I. A Theoretical Approach of the Problem of Interpretation

A. The Scope of Interpretation

In principle, judges apply existing law. If we retain this premise, it would appear that judges do not play any creative role, that case-law is not a source of law. This is all the more so in international law, where the principle of the ‘relative effect’ of judicial decisions applies. This principle, laid down in Article 59 of the ICJ Statute, is a consequence of State sovereignty.¹

Nevertheless, in order to apply a rule, it must first be stated and then interpreted. The issue is thus whether international judges hold any creative power at the two stages of statement and interpretation of the rules. I believe that an affirmative response may be given in both cases.

1. The Margin of Interpretation in the Statement of Customary International Law

We all know that custom plays an important role in international law: a customary rule, born of practice, is an unwritten rule. As such, in some cases, its existence only becomes certain once it has been stated by a judge. It is well known that the existence of a customary rule implies the presence of a substantive element and a subjective element of opinio juris. In case of a dispute between States concerning the existence of a customary rule, the judge must verify the presence of these two elements before stating the rule. As regards the substantive element, the judge does not have much room to maneuver: either a certain practice exists or it does not. That is not the case, however, for opinio juris, a purely subjective element, the existence of which is not always easy to prove. Kelsen believed that the presence of this element gives the judge a great deal of room to maneuver and that, in reality, it simply serves to mask the judge’s role in the creation of law. More recently, one author went so far as to claim that a customary rule is often no more than a “legal hypothesis confirmed by a judicial decision”.²

¹ ICJ Statute, Art. 59: “The decision of the Court has no binding force except between the parties and in respect of that particular case”.
² The complete text reads in French:

En effet, l’induction conduit à une hypothèse, à la différence de la déduction, qui contraint à une conclusion. Cette hypothèse, lorsqu’elle est retenue par le juge, prend force juridique. Ainsi, du point de
I consider that the importance of custom in international law enhances the role played by judges in the creation of the law. Yet, I also believe that the judge’s creative role exists in every legal system, since every rule must be interpreted before it can be applied.

2. The Scope of Interpretation of the Meaning of a Conventional Rule of International Law

In reality, in my opinion, every interpretation involves an element of creation. Yet, as will be seen, not all lawyers agree on this point.

(a) The Different Types of Interpretation

When applying a legal rule, the meaning or signification of the rule must first be ascertained. There are differing ways of applying a rule:

– either by laying down a subsidiary rule of application;
– or by making a concrete act of individual application;
– or by resolving a conflict of interpretation concerning the application of the rule.

In all these cases, applying the rule requires interpretation, *i.e.* a *determination of its meaning*, of its true content.

However, it is possible to distinguish two very different forms of interpretation depending on the body called upon to determine the meaning:

– what may be called ‘authentic interpretation’, when the interpretation is effectuated by bodies that are empowered to apply the law; and
– what may be called ‘non-authentic interpretation’, by private individuals who attempt to apply a law in order to avoid a sanction, or by jurists, law professors, etc.

The question, then, is what constitutes an authentic or non-authentic interpretation of international law. In international law, those subject to the law are often the same as the ones that are empowered to apply the law. Thus, contrary to what happens in national law, interpretation by the subjects of international law, which are at the same time subjects and authors of the law, is an authentic interpretation.

As already stated, the application of a legal rule always involves interpretation. However, the scope of such interpretation may vary.

---

vue de la logique, la coutume est une hypothèse juridictionnelle, un raisonnement inductif, consacré par l’autorité de la chose jugée.