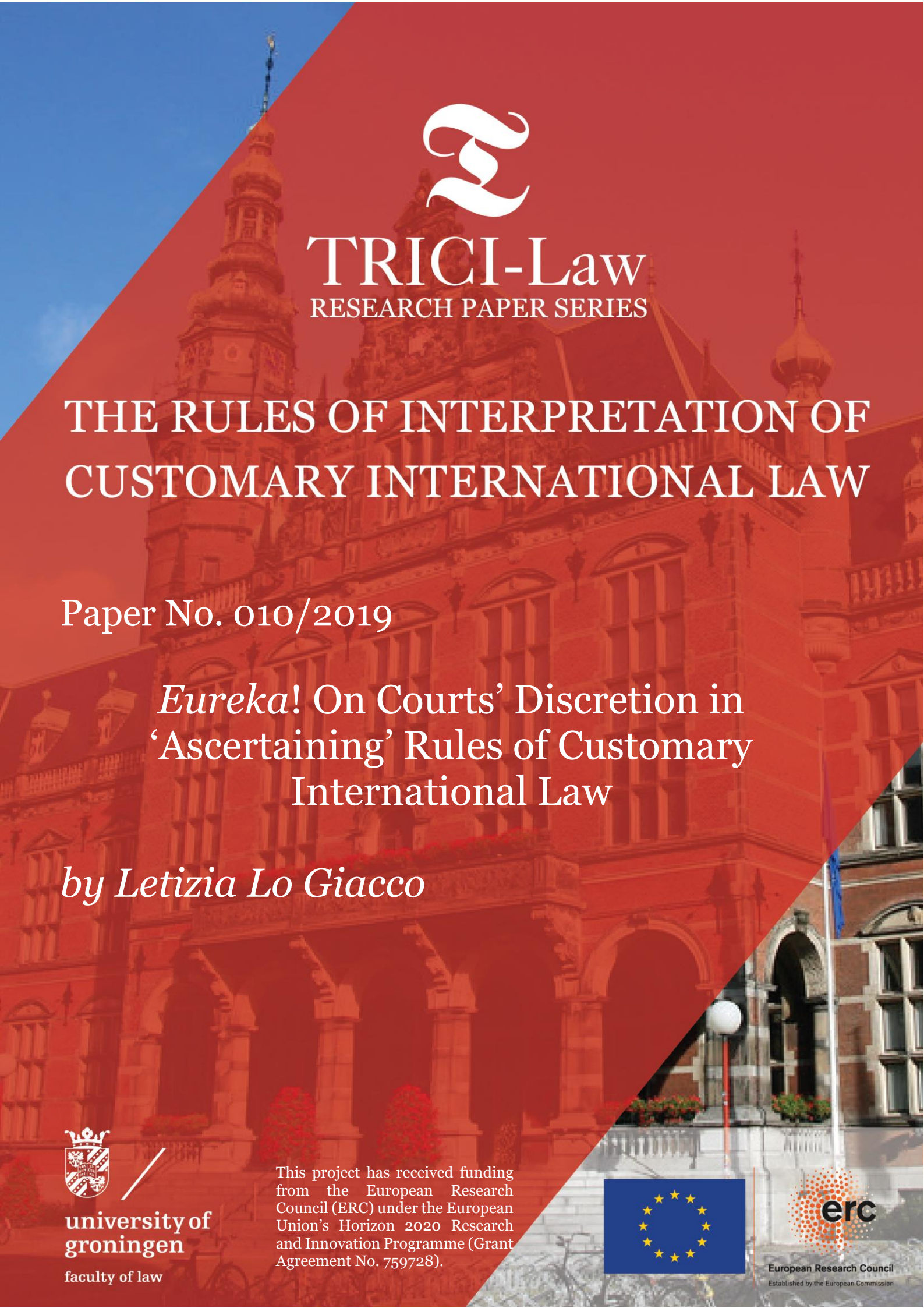
Eureka! On Courts' Discretion in 'Ascertaining' Rules of Customary International Law

Lo Giacco, L.; Merkouris, P.; Kammerhoffer, J.; Arajärvi, N.; Mileva, N.



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by Letizia Lo Giacco

university of groningen
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Letizia Lo Giacco (LL.D., LL.M.)
Assistant Professor, Leiden University
l.lo.giacco@law.leidenuniv.nl

Contribution
TRICI-LAW Project
University of Groningen

'*Eureka!* On Courts' Discretion in 'Ascertaining' Rules of Customary International Law'

Letizia Lo Giacco[1]

Abstract

The determination[2] of rules of customary international law has been typically inserted in the methodological dualism between induction and deduction. By induction, interpreters *find* existing legal rules on the basis of the empirical material – state practice and *opinio juris*. By deduction, instead, interpreters *find* legal rules by deducing them from existing principles and rules of international law. Notably, while induction is portrayed as empirically-grounded – therefore arguably objective – deduction is presented as a logical exercise, thus disguising the margin of manoeuvre that interpreters enjoy in ascertaining rules of customary international law.

The present contribution contends that the methodological dualism informing the discourse on the determination of rules of customary international law shall be revisited to reflect the argumentative nature of such a determination. This twist is conducive to unveil the role that *discretion* plays in the ascertainment of rules of customary international law, rather than embracing a purely methodological lens which rather mystifies it. Accordingly, interpreters operate within an argumentative framework in that they necessarily select and appreciate evidence of practice and *opinio juris*, which is far from being incontrovertible, let alone fully representative of the majority of states. Yet, owing to the authority of courts in a legal order, their verbalization of presumably existing rules of customary international law is a necessary endeavour for the materialization of such 'rules' and their fruition by the legal practice.

1. Introduction

A number of scholarly contributions has tackled the determination of *rules* of customary international law under the umbrella of the *methodological* dualism between induction and deduction.[3] Induction indicates the method of extrapolating a general rule by observing specific instances of practice; deduction is instead the method whereby a specific rule can be inferred from generally accepted rules or principles.[4] 'Filling lacunae' by ascertaining rules of customary international law is a canonical example of deduction. Accordingly, two main approaches have been described as underpinning the ascertainment of rules of customary international law by interpreters. Pursuant to the former, a rule of customary international law may be induced from patterns of state practice and *opinio juris*. This way of ascertaining rules of law proceeds from the observation of empirical facts

[1] (LLD, LLM) Assistant Professor of International Law, *Grotius Centre for International Legal Studies*, Leiden Law School, l.lo.giacco@law.leidenuniv.nl. I owe special thanks to Uta Bindreiter for generous feedback.

[2] Preliminarily, 'determination' is used to mirror the terminology adopted in Article 38(1)(d) of the Statute of the International Court of Justice ('judicial decisions…as subsidiary means for the determination of rules of law'). However, throughout this text, the term 'ascertainment' is used to reflect an approach to legal interpretation in which the interpreter contributes to the construction of the 'object' to interpret. 'Ascertainment' is contrasted with 'identification', used by the International Law Commission, which is arguably underpinned by a competing approach to legal interpretation as a mere *finding* exercise. On the point, see Section 2.

