the doctrine's implicit analogizing of customary law with legislation or agreements from a structural perspective: the road is still conceptualized as a self-standing law that grows apart from other such laws in a 'land' or space that is already carved out as 'vacant' or empty. For the road metaphor, see C. de Visscher, *Theory and Reality in Public International Law* (1957), at 149.

[85] Raz, *supra* note 74, at 73.

[86] Simpson, 'The Common Law and Legal Theory', in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence* (1973) 77, at 94.

[87] This can explain why most legal theorists who explored the problem of individuation of laws either did not deal with customary law at all or suggested that the individuation of its legal rules from the perspective of their validity was straight out impossible. See Raz, *supra* note 74, at 70ff; see also Murphy, *supra* note 20, at 59–83. In a similar vein, Jeremy Bentham would suggest that '[a]s a System of general rules, the idea of the Common Law is a thing merely imaginary'. Bentham, 'A Comment on the Commentaries (1775): Of the Laws of England: 1. Statute Law: Kinds of Statutes', in J.H. Burns and H.L.A. Hart (eds), *The Collected Works of Jeremy Bentham: A Comment on the Commentaries and A Fragment on Government* (1977) 118, at 120. Bentham would also characterize the existence of the common law as 'a fiction from beginning to end'.

[88] Arguably, the assumption that custom is in fact composed of rules in the image of domestic legislation or international agreements also lies behind the most famous conundrum of current doctrinal thinking on custom: the so-called chronological paradox. This paradox is premised on the image of custom as a set of authoritatively individuated, and distinctly existing legal rules, making it difficult, if not impossible, to then explain the development of new rules given that the subjective element of custom needs to correspond to following already existing rules. For this understanding of *opinio juris*, see the *North Sea Continental Shelf* case, where the ICJ held that '[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'. *North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969) 3, at 44.

All in all, custom comprises legal norms that exist in a relationship of deeper analytical dependence than those contained in other legal materials, such as treaties or legislation. The relationship between the legal norms and their expression in words is also distinct from other legal materials. Legal norms of custom may be associated with a particular formulation, but they are not anchored to it through a formal, validity-endowing act. We may of course still talk of 'rules' of custom – after all, we must start our analysis from somewhere. In practice, these may be barely distinguishable from the actual underlying 'tree' of legal norms that make up customary law. At closer inspection, however, such 'rules' are better understood not as fixed boundaries of where the space for one legal norm ends and that for another begins but, rather, as convenient and, to some extent, negotiable, epistemic ways to describe the existing legal patchwork by breaking it down in 'small and manageable units out of the total legal material in a way which will promote our understanding of the law'.[89]

C *The Problem of Individuation in Applying Customary International Law*

This way of conceptualizing customary law – as an organic body of legal norms that gradually branches out as opposed to an assemblage of self-standing rules – permits a fresh look at what traditionally have seemed as problematic aspects of custom identification. Indeed, the latter exercise has at times appeared to be a 'mysterious [and] complex alchemy'.[90] This part argues that identification may seem less mysterious once we abandon the assumption that custom crystalizes in distinct packages and forego our reluctance to fully engage with the notion of interpretation regarding that source. While we should care about how to properly collect and evaluate the material evidence of custom, this section suggests that we should also be thinking about how parameters of our search for legal norms or the description of practice came to be in the first place.

A short foray in the case law of the ICJ may illustrate how drawing the boundaries between different putative rules of custom has remained a relatively obscure exercise, even as it may critically influence the outcome of cases. Take, for example, the ICJ's recent advisory opinion in the *Chagos* case. In that case, the United Kingdom (UK) argued that it had been a persistent objector to the right of self-determination in general[91] but also that the right of territorial integrity for non-self-governing territories at the time of Mauritius' independence was 'not supported by widespread and virtually uniform State practice' and that, in any event, 'the United Kingdom

[89] Raz, *supra* note 77, at 831.

[90] Pellet, 'Article 38', in A. Zimmerman *et al.* (ed.), *The Statute of the International Court of Justice: A Commentary* (2nd edn, 2012) 731, at 827.

