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'And in the Darkness Bind Them'

Hand-Waving, Bootstrapping, and the Interpretation of Customary International Law after *Chagos*[*]

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1 Introduction

The essential role of interpretation in relation to national statutes has, especially in common law jurisdictions, given rise to a complex apparatus of guidelines, axioms and indeed further statutes ('Interpretation Acts'). Somewhat by analogy or by extension, the interpretation of international conventions (treaties) has long been recognised as itself both complex and immanent to the process of application of treaties, not least when the effect of a treaty is in dispute. It is true that despite well over a century of international jurisprudence on the interpretation of treaties, including the development of the Vienna Convention on the Law of Treaties (VCLT) itself, complexities and unresolved difficulties remain in that sphere.[1] However the processes of disciplined interpretation of written statements of law, whether municipal (national) or international, and the problems that arise therefrom, are at least familiar.

The role of interpretation in the second of the sources of public international law – 'international custom, as evidence of a general practice accepted as law' – is much less familiar. Scholarship in this area is just beginning.[2] It has been proposed that interpretation in this

[*] Thanks are due to Helmut Aust, Gleider Hernández, Jörg Kammerhofer, Panos Merkouris, Marko Milanovic and Sundhya Pahuja.

[1] P Merkouris, 'Treaty Interpretation and Its Rules: Of Motion through Time, "Time-Will" and "Time-Bubbles"' in M Fitzmaurice and P Merkouris (eds), *Treaties in Motion* (Cambridge University Press 2020) 121; J Crawford, *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press 2019) 369.

[2] Merkouris (n 1); See Chapter 22 by Ryngaert in this volume; P Staubach, 'The Interpretation of Unwritten International Law by Domestic Judges' in HP Aust and

context is of most significance in the application of customary international law (CIL) to new situations, rather than in its initial discernment as such. Without disputing the relative importance of interpretation in the application of CIL, vis-à-vis interpretation in other aspects of the technique of CIL, it may still prove of value to widen the scope of enquiry in that respect. There is thus room for the view that interpretation is intrinsic to the definition, articulation and implementation of CIL just as it is for the law of treaties, for 'general principles', for teachings of the publicists or for previous decisions of international tribunals; and indeed for considerations *ex aequo et bono*.[3] Interpretation may of course be applicable in somewhat different ways to these various genres of 'source' (by which term they are collectively and colloquially known) in international law.[4] Put this way, interpretation is ubiquitous; and while this is itself significant, care must also be taken to distinguish modes or genres of interpretation. To draw attention to a role for interpretation in relation to CIL is thus only a very preliminary step, as is of course recognised by scholars.[5]

In this chapter we argue that some of the most important aspects of the role of interpretation in the context of CIL can be expressed in the following way: namely to claim at least for the sake of argument that the most characteristic phrase concerning CIL in the discourse of public international law is the phrase '*this may represent customary international law*'.

G Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016) 113.

[3] Every genre of international law recognised by the Statute of the International Court of Justice is by definition distinct in its *modus operandi*. Thus the *ex aequo et bono* of Article 38(2) works in a very different way from sources indicated in Article 38(1); and publicists' contributions work very differently from judicial decisions, both of which are located within Article 38(1)(d). *Ex aequo et bono* may in any event be considered to lie outside sources proper; Crawford (n 1) 41.

[4] Ryngaert (n 2).

[5] Merkouris (n 1). It is self-evident that any reference to 'principles' or 'doctrines' in relation to CIL, immediately raises questions of the role of interpretation whether the reference is to an aspect of the customary form or to 'the doctrine of CIL' as a whole. Respectively, KJ Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112 AJIL 191; BS Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 AJIL 1, 43; some 'doctrines' that may hint at international customary status, perhaps of a regional nature ('regional understandings'), find their way into treaties. Thus the reference to a version of the Monroe Doctrine in Article 21 of the Covenant of the League of Nations: JP Scarfi, 'Denaturalizing the Monroe Doctrine: The Rise of Latin American Legal Anti-Imperialism in the Face of the Modern US and Hemispheric Redefinition of the Monroe Doctrine' (2020) LJIL 541, 551.

It is the word 'may' on which we lay emphasis. This hypothetical or tentative assertion of the existence and validity of a particular CIL, is intrinsically interpretive. What we will argue is that this hypothetical or tentative gesture, thought of as a species of interpretation, takes us to the heart of CIL. In other words, what is central to any statement about CIL is the attribution of the possibility of customary justification for some conduct or prohibition, irrespective of whether this has ever been or will ever be, tested.[6] Despite the gravity of the rights and obligations connected with the norm thus speculated upon, there is a certain archness to the trope. The kind of uncertainty thereby conjured is a kind of uncertainty quite different to what one finds with other genres of source. A wished-for consensus of the most qualified publicists or of judicial decisions, on a particular point, might expose uncertainty of a somewhat humble variety and one that is in essence empirical. A survey of relevantly common municipal regulation, entered into in the spirit of the *Barcelona Traction* dispute, would be uncertain in somewhat the same manner, as of research. To refer in an open-ended manner to the possibility of there existing a presently unknown, written agreement between sovereigns would seem absurdly speculative yet this is only the case because treaty making has become a public affair. In principle all such hypothesised sources might be enquired into with a reasonable expectation of establishing either their existence or non-existence. Often CIL will be sought out in a similarly empirical manner yet the gesture seems intrinsic to this source of norms in a way unmatched by the other sources. This gesture, almost a gesture to a higher realm of the transcendent, might be said to locate CIL in some grey zone between *lex lata* and *lex ferenda*: a zone we might call *lex hypothetica*.[7]

