11

Interpretation of Customary Rules by Reference to Treaties and General Principles of Law

MARINA FORTUNA

1 Introduction

In its case law, the International Court of Justice (ICJ) has repeatedly suggested the idea that rules of customary international law (CIL) do not operate in a vacuum but, instead, are to be understood against the background of other rules of the international legal system.[1] This observation, although somewhat unsurprising, shows that the sources of international law exist in close interconnection – something that is also visible if one looks at the rules of interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties (VCLT). Accordingly, 'any relevant rules of international law applicable in the relations between the parties' must be taken into account, together with the context, when interpreting treaty provisions.[2] The question addressed in this chapter is whether or not the same can be said of the interpretation of *customary* rules. In other words, if we look at the practice of international courts and tribunals, is it possible to reach the conclusion that CIL rules, too, must be interpreted with the cognizance of any relevant rules of international law applicable between the parties?

To answer this question, I have enquired into the practice of international courts and, in particular, into the ways in which, if at all, they use

This chapter is a slightly modified version of chapter 4 of my PhD thesis 'Interpretation of Customary International Law in International Courts', published by Ridderprint in October 2023. The chapter is based on research conducted in the context of the project 'The Rules of Interpretation of Customary International Law' ('TRICI-Law'). This project received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

[1] See n 12.

[2] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 31.

treaties and general principles of law – the other two sources of international law contained in Article 38 of the ICJ Statute – to interpret the content of customary rules. Here, following my previous writings on the subject of CIL interpretation, I understand interpretation as an act of discerning the content and scope of the customary *rule,* rather than interpreting the elements of custom – state practice and *opinio juris*. While in this chapter I engage in a critical reading of the judgments, I leave aside as being outside the scope of this chapter my musings on the interpretability of CIL.[3]

According to the ILC's draft conclusions on the identification of CIL, other rules, such as those contained in treaties, can aid determination of a customary rule's existence.[4] Our focus, then, will be on studying the judgments of international courts with a view to demonstrating how they use treaties and general principles to establish the content of customary rules whose existence is not disputed by the parties.[5]

To facilitate the analysis of the case law and the accompanying argumentation, the chapter has been structured in three sections. Section 2 unpacks the various meanings of systemic interpretation that can be found both in legal scholarship and in practice and which will be used as an analytical framework for the subsequent analysis. Sections 3 and 4 analyse the case decisions in which international courts and quasi-judicial bodies have used treaties and general principles of law in construing the content of customary rules. Section 5 examines case law in which the interpretation of a CIL rule is carried out by reference to the body of rules of which it is part.

[3] For my previous writings, see M Fortuna, 'Different Strings of the Same Harp: Interpretation of Rules of Customary International Law, Their Identification and Treaty Interpretation' in P Merkouris, J Kammerhofer and N Arajarvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022); M Fortuna, 'Interpretation of Customary International Law in International Courts' (PhD thesis, University of Groningen 2023) <https://research.rug.nl/en/publications/interpretation-of-customary-international-law-in-international-co> accessed 26 May 2024.

[4] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 142.

[5] On systemic interpretation of CIL rules, see also A Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht' (1977) 37 ZaöRV 505, 526–27; P Merkouris, *Article 31 (3) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015) 266.

2 The Multiple Meanings of Systemic Interpretation as an Analytical Framework

It is common practice among international courts and tribunals to use customary rules to interpret treaties. One frequently cited example is the *Jan Mayen* case, where the ICJ stated that Article 6 of the 1958 Convention on the Continental Shelf must be interpreted and applied by reference to customary law.[6] Pronouncements similar to those made in the *Jan Mayen* case usually fall within the ambit of Article 31(3)(c) of the VCLT, according to which 'any relevant rules of international law applicable in the relations between the parties'[7] must be taken into account, together with context, in interpreting treaty provisions. This rule is usually referred to in case law and literature as the principle/rule of systemic interpretation[8] or systemic integration.[9] Confusingly, however, both of these terms have been used to convey not one but four different meanings.

