Interpretation Principles of *Jus Cogens* Principles as Public Order in International Practice

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Abstract: What is happening if the custom is founded on the coincidence of interests, or even worse, on error? If we rapport specific problems of international customary law to the principles of judicial interpretation it results that a common error (including opinio juris) does not disturb the process of legality proper to the principle *error communis facit jus*. According to the principle of equity, a common error operates only if the victim's interests are not affected in an irreparable manner. In this case, the error is insuperable and represents a vice for judicial nullity. Error cannot be accepted when it results from the actions of the state, realized with bad intention, as coercion is. P*acta sunt servanda* as a *jus cogens* norm protects nor only good faith. Thus, through interpretation theories in the Anglo-American environment we will use the refinement of a traditional position in continental interpretation, arguing *a* general method of interpretation based on the recovery of the legislator's intentions, had at the moment of an edition of a juridical norm. We will use of this application the dialectics between meanings expressed by the text and those the interpret advances with the role of interpretative hypothesis in order to find its meaning.

Keywords: jus cogens; public order; interpretation; custom; principles; equity

1. Introduction

The task of interpretation is represented by the dissolving of the misunderstanding regarding the meaning of judicial norm. "*The genesis of error interpretation is double: either through a conscious misunderstanding, either directly. In the first case we speak about the author's fault, most likely about his deviation from the current use of language or the use without an analogy, probably it is always about a fault of interpretation. We can express the entire task [of hermeneutics] and in a negative manner: in any point, the misunderstanding must be suppressed. Because no one can accept a simple misunderstanding [conscious]. If this task is completely realized, a complete understanding must be produce*". (Schleiermacher, 2001, p. 41)

The problem with this type of interpretation results from the fact that the two types of interpretation (the grammatical one, aiming the reconstruction of text meanings starting from the context in which this is written) and respectively psychological (which supposes the intuition of the author's intentions regarding the judicial norm in favour of which this infinite reconstruction is not helped but by the same capacity to consult the historical context, with data gathered in the language) are in a circular manner dependent on each other, thus their dialectics remains a methodological desire based on the conception on the language as a historical environment of life.

It is true that the doctrine has considerably put problems regarding the jus cogens norms as they are defined and how they can be determined. We consider that jus cogens represents the *ordre publique* on the international arena, but only if the rules of international moral rules are included as being cogens, and in consequence jus cogens could be thus applied to political interests in international relations. (Yearbook of International Law Commission, 1953, p. 155)

2. Particularities of Interpretation Theories from the Anglo-American Area

The purposes of valid interpretation are not entirely oriented towards the recognition of the author's intentions, and the validity criteria, considered acceptability criteria are prescriptions regarding our manner of understanding the judicial norms rapports.

A language semantic autonomy that is inherited by actual radical relativism is not possible only as a reaction to the same common conception over the language used. The challenge in this case is not to establish the initial position, but to completely give up this conception over language in favour of a more detached and permissive one, that is, as pragmatists propose, a conception over language as a tool and the using of these tools in a more or less comfortable manner with contextual and community relevant interests.

Internationalist theories in interpretation can be looked at from the point of view of a general theory of interpretation that sustains at least the fact that the legislator's intentions are necessarily relevant for the interpretation of norms that he creates. Certainly, such a theory of interpretation supposes that these intentions represent in

a great measure the criterion of validity of an interpretation that needs to be based on data offered during the process of its verification.

By distinguishing between understanding and interpretation, the differentiating between the two types of internationalism can be solved because meaning is not built but at a superior level, in the interpretation (in meta-language). The author's intention is real and discovered, but for this it is necessary to build an explanation that can build meaning. But this leads us to a double dependence of the intention meaning, under the shape of stratified constructions of the interpretation levels. Thus, there are more levels of the meaning that correspond to more levels of interpretation:

a) at the first level we find verbal and linguistic sequences, through the grammatical method;

b) at the second level we find the legislator's intentions;

c) at the third level we find effective intentions of the judicial norms;

d) the fourth level sustains a semantic constraint through which the interpreter of the judicial norms is capable of recognizing the legislator's intentions and to follow a certain effect that would transmit in an implicit manner the idea aimed at by the norm author. (Eco, 1992, pp. 27-35)

The concept of customary international law is defined by the Statute of the International Court of Justice (ICJ)[1], in article 38, as being the large and uniform practice of states under the imperative *opinio iuris sive necesitatis*. The literal meaning of the Statute is "*a practice generally accepted by the law",* but more authors have developed article 38 from a dialectic perspective. (Custom, 1999) (D'Amato, 1971) (Kontou, 1994) (Rosenne, 1984) (Wallace & Holiday, 2006) (Wolfke, 1993) According to this, a practice generally accepted as law is the proof of a custom, but the vice-versa situation is irrelevant[2]. Judge Manley O. Hudson as

[1] The Statute of the International Court of Justice found on http://www.icj cij.org/documents/index.php?