Approached in this somewhat sceptical manner, the essence of CIL seems to be 'bindingness' (legal obligation) combined with opacity – what might be called 'blindingness' – because the transparency that comes with treaties (albeit, only since the mid-twentieth century) is necessarily absent. Accountability might be said to be dramatically

[6] On emerging CIL regulating state conduct over human rights obligations see EJ Criddle and E Fox-Decent, 'Mandatory Multilateralism' (2019) 113 AJIL 272, 285. On emerging CIL regulating state conduct over climate change mitigation and response see B Mayer, 'Climate Assessment as an Emerging Obligation under Customary International Law' (2019) 68 ICLQ 271. These claims are of methodological interest irrespective of their substantive merits or persuasiveness.

[7] Alongside a number of important distinctions, this appeal to the vocabulary of modal logic is also to be seen in speculative claims concerning the peremptory norm as discussed below.

lacking.[8] The combination of these two factors might be referred to by borrowing, with apologies and with some poetic license, the words of J. R. R. Tolkien: 'And in the darkness bind them.' Only retrospectively and vicariously, that is to say in the decisions or advisory opinions of tribunals, is CIL endowed with a measure of transparency. This takes place by means of the 'translation' of the CIL into written form. Thus CIL, which is defined as unwritten, paradoxically only has normative force when it is written. Up until that point at least it is something of a will o' the wisp. The process seems a little like the recognition of states under the declarative mode, or like the announced discovery of a common law principle or a maxim of equity: more alchemy than chemistry or, to adjust the metaphor, more priestly than Priestley. A qualitative change takes place, a transubstantiation or saltation.[9] Correspondingly, the circularity in argument or 'bootstrapping' aspect seems problematic as one intangible step leads on to another. Of course the enigmatic if not paradoxical character of CIL is widely recognised, for example in the arcane form of the persistent objector to an emerging customary norm.[10] Here a sovereign is held retrospectively to have been sufficiently cognizant of an emerging customary norm as between relevant sovereigns, of which that sovereign is one, that the sovereign's historical protests constitute a kind of negative prescription by means of which his or her putative obligations are nullified. Given the relationships between prescription in the international law of territory and the common law principle of adverse possession, the persistent objector would seem to be claiming something like an 'adverse immunity'.[11]

Further below, we will frame and motivate our comments on the role of interpretation in CIL by means of an enquiry into the role played by CIL in

[8] In this connection note should be taken of the Appeals Chamber of the International Criminal Court declaring an end to a CIL of head of state immunity, an example surely of the consequences and risks of poor accountability. See Dapo Akande, 'ICC Appeals Chamber Holds that Heads of State Have No Immunity under Customary International Law Before International Tribunals' (*EJIL: Talk!*, 6 May 2019) <https://bit.ly/3F8lRO2> accessed 1 March 2021.

[9] On the trigonometrically 'tangent'-like form of time understood within international law see JR Morss, 'Riddle of the Sands: Time, Power and Legitimacy in International Law' in P Singh & B Mayer (eds), *Critical International Law: Post-realism, Post-colonialism, and Transnationalism* (Oxford University Press 2014) 53, 71.

[10] JR Morss, 'Book Review: *Brownlie's Principles of Public International Law* by James Crawford and *International Law* by Gleider Hernández' (2020) 21(1) MJIL 1.

[11] As Hohfeld would observe, an immunity in one party connotes a corresponding disability in another; JR Morss, 'Cutting Global Justice Down to Size? Rights, Vulnerabilities, Immunities, Communities' (2019) 40(30) Liverpool LR 179, 200.

the *Chagos Advisory Opinion*.[12] On 25 February 2019 the International Court of Justice (ICJ) handed down its Advisory Opinion in relation to the continuing administration by the UK of the Chagos Archipelago in the Indian Ocean. In exerting control over the territory, which prior to the independence of Mauritius was part of that non-self-governing entity, the UK had forcibly transferred its population. A population of Chagossians had been dispossessed by the British government and its military in the 1960s, and relocated to mainland Mauritius, giving rise to various deleterious consequences for that population both material and affective.[13] The UK had undertaken to 'return' the Chagos Archipelago to Mauritius if and when it was no longer needed for defence purposes.[14] Subsequent General Assembly resolutions consistently condemned the continuing administration of the Chagos Archipelago by the UK.[15] While at pains to avoid the appearance of treating the question before it as a dispute between two parties, namely Mauritius and the UK, the majority clearly endorsed the postcolonialist argument that was proposed on behalf of Mauritius and also on behalf of many other states contributing to the proceedings.[16] Thus the process of decolonisation was found not to have been 'lawfully completed' in 1968 when Mauritius acceded to independence.[17] Merits of arguments submitted to the court will not be rehearsed or evaluated.[18] This Advisory Opinion has

[12] UNGA Res 71/292 'Request for an Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965' (22 June 2017) UN Doc A/71/PV.88; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 (*Chagos Advisory Opinion*).

