

THE THEORY, PRACTICE, AND INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

Although customary international law (CIL) has been central to international law from its inception, it is often misunderstood. This edited volume remedies that problem by tracing the history of CIL, and providing an in-depth study of its theory, practice, and interpretation. Its chapters tackle the big questions which surround this source of international law such as: what are the rules that regulate the functioning of CIL as a source of international law? Can CIL be interpreted? Where do lines between identification, interpretation, application, and modification of a rule of CIL lie? Using recent developments, this volume revisits old debates and resolves them by proffering new and innovative solutions. With detailed examples from international and national courts, it places CIL in a range of settings to explain, explore and reflect upon this developing and highly significant field. This title is also available as Open Access on Cambridge Core.

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THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

Established in 2021, the *TRICI-Law Book Series* is a limited series that aims to publish monographs and edited volumes on topics that shed light on legal interpretation in international law, with a particular emphasis on the interpretation of customary international law. Titles appearing in the series examine the interpretation of customary international law from a theoretical and practical perspective, and compare the characteristics of legal interpretation in international law across courts, regimes and sources as they have evolved and continue to do so through time. The *TRICI-Law Book Series* is a joint initiative between Cambridge University Press, the European Research Council and the University of Groningen. The titles in this series are available as Open Access.

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THE THEORY, PRACTICE,
AND INTERPRETATION
OF CUSTOMARY
INTERNATIONAL LAW

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PREFACE

This edited volume finds its origin in a conference on the theory and practice of customary international law (CIL) and its interpretation, held in May 2019 at the University of Groningen. The conference was co-organised by the TRICI-Law project and the Interest Group on International Legal Theory and Philosophy (IGILTP).

The TRICI-Law project, headed by Professor Panos Merkouris, is a five-year research project funded by the European Research Council (ERC) Horizon 2020 program (Grant Agreement No. 759728). The project is dedicated to the in-depth study of CIL interpretation, and the identification of the rules that guide this process. It is the first of its kind, introducing the lens of interpretation as a separate process to be studied in the life cycle of a CIL rule.

The IGILTP is one of the interest groups of the European Society of International Law (ESIL). It seeks to facilitate research into all areas, approaches and questions of a theoretical and philosophical nature with a bearing on international law. In the IGILTP the TRICI-Law project found a willing ally for the organisation of the conference and the collection of this edited volume. It was during our time as co-members of IGILTP's Coordinating Committee that we exchanged many of the ideas that inspired the theoretical questions tackled in this volume.

The conference presented an ambitious programme. We invited scholars and practitioners to engage with questions that hit at the core of our selected subject: what are the rules that regulate the functioning of CIL as a source of international law? Is the classical paradigm of state practice and *opinio juris* still valid today? Can CIL be interpreted? Is there a difference between the interpretation of state practice and the interpretation of a customary rule? Where do lines (if any) between identification, interpretation, application and modification of a rule of CIL lie? And what potential lessons may we learn from domestic approaches to these questions?

We were delighted to receive over 100 abstracts in response to our call for papers; a testament to the continued interest that the theory of CIL inspires among scholars and practitioners of international law. We were particularly encouraged to see that many of the abstracts were willing to engage with the novel lens of interpretation alongside the more traditional subjects of CIL genesis and identification. Thus, in our selection of abstracts we were careful to strike a balance between contributions which examined more traditional issues related to the theory of CIL, and contributions which went outside these familiar frameworks. Moreover, attention was paid to bring together a complementary diverse set of contributions which deal with the theory, practice, and interpretation of CIL respectively. The conference, and ultimately the chapters of this edited volume, reflect this balance.

The edited volume boasts twenty-three chapters, organized into five parts. Part I, dedicated to the theory of CIL, deals with the fault lines in CIL theory and the need for new approaches. This part contains chapters which examine some of the issues emerging from the theory of CIL, commentaries on the validity of the traditional ‘state practice and *opinio juris*’ model, and suggestions for alternative theoretical approaches. Part II is dedicated to an examination of CIL as a source of international law, with a focus on the doctrine and history of custom. This part contains chapters that critically engage with questions of doctrine, the historical development of CIL, and the contribution of some seminal historical scholars to the way we understand CIL today. Part III turns to the practice of CIL. The chapters in this part present studies of the ways various institutions and actors engage with the application of CIL, and offer commentaries on how these practices shape the way CIL operates in international law. Part IV then introduces the notion of interpretation as a separate stage in the life cycle of a customary rule. This part contains chapters which persuasively illustrate the need to account for interpretation in the operation of a CIL rule, and offer suggestions as to how this may be done. Finally, Part V provides insight into the way domestic courts deal with custom. The chapters in this final part trace the jurisprudence of various domestic courts and illustrate that interpretation of custom (both international and domestic) is regularly engaged in by domestic judges, and that there are valuable lessons to be learned from these approaches for the purposes of international law.

