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faculty of law

# The Theory & Philosophy of Customary International Law and its Interpretation

24th - 25th May 2019  
Groningen  
The Netherlands



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Interest Group on  
International Legal Theory & Philosophy  
IGILTP



## Welcome from the Organizers

Dear participants,

The organizing committee warmly welcomes you to the first TRICI-Law and ECTPIL Conference: *'The Theory and Philosophy of Customary International Law and its Interpretation'*.

Despite claims to the contrary, and to paraphrase Mark Twain's famous quip, the rumours of customary law's death have been greatly exaggerated – customary international law remains alive and well. Nowadays, international law seems to be going through a similar process as mathematics did in the 19th century. In order for international legal scholarship to progress, we need to go back to its theoretical foundations. We need to identify, critique and discuss the axioms on which the system is based, as well as the rules under which these building-blocks of the international legal system function.

There is still much to do before we can understand customary international law in all its complexity. One reason is that most analysis tends to focus on the process of emergence and identification of a rule of customary international law, through the dichotomous requirements of state practice and *opinio iuris*, with all the shortcomings and pitfalls that it entails. Yet, customary international law as a source raises other questions, too. Can we speak of 'rules' in this context (what is the nature of customary law)? What is the foundation for the sources of international law in general and customary law, in particular? Do we conflate the determination of a rule of customary international law with the determination of its content? Is customary international law open to interpretation and if so what are the rules that govern this interpretative process?

Customary international law and its interpretation demands our attention and we are extremely pleased that you will join us in this event. Thank you, for making the effort to travel to Groningen to join us in what will hopefully be a thought provoking event.

We hope it will provide many opportunities for knowledge exchange and for strengthening existing ties and for building new partnerships.

We would also like to thank the European Research Council, TRICI-Law and the ESIL Interest Group on International Legal Theory and Philosophy as the key sponsors of this event and the University of Groningen, Municipality of Groningen and the Province of Groningen for their valuable contributions to making this event possible.

Warm regards,

### The Organizing Committee

#### TRICI-Law

Prof. Panos Merkouris

Ms. Nina Mileva

Ms. Marina Fortuna

#### ESIL IGILTP

Dr. Jörg Kammerhofer

Dr. Noora Arajärvi



## The Organizing Committee



**Prof. Panos Merkouris**  
Principal Investigator  
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ESIL IGILTP



**Dr. Noora Arajärvi**  
Deputy Chair  
ESIL IGILTP



**Marina Fortuna LLM**  
PhD Researcher  
TRICI-Law Project



**Nina Mileva LLM**  
PhD Researcher  
TRICI-Law Project



**Tatiana Spijk-Belanova LLM**  
Project Manager  
TRICI-Law Project



**Konrad Turnbull**  
Student Assistant  
TRICI-Law Project

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Bagus Hadiredjo  
Nasya Desiria  
Isabelle Dahl

## Conference Programme

Friday 24th May 2019

- 08.30 – 9.00 am **Registration**  
**Location:** Academy Building / Bruinzaal
- 09.00 – 09:30 am **Opening of Conference**  
**Location:** Academy Building / Aula
- 09.30 – 10.15 am **Keynote Speech**  
**Location:** Academy Building / Aula  
H.E. Judge Raul Pangalangan of the International Criminal Court  
*On Reading the Unwritten: Constraints on Codified Rules and the Enduring Power of Custom*
- 11.00 – 11.30 am **Coffee Break** **Location:** Academy Building / Bruinzaal
- 11.30 – 13.00 pm **The Theory and Philosophy of CIL as a Source of Law**  
**Location:** Senaatskamer  
Chair: **André de Hoogh**  
**Jörg Kammerhofer:** *The Theory of Customary International Law after the ILC Project: Between Pragmatism and Disenchantment*  
**Jean d'Aspremont:** *The Four Lives of Customary International Law*  
**Diego Mejia-Lemons:** *Customary International Law and the Regulation of the Sources of International Law*  
**Romel Bagares:** *Enkapsis and the Development of Customary International Law: A Dooye- weerdian Approach*
- 13.00 – 14.15 pm **Lunch** **Location:** Academy Building / Bruinzaal

14.15 – 15.45 pm

**Ontological Critiques of CIL**  
**Location:** Senaatskamer

Chair: **Pauline Westerman**  
**Noora Arajärvi:**  
*Misinterpreting Customary International Law: Corrupt Pedigree or Self-fulfilling Prophecy?*  
**Francesca Iurlaro:**  
*The Fiction of Customary International Law: an Historical and Theoretical Perspective*  
**Timothy William Waters:**  
*Tools to Match Desire: Customary International Law's Plastic Hypocrisy*  
**Andreas Hadjigeorgiou:**  
*Beyond Formalism: Reviving the Legacy of Sir Henry Maine for Customary International Law*

14.15 – 15.45 pm

**Faultlines and Weak Spots in the Edifice of CIL**  
**Location:** Old Courtroom

Chair: **Daniel Peat**  
**Andreas Føllesdal:**  
*Whence the Legitimate Authority of Customary International Law: to Honor State Consent, or Legitimate Expectations – or Both?*  
**Max Henry Mayer:**  
*Law and its Other: The Making of Customary International Law*  
**Asif Hameed: Particular vs General Rules:**  
*A Major Faultline for Customary International Law*  
**Sean Yau:**  
*Between Identifying and Conceptualising 'Exceptions' to Customary International Law*

13.45 – 16.15 pm **Coffee Break**

**Locations:** Bruinzaal *and* Old Courtroom

16.15 – 17.45 pm

### Alternative Approaches to CIL

**Location:** Senaatskamer

Chair: **Ingo Venzke**

**David Howard:**

*An Alternative Theory of Customary International Law*

**Anna Baka:**

*The Phenomenology of Absence in Customary International Law*

**Frederick Cowell:**

*Can Customary International Law Emerge from Universal Periodic Review Recommendations? A Democratic-Constructivist Theory*

**Markus Beham:**

*State Interest and Customary International Law – Identifying Custom Through International Relations*

16.15 – 17.45 pm

### Actor Variety in the Content-Determination of CIL

**Location:** Old Courtroom

Chair: **Brigit Toebes**

**Catherine Brölmann:**

*Is the Classical Paradigm of State Practice and Opinio Juris still valid today?*

**Machiko Kanetake:**

*Critical Analysis of the Formation of Customary International Security Law*

**Maiko Meguro:**

*Behind the Fiction of Opinio Juris: the Actors that Actually Create International Law*

**Zhuo Liang:**

*The Practice of Non-state Armed Groups and the Formation of Customary International Humanitarian Law: Towards a Direct Relevance?*

18.30 – 19.30 pm **Drinks** (for all Conference Attendees)

**Location:** Provinciehuis

Sponsored by the Province of Groningen, University of Groningen and the Municipality of Groningen

19.30 – 22.00 pm **Dinner** (for Organization Committee & Speakers)

**Location:** Prinsenhof

## Conference Programme

Saturday 25th May 2019

09.00 – 10.45 am

### Domestic Court Lessons on the Theory and Interpretation of CIL

**Location:** Van Swinderen Huys

Chair: **Geir Ulfstein**

**Cedric Ryngaert:**

*From Customary Law Ascertainment to Interpretation: the Role of Domestic Courts*

**Luigi Crema:**

*Once You Get to the Top of a Positized Legal System, Customary Law Comes Out Again*

09.00 – 10.45 am

### The Relevance of Hermeneutics & Interpretation in CIL\*

**Location:** Old Courtroom

Chair: **Noora Arajärvi**

**Panos Merkouris:**

*The Viability of and Need for Interpretation of Customary International Law*

**John R Morss:**

*The Interpretation of Customary International Law: Some Questions*

### Domestic Court Lessons on the Theory and Interpretation of CIL (Continued)

**Gerard Hoogers:**

*Customary International Law as a Tool for Federal Dispute Settlement*

**Nina Mileva:**

*Old, New, Borrowed, or Blue: How can we Learn from the Interpretive Practices of Domestic Courts?*

### The Relevance of Hermeneutics & Interpretation in CIL (Continued)

**Orfeas Chasapis Tassinis:**

*Interpreting State Practice and Interpreting the Rules of Customary International Law: Practical Relevance and Theoretical Reflection*

**Fabian Augusto Cardenas Castaneda**

*Interpreting CIL as an Argumentative Construct*

10.45 – 11.15 am **Coffee Break**

**Location:** Van Swinderen Huys

11.15 – 13.00 pm

### The Need for Methodological Rigour in the Identification, Interpretation and Application of CIL

**Location:** Van Swinderen Huys

Chair: **Jörg Kammerhofer**

**Vladyslav Lanovoy:**

*The Role of International Courts and Tribunals in the Treatment of Customary International Law: A Plea for Greater Methodological Rigour*

**Letizia Lo Giacco:**

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

**Anastasios Gourgourinis:**

*Navigating the Identification and Application of Customary International Law in International Investment Arbitration*

**Nikolaos Voulgaris:**

*The Genesis of Customary International Law through the International Law Commission; Disentangling Lex Ferenda from Lex Lata*

11.15 – 13.00 pm

### Delineating the Interpretative Stage in the 'Life-Cycle' of CIL

**Location:** Old Courtroom

Chair: **Malgosia Fitzmaurice**

**Riccardo di Marco:**

*Customary International Law: Identification vs Interpretation*

**Mariana Clare de Andrade:**

*Identification of and Resort to Customary International Law by the WTO Appellate Body*

**Kostiantyn Gorobets:**

*Practical Reasoning and Interpretation of Customary International Law*

**Marina Fortuna:**

*Interpretation of Customary International Law: You Know It When You See It?*

13.10 – 13.30 pm **Closing**

**Panos Merkouris**

(Local host & Co-organizer)

**Noora Arajärvi**

(Co-Organizer & Deputy Chair ESIL IGILTP)

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\*Additionally, **Hugh Thirlway** contributed an essay on the topic entitled: 'A Hermeneutic Approach to Customary International Law'

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## Keynote Speaker



**H.E. Judge Raul Pangalangan** came to the ICC from the University of the Philippines where he was a Professor of Law and former Law Dean. He has lectured inter alia at the Harvard Law School and The Hague Academy of International Law. He is a contributing author to the Commentary on the Rome Statute of the International Criminal Court. He has been a Member of the Philippine Bar since 1984. He has argued before the Philippine Supreme Court and has been designated as *amicus curiae* in leading constitutional law and international law cases.

He was a Philippine Delegate in the drafting of the Rome Statute in 1998 and co-chaired the national campaign for ratification by the Philippines and other Asia-Pacific states. He studied at Harvard where he

received his LL.M. (winning the Laylin Prize in international law) and S.J.D (winning the Sumner Prize for best dissertation on international peace). He holds the Diplôme of The Hague Academy of International Law.

### On Reading the Unwritten: Constraints on Codified Rules and the Enduring Power of Custom

The dynamic between codified treaty obligations and customary international law has been part of some of the most important cases at the International Criminal Court, e.g., on head of state immunity, the international humanitarian law on war crimes, or attacks against cultural heritage.

This comes at a time of an inward turning toward nationalism that rejects anything “international.” States assert their sovereignty over international “law making”, embracing only treaties that they sign and questioning custom like they were edicts divined from the heavens. This year, the world marks the 50th anniversary of the Vienna Convention on the Law of Treaties, but stands perplexed on how to fete custom law because, by the nature of the beast, its birthdate is either ancient or amorphous.

Yet especially with the rise of international human rights law, of “peoples” distinct from nation-states, of a universal claim over the global commons — in both the natural patrimony and cultural heritage — unwritten law (found in custom, *jus cogens*, or obligations *erga omnes*) is either the last dying gasp of natural law against the positivist onslaught, or the glorious reaffirmation that there are principles of justice that state sovereignty cannot trump. Being unwritten may sometimes be a disadvantage before the courts of law but it packs a power in the verdict of history.

## Chairs



**André de Hoogh** is associate professor in international law at the University of Groningen. He possesses wide-ranging and thorough knowledge in international law and has been publishing and teaching on all kinds of aspects for many years now. De Hoogh obtained his doctorate (Ph.D.) at the (Radboud) University of Nijmegen in 1996 on research into obligations *erga omnes* and international crimes committed by States. Before moving to Groningen in 1998, he was employed for several years by Utrecht University. In 1999, he acted as UN accredited observer to the popular consultation in the former Portuguese colony of East Timor, which was to determine the political future of the country.

**Pauline Westerman** is Professor in Philosophy of Law at the Faculty of Law, University Groningen and a member of staff of the Academy of Legislation in the Hague. She studied philosophy of science, wrote her dissertation on the decline of natural law theories and since then wrote mainly about contemporary forms of legislation and regulation from a philosophical point of view. In 2018 her book ‘Outsourcing the Law’ was published (Elgar) as well as an edited volume on *Soft law and Validity* (Springer). Pauline Westerman is a member of the Royal Dutch Academy of Science.



**Daniel Peat** is an Assistant Professor in Public International Law at the Grotius Centre for International Legal Studies at Leiden University. Before joining Leiden University, he worked at the International Court of Justice as an Associate Legal Officer for President Abdulqawi A. Yusuf. Daniel was awarded a PhD in Law from the University of Cambridge, where he was a member of Gonville & Caius College and a recipient of the WM Tapp Studentship. Daniel’s forthcoming monograph, *Comparative Reasoning in International Courts and Tribunals*, will be published by Cambridge University Press in 2019. He co-edited *Interpretation in International Law*, published by Oxford University Press in 2015, and acts as Co-Rapporteur for the International Law Association Study Group on the Content and Evolution of the Rules of Interpretation.

**Ingo Venzke** is Professor for International Law and Social Justice and the University of Amsterdam and Director of the Amsterdam Centre for International Law (ACIL). His monographs include *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) and *In Whose Name? A Public Law Theory of International Adjudication* (together with Armin von Bogdandy, OUP 2014). Ingo is Editor-in-Chief of the *Leiden Journal*

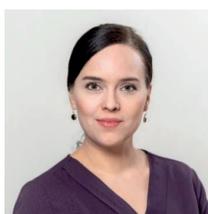


of International Law (together with Eric de Brabandere). His teaching includes courses on international dispute settlement, international economic law, and methods of legal research. His research focuses on the relationship between international law and inequality, on contingencies in the history of international law, and on the theory and practice of interpretation.



**Brigit Toebes** (1969) holds the Chair 'Health Law in a Global Context' at the Department of Transboundary Legal Studies of the Faculty of Law of the University of Groningen, the Netherlands. She is co-founder of Global Health Law Groningen Research Centre and founding member of the Aletta Jacobs School of Public Health. Her current specific research interests concern international health law as an emerging branch of international law, and the role of law in reducing chronic disease incidence and socio-economic health inequalities. She has served as a consultant to WHO, Open Society Foundations, the UN Special Rapporteur on the Right to Health, and the Netherlands Ministry of Health.