[3] See, *inter alios*, R. Kolb, 'Selected Problems in the Theory of Customary International Law', *50 Netherlands International Law Review* (2003) 119-150; S. Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', *26 EJIL* (2015) 417-443, A. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', *95 American Journal of International Law* (2001) 757-791, at 758.

[4] S. Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', *26 EJIL* (2015) 417-44, at 420.

and, via induction, *finds* rules of customary law which are created by the combination of the two constitutive elements.[5] As such, 'lawyers move behind the law and cannot pretend to lead it.'[6] For the latter, instead, a rule of customary international law may be (logically) deduced from the existence of axiomatic rules or principles of international law, e.g. the principle of sovereign equality between states[7] or the principle of good faith.[8] This way of reasoning is based on the fundamental assumption that international law is a system of rules where claims to the existence of rules of customary international law draw justification from their coherence with other rules within the system.[9]

However, the methodological dualism between induction and deduction is too ambitious and short-sighted at the same time. It is too ambitious, because it presumes that an extensive review of empirical elements would point to the existence of a legal rule presumably and incontrovertibly existing 'out there', ready to be singled out; and it is short-sighted, because it disguises – as empirically or logically based – the argumentative nature of claims to existing rules of customary international law and the role that judicial discretion plays therein. Interestingly, the methodological oscillation between induction and deduction may be portrayed as a struggle between an historical and a philosophical approach to the identification of rules. While the historical approach (induction) would point to the collection of facts as empirical evidence from which to extract a certain historical narrative, on the other hand the philosophical approach (deduction) would serve as an efficient short-cut to make a logically-based descriptive claim of the law.[10] Importantly, both approaches strive to advance claims to scientific truths, thus leaving little space to the contestation of such *findings*.

In light of the foregoing, this contribution has a twofold aim. First, it invites recalibrating the debate surrounding the ascertainment of customary international law towards an argumentative lens. Such a recalibration is conducive to illuminate the element of *discretion* involved in the ascertainment of rules of customary international law, which remains controversially clothed in a method-focused debate. Importantly, this implies looking at potential rules of interpretation[11] of customary international law not as a method to *find* the law 'out there', but rather as shared arguments to *justify* any claim to existing rules of customary international law.

Secondly, this contribution clarifies an irony surrounding the determination of rules of customary international law. If, on the one hand, illuminating the element of discretion defeats the idea of an entirely objective reality observable by courts; on the other hand, the authoritative *verbalization* of such rules by courts is necessary for their materialization and for their coming to fruition in the legal practice. In the absence of such authoritative verbalization, there would hardly be any 'rule' of customary international law; at best a rough idea of a

[5] The link between the two elements was spelled out by the ICJ in the seminal *North Sea Continental Shelf cases*, in which the Court considered 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. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*.' See *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark/ Federal Republic of Germany v. The Netherlands), I.C.J. Reports 1969*, p. 3, §77.

[6] G. Schwarzenberger, 'The Inductive Approach to International Law', *60 Harvard Law Review* (1947) 539-570, 568.

[7] See e.g. *Arrest Warrant case (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, §53-55.

[8] See e.g. *Gulf of Maine case (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 246, §87.

[9] On a critical account of international law as a system, see J. d'Aspremont, 'The International Court of Justice and the Irony of System-Design', *8 Journal of International Dispute Settlement* (2017) 366-388.

[10] I owe a special acknowledgement to Dr. Adeel Hussain for having suggested this pertinent parallel of the dialectics between history and philosophy.

[11] These are not necessarily 'legal', but may be 'disciplining', too. On the point, see O. Fiss, 'Objectivity and Interpretation', *34 Stanford Law Review (1982) 739*, at 744; J. d'Aspremont, 'The Multidimensional Process of Interpretation', in A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (OUP, 2015), p. 123.

metaphysical customary international law. This is demonstrated by a number of cases[12] in which, where applicable, courts have relied on prior judicial decisions ascertaining rules of customary international law or of 'soft law instruments' codifying such rules *qua* written utterances on customary international law.

My argument is developed throughout four sections followed by a fifth conclusive one. Section 2 takes the cues from the recent work of the International Law Commission on the identification of customary international Law and considers the implications of moving from a methodological to an argumentative lens for such identification. Section 3 presents a perusal of judicial decisions in the context of international criminal law illustrating the range of discretion exercised by judges in appraising evidentiary elements for the purposes of ascertaining rules of customary international law, in their form and content. Section 4 reflects upon the role of courts for the materialization of 'rules' of customary international law and the correlated role that past judicial decisions play in the ascertainment of such rules. Finally, section 5 draws conclusions.

2. Revisiting old myths: from epistemological methods to argumentative strategies

The work of the International Law Commission (ILC) on the identification of customary international law[13] intervenes in the debate about the determination of rules of customary international law by tackling the long-standing question of the '*methodology*'[14] that interpreters '*must*'[15] apply to identify such rules. Indeed, the international law literature has repeatedly emphasised the difficulties linked to the determination of rules of customary international law. One of such difficulties rests with the fact that evidence of state practice and of *opinio juris* may be interpreted differently by different courts, may be considered quantitatively insufficient to prove the existence of customary rules or to be regarded as conclusive of such an existence. Different types of practice may be taken into account, as well as different methods may be employed in this identification activity. This point was expressed by Judge Tanaka in his dissenting opinion in the seminal judgment in the *North Sea Continental Shelf cases*, which have become landmark precisely on points of customary international law:

> To decide whether these two factors [state practice and *opinio juris*] in the formative process of a customary law *exist or not*, is a delicate and difficult matter. The *repetition*, the number of examples of State practice, the *duration* of time required for the generation of customary law *cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances*.[16]

In the face of such difficulties, the ILC has laid down preliminary conclusions seeking 'to offer *practical* guidance on how the *existence* of rules of customary international law, and their *content*, are to be determined.'[17]

Two points are in order here. First, the ILC conclusions make reference to two types of activities: one ascertaining the existence of a rule of customary international law, which, from a formal point of view, was created by state practice and *opinio juris*; the other determining the content of such an identified rule. Although both these activities are interpretive in character, they concern two ontologically different dimensions: that of law-

[12] See Section 4.
[13] ILC, 'Draft conclusions on identification of customary international law, with commentaries', A/73/10, 2018.
[14] Ib, p. 122, General commentary (2).
[15] Notably, the ILC Report is drafted in a prescriptive language.
[16] *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark/ Federal Republic of Germany v. The Netherlands), I.C.J. Reports 1969*, p. 3, *dissenting opinion of Judge Tanaka*, p. 175 [*emphasis* added].
[17] ILC Report, A/73/10, 2018, p. 122, General commentary (2).

ascertainment and that of content-determination.[18] While the former articulates itself along elements that are constitutive ingredients to a claim to an existing customary rule, the latter typically hinges on interpretive strategies such as the textualist, intentionalist and purposivist.[19] It is germane to acknowledge that while the ascertainment of rules of customary international law is ingrained in a vigorous doctrinal convergence towards the two-pronged structure of state practice and *opinio juris*, albeit identifiable via different methods, the content-determination activity appears fuzzier and is indeed a dimension where the exercise of discretion by interpreters is left most unrestrained. The present contribution primarily focuses on the law-ascertainment activity.