Firstly, a textual analysis of Article 31(3)(c) shows this paragraph to be part and parcel of the core rule according to which treaty provisions must be interpreted in accordance with the ordinary meaning the words are to be given in their context and in the light of their object and purpose. In addition to context, Article 31(3)(c) states that any relevant rules of international law applicable in the relations between the parties must be taken into account *in the determination of the ordinary meaning of the terms.* As aptly noted by Tzekvelos, 'Article 31(3)(c) expands the semantic field of the provisions of a convention'.[10] One example of this is when interpreters look at the use of the same term in another treaty that is in

[6] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Merits) [1993] ICJ Rep 38 [46].

[7] Vienna Convention on the Law of Treaties (n 2) art 31.

[8] An example in this sense is *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Preliminary Objections) [2019] ICJ Rep 7, 72 (Separate Opinion of Judge Brower).

[9] ILC, 'Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions' UN Doc A/CN. 4/L. 702 (18 July 2006) 84 para 413. For a more comprehensive enumeration of the different ways in which this rule is referred to, see P Merkouris, 'Principle of Systemic Integration' para 2 (2020) MPEiPro, <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2866.013.2866/law-mpeipro-e2866> accessed 13 May 2024.

[10] V Tzekvelos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration' (2010) 31 MJIL 621, 651.

force between the parties and use it to further a particular understanding of the term. This is the first meaning of systemic interpretation.

The second meaning that has been ascribed to systemic interpretation is that of an interpretation of a rule against the background of the system of law as a whole. At the Institut de Droit International, this position was expressed by Verdross, who stated that 'a treaty must be interpreted in light of general law and general principles of law'.[11] According to the ICJ, 'a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and *in the context of a wider framework of legal rules of which it forms only a part*'.[12] Depending on how it is applied, this meaning of systemic interpretation may either converge with the first meaning – if the ordinary meaning is determined by reference to these other principles or rules – or go beyond it and result in what Alexy and Adler describe as the use of systemic arguments in interpretation.[13]

This second meaning is markedly different from what Article 31(3)(c) prescribes,[14] which is to use any relevant rules for the determination of ordinary meaning in the light of context and of object and purpose. It is important to note that Article 31(3)(c) mentions the use of any relevant rules applicable between the parties and not any relevant rules generally. Only reference to all relevant rules would in fact suggest that the rules as a whole should be taken into account for interpretative purposes. According to this second understanding, systemic interpretation is essentially a use of systemic arguments that involves placing the rule in the system of international law as a wider form of context.[15]

Another meaning of systemic interpretation is reflected in Verzijl's dictum in the *Georges Pinson Case*, where he noted that every treaty must

[11] Comments by Verdross, Institut de Droit International, Annuaire vol 43/I (Bath Session September 1950) 438, 456.

[12] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73 [10] (emphasis added); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 [53]; *Jadhav (India v Pakistan)* [2019] ICJ Rep 418, 516 (Declaration of Judge Robinson).

[13] R Alexy and R Adler, *A Theory of Legal Argumentation* (Oxford University Press 2011) 240.

[14] *A contrario*, the ILC Study Group on Fragmentation established that the rule 'points to a need to take into account the normative environment more widely'. See ILC, 'Report of the Study Group' (n 9) para 415.

[15] ibid para 414. See also LM Bentivoglio, *Interpretazione del Diritto e Diritto Internazionale* (Pavia 1953) 209; PG Staubach, *The Rule of Unwritten International Law: Customary Law, General Principles and World Order* (Routledge 2018) 156.

be considered to refer tacitly to general principles of international law for all those matters that it does not clarify in express terms.[16] This is different from systemic interpretation as meaning that other relevant rules must be used to determine the sense to be given to the words used in the treaty. Instead, it is a form of gap-filling, a technique to avoid a pronouncement of *non liquet*. And while Verzijl's statement conditions recourse to general principles of law on the lack of an express resolution of the issue in conventional rules, systemic interpretation/integration has also been argued to support what essentially is an incorporation of extraneous rules and their application to the case, even when there is no clause providing for such reference.[17] The issue here is that the use of what is termed systemic interpretation would in this case be in violation of the obligation of good faith in interpretation.[18] Moreover, as Moreno-Lax rightfully points out, 'Article 31(3)(c) VCLT should indeed be taken as a rule of interpretation, rather than a source of directly applicable law'.[19]

Finally, systemic interpretation or integration has also been interpreted in a way that equates it with an interpretation that allows for coordination of norms in the case of indirect or, what de Wet and Widmar call, broad normative conflict.[20] The case law of the ECtHR, which refers to it as harmonization, is a good example of this approach,[21] although, strictly speaking and interpreting the Article 31(3) holistically, it goes

[16] *Georges Pinson Case (France/United Mexican States)* Award of 13 April 1928, UNRIAA, vol V, 422 [50] ('Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente.').