[2] *Restatement of the Law* has presented as evidence of customary international law:
1. The fact that a rule has become international law is determined by a prove close to the particular source from which this derives; 2. In determining if a rule has become international law, a low weight is offered to the following: judgments and opinions of international and arbitrary courts; judgments and opinions of national judicial courts; to the doctrine; to declarations of states that have understood to statute a rule of international law when such declarations have no seriously been doubted by other states; (American Law Institute. Restatement of the Law, Third, the Foreign Relations Law of the United States. American Law Institute Publishers, 1987).

developed for the International Law Commission the demands of art. 38 into five preconditions (Hudson, 1950):

1. Concordant practices of states referring to a type of situation in international relations;
2. Repetition and the continuing of this practice for a period of time;
3. The conformity of that practice with superior norms of international law;
4. A general recognition of this practice by the other states (facultative);
5. The legality of the elements mentioned offered by a legal authority.

On one side, this definition qualifies the normative character of the custom, and in the same time differentiates customary international law from other forms of international law. On the other side, the definition explains how the states can repudiate by their behaviours the rules of customary international law in spite of the fact that the deviations from the norm does not necessarily mean the repudiation of that rule.

For the same case, OCJ has declared in the *North See Continental Shelf* case that the customary international law is a long and undisputed practice of the states. The frequency and the habitual character are not sufficient for the defining of customary international law, because „comity" also supposes frequent and repeated acts of courtesy (the same situation being valuable for international moral). In the same manner, ICJ has declared in the *Lotus* case that the abstinence of exercising penal jurisdiction on acts committed on board of boats in international sea represents an international custom "*if such abstinence is based on the existence of their consciousness that they have the duty to abstain*".

The Rational Choice theory has underlined the fact that nobody showed what types of national actions matter in international state practice. We consider that it is generally accepted the fact that the evolution of international law regarding the delimitation between the domains reserved to states and that of international law will establish which sectors can be considered international states practices in the development process of customary international law.

In any case, I do not agree with the arguments of the two theoreticians that the jurists' writings represent tendentious sources of the customary international law and treaties represent informal sources of customs. Treaties may constitute a source of customary international law for the states that are not parties to the treaties. The

jurists' writings cannot create customary international law understood as a repeated practice of states, but they may explain or influence it.

Non-compulsory declarations and resolutions emitted by the international multilateral organisms are seen as proves of customary international law, because they explain international behaviours[1]. It is true that customary international law theories do not show us how vast and uniform international practices of all states must be. The International Court of Justice has established in *The Right of Passage on The Indian Territory* (Portugal versus India) case that practices between states can be general or bilateral[2].

3. Contradictory Debates

The customary international law regarding *opinio juris sive necesitatis* has given birth to contradictory debates. For this matter, four hypotheses have been emitted:

1. The compulsory character of customs is perceived as a pre-existent obligation. This theory was criticized because it limits the future development of customary international law;
2. The "error" argument explains *opinio juris* as being a common belief of states that follow a new legal norm where there wasn't any;
3. Practicism according to which *opinio juris* is obvious when the practice of states is clear and consistent;
4. Finally, a part of the doctrine considers that *opinio juris* is not compulsory.

According to this theory, he process of creating a new custom can be explained in a variety of methods, from the necessity of a general recognition of the new custom by the sates to the hypothesis that the accuracy of their belief is irrelevant or to the

[1] In *Principles of Public International Law*, Ian Brownlie lists the following sources as proves of the custom: „*The material sources of the custom are numerous and include the following: diplomatic correspondence, political declarations, press declarations, opinions of official legal counselors, official notebooks on legal matters, military law notebooks, executive decisions and practices, orders to naval forces, comments offered by governments over the projects of the International Law Commission, states legislations, national and international judicial decisions, declarations from treaties or other international instruments, a pattern of the treaties from the same category, practice of international organs and the resolutions of the* United Nations General Assembly regarding legal matters". (Brownlie, 2003. p. 6).