Secondly, by offering such preliminary conclusions, the ILC seemingly perpetuates two intrinsically entangled myths, namely the myth of a universal methodology to explore and assess state practice[20] and *opinio juris*; and the myth of a hypothetical 'out there' where to identify already existing rules of customary international law.[21] The idea of these being myths stems from a sceptical conception of interpretation, defined as an act consisting in ascribing, as a matter of choice, normative meaning to texts as well as in engaging in legal constructions, especially when no text to interpret in the former sense is available. Indeed, legal construction is particularly relevant in the context of ascertaining rules of customary international law as, by definition, such rules are unwritten or, *rectius*, 'unexpressed', and are made expressed though the ascription of a normative meaning to empirical facts.[22] Such definition of interpretation may be further reduced by accepting that also texts are no more than facts and therefore interpretation is no more than an act of legal construction of facts bearing a normative meaning. As a consequence, law is a set of interpretive practices in which judges play a central role in constructing law.

Against this sceptical understanding of interpretation, the *problématique* of reiterating the legendary beliefs mentioned above essentially rests with the normative view that produces the empirical facts upon which the existence of a certain rule of customary international law is grounded. Indeed, state practice and *opinio juris* do not exist, under these labels, in the empirical world 'out there', but are an interpreter's intellectual construction.

[18] This distinction has been formulated by Jean d'Aspremont in, J. d'Aspremont, 'The Multidimensional Process of Interpretation', in A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (OUP, 2015).

[19] J. d'Aspremont, 'The Multidimensional Process of Interpretation', in A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (OUP, 2015), 122.

[20] Cf. A/73/10, 2018, Conclusion 4(2), referring to the practice of international organizations alongside that of states.

[21] These conclusions may arguably be seen as seeking to offer agreed rules (or meta-rules) comparable to the ones that apply, *mutatis mutandis*, to the interpretation of international treaties, and potentially of legal texts more broadly. Commentators have indeed referred to the rules of the 1969 Vienna Convention on the Law of Treaties (VCLT) – in particular Articles 31-33 – as meta-rules or common methodology for the interpretation of international treaties, or to legal texts more broadly. In the area of international criminal law, there are many examples pointing to this practice. See e.g. ICTY, *Prosecutor v. Slobodan Milošević*, IT-02-54, Decision on Preliminary Motions, 8 November 2001, §47: 'the Statute of the International Tribunal is interpreted as a treaty'; ICTR, *Prosecutor v. Nyiramasuhuko et al*., ICTR-98-42-A, Judgment of 14 December 2015, §2137: '[...][t]he Appeals Chamber recalls that, while the Statute "is legally a very different instrument from an international treaty", it is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose, within the meaning of Article 31(1) of the Vienna Convention on the Law of Treaties of 1969, which reflects customary international law'; ICC, *Prosecutor v. Bemba*, ICC01/05-01/08, Trial Judgment of 21 March 2016, §§75-86, and cited jurisprudence (§75): '[t]he Appeals Chamber clarified that the interpretation of the Statute is governed, first and foremost, by the VCLT, specifically Articles 31 and 32.' The application of the VCLT to the Rome Statute has generated a scholarly debate for possible conflict with the principle of legality. On the point see D. Akande, 'Can the ICC Prosecute for Use of Chemical Weapons in Syria?', *EJIL:Talk!*, post 23 August 2013, and contributions by K.J. Heller and D. Jacobs. See also D. Jacobs, 'International Criminal Law', in J. Kammerhofer and J. d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP, 2014).

[22] R. Guastini, 'A Realist View on Law and Legal Cognition', *27 Revus* (2015) 45-54, at 46-47. In particular, Guastini defines 'unexpressed' norms as those 'lack[ing] any official formulation in the sources of law, not being a plausible meaning of any particular normative sentence'. See ib., at 48. See also R. Guastini, *Interpretare e Argomentare* (Giuffré, 2011), pp. 69-70.

As such, they are first identified, selected, assessed, and categorised like relevant by the interpreter, as a reflection of his/her normative ideology. The concept of 'normative ideology' is to ascribe to the Scandinavian legal realist Alf Ross, who defined it as the judge's belief about what the law in force is. In other words, the selection and assessment of practice and *opinio juris* are but the result of an exercise of discretion, which looms in every act of interpretation.[23]

The ILC Report does not consider this stage of construction of relevant facts, but rather ventures in the assumption that state practice and *opinio juris* are given, intelligible to interpreters in equal terms. This position itself may be the product of normative stances, postulating that interpretation in international law is an objective exercise in which the interpreter plays a marginal role.[24] However, as underscored in the literature,[25] this position does no longer appear tenable, in that legal interpretation entails a subjective choice of the judge between different possible interpretive outcomes and, thus, it cannot be retained watertight to an interpreter's own normative stance vis-à-vis international law as a legal order and its function.[26] Once assumed that interpreters contribute themselves to construct the object of interpretation, professing that interpreters operate a *finding* exercise of legal rules appears a commitment of faith more than anything else. As such, questions pertaining to the law-ascertainment and the content-determination of rules of customary international law are inescapably accompanied by rival ideologies about the ontology of interpretation in international law and, more broadly, about international law as a legal order.

In light of the foregoing, the conclusions laid down by the ILC are worthy of reflection beyond the myths of objectivity and 'out-there-ness' in the identification of rules of customary international law it seemingly reiterates. Rather, by moving away from understanding law-ascertainment and content-determination as a finding exercise, one could appreciate the ILC draft conclusions as directives constraining the interpreters' range of discretion in the context of justification. In other words, evidence of state practice and *opinio juris* are used to *justify* the claim to existing rules of customary international law, *not to find* them. Looking at induction and deduction as argumentative strategies entails that interpreters of international law lay down norm-descriptive statements about the law that require justification in order to be accepted as correct.