**Geir Ulfstein** is Professor of international law at the Department of Public and International Law, University of Oslo and Co-director of PluriCourts – Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, University of Oslo. He has been Director of the Norwegian Centre for Human Rights, University of Oslo (2004-2008). Ulfstein has published in different areas of international law, including the law of the sea, international environmental law, international human rights and international institutional law. He is General Editor (with Andreas Føllesdal) of two book series *Studies on Human Rights Conventions* (Cambridge University Press) and *Studies in International Courts and Tribunals* (Cambridge University Press). Ulfstein is President of the Norwegian Branch of the International Law Association, Co-chair of the International Law Association's Study Group on the 'Content and Evolution of the Rules of Interpretation' and is Chair of the Scientific Advisory Board, Max Planck Institute for Procedural Law, Luxembourg.



**Noora Arajärvi** is a researcher with expertise and interest in the sources of law, international legal theory, rule of law and sustainable development. Currently she works at the Hertie School of Governance and as a consultant for the Centre for Socio-Legal Studies at the University of Oxford. Her past positions include serving at the Rule of Law Unit of the UN Secretariat, lectureships at the University of Central Lancashire and the University of the West Indies, and a postdoctoral fellowship with the Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?'. Dr. Arajärvi is the author of *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (2014) and several research articles.

**Professor Malgosia Fitzmaurice** holds a chair of public international law at the Department of Law, Queen Mary University of London (QMUL). She specialises in international environmental law; the law of treaties; and indigenous peoples. Her latest publications are a monograph *Whaling and International Law*, Cambridge University Press, 2015 and (co-edited with Dai Tamada) *Whaling in Antarctic: Significance and Implications of the ICJ Judgment*, Brill/ Nijhoff, 2016. She has delivered a lecture on the International Protection of the Environment at the The Hague Academy of International Law. Professor Fitzmaurice was invited as a Visiting Professor to and lectured at various universities, such as Berkeley Law School; University of Kobe; Panthéon-Sorbonne (Paris I). Professor Fitzmaurice teaches undergraduate and LLM modules in international environmental law and the law of treaties. She also supervises PhD students. She is Editor in Chief of *International Community Law Review* journal and of the book series published by Brill/Nijhoff *Queen Mary Studies in International Law*.



**Jörg Kammerhofer** (Mag., Dr. iur., Vienna; LL.M., Cantab) is a Senior Research Fellow at the University of Freiburg, Germany. He specialises in international law's general, theoretical and procedural aspects, international investment law as well as the theory of law, in particular the Pure Theory of Law. He has written widely on international law and legal theory, inter alia on customary international law, the law on the use of force and the ICJ. He has been a member of the Coordinating Committee of ESIL's Interest Group on International Legal Theory and Philosophy since 2006 and was its chair 2017-2019. He has recently completed the manuscript for a monograph entitled *Expropriation in International Investment Law: General Law from Fragmented Sources*.

## Speakers & Abstracts

### Panel 1: The Theory and Philosophy of CIL as a Source of Law

**Jörg Kammerhofer** (Mag., Dr. iur., Vienna; LL.M., Cantab) is a Senior Research Fellow at the University of Freiburg, Germany. He specialises in international law's general, theoretical and procedural aspects, international investment law as well as the theory of law, in particular the Pure Theory of Law. He has written widely on international law and legal theory, inter alia on customary international law, the law on the use of force and the ICJ. He has been a member of the Coordinating Committee of ESIL's Interest Group on International Legal Theory and Philosophy since 2006 and was its chair 2017–2019. He has recently completed the manuscript for a monograph entitled *Expropriation in International Investment Law: General Law from Fragmented Sources*.



#### **The Theory of Customary International Law after the ILC Project: Between Pragmatism and Disenchantment**

The ILC has now concluded its project on the Identification of Customary International Law. Ably directed by Michael Wood, it has from the very beginning been suffused by the spirit of pragmatism. The project primarily wanted to providing guidance to decision-makers, particularly those not professionally trained in international law; engaging in depth with the theory of customary international law was consciously avoided as far as possible. Yet, for all its self-avowed pragmatism, the ILC could not avoid taking a stance on the theoretical aspects of this source, even if only in a roundabout, subconscious manner. On the other side of the equation we find foundational critiques of customary international law, with Martti Koskenniemi's *From Apology to Utopia* a prominent example. An excellent recent contribution to this genre is Jean d'Aspremont's *International Law as a Belief System*, where customary international law is downgraded to a set of doctrines within the canon of stories international lawyers tell themselves, our 'bed time stories', so to speak.

Both methods – apologetic pragmatism as well as iconoclastic scepticism – have virtues, but both have very dangerous vices and both, in a sense, contain the seeds for their own destruction. This contribution will be an effort to show the relative merits and demerits of these two approaches, exemplified in the ILC report and d'Aspremont's book. We will focus on what they can tell us about the theoretical foundations of customary international law as a source of international law. The present author is sympathetic to both *modi operandi*: customary international law is on shakier ground than mainstream writers and practitioner's assume, but the point cannot be to employ a brutal reductionism.

In this presentation, we will show where the quicksand lies and why our reliance on this source is problematic. To paraphrase Carl Schmitt: whoever invokes customary international law wants to deceive.



**Jean d'Aspremont** is Professor of International Law at Sciences Po School of Law. He also holds a chair of Public International Law at the University of Manchester where he founded the Manchester International Law Centre (MILC). He is General Editor of the *Cambridge Studies in International and Comparative Law* and Director of Oxford International Organizations (OXIO). He is a member of the Scientific Advisory Board of the *European Journal of International Law* and series editor of the *Melland Schill Studies in*

*International Law*

#### **The Four Lives of Customary International Law**

This contribution tells the story of the doctrine of customary international law in the 98 years between the moment the introduction of the draft rules to be applied by the new Permanent Court of International Justice on 1st of July 1920 and the adoption on 25th May 2018 of its 16 Conclusions on the identification of customary international law by the International Law Commission. This story of the doctrine of customary international law is not linear. It is tumultuous and pockmarked by a series of metamorphoses. In particular, the tumultuous story told here is articulated around four moments of rupture: 1920, 1927, 1986, and 2018. These four moments corresponds to four key metamorphoses of the doctrine of customary law. Each of these four metamorphoses originates in powerful interventions by some given actors resulting in a redefinition of how arguments about the customary status of a rule ought to be made. It is argued in this article that the doctrine of customary international law, by undergoing these four metamorphoses, has gone through 4 different stages: the age of innocence (1920 – 1927), the age of dualism (1927-1986), the age of turmoil (1986-2018), and the return to innocence (2018-present). The story offered in this article is a story about the four lives of customary international law. This story of the four lives of customary international law is produced through a chronological narrativization of these four moments of rupture and organized on the basis of a specific four-tiered periodization. This contribution will proceed chronologically and sketches out each of these four stages in the history of the doctrine of customary international law between July 1920 and May 2018 one after the other.

This story about the four lives of customary international law will help us shed a new light on the nature of the doctrine of customary international law and the very idea of 'rules' in the doctrine of sources of international law. Drawing on the story of the four lives of customary law, this contribution will develop the an anti-necessitarian argument against the idea that the doctrine of customary law constitutes a set of (customary) rules.

**Diego Mejía-Lemos** (PhD, LL.M. (National University of Singapore), LL.M. (New York University), PGDip, LLB (Universidad Nacional de Colombia), Abogado (Colombia)) is a *Post-Doctoral Fellow at the NUS Faculty of Law*. Dr Mejía-Lemos has held positions in both academia and practice. At the *International Bureau of the Permanent Court of Arbitration, in The Hague*, he provided support to investment treaty arbitrations conducted under the PCA's auspices. While based in Paris, he participated in *Freshfields Bruckhaus Deringer's* advice and representation of a state in a maritime boundary dispute before the *International Court of Justice*. Previously, in Colombia, he had served as *Assistant Professor of Law and Principal Investigator of two research projects at the Universidad de Bogotá*, appeared as *amicus curiae* before the *Constitutional Court* and clerked at the *Supreme Administrative Court (Consejo de Estado)*. His work has been published or is forthcoming in the *American Journal of International Law*, the *Oxford Reports on International Law*, the *Oxford Reports on International Organizations*, and *Oxford University Press's Investment Claims* (as reporter on *Singapore's Bilateral Investment Treaties*), i.a.



### Customary International Law and the Regulation of the Sources of International Law

The proposed paper analyses various issues concerning the nature and source of rules regulating the sources of international law, with a specific focus on customary international law (CIL). In particular, it argues that custom is the source of the meta-rules regulating the sources of international law, and, therefore, that such 'meta-rules' are customary.

The paper provides an analysis of the aforementioned issues by reference to selected bodies of literature. These bodies of literature have been extensively surveyed by the author in his doctoral dissertation and discussed in a paper published in the *German Yearbook of International Law*, which formed the basis of one of his earlier paper presentations, at the *Third Annual ASIL-ESIL-MPIL Workshop* (see cv). The paper, building on the dissertation and *GYIL* article, proceeds in three main parts.

Part I addresses the nature of meta-rules on sources. Part I first distinguishes the question of meta-rules from that of the foundation of international law, i.a. (like Mendelson's distinction of 'levels of analysis'). Furthermore, Part I assumes the premise that such meta-rules may exist and are significant (contra, i.a., D'Aspremont). This position is briefly covered (see *GYIL* article). In this vein, Part I argues against both the Kelsenian (and constructs such as Kammerhöfer's) and Hartian (and theories such as D'Aspremont's) conceptions of meta-rules. Instead, Part I argues in favour of distinguishing the question of identification of rules (as demanded by Hartian approaches) from that of their creation.

Part II turns to the question of the sources of the meta-rules on sources, building on Part I's denial of the impossibility of source-based meta-rules (entailed, i.a., by Kelsenian Grundnorm representations). Part II, in particular, addresses the importance of the

question of source of the aforementioned meta-sources, by emphasizing, i.a., the need for determining the source of a rule in order to establish its existence and scope of application. Part II further argues for a representation of sources as 'means', not 'processes' (like Capotorti, Monaco and Sur, i.a.). In identifying the nature of sources of international law, Part I finally argues in favour of distinguishing sources of law from sources of obligation (like Fitzmaurice, i.a.)

Part III concludes by examining various aspects of the claim that CIL contains the aforementioned meta-rules. As for CIL as a source, Part III, following up on Part II, specifically argues for the suitability of CIL as source of meta-rules on sources, given CIL's unique potential for creating rules universally applicable. As to the possibility of CIL meta-rules, Part III, building on Part I's denial of claims of circularity, explores and addresses those issues, as particularly raised in relation to CIL (including in earlier literature, like Strupp). As for the nature and content of CIL meta-rules on sources, Part III discusses the somewhat limited body of literature supportive of the role of CIL as regulating sources of international law, with a particular focus on the work of Henkin, Reuter, Sur and Weil.



**Romel Regalado Bagares** (LLB, University of the Philippines, 2003; MA, VU-Amsterdam, 2007, cum laude) is *professorial lecturer in public international law at the Lyceum Philippines University College of Law* and serves as *general counsel for one of largest microfinance NGOs in Manila, with a clientele of nearly 200,000 poor women*. At *Center for International Law-Philippines*, he has had extensive experience litigating human rights cases before various Philippine courts and UN human rights mechanisms.

Most recently, he took part in the first legal challenge against *President Rodrigo Roa Duterte's* deadly drug war, and argued before the *Philippine Supreme Court* a pending petition against *Mr Duterte's* unilateral decision to withdraw *Philippine membership in the Rome Statute*. He is working on the application to international law of the *Encyclopedia of the Science of Law* developed by the Dutch Christian philosopher *Herman Dooyeweerd (1894-1977)*, under the external doctoral program of the *Faculty of Philosophy of the Vrije Universiteit Amsterdam*

### Enkapsis and the Development of Customary International Law: A Dooyeweerdian Approach

This essay draws from the work of the late Dutch Christian philosopher Herman Dooyeweerd (1894-1977), former chair of jurisprudence and the history of Dutch law at the *Vrije Universiteit Amsterdam (1926-1964)*, to construct an account of customary international law. Rejecting an account of the state as the sole lawmaker, he proffers a pluralist ontology founded on the philosophical principle *sovereiniteit in eigen kring* (sphere sovereignty) as a source of diverse structural-material principles for legal or jural positivization. Here, there are three inter-related elements: first, is his notion of individuality-structures (entities), which give rise to law unique to their particular practice

or sphere (entities as rule complexes, each sovereign in its own orbit, exhibiting a differentiated responsibility unique to its nature). Second is the various ways in which they engage in relations of enkapsis or enkaptic interlacements – resulting in complex intertwinements of the formal and the material sources of law with profound implications on the private-public (law) distinction. Third is his modal theory of the jural aspect, which is one of the irreducible yet interconnected universal multi-dimensional modes or aspects of reality, and through which entities and enkapses are viewed and understood as legal phenomena.

In summary, his theory of the sources of law states:

All law displaying the typical individuality structure of a particular community of inter-individual or inter-communal relationship, in principle falls within the material-jural sphere of competence of such a societal orbit, and is only formally connected (in its genetic form) with spheres of competence of other societal orbits.

Through enkapsis, different sources of law display a mutual interrelationship that bind and limit without altogether canceling one another. For Dooyeweerd, insight into the nature of enkapsis,

appears to be of fundamental importance for the theory of human society because, in current conceptions, the difference in principle between sphere sovereignty and autonomy is consistently misunderstood.

This insight has a fundamental bearing on any theory of the sources of law,

because it is only by making a sharp distinction between the internal sphere sovereignty of radically different societal structures (such as for example, state, church, and business organization) and the autonomy of parts of one and the same societal whole (such as, for example, municipality and province within the state) can proper jural insight be obtained into the mutual relationship of the original material spheres of competence with respect to the area of law formation.

Thus, a formal source or genetic form of law positivizing jural principles may be an original source of law in one sphere of competence but may be a derived source of law in another.

Applying his theory, customary international law is a formal source of law; that is, a genetic form or mode of generating international law. But its material bases may lie in the particular enkaptic interlacements involved. Further, as a formal source exhibiting the duality of norms in international law, a treaty may be a codification of norms that exist independently as custom, but it may at the same time display a multi-layered interlacement of structural-material principles from various sources.

## Panel 2.1: Ontological Critiques of CIL

**Noora Arajärvi** is a researcher with expertise and interest in the sources of law, international legal theory, rule of law and sustainable development. Currently she works at the Hertie School of Governance and as a consultant for the Centre for Socio-Legal Studies at the University of Oxford. Her past positions include serving at the Rule of Law Unit of the UN Secretariat, lectureships at the University of Central Lancashire and the University of the West Indies, and a postdoctoral fellowship with the Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?'. Dr. Arajärvi is the author of *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (2014) and several research articles.



### **Misinterpreting Customary International Law: Corrupt Pedigree or Self-fulfilling Prophecy?**

This paper analyses the practical and normative consequences of misinterpretation of customary international law (CIL) arising from situations where courts (and potentially other actors) find CIL to have crystallised without sufficient evidence of practice and/or *opinio juris*.

While traditionally CIL emerges spontaneously “like a path in a forest”, the proliferation of international interactions, norm-interpreters, and theories of “modern CIL” suggest that identification and interpretation of CIL have become more strategic endeavours. With various interpretative methodologies in place (Arjærvi, 2014), some findings of CIL have been criticised for being inaccurate, due to either a genuine mistake in the interpretive methodology or aspiration to apply a progressive rule for moral, ethical, policy, or other extra-legal reasons.

