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## ‘Customary Law Interpretation as a Tool’ Series

# Interests, Strategies and Veto Players: The Political Economy of Interpreting Customary International Law

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It is generally acknowledged in the literature that international courts make decisions within legally bounded discretion in relation to state governments or national courts. Yet, the scope of this discretion and the determinants of its boundaries are highly contested. One factor in this is the uncertainty that judges face regarding the political reactions to their decisions and how the latter are implemented and enforced. Interpretation can be a tool in the hands of international courts. How does that tool play out in Customary International Law (CIL)? Whereas legal scholarship has traditionally been concerned

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with the identification of CIL, recent scholarship has turned to the question of the interpretation of custom.[1] I agree with the claim that CIL can be interpreted and is not only to be found. How much 'finding' and how much 'interpretation' is done depends on the CIL norm.[2] And 'finding' itself includes interpretation: it is not just an exercise in looking for objective evidence of state practice and *opinio iuris*. The discretionary leeway of international courts lies on a continuum.

Some puzzles remain unsolved in the legal literature, such as the case of muddled findings of CIL by the ICJ where a clear methodological strategy seems absent.[3] It remains also unexplained why, oftentimes, the ICJ takes the position of weaker states or makes strong statements when faced with powerful states.[4] And it remains unclear why, if states are the 'creators' of CIL, the role of international courts in determining CIL (finding and interpretation) is *de facto* so important, in spite of Art. 38 (1)(d) ICJ Statute and the International Law Commission considering international judgments merely as supplementary means for the determination of rules of law.[5]

This contribution submits that political economy, more specifically veto player theory,[6] can illuminate some of the puzzles that the legal literature has been confronted with. Veto player theory is a powerful and commonly used instrument for analyzing the configuration of preferences and institutions within and across political systems but has been neglected in international law. I submit that this approach is also applicable to international courts as a theoretical framework for understanding the interpretations by courts generally and those of CIL more specifically. This Reflection views interpretation as a tool by identifying the relevant actors, their interests, and their possible strategic moves. Veto player theory can generate testable hypotheses on the interpretation of CIL. Although it is not feasible to validate veto player theory as applied to international courts empirically here, this

[1] Panos Merkouris, 'Interpreting the Customary Rules of Interpretation' (2017) 19 Int CL Rev 127, 134-7. See also Orfeas Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 EJIL 235.

[2] For an excellent overview of the discussion, see Marina Fortuna, 'Different Strings of the Same Harp: Interpretation of Customary International Rules, their Identification and Treaty Interpretation' in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (CUP 2022).

[3] Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417, 418: '(T)he Court has hardly ever stated its methodology for determining the existence, content and scope of the rules of customary international law that it applies.'

[4] See the discussion below with examples.

[5] Conclusion 13.1 of the UNGA, 'Draft Conclusions on Identification of Customary International Law' (International Law Commission, 70th Session, 30 April – 1 June & 2 July – 10 August 2018), UN Doc. A/CN.4/L.908 states: 'Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.'

[6] See George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton University Press 2002).

short piece sets out a basic framework for thinking about the interpretation of CIL by international courts.

I will proceed as follows: After a short introduction to veto player theory, I turn to CIL more generally by identifying the relevant actors and their interests before tuning to interpretation, with a special focus on international courts' role therein. I then address the tool of interpretation within that theoretical framework.

**Veto Player Theory**

Political economy is the application of economic theories, primarily rational choice theory, to explain political processes based on the strategic interactions of self-interested actors. A subset of this approach is veto player theory.[7] This theory explains the costliness of changing the status quo policy (no matter what the status quo is) based on the different players or actors involved. Veto players are defined as those individual or collective actors whose agreement is necessary for a change in the status quo policy.[8] Most often, national political systems are analyzed, e.g., by comparing the effect of the number of veto players in parliamentary versus presidential systems or the number of chambers in the legislature. Tsebelis, the theory's founding father, argues that policy stability is the effect of a particular constellation of veto players. If the distance of the ideal points (i.e., the preferred position) between veto players increases, policy stability, in the sense of the likelihood of remaining in the status quo, increases. Change (in policies or institutional designs) will become slower and more difficult with an increase in the number of veto players or the distance of their 'ideal points' (ideological distance). In the case of collective veto players, high qualified majority thresholds (or equivalents) also make change more difficult.