The implications of a recalibration from a methodological to an argumentative lens are manifold. First, it entails looking at *opinio juris* and state practice as corroborative or evidentiary elements, rather than truly constitutive or formative ones. Importantly, their persuasive strength rests on the fact that they are traditionally *accepted* as necessary ingredients to a claim to existing rules of customary international law. As questions about the existence and content of rules of customary international law are addressed within an argumentative framework, it follows

[23] On the point, A. Ross, *A Textbook of International Law – General Part* (Longmans, Green and Co, 1947 – reprinted, 2006, 2013), p. 83; A. Aarnio, *Reason and Authority* (Ashgate, 1997), p. 74; U. Bindreiter, 'The Realist Hans Kelsen' in L. Duarte d'Almeida, J. Gardner, and L. Green (eds), *Kelsen Revisited – New Essays on the Pure Theory of Law* (Hart, 2013), p. 112.
[24] As anticipated in footnote 2, this is arguably reflected in the terminological choice, too, of referring to 'identification' rather than to 'ascertainment' of rules of customary international law. In fact, the interpretive activities of law-ascertainment and content-determination are underpinned, in Jean d'Aspremont's conception, by an understanding of legal insterpretation as a 'performative and constitutive activity in that it contributes to the making of what it purports to find.' See J. d'Aspremont, 'The Multidimensional Process of Interpretation', in A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (OUP, 2015), p. 113.
[25] G. Hernández, 'Interpretation', in J. Kammerhöfer & J. d'Aspremont (eds), *International Legal Positivism in a Post-Modern World*, (CUP, 2014), pp. 318-319; I. Venzke, 'Post-modern perspectives on orthodox positivism', in J. Kammerhöfer & J. d'Aspremont (eds), *International Legal Positivism in a Post-Modern World*, (CUP, 2014), p. 182.
[26] H. Lauterpacht, *The Development of International Law by the International Court* (Praeger, 1958), p. 399; D. Kennedy, 'The Turn to Interpretation', *58 Southern California Law Review* (1985) 251; G. Hernández, 'Interpretation', in J. Kammerhofer and J. d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP, 2014), p. 326; B. Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2010), p. 6.

that, by way of legal justification, these findings need to persuade that they are correct.[27] Secondly, understanding the ascertainment of rules of customary international law as a finding exercise rather than an argumentative activity suggests that there is *one* objectively correct rule to which general practice and *opinio juris* point. Conversely, argumentation, as a process of justification, is premised upon the idea that potentially a range of different hypotheses about existing rules of customary international law can be justified and regarded as correct in law.[28] By admitting that different simultaneous plausible interpretations of facts and legal rules are possible, the argumentative lens emphasises the subjective element involved in the ascertainment of rules of customary international law and, as such, it embraces rather than negates the diverse and competing normative views informing interpretation in international law. Thirdly, a recalibration from a methodological to an argumentative framework entails that criteria (or meta-rules) envisaged as a universal methodological roadmap to the 'identification' of rules of customary international law – e.g. those proposed by the ILC[29] – are instead arguments restraining the *discretion* of interpreters – with special regard to courts – i.e. what it can be accounted for and how much weight shall be given to these elements[30] in determining the existence and the content of rules of customary international law.[31] Against this backdrop, the point is not to establish the appropriate method to identify customary international rules existing 'out there', but rather to establish the *constraints to discretion* which a court can possibly exercise in order for the ascertainment of rules of customary international law to be reasonable and not to result in arbitrary adjudication.

3. Judicial discretion in the ascertainment of customary international law: clues from the practice

The preceding sections have attempted to problematize the myth of epistemological methods reiterated in the scholarly debate on the determination of rules of customary international law. In this wake, a twist to an argumentative lens is invited in order to illuminate the element of discretion in legal interpretation, typically left in the background. Discretion, in the context of legal interpretation too, is not a concept of easy definition. One tentative definition has been provided by Cass R. Sustein as 'the capacity to exercise official power as one chooses, by reference to such consideration as one wants to consider, weighted as one wants to weight them.'[32] In Sustein's view, '[a] legal system cannot avoid some degree of discretion, in the form of power to choose according to one's moral or political convictions. […][T]he interpretation of seemingly rigid rules usually allows

[27] In this context, it is worth observing that the latest ILC report on the identification of customary international law acknowledges the necessity of 'a structured and careful process of legal analysis and [that] *evaluation* is required to ensure that a rule of customary international law is properly identified, thus promoting the *credibility* of the particular determination as well as that of customary international law more broadly.' See ILC Report, A/73/10, 2018, p. 122, General commentary (2) [*emphasis* added].
[28] The hypothesis made by a court is authoritative because the court expresses it, not because this is where a convergent practice of the majority of states points to.
[29] ILC Report, A/73/10, 2018, p. 122, General commentary (2).
[30] See ib.
[31] This is not to say that the function of such meta-rules could be disentangled further. For instance, in the context of the rules of the VCLT, Michael Waibel considers that 'the ILC and the Vienna conference gave limited consideration to the question of why interpretive principles were normatively desirable' except for 'brief references to legal certainty and the need for convergence in treaty interpretation.' See M. Waibel, 'Principles of Treaty Interpretation: Developed for and Applied by National Courts', in H.P. Aust and G. Nolte (eds), *The Interpretation of International Law by Domestic Courts – Uniformity, Diversity, Convergence* (OUP, 2016), p. 12.
[32] Cass R. Sustein, 'Problems with Rules', *83 California Law Review* (1995), 953-1026, at 960.

for discretion. But a legal system can certainly make choices about how much discretion it wants various people to have.'[33]

Typically, in a legal order, courts are afforded some degree of interpretive discretion, enabling judges to make a choice between possible interpretive outcomes. The international legal order is no exception to this. For instance, Article 38(2) of the Statute of the International Court of Justice provides a useful illustration of the discretion vested in the Court by state parties, in that it acknowledges the non-prejudiced '*power* of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.' Likewise, in the *Continental Shelf case*, the ICJ expressly recognised its power to discretionary choices:

> […] when applying positive international law, a court may *choose* among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice.[34]

Indeed, past judicial decisions on points of customary international law are a good terrain to explore the way in which courts exercised discretion in the assessment of evidence of state practice and *opinio juris.* Qualities typically associated to rules of customary international law such as repetition, generality, uniformity, and duration, as well as the weight to allocate to *opinio juris* as compared to state practice were laid down and elaborated in judicial decisions. Arguably, these case-law-based criteria are an expression of *how* discretion is channelled and constrained in legal argumentation, enabling the exercise of discretion by a judge to appear rationalised, rather than arbitrary, in that they offer a range of arguments that a court may put forward to justify a certain holding.

This section considers some judicial decisions, as well as separate opinions laid down by the International Criminal Tribunal for the Former Yugoslavia (ICTY) established by UN Security Council resolutions under Chapter VII.[35] Looking at these decisions is particularly appropriate for the purposes of this contribution, given the tribunal's mandate to apply rules that had, 'beyond any doubt', crystallized into customary international law.[36] The purpose of showcasing these judicial decisions is to illustrate, by reference to practice, some of the different approaches exhibited by judges in the ascertainment of rules of customary international law. Arguably, such a variation cannot be adequately explained by the methodological dualism between induction and deduction, as the evaluation of evidentiary elements supporting the existence of a rule of customary international law is far from incontrovertible. After all, what judges do is to argue in favour of an interpretation rather than another based on certain elements of state practice and *opinio juris.*[37] As such, statements about the existence of a particular rule of customary international law are argumentative in nature and seek to persuade a certain audience of their correctness.