This paper, first, determines what amounts to misinterpretation and what types of misinterpretation of CIL can be identified, relying on the Reports and draft conclusions of the International Law Commission’s Special Rapporteur on CIL for analytical guidance. It then proceeds to discuss the respective role of practice and *opinio juris* in the process and the differing consequences of a flawed interpretation of one or the other. This is followed by an analysis of examples of misinterpretation of CIL in international courts, drawing from author’s previous work. Finally, a normative evaluation is set out: whether such misinterpretation renders a norm invalid, illustrates *lex ferenda*, or creates an authoritative verdict of the status of law, even against its flawed premise – “a corrupt pedigree” as termed by Fernando Teson (2014). The misinterpretation of customary norm, which is subsequently followed by states and other entities as if it were part of CIL, creates a self-fulfilling prophecy – a self-generating crystallisation of a rule. Even if the rule was not customary law in reality at its inception, the subsequent practice and

acceptance eradicates the “mishap” of the initial misinterpretation and legitimatises the rule as part of CIL. On the other hand, as examples from international criminal tribunals illustrate, a later decision may denounce the misinterpretation and correct the course of the customary process, or the misinterpretation will remain an unfortunate but soon forgotten misstep, not to be restored nor repeated. The paper concludes with some conceptual considerations on the impact of interpretative exercise on recognition, validation and legitimation of CIL.



**Francesca Iurlaro** holds a PhD in Law from the European University Institute in Florence (2018) and she is currently a Research Fellow of the University of Milan, Italy. She graduated in the history of philosophy (University of Macerata, 2014) and has an LLM in Comparative, European and International Laws (European University Institute, 2015). For her PhD thesis, she worked on a history of the concept of customary international law in the natural law and *ius gentium* tradition from Francisco de Vitoria to Emer de Vattel. She is now turning her dissertation into a book for publication, titled “The Invention of Custom. Natural Law and the Law of Nations, 1550-1750”. Her research interests include international legal thought, history of political thought, history and reception of natural law theories, law and literature, food ethics, and animal rights. In 2012 she was awarded the Alberico Gentili Prize for her Italian translation of and introduction to Alberico Gentili’s *Lectionis Virgilianae Variae Liber ad Robertum filium*, a less-known commentary of Vergil’s *Eclogues* published by the famous jurist in 1603.

### **The Fiction of Customary International Law: an Historical and Theoretical Perspective**

Over the last four years, I have been working on a thesis titled ‘Unpuzzling Customary International Law: The Invention of Customary Law of Nations from Francisco de Vitoria to Emer de Vattel’, which I have recently defended and I am currently turning into a book manuscript. In this thesis, I have provided an intellectual-historical investigation of the concept of customary international law across a time span of two centuries. By relying on a close analysis of natural law and *ius gentium* doctrines and their intellectual sources, I argued that natural law provides normative content to the concept of custom allowing, therefore, its emergence as a distinctive source of obligation among sovereigns.

One of the aspects that emerged from this analysis is that, in various ways, the employment of fictional arguments is a consistently acknowledged feature of custom. In order to conceptualize custom, recourse to fictional arguments constitutes a powerful means of articulating its conceptual ambiguity.

There are at least three senses in which custom might be interpreted by analogy with fiction, and that I will explore in this contribution, both in terms of their historical as well as concerning their wider conceptual, and even contemporary, significance.

First, fictional arguments help us to deduce and presume the existence of a universal consensus legitimating custom. This is particularly evident in the works of Francisco de Vitoria (1483-1546), whose doctrine of *ius gentium* is based on the deduction of universal principles of human nature. From this perspective, in order to identify customs Vitoria suggests that the following counterfactual argument could be employed: what would sovereign x do in a given situation y? Quite interestingly, Emer de Vattel (1714-1767) also makes use of fictional arguments to argue for the existence of customary rules binding on sovereigns, although starting from fundamentally different premises. Vattel claims that customs should be judged according to natural law, whose foundational principle is a noble self-interest. This allows custom to enshrine and secure collective as well as individual interests. Indeed, if nations acted according to self-interest as they would in a condition of natural liberty, they would inevitably comply with natural law. In this respect, custom is what nations seem to observe (both in theory and in practice) as a reminder of their original natural liberty. Fiction powerfully helps nations recall that often forgotten original state.

Second, the concept customary international law is also constructed by jurists via proper legal fictions. In cases in which a strong sense of obligation is attached to an otherwise normatively indifferent conduct, that conduct should be considered as if it really possessed all that legal meaning and value. In a similar vein, Christian Wolff’s (1679-1754) suggestion to conceive of customs as if they were treaties also implies the fictional reasoning that tacit consensus has to be interpreted (and considered as legally cogent) as if it was expressed, in order to argue for equal legal effects stemming from such an analogy.

In this respect, a third kind of fiction is employed, mostly by humanist jurists: literary fiction as a reflection of human nature. Alberico Gentili (1552-1608) and Hugo Grotius (1583-1645) both make use of literary *fictio*, understood as the body of different historical, philosophical and poetic sources of the classical textual tradition, to make the claim that *fictio* is either a powerful imitative practice (of which exempla from the past are particularly significant evidence since they provide moral guidance), or an important means to collect further evidence of natural law principles. In both cases, their claim is that customary law of nations becomes visible through the fabric of intertextuality. To this end, the fact that literary fiction provides an important source of information implies, to a certain extent, the fictional argument that the same rules so perfectly enshrined in the classical past are also valid for the present, simply by virtue of their paradigmatic, normative force.



**Timothy William Waters** is a Professor of Law and Val Nolan Faculty Fellow; Associate Director, Center for Constitutional Democracy at Indiana University Bloomington. Waters' scholarly interests include the structure of the inter-state system, ethnic conflict, human rights, transitional justice, and comparative law, especially in European and Islamic contexts. His principal research involves re-defining self-determination to devise an effective right of peaceful secession. He has published extensively in leading journals of international law and international relations, including at Yale, Harvard, NYU, Virginia, and George Washington. Waters has served as a consultant on legal system reform for the Open Society Institute, UNDP, and the Latvian Ministry of Justice, on ethnic discrimination for Human Rights Watch, and as a consultant to the defense on Padilla et al. He monitored implementation of the Dayton Peace Accords in Bosnia for the OSCE, and at the Yugoslav war crimes tribunal, he helped draft the indictment of Slobodan Milosevic. He was a Peace Corps volunteer in Hungary, where he first developed his interest in regulation of minority-majority conflicts.

### **Tools to Match Desire: Customary International Law's Plastic Hypocrisy**

Although much of international law is articulated in treaties, customary rules underpin some of that law's most important normative commitments. After all, as Koskeniemi has noted, we don't believe that genocide is illegal – let alone wrong – solely because of the Genocide Convention. Arguably the entire edifice of international law's authority rests on a customary basis, underpinning every claim that a given positivist textual commitment matters. Custom's decline was long anticipated, but it has proved tenacious, in part because it has turned out to be quite useful.

At the same time – perhaps precisely because of its persistent centrality – customary international law, or CIL, has been subjected to trenchant critiques concerning its doctrinal incoherence, irrationality, and irrelevance to the actual decision-making of states. Equally, CIL has been vigorously defended by those for whom custom's normative character and potential are important.

Yet there is one aspect of CIL on which the two sides of this debate have largely been silent: the ethical foundations of its method. Especially in the hands of its so-called modern practitioners, CIL relies on a highly indeterminate set of constitutive methods that privilege public rhetorical positions over evidence of actual intimate conviction in order to do its principal jurisprudential work. Simply put, custom relies on hypocrisy.

Now this may be a good thing. We typically think of hypocrisy as inherently bad, but as a matter of method, this is not a necessary, nor necessarily obvious, judgment. But either way, the descriptive fact of CIL's deployment of a method that is technically hypocritical is consequential – especially for the interaction of custom with human rights, which has always exhibited a strong concern with morality alongside (and as part of) its legal development.

The kind of CIL that has been most successful in advancing and legitimating a rights agenda has adopted two related innovations: An expressly normative commitment and a technically hypocritical method converge, allowing greater development of customary rules than either a more normatively restrained or methodologically fastidious approach would allow. But this means the most efficacious form of CIL, from a rights perspective, rests on a problematic epistemological and ethical foundation. For, apart from the ethical concerns hypocrisy usually entails, CIL derives rules from what actors say in ways that, in any other discipline, would immediately be recognized as analytically naive.

This article first reviews the theory and operation of CIL – the standard view, principal critiques, and CIL's particular reliance on indeterminacy. Then it turns to a consideration of how modern CIL privileges rhetorical statements and ignores contrary evidence to construct normatively preferred claims, in ways that are best described as technically hypocritical and methodological heterodox – if also necessary to the realization of modern custom's normative desires. That custom survives and even thrives is testament to the value of plastic and malleable tools.

**Andreas Hadjigeorgiou** My education and research have always been fixed upon Law with a keen interdisciplinary spirit. As such after successfully completing a degree in Law and International Studies (University of Surrey, UK), I pursued a master's degree in Legal Theory and International Law (University of Vienna, Austria). This direction came to successfully shape my interest in international legal theory, which I came to express in my PhD thesis (joint collaboration between the University of Antwerp, Belgium, and the University of Groningen, Netherlands). My research centres around the interdisciplinary conceptualisation of custom and customary law. More specifically, I investigate, and attempt to operationalise for International Law, a lost legacy which begun, and evolved out of, the works of Sir Henry Maine – and his disciples in Oxford



### **Beyond Formalism: Reviving the Legacy of Sir Henry Maine for Customary International Law**

Despite the fact that the legality of CIL is taken almost for granted these days, certain problems still remain. 1) General legal theory still understands CIL as a defective, or exceptional, case of law due its primarily customary element – and to an extent this migrates to IL. 2) The 'slow growth of custom' is taken to be a serious problem hindering international law which can only be overcome by formal means (i.e. treaties). And as such, 3) International legal scholarship itself seems to think of this customary element as outdated or problematic, and we see a shift towards formalism (replacing custom with treaties).

These criticisms and concerns attack, not only the ontology, but question the efficacy of CIL, and doubt whether its existence will continue to have relevance. Nevertheless, while most theories of (international) law ascribe to at least one of these positions, a now-forgotten school of thought, led by the work(s) of Sir Henry Maine, reversed all of them. For Maine the historical evolution of law begun with custom, and no legal system can develop beyond it. 'Customary law' is the most primitive, rudimentary, yet fundamental and central form of the phenomenon of law. Despite its informal appearance, it manages to constitute a society, to create order, and by organizing individuals in (in)formal institutions, it provides humanity secular means through which to fulfil their needs and achieve survival in close proximity to each other.

Law from this perspective is a facet of culture, and legality a mode of custom; and in this most rudimentary form we can see how law manages to arise freely, and spontaneously, without the need for formalities or imposition. While it is true that Maine himself notes that domestically certain deficiencies necessitated the formalization of customary law, this had its own adverse effects. The main idea is that once (customary) law is formalized and custom is excluded from yielding law, its spontaneous evolution terminates, and this formal law begins to detach from the continuously changing environment to which it belongs. From there, Maine isolates three agents of change; Legal Fictions, Equity, and Legislation.

If we choose to assimilate a Mainian perspective, then a new vision spawns for CIL. First, CIL is law-properly-so and perhaps the most fundamental type; no ontological concerns arise. Second, the 'slow growth of custom' might not be as slow as we might have thought once Legal Fictions and Equity are taken in mind. Third, rather than replacing customs with treaties, Maine's perspective suggests the two can work together; by consolidating each other we can avoid the pitfalls of formalism and the adverse effects that come with it.

Most importantly, Maine's evolutionary narrative speaks of a myriad of stages and forms in between the most primitive customary law and the complex domestic legal systems. By avoiding this strict dichotomy, Maine's perspective allows us to see CIL as much more than the simplest structure of customary law, although not yet on par with the complexity of domestic legal systems. Two points might be added, that a) this might not be such a bad thing, and b) that despite their formal and structural differences, no great divide separates the most primitive customary law from its more complex legal system counterpart.

## Panel 2.2: Faultlines and Weak Spots in the Edifice of CIL



**Andreas Føllesdal** Professor of Political Philosophy, Faculty of Law, University of Oslo. Co-Director of PluriCourts, a Centre of Excellence for the Study of the Legitimate Roles of the Judiciary in the Global Order. Principal Investigator, European Research Council Advanced Grant MultiRights 2011-16, on the Legitimacy of Multi-Level Human rights Judiciary. Ph.D. 1991 in Philosophy, Harvard University. Føllesdal publishes in the field of political philosophy, mainly on issues of international political theory,

international courts, globalisation/Europeanisation, Human Rights, and Socially Responsible Investing.

### **Whence the Legitimate Authority of Customary International Law: to Honor State Consent, or Legitimate Expectations – or Both?**

State consent has long been assumed to be the central and even sole source of legal validity of international law (IL), by the ICJ and International Legal Positivism.

This centrality of state consent, has been challenged for several empirical, conceptual and normative reasons, especially but not only for customary IL (CIL) This paper explores such criticisms to reconstruct claims to legitimate authority on behalf of IL in general, and for ICL in particular: Whence any claims of the sources of IL to offer reasons for judges for interpretation of IL, and for compliance constituencies to defer to judgments of international courts, to act any different?

An aim of this paper is to explore whether and how arguments for the centrality of state consent can provide (partial) support for ICL's claim to be a legitimate authority, and shed light on why state consent is neither necessary nor sufficient to give rise to legally binding obligations – yet why state consent may sometimes be relevant.

Section 1 explores challenges to the current centrality of state consent. States consent is difficult to discern even for several formal sources (ICJ Statute Art 38) (– not to mention law making by international organizations - Alvarez 2006 and international courts, von Bogdandy and Venzke 2011). In particular, ICL, including norms of *pacta sunt servanda* and *jus cogens*, are said to derive and develop from the practice of state. So treaties may thus bind third parties (Vienna Convention Art 38, Pellet 2000, 37-38; Meron). The criteria of state practice and *opinio juris* are not only unsatisfactory 'non-moralized social facts' as evidence of state consent, but their vagueness leave judges striking discretion – and are conceptually contested to boot.

Section 2 therefore identifies reasons to value state consent even when, and especially when, "consent is falling out of favour" (Collins 2018). Reasons with varying scope of application and weight include compliance, specification, reduction of domination and

enhanced fairness. Such arguments help assess both the value of state consent and proposed improvements. One aim is to identify the conditions, limitations - and incompleteness of state consent as necessary or sufficient conditions for some of the states' legal obligations. These help identify any justification of such circumscribed state consent for the legitimate authority of IL and ICL. Proposed reconstructions and improvements presumably retain some functions for state consent, specified in light of these reasons.

Section 3 starts to situate state consent in alternative broader normative accounts of promise-keeping. In particular, the paper explores the normative premise of "what we owe to other people when we have led them to form expectations about our future conduct." (Scanlon 1990, 199-201, 208; MacCormick 1972). This is certainly only one normative requirement on behavior, and the social practice of promises including treaties is only one of several means to create such expectations. Other behaviour, as part of practices or not, can also create such expectations. Other overriding duties may hold independent of any social practice.