Based on this theory, one can analyze national courts with constitutional review powers, as well as the European Court of Justice[9] and their interaction with other political players.[10] These courts play an

[7] See George Tsebelis, 'Veto Players and Institutional Analysis' (2000) 13 Governance 441. On veto player approaches, which differ slightly in their assumptions, see Steffen Gangoff, 'Promises and Pitfalls of Veto Player Analysis' (2003) 9 Swiss Political Science Review 1.
[8] Tsebelis (n 6) 2.
[9] See Olof Larsson and Daniel Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) 70 International Organization 377.
[10] See Sylvain Brouard and Christoph Hönnige, 'Constitutional courts as veto players: Lessons from the United States, France and Germany' (2017) 56 European Journal of Political Research 529; Nicos C. Alivizatos, 'Judges as Veto Players' in Herbert Doering (ed), *Parliaments and Majority Rule in Western Europe* Palgrave Macmillan 1995) (suggesting that divisions between the political branches strengthen the courts).

important normative role as they can nullify acts of legislative bodies and thus prevent or reverse a change in the legal status quo. Veto player theory includes adjudication as a means of policy making within the constraints of the law and courts themselves can therefore be veto players under certain conditions.

**The Veto Player Model Adapted to the CIL Game**

I submit that veto player theory can usefully be applied to the CIL game as well.[11] In legal scholarship, since states are the 'creators' of CIL, the crucial players are deemed to be states (and their national courts). Stability or the status quo of CIL thus depends solely on the behavior of states. Because a CIL rule results – in addition to *opinio iuris* – from prevailing state practice, violations of the rule may modify its content or even abolish it altogether.[12] According to the traditional understanding, the evolution of CIL requires one or more states to deviate from existing customary rules and engage in new conduct. This can be referred to as 'custom breaking'.[13] A deviation's legal status is determined over time, as other states respond by deciding whether to follow the proposed break. As such, the compliance behavior of states is crucial in determining CIL, in contrast to treaty law where noncompliance does not generally affect the validity of the law. One powerful state taking the lead may sway the behavior of others. The veto player analysis would then be confined to states (including their national courts) taking different positions on CIL and its interpretation. I argue that this picture is overly simplistic.

Generally, a multitude of actors are relevant to the interpretation of CIL: states' governments, national courts,[14] and academics – and, not least, international courts.[15] Who then counts as a veto player in the CIL game? The uncertainty underlying the identification and interpretation of CIL leaves room for

[11] See George Norman and Joel P. Trachtman, 'The Customary International Law Game' (2005) 99 AJIL 541 (using game theory, although not veto player theory, to explain compliance with CIL).
[12] Jonathan I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) Brit YB Intl L 1, 21; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* (Merits) [1986] ICJ Rep 14, para. 207 ('Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.').
[13] See Suzanne Katzenstein, 'International Adjudication and Custom Breaking by Domestic Courts' (2012) 62 *Duke Law Journal* 671.
[14] UNGA (n 5) 13.2: 'Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules'. See also Anthea Roberts, 'Comparative International Law: The Role of National Courts in Creating and Enforcing International Law' (2011) 60 Intl & Comp L Q 57.
[15] UNGA (n 5) 14: Teachings also qualify as 'a subsidiary means for the determination of rules of customary international law.'

different actors to pursue their respective interests. International courts clearly have a pole position in this exercise,[16] given their unique ability to gather information and make authoritative statements that create focal points.[17] As Cohen writes: 'The ICJ's and other courts' opinions become new baselines against which future analyses of CIL take place'. [18] International courts are, thus, important veto players in the finding as well as the interpretation of custom.[19] From the viewpoint of international courts, who the other veto players are depends on the veto power constellation they are faced with, to which I turn below. For now, it suffices to paint the overall picture. Courts interact with other potential veto players; that is, they can maintain the status quo (whether this is the presence or absence of CIL or a specific interpretation of it) only if they cannot be overruled or vetoed by other relevant actors, e.g., states or national courts.[20]