[17] See also C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (2005) 54 ICLQ 279; A Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2(1) JIDS 31, 51.

[18] V Moreno-Lax, 'Systematising Systemic Integration' (2014) 12 JICJ 907, 922.

[19] ibid.

[20] E De Wet and J Vidmar, 'Conflicts between International Paradigms: Hierarchy versus Systemic Integration' (2013) 2 GlobCon 196, 208.

[21] See eg *Loizidou v Turkey,* App no 15318/89 (18 December 1996) [43]; *Fogarty v United Kingdom*, App no 37112/97 (21 November 2001) [35]; *McElhinney v Ireland*, App no 31253/96 (21 November 2001) [36]; *Banković and ors v Belgium,* App no 52207/99 (12 December 2001) [57]; *Cudak v Lithuania,* App no 15869/02 (23 March 2010) [56]; *Sabeh El Leil v France*, App no 34869/05 (29 June 2011) [48]; *Oleynikov v Russia,* App no 36703/04 (14 March 2013) [56]; *Hassan v United Kingdom,* App no 29750/09 (16 September 2014) [102]; *Radunović and ors v Montenegro,* App no 45197/13, 53000/13 and 73404/13 (25 October 2016) [63]; *Rinau v Lithuania,* App no 10926/09 (14 January 2020) [185].

beyond what Article 31(3)prescribes. In the words of Tzevelekos, the European Convention on Human Rights 'benefits from the latter [international law] through absorption of normative elements which, although absent from its "imperfect" text, are both complementary and necessary for the effective promotion of its special scopes'.[22]

To sum up, this means that other rules may essentially fulfil four different functions, all under the label of systemic integration: (1) other rules may serve as an aid to determine the ordinary meaning of the terms; (2) other rules may be used as a tool for systemic arguments; (3) other rules may be used as tools for gap-filling; or (4) other rules may be used as a tool for the resolution of a normative conflict. The latter two go beyond our understanding of interpretation. I will use this framework as a reference point for my analysis, in the following three sections, of case law where customary rules have been interpreted.

3 Interpretation of Customary Rules by Reference to Treaties

While, according to Article 38 of the ICJ Statute, international custom is a separate source of law, it exists in close interconnection with the other sources of international law. This is clear from the ILC's draft conclusions, according to which '[v]arious materials other than primary evidence of alleged instances of practice accepted as law (accompanied by *opinio juris*) may be consulted in the process of determining the existence and content of rules of customary international law'.[23] Such materials include 'treaties, resolutions of international organizations and intergovernmental conferences, judicial decisions (of both national and international courts), and scholarly works'.[24] The ILC then adds that 'such texts may assist in collecting, synthesizing or interpreting practice relevant to the identification of customary international law, and may offer precise formulations to frame and guide an inquiry into its constituent elements'.[25]

According to an empirical study conducted by Choi and Gulati, treaties are the most frequently used materials for the identification of

[22] Tzevelkos (n 10) 650.
[23] ILC 'Draft Conclusions' (n 4) 142.
[24] ibid.
[25] ibid. An example in this sense is *Responsibilities and Obligations of States with Respect to the Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Dispute Chambers)* (Advisory Opinion) ITLOS Reports 2011, 10 [169].

customary rules.[26] Treaties can codify, crystallize and even generate customary rules.[27] Treaties that codify pre-existent custom are known as declaratory, and whether a treaty is declaratory of CIL is determined by analysing the preamble of the treaty or by looking at the *travaux préparatoires* for confirmation that this was the intention of the parties.[28] Most treaties, however, fall into the category of *partly* declaratory treaties,[29] meaning that some provisions are codifications, whereas others are not.