[2] Case Concerning the Right of Passage over Indian Territory *(Portugal v India) (Merits)* [1960] ICJ Reports 6 p. 39.

possibility la that the states can be deceived by others, when the latter have affirmed a false conception, on purpose.

The last point debated by the theory has raised a sensible problem regarding the consent of states in the creation of international customs. Referring to this problem, Michel Byers has sustained that the necessity of the states accept represents an inadequate explanation of customary rules and that the states may be kept only by their suzerain will. Morris Mendelson has also considered that any presumption favouring the condition of the states consent is inadequate. (Mendelson, 1995, p. 185–194)

In the *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua vs. U.S.) case ICJ has established that there are other rules of international law than the ones accepted by the states. In spite the fact that the role of the non-state actors is developing in the creation process of international norms, states have remained central subjects of this process, with their privileges in determining the fact that there is a new law.

The committee of the International Law Association regarding the realization of customary (general) international law has accessed in the Final Rapport[1] the states superiority in the determination of customary rules, but has rejected the conditions regarding states consent as a general precondition of customary international law. It has been sustained the fact that in this case consent is compulsory for the rule corresponding to customary international law according to the *pacta sunt servanda* principle, understood in the following manner "*consent obliges the state that has given the consent*" (he principle of protecting good faith). The states consent is not a compulsory precondition, because the common belief that that practice is legally compulsory is sufficient to create an international customary law. Belief represents a sufficient precondition, but not a necessary one, because opinio juris can be proven by any means and methods.

The affirmations of the Committee of the International Law Association allow the conclusion that, on one side, a particular action can give birth to a customary rule, despite the fact that the states do not accept it as a legal obligation. On the other side, a particular action, capable of creating customary international law may be undercut by contrary opinions of the states.

[1] The Final Report of The Committee, London Conference (2000) presented on www. ila-hq.org.

From the intersections of both theories (the facultative character of the states consent and the opinio juris belief) it would results that opinio juris compensates a relative absence of the practice and vice-versa. But what happens, in the case of a putative customary international rule, when that state is kept by a practice based on conceptions or false information regarding the existence of particular legal obligations? The theory "*more practice, less need for a subjective element"* regarding customary law does not show us how strong and how long must the practice of the states be in order to opinio juris. Less practice can be underlined by a strong opinio juris in order to give birth to a customary international rule?

I consider that the realization process of the customary international law without the states consent is not legal in the virtue of the fact that international law is based on horizontal relations and the apparition of a hierarchy is visible only in the interior of international organizations.

Thus, a part of the theoreticians have tried to approve a new idea – the role of the states interests in the creation process of customary international law.

The Paquette Habana case has been proposed as basis for debates regarding the use of the "*coercion"* concept in order to explain the manner in which a more powerful owner of fishing sips intimidates a weaker adversary (during a war). The latter fears to capture the boat due to the owner's reprisals.

Another concept of this theory is based on the phrase "*coincidence of interests"*. According to this, fishing boats that belong to a belligerent have not been captured because their enemy considered that the costs imposes are more substantial than the benefits won. "*Cooperation*" is the third explanation for the abstention to capture a fishing boat that belongs to a belligerent, by its enemy. Each state is encouraged to attack as long as the others abstain to proceed in the same manner. Equilibrium will be kept only if a quiet belief of the part exists, if one of the captures the fishing boars of the other, the latter will proceed in the same manner[1]. Another argument is ”*coordination"* according to which states have accepted to develop a common rule, which will be more advantageous for both states that follow a convergent road, than a separate one.

The arguments used cannot exclude the compulsory character of customary international law, because law itself, from a conceptual point of view, is defined as

[1] This situation was named by the authors and used in the doctrine as "Bilateral repeat prisoners' dilemma".

an expression of existent interests at a given time. When general interests cannot be satisfied by law, than the law is changed without having any effect on its compulsory feature.

H.L.A Hart makes a distinction between legal social and moral norms due to a proper interest in both categories of norms. (Hart et al. 1997, pp. 225–226) The interests engaged by international law are, usually, common interests of the international community (regional or multilateral, even bilateral). Phillip Trimble considers that a state may decide to forget advantages on a short period, derived from the violation of international law norms, because it has a supreme interest in the maintaining of the entire system. General international law is seen as affecting directly the interests of states. (Trimble, 1990, pp. 811- 833)

Byers noted that states are not only subjects bur also creators of international law. This means international law results from common or coordinated behaviours (at least on one side) and for this reason, international law reflects interests on a long term of most, if not all the states. In conclusion, the states behaviours oblige them to take part in international relations. States are aware that their behaviours may create customs that can become obligations. States also desire to form rules by their actions. The facts mentioned distinguish the legality process of customary international law from the process of assuming decisions by which authorities act to satisfy their interests. Interesting debates have been raise by the vice of the states consent by coercion. The problem will be solved after the theories mentioned, regarding the state consent, have been chosen.