[91] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports (2019) 1. For a historical study questioning the consistency of the UK's stance, see Chasapis Tassinis and Nouwen, '"The Consciousness of a Duty Done?": British Attitudes towards Self-Determination and the Case of the Sudan', 89 *British Yearbook of International Law* (2019) 1.

would have been a persistent objector to any such rule'.[92] Although, formally, the UK was arguing for the absence of evidence supporting such a rule, in essence, it was also implying that the existence of such a separate rule was needed if Mauritius' argument was to succeed. Indeed, if the 'territorial integrity for non-self-governing territories' was understood as a rule that was formally separate from the right of self-determination, then one would have to identify it via a separate survey of state practice and *opinio juris*.

In response to the UK's arguments, the Court held that the right to territorial integrity of a non-self-governing territory was 'a corollary' of the right to self-determination. At the same time, the Court sought to confirm this logical extrapolation by referring to state practice and *opinio juris*.[93] Yet the question remains: did the Court think that this logical extrapolation, even when accompanied by state practice and *opinio juris*, amounted to a separate legal norm or to the interpretation of an existing legal standard? One way to resolve this ambiguity could be to look at the conclusion of the Court's syllogism. According to the Court, 'it follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, *is contrary to the right to self-determination*'.[94] It seems then that the right to self-determination is the legal standard against which the Court assessed the legality of the UK's actions and that the territorial integrity of self-determination units was not dealt with on a separate basis but, rather, as the logical corollary of an existing legal standard that was produced in the process of illuminating the precise meaning of that standard (using state practice and *opinio juris* as one of the criteria for drawing such an inference or to confirm this meaning of that standard) (see Figure 5).

Yet there are other cases where deriving one legal norm from another has led the ICJ to speak of, and apply, the derived norm as a separate legal standard. In *Jurisdictional Immunities of the State*, the Court deemed that 'the rule of State immunity … derives from the principle of sovereign equality of States',[95] and then it supported its assertion by a survey of state practice and *opinio juris* to that effect. However, in the end, the Court applied the former legal standard, finding that Italy had 'violated its obligation to respect the immunity of the Federal Republic of Germany' and not the 'principle of sovereign equality of states'.[96] Likewise, the Court in *Military and Paramilitary Activities in Nicaragua* found that 'non-intervention' was not only confirmed by state practice and *opinio juris* but was also 'a corollary of the principle of the sovereign equality of states'. In the end, however, it found a violation of the principle of non-intervention instead of sovereign equality.[97]

[92] See UK, Written Statement in the Advisory Proceedings before the International Court of Justice Regarding the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius, 15 February 2018, at 130, para. 8.31; 141, para. 8.71.

[93] *Legal Consequences of the Separation of the Chagos Archipelago*, *supra* note 91, at 38.

[94] *Ibid.*, at 38 (emphasis added).

[95] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 22 December 2012, ICJ Reports (2012), 99, at 123.

[96] *Ibid.*, at 154.

[97] *Military and Paramilitary Activities in Nicaragua*, *supra* note 49, at 106.

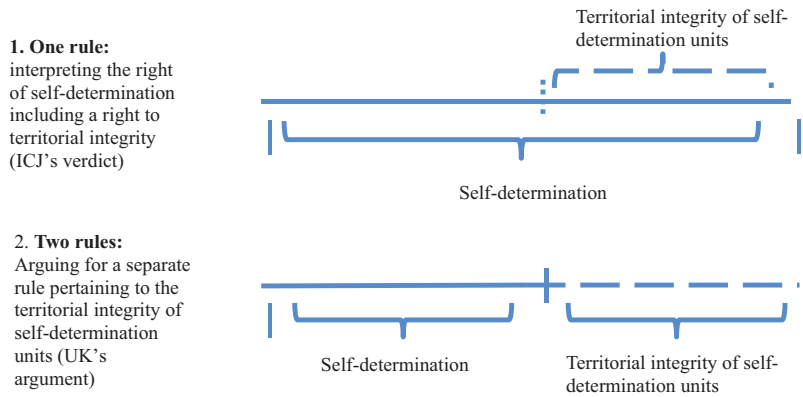

Figure 5: *Chagos advisory opinion: Are self-determination units entitled to territorial integrity?*