At the same time, because treaties and custom originate from two different processes of law creation,[30] treaties do not absorb CIL even when they codify it. This means that custom does not cease to exist upon being codified; it runs its course parallel to the treaty.[31] This is what the ICJ conveyed through the following statement in the *Nicaragua* case:

> even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability.[32]

Moreover, as the ICJ argued, custom continues to apply even between the states that are parties to the treaty.[33] This means that while different in nature and form, custom and treaty often overlap in substance. But treaties can also crystallize emergent customs,[34] where crystallization means that the custom was *in statu nascendi* when the treaty was drafted

[26] SM Choi and M Gulati, 'Customary International Law: How Do Courts Do It?' in C Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 117.

[27] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3 [37]; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 [177]. See also RB Bilder and others, 'Disentangling Treaty and Customary International Law: Remarks' (1987) 81 ASIL Proc 157, 159; BB Jia, 'The Relations between Treaties and Custom' (2010) 9(1) Chinese JIL 81, esp. 92; ILC 'Draft Conclusions' (n 4) 143.

[28] Y Dinstein, 'The Interaction between Customary International Law and Treaties' (2007) 322 RdC 243, 360–63.

[29] ibid 355.

[30] Jia (n 27) 97.

[31] Dinstein (n 28) 386–87.

[32] *Military and Paramilitary Activities in and against Nicaragua* (n 27) [175].

[33] Dinstein (n 28) 396.

[34] ibid 352.

but became a customary rule subsequently.[35] They can also generate custom, where a provision created in the process of the drafting of a treaty becomes customary because it is widely followed even by non-parties.[36]

According to the ILC, all three types of treaties – those that codify custom, those that crystallize custom and those that generate custom – can be used in the process of CIL identification. Yet, as the ILC itself points out, a distinction needs to be drawn between the use of conduct in relation to treaties as state practice, where behaviour such as voting patterns is used as evidence for one of the elements of CIL, and the use of treaties as a reflection of CIL,[37] where actual treaty provisions are used as the container of a customary rule, because they have codified, crystallized or generated a customary rule.

The use of treaties for what is, or what in some cases the courts frame as, interpretation of customary rules in international courts and quasi-judicial bodies tends to fall into two categories: (1) the use of treaty provisions to interpret CIL; or (2) the use of elements from treaty interpretation to interpret CIL.

In none other than the *Nicaragua* case, where the ICJ established the relationship between treaties and custom, it also noted that 'while the Court has no jurisdiction to consider that instrument [the Charter of the Organization of the American States] as applicable to the dispute, it may examine it to ascertain *what light it throws* on the *content* of customary international law'.[38] This statement was made in connection with the question of whether the lawful use by a third state of collective self-defence depended on a request from the attacked state.[39] After examining the provisions of the OAS Charter and the Inter-American Treaty of Reciprocal Assistance, the ICJ concluded that there was no rule allowing for the exercise of collective self-defence without a prior request made by the attacked state.[40] In this case, the court frames its reasoning as a form of interpretation. Yet, it ends up applying the requirement contained in the OAS Charter and the 1947 Rio Treaty, according to

[35] ibid 358.
[36] ibid. For a comprehensive analysis of the relationship between CIL and treaties, see also M Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (2nd ed, Brill 1997).
[37] ILC 'Draft Conclusions' (n 4) 143.
[38] *Military and Paramilitary Activities in and against Nicaragua* (n 27) [196] (emphasis added).
[39] ibid [196].
[40] ibid [199].

which the measures of collective self-defence must be taken at the request of the attacked state. This led to the following conclusion:

> [T]he Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is not rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of the attack.[41]

In other words, the ICJ engaged in a form systemic integration as a gap-filling exercise bordering on law-making.

The second case under analysis is the *Nuclear Weapons Advisory Opinion,*[42] which concerned the permissibility of the use and threat of use of nuclear weapons. The issue was controversial because international humanitarian law, including customary rules, lacked specific rules that would govern the use or threat of use of nuclear weapons in particular. One of the members of the bench, Judge Guillaume, appended a separate opinion, in which he stated that the rules of the *jus ad bellum* – in this particular case Article 51 of the UN Charter – could provide a *clarification* of the rules of the *jus in bello*.[43] To answer the question on the extent to which the use or threat of use of nuclear weapons was permitted in international law, Judge Guillaume, largely following the ideas set out in the main advisory opinion, emphasized that given the content of Article 51, according to which nothing shall impair a state's right of self-defence, the use of nuclear weapons is allowed.[44]

Judge Guillaume further opined that customary rules of humanitarian law must also be 'completed by reference to the rules concerning the collateral damage which attacks on legitimate military objectives can cause to civilian populations',[45] as contained in the Additional Protocol to the Geneva Conventions. Therefore, the only prohibition in customary humanitarian law was on the use of weapons that could not distinguish between civilian and military targets, which, according to the judge, was not necessarily the case with nuclear weapons.[46]

[41] ibid.
[42] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226, Separate Opinion of Judge Guillaume [8].
[43] ibid.
[44] ibid.
[45] ibid [5].
[46] ibid.