How should we understand the interpretation of CIL? Transferring the insights of veto player theory from the national to the international plane would have the following implications. The more veto players international courts face or the greater the veto players' ideological distance,[21] the easier it is for the court to impose its preferred interpretation of CIL as the legal status quo. Veto player theory in the CIL game is forward-looking: it analyzes under which veto player constellations the status quo – as determined by the court when adjudicating – can be maintained and whether it can be overridden by other veto players in the future. Therefore, the more veto players or the higher the ideological distance between them, the more interpretative leeway a court has. Counterfactually, if only one state

[16] Pierre-Hugues Verdier and Erik Voeten, 'Precedent, Compliance, and Change in International Customary Law: An Explanatory Theory' (2014) 108 AJIL 389, 421: 'ICJ does have the capacity to influence the development of CIL, and it possesses some discretion to do so in order to advance rules that it believes to be normatively desirable.'

[17] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 202. 'Far from being treated a subsidiary source of international law, the judgments and opinions of the [International Court of Justice] are treated as authoritative pronouncements upon the current state of international law.' See also Ezgi Yildiz and Umut Yüksel, 'Understanding the Limitations of Behavioralism: Lessons from the Field of Maritime Delimitation' (2022) 23 German Law Journal 413 (analyzing focal points created by the ICJ on states' behavior). In veto player approaches, this is called an equilibrium (meaning that it is a stable status quo).

[18] Harlan G. Cohen, 'Methodology and Misdirection: Custom and the ICJ' (*EJIL:Talk!*, 1 December 1 2015) < https://www.ejiltalk.org/methodology-and-misdirection-a-response-to-stefan-talmon-on-custom-and-the-icj/>.

[19] Eyal Benvenisti and George W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 EJIL 59, 63, writing that international courts 'are in a position to act as agenda setters by having an early opportunity to interpret international norms, and thus establish a legal focal point which can function to narrow the range of options that remain open to national legislatures and courts.' Similarly, Tom Ginsburg, 'Bounded Discretion in International Judicial Lawmaking' (2005) 45 Va J Intl L 631, 639 writes: 'In practice, . . . customary law is often first identified by courts.'

[20] Roberts (n 14) 76, stressing that national courts interpret international law often differently, leading to different 'dialects.' That implies, viewed through the lens of veto player theory, that national courts are seldom 'veto players' in CIL since they are too diverse to change the interpretation given *stricto sensu* by international courts. This changes once they all find a common dialect – a collective action problem.

[21] That is, divergent views on a specific matter the other players have.

could veto the legal status quo as determined by the court, the court's margin of maneuver would be much smaller and the court would be constrained by the ideal point of that one veto player when interpreting CIL in order not to get overruled.

Let's now analyze the different veto player constellations a court can be faced with. Assuming for a moment that all states count as players of equal power, what does the game look like? If all states were to unanimously agree that an interpretation by an international court is wrong, they would be a powerful collective veto player able to overturn the interpretation, changing the status quo set by the court. Thus, all states can potentially be veto players if they are able to act collectively. In CIL, forming a collective can mean one of two things – either a sufficient number of states agree on a different interpretation (constructive veto) or a sufficient number of states veto the interpretation by the court (destructive veto). As posited by veto player theory for collectives, the higher the threshold to find a common position, the more difficult it is to effect change to the status quo. Given the multiplicity of CIL creators – i.e., states – and the attendant potential for collective action problems, it is in principle difficult to override a court's interpretation. This reasoning applies to the identification of CIL, as well as to interpretation *stricto sensu*.

If there is no consensus to override the court by the relevant actors, any legal status quo as determined by the court through interpretation will stand. Thus, the more heterogeneous the states' ideal points on a court's interpretation of CIL (the higher the ideological distance), the more likely it is for the interpretation to stand, thereby giving the court more interpretative leeway. This is somewhat counterintuitive since mainstream CIL theory demands implicit consensus of states to find a status quo or change of custom. Looking at courts as veto players, in contrast, suggests that the less consensus there is between states – i.e., the more disagreement about the direction in which one should deviate from the status quo as set by the court and therefore the bigger their ideological distance – the more the court can determine the legal status quo and the more the stability of CIL interpretation (or finding of its absence) will be ensured. What's more, the multitude of states explains why courts are so important for the interpretation of CIL in the first place. Considering international courts as veto players thus gives another viewpoint on the interpretation and stability of CIL.