[13] E Forbes & JR Morss, 'Peoplehood Obscured? The Normative Status of Self-Determination after the Chagos Advisory Opinion' (2020) 46(3) Monash University Law Review 145–68; J Trinidad, *Self-Determination in Disputed Colonial Territories* (Cambridge University Press 2018) 83.

[14] This statement was made in the course of the Lancaster House Agreement in 1965 between Mauritian and British officials, prior to the independence of a truncated Mauritius: *Chagos Advisory Opinion* [108].

[15] See for example UNGA Res 2066 'Question of Mauritius' (16 December 1965) UN Doc A/RES/2066(XX).

[16] S Allen, 'Self-Determination, the Chagos Archipelago Advisory Opinion and the Chagossians' (2020) 69 ICLQ 203; FL Bordin, 'Reckoning with British Colonialism' (2019) 78 CLJ 253; J Klabbers, 'Shrinking Self-Determination: The Chagos Opinion of the International Court of Justice' (2019) 8(2) ESIL Reflections 1 <https://bit.ly/3GPgTX5> accessed 1 March 2021; M Milanovic, 'ICJ Delivers Chagos Advisory Opinion, UK Loses Badly (*EJIL: Talk!*, 25 February 2019) <https://bit.ly/3FdrXNq> accessed 1 March 2021.

[17] *Chagos Advisory Opinion* [183].

[18] It may be that an argument based on estoppel or prescription would trump any argument based on CIL. As noted above, the UK assured the government of Mauritius in the 1960s

already generated considerable commentary and debate in relation to the continuing administration by the UK of the Chagos Archipelago.[19]

Customary international law plays an important role in the *Chagos* opinion. Has *Chagos* advanced our understanding of CIL? Has it 'developed' CIL? Has it clarified the relationships between CIL and such denizens of international law as the peremptory norm, obligations *erga omnes*, the technique of *uti possidetis juris*, the general principle of international law or the inexorable (e.g. anticolonial) trend of modern history recognised as a matter of fact by the court? Has it 'stabilise[d] history' as, it has been suggested, was the aspiration behind the UN Charter itself?[20] In other words what, against the background of our observations above, does *Chagos* tell us about the role of interpretation in CIL? Before engaging with this question however, some wider questions need to be addressed.

2 On Structure, Depth and Explanation in International Legal Discourse

There is no a priori reason to treat interpretation as so intimately connected to written text that norms based on unwritten conduct fall outside of its scope. Certainly the academic disciplines of hermeneutics and other interpretive techniques evolved from practices of the glossing of written texts, namely texts of Holy Writ.[21] That history clings to the techniques in ways that we sometimes notice and sometimes do not notice, just as international law as a whole is contaminated but not entirely determined by the colonial oppression inflicted on the globe by the hegemonic princes of past centuries.[22] And just as hermeneutics has

that Chagos would be 'returned' in due course, thus defining the UK occupation as illicit or at least irregular and based on the legal fiction of the sovereign consent of Mauritius, a consent that, even if valid in the past, has been withdrawn by the sovereign in question. Alternatively, as observed by Cançado Trindade J in his Separate Opinion the UK had in the context of denying the need for any report to the Human Rights Committee described BIOT (British Indian Ocean Territory) as having no population; in which case a claim based on *terra nullius* might have been open to Mauritius: *Chagos Advisory Opinion*, Separate Opinion of Judge Cançado Trindade, 22 [64].

[19] T Frost & CRG Murray, 'Homeland: Reconceptualising the Chagossians' Litigation' (2020) 40(4) OJLS 764.

[20] PM Dupuy, 'Intergenerational Reflections on International Law' (*EJIL: Talk!*, January 2020) <https://bit.ly/3sbh9M1> accessed 1 March 2021.

[21] MJ Inwood, 'Hermeneutics' in T Honderich (ed), *The Oxford Companion to Philosophy* (Oxford University Press 1995) 353.