In both cases there was a legal gap, which was resolved by what was framed as an interpretative exercise and which, if accepted as such, would fall under the third meaning of systemic interpretation outlined in Section 2. Whereas in the first case the customary rules on self-defence were completed with the requirement of a request on the basis of a reference to the OAS conventions, in the second case treaty rules were used to make the argument that rules of customary international law do not prohibit the use or threat of use of nuclear weapons. In both cases, the answer was sought outside CIL or its constituent elements – there was no mention of either state practice or *opinio juris* – instead, the reasoning was framed as an attempt at clarification or explanation, both of which are more akin to interpretation rather than orthodox ascertainment of customary rules. While in its draft conclusions the ILC established that treaties may 'assist in collecting, synthesizing or interpreting practice relevant to the identification of customary international law, and may offer precise formulations to frame and guide an inquiry into its two constituent elements',[47] it is clear that the function of treaties in these cases goes beyond this and extends to interpretation *lato sensu* of the content of CIL in a way that completes it.

Two other cases, both from the practice of international and internationalized criminal courts, show a different facet of systemic interpretation. In *The Prosecutor* v. *Kunarac* the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) sought to establish the definition of torture under customary international law.[48] After noting that the definition given in the Convention against Torture[49] could be taken as representing customary international law, the Trial Chamber stated that Article 1 of the Convention against Torture could nevertheless be used as an interpretational aid.[50] In a similar vein, in *The Prosecutor v. Chea* the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) found that the expression 'other inhumane acts' in connection with crimes against humanity was likely a CIL rule and then stated that:

> in determining what constitutes 'inhumane' conduct reference could be made to: 1) serious breaches of international law regulating armed conflict

[47] ILC 'Draft Conclusions' (n 4) 142.
[48] *The Prosecutor v Kunarac and ors* (Judgment) ICTY-96-23-T and ICTY-96-23/1 (22 February 2001) [194]–[195].
[49] Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987)1465 UNTS 85.
[50] ibid 482.

> from 1975–1979, *including the grave breaches provisions of the 1949 Geneva Conventions* or 2) serious violations of the fundamental human rights norms protected under international law at the relevant time.[51]

In these cases, other treaty provisions seem to have been used for construing the meaning of the customary rule, which comes closest to the first meaning of systemic interpretation described in Section 2.

Another pair of cases – or two individual opinions, to be more precise – illustrate how elements of treaty interpretation have been used in an interpretative argument on customary rules. The first example is the dissenting opinion of Judge Sørensen in the *North Sea Continental Shelf* case,[52] where he noted that:

> If the provisions of a given convention are recognized as generally accepted rules of law, this is likely to have an important bearing upon any problem of *interpretation* which may arise. *In the absence of a convention* of this nature, any question as to the exact *scope* and *implications of a customary rule* must be answered on the basis of a detailed analysis of the State practice out of which the customary rule has emerged. If, on the other hand, the provisions of the convention serve as evidence of generally accepted rules of law, it is legitimate, or even necessary, to have recourse to *ordinary principles of treaty interpretation*, including, if the circumstances so require, an examination of *travaux préparatoires*.[53]

Unlike in the previous pair of cases, where treaties themselves were used to construe and complete the content of customary rules, in this case Judge Sørensen, while not actually making an interpretation on the basis of elements of treaty interpretation, clearly advocated in its favour, but only in cases where the treaty codifies, crystallizes or generates rules of CIL. In such a case, the argument goes, judges may resort to considering even the preparatory work of the treaty.

The second example is Judge Shahabudeen's dissent from the Decision on Interlocutory Appeal from the ICTY in *Hadžihasanović*. In this case the tribunal was called upon to determine whether a superior could be punished under the principle of command responsibility for acts

[51] *Prosecutor v Chea*, Case no 002 (ECCC Pre-Trial Chamber Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011) [164] (emphasis added).