In the seminal *Erdemović* case, the ICTY Appeals Chamber was to consider whether, under customary international law, duress would allow a complete defence to a soldier charged with the killing of civilians.[38] To this purpose, national courts' decisions and state legislations were examined. Yet, the threshold beyond which

[33] Ib.
[34] *Continental Shelf case (Tunisia v. Libyan Arab Jamahiriya), I.C.J. Reports (1982)* p. 18, at para. 71 [*emphasis* added]. On the point see M. Kotzur, '*Ex aequo et bono*', Max Planck Encyclopedia of Public International Law [MPEPIL] 2009.
[35] UN Security Council Resolution 827/1993.
[36] Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution, S/25704(1993).
[37] Cf. N. MacCormick, 'Argumentation and Interpretation in Law', *9 Argumentation 467* (1995), at 467: '[interpretation is] a particular form of practical argumentation in law, in which one argues for a particular understanding of authoritative texts or materials as a special kind of (justifying) reason for legal decisions.'
[38] ICTY, *Prosecutor v. Erdemović*, IT-96-22-A, Judgment, 7 October 1997, §19: 'duress *does not afford a complete defence* to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.'

such evidence suffices to demonstrate the existence of a rule of customary international law lies within the discretion of an interpreter. For instance, the joint separate opinion of Judges McDonald and Judge Vohrah, appended to the judgment, is a good illustration of how elements of state practice and *opinio juris* are hardly incontrovertible and can be differently appraised by different interpreters.

> 49. […] [F]or a rule to pass into customary international law, the International Court of Justice has authoritatively restated in the *North Sea Continental Shelf* cases that there must exist *extensive and uniform state practice* underpinned by *opinio juris sive necessitatis*. To the extent that the domestic decisions and national laws of States relating to the issue of duress as a defence to murder may be regarded as state practice, *it is quite plain that this practice is not at all consistent*.[39]

This holding considered the defence's survey, in its Notice of Appeal, of 'the criminal codes and legislation of *14 civil law jurisdictions* in which necessity or duress is prescribed as a general exculpatory principle applying to all crimes. […] Indeed, the rejection of duress as a defence to the killing of innocent human beings in the *Stalag Luft III* and the *Feurstein* cases, both before British military tribunals, and in the *Hölzer* case before a Canadian military tribunal, reflects in essence the common law approach.'[40] Judges McDonald and Vohrah finally concluded as follows:

> 55. […] [I]t is our considered view that no rule may be found in customary international law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings. *The post-World War Two military tribunals did not establish such a rule.* We do not think that the decisions of these tribunals or those of other national courts and military tribunals constitute consistent and uniform state practice underpinned by *opinio juris sive necessitatis*.[41]

The approach of judges McDonald and Vohrah can be contrasted with the declaration of Judge Robinson to the Appeal Judgment in the *Furudžija* case,[42] in which the Judge considered that:

> '[a] *global search*, in the sense of an examination of the practice of every state, *has never been a requirement in seeking to ascertain international custom***,** because what one is looking for is a *sufficiently widespread practice of states accompanied by opinio juris.*' […] '[I]t is accepted that such [*national*] *decisions may, if they are sufficiently uniform, provide evidence of international custom* [I. Brownlie, *Principles of Public International Law* (5th ed. 1998), p. 5. As Oppenheim comments: "Decisions of municipal courts . . . are not a source of law in the sense that they directly bind the state from whose courts they emanate. But the cumulative effect of uniform decisions of national courts is to afford evidence of international custom (although the weight to be attached to that evidence will vary with the status of the courts and the intrinsic merits of the decisions)", *Oppenheim's International Law*, Vol. 1 (9th ed., 1997), p. 41]'.[43]

This strikes a significant discrepancy between the approach of Judges McDonald and Vohrah, in upholding an *extensive* empirical test, as formulated by the International Court of Justice in the cited *North Sea Continental Shelf cases*, for ascertaining the existence of a rule of customary international law, and Judge Robinson who instead submitted that a wide ('global') test has never been the requirement, but rather a *sufficiently widespread practice*. The threshold of empirical evidence demanded by the two approaches is expression of the range of discretion available to the interpreter when engaging in the ascertainment of rules of customary international law.

[39] ICTY, *Prosecutor v. Erdemović*, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, §49, [*emphasis* added].
[40] Ib, §49.
[41] Ib, §49-50 and 55 [*emphasis* added].
[42] ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeal Judgment, 21 July 2000, Declaration of Judge Patrick Robinson, §12.
[43] Ib [*emphasis* added].

Moreover, judges have granted a different weight to state practice and *opinio juris* for the purposes of ascertaining rules of customary international law. One such illustration is offered by the *Kupreskić* case[44] in which the ICTY Trial Chamber acknowledged that *opinio juris* may play a primary evidentiary role at the expense of state practice.[45]

> 527. […] The question nevertheless arises as to whether these provisions [Article 51(6) and Article 52(1) of the First Additional Protocol of 1977], *assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law.* […] Admittedly, *there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely usus or diuturnitas has taken shape.* This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. *In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent.* The other element, in the form of *opinio necessitatis, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law*.[46]

The ICTY Trial Chamber further elaborated on the formation of a rule of customary international law prohibiting reprisals against civilians by reference to 'widespread *opinio necessitatis*'… 'confirmed, first of all, by the adoption, by a vast majority, of a Resolution of the U.N. General Assembly in 1970 which stated that "civilian populations, or individual members thereof, should not be the object of reprisals"' and by the high number of States that have ratified the First Protocol.[47] The reference to manifold instruments such as the above mentioned UN GA resolution of 1970, a Memorandum of the ICRC of 7 May 1983, the pronouncement of ICTY Trial Chamber I in *Martić,* 'substantially upholding such a rule',[48] shows the intention of the Chamber to find ample corroboration to its claim to the existence of a rule of customary international law. This overview, in the *Kupreskić* case, finally led the Chamber to conclude as follows:

> […] the aforementioned elements seem to support the contention that the demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*, have by now brought about the *formation* of a customary rule also binding upon those few States that at some stage did not intend to exclude the abstract legal possibility of resorting to the reprisals under discussion.[49]

In the *Furundžija* case, the ICTY Trial Chamber was to establish the customary character of the prohibition of torture in time of armed conflict. The Chamber found that 'the broad convergence of international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in article 1 of the Torture Convention.'[50] In particular, indication of the customary

[44] ICTY, *Prosecutor v. Kupreskić*, IT-95-16-T, Trial Judgment, 14 January 2000.
[45] Notably, a traditional – evidentiary stringent – approach to the identification of rules of customary law, of the type advocated by Judge McDonald and Judge Vohrah in *Erdemović*, is not necessarily conflicting or irreconcilable with the one upheld by the Trial Chamber in *Kupreskić*. Commentators have looked at those as mirroring types of international custom along a *sliding scale*. See, *inter alios*, P. Chiassoni, 'La consuetudine internazionale: una ricognizione analitica', *Ragion pratica* (2014) 489-510.
[46] ICTY, *Prosecutor v. Kupreskić*, IT-95-16-T, Trial Judgment, 14 January 2000, §527 [*emphasis* added].
[47] Ib, §532.
[48] Ib.
[49] Ib, §533 [*emphasis* added].
[50] ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-T Trial Judgment, 10 December 1998, §161. The Chamber considered this finding 'incontrovertible'. See ib. §139: 'It therefore seems incontrovertible that torture in time of armed conflict is

character of the prohibition of torture in time of armed conflict was inferred from the number of ratification of relevant international treaties, as well as in the lack of opposing claims by states purporting the contrary.[51] This finding was finally sealed by reference to relevant ICJ judicial decisions.[52]

This overview of judicial pronouncements suggests that judges play a fundamental role in the ascertainment of customary international law. In particular, judges' verbalization of 'rules' of customary international law in judicial decisions appear a propaedeutic step for materializing such rules in an authoritative form and bringing them to fruition of the legal practice. Courts' engagement in such verbalization may also be determinant to assess the interpretive steps (meta-rules) claimed to have been adopted for determining such rules and possibly challenge them. As recalled earlier, judges may engage in the formal ascertainment of rules of customary international law, as well as in the determination of their substantive content.[53] While for the former, state practice and *opinio juris* occupy a prominent role in legal argumentation, for the latter courts are seemingly inclined to refer to existing written formulations having a normative bearing. In fact, reference to existing written formulations allows a court to articulate the content of existing rules of customary international law in a persuasive way.