[22] Compare A Anghie, 'On Critique and the Other' in A Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 389.

no intrinsic, constrained identity with particular texts in that sense, being relevant to a variety of profane as well as religious writings (and to non-Christian as well as Christian religious materials, it goes without saying), interpretation has no intrinsic constrained identity with the printed word in any language. Not to recognise this would be among other things to entirely misunderstand Derrida's dictum (or was it a *ratio*?) to the effect that 'there is nothing outside the text'. What 'text' meant for Derrida was not restricted to cold print on the page, as in the myth of 'black letter law' so derided by critical writers in legal theory; and without neglecting the significance of the challenge made by Derrida to hermeneutics, to phenomenology, and to other brands of interpretive discipline, his point ranged more widely. To approach this point from another direction, the science or discipline of semiotics is patently concerned with meaning-making well beyond the written (or indeed the spoken) word. Famously Roland Barthes analysed dress codes.[23] Semiotics in that respect is cognate with structuralist anthropology from Levi-Strauss to Margaret Strathern and hence with structuralism in general.[24]

2.1 Bootstrapping and Hand-Waving

Interpretation thus includes any appeal to particular frameworks of meaning beyond the specific text, conduct or pattern that is observed. Across the many forms and disciplines of interpretation, it can be generally said that coherence is a significant virtue. By the application of meaning systems, propositions gain a kind of validity from that coherence independently of other forms of legitimation. Coherence becomes a kind of authority.[25] However, to develop an argument based primarily on coherence might in some circumstances be unkindly referred to as 'bootstrapping'. To attempt to lift oneself up by one's own bootstraps is a telling metaphor. It is of course the reflexivity that is the problem. As Archimedes noticed, an external point of leverage is called for by the aid of which the lifting becomes possible. Again, if one's bootstraps are sufficiently robust and the boots themselves of the correct size, an external agent standing on *terra firma* may well be able to lift one up in such a manner, however undignified that would be.

[23] F Dosse, *History of Structuralism Vol 1: The Rising Sign, 1945–1966* (University of Minnesota Press 1997) 75.

[24] JR Morss 'Description Without Apology? On Structures, Signs and Subjectivity in International Legal Scholarship' (2018) 58 IJIL 235.

[25] S Wolfram, 'Coherence Theory of Truth' in T Honderich (ed), *The Oxford Companion to Philosophy* (Oxford University Press 1995) 140.

Coherence is not to be lightly dismissed. After all, any use of logic or of mathematics involves reliance on a system of coherence, and is usually not considered the worse for that. But neither logic nor mathematics is self-executing. In a context relevant to the discussion below, it has been claimed that the principle of *uti possedetis* according to which administrative boundaries of the colonial power are retained by new neighbours after independence, is 'logically connected with the phenomenon of the obtaining of independence, wherever it occurs'.[26] Just as the application of mathematics or logic can lead the scholar astray at times, without it always being obvious exactly when the wrong step was taken or the wrong connection made, so the cumulative construction of claims about the conduct of international entities as generating normativity – the bread and butter of CIL as usually understood – may risk the inevitable fate of a house of cards. It is merely high school level physics to learn how error estimates accumulate in the laboratory, such that a modest error range on each of two or three independent parameters (temperature, weight and so forth) may accumulate to a hefty 'known unknown' when those readings are combined in sequence. If the discourse of CIL involves a sequence of 'ifs' and 'maybes', as is surely so often the case, then it may be a tottering tower of claims that is constructed. If apples and oranges are on occasion pressed into service, so to speak – so that what is being built comprises somewhat different elements – the fragility is again manifest. A telling analogy is the conceit of the chain of counterfactuals across history, so that the retrospective adjustment of one event suggests consequences which themselves serve to generate further and equally fictitious consequences. Historian Niall Ferguson has attempted such a conceit.[27] 'Hand-waving' refers to the argumentative practice of deliberately indicating that one is evading difficult questions or traversing fragile steps of a thesis. In combination these discursive gestures or techniques have a tendency to generate conclusions that leap well ahead of any substantive basis in interconnected claims either empirical, conceptual or legal. To change the metaphor yet again, the conclusions thus arrived at may appear somewhat like the rabbit produced from the hat of the conjuror. If that comparison is in any way apt, then there would be cause for concern.

Before exploring this idea further, other distinctions between CIL and other genres of international norm should be considered. The unwritten

[26] *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgment) [1986] ICJ Rep 554 [20].
[27] N Ferguson (ed), *Virtual History: Alternatives and Counterfactuals* (Picador 1997).

aspect of CIL is often considered its essential characteristic. But it is only in contrast to international treaties or 'conventions' that the unwritten aspect of CIL seems to be noteworthy in the context of the sources of international law. Treaties are written documents, signed by representatives of polities. 'General principles' of international law are not, as such, reduced to writing. The most canonical examples of such principles, at least in terms of the jurisprudence of the ICJ, consist of the appeal to common practices among relevant States vis-à-vis their national legal frameworks on the status of corporate entities. The fact that these national laws (in Belgium, Spain and so on) are themselves, and in a variety of languages, written law in a very traditional sense, does not affect the conclusion that the general principle abstracted from them in the case of the *Barcelona Traction*, is not itself written. The status of so-called principles of international law in a wider sense (beyond the definition in Article 38(1)(c)) is problematical in any event. Textbook writers have been trying to tie down such generic principles for several centuries.

One extreme example – extreme in its scale and self-confidence, and perhaps in its practical import – is the encyclopaedic package of claims made on behalf of the International Committee of the Red Cross (ICRC) concerning regulation of armed conflict in the form of international humanitarian law.[28] That project has given rise to extensive online resources that attempt to maintain and update a body of knowledge on both conduct-based ('objective') and *opinio*-based ('subjective') grounds for the identification of CIL. While the specialised focus of those claims takes the ICRC exercise outside the substantive scope of this chapter, it might be borne in mind as a marker for the potential scope of an industry of speculation relating to CIL.