Section 4 brings this account to bear on the roles and current conditions and scope of state consent in creating valid obligations under IL, and on the claims of ICL in particular - including its defining characteristics. Topics may include the norm that new *jus cogens* norms retroactively void treaties (Vienna Convention art 64); a more plausible reconstruction of 'tacit consent', why coerced peace treaties may still be legally binding, etc.

**Max H. Mayer** is a PH.D. candidate at Tübingen University, writing about the theory of customary international law formation. He holds a position as academic staff and teaches Law, Human Rights and Legal Theory at the Leibniz Kolleg of Tübingen University. He has studied Law at the Universities of Heidelberg, San Diego, Geneva and Tübingen, with an emphasis on international law and international legal theory.



### **Law and its Other: The Making of Customary International Law**

My paper asks what the existence of customary international law means for the idea of rule of law in international law. To this end, it will provide a theoretical critique of the process through which customary international law is being created. The central claim is that the production of customary international law needs to be seen - at least in effect - as a continuous suspension of international law, for it provides a legal mechanism to change or re-interpret international law through its persistent violation. It thereby renders the rule of law in international law incomplete, subjecting international law to a sphere of lawlessness.

The paper proceeds in three steps. Firstly, taking in account the legal conditions for the emergence of customary international rules, I will examine the precise way in which

customary law systematically enables States to act in disregard of international law, creating what can be called a realm where international law is absent. I will then, in a second step, inquire how this coexistence of legal validity and suspension can be thought of in detail. The challenge here is to develop a theoretical notion of custom that appreciates the contradicting moments which arise from its legal doctrine, most importantly the fact that international law instates legal rules and at the same time provides a mechanism that calls for their violation, and the fact that it is international law which suspends itself. International law, through a mechanism of its own, is at once valid and invalid. To deal with these questions, I will draw on Carl Schmitt's concepts of sovereignty and the exception, Walter Benjamin's critique of revolutionary and legalized violence, as well as insights from poststructuralist theories of Jacques Derrida, Giorgio Agamben and Niklas Luhmann, among others. The result will be an ontology of customary international law that reveals how the process of customary international law production gives rise and maintains a relation to its opposite. It will show that 'behind' the legal rules on customary international law lies a social process that defies the limitations of international law.

This implies further consequences for how we should think of international law in general. With a view to examining these consequences, I will, in a third step, compare the way that international law relates to its other through customary law to the way that international law and even law in general relate to spheres of a legality, as well as reflect on the character and function of customary law in international relations. Against this background I will conclude that without significant alterations to the legal concept of customary law creation which eliminate the reference to State practice, customary international law will be a factor, inherent in international law, that undermines the legalization of international relations.

The paper is part of an ongoing PhD-Project on the theory of customary law and the right to self-defense, of which it will constitute the central theoretical chapter.



**Asif Hameed** is a Lecturer in Law at Southampton Law School within the University of Southampton. Asif's research interests fall mainly within constitutional law, international law, and legal theory. Much of his research within these fields is about two basic questions: (1) how law is made, and (2) how legal rules conflict with each other. Asif tries to think about these questions at both a theoretical and a practical level, and often with the aim of employing theoretical insights to improve our understanding of legal questions. Asif's doctoral degree at Oxford was a mix of international law and legal theory, and he taught at Cambridge for five years before moving to Southampton Law School.

### **Particular vs General Rules: A Major Faultline for Customary International Law**

Customary international law comprises general rules binding States generally, and particular rules binding only a limited number of States. My paper focuses on what

particular customary law is, and on its relationship with general customary law. This is not a marginal topic. I will suggest that the distinction is profoundly important to customary international law. I will also suggest that the distinction is challenging to draw, in part because of difficulties in interpreting State practice.

What is particular custom? A common view is that it is geographically confined – eg arising among neighbouring States,<sup>1</sup> or with regard to a matter falling within a certain geographical area.<sup>2</sup> Hence writers and jurists have spoken of “regional” or “local” custom. Another view, recently endorsed by the ILC in its 2018 draft conclusions on custom, is that particular custom need not be geographically confined: “there is no reason in principle why a rule of particular customary international law could not also develop among States linked by a common cause, interest or activity other than their geographical position”.<sup>3</sup>

This approach faces problems where State practice and *opinio juris* diverge. Suppose that 80 States recognise the immunity of incumbent Heads of State from foreign criminal jurisdiction, and 60 States deny such immunity.<sup>4</sup> The practice is too inconsistent to infer a general rule. But might we infer a particular customary rule, at least among the 60 States? (And perhaps *another* particular rule among the other group of 80 States?)

The ILC’s response is that particular custom depends on a practice among “the States concerned that is accepted by them as law (*opinio juris*) among themselves”.<sup>5</sup> Its commentary explains that “the practice must be general in the sense that it is a consistent practice ‘among the States concerned’, that is, all the States among which the rule in question applies”.<sup>6</sup> Perhaps, then, no particular customary rules may be inferred in the above example if each group of States (80 and 60) think that the rule applies to all States, not just among members of their own group.

But how do we tell? How should we interpret State practice given that it is typically vague or silent on this matter? Should interpretative presumptions be used and, if so, how and why?

The ILC’s proposal raises further concerns. Suppose that a particular customary rule (as the ILC understands it) emerges among 20 States, who do recognise this rule among themselves. Later, 5 additional States begin engaging in practice that seems to align with this rule; must each of the 5 be recognised by the group of 20 so as to establish a rule “among themselves” (the 25)? And again, how is this to be inferred from the State practice given that it is normally silent or vague?

<sup>1</sup> eg the *Asylum case (Columbia v Peru)* [1950] ICJ Rep 266.

<sup>2</sup> eg *Right of Passage over Indian Territory (Portugal v India)* [1960] ICJ Rep 6.

<sup>3</sup> International Law Commission, “Draft conclusions on the identification of customary international law, with commentaries” (2018), *Conclusion 16* and associated commentary at para (5).

<sup>4</sup> As discussed in Sean D Murphy, “Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission” (2015) 109 *AJIL* 822, 831-832.

<sup>5</sup> ILC, “Draft conclusions on custom”, *Conclusion 16(2)* (emphasis added).

<sup>6</sup> ILC, “Draft conclusions on custom”, commentary on *Conclusion 16* at para (7).

The alternative is to dismiss the ILC’s proposal, in which case we return to the problem that, where practice is divergent or inconsistent, various particular rules could be inferred.<sup>7</sup>

This is a major faultline for custom. Although questions about particular and general custom are not new,<sup>8</sup> their relationship requires further analysis. The paper will set out the problem and attempt to suggest a way forward.

Sean Shun Ming Yau is a PhD Researcher at Amsterdam Center for International Law, University of Amsterdam. He holds an LLB from The University of Hong Kong and an LLM from Leiden University. He has formerly worked as Legal Assistant at the International Law Commission and the African Union before the International Criminal Court.



## Between Identifying and Conceptualising ‘Exceptions’ to Customary International Law

This is an existential question. Do exceptions to rules of customary international law (CIL) exist? Codified in article 37 of the Statute of the International Court of Justice (ICJ) as a formal source of law, CIL’s legal force is encapsulated in a complex process of custom-formation: settled State practice accompanied by *opinio juris*. Judicial practice, however, shows that international legal argumentation is able to circumvent CIL a priori by pleading ‘exceptions’ to the customary rules bound upon them. In *Prosecutor v. Omar al-Bashir*, the Prosecution considered Jordan’s ground of appeal irrelevant that the customary rule on immunity *ratione personae* was absolute. According to them, the rule only applied vis-à-vis foreign criminal jurisdictions and the distinct nature of international criminal proceedings rendered it inapplicable. On this basis, the Prosecution advanced a proposal to conduct legal assessment anew on any emerged customary rule on immunity *ratione personae* before international criminal tribunals.

<sup>7</sup> The idea that particular customary rules may be inferred from the practice of a group of States (in the context of international organisations’ decision-making and voting) is also intriguingly discussed in International Law Association, “Statement of Principles Applicable to the Formation of General Customary International Law” (2001) 1, 65: “Resolutions of more restricted conferences may (in appropriate circumstances) provide rebuttable evidence of the opinions of their participants as to the content of existing customary law, or even help to create new particular customary law for those voting in favour; but the lack of generality of participation will prevent such resolutions from becoming general law” (emphasis added).

<sup>8</sup> eg AV Lowe, “Do general rules of international law exist?” (1983) 9 *Review of International Studies* 207; Hidemi Suganami, “A.V. Lowe on general rules of international law” (1984) 10 *Review of International Studies* 175; AV Lowe, “A reply” (1984) 10 *Review of International Studies* 183; Olufemi Elias, “The Relationship between General and Particular Customary International Law” (1996) 8 *African Journal of International and Comparative Law* 67; Anastasios Gourgourinis, “General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System” (2011) 22 *EJIL* 993.

Another example is humanitarian intervention. The intervening third States have increasingly justified their action by dismissing the applicability of the principle of non-intervention. They claimed, inter alia, that the 'failed States' (e.g. Syria and Yemen) possess no full sovereignty or territorial integrity to be preserved under international law. In essence, they attempt to carve out a legal space of non-regulation by international law.

The question this article wishes to answer is therefore: where does the applicability of a customary rule end? At the heart of this question is a fundamental challenge of delimiting the scope of application for CIL. In *Nicaragua v. United States of America*, the ICJ famously held that any deviation from a well-established customary rule (there referring to the prohibition on the use of force) was not evidence of an exception, but of violation. But such binary understanding of compliance/violation - and thereby the application/non-application of a customary rule - is no longer clear-cut. Two years later, the Court in the *Gulf of Maine* case further expounded its position. It held that once a customary rule is established, its application is a matter of deduction. But how such deduction would operate in practice has been left largely unexamined.

The purpose of the article is to provide a counter-narrative to the exceptions of customary rules by challenging their existence. In doing so, it suggests that exceptions to CIL are a product of conceptualization (the validity of which pending verification) rather than of positive law. In other words, once the facts fall outside the scope of a customary rule, the latter rule is simply inapplicable, rather than generating an 'exception'. But the question remains whether international law admits exceptions to CIL in other ways. In what follows, the article will focus on the following areas:

- The custom-formation process and its implications on CIL exceptions
- International jurisprudence on the delimitation of CIL's scope of application
- Other possibilities of CIL exceptions, e.g. the persistent objector rule
- The demarcation line for the applicability of a customary rule

### Panel 3.1: Alternate Approaches to CIL



**David Howard** is an attorney at Baker Botts LLP in New York, NY. His litigation practice focuses primarily on complex commercial controversies and multinational disputes, including international arbitration and the domestic enforcement of foreign judgments. His arbitration experience ranges from Olympic sports disputes to international finance and construction matters. In addition, David has written extensively on the interaction between U.S. and international law, including international investment law. David graduated from the University of Texas School of Law, where he was a member of the editorial board of the *Texas International Law Journal*.

#### **An Alternate Theory of Customary International Law**

The typical theory of customary international law ("CIL") provides that CIL is considered a binding norm of international law if it is "a general and consistent practice of states followed by them from a sense of legal obligation." CIL is continually evolving based on state practices; as state practices change, so does CIL. There is no central maker of the law, nor is there a widespread agreement among states on all, or arguably many, aspects of CIL norms.

International human rights law provides a problem for traditional CIL. This "modern" CIL does not follow the typical standard, as it generally defines what the "general and consistent practice of states" should be rather than what it is. For example, virtually all states condemn torture, yet many are still accused of continuing the practice despite that the act of torture is a violation of CIL proclamations.

This Article will challenge the traditional theory that CIL is followed "from a sense of legal obligation." Instead, this Article will put forth an alternative theory that states generally follow international law because it benefits them in some way outside of pure legal compliance. Professor Thomas M. Franck asserted that nations "obey powerless rules" because they are pulled toward compliance by considerations of legitimacy and distributive justice. Professor Ronald Dworkin similarly put forth his theory that states follow international law because they are obligated to improve their own political legitimacy, namely through complying with international law. Professors Jack Goldsmith and Eric Posner have used game theory in concluding that "CIL emerges from states' pursuit of self-interested policies on the international stage."

Drawing on these and other theories, this Article will conclude that states do not follow CIL out of a pure sense of legal obligation. States follow CIL because it benefits their national self-interests. In asserting this theory, this Article will further focus on what reasons a state may analyze when deciding whether to comply with international law. In

this analysis, a state may decide to comply or deviate from CIL norms if the benefits outweigh the potential harms to the nation's interests. Any one of the benefits—including legitimacy, justice, peace, or economics—may be considered in this cost-benefit analysis.

Admittedly, this theory raises a host of questions, including whether states are rational actors or always act on that rationality, and do states follow national interests or how the leaders view their country's national interests. One particular question refers to Professor Henkin's oft-quoted description of compliance with international law: "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." If this is true, then we must understand the times that international law is not complied with and whether any legal obligation was involved.

**Anna Irene Baka** is a licensed Greek jurist, Senior Legal Associate at the Greek National Commission for Human Rights and Adjunct Lecturer in Jurisprudence at the University of London International LLB Program in Athens, Greece. She has completed her postgraduate studies in Athens, Greece (LL.B. and LL.M. in Public Law and European Integration) and Brussels, Belgium (LL.M. in International, European and Comparative Law). She holds a Ph.D. in International Law and Legal Philosophy from the University of Hong Kong (HKU), for which she was awarded a scholarship by the University of Hong Kong as well as the Hellenic National Scholarship. She has substantial professional legal experience with public entities, parliaments, governments and international organizations in Europe and Asia.



### The Phenomenology of Absence in Customary International Law

The proposed paper aspires to offer an alternative, phenomenological reading of customary international law as formalized, inter-state synchronicity, presumably grounded on conscious common acting and believing. Indeed, for the application, or interpretation, of customary international law, the international lawyer is called upon to act as a) a historian, when tracing state practice, b) a social anthropologist/psychologist when figuring the *opinio juris*, and c) a logician, when aligning a) and b).

The paper focuses on the phenomenology of absence in customary international law. Customary international law bears an ab initio element of absence and thus abstractness: the lack of written formality which, as such, can spur multitudinous interpretative debates. The profound ambiguity surrounding all elements of customary international law particularly as regards the subjective, psychological element of *opinio juris* is further accentuated by the prevailing element of absence, silence or non-action and their often-monolithic interpretation as non-objection or, even, acquiescence. The legal positivist eagerness to evaluate and attach negativity to absence has its roots in the Wittgensteinian, contextual and consensual origins of legal positivism, assumed in both Kelsen's and HLA Hart's theories, and the subsequent rejection of metaphysics, i.e. the

premise that there is no a-contextual, a-consensual meaning –essentially meaning outside communitarian semiotics. There also appears to be a fundamental presumption as regards negative and affirmative propositions in public international law: negative premises are less valuable and less informative than affirmative ones, while affirmatives are given semantic priority and added legal value over negatives. So if a positive statement corresponds to a positive affirmation, to what state of affairs does a negative statement or non-statement, refer or correspond? What is a negative fact? What is a non-fact? What is the value of non-doing? Non-acting or abstaining? Non-believing towards a certain *opinio juris*? Is every absence, or negation, necessarily a denial of a state of affairs?