In practice, some states may be more important than others in the CIL game in the sense that they may have more influence in shaping custom, be it because they are more effectively involved (e.g., states being involved in space activities may count more in finding and interpreting custom in space) or because they are more powerful. Those states whose legal decisions are believed to be especially

influential will anticipate their decisions to have a comparatively more significant impact on other states.[22] Verdier and Voeten suggest that there may be a '*tipping point* phenomenon in which a relatively small number of defections slowly build up until they reach a critical mass, beyond which defections accelerate and the CIL rule unravels'.[23] As such, in CIL, an actor's choice depends on how many others make that choice.[24] International courts will take into account which states are affected by its interpretation, how they might react, and whether they are able to put in motion an override of its interpretation of CIL. Note that this can be a coordinated reaction by states or a cumulative, decentralized reaction by a multitude of states.

**Interests, Strategies and Choices of International Courts**

Positive or descriptive political economy theory suggests that national judges seek to promote their interests. Normally, in addition to status and career, these interests are defined as policy interests, i.e., an interest in promoting particular policies. The same can be assumed for international judges. Whatever the preferences of international judges (e.g., justice or a peaceful world), the theory could still be applied as long as the international judiciary pursues its preferences strategically, assuming that at least the non-dissenting judges of an international court have an interest in having their interpretation stand as CIL.[25]

International judges are likely to be attentive to signals concerning the probability of an unfavorable override. According to veto player theory, courts will thus make their decisions in view of the possible likelihood of being 'overruled.' The overruling of an international court decision can have a variety of manifestations. Some may be institutional,[26] while others may be more ad hoc, e.g., through opposition to or non-compliance with a judgement, or by making a treaty which contradicts the Court's interpretation of CIL. Whilst I leave out issues of institutional backlash against international courts, I concentrate on the possible reactions of states (and their national courts) to international courts'

[22] Verdier and Voeten (n 16) 404.
[23] Verdier and Voeten (n 16) 405.
[24] See Thomas C. Schelling, *Micromotives and Macrobehavior* (W.W. Norton 1978) 83–110; Mark Granovetter, 'Threshold Models of Collective Behavior' (1978) 83 Am J Soc 1420. See also *North Sea Continental Shelf* (Germany/Denmark; Germany/Netherlands) [1969] ICJ Rep 3, para. 60ff, especially para. 74.
[25] Clearly, the ICJ is of special importance in interpreting CIL, although other courts' pronouncements also play a role. And courts may in reality not be unitary actors in that different positions, as witnessed by separate or dissenting opinions, are common within a court. In order to reduce complexity, I assume that all judges share an ideal point.
[26] See Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 International Journal of Law in Context 197.

interpretation of CIL. In CIL, overriding is generally more difficult than in treaty law since players are widespread and possibly not coordinated.[27]

First, overruling can take the form of non-compliance by a state party to the dispute as one veto player with the CIL rule as found or interpreted by the court. If it is a small state, this may be considered just that: non-compliance. But if that state is a 'big player' in the formation of CIL and if that state indicates during the proceedings that it takes another view on whether custom exists or advances a different interpretation of it, it may be considered an overruling of the court's finding if, and only if, other states react accordingly. Veto player theory thus delivers an explanation for why international courts pay special attention to powerful states or those specially affected by a rule of CIL when identifying it.[28] Powerful states are the most relevant veto players in the sense that their veto may have a stronger influence on other states. That does not imply that a court necessarily sides with those states, but it will argue even more carefully, taking into account the practice and *opinio iuris* of those states.