Optimism is one might say 'in the DNA' of the ICRC, given its Sisyphus-like exertions in the face of human conflict. What this chapter is concerned with is a more general process. It is the *Chagos Advisory Opinion* as paradigm for the discerning of 'general' CIL, that is, rules of CIL valid for all states as such.[29] A familiar example of such a general or pan-state CIL would be immunity from prosecution of heads of state.[30] Such rules must be distinguished from rules *jus cogens* that are asserted,

[28] JM Henckaerts & L Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press 2005).

[29] ILC, 'Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (27 March 2015) UN Doc A/CN.4/682 [80].

[30] G Hernández, *International Law* (Oxford University Press 2019) 234.

on grounds other than customary observance, to have peremptory force as such. At this point it could be observed that one of the points of contact between the norm *jus cogens* (the peremptory norm) and CIL is precisely in this modality of the hopeful hypothetical.[31] The substance of posited norms *jus cogens* is typically weighty in an ethical sense, as compared to the typical CIL on boundaries or access to fish, but while they diverge in various other ways these two challenging forms of international norm do seem to share this gesture; and of course, self-determination as a putative CIL does indeed involve weighty ethical issues. What will be suggested here is that the step by which a general rule of CIL is identified in the *Chagos Advisory Opinion* comprises an extrapolation from at best a combination of majoritarian avowal on behalf of sovereigns, and the sovereign ratification of international instruments. As we shall see, the gap between 'ought' and 'is' is bridged by a mixture of hand-waving and bootstrapping even if the expressed view of the majority of the bench is much more restrained in this regard than some of the separate opinions.

2.2 *Alternative Reference Classes for Customary International Law*

The reference class of the term CIL can be defined in a wide variety of ways. One alternative is of extreme breadth but little precision. As James Crawford indicates, in the tradition of Ian Brownlie and others, the practice of states understood most generally can be what is indicated.[32] Without neglecting the essential distinction between CIL and mere comity or courtesy, a distinction that goes back at least to the beginning of the nineteenth century,[33] it is still the case that customary forms of international law represent a kind of oceanic backdrop for much that is more narrow, more technical or more specified in terms of the conduct and the expectations of parties. Thus in what might be called the Brownlie-Crawford approach, attention is paid to what are taken to be deeper and slower-moving features of the international legal landscape, generative of 'principles'. This is an extensive rather than an intensive approach to what might loosely be termed custom-based conduct. It is exemplified by the observation that 'the state is itself a customary law phenomenon'.[34] This recognition does not claim that all such conduct is CIL in a substantive,

[31] On the promissory aspect of international law see Dupuy (n 20).
[32] Crawford (n 1) 21.
[33] The distinction was observed as being already a century old, and in that respect attributable to Lord Stowell when discussed in *The Paquete Habana*, 175 US 677 (1900) 677.
[34] Crawford (n 1) 44.

dispute-resolving sense. It is in some ways a Kelsenian argument, pointing to an infrastructure of norms that might be said to be logically necessary in order for substantive CIL to exist and function. That is to say, these oceanic customs are understood as disconnected from the CIL that according to the jurisprudence of the ICJ, is provided in Article 38 (1)(b). Nor is it claimed in any systematic way that such background customs constitute necessary appurtenances of states. In other words there is something of a policy-oriented positivism in operation here: 'this is what states do'.[35]

As suggested in the preceding, a reference class for CIL may be the class of incidents of statehood. This 'ontological' variety of the sense of custom at the international level, tied to the definition of statehood in recursive ways, has an extensive lineage even if its inadequacies are patent. Clearly the reference class of customs that apply to all states, whether or not that relationship is thought of as involving inherence, is an important variety of reference class. So as well as the background or process-oriented framework, we have the statehood-intrinsic (or ontological) and the statehood-generic as additional, distinct but overlapping reference classes. Specially affected states as constituting the relevant set might be thought of as yet another option; and the admittedly old-fashioned view that hegemonic or elite states play a special role in generating and legitimising CIL, might be further added.[36] Finally, reference to CIL may narrowly refer to a CIL that has been found by an appropriate tribunal – and this really means the ICJ – to meet its technical and forensic requirements, as famously laid out for example in the *North Sea Continental Shelf Cases*. That is to say, CIL may refer specifically and narrowly to legal obligations discerned by the ICJ (or similar) in dispute resolution or in the context of advisory opinions. This narrowly defined category would correspond to an approach to the notion of peremptory norms on the basis of accepting only those norms that the ICJ has in fact identified as having *jus cogens* status.[37]

3 Interpretation in *Chagos:* A Customary International Law of Self-Determination?

So what of the *Chagos Advisory Opinion*? In the opinion crafted by the majority, considerable reliance is placed on CIL.[38] It could be said to be the