According to the rules of Logic and the canons of reasoning, negation may correspond to multiple values, a variety of propositions and modalities, which in international jurisprudence have been either equated or largely ignored. The Lotus case and the Kosovo advisory opinion are typical jurisprudential examples of this. Even from the Critical Legal Studies' perspective, the dualism of presence and absence as manifested in Derrida's *suppléant*, largely overlooks the quantifications and varieties of meaning in non-appearances, such as the conceivable neutrality of absence.

The modalities of negation and absence are not just academic topics but affect the rationality and soundness of international legal doctrine and even have a real impact on international relations when overlooked –as the Chinese reception of public international law during the 1883-1885 Sino-French war in Indochina, and even more recently the South China Sea maritime dispute, have notably unveiled. And indeed, whereas it is not the task of the international legal lawyer to be a historian, a social anthropologist or a logician, it is his/her duty to be alert and inquisitive towards the presumptions he/she passes on and solidifies.



**Frederick Cowell** is a lecturer in law at Birkbeck College, University of London. His research focuses on compliance and international law, the backlash towards human rights and the role of international organisations. In 2017 he co-authored the book *Critically examining the Case Against the 1998 Human Rights Act* published by Routledge and has recently completed a book entitled *Defensive Relativism: Understanding the Practice and Procedure of Cultural relativism in International Human Rights Law*.

### Can Customary International Law emerge from Universal Periodic Review recommendations? A Democratic-Constructivist Theory

The emergence of customary international law has been governed by examining state practice to ascertain the emergence of norms. As Jan Wouters and Cedric Ryngaert (2011) argue this involves closely examining the verbal description of state practice in order to assess the emergence of new norms and the formation of customary international law. This paper argues for a refinement of what we consider state practice

and for a revitalised conception of the understanding the emergence of customary international law using constructivist theory.

The first part of this paper examines the UN Human Rights Council's mechanism of Universal Periodic Review. One key element of the review process is the ability to make recommendations to states. These are issued to the state under review during the interactive discussion stage of the review process and the state has the opportunity to either accept the recommendation or else the recommendation is simply noted in their UPR report. Patterns of accepted recommendations on the same subject matter can indicate the formation of new customary and a couple of examples, such as the consideration of corporal punishment as inhuman and degrading treatment are explored. The experience of UPR recommendations can be read along with the literature on the legal status of UN General Assembly Resolutions, where the emergence of new customary norms can be established.

The second part of this paper develops these examples into a democratic-constructivist theory for ascertaining the emergence of customary international law. Drawing on constructivist scholarship, in particular Jutta Brunné and Stephen Toope's (2010) work on an interactional account of international law, it is argued that identifying quantifiable patterns of support for the existence of a norm justifies its treatment as law as it is a definitive expression of the collective will of the international community. This attempts to bypass various forms of positivist reasoning by looking at international law as an expression of communal and shared values and a concrete and quantifiable expression of those values more accurately describes not only how norms emerge but also how they function. It also resolves the problem of the persistent objector as the focus becomes not whether a state has consented to the existence of a norm but on how that norm is articulated as being the will of the international community at large.

This raises several important questions which are addressed in the concluding part of the paper. Firstly whether the experience of the UPR recommendations can be more readily applied to the formation of customary international law in areas beyond human rights, or whether it is simply a function of the UPR process. Secondly what would be the threshold for support from states for a norm before it is considered customary – all democratic mechanisms require a threshold for success or failure and any theory of democratic-constructivism would need to give a sense of how this could be achieved?

**Markus P. Beham** is currently an Assistant Professor at the University of Passau, Germany, and an adjunct lecturer in international law at the University of Vienna, Austria. Prior to that, he worked as an Associate at Freshfields Bruckhaus Deringer LLP, resident in the firm's Vienna office and as a fellow at the Department of Legal Philosophy of the University of Vienna. The author holds a joint doctoral degree from the Université Paris Ouest – Nanterre la Défense and the University of Vienna and a doctoral degree in history from the latter as well as an LL.M. degree from Columbia Law School in New York.



### **State Interest and Customary International Law – Identifying Custom Through International Relations**

Normative efforts in international law must be grounded on a sound assessment of the legal status quo. What might appear as a comforting truism for the pragmatic positivist of black letter law seems an almost unattainable goal in the identification of international custom. This paper proposes that a credible effort at proving non-consensual unwritten law must take into account international relations theory, in particular the realist notion of state interest.

As Louis Henkin convincingly laid out long ago in his seminal work *How Nations Behave*, states act according to carefully calculated interests and dependent upon the consequences of their conformity to or violation of international law. In assessing state practice, it is impossible to avoid dipping into any such 'law and ...' approaches, if one wants to make any determination to the likelihood of certain acts.

For the classic realist, states are driven by two principal considerations: first, national security, comprising the protection of statehood, territorial integrity, as well as sovereignty, and, second, a functioning economy. Recalling the definition of what constitutes a state, these 'traditional' interests are inextricably linked to its 'survival'. This, in turn, serves as a beacon for the formation of custom.

This is not to say that interest alone is determinative of state behaviour, as some neo-realists have argued. However, if customary international law is in any way dependent upon state practice and states act primarily according to their interests, then the result may well be that customary international law can only exist for norms that states require being followed. Effectivity and reciprocity act both as catalysers and indicators for likely candidates, immunity of the highest organs of a state being the textbook example.

Of course, acting towards interests sometimes necessitates complex forms of cooperation that go beyond the strictly personal sphere. Thereby, trade-offs become unavoidable in the pragmatic predicament of asserting interests. But these are often means, not the end in itself. Multilateralism should not blind the eye to the

ineffectiveness of norms grounded on 'modern' forms of custom identification in situations put under the stress of international relations.

In the competition of 'first-order reasons', to borrow Joseph Raz's terminology, interests related to the survival of the states will, naturally, prevail. In absence of an exclusionary rule, a state will balance these interests in accordance with their respective 'strength' or 'weight'. A ready example is the primacy that states accord to national security considerations over basic citizen's rights in the face of terrorism. Altruistic obligations, in particular, do not seem likely candidates for custom.

The present paper sets out from the classic textbook 'two element' theory of customary international law – taken as a starting point once more by the ILC – to set out the problem of identification. It then presents the idea of classic realism that states act according to a set of inherent interests, rebutting the various challenges to the theory. Finally, the natural connection between custom formation and this particular international relations theory is proposed to contrast effective versus ineffective 'modern' custom.

## Panel 3.2: Actor Variety in the Content-Determination of CIL



**Catherine Brölmann** is associate professor of international law at the University of Amsterdam. She is co-editor-in-chief of *Oxford International Organizations and an editor i.a. on the board of International Community Law Review*. Her research focuses on law of international organizations, lawmaking processes, and international law of natural resources. She is currently a member of the Advisory Committee for Public International Law of the Netherlands Government.

### 'Is the classical paradigm of state practice and opinio juris still valid today?'

The two-element doctrine regarding the formation of customary international law has been a longtime subject of (inconclusive) debate, involving philosophical, theoretical, doctrinal and heuristic perspectives (with due regard for the variety of meanings given to these terms in the context of law). One well-known facet has been the interplay and weighing of the two elements (as e.g. in the distinctions between 'wise custom and wild custom' (Dupuy 1974) and between 'traditional and modern custom' (Roberts 2001)); another is the question of whether to speak of two separate elements (in the context of law ascertainment often put as 'requirements') is even justified. That said, the title proposed by the organizers refers to a 'classical' paradigm, and indeed it seems that as a doctrine the two-element approach is invariably in use.

The present paper responds to the diachronic aspect of the title, and addresses the question whether the two-element doctrine will be tenable, or continually 'valid', in twenty-first century international law. The point made in the paper is that the conceptualization of the two-element doctrine has been closely connected to the sovereign state, more than to the 'international legal person' in *abstracto*. While this is not surprising, given the fact that states for a long time were considered to be the sole international legal persons, it has brought specific political and philosophical connotations to the thinking about custom formation.

Thus, the power of 'practice' as a component of customary international law is in part linked to the absolute authority of the sovereign state in its own sphere, with factual conduct counting as an expression of sovereign Will. *Opinio juris* refers to a legally relevant 'state of mind', which – even if the anthropomorphic view of the State and its legal 'personality', was to some extent dismantled by Interbellum scholars and has been the object of contestation ever since international law has remained discretely at ease with projecting onto States.

To examine whether the two-element doctrine is future-proof, we must look at trends in international law today. The two most prominent ones are the increase in shades of

normativity and the arrival of new actors. Since custom as such is a formal source, the relevant test of validity is whether the two-element paradigm can perform its function in relation to a non-state actor. The candidate then is the international organization: of all non-state actors the most fully-fledged participant in international legal affairs. Proceeding from there we find that international law is hesitant when it comes to the identification of practice as a separate expression of international organizations and the attribution of *opinio juris* as a belief held by organizations in the way of states. This has been recently confirmed by the modest role of international organizations as independent actors in the 2018 ILC Conclusions on identification of customary international law.

With the arrival of non-state actors the two-element doctrine from a theoretical perspective remains problematic as ever - and the construal of practice as evidence of *opinio juris* arguably the most convincing. The conclusion of this paper is that, however, as a heuristic device the two-element doctrine is needed even more than before, because for their lack of 'sovereign power' non-state actors such as IOs are less readily seen to generate custom based either only on practice or only on *opinio juris*.

**Machiko Kanetake** is an Assistant Professor of Public International Law in Utrecht University. Machiko has received Ph.D. from Kyoto University and LLM at the London School of Economics (LSE). Machiko has been appointed as a postdoctoral researcher and lecturer at the University of Amsterdam (2011-14). She has also been appointed as a Hauser Visiting Doctoral Researcher (2010-11) of the Global Fellows Program at New York University (NYU) School of Law, a Visiting Researcher (2012) of the University of Sydney, a Visiting Fellow (2014-2015) at the Human Rights Program, Harvard Law School, and a Visiting Fellow (2015) at the Transnational Law Institute, the Dickson Poon School of Law, King's College London. She is an Editorial Board member of the *Leiden Journal of International Law*.



### Critical Analysis of the Formation of Customary International Security Law

In the development of customary international law, 'silence' can be an indication of states' acceptance. According to Conclusion 10.3 of the ILC 2018 draft conclusions, '[f]ailure to react over time to a practice' may serve as evidence of acceptance as law (*opinio juris*). While this conclusion reflects the reality of international relations where states choose not to react to other states' practices for strategic reasons, the lack of explicit reaction can be the result of many political and pragmatic obstacles that constrain states' conduct. To overlook considerable variance among states would mean to maintain the exclusion, from the process of developing customary international law, of those politically marginalised states whose interests may eventually be affected.

Against this background, this paper aims at situating states' 'silence' in the context of the development of *jus ad bellum*. The focus of the paper is directed at the permissibility of

the use of force in self-defence against non-state attacks. The topic has been extensively debated during the last two decades, and, given the maturity of academic discussion, the paper by no means intends to answer the question of whether such use of force is legally permissible. Instead, this paper highlights both doctrinal and pragmatic factors that exclude certain actors and perspectives from the deliberation of customary international law concerning the use of force in self-defence.

If one consults academic literature published within several years after the September 11 attacks, it is readily possible to present a plausible argument that self-defence against non-state attacks is legally permissible where the territorial state is unwilling or unable to prevent further attacks. While the initial literature has been subject to critique, the question remains as to why controversies regarding self-defence against non-state attacks, as well as the related 'unwilling or unable' doctrine, did not occupy a good deal of attention from the outset in academic discussions in leading journals published in English, as well as in practice. This is not only because of a crisis mind-set which often leads the development of customary international law, but this is also due to the doctrines of customary international law, which preserve and endorse the existing political power asymmetry. The idea that the passage of only a short period of time should suffice works in favour of those states and organisations which have better accessibility to relevant information. The same holds true for the doctrine of specially affected states. This is accompanied by the fact that many states are effectively prevented from being in a position to react to other states' practices. This paper also refers to the problem embedded in the publication of academic journal articles. Due to their quest for originality, the articles which confirm the status quo in the interpretation of self-defence tend to be much less visible than those articles which highlight possible changes in the scope of self-defence.



**Maiko Meguro** joined the Amsterdam Center for International Law, University of Amsterdam, the Netherlands in September 2016. She is currently working on international law with a focus on theoretical and empirical aspects of creation of bindingness through the lens of decision-making processes that take place at both domestic and international level. She is also working with the European Commission seconded from Ministry of Economy, Trade, and Industry of Japan where she previously served as a deputy director specialized in international negotiations and legal matters. Her practice covers law and policies related to climate change, trade and investment, resources, and digital economy and technologies.

### Behind the fiction of *opinio juris*: the actors that actually create international law

This presentation challenges the concept of *opinio juris* which is widely understood as an "unintentional" form of legal ascertainment in contrast to consent - an intentional form of legal ascertainment in treaty making. *Opinio juris* is usually construed as a belief that the legal obligation "had existed" at the time of State conducts. This position presupposes

that the State came to accept a legal obligation at an intangible time in the past, and neither the State nor the Court can identify when and how a certain practice is ascertained as being a legal obligation or a right to act. In case of customary international law, legal ascertainment is construed as a gradual process without a demonstrable threshold. This approach remains dominant in the latest International Law Commission (the ILC) Conclusions on identification of customary international law.

This contribution raises the question of the (im)possibility for a State to be bound by a legal obligation unintentionally without a moment of formal acceptance. In grappling with this question, this contribution seriously revisits the idea of *opinio juris* as the belief that the legal obligation “had existed” at the time of State conduct. It shows that such an idea is built upon a fiction of anthropomorphism of State will, and further demonstrates that this fiction is a fallacy in customary law making when it is looked at through the lens of domestic decision-making process. Once it has shed light on this fallacy, this contribution shows that various actors contribute to the production of a “State will”. Whilst this plurality of actors behind the veil of State is somehow recognized in the context of state practice as understood by the ILC, it has been completely overlooked with respect to the creation of *opinio juris*.

The presentation seeks to suspend the fiction created by anthropomorphism and elucidate how States actually create acceptance of law. It thus focusses on the process behind the veil of State to create a State position which is perceived as a State will (e.g. *opinio juris*, acceptance as law or even a consent). The main claim is thus that a state position is the outcome of internal decision-making process participated by domestic actors with varied motivation and interests.

It is submitted that the implications of this claim are wide-ranging for current legal scholarship on the sources of international law. With respect to *opinio juris*, this raises a serious question about the idea of *opinio juris* as an unintentional form of legal ascertainment. The fiction incorporated to the concept of “State will” cannot function (and make sense) for *opinio juris* (or acceptance as law), as an intentional form of legal ascertainment is not possible under the internal decision-making process. This internal process can only accommodate conscious decisions by a State. In the light of this decision-making process, no State can possibly accept any obligation without knowing when and how.

**Zhuo Liang** is a PhD candidate in international law at the Graduate Institute of International and Development Studies, Geneva. His PhD project deals with Chinese approaches to the conception as well as general and specific issues of international humanitarian law and their legal implications. He holds a LLB and a LLM from China University of Political Science and Law, and an Advanced LLM from Leiden University. He previously worked as a legal intern for the International Committee of the Red Cross in Beijing and the Special Tribunal for Lebanon in The Hague.



## The Practice of Non-state Armed Groups and the Formation of Customary International Humanitarian Law: Towards a Direct Relevance?