Despite the fact that customary international law is seen as an unwritten practice of states, t is clearly influenced by conventional law (treaties, the resolutions of United Nations organisms etc.) of international jurisprudence and the general principles of law[1].

The legality of customary international law is also given by its conformity to universal conventions, usually insuring an international suzerain equality and, in consequence, rejecting coercion at a world level. When the custom is contrary to these, is legal compulsory character is undercut by the general treaty because the *opinio juris* of states cannot be presumed.

[1] These are sources of customary international law according to art. 38 of the International Court of Justice Statute.

The Vienna Treaties Convention does not contain any provision regarding an eventual conflict *contradictio in terminis* between customary law and the conventional one. Thus raises the hypothesis in which the parties have concluded a treaty contrary to the old custom, if a normative conflict regarding this situation appears.

The treaty provisions will prevail over the custom because an express and written agreement of the states is less doubtful than an unwritten custom. The explanation regarding the treaty superiority refers to the fact that the treaty more recently shows actual interests of the state and the old custom ceases to show novelty, according to the lex *posterior derogate legi priori* principle. Another point of view would be the fact that the treaty represents *lex specialis* on its argument *jus scriptum* being superior to the older custom according to *especially general bus derogate.*

Mark E. Villiger (Villiger, 1985, p. 37) considers that the two principles must be used together and do not complete one another. *Lex posterior* raises the problem of establishing a precise moment (which is very difficult) for the realization of a customary rule and *lex specialis* represents a danger for preexistent universal conventions regarding human rights. The same author refers to the fact that customary international law and treaties represent autonomous sources of law and for this reason, they are equivalent to a compulsory force. In consequence, they can influence each other and the principle *mutuus consensus mutuus dissenssus* (a rule can be alternated only by another of the same gender) cannot be applied. For this matter, a customary norm can be changed by a simple treaty. The latter can be modified again by a future customary norm. (Villiger, 1985, p. 35) We cannot apply the same reasoning when unwritten norms of jus cogens are implicated, due to article 53 of the Vienna Convention, which stipulate the nullity of the treaties that overrides jus cogens, even if the treaty is more recent. Gerald Fitzmaurice declared that it is generally recognized in the application of a declarative treaty the fact that the parties conform to the obligations of general law, already valid for them. (Fitzmaurice, 1958, pp. 170-173)

If the future treaty a cause to end the preexistent customary international rules? The International Court of Justice has declared in the *North See Continental Shelf*[1] case that the rules of law with a fundamental character, regarding the continental shelf are contained in the Continental Shelf Convention, even independently. An

[1] *International Court of Justice,* North Sea Continental Shelf Cases, Published A. W. Sijthoff Germany (West), Denmark (1969).

international convention, being an independent source of law cannot touch customary law, (Collected Courses of The Hague Academy of International Law, 1998, pp. 220-221) but it can modify it or transform it from a general customary rule to a local one.

A second hypothesis refers to the situation in which the parties of the existent treaty agree to change some of the provisions forming new customs. For this matter, the principle *bona fide* supposes the situation in which the states consent obliges them in the international arena.

Also, the Project of the International Court Commission (ICC) on the modification of treaties through practices subsequent in art. 38 is (that does not regard the rules of jus cogens): „*a treaty can be modified by a subsequent practice in the application of the treaty having the agreement of the parties to modify its provisions...*" In *travaux préparatoires* ICC has considered an agreement of the states that seemed to be not only an act by the Vienna Treaties Convention by art. 42[1] had confirmed the possibility of the treaty provisions, which do not result from customs, in order to become customs.

Michael Akehurst has expressed his opinion that it is "*difficult to interpret the erasing of article 38 as a clear rejection of the fact that the existent law allowed a treaty to be amended by a subsequent practice, especially if, the Vienna Convention has not excluded the possibility of concluding treaties by desuetude and allows in an express manner a treaty to be interpreted in the light of subsequent practice (art. 31(3) (b)...*" (Akehurst, 1977, p. 277) The same tendency seem to be constituted by the Arbitrary Decision from 1963 on the interpretation of the Bilateral Agreement regarding air transport between France and the United States[2] as the consultative notice on Namibia[3] emitted by ICJ in 1971. But,

[1] Art. 42(2) of the Vienna Convention stipulates that the abrogation of a treaty can take place "only as a result of the application of the treaty provisions or of the present Convention".