[35] R Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford University Press 1963).
[36] See Chimni (n 5); Heller (n 5).
[37] For a rigorous analysis see Hernández (n 30) 66.
[38] *Chagos Advisory Opinion* [142].

https://doi.org/10.1017/9781009025416.021 Published online by Cambridge University Press

most significant basis for the outcome, always granted the overriding role of the UN Charter. The latter of course refers to the 'self-determination of peoples' but without much clarity.[39] In the *Chagos Advisory Opinion*, the right to self-determination is defined as CIL and moreover, one that is 'binding on all States'.[40] Respect for such a right 'is an obligation *erga omnes*'.[41] On that basis, the majority finds that the territorial integrity of a former non-self-governing territory is violated if part of that territory is excised from the territory of the newly independent entity.[42]

It should be noted that the majority is at pains to emphasise its restrained approach in contrast to the enthusiastic and even crusading, *ex cathedra* values-based approach advocated by the Separate Opinion of Judge Cançado Trindade. The majority emphasises its continuity of approach with previous findings and opinions of the ICJ. If anything the majority presents itself, if only strategically, as conservative and cautious. Thus in its *Chagos Advisory Opinion* the majority of the ICJ bench carried out an exercise in the interpretation of CIL in the context of the self-determination of peoples and of the administration of non-self-governing territories in terms of Chapter XI of the UN Charter. However politically welcome the outcome in respect of a snub for a former colonial power, and ipso facto a snub for that power's powerful client, the United States in this case (since the United States had leased the Diego Garcia location as a naval base), the reasoning of the court in terms of its reliance on CIL stands in need of interrogation.[43]

In the *Chagos Advisory Opinion* it appears that the court provided an object lesson in the ascertainment and application of CIL in twenty-first century international law. While insisting that the ascertainment of the content of the putative rule of CIL (the 'what') as well as the ascertainment of the chronology of its coming into effect (the 'when') are exercises limited to the specific customary rule in question, more general methodological assertions can certainly be identified. The unpacking of the putative

[39] '[T]he principle of equal rights and self-determination of peoples' is referred to in connection with the Purposes of the United Nations at Article 1(2) yet self-determination is not in itself one of the Principles of the UN which focus on the peaceful co-existence and internal autonomy of member states (Article 2).

[40] *Chagos Advisory Opinion* [148].

[41] ibid [180].

[42] ibid [160].

[43] The circumstances of the French Overseas Department of Mayotte with respect to Comoros, are in some respects comparable to Chagos. See M Hébié, 'Was There Something Missing in the Decolonization Process in Africa? The Territorial Dimension' (2015) 28 LJIL 529, 547.

customary rule and the closely related investigation of its provenance are anchored to previous findings of the court in relation to quite different kinds of CIL such as the allocation of access to offshore resources among adjacent coastal states. The parameters of difference are such matters as human rights norms versus access to resources norms; but also, pan-state norms versus 'regional' or 'specially affected state' norms. Although the court's primary steps in enquiring into a putatively salient customary rule in this context may be said to be formal ones, to the extent that finding the relevant and adequate combination of conduct and *opinio juris* is a formal exercise, the investigation into the content and thus the consequences or effects of the customary rule is unambiguously a matter of interpretation. (In any event form and content are intermingled, if not circular, in the context of CIL.) The extent to which 'reading up' of the CIL takes place – the widening and the increased weighting of the obligations which are said to flow from it – is perhaps much greater than would usually be the case, for example with another *North Sea Continental Shelf* situation. An advisory opinion is indeed more appropriate to such an expansive exercise than a dispute between states. The CIL that is examined in the *Chagos Advisory Opinion*, with its UN Charter connections, its General Assembly contributions and its world-historical resonances, might be said with some justification to be *sui generis.* But the building of the edifice of the CIL of the decolonising of non-self-governing territories is still remarkable. The method of interpretation employed by the court enables it to successively unpack this CIL into what one might describe as an articulated and systematic project management scheme governing the decolonising process as generic historical transition. It is such a process, read by the ICJ majority into the combined effect of the UN Charter and Resolutions of the General Assembly, that according to the bench was applicable to the case of the Chagos Archipelago but manifestly dishonoured by successive UK governments.

According to the majority, a right to self-determination based on CIL may be discerned, crucially one that was in existence before the time at which the UK government purported to excise the Chagos Archipelago.[44] The court saw it as its task to ascertain 'when the [right to self-determination] crystallised as a customary rule binding on all States'.[45]

[44] Also crucially, not 'Chagos for the Chagossians' but 'Mauritius (including Chagos) for the Mauritians (including the Chagossians)'. See JR Morss, 'Mars for the Martians? On the Obsolescence of Self-Determination' in FR Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 184.

[45] *Chagos Advisory Opinion* [148]; also see Sir Michael Wood's observation on 'General' Customary International Law, that is rules of CIL valid for all states: M Wood (n 29) [80].