[52] *North Sea Continental Shelf Cases* (n 27).

[53] ibid, Dissenting Opinion of Judge Sørensen 244 (emphasis added).

committed by subordinates prior to the assumption of command.[54] When determining the scope of action of the customary principle of command responsibility, Judge Shahabudeen argued that 'any interpretation [of the customary rule] can be made *by reference to the object and purpose of the provisions laying down the doctrine*'[55] – Articles 86 and 87 of Protocol I Additional to the Geneva Conventions.

A final example that illustrates this approach is the judgment of the Appeals Chamber of the ICTY in *The Prosecutor* v. *Aleksovski*.[56] In examining the standard of control for the purposes of establishing the international character of an armed conflict, the Appeals Chamber opined that:

> To the extent that it provides for greater protection of civilian victims of armed conflicts, this [the overall control test] different and less rigorous standard is wholly consistent with the fundamental purpose of Geneva Convention IV, which is to ensure 'protection of civilians to the maximum extent possible'[57]

In other words, the Appeals Chamber favoured the overall control test applied in *The Prosecutor* v. *Tadić* over the effective control test applied in *Nicaragua* and used the purpose of Geneva Convention IV as an argument to buttress its position.[58] This statement evokes, to some extent, Article 32 of the VCLT, according to which supplementary means of interpretation may be used to confirm the meaning arrived at through the general rule. However, it is not so much a supplementary means of interpretation, as foreseen in Article 32, but rather the consistency of the chosen standard with the *purpose of a treaty* that is being used here to confirm the choice in favour of the overall control standard. At the same time, the argument relies on the need to ensure normative harmony or consistency between the chosen standard and the convention in relation to which it applies. All in all, in terms of qualification, here it seems that the courts are engaged in an operation akin to that of systemic interpretation in its second meaning – as a tool for crafting systemic arguments.

[54] *The Prosecutor v Hadžihasanović and ors* (Interlocutory Appeal) ICTY-01-47-AR72 (16 July 2003).
[55] ibid, Dissenting Opinion of Judge Shahabudeen [11] (emphasis added).
[56] *The Prosecutor v Aleksovski* (Appeals Chamber Judgment) ICTY-95-14/1-A (24 March 2000).
[57] ibid [146].
[58] *The Prosecutor v Tadić* (Appeals Chamber Judgment) ICTY-94-1-A (15 July 1999) [194].

4 Interpretation of Customary Rules by Reference to General Principles

While it seems that general principles have no role to play in the identification of CIL, in the practice of courts, especially criminal courts, it can be seen how the two can be embedded in judicial reasoning, often to the point of confusion. A few words, then, must first be said about the conceptual embeddedness and difference between general principles and custom.[59]

References to principles in the case law of international courts frequently cause confusion because it is unclear whether they are referring to fundamental principles of international law or those belonging to a branch of international law or to general principles of law recognized by civilized nations.[60] The latter, in turn, may be variously defined as domestic law principles that are common to all/most States, such as estoppel;[61] as natural law principles, such as equity or considerations of humanity;[62] as principles that originate from international relations;[63] or as 'general propositions underlying the various rules of law which express the essential qualities of juridical truth itself'.[64] Because of this lack of agreement or clear-cut definition of (general) principles, their analysis is often embedded with that of custom.[65] This is seen especially where ad

[59] See *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, Separate Opinion of Judge Trindade [17].

[60] See eg *Military and Paramilitary Activities in and against Nicaragua* (n 27) [220]. It has also been argued that '[t]he constituent elements of custom and general principles are notoriously vague'. See J Pauwelyn, RA Wessel and J Wouters, 'Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable' in J Pauwelyn, RA Wessel and J Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012) 508.

[61] GI Tunkin, *Theory of International Law* (Harvard University Press 1974) 202.

[62] A Verdross, 'Les principes généraux du droit dans la jurisprudence internationale, 1935' (1935) 52 RdC 193, 228.

[63] AC Arend, 'Toward Understanding of International Legal Rules' in RJ Beck, AC Arend and RD Vander Lugt, *International Rules: Approaches from International Law and International Relations* (Oxford University Press 1996) 289, 297–98; T Klenlein, 'Customary International Law and General Principles: Rethinking Their Relationship' in B Lepard (ed), *Reexamining Customary International Law* (Cambridge University Press 2016) 133, 133-139; G Gaja, 'General Principles of Law' para 19 (2020) MPEPIL <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1410> accessed 14 May 2024.