Under the classical approach, customary international law (CIL) can only be derived from state practice and *opinio juris*. However, this two-element doctrine of CIL has been under challenge from an undeniable phenomenon that various non-state actors have been playing a part in contemporary international law-making. International humanitarian law (IHL), on its part, confronting the frequent occurrence of non-international armed conflicts since World War II, has substantially involved the behaviors of non-state armed groups (NSAGs). This background leads to the question how we should evaluate the practice of NSAGs in the context of formation of customary IHL, e.g. to absorb it into state practice, to accept it as another independent avenue of the formation of customary IHL, or to negate its values anyway.

The ICRC customary IHL study collected practice of NSAGs, but listed it under the heading of “other practice”, which was invoked to reflect rather than determine the existence of customary IHL norms. On the other hand, a prominent example of authoritative recognition of the relevance of practice of NSAGs to formation of customary IHL can be found in the Tadić case, in which the ICTY Appeals Chamber considered the unilateral declarations by both conflicting parties, including NSAGs, could contribute directly to the formation of customary IHL. Scholars have discrepant opinions on whether and to what extent the practice of NSAGs should be recognized as a constitutive element of customary IHL. Such a discrepancy of views reveals the lack of clarity of the status of NSAGs’ practice in the formation of customary IHL.

This article holds a positive view on the relevance of NSAGs’ practice to the formation of customary IHL. Not confined to this traditional yes-or-no question, it moves further and spends its length on elaborating on the possible approaches and consequences of incorporating NSAGs’ practice into the formation of customary IHL. Part I of this article will expound why there are good reasons to affirm the relevance of NSAGs’ practice to the formation of customary IHL in general. Part II will examine different angles of such incorporation. A series of questions are to be discussed: Which types of practice and armed groups are relevant to the formation of customary IHL and which ones are not? Should NSAGs’ practice be seen as part of state practice or an independent element of customary IHL? Assuming it is an independent element, should it be weighed as equal or infer to state practice in terms of its significance for formation of customary IHL? Part III will deal with the legal consequences of potential existence of multiple customary IHL norms, as a result of recognizing NSAGs’ practice as an independent element of customary IHL. Such norms may include those formed through pure state practice, through co-practice of state and NSAGs and through pure NSAGs’ practice. What are their respective scopes of application and how can we handle its undermining of the uniformity of customary IHL? Conclusive remarks will be made in the end based on the previous findings.

## Panel 4.1: The Relevance of Hermeneutics and Interpretation in CIL



**Panos Merkouris** (PhD, Queen Mary, University of London) is Professor and Chair on Interpretation and Dispute Settlement in International Law at the University of Groningen, the Netherlands. His areas of expertise are law of treaties, customary international law, sources, and international dispute settlement. He is Principal Investigator of the ERC project TRICI-Law.

### The Viability of and Need for Interpretation of Customary International Law

Whereas in the application of treaties the process of interpretation is one that always yields a solution, with respect to CIL these rules of interpretation have not been examined. What Pratchett and Gaiman expressed, albeit in a different context, in their darkly humorous book *Good Omens* is a very apt analogy. By not knowing what the rules that govern the interpretation of CIL are, we end up playing an 'ineffable game of [the judge's/interpreter's] own devising, which might be compared, from the perspective of any of the other players, to being involved in an obscure and complex version of poker in a pitch-dark room, with blank cards, for infinite stakes, with a Dealer who won't tell you the rules, and who smiles all the time'.<sup>9</sup>

This leads to one of the following two paradoxical scenarios. Either CIL needs to be induced each and every time, by reference to State practice and *opinio juris* (but this is extremely problematic as it fails to take into account the continued existence, development and manifestation of CIL rules); or, even worse, CIL is asserted by international judges. But assertion, essentially means that international judges create law: they become law-makers and exercise a power to legislate (*pouvoir de légiférer*) that goes clearly against any notion of separation of powers that is so crucial to the structure of any legal system. Both of these scenarios are untenable, so evidently there is a critical gap in the study of CIL and in understanding how CIL can be applied in individual cases once it has been formed. In the case of treaties, this is done through the intermediary of interpretation.

This paper will have a two-pronged approach. Firstly, demonstrate that the arguments against the interpretation of customary international law do not hold up to scrutiny. These arguments can be grouped into three larger sets:

- It is an axiom of international law that CIL cannot be interpreted;
- CIL is not open to interpretation due to its unwritten nature;
- CIL is not open to interpretation because no court has ever undertaken such a task.

<sup>9</sup> T Pratchett and N Gaiman, *Good Omens* (Harper Torch 2006), 12.

These arguments upon closer examination will be shown to not only be demonstrably based on false assumptions but also rejected in modern judicial practice.

The second part of this paper will elaborate on why interpretation of CIL is not only logically and methodologically inevitable but practically also a desired option for a plethora of reasons. Indicatively:

- the lack of an in-depth discussion on the rules of interpretation of CIL, leaves the manner in which CIL is being identified and its content determined couched in mystery; this raises grave concerns as to the proper function of this source of international law, and even more perilously as to the predictability/foreseeability of the international legal system.
- interpretation ensures the flexibility and relevance of CIL rules,
- CIL interpretation may offer a way to address many of the concerns and criticisms that have been launched against the rules that govern the emergence of CIL.

Through this analysis, the paper will demonstrate that the interpretation of CIL is not only something that is actually happening, but also a process that is inherently necessary for the effectiveness of any legal rule, irrespective of whether it is a conventional or customary one.

**John R Morss** grew up in London and was educated in psychology in Sheffield and Edinburgh Universities, subsequently teaching psychology in the north of Ireland in the early 1980s, before relocating to Dunedin NZ to teach in an education faculty. After qualifying in law at the University of Otago he shifted to Melbourne Australia to teach law at Deakin University Law School where he is Senior Lecturer in International Law. His publications include 3 sole-authored monographs, 1 co-written monograph and 3 co-edited books plus recent publications on self-determination, peoplehood and the problematic status of the Vatican City/Holy See.



### The Interpretation of Customary International Law: Some Questions

The case has been made for a de facto interpretive scheme applicable to Customary International Law [CIL] operating in parallel with the Vienna Convention on the Law of Treaties 1969 [VCLT]. What might thus be called a "VCLT-CIL" would in effect shadow VCLT just as CIL has been found, on occasion, to shadow conventional agreements, as found to apply to the UN Charter's Art 2(4) prohibition of the international use of force by the majority in *USA v Nicaragua*.

The former proposal – for CIL interpretation – is at least as plausible as the latter proposal, and does not rely on it. It arises from a scrutiny of the procedure of such international tribunals as the ICJ as they grapple with the broad spectrum of internationally recognised sources of law in the context of disputes or of Advisory

Opinions. This contribution hopes to engage sufficiently with Merkouris' proposal – suspending its author's disbelief in the conceptual coherence of CIL – so as to articulate some critical questions about how interpretation functions in these tribunals. For there is no question that CIL plays an important role in decisions and opinions from the ICJ, somewhat irrespective of the scepticism of some commentators; the status of Art 38 (1) (b) is after all, expressly higher than the status of Art 38 (1)(d). The question is what role interpretation of CIL plays.

The case could be made that the different genres of CIL manifest quite distinct relationships with interpretation. What might be called 'empirical' CIL – as exemplified, at least in theory, by the notorious 'two-state' CIL entertained by the ICJ in the Asylum Case but also by the unremarkable regional CIL of adjacent coastal states posited in the North Sea Continental Shelf – may be said to call for discernment and evaluation, and perhaps for application, but not for interpretation.

At one of the other several extremes of the mapped landscape of CIL, norms of the so-called peremptory class may again sidestep interpretation. As well as the contestedness of such norms *jus cogens* in terms of evaluation, there are other reasons for putting them to one side in the present analysis. Importantly, the claimed universality of such norms is not a reason for their exclusion. For the class of CIL most interesting for present purposes, contains CIL that are themselves in a sense universal. These are "general CIL ... binding on all States." Such 'general' CIL would seem to include the comity/reciprocity based understandings around acts of state, diplomatic protection and the immunity of Heads of State, and state responsibility: understandings that might be said to be inherent to statehood itself, yet inherent in substantive ways (here contrast the procedural role played by *pacta sunt servanda*). Interpretation is surely of the essence of such CIL. If these distinctions among CIL are valid, then different genres of CIL are as different from each other as are CIL from conventions: a diversity obscured by the wording of Art 38. (In contrast, like happy families, treaties are perhaps basically all alike.)



**Orfeas Chasapis-Tassinis** WM Tapp Scholar and PhD Researcher at Gonville and Caius College, University of Cambridge; Graduate Teaching Assistant at the Faculty of Law; Research Assistant at the Lauterpacht Centre for International Law (Dr. Sarah Nouwen); NYU LLM (Jerome Lipper Prize); NYU International Law and Human Rights Fellow at the International Law Commission (Assistant to Sir Michael Wood, Special Rapporteur on the Identification of Customary International Law).

### **Interpreting State Practice and Interpreting the Rules of Customary International Law: Practical Relevance and Theoretical Reflection**

While theoretical reflection in the field of customary international law has been prolific on issues pertaining to the formation of new rules with problems regarding the types and threshold of evidence for the identification of new rules lying at the centre of attention<sup>2</sup>

questions of how to interpret state practice itself and how to distinguish this exercise from that of interpreting the customary rules have remained largely underexplored. Significant conceptual, and ultimately analytical and practical, problems derive from this neglect. Most importantly for practice, different constructions of a customary rule and/or interpretations of state practice may lead to diametrically opposing conclusions about the scope *ratione personae* and *ratione materiae* of the rule itself. This is the result of the remarkable plasticity that characterizes customary international law, due to its nature as an unwritten form of law. This plasticity can be understood in at least two ways. First, a rule of customary international law may yield itself to different constructions using the same building blocks, based on what one assumes to be the content of the rule to begin with. Second, the building blocks themselves, ie instances of state practice may not be as solid as frequently assumed: they are themselves open to interpretation, and thus re-configuration. The theoretical ambiguity around this plasticity, although not always flagged as such, underpins key debates in international law. For example, one can understand in these terms the protracted disagreement over whether international organizations should be dealt with as states for the purposes of applying to them the same rules of customary international law. Similarly, scholars writing on self-determination are in reality often arguing over the real meaning of state practice: should we understand existing state practice as articulating a right against colonial rule or against despotic and oppressive rule in general? Why should state practice be appraised differently based on whether it occurred in a colonial context or not? Comparable problems often present those writing on humanitarian intervention: should practice when the SC was deadlocked due to the veto of a P-5 member be lumped together with those where there was no such deadlock? And what does this mean for the ultimate construction of the rule's scope *ratione materiae*? All in all, it seems that these questions have lacked sustained theoretical treatment, a gap that this paper seeks to address. More specifically, this paper tackles this plasticity re-describing key debates within these three areas of international law (application of customary norms governing state conduct to non-state actors, self-determination, humanitarian intervention) evaluating attempts to expand, contract, or simply reimagine the boundaries of the (assumed) scope *ratione personae* or *ratione materiae* of these rules, as well as exploring the permissible rationales for doing so. In conclusion, this paper, by closely examining international legal arguments relating to three topical areas, sheds new light on a largely neglected issue that goes to the heart of most arguments about how to construct, and sometimes reconstruct, the rules of customary international law.

**Fabian Augusto Cárdenas Castañeda** is professor of international law at the University of Bogota Jorge Tadeo Lozano. He received his Ph.D. *summa cum laude* in international law from Pontificia Universidad Javeriana, with a thesis titled "Customary International Law as an Argumentative Framework". He also holds an LL.M in public international law from Leiden University and a LL.B *summa cum laude* from the National University of Colombia. He has been legal advisor of the Colombian Ministry of Foreign Affairs and legal inter at the ICC. With more than decade of academic experience in different universities and a series of publications in international environmental law and the sources of international law. He is founder and board member of the Colombian Academy of International Law as well as member of the Ad Hoc Group of International Responsibility and Environment of the Latin American Society of International Law.



### Interpreting CIL as an Argumentative Construct

Hermeneutics in law is meant to be the act of giving meaning to a certain norm with a view to make it applicable in a particular situation. Regarding the law of the treaties, the allocation of meaning is closely related to the written text describing a norm. However, and contrary to what traditional perspectives sustain, I agree that when it comes to the interpretation of customary international law, it is not feasible to separate the intellectual process of interpretation with those of content determination and law ascertainment of the source. Therefore, when a customary norm is being interpreted, its content is also being determined, while it is still conceivable to consider particular law ascertainment criteria. All of this is possible when interpretation concerns a malleable and still mysterious source like CIL. The foregoing processes, forerun by the act of interpretation, are intellectual in nature, argumentatively construed by the community of international lawyers. This means that the very existence of objective rules of interpretation for CIL is a matter to be disputed.

## Panel 4.2: Domestic Courts Lessons on the Theory and Interpretation of CIL



**Cedric Ryngaert** (PhD Leuven 2007) is Chair of Public International Law at Utrecht University (Netherlands) and Head of the Department of International and European Law of the University's Law School. Among other publications, he authored *Jurisdiction in International Law* (OUP 2015, 2nd ed). In 2012, Prof. Ryngaert obtained the Prix Henri Rolin, a five-yearly prize for international law and international relations. He was co-rapporteur of the International Law Association's Committee on Non-State Actors between 2007 and 2014. Between 2013 and 2018, Prof. Ryngaert was the principal investigator of two projects on unilateral jurisdiction and global values.

### From Customary Law Ascertainment to Interpretation: the Role of Domestic Courts

The TRICI project observes that 'in the study of customary international law (CIL) there is a critical gap in understanding how customary international law (CIL) can be applied in individual cases once it has been formed'. The project then sets for itself the goal to uncover rules of interpretation of customary international law. In the words of the project, if such rules were to exist, CIL need not be induced each and every time, by reference to state practice and *opinio juris*, or asserted by judges.

Such a goal appears to be at loggerheads with the very nature of CIL as a flexible and protean source of international law, that is at least potentially in a state of constant flux. Given these characteristics, judges always have to revisit the very existence of customary norms *de novo*. Although unlikely, it is after all not impossible that customary norms form almost overnight (instant custom). Methodologically speaking, judges have to concern themselves first and foremost with the ascertainment and identification of norms of customary international law, before they can apply and interpret such norms. This follows from the very text of Article 38(1)(b) of the ICJ Statute, which provides that the ICJ (and courts more generally one may well posit) 'shall apply' ... 'international custom, as evidence of a general practice accepted as law'. Pursuant to this provision, courts can only apply a customary norm after they have first established its evidence-based existence. This process is admittedly interpretative, but it is so only in an evidentiary rather than normative sense. Instead of interpreting previously crystallized norms by analogy with Article 31-32 VCLT, judges interpret evidentiary materials placed before them, with the aim of distilling, or not, customary norms from those materials.