In this light, General Assembly Resolution 1514 (XV) of 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples, was 'a defining moment in the consolidation of State practice on decolonization'; it 'clarifies the content and scope of the right to self-determination'.[46] It has the character of a declaration of a right to self-determination as 'a customary norm'.[47] This right to self-determination is a 'basic principle of international law' and 'its normative character under customary international law' was also confirmed by General Assembly Resolution 2625 (XXV) of 1970, to which was annexed the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[48]

Moreover, a right to the territorial integrity of a non-self-governing territory is *itself* a customary law.[49] In this context the court observed, in a methodological vein, that 'State practice and *opinio juris* . . . are consolidated and confirmed gradually over time'.[50] Thus it is proper for the court to consider 'the evolution of the law of self-determination' since Resolution 1514.[51] But 'confirmed gradually' seems odd, as does the language of 'evolution'. How can 'confirming' be gradual? Perhaps it might be said that, as observed by Criddle and Fox-Decent, *evidence* going to the identification of a rule of CIL may be said to accumulate. Thus in the context of a posited rule of CIL requiring state cooperation over human rights breaches, '[a]s evidence of state practice and *opinio juris* continues to accumulate in the future [the existence of such a rule of customary international law] may eventually become the prevailing view'.[52] Now despite the attractiveness of this innocent-looking proposal, complexities still arise in this formulation. As discussed above, a postulated customary norm is not amenable to empirical investigation and the accumulation of data in the way that other forms of source may perhaps be. Common strategies in municipal law across the globe might well accumulate in a factual sense, thus building up the argument for a 'general principle' à la *Barcelona Traction* should a suitable international dispute

[46] *Chagos Advisory Opinion* [150].
[47] ibid [152]. This view had been expressed trenchantly as early as 1963 by Rosalyn Higgins (n 35) 100.
[48] *Chagos Advisory Opinion* [155].
[49] ibid [160].
[50] ibid [142].
[51] ibid.
[52] Criddle & Fox-Decent (n 6) 285.

arise. Despite their subsidiary status, judicial decisions or the writings of the publicists might accumulate across time in relevantly patterned ways, to which international tribunals may well pay attention. Suitably trained agents might keep track of such data. Nor would processes of interpretation be entirely absent from the epistemological projects involved, for the categorisation of a second or subsequent statute, judicial finding or scholarly conclusion as adding weight to a first rather than starting its own pile, must always involve interpretation.

Yet, CIL just does not seem amenable to such scientistic accretion of data. Especially in the domain of the *opinio*, where the data would have to take the form of evidence of obligations understood by sovereigns as binding, the customary norm must first be postulated and in effect promulgated in order for the data to be defined. There is a circularity here which the discerning of other forms of international norm can evade. It is true of course that the doctrine of 'intertemporal law' requires retrospective assessments of international norms, that is to say ascertainments of applicable norms from a previous era.[53] Various sources of international law and various forms of evidence for them might be investigated in that historical mode. Quite deliberately, and in effect as a 'legal fiction', the bench transports itself as in a time machine to that past era in a quasi-archaeological investigation. The 'synchronic' findings, such as the conclusions on legitimate modes of acquisition of territory in the late nineteenth century, may subsequently be drawn on by scholars interested in defining 'diachronic' trends across historical time in relation to such norms. But that would be an entirely separate and so to speak parasitic exercise. The application of intertemporal law does not yield knowledge in the diachronic domain. The time machine travels strictly between 'then' and 'now', it does not traverse the times before or between. Nor does it generate comparisons even between 'then' and 'now'; the 'now' is no more than a launching pad for the shuttle which returns to base after its sample of the core. This methodology for dispute resolution does not seek to trace longitudinal patterns, developments or 'evolution'. It does of course involve a leap of the institutional imagination but that leap is strictly constrained; it is not a leap of faith.

The term 'evolution' therefore does not assist. The term is a flexible one, as it has been across many disciplines and several centuries.[54] But it

[53] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 [55–57].
[54] JR Morss, *The Biologising of Childhood: Developmental Psychology and the Darwinian Myth* (Erlbaum 1990).

certainly connotes gradual improvement in a manner that is in some sense natural and certainly not the direct result of human agency, even if the Darwinian model of natural selection is closely modelled on the systematic interventions of the breeder of domesticated animals, that persistent objector to the customary reign of Mother Nature. In an otherwise carefully crafted opinion, the term may be readily excused. It is perhaps a harmless nod to the grand historical narrative of the postcolonial. Yet the implication that the customary form of international legal norm is in some sense a natural emanation, deserves a little more investigation. It is of course straightforward to connect such an appeal to the natural law tendencies of some of the world's most influential jurists. A progressivist and even triumphalist tone is not difficult to discern. But this attitude would seem to have a particular connection with CIL if that variety of norm is thought of as the expression of an organic and inarticulate global conscience of mankind, growing or unfolding, slowly yet inexorably, across time.[55] And of course such treatment would be interpretation, indeed.