4. The materialization of 'unexpressed' rules and the role of past judicial decisions

Based on the judicial decisions considered thus far, at least two factors played a role in allowing the interpreter to modulate the range of discretion: first, the threshold of empirical evidence required for a claim to customary international law; second, the more or less weight that an interpreter may attribute to state practice and *opinio juris* as evidentiary elements. In addition to these, one may consider factors which instead appeared to constrain a judicial exercise of discretion. For instance, the following examples show that prior written formulations of unexpressed rules – first and foremost, although not exclusively, judicial decisions – were typically relied upon in international adjudication.

In the recent *Chagos* Advisory Opinion,[54] the International Court of Justice was to determine 'when the *right* to self-determination crystallised as a customary *rule* binding on all States.'[55] After recalling the trite adage that 'custom is constituted trough general practice accepted as law', the Court turned to the UN General Assembly resolutions to survey the evidence of state practice, which it considers relevant and determinant for sealing the customary nature of the right to self-determination, notably resolutions 637 (VII)/1952, 738 (VIII)/1953, 1188 (XII)/1957 and 1514 (XV)/1960. The Court regarded this latter as 'a defining moment in the consolidation on

prohibited by a general rule of international law. In armed conflicts this rule may be applied both as part of international customary law and – if the requisite conditions are met - qua treaty law, the *content* of the prohibition being the same.'

[51] ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-T Trial Judgment, 10 December 1998, §138: '…the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture. In other words, this participation is highly indicative of the attitude of States to the prohibition of torture.'

[52] Ib, §138: '…the International Court of Justice has authoritatively, albeit not with express reference to torture, confirmed this custom-creating process: in the *Nicaragua* case it held that common article 3 of the 1949 Geneva Conventions, which inter alia prohibits torture against persons taking no active part in hostilities, is now well-established as belonging to the corpus of customary international law and is applicable both to international and internal armed conflicts [*See* Judgement, *Case Concerning Military and Paramilitary Activities in and against Nicaragua,* (*Nicaragua v. U.S.A.*), (Merits), 1986 I.C.J. Reports 14, 27 June 1986, pp. 113-114, §218].'

[53] As mentioned earlier, such a summa divisio between form and content is maintained by the ILC too, which considers instances in which the existence of a rule of customary international law is agreed but its content is disputed. Cf. ILC Report (A/73/10, 2018), p. 124, commentary (4).

[54] *Legal consequences of the separation of the Chagos archipelago from Mauritius in 1965*, ICJ Advisory Opinion, 25 February 2019.

[55] Ib, §148.

State practice on decolonization' clarifying 'the *content and scope* of the right to self-determination'.[56] In ascertaining the customary character and the substantive contours of the right to self-determination, the Court thus deferred to UNGA resolution 1514/1960 not only as *declaratory* of the existing customary right to self-determination,[57] but also to determine the *content* and *scope* of such a right',[58] namely to *interpret* such a right.[59] Unsurprisingly, such material is used by the Court to justify the claim of ascertained rules of customary international law having a certain meaning.

In the *Rwamakuba* case,[60] the ICTR Appeals Chamber was confronted with the question whether joint criminal enterprise was an existing mode of liability under customary international law, whereby conviction of an individual was permissible. The Chamber approached the question by reference to state practice and *opinio juris*, but instead of engaging with these elements, it upheld the finding in the *Tadić* Appeals Judgement pursuant to which the participation to a common plan to commit a crime against humanity was criminalized under customary international law before 1992.[61] The ICTY Appeals Chamber has placed similar reliance in other cases on proceedings held following World War II, including the proceedings before the International Military Tribunal and before tribunals operating under Allied Control Council Law No. 10 ("Control Council Law No. 10"), as indicative of principles of customary international law at that time.[62]

Similarly, in the *Kayishema & Ruzindana* case, the Appeals Chamber considered the principle of the right to a fair trial as 'part of customary international law… embodied in several international instruments, including Article 3 common to the Geneva Conventions [See *Čelebeći* Appeal Judgment, §§138 and 139].'[63] In the *Hadžihasanović et al*. case, the ICTY Appeals Chamber considered that 'to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting *opinio juris*.'[64] By reference to the ICJ judicial decisions concluded that 'Article 3 common to the Geneva Conventions of 1949, which has long been accepted as having customary status [See *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22, and *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, pp. 112 and 114].' In the same case, the Appeals Chamber found 'that the customary international law rule embodied in Article 3(e) is applicable in all situations of armed conflict [international and non-international], and is not limited to occupied territory [*Kordić* Appeals Judgement, §78 ("[t]he prohibition of plunder is general in its application and not limited to occupied territories only")],'[65] and that, as such, 'violations of the

[56] Ib, §150.
[57] Ib, §152.
[58] Ib, §150.
[59] See also, ib, §146.
[60] ICTR, *Prosecutor v. Rwamakuba*, ICTR-98-44-AR72.4, Decision on Joint Criminal Enterprise, 22 October 2004.
[61] ICTR, *Prosecutor v. Rwamakuba*, ICTR-98-44-AR72.4, Decision on Joint Criminal Enterprise, 22 October 2004, §14: 'Norms of customary international law are characterized by the two familiar components of state practice and *opinio juris*. In concluding that customary international law permitted a conviction for, *inter alia*, a crime against humanity through participation in a joint criminal enterprise, the *Tadić* Appeals Judgement held that the recognition of that mode of liability in prosecutions for crimes against humanity and war crimes following World War II constituted evidence of these components.
[62] See, e.g., *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998, paras. 195, 211, 217; *Tadić* Appeal Judgment, paras. 200, 202; see also *Ojdanić* Jurisdiction Appeal, Separate Opinion of Judge David Hunt, para. 12 ("It is clear that, notwithstanding the domestic origin of the laws applied in many trials of persons charged with war crimes at that time, the law which was applied must now be regarded as having been accepted as part of customary international law.").
[63] ICTR, *Kayishema & Ruzindana*, ICTR-95-1-A, Appeal Judgement, 4 December 2001, §51.
[64] ICTY, *Prosecutor v. Hadžihasanović et al*., IT-01-47-AR72, Decision on Command Responsibility, 16 July 2003, §12.
[65] ICTY, *Prosecutor v. Hadžihasanović et al*., IT-01-47-73.3, Decision of Motions for Acquittal, 11 March 2005, §37.