While this practice of courts has been duly criticized as being inherently biased, particularly against developing States,[29] or as owing to missing knowledge and information on state practice and *opinio iuris* by developing States,[30] another explanation may be found in the strategic calculus that courts apply when interpreting custom. Similarly, the ICJ could have had in mind to essentially preempt any change of the CIL status quo as interpreted by it, given that its veto player in this case was the US, when it states in the *Nicaragua* case that '[i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule'.[31] It is likely that the ICJ was strategically protective of its own finding.

Second, the ICJ tends not to rule on the basis of CIL when the disputing parties object explicitly to its application, regardless of whether the CIL norms had been codified in treaty law.[32] In the absence of

[27] In treaty law, there are many options for overriding a court, from authoritative interpretations as in the WTO (Article IX:2 of the Agreement Establishing the World Trade Organization) to amending the treaty. Admittedly, these options can also cause difficulties in treaties with many State Parties.
[28] *North Sea Continental Shelf* (n 24) para. 74.
[29] B. S. Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 AJIL 1, 20-27.
[30] Georg Nolte, 'How to Identify Customary International Law? – On the Final Outcome of the Work of the International Law Commission (2018)' [2019] KFG Working Paper No. 37, 8.
[31] *Military and Paramilitary Activities in and Against Nicaragua* (n 12) para. 186.
[32] See on that analysis Matthias Vanhullebusch, 'Complying with Custom before the World Court: Towards a Relational Normativity' (2021) 12 Journal of International Dispute Settlement 325; *North Sea Continental Shelf*

a consensual basis for the existence and application of CIL norms in its contentious cases, the Court has relied on shared moral values, such as humanity[33] and justice.[34] These values are more difficult to contest for states, given that no state likes to openly veto them.

Third, when an overruling of a CIL interpretation could be realized through ongoing treaty negotiations on the same subject matter, a court will be reluctant to find or interpret custom and will rather stick to the status quo. In the *Fisheries* case, the ICJ stated clearly that it 'cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down'.[35] By not pronouncing on custom, it also preempts a potential future override of the treaty under negotiation.

Fourth, international judges also tend to support the claims of weaker states because any erosion of strong veto players' position, often powerful developed states, increases their own discretion and authority as a veto player. According to veto player theory, the interests of judges are best served when they are operating in a multipolar environment in which they are viewed as a critical part of any 'winning' coalition or the single most important veto player. Supporting the claims of weaker states is a strategy that promotes the emergence of such multipolarity, even if it does not guarantee it. This phenomenon has been observed in national legal systems where courts have systematically supported the weaker political branch of government in its conflicts with the relatively stronger branch in order to enhance their own prestige.[36]

## Conclusion

Veto player theory has hitherto not been applied to international courts, neither in respect of the interpretation of treaty law nor that of CIL. This ESIL Reflection is a first attempt thereto. Surely, international courts will be aware of their legitimacy and their reputation when interpreting CIL and will stay within the confines of the sources doctrine. But understanding them as strong veto players on

(n 24) para. 62; *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624, paras. 117–18.

[33] *Corfu Channel (UK v. Albania)* (Judgment) [1949] ICJ Rep 4, p. 22 (referring to elementary considerations of humanity); *Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) [2012] ICJ Rep 422, paras. 68-69, 99, 113 (referring to the 'common interest' of states parties to the Torture Convention 'to ensure, in view of their shared values, that acts of torture are prevented'); *Jadhav Case (India v. Pakistan)* (Judgment) [2019] ICJ Rep 418, paras. 89–90, 95.

[34] *Continental Shelf (Tunisia v. Libya)* (Judgment) [1982] ICJ Rep 18, para. 71 (referring to the principle of justice).

[35] *Fisheries Jurisdiction (United Kingdom v. Zeeland)* (Merits) [1974] ICJ Rep 3, para. 53.

[36] Eyal Benvenisti and George W. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 Stanford Law Review 595, 624ff.

custom helps to illuminate some puzzles hitherto unexplained by the legal literature. Going forward, it should be possible to test the application of veto player theory by explaining the position of the ICJ in each case, depending on the veto player constellations. And surely, if stability of the law, that is the maintenance of the legal status quo of CIL, is a desideratum, then the strategic handling of CIL interpretation by international courts may not be a bad thing.

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