Finally, the implications of the *Chagos Advisory Opinion* for other putative customary norms should be briefly discussed. The principle of *uti possidetis juris* in international dispute resolution has famously been applied in postcolonial Africa in treating as default international boundaries between newly independent states, the administrative boundaries drawn up by former colonial sovereigns. As with any reference to a 'principle' of international law, the question must always be put as to what kind of source such a posited norm may be. The claim that *uti possidetis* has customary status is questionable.[56] It seems to exist in that penumbra of the quasi-customary along with procedural norms of wider significance such as *pacta sunt servanda*. In any event to the extent *uti possidetis* represents the dead hand of colonialism, the *Chagos Advisory Opinion* represents if anything the revenge of the principle. Here, the colonial boundary manifested by the inclusion of the Chagos Archipelago into a larger Mauritius entity by France, is now relied upon to the detriment of the residual administrative power (the UK), so that it is hoist by its own imperialist petard.[57] Of course any reference

[55] The '*opinio juris communis*' promulgated by Cançado Trindade J seems to derive only from scholarly writings of Bin Cheng. *Chagos Advisory Opinion* (n 12) (Separate Opinion of Judge Cançado Trindade) 22 [87].

[56] S Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (McGill-Queen's University Press 2002) 131.

[57] *Chagos Advisory Opinion* [27].

https://doi.org/10.1017/9781009025416.021 Published online by Cambridge University Press

to *uti possidetis* raises questions of self-determination.[58] The formula is in effect an alternative to self-determination and consigns the latter to the 'too hard' basket, in favour of 'nation building'.[59] To the extent self-determination is coterminous with peoplehood, peoplehood is recognised as flowing across national borders so that pluri-peoplehood within one territory is implicit, typically in the form of one or more minority populations. If two or more peoples are clearly identified within one state territory, then territorial integrity might become a burden rather than a virtue from the point of view of the self-determination of 'peoples'.[60] Thus the key finding in the *Chagos Advisory Opinion* that territorial integrity of a non-self-governing territory is the essence of the CIL of self-determination in decolonisation, serves to undermine self-determination in favour of territorial integrity.[61] There still does not seem to be a substantive contribution from CIL to the vital question of 'what is a people?'[62]

In a methodological sense, the account now provided by the ICJ of the international legal norms governing self-determination constitutes primarily an act of interpretation of CIL. Disappointing or not in its achievements in that regard, it is a reminder of the significance of such

[58] Lalonde (n 56) 239.

[59] *Case Concerning the Frontier Dispute* (n 27).

[60] In Chapter XI of the UN Charter (Declaration Regarding Non-Self-Governing Territories) the chapeau for Article 73 speaks of 'territories whose peoples' while Article 73(b) talks of 'the particular circumstances of *each territory and its peoples*' [emphasis added]. The latter phrase is also employed in the corresponding article under Chapter XII (International Trusteeship System), viz art 76(b). The difference may be subtle yet the second formulation, unlike the first, expressly indicates the possibility of pluri-peoplehood, consistent with the harsh territoriality, entirely at odds with the principle of self-determination, conveyed by *uti possedetis*. The term 'self-determination' is not employed in either of these chapters.

[61] Trinidad (n 13).

[62] A Badiou et al, *What Is a People?* (Columbia University Press 2016); Forbes & Morss (n 13); JR Morss, 'Pluralism, Peoplehood and Political Theology in International Legal Scholarship' (2018) 27(1) GLR 77. Whether or not the conceptual circularity is to be attributed to inadequacies in CIL, it has been correctly observed by David Miller that '[t]o confine the right of self-determination to existing *states* is effectively to say that only those who have already achieved self-determination are entitled to exercise it'. D Miller, *Is Self-Determination a Dangerous Illusion?* (Polity Press 2020) 7. Comparing such historic and primarily European nations (well-deserved self-determination achieved) with the populations of administered territories elsewhere (self-determination a distracting pipe dream under *uti possedetis*) indeed reveals a striking manifestation of imperialism (ibid 8). The UN Charter might be said to encapsulate this worldview. Also it is of interest that self-determination is erased in two ways here: as already achieved at the centre and as a false hope at the margins.

interpretive processes. Customary norms of international law weigh heavy on minority populations and there is no route to resolving such injustice save through interpretation of those norms in a variety of senses of 'interpretation'. Paradoxically again, it may be that interpretation in CIL turns out to be even more important than it is in its familiar 'comfort zone' of treaties.

4 Conclusion

Sceptical remarks have been made above concerning the rhetorical devices employed in the discourse of CIL. Especially in the writings of commentators, one of the myriad ways in which interpretation is thus involved is in the ubiquity of the proposal that such-and-such a conduct or prohibition 'may be' CIL or 'may be emerging' as such. This mode of speculation has been said above to be of the essence of what CIL means in the public international law of the present era. Opacity and regulation sit uncomfortably together either at the municipal or the international level. At the municipal level democratic arrangements, however fragile and imperfect, play an important role in battling the forces of obscurantism. At the international level the barriers to transparency must be dismantled by eminent jurists, assisted by commentators. To express it generously, the goal of hermeneutics is interpretation in the interest of enlightenment. That goal is an honourable one and therefore the systematic investigation of the role played by interpretation in the theory and practice of CIL is essential. International law like all law in the real world is made and remade by humans, albeit in complex ways; and binding in darkness belongs only in fantasy fiction.