prohibition against "plunder of public or private property" under Rule 3(e) entail, under customary law, the individual criminal responsibility of the person breaching the rule.'[66] Similarly, in the *Tadić* Appeal Judgment, the ICTY Appeals Chamber found case law to be reflective of customary international law.[67]

At a very first glance, the ascertainment of rules of customary international law, more than any other ambit, seems to confirm the tenets of a legal realist approach to law. If law is fact, namely the law which is applied in practice by courts, what else than 'finding' rules of customary international law can prove that such rules are brought to 'reality' through judicial pronouncements? Indeed, the ascertainment of 'unwritten law deriving from practice *accepted* as law'[68] entails important juristic and epistemological implications. From a juristic standpoint, the ascertainment of rules of customary international law consists in an act of interpretation carrying with itself claims of formal and substantive validity. From an epistemological point of view, the act of ascertainment presupposes that rules of customary international law exist 'out there' and that an interpreter may bring them to perceived 'cognition' or to 'reality', hence to fruition of actors in the international legal practice.

In relation to this, two entangled questions are in order. First, what kind of act is the act of ascertaining rules of customary international law? It is argued that this is an act of legal construction that is adjudicative, not cognitive, in nature.[69] Second, are interpretive utterances claiming the existence customary international law norm-descriptive or norm-expressing statements? In Alf Ross' view, judicial decisions may be considered as norm-descriptive statements about the law, as opposed to deontic rules, which are norm-expressive statements of the law.[70] More precisely, the written formulation of rules of customary international law in judicial decisions provides these rules with an authoritative text constituted by the written utterances of what the court ascertained as existing rules of customary international law and what it interpreted as their normative meaning. This owes,

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[66] Ib, §38. The same way of argumentation is found in §§47 and 48 of the decision:

> 47. The Appeals Chamber in the *Tadić* Jurisdiction Appeal found that the Article 3(d) prohibition against destruction or wilful damage to institutions dedicated to religion applied to both non-international and international armed conflict [*Tadić* Jurisdiction Decision, para. 86 (noting "this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal's interpretation of those Regulations"); ibid., para. 87 (stating "the Hague Convention [is] considered *qua* customary law" applicable to international armed conflict); ibid., para. 98 (noting one rule of customary international law that applies to non-international armed conflict is Article 19 of the [1954] Hague Convention, which states that "[i]n the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property", where respect for cultural property includes protection and safeguarding of "immovable property of great importance to the cultural heritage of every people, such as monuments of architecture... whether religious or secular". *See* Articles 1, 2, 3, 4, and 19 1954 Hague Convention); *ibid*., para. 127 (noting the protection of cultural property as one of the "customary rules [that] have developed to govern internal strife").][66] This Appeals Chamber affirms that conclusion.
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> 48. The Appeals Chamber is satisfied that violations of the prohibition against "destruction or wilful damage done to institutions dedicated to religion" under Rule 3(d) entails, under customary law, the individual criminal responsibility of the person breaching the rule. […]

[67] ICTY, *Prosecutor v. Tadić,* IT-94-1-A, Appeal Judgment, 15 July 1999, §226: 'The Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that case law *reflects customary rules of international criminal law*'[*emphasis* added].

[68] ILC Report of the Identification of Customary International Law ('ILC Report'), A/73/10, 2018.

[69] R. Guastini, 'A Realist View on Law and Legal Cognition', *27 Revus* (2015) 45-54, at 46. 'Adjudicative' is the quality of an interpretation consisting in ascribing a certain meaning to the object to be interpreted while discarding other possible ones. Conversely, 'cognitive' indicates the act of clarifying all possible meanings.

[70] A. Ross, *On Law and Justice* (University of California Press, 1959), p. 10; U. Bindreiter, 'The Realist Hans Kelsen' in L. Duarte d'Almeida, J. Gardner, and L. Green (eds), *Kelsen Revisited – New Essays on the Pure Theory of Law* (Hart, 2013), p. 108; J. v. H. Holtermann, 'A Straw Man Revisited: Resettling the Score Between H.L.A. Hart and Scandinavian Legal Realism', *57 Santa Clara Law Review* (2017) 1, at 15-18.

among other things, to the nature of international law, and law more generally, as a learned profession about what the law is – *rectius*, *what courts considered it to be* – thus, a learned profession articulating verbal/written expressions about the formal and substantive validity of the law.[71] Importantly, such verbalization stems from an evaluative process channelled through the judges' normative ideology[72] – embedded in an exercise of discretion – about what they believe it exists – or should exist – as a matter of legal rules, universally binding *qua* customary international law. Within this learned profession, judicial decisions arguably constitute authoritative statements *on* rules of customary international law, embedding a standard of correctness.[73] As such, this actual formulation of rules of customary international law in their form and content is necessary in order for 'rules' as such to materialize, as well as to formally and substantively challenge such rules on the basis of a cognized formulation. Even more so, if courts claim to have *found* rules of customary international law based on state practice and *opinio juris*. Whether those verbal expressions truly reflect existing law is arguably irrelevant as long as those expressions are accepted as correct.

As such, judicial decisions verbalising rules of customary international law fall short to be considered as purely norm-descriptive statements on the law, as they embed the (deontic) expression of rules of customary international law. In other words, sentences which formulate unexpressed norms are 'secretely prescriptive',[74] as they pretend to describing existing law but are actually constructing new rules.

To illustrate this ambiguity, one may refer to the ILC report on the identification of customary international law mentioned above, whose proposed meta-rules are not laid down in a vacuum. Rather, they considerably draw from ICJ pronouncements determining the *qualities* of the constitutive elements of customary international law, i.e. the criteria necessary to claim the existence of a rule of customary international law. For instance, the commentary to draft conclusion 2, the ILC maintains the same criteria for the identification of rules of customary law as those established by the ICJ in its judicial decisions:

> (2) A general practice and acceptance of that practice as law (*opinio juris*) are the two constituent elements of customary international law: together they are the essential conditions for the existence of a rule of customary international law. The identification of such a rule thus involves a careful examination of available evidence to establish their presence in any given case. This has been confirmed, inter alia, in the case law of the International Court of Justice, which refers to *"two conditions [that] must be fulfilled*" [*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77] and has repeatedly laid down that "the existence of a rule of customary international law requires that there be *"a settled practice"* together *with opinio juris"* [See, for example, *Jurisdictional Immunities of the* State *(Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 122–123, para. 55; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 29–30, para. 27; and *North Sea Continental Shelf* (see footnote above), at p. 44, para. 77]. To establish that a claim concerning the existence or the content of a rule of customary international law is well-founded thus entails a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation (namely, that it is required, permitted or prohibited as a matter of law). The test must always be: is there a general practice that is accepted as law?[75]

[71] Cf. A. Carty, 'Scandinavian Realism and Phenomenological Approaches to Statehood and General Custom in International Law', *14 EJIL* (2003) 817, at 819.
[72] See *supra* note 23.
[73] The expression 'standard of correctness' is borrowed from John Bell, see J. Bell, 'Sources of Law', *77 Cambridge Law Journal* (2018) 40-71. This notion of correctness applied to judicial decisions is reflected in the maxim *jura novit curia*.
[74] R. Guastini, 'A Realist View on Law and Legal Cognition', *27 Revus* (2015) 45-54, at 51.
[75] ILC Report, A/73/10, 2018, draft conclusion 2, comment (2).