[64] B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 2006) 24.

[65] M Dordeska, *General Principles of Law Recognized by Civilized Nations (1922–2018): The Evolution of the Third Source of International Law through the Jurisprudence of the*

hoc courts and tribunals declare their aim to be the establishment of customary international law at a particular point in time, whereas in actual fact they are surveying the domestic legislation of states, not as state practice but for the purpose of finding a common denominator in the definition of specific crimes.[66]

The embeddedness between general principles and custom can be seen not only in case law but also in those writings of legal scholars that propound a broad understanding of the concept of customary international law.[67] The confusion is due to, or at least so it seems, the early practice of the Permanent Court of International Justice (PCIJ). For instance, in the *Lotus* case the PCIJ observed that 'rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by *usages generally accepted as expressing principles of law*'.[68] What adds to the confusion is that in its more recent practice, the ICJ seems to have requalified as CIL norms that it previously considered to be general principles.[69]

The absence of a clear-cut distinction can even be found in the conclusions of the ILC. The ILC's stance is that the '"rules" of customary international law . . . may be referred to as "principles" because of their more general and more fundamental character'.[70] In other words, it is admitted that general principles can be of a customary origin (also given that CIL is part and parcel of general international law) and are distinguished from regular customary rules by possessing a higher degree of abstractness.[71] The practice of international courts and tribunals seems to support this view, at least to a certain degree.[72] If, however, a neat distinction is maintained between general principles and CIL, then, given the former's high degree of generality, general principles constitute

Permanent Court of International Justice and the International Court of Justice (Brill 2020) 54.

[66] See eg *Prosecutor v Chea and Samphan*, Case no 002/02 (ECCC Judgment, 16 November 2018) [392], esp [396], [409]–[410].

[67] Cheng (n 64) 23.

[68] *The Case of S.S. Lotus* (Judgment) [1927] PCIJ Series A No 10, 18 (emphasis added).

[69] Dordeska (n 65) 153–56. See also K Wolfke, *Custom in Present International Law* (2nd revised edn, Martinus Nijhoff 1993) 105–08.

[70] ILC, 'Draft Conclusions' (n 4) 124.

[71] Tunkin (n 61) 124; H Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law' in *Symbolae Verzijl* (Martinus Nijhoff 1958) 196; K Wolfke, 'Some Persistent Controversies Concerning Customary International Law' (1993) 24 NILR 1, 12.

[72] *Pulp Mills* (n 59) [101].

a residual category, acting as a filler when the other two sources – treaties and CIL – are unable to resolve the dispute.[73]

According to Judge Trindade of the ICJ, general principles of law 'orient the interpretation and application of the norms and rules of this legal order, be they *customary* or conventional'.[74] The ICTY seems to share this view. In *The Prosecutor* v. *Kupreškić*,[75] the Trial Chamber, by taking into account *other principles*, expressed its clear support for a systemic approach when examining the prohibition of attacks on civilian populations. The Trial Chamber argued that to establish 'the scope and purport'[76] of the customary rules on the requirement of proportionality between collateral damage and direct military advantage and the prohibition of the use of indiscriminate means or methods of warfare, it was necessary to interpret them by reference to elementary considerations of humanity, which the Trial Chamber framed as being 'illustrative of a general principle of international law'.[77]

In *The Prosecutor* v. *Furundžija*, the Trial Chamber had to decide on the definition of rape and the forms of behaviour that fell under this offence and, in particular, whether oral penetration could qualify as rape.[78] The Trial Chamber firstly stated that the prohibition of rape in armed conflict had evolved into a norm of customary international law,[79] yet found that international law (whether treaty or custom) contained no definition of rape.[80] Subsequently, it scrutinised national legislation and, as a result, established that while national laws generally converged around the definition of rape as 'the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus',[81] there were discrepancies concerning whether oral penetration qualified as rape or a different type of sexual assault.[82] The question of whether the definition of rape included or excluded oral penetration was decided by reliance on the principle of