Note that, in these three cases, the ICJ surveyed state practice and *opinio juris* and argued for the logical derivation of one legal standard from another. There are also cases where the Court merely derived one legal standard from another without any exposition of specific state practice and *opinio juris*. For example, the Court in *Questions Relating to the Seizure of Certain Documents* derived a state's 'right to communicate with its counsel and lawyers in a confidential manner with regard to issues forming the subject-matter of pending arbitral proceedings and future negotiations between the Parties' from the principle of the sovereign equality without looking into state practice and *opinio juris* at all.[98] Likewise, in the *Corfu Channel* case, the Court found that the 'obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them' without any evidence of state practice or *opinio juris* as to that specific obligation. Rather, it inferred the latter from 'certain general and well-recognized principles – namely, elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[99] In these cases, the Court did not speak of a self-standing specific legal norm guaranteeing a state's 'right to communicate with its counsel and lawyers in a confidential manner' or one requiring that a state must 'notify other states about the existence of minefields in its territorial waters' and thus freed itself from having to look for new evidence supporting these more specific customary rules.[100]

[98] *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, Provisional Measures, 3 March 2014, ICJ Reports (2014) 147, at 153.

[99] *Corfu Channel (UK v. Albania)*, Judgment, 15 December 1949, ICJ Reports (1949) 4, at 22; see also *Pulp Mills (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Reports (2010) 14, at 55–56: 'The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (citing the *Corfu Channel* case).'

[100] For some discussion on how the two-element approach may be applied in cases such as these, see ILC, *supra* note 3, at 126, para. 5, Commentary to Conclusion 2.

Since the ICJ did not survey state practice and *opinio juris* specifically for each of these pronouncements, one line of critique would dismiss the Court's conclusions as resting on nothing but assertion.[101] However, asking that the Court should accompany its every utterance with sufficient evidence may not only be asking too much but also asking for the wrong thing. Instead of demanding that every separate formulation or interpretation of the rule be buttressed by concrete evidence supporting a new rule, we should be asking first what our underlying organizing concepts actually entail. As already discussed, concepts – including those that help describe a practice and infer rules of conduct from it – structure raw physical reality through abstracting from it, telling us what is relevant and cutting off from our vision what is not. In turn, this abstraction creates the possibility of transcendent meaning. In the case of applying customary law, this means that, because existing norms are themselves the product of interpretation, they may transcend the factual patterns that underpin them.

To give one concrete example of what such an analysis could look like, take again the *Bashir* case that we employed earlier to introduce the challenge of individuation. In this case, we might ask why it is relevant that jurisdiction is exercised by an international, as opposed to a national, court for the purposes of delimiting head-of-state immunity from jurisdiction. One way of thinking about the problem in this case is to argue that the parent rule of head-of-state immunity is sovereign equality, following the ICJ's rationale in *Jurisdictional Immunities of the State* with respect to state immunity.[102] In addition, head-of-state immunity could be thought of as an offshoot of the principle of non-intervention, which itself derives from sovereign equality, as the ICJ recognized in *Military and Paramilitary Activities in Nicaragua*.[103] The next step then is to reason that sovereign equality is not threatened by acts of international organizations to whose jurisdiction the state has consented but, rather, that it is violated when

[101] This is not to say that the Court's reasoning and methodology have always been irreproachable. See Talmon, *supra* note 60, at 434ff.

[102] *Jurisdictional Immunities of the State*, *supra* note 95, at 123; see also ILC, *supra* note 3, at 127, para. 3, Commentary to Conclusion 3. Note that the argument here does not rest on showing that head-of-state and state immunity are one and the same concept. Rather, it is based on showing the common root of both concepts – namely, sovereign equality. In this respect, see Mallory, 'Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings', 86(1) *Columbia Law Review* (1986) 169, at 170–171, where the author argues that state and head-of-state immunity have evolved into separate 'legal constructs' but still share a 'common origin'. For reference to the two concepts as 'closely related', see P.T. Stoll, 'State Immunity', in *MPEIL*, April 2011, para. 13, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1106. *Cf.* Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247(3) *Recueil des cours* (1994) 13, at 35; A. Watts 'Heads of State', in *MPEIL*, October 2010, para. 24, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1418?prd=EPIL, who notes that considerations of sovereign equality are 'helpful but inadequate' with respect to the evolution of head-of-state immunity.