The ample reliance on these judicial decisions suggests that criteria determined therein have been accepted as correct. In particular, criteria such as '*settled* practice' or '*consistent* practice of the *majority* of the states', found in judicial decisions inasmuch in the Report of the ILC, stem from the discretion that a court enjoys in the adjudication of legal issues – i.e. they are set forth according to the discretion which the court considers to the able to exercise – and have the power to limit or further enlarge the measure of discretion afforded to the judge in later cases. The ILC Report sanctions the criteria relevant for the ascertainment of rules of customary international law that have been considered persuasive. Furthermore, the determination by the ILC that the test to ascertain the existence of a rule of customary international law '*must always* be: is there general practice accepted as law?' is eloquent for the constraint to interpretive discretion which the ILC conclusions, too, seek to produce onto subsequent interpretive authorities.

The spurious nature of judicial decisions ascertaining rules of customary international law as merely norm-descriptive statements and is further exacerbated by the sceptical understanding of interpretation discussed above, looking at it as an argumentative art rather than an exact science.[76] In fact, courts ascertaining rules of customary international law operate an existential interpretation[77] and may not be regarded as performing a merely declaratory function. Although this outlook bears the marks of legal realism,[78] it is not limited to it. Admittedly, even Hans Kelsen argued that 'the function of adjudication is constitutive through and through' and 'the judicial decision is itself an individual legal norm.'[79]

5. Conclusions

Qua unwritten by definition, customary international law seems to appertain more to a metaphysical dimension than to the world of reality. In this scenario, the judge seemingly plays an intermediary role between the metaphysical dimension of intangible customary international *law* and the world of reality in which *rules* materialize through the pronouncements of the judge. As such, courts may be seen as bringing customary international law to real life – as opposed to a metaphysical dimension – drawing from a world of hypothetical *rules* of customary international law. In ascertaining the existence of such rules, and formulating their content,[80] courts lay down written utterances of otherwise unwritten 'law' presumably existing 'out there'. In other words, the route from the metaphysical space to the world of reality channelled by courts enables the materialization of rules (verbalized in written utterances), the scrutiny of the methods and criteria (meta-rules) used to ascertain such rules, as well as the evaluation of the evidence that a court considered.

[76] Cf. U. Linderfalk, 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making', *26 EJIL* (2015) 169, at 175-179.
[77] The expression 'existential interpretation' is borrowed from D. Hollis, 'Sources and Interpretation Theories: An Interdependent Relationship', in J. d'Aspremont and S. Besson (eds), *The Oxford Handbook of the Sources of International Law*, (OUP, 2017). The notion of 'existential interpretation' may be reconciled with a legal realist approach considering the law 'in force' as the one that is considered so by courts. See, inter alios, A. Ross, *On Law and Justice* (University of California Press, 1959), pp. 17-18; J.v.H. Holtermann, 'Alf Ross: On Law and Justice; "Editor's Introduction", forthcoming in Ross, Alf, *On Law and Justice*, ed. Jakob v. H. Holtermann, tr. U. Bindreiter (OUP, 2018)', *116 iCourts Working Paper Series* (2018), at 35-38.
[78] P. Chiassoni, 'Wiener Realism' in L. Duarte d'Almeida, J. Gardner and L. Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing, 2013); S. L. Paulson, 'Introduction' in S. L. Paulson and B. L. Paulson (eds), *Normativity and Norms – Critical Perspectives on Kelsenian Themes* (Clarendon Press, 1998), xliii.
[79] Ib.
[80] A good example of this is provided by the *Arrest Warrant case (Democratic Republic of Congo v. Belgium), I.C.J. Reports 2002*, §61.

Courts are in a special position to pronounce such statements because of the authority typically vested in them within a legal order. As argumentative strategies, induction and deduction enable courts to portray the ascertainment of customary international law as an act of *finding*, which does not depend on an exercise of discretion, but rather sets the interpreter in the context of exploring an objective reality. This ascertainment confers to customary international law an aura of objectification, and divests it of the potential criticism as judge-made law. As such, interpretation – which entails a discretionary choice between possible interpretive outcomes – is *perceived* as an act of cognition rather than adjudication. Discretion not only lies in the power to make such a choice, but also in formulating a hypothesis about a presumably existing rule of customary international law, as a reflection of, *inter alia*, of the ideal of international legal order that a court seeks to realize, as well as in regarding certain principles of international law as axiomatic. Accordingly, a judge may do away with the principle of sovereign equality between states less easily, than with the principle of responsibility to protect, depending on what a certain normative ideology would present as axiomatic.

Against this background, this contribution has revisited the methodological dualism between induction and deduction as applied in the context of the 'identification' of rules of customary international law. Revisiting such dualism came with suggesting embracing an argumentative lens. Like shifting lenses may entail empowering or disempowering one's sight, similarly twisting a methodological focus, which has featured the legal discourse on the identification of customary international law, towards an argumentative lens may entail that elements which previously appeared obfuscated become more candid and *viceversa*. The twist from the methodological dualism induction/deduction to an argumentative lens was precisely aimed at reflecting the argumentative character of the ascertainment of rules customary international law.

It has been contended that while the methodological lens obscures the range of discretion exercised by the court in the ascertainment of rules of customary international law, the argumentative lens sheds light on it, insofar as a claim of the existence such rules necessarily entails the selection and assessment of state practice and *opinio juris* which is far from being incontrovertible. The cursory survey of judicial decisions, primarily drawn from the field of international criminal law, has sought to show the different argumentative strategies whereby judges evaluated 'evidentiary elements' (state practice and *opinio juris*). Whether and how judges engage in the argumentative strategies of induction or deduction of existing rules of customary law is after all a discretionary choice. Yet, judicial decisions verbalizing rules of customary international law are necessary for the materialization of such unexpressed rules in an authoritative form, as well as for the contestation of such rules, based on the arguably identified form and content. As such, courts play a fundamental role to nurture the myth of rules of customary international law as an empirically based discovery rather than a discretion-centred activity.

The ample reference to prior judicial decisions corroborates the fundamental role played by courts in interpreting the world of facts bearing a normative significance ('practice accepted as law'), and in verbalizing 'rules' of customary international law. In other words, courts are in a special position as interpreters, insofar as their pronouncements are understood as authoritative statements on the law embedding a standard of correctness, upon which actors in a legal field can rely, and which seemingly motivates actors to reiterate the myth of rules of customary international law existing 'out there'.