[2] This refers to "*this course of action can be in fact, taken into consideration, not pure and simple as a useful means for the intercepting of the ICC agreement, but also as something more: this* is a possible source of the subsequent modification resulting from certain actions of attitudes, on the judicial situation or rights that they could claim in an adequate manner" (Reports of International Arbitral Awards, Vol. XVI, pp. 62-63).

[3] In its consultative notice, ICJ has declared that "*the fundamental rules and the position adopted by the members of the Council, especially by its permanent members, have interpreted consistently and uniformly the practice of voluntary abstention of a permanent member as not representing a barrier for the adoption of a resolution...This procedure followed by the Council of Security which has continued unchanged after the 1965 amendment of art. 27 of the Charta, was generally accepted by*

customary rules and treaties are laws with a compulsory normative character despite the assertions Goldsmith-Posner (regarding the lack of legality or the compulsory character for both sources) because they have consented to this according to art. 35 from the ICJ Statute and to change this fact would mean to degrade the rules of international law.

The Goldsmith-Posner theory is wrong under the aspects mentions regarding the fact that the major role of states interest in the process of changing customary international law would signify the fact that customary law lacks legality. The sense of the idea reflecting the role of the states interests in changing customary international law is that states must conciliate their interests with the existent law and in consequence, the law represents the harmony of different interests of states, the reconciliation between them, at least in the first stage (the gaining f the states consent). Then, it becomes impersonal and compulsory on all parts. The changing of customary laws cannot degenerate to an inferior level of their illegality. They will be changed only in a progressive sense according to the evolution of standards generally recognized of international law. May customary law be changed according to more reduced standards? The answer to this problem will be found by approaching a dialectic perspective of the evolution of customary international law through the principle of equity. Equity refers to a general protection of the law subjects (intern – individual persons and legal person or international – states on non-state actors) against any prejudice or their damage. Equity implies the actor's responsibility in the international arena.

As general principle of law, equity is frequently classified in *secundum legem*, *praeter legem* and *contra legem* equity. When equity accompanies the new custom (*secundum legem),* the change of customary international law is legal. If equity is capable of remediating the insufficiencies of the new customary law *(praeter legem),* the vices of the new custom are not the cause of its nulit. But when equity operates in opposition to law so that it alters it or temperate its effects *(contra legem),* the new practice cannot be legal, thus in consequence it is not a law.

These are variants of interpretation, being differentiated according the spatial criterion, of the translation of the normative meaning towards a more extended of restraint area of situations in rapport to that presumed in the normative text. These have in common the fact that they regard the norm in a spatial order, that of a

the members of the United Nations and probes a general practice of the Organization" (ICJ Reports 1971, p. 22).

rapport understood as a connection between exterior reciprocal entities, on one side the prescription of the norm, general and abstract, and on the other side, particular cases it refer to. (Huma, 2005, p. 119)

If we rapport the object only to political interest but not to law, all the facts mentioned cannot be applied because equity acts only in the interior of the law and moral. But, political interest must cease to violate others rights. International community cannot allow political interests to dictate practices of unfair and injuring states.

The extension of concepts, the analogy and induction, regarded as "complex procedures of judicial technique of law, on one side and the considering of law reason, the distinctions and the argument a contrario on the other side, regarded as „procedures of restrictive interpretation", all these tend to be reduced to a formal and technical condition of exterior instruments of following the applicability of the law in situations quantified exclusively by the coercion power of the law, that is of the imperative considered in the exteriority towards the situation seen as an axiological neutral state in rapport to the exigencies of the law.

"The general method of judicial sciences could be named for the understanding by paideic interpretation[1] (Marcu & Maneca, 1975, p. 775) of positive law, because law if mainly participative. In the absence of a definitive character, interpretation is never paideic, even if it would lack humanism. The term *paideic interpretation* seems socking until the development of its meaning with direct consequences for an evolution dimensioning of the law – cultural and civilization". (Mihai, 2003, p. 94)

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[1] *Paidee* = education of the human spirit by cultivating philosophy and science (gr. Paideia).

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