[73] See X Shao, 'What We Talk about When We Talk about General Principles of Law' (2021) 20/2 Chinese JIL 219.
[74] *Pulp Mills* (n 59) Separate Opinion of Judge Trindade [216] (emphasis added).
[75] *The Prosecutor v Kupreškić* (Judgment) ICTY-95-16-T (14 January 2000).
[76] ibid [526].
[77] ibid [525].
[78] *The Prosecutor v Furundžija* (Judgment) ICTY-95-17/1-T (10 December 1998).
[79] ibid [168].
[80] ibid [174].
[81] ibid [181].
[82] ibid [178]–[182].

respect for human dignity as 'the essence of the whole corpus of international humanitarian law as well as human rights law'.[83] The inclusion of oral penetration in the definition of rape, both as a treaty and a customary prohibition, was preferred because this solution appeared to be 'consonant with this principle'.[84] Judging from these two cases, it appears that general principles of law are used mainly for making systemic arguments that would determine the scope of the customary rule, thus falling under the second meaning of systemic interpretation.

An example of how the language of systemic interpretation can be misused is found in *Case 002*, where the ECCC Trial Chamber stated that 'as recognised by the Pre-Trial Chamber, having regard to *general principles of law* can *assist* when *defining the elements of an international crime*, where that crime has otherwise been recognised in *customary international law*'.[85] After surveying the legislation of different countries, the Trial Chamber concluded that the *mens rea* of murder as a crime against humanity included *dolus eventualis*.[86] While announcing what appears a systemic approach towards the interpretation of the elements of the crimes found in CIL, the Pre-Trial Chamber ended up surveying the legislation of states and, given that the majority included *dolus eventualis* as the mental element for this crime, established that this had been the *mens rea* for murder prior to 1975.

5 Interpretation of Customary Rules by Reference to the System of Rules as a Whole

To complement the case law analysed in the previous sections, where other rules were used to construe custom, mention should lastly be made of a case where judges relied on a system of rules in its entirety to interpret the customary rule on attribution. In *The Prosecutor v. Tadić*, when arguing against the use of the *Nicaragua* effective control test in this case, the Appeals Chamber made the overarching argument that 'a first ground on which the *Nicaragua* test as such may be held to be unconvincing is based on the very *logic* of the entire *system* of international law on State responsibility'.[87] It subsequently added that:

[83] ibid [183].
[84] ibid.
[85] *Prosecutor v Chea and Samphan* (n 66) [638] (emphasis added).
[86] ibid [650].
[87] *The Prosecutor v Tadić* (n 58) [116] (emphasis added).

> the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.[88]

In addition, it stated that the same logic had to apply to the questions on the appropriate control test.[89] Overall, when looking at the argument advanced by the Appeals Chamber, it appears to conflate teleological considerations with systemic ones in order to show why the effective control test is at odds with the whole system of state responsibility. In subsequent paragraphs, the Appeals Chamber examined state practice and *opinio juris* to show how the effective control was not rooted in practice.[90] However, this was done only subsequently and as an additional argument to the first teleological-systemic argument advanced, which means that it supports the argument being made here that ascertainment of state practice and *opinio juris* cannot be considered the only methods of determining the content of CIL rules in the case law of international courts and tribunals. This is an instance of a classic systemic argument in interpretation combined with teleological considerations, which shows that systemic arguments in the wider sense are not alien to the interpretation of customary rules.

6 Conclusion

Systemic treaty interpretation is ever-present in the practice of international courts and tribunals. While the term does not at first glance appear equivocal, it has in fact been used to refer to four different operations. Firstly, it may denote the act of using other rules as an aid to determine the meaning of treaty terms. Secondly, it can mean the use of systemic interpretative arguments. Thirdly, it has been used to refer to the act of gap-filling and, lastly, to the act of resolving conflicts between norms.

As this chapter has shown, systemic interpretation is also not foreign to CIL rules and, as with treaties, different variants of systemic interpretation have emerged in the practice of international courts. The most common is the use of systemic interpretative arguments, where other

[88] ibid [121].
[89] ibid [122].
[90] ibid [124]ff.

rules or the rules of the system taken as a whole are used to construe the content of a customary rule.

That systemic interpretation is equally capable of applying to customary rules not only advances our understanding of CIL interpretation but is further proof of the enduring interconnection between CIL and the two other sources of international law – treaties and general principles of law.