A look at the practice of courts reveals that they do not usually engage in thorough processes of customary international law-identification, however. This applies in particular to domestic courts, which either have little customary international law

expertise, or which deal with cases in which the customary international law question does not occupy a central place in the dispute. This paper demonstrates empirically that domestic courts often apply rather than ascertain customary international law. They tend to rely on, and defer to other authorities (e.g., the ICJ, the ILC), even if occasionally they embark on a serious law-ascertainment process of their own. While such 'other authorities' only have evidentiary value that should be weighted with other materials evidencing (or not) the existence of a particular customary norm, one cannot escape the impression that domestic courts are simply giving effect to, or applying pre-existing customary norms. If that is true, there is in principle room for the development of rules of interpretation. The fact remains, however, that domestic courts continue to hew to the fiction that they are law-finders rather than law-appliers; accordingly, none of them has relied on or developed such rules. It is only if they own up to their limited agency in identifying customary law, that rules of interpretation can appear on the horizon.

**Luigi Crema** is Assistant Professor of international law at the *Università degli Studi di Milan*. He graduated *summa cum laude* at the faculty of law of the University of Milan, and holds a joint PhD from the Universities of Geneva and Milan. He has been a visiting fellow at the New York University School of Law and a visiting professor at the University of Notre Dame Law School.



### **Once You Reach the Top of a Positivized Legal System, Customary Law Emerges Again. Hints from the Italian Constitutional Court.**

In general, the Italian constitutional legal system denies any status to customary law within Italian law. The only customary rules mentioned in the constitutional system are those of international law, which are incorporated into the Constitution through Article 10(1): "The Italian legal system shall conform to the generally recognized principles of international law". This structure comes from the traditional, positivistic preference for written and codified rules, adjusted to meet the need to curb the Nation State from the possible excesses which historically led to fascism and WWII, by enlarging the sources of law above and beyond the Constitution.

The Italian Constitutional Court has often been asked to adjudicate on Art. 10(1) in generic terms, or by reference to specific treaties – including the ECHR and the UDHR. On almost every such occasion, the Court has refused to consider treaties as included under Article 10, and, therefore, it has never ruled on the difficult relationship between written law and customary rules crystallized, codified in an international treaty. Only in one case did it deal with written international law and customary rules together. In that case, the Court made generic references to several international treaties expressing, in the Court's view, a certain "principle of international law", without investigating its actual customary nature. More recently the Court referred to *jus cogens* and state immunities, but, again, without engaging in an analysis of state practice.

In addition to these cases dedicated to customary international law, the Court has heard a few cases in which it has had to adjudicate on the existence of constitutional customary rules among domestic State organs. It refrained, however, from reflecting on, or drawing, a precise theory concerning them and their place in the theory of sources. While customary law rules have an important position in international law and law in general, the Italian Constitutional Court still appears to have some difficulty accepting its role and handling it. This presentation will be both the occasion to present the Italian case law on customary international law, and to reflect on the importance of customary international law even in a legal system that relies only on written law.



**Gerard Hoogers** studied law at the Catholic University of Nijmegen and graduated in 1994, specializing in constitutional law and the philosophy of law. He is currently at the University of Groningen Law Faculty as senior lecturer in constitutional law. His publications are in the field of (comparative) Dutch constitutional law; the constitutional systems of the Netherlands Antilles and Aruba; and the theoretical foundations of constitutions and constitutional law. Furthermore, he is in charge of the research programme "Sovereignty, representation and democracy in the European and international legal order". As per 1 February 2012, he was appointed honorary professor for comparative constitutional law at the Carl von Ossietzky-University of Oldenburg (FRG).

### **Customary international law as a tool for federal dispute settlement: the surprising relevance of customary international law for the domestic legal order in Germany and Austria**

The publication of Triepel's *Völkerrecht und Landesrecht* (1899) was a milestone in the development of international legal theory. It was also a very important contribution to the intellectual debate in Germany and the German-speaking world on the relationship between international and national law. In both the German Reich and in Austria Triepel's work played an important role in the development of the dualist and transformist approach still dominant today. As a result of this, both the German Constitution of 1919 (the *Reichsverfassung*) and the Austrian Constitution of 1920 (the *Bundes-Verfassungsgesetz*) contain a paragraph dealing with the internal position of customary international law (art. 4 RV and art. 9 B-VG respectively). The *Staatsgerichtshof für das Deutsche Reich* (RStGH), the specialised court introduced by the 1919 Constitution to deal with federal disputes decided a number of interesting cases concerning disputes between two or more States in Germany by using a number of customary international norms incorporated through article 4 of the Constitution. In my presentation, I will analyse these decisions to see how and why the RStGH used these norms to settle conflicts of a domestic nature and how they were interpreted to be useful in a purely domestic context. The post-war German Constitution, the *Grundgesetz*, has an almost identical article to article 4 of the 1919 Constitution, article 25 GG. The main difference is that article 25 strengthens the domestic position of customary international norms by granting them prevalence over federal acts. Surprisingly however, the

*Bundesverfassungsgericht (BVerfG)* refuses to acknowledge the relevance of customary international law for the settlement of federal disputes. Instead, it opts for the formulation of unwritten principles seen as of domestic origin that are materially identical to the norms used antebellum by the RStGH. My analysis will focus on the question what, if anything, has changed by this different approach. The analysis on Germany will be complimented by a short excursion to Austria to see if and how the *Verfassungsgerichtshof (VfGH)* uses article 9 B-VG to settle disputes between two or more Austrian states and if this approach differs from the German one. Thus, my presentation will shed light on the question whether and how customary international law can be a useful tool for purely domestic legal disputes.

**Nina Mileva** is a PhD candidate of the TRICI-Law research project under the supervision of Prof. Panos Merkouris. Her research concerns the interpretability of customary international law (CIL) in theory, and examines the theoretical validity of customary law being open to interpretation. She earned her Bachelor of Liberal Arts and Sciences (Honors) from the Amsterdam University College, and her Master in Public International Law (LLM) from the Utrecht University. Most recently she worked as a junior researcher at the Utrecht University, under the supervision of Prof. Seline Trevisanut. Previous to that, she obtained her practical experience from the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Court (ICC) and the Center for International Justice of Amnesty International in the Hague.



### **Old, New, Borrowed, or Blue: How can we Learn from the Interpretive Practices of Domestic Courts?**

The interaction between domestic and international law is a dynamic relationship which has received renewed scholarly interest in the past decade. In the traditional conceptualization of domestic v. international law, the two levels interact in broadly two ways: i) the 'monist v. dualist' framework for the purpose of conceptualizing international law's domestic application, and ii) the 'sources of international law' framework for the purpose of conceptualizing domestic law's role in the international legal sphere. In the latter in particular, domestic law and legal practices may feature internationally through the mediums of customary international law (CIL) or general principles.

More interestingly however, scholars and practitioners are increasingly recognizing that the domestic and international levels interact in a much wider and more diverse manner than the one provided for in the traditional frameworks. Studies of the International Law Association (ILA) have shown that domestic courts engage with international law in significantly more diverse manners beyond the 'monist v. dualist' framework and the traditional framework of sources. On the other hand, domestic legal principles and approaches have also found their way into multiple fora of both international adjudication and international law making. Thus, it has been observed that the interaction between the two levels also implies mutual influence.

This paper will examine the relationship between domestic and international law with a particular focus on CIL and the rules for its interpretation. More specifically, the objective is to explore how domestic interpretive practices have influenced interpretation on the international level, and how they may inform or otherwise influence the development of rules for the interpretation of CIL. Bearing this objective in mind, the paper will examine the interaction between domestic and international law, with a view to developing a theoretical framework which captures the ways in which international law receives or learns from domestic legal practices in the field of CIL. In particular, the paper will focus on answering the question "how can international law learn from the interpretive practices of domestic courts?". Thus, the paper will develop a working theoretical framework of interaction aimed at capturing the ways in which international law may learn from domestic law and practices with respect to CIL interpretation. This framework will serve as the basis for further research on the topic.

The paper will examine theoretical frameworks of interaction developed by several authors in the fields of general international law, international economic law, and environmental law. Then, building on these findings, the paper will turn to developing a working theoretical framework tailored to the interaction between domestic and international law specifically with respect to interpretive practices. The result will be a working theoretical framework which maps the ways in which international law can learn from the interpretive practices of domestic courts, for the purpose of developing rules for CIL interpretation on the international level.

## Panel 5.1: Delineating the Interpretative Stage in the 'Life-Cycle' of CIL

**Riccardo di Marco** Ph.D. Candidate in Public International Law - Co-tutorship between the University of Rome Tor Vergata under the direction of Prof. A. Gianelli and the University of Paris Nanterre under the direction of Prof. J.M. Thouvenin. Research Interests: Methodology and Theory of International Law, Sources of International Law, The relationship between International Law and Domestic Law. Attendee of the Summer Courses in Public International Law at the Hague Academy of International Law in 2018 (with scholarship). Paper: *The "Path Towards European Integration" of the Italian Constitutional Court: The Primacy of EU Law in the Light of the Judgment No. 269/17, European Papers, 2018.*



Traditionally, academic authors working on the interpretation of public international law, state that only treaties can be interpreted. Therefore, this process is completely distinguishable from the one of identification. Indeed, treaties are generally easy to identify, and once this identification has been completed, it is in most cases, possible to interpret these treaties with the same ease. On the contrary, if one focuses on general international law, it is often argued that the process of its interpretation is inherent to its identification. Thus, the moment in which one establishes the existence of customary international law, one is also obliged to proceed to the identification of this type of rule. Hence, many scholars do not think that it is possible to distinguish the establishment of the existence of a customary rule from the determination of its contents. In this respect, it is of high significance that the recent work of the International Law Commission concentrates on the identification of customary international law. This highlights the fact that customary rules and treaties are of different nature indeed. In fact, according to the International Law Commission, customary international law, an unwritten source of law, can only be identified and thus not be interpreted. Based on this statement, one could argue that the use of the word "identification" is of higher appropriateness than to the word "interpretation". Nevertheless, it should not be forgotten that the primary intention of the interpretation of every rule, in every legal system, is indeed to determine whether - once both its content and its general and abstract scope are established - it can be applied to the circumstances of the particular case. It therefore seems difficult to argue that the process of the identification of a rule is indistinguishable from the one of its interpretation, even in case of an unwritten rule. This point of view intends to assure the maintenance of a reasonable flexibility in the application of custom. Claiming that customary international law cannot be interpreted would indeed artificially restrict the interpreter's freedom of manoeuvre. Furthermore, it seems difficult to argue that a customary rule - previously established - should be applied to new circumstances falling within its scope, regardless of general principles of interpretation used for the application

of treaties. The aim of this paper is to discuss whether it is possible to use the word "interpretation" in regard to customary international law. In a second time, it focuses on the question whether it is possible to acknowledge that the process of interpretation of customary international law is separate from the one of its identification.



**Mariana Clara de Andrade** is a PhD researcher at the University of Milano-Bicocca (Italy). Her research focuses on the use of customary international law and general principles in the WTO dispute settlement system, and the relation between recourse to these sources and the current legitimacy crisis of the Appellate Body. Mariana has been a guest researcher at Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and at the University of Geneva, and is currently finalizing her doctoral research under the PhD Support Programme at the WTO. She holds a Bachelor and LL.M from the Federal University of Santa Catarina (Brazil).

### Identification of and Resort to Customary International Law by the WTO Appellate Body

The recourse to customary international law by international adjudicators is a valuable element contributing to a better understanding of this source of international law. The aim of this article is to examine the recourse to this source by the WTO's Appellate Body. This international adjudicative forum is particularly interesting due to its limited material jurisdiction, as it can only assess WTO law. This paper thus analyses the means through which the adjudicators identify customary international law and what are the customary norms they resort to. Moreover, given the mentioned jurisdictional limitations of WTO adjudication, it is relevant to examine whether this recourse is limited to serve as interpretative aid to WTO provisions or whether it amounts to the application of these 'extraneous' sources. It is therefore relevant to understand the difference between the use of customary rules for purposes of interpretation and the actual application of these sources within WTO dispute settlement. It is concluded that the Appellate Body's reliance on customary international law is limited: it only resorts to codified rules of treaty interpretation and state responsibility. Moreover, it does not proceed in properly identifying rules of international law, but merely asserts their existence and relevance on the basis of other authoritative references. Through this methodology, and by using customary rules under only these two 'fields', the AB has more leeway in not overstepping the line of its jurisdictional limitations.

**Kostiantyn Gorobets** got his Masters in Law at the Odesa Law Academy (Ukraine) in 2011. A year and a half after that he defended his Candidate of Legal Science thesis (post-soviet equivalent to PhD in law) in the field of legal philosophy. In 2013–2016 works as an assistant professor in Odesa Law Academy. From 2017, is doing his second PhD at the University of Groningen, Department of Transboundary legal studies. He works on the project “Beyond Validity: Authority of International Law”. The project focuses on the interplay between legal philosophy and international legal theory in explaining the conditions and dimensions of authority of international law as its relative normative strength.



### Practical Reasoning and Interpretation of Customary International Law

Customary international law as a phenomenon provides a solid ground for testing theories and conceptions of legal normativity and authority. It challenges the simplest yet very common idea that law should be identified by its ‘author’ and interpreted according to his or her will or intention. Customary (international) law does not fit to this scheme as it usually has no ‘author’ in the same way as, for example, treaties<sup>10</sup>, and its authority depends more on the content rather than on the origin of its rules. Consequently, this makes the originalistic interpretation of customary international law irrelevant, if not impossible.

An alternative approach to explaining the authority of customary international law and to developing a feasible strategy for its interpretation is theory of practical reasoning. Here, rules are considered as second-order reasons for action that represent a certain balance of first-order reasons. Rules are time- and labour-saving devices which allow subjects to take ‘shortcuts’ in their practical reasoning, avoiding in such a way deliberations regarding the best balance of the first-order reasons every time this is relevant. Thus, the authority of rules depends on how effectively they perform their ‘shortcutting’ function pre-empting their addressees from recurring to their underlying first-order reasons.

The interpretation of customary international law, from this perspective, is a twofold enterprise. On the one hand, the interpretation is aimed at discovering what first-order reasons guide the actions of states and what their relative strength is. The first-order reasons here represent all the facts that count for or against performance of certain actions of states at the stage of rule formation. The crystallisation of a customary rule is therefore a formation of a shortcut in practical reasoning, when a customary rule replaces deliberations about the relevant first-order reasons and, to some extent, excludes them

<sup>1</sup> It can be objected that the community of states is a collective author of rules of customary international law, but this is beside the point. That a rule is being practiced does not entail that it is being authored in such a way.

from consideration; a customary rule becomes a reason for action in its own right representing a balance of the first-order reasons.

On the other hand, interpretation is aimed at the evidence of states’ perception of the normative strength of this already existing customary rule, and at whether they consider this second-order reason as creating a legal obligation to act or refrain from acting for this reason. *Opinio juris*, therefore, relates to a second-order reason, i.e., to an already existing customary rule. This indicates that interpretation of state practice and its underlying first-order reasons is distinct from the interpretation of *opinio juris* that focuses on second-order reasons. Interpretation of the first-order reasons relates to the content of a rule, whereas interpretation of the second-order reasons—relates to its normative strength.

The practical reasoning-based interpretation of customary international law allows one to avoid complications/limitations of the authorship/origin-focused approaches. It also provides a better understanding of relations between state practice and *opinio juris*.