[103] See *Military and Paramilitary Activities in Nicaragua*, *supra* note 49, at 106. Furthermore, head-of-state immunity may be thought to be related to the rationale underlying diplomatic immunity in general, namely non-interference with a state's conduct of its international relations. As the ICJ has held, 'there is no more fundamental prerequisite for the conduct of relations between States … than the inviolability of diplomatic envoys and embassies'. *United States Diplomatic and Consular Staff in Tehran Case (United States of America v. Iran)*, ICJ Reports (judgment of 24 May 1980) 3, at 43; see also Akande and Shah, '*Immunities of State Officials, International Crimes, and Foreign Domestic Courts*', 21 *EJIL* (2011) 811, at 824.

states create an international organization and that organization exercises jurisdiction over the heads of state of non-members.[104] Therefore, the organizing concept behind immunity – namely, sovereign equality – suggests that whether a court is domestic or international is irrelevant for that rule's scope of application.[105] Thus, no separate state practice or *opinio juris* should be necessary to prove the existence of a rule of head-of-state immunity before international courts; indeed, proving the existence of such a rule should not have been required in the first place.

All in all, underlying assumptions about the nature of customary international law can twist our understanding as to what that process should entail as well as how the outcome of that process is conceptualized. By largely ignoring the concept of interpretation, our operating theories of custom may seem to reduce the complexity of that source by putting virtually all of the emphasis on gathering the appropriate evidence. In reality, however, this approach serves only to hide that complexity from view. In response, this part has called for turning our attention from the tip of the spear – that is, the actual identification of a rule – to the antecedent stages of mapping the space in which the specific legal norms are to be singled out for identification. Factoring interpretation into our analyses of customary law may thus make identification seem less arbitrary while opening up more productive avenues in legal reasoning about this fundamental source of international law.

5 Conclusion: Take Pencil and Paper

Famously, Karl Popper once began his lecture by tasking his students to '[t]ake pencil and paper; carefully observe and write down what you have observed!'. When the students asked what it is exactly that he wanted them to observe, Popper replied: 'Clearly the instruction, "Observe!" is absurd … Observation is always selective. It needs a chosen object, a definite task … it presupposes similarity and classification which in their turn presuppose interests, points of view, and problems.'[106] And, yet, as absurd as it may seem, our current theories of customary international law have been asking us mostly to 'observe', full stop. It is not surprising then that 'current interests, points of views and problems' have introduced, in practice and doctrine, 'similarities and classifications' of their own regardless of whether international legal scholarship has paid systematic attention to them. By neglecting this line of inquiry, our theories have practically reduced theorizing custom to collecting and assessing the appropriate practice and *opinio juris*. Doing so, we have left outside our ambit a series of important questions, while sometimes creating an obscure, if not incomprehensible, analytical picture for ourselves.

[104] Leaving to the side other aspects of the *Bashir* case relating to the interpretation of the Rome Statute and the UN Security Council resolution referring the situation in Darfur to the International Criminal Court. SC Res. 1593, 31 March 2005.

[105] See also Akande, 'International Law Immunities and the International Criminal Court', 98 *AJIL* (2004) 407, at 417.

[106] K.R. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (2003), at 61.

This picture begins to unravel once we factor interpretation in the life of custom. As this article has argued, interpretation in fact plays a ubiquitous role in that regard. Three stages of interpretation were accordingly outlined: interpretation when describing a certain practice, interpretation when inferring from it legal norms and interpretation when applying the norms already identified. Focusing on the interplay between these stages calls into question old assumptions about the nature of customary international law and unlocks vital space in thinking about that source of law.

Introducing the notion of interpretation into the theory of custom may better inform how we construct legal norms out of the evidence at hand and how we single out putative rules of custom for the purpose of their identification. While intuitive in some regards, our working theoretical models of custom tend to overlook how customary international law structurally differs from the types of legal materials, such as treaties or legislation, whose legal material can arguably be conceptualized in discrete terms. Instead, singling out customary legal norms for identification rests on legal reasoning in a manner in which legal materials that are anchored to a formal act that recognizes their validity do not. This may seem to open up the legal analysis of custom – already notoriously mysterious – to new space for contestation. In reality, however, this space has always been there, silently shaping the field where cases can be won or lost, leaving us with the impression of a 'complex alchemy' at play. The only antidote for this is to extend our analytical rigour beyond the problem of gathering the appropriate evidence for the purposes of custom identification. It is to embrace the role of interpretation in the life of custom from beginning to end.