**Marina Fortuna** is currently a PhD student at the University of Groningen. She obtained her LLB degree from Babes-Bolyai University and her LLM degree in Public International Law from the University of Groningen. During her undergraduate studies she developed an interest in public international law and human rights law. To see how international law works in practice, she completed an internship at the Romanian Ministry of Foreign Affairs and participated in the International European Human Rights Moot Court Competition and Telders International Law Moot Court Competition. Marina’s area of interest and research includes customary international law, the law of state immunity, state responsibility and international dispute settlement.

### Interpretation of Customary International Law: You Know It When You See It?

This contribution grapples with the question of how to recognize the stage of ‘interpretation’ in ‘the life-cycle of customary international law’. First, it briefly outlines the ‘stages of development’ of customary international law. It divides the life of customary international law into three stages: the formation stage, the existence/identification stage and the concretization/interpretation stage, each of which differs with respect to the function they perform in the development of a full-fledged customary rule.

Secondly, this paper briefly addresses the two critiques of non-interpretability of customary international law and defines ‘interpretation’. Here, reference is made to the distinction made by Francis Lieber between construction and interpretation, but also to the difference between interpretation of state practice and interpretation of a customary rule.

Finally, what makes the core of this paper is an analysis of the problems that exist in recognizing the stage of interpretation in the case law of international courts and tribunals.

The first issue is that, oftentimes, judges are unaware that they engage in the interpretation of customary rules, which is why they do not explicitly acknowledge this normative process. But this silence should not be construed against interpretation of CIL. Borrowing from the language of the rules of treaty interpretation, the instances of customary law content determination become easy to detect. By 'rules of treaty interpretation' I refer not only to rules embodied within Article 31 VCLT, but also those outside the VCLT.

A second problem is that judges 'blend' interpretation of custom with treaty interpretation. There are cases where these two normative processes may occur simultaneously. Nonetheless, this should not be understood as a blanket authorization to resort to interpretation of treaties in order to determine the content of customary rules.

Lastly, this contribution tackles the problem of judicial choice – sometimes the employment of identification over interpretation or vice versa is just a matter of judicial preference. This problem stems from the design of customary international law, but may be overcome with a wider recognition of CIL interpretation.

## Panel 5.2: The Need for Methodological Rigour in the Identification, Interpretation and Application of CIL

**Vladyslav Lanovoy** is an Associate Legal Officer to H.E. Judge Mohamed Bennouna at the International Court of Justice. He is also a Lecturer at Lille Catholic University and a Teaching Fellow at Queen Mary University of London. He holds a PhD in international law from the Graduate Institute in Geneva, which was supervised by Professor Pierre-Marie Dupuy. Dr. Lanovoy is the author of *Complicity and its Limits in the Law of International Responsibility* (Hart 2016), which has been awarded the 2017 Paul Guggenheim Prize in International Law. He has previously worked in international arbitration at Freshfields Bruckhaus Deringer LLP and at the Permanent Court of Arbitration. He has also consulted for the UN Office of the High Commissioner for Human Rights and the UN Environment Programme.



### **The Role of International Courts and Tribunals in the Treatment of Customary International Law: A Plea for Greater Methodological Rigour**

This paper criticizes the application by international courts and tribunals of the three methodological steps of identifying, applying and interpreting customary international law. It argues that these steps have been repeatedly conflated and that courts and tribunals have become increasingly assertive and laconic, and thus less accurate in their analysis of the existence and content of customary international law. The paper draws on a number of examples from the jurisprudence of the International Court of Justice, the World Trade Organization dispute settlement mechanism, the European Court of Human Rights and investor-State arbitral tribunals. The paper's principal argument is that, irrespective of the jurisdictional limits and the particularities of the relevant applicable law, courts and tribunals should exercise greater caution in their treatment of these issues, absent which they risk improperly assuming a lawmaking role. Equally problematic is the tendency of international courts and tribunals to rely extensively on the work product of the International Law Commission, which more often than not represents a compromise resulting from last minute decisions on what should be included in the text of an article or rule and what should be included in the commentary, thus representing progressive development of international law rather than its codification proper. This is a systemic issue and poses particular problems where the evidence of State practice and *opinio juris* is divisive or absent. Such pronouncements by courts and tribunals go on to influence the direction of subsequent State practice or simply forestall the law and prevent it from changing and adapting to the reality of international affairs. An example of this trend is the way domestic courts rely on the pronouncements of their international peers, rarely if ever questioning the validity of their findings as far as customary international law is concerned. The paper concludes with a plea for greater

methodological rigour when it comes to ascertaining the existence and content of customary international law.



**Letizia Lo Giacco** holds an LLD in international law from Lund University and an LLM in international humanitarian law from the Geneva Academy of International Humanitarian Law and Human Rights. Her doctoral research inquired the practices of citing judicial decisions in courts' argumentation as a formative process of international (criminal) law. Letizia's research pertains to questions of international legal theory, judicial practices and legal argumentation, and her publications appeared on the *Cambridge International Law Journal* and the *Heidelberg Journal of International Law (ZaöRV)*. She was a visiting research fellow at the Manchester International Law Centre, the Amsterdam Centre of International Law and the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, where she has been a regular contributor to the Max Planck Trialogues on the Law of Peace and War since 2016.

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

The ascertainment of rules of customary international law by courts is typically portrayed as an act of discovery engaging with the practice and *opinio juris* of states, as well as with the practice of international organizations, as recently spelled out in the International Law Commission Report on the Identification of Customary International Law (2018, A/CN.4/717, para. 47). Accordingly, courts just need to venture out there, explore such practice and *opinio juris*, and customary international law rules will be found. This legendary conception is though challenged by the alternative portrayal according to which interpreters actually operate in the context of justification, rather than discovery, in that they necessarily select and appreciate evidence of practice and *opinio juris*, which is far from being incontrovertible, let alone fully representative of the majority of states. In other terms, the selection and assessment of practice and *opinio juris* are but the result of an act of court's discretion, which is obscurely surfacing every act of legal interpretation.

Yet, courts' ascertainment of arguably existing rules of customary international law appears a necessary endeavour – the legend is worth believing. Owing to the authority of courts within legal orders, judicial decisions ascertaining the existence of CIL rules are typically understood as legally correct statements of the law. In particular, this actual formulation of rules of customary international law in its scope and content is necessary in order for i) 'rules' as such to materialize, and ii) the contestation of such rules to occur on the basis of a cognized formulation, as well as to challenge the rules of interpretation applied. Such judicial decisions represent odd creatures since, by ascertaining the existence of CIL rules, they necessarily yield effects *erga omnes* although they, in principle, only bind the parties to the case settled by the decision.

By engaging with judicial decisions issued by international and domestic courts in the field on international criminal law, this contribution has a twofold aim. First, it challenges the legendary portray of courts operating in the context of discovery when ascertaining existing CIL rules, by showing that they instead operate in the context of justification. Secondly, it problematizes the ambivalent nature of judicial decisions ascertaining the existence of rules of customary international (criminal) law, as producing legally binding effects *inter partes* and, at the same time, *erga omnes* effects stemming from the identification of CIL rules. As such, courts ascertaining CIL rules, formulate and let them materialize, including those that are considered necessary to the international legal order. Such an activity hinges on the discretion that courts are afforded to make such determinations on the basis of their appreciation of state practice and *opinio juris*. Since this evidence lends itself to different interpretations, all the more so courts operate in the context of justification rather than discovery.

**Anastasios Gourgourinis** is Lecturer in Public International Law at the Faculty of Law of the National and Kapodistrian University of Athens, specializing in International Economic Law. He is also a Research Fellow at the Academy of Athens. He holds an LL.B. and an LL.M from the Faculty of Law of the National and Kapodistrian University of Athens, as well as an LL.M. (awarded with Distinction) and a Ph.D. from University College London. He has taught at University College London, the Athens University of Economics and Business, Panteion University of Athens and the University of Piraeus. Anastasios has served in the past as Special Legal Advisor at Greece's Ministry for Development and Competitiveness, and the Ministry of State, advising on issues pertaining to investment, trade and state aid. Currently, he practises with the Athens Bar in Greece.



### Navigating the Identification and Application of Customary International Law in International Investment Arbitration

This presentation will assess whether the identification and application of custom by investment arbitral tribunals is methodologically satisfactory. The importance of customary international law in foreign investment protection is some times understated. Customary international law is in fact applicable in international investment arbitration independently of any choice of law, establishing minimum standards of protection for foreign investors, residually applies with respect to issues not covered by international investment agreements (IIAs), and operating as a tool for the latter's interpretation. Customary law could also fall within the scope of dispute resolution clauses in IIAs, unless expressly and unequivocally excluded. Still, one could trace a reluctance on behalf of investment arbitrators to delve into elaborate analysis regarding the identification of custom when its existence and/or content is disputed, by shifting, for instance, the burden of proof to the party asserting the customary rule (rather than the tribunal exercising its *iura novit curia* power). It is in this context that this presentation will attempt to explain the underlying rationale for this reluctance and offer insights on the better (methodological) way forward.



**Nikolaos Voulgaris** is a lecturer at the European Law and Governance School and Head of the Treaty Division of the European Public Law Organization. He is also a teaching assistant at the LLM in public international law at the University of Athens and a Fellow at the Athens Public International Law Centre. He completed his doctoral studies at King's College London in February 2016. During his PhD he taught public international law at King's and worked as a research assistant for the Freedom Rights Project. He holds an LLB and an LLM from the University of Athens (rank: shared 1st) and an LLM from King's College London (awarded with distinction). For his doctoral studies he was awarded the King's University of London Studentship and the Leventis Foundation Scholarship. For his first LLM dissertation he was awarded the Oikonomides prize, a biennial prize for the best dissertation written by a Greek citizen.

### **The Genesis of Customary International Law through the International Law Commission; Disentangling *lex ferenda* from *lex lata***

It falls within the mandate of the International Law Commission (ILC) not only to identify or codify existing law (*lex lata*), but also to record international law's progressive development (*lex ferenda*) in matters when no identifiable legal rules exist. The separation between the two exercises, reflected in the Commission's Statute 'has proved impractical' or 'unworkable' and the Commission's modern practice has pushed the distinction aside. Nevertheless, an analysis of the ILC's longstanding practice demonstrates that *lex ferenda* is of legal significance for the formation of customary rules since it directs their future development and concretisation into *lex lata*. In this paper, I challenge the, unexpressed yet dominant, perception that progressive development is but an appurtenance of codification. On this basis, I purport to understand the methodology guiding the identification of *lex ferenda* rules in international law. Given the inherent linkage between *lex ferenda* and *lex lata* when it comes to customary law, I believe that this understanding is crucial for the identification of the content of customary rules.

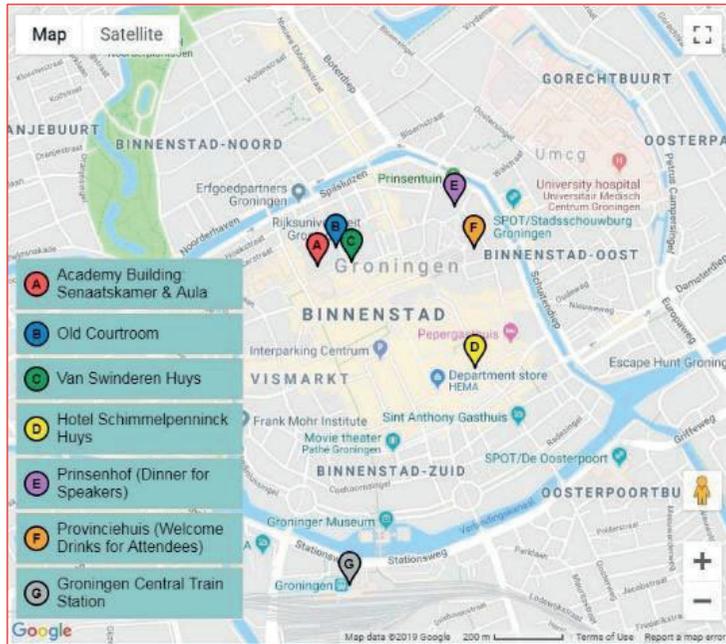
The argument develops in three parts. The first demonstrates that progressive development is often a necessary and important first step in the emergence of customary rules. In fact, it would be impossible to conclude any ILC project without the necessary concession that the Commission's end product reflects, at least in part, international law's progressive development. In many occasions the ILC has invented rules - that eventually hardened into custom - either *ex nihilo*, that is without any prior legal indication as to how a matter should be regulated (Article 50 of the VCLT) or when such indications were insufficient to form a positive law rule (Article 50 of the Articles on State Responsibility).

The second part argues that the elaboration of progressive development is under-theorised in international law and the ILC never developed a concomitant methodology. The ILC Statute defines 'progressive development' as 'the preparation of draft

conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'. Given the lack of further guidance, the ILC does not follow systematically a juristic methodology in order to infer the progressive development of international law. This results in drafting provisions that have a weak claim to transforming into customary *lex lata*, a problem that has been haunting the ILC in recent years.

The final part aims to construct such methodology by surveying ILC practice. I argue that the elaboration of *lex ferenda* is subject to a specific methodology that constitutes a mixture of both policy and legal considerations. Dependent on whether *lex ferenda* derives *ex nihilo* or as a reflection of underdeveloped/conflicting practice this methodology is twofold. To bolster this thesis, I will examine at first the derivative responsibility provisions contained in the Articles on Responsibility for International Organizations where the Commission admittedly had no relevant practice to 'build on' and then the rule on the participation of International Organizations in the formation of custom (Conclusion 4 para 2 of the Conclusions on the Identification of Customary Law) where the ILC had to adopt a position between two conflicting views deriving from practice. The crux of my argument is that the ILC is not unrestrained when delivering its function of progressive development; an understanding of the methodology employed in the identification of *lex ferenda* will significantly aid the Commission in contributing to the genesis and development of customary international law. With this in mind, this paper's cry-out is that the overlooked distinction between progressive development and codification be rediscovered.

## Conference Maps & Directions



**D. Hotel Schimmelpenninck**  
Oosterstraat 53,  
9711 NR Groningen



**E. Prinsenhof (Dinner)**  
Martinikerhof 23,  
9712 JH Groningen



**F. Provinciehuis**  
Martinikerhof 12,  
9712 JG Groningen



**G. Central Train Station**  
Stationsplein 4,  
9726 AE Groningen



**A. Academy Building**  
University of Groningen  
9712 CP Groningen



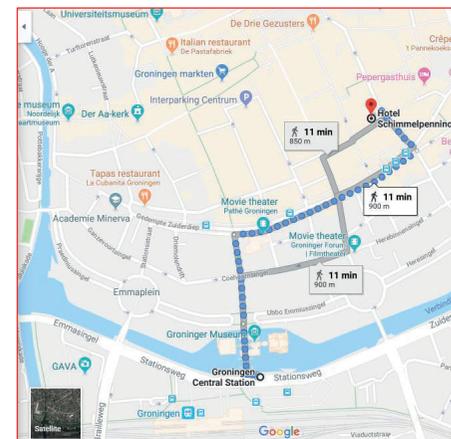
**B. Old Courtroom**  
Oude Boteringstraat 36  
9712 GK Groningen



**C. Van Swinderen Huys**  
Oude Boteringstraat 19,  
9712 GC Groningen



Directions from Groningen Central Station to the Hotel Schimmelpenninck Huys



Directions from Groningen Central Station to the Academy Building (Aula / Senaatskamer)



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