We are deeply grateful to the contributors of this edited volume for their impressive scholarly efforts reflected in each chapter. We also thank the other speakers and chairs of the conference, whose presentations and

comments during the 2019 conference no doubt inspired many of the discussions developed in this volume. We are particularly grateful to His Excellency Judge Raul Pangalangan for his engaging keynote speech on the constraints on codified rules and the enduring power of custom.

This edited volume is the first in a line of publications that will deal with the various issues emerging for the study of CIL interpretation. We are very grateful to Cambridge University Press for hosting this pioneering research collection under the heading of the “TRICI-Law Book Series”. In particular, a special thanks is owed to Ms Finola O’ Sullivan, with whom we fleshed out the idea for this book series on a sunny day in Athens during one of the breaks of the ELSA Conference, and who went above and beyond the call of duty in ensuring that this volume and the book series would get off the ground. We are also indebted to Ms Marianne Nield for her invaluable support and unending patience throughout this process and for those that are still to come, and to Mr Tom Randall and the Cambridge University Press editing team for their continued support through the publication process. A special place of mention is also owed to the ERC and the University of Groningen, without whose generous financial help this edited volume, as well as the TRICI-Law Book Series, would not have been possible.

Finally, we thank Ms Nina Mileva for her assistance in the organisation of the conference and the editing of this volume, as well as Mr Konrad Turnbull for his immense help in all practical matters related to the production of this volume.

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ABBREVIATIONS

AB	Appellate Body
ACHEA	The Association for Christian Higher Education in Australia
AG	Advocate General
AJIL	<i>American Journal of International Law</i>
Amer Sociol Rev	<i>American Sociological Review</i>
Am J Juris	<i>The American Journal of Jurisprudence</i>
Am U Int'l L Rev	<i>American University International Law Review</i>
AppPEN	Approximately Plausible Empowerment Norm
APSR	<i>American Political Science Review</i>
ARIEL	<i>Austrian Review of International and European Law</i>
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
ASCM	Agreement on Subsidies and Countervailing Measures
Asian JIL	<i>Asian Journal of International Law</i>
ASIL	<i>American Society of International Law</i>
Aust YBIL	<i>Australian Yearbook of International Law</i>
BC Int'l & Comp L Rev	<i>Boston College International and Comparative Law Review</i>
BIOT	British Indian Ocean Territory
BJ Pol S	<i>British Journal of Political Science</i>
Brook J Int'l L	<i>Brooklyn Journal of International Law</i>
BVerfGE	<i>Die Entscheidungen des Bundesverfassungsgerichts</i>
B-VG	<i>Bundes-Verfassungsgesetz</i>
BVG	<i>Bundesverfassungsgesetze</i>
BYBIL	<i>The British Yearbook of International Law</i>
Cal W Int'l LJ	<i>California Western International Law Journal</i>
Can YBIL	<i>Canadian Yearbook of International Law</i>
Cardozo L Rev	<i>Cardozo Law Review</i>
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
Chin J Int Law	<i>Chinese Journal of International Law</i>
ChJIL	<i>Chicago Journal of International Law</i>

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CIL	Customary International Law
CJIL	<i>Cambridge Journal of International Law</i>
CJLJ	<i>Canadian Journal of Law & Jurisprudence</i>
CLJ	<i>Cambridge Law Journal</i>
CLP	<i>Current Legal Problems</i>
CLR	<i>California Law Review</i>
CMLJ	<i>Capital Markets Law Journal</i>
Colum J Transnat'l L	<i>Columbia Journal of Transnational Law</i>
Const Comment	<i>Constitutional Commentary</i>
Cornell Int'l LJ	<i>Cornell International Law Journal</i>
CRC	Convention on the Rights of the Child
Crim LF	<i>Criminal Law Forum</i>
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
Duke J Comp& Int'l L	<i>Duke Journal of Comparative and International Law</i>
Duke LJ	<i>Duke Law Journal</i>
EC	European Communities
ECCC	Extraordinary Chambers in the Courts of Cambodia
Ecology LQ	<i>Ecology Law Quarterly</i>
EJIL	<i>European Journal of International Law</i>
Emory Int'l L	<i>Rev Emory International Law Review</i>
FCAFC	The Full Court of the Federal Court of Australia
FRG	Federal Republic of Germany
FYBIL	<i>Finnish Yearbook of International Law</i>
Ga J Int'l & Comp L	<i>Georgia Journal of International and Comparative Law</i>
GDR	German Democratic Republic
Geo LJ	<i>Georgetown Law Review</i>
Georget J Int Law	<i>Georgetown Journal of International Law</i>
Geo Wash Intl L Rev	<i>George Washington International Law Review</i>
GLR	<i>Griffith Law Review</i>
GYIL	<i>German Yearbook of International Law</i>
Harv Hum Rts J	<i>Harvard Human Rights Journal</i>
Harv Int'l LJ	<i>Harvard International Law Journal</i>
Harv L Rev	<i>Harvard Law Review</i>
HE His/Her	Excellency
HHR	<i>Journal Health and Human Rights Journal</i>
HPCR	<i>Humanitarian Policy & Conflict Research</i>
HRC UN	Human Rights Council
HR&ILD	Human Rights & International Legal Discourse
HRLR	<i>Human Rights Law Reports UK Cases</i>
HYIL	<i>Hague Yearbook of International Law</i>
ICC	International Criminal Court

ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICLR	<i>International & Comparative Law Review</i>
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
ICs	International Courts
IDI	Institut de Droit International
IJIL	<i>Indian Journal of International Law</i>
IL	International Law
ILA	International Law Association
ILC	International Law Commission
ILDC	International Law in Domestic Courts
ILR	<i>International Law Reports</i>
ILS	International Law Studies
Ind J Global Legal	Studies <i>Indiana Journal of Global Legal Studies</i>
Int CLR	<i>International Criminal Law Review</i>
Int CL Rev	<i>International Community Law Review</i>
IO	International Organisation
IOLR	<i>International Organizations Law Review</i>
IP	International Peacekeeping
IRRC	International Review of the Red Cross
Isr YB Hum Rts	<i>Israel Yearbook on Human Rights</i>
ITLOS	International Tribunal for the Law of the Sea
IYIL	<i>Italian Yearbook of International Law</i>
J Conflict Resol	<i>Journal of Conflict Resolution</i>
JC&SL	<i>Journal of Conflict and Security Law</i>
JICJ	<i>Journal of International Criminal Justice</i>
JIDS	<i>Journal of International Dispute Settlement</i>
JIHLS	<i>Journal of International Humanitarian Legal Studies</i>
J Intl Econ L	<i>Journal of International Economic Law</i>
JLS	<i>Journal of Legal Studies</i>
J Med Ethics	<i>Journal of Medical Ethics</i>
JMWP	<i>Jean Monnet Working Paper</i>
JWT	<i>Journal of World Trade</i>
LEG	Legal Theory
LGDJ	The Librairie générale de droit et de jurisprudence
Liverpool LR	<i>Liverpool Law Review</i>
LJIL	<i>Leiden Journal of International Law</i>
Lond rev int law	<i>London Review of International Law</i>
Loy LA Int'l & Comp L Rev	<i>Loyola of Los Angeles International and Comparative Law Review</i>
L& Phil	<i>Law and Philosophy</i>

LIST OF ABBREVIATIONS

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LP ICT	<i>The Law & Practice of International Courts and Tribunals</i>
Mich J Intl L	<i>Michigan Journal of International Law</i>
Mich L Rev	<i>Michigan Law Review</i>
Minn L Rev	<i>Minnesota Law Review</i>
MJIL	<i>Melbourne Journal of International Law</i>
MPEPIL	<i>Max Planck Encyclopedia of Public International Law</i>
NILR	<i>Netherlands International Law Review</i>
Nord J Intl L	<i>Nordic Journal of International Law</i>
NWULR	<i>Northwestern University Law Review</i>
NYIL	<i>Netherlands Yearbook of International Law</i>
NY L Sch J Hum Rts	<i>New York Law School Journal of Human Rights</i>
NZ L Rev	<i>New Zealand Law Review</i>
OHCHR	Office of the United Nations High Commissioner for Human Rights
OJLS	<i>Oxford Journal of Legal Studies</i>
OU	University of Oklahoma
Pace Int'l L Rev	<i>Pace International Law Review</i>
PCIJ	Permanent Court of International Justice
Phil & Pub Aff	<i>Philosophy & Public Affairs</i>
Phil Rev	<i>Philosophical Review</i>
PROC	<i>Proceedings of the Annual Meeting</i>
RBDI	<i>Revue Belge de Droit International</i>
RD	<i>Revista de Derecho e Jurisprudencia y Ciencias Sociales</i>
RDC	Recueil des Cours (Abbreviation for collected courses of the Hague Academy, in references and bibliography)
RGDIP	<i>Revue générale de droit international public</i>
RIAA	<i>Reports of International Arbitration Award</i>
RIO	<i>Review of International Organizations</i>
Riv Dir Int	<i>Rivista di diritto internazionale</i>
RQDI	<i>Revue Québécoise de Droit International</i>
RStGH	<i>Staatsgerichtshof für das deutsche Reich</i>
RV	<i>Reichsverfassung</i>
Santa Clara L Rev	<i>Santa Clara Law Review</i>
S Cal L Rev	<i>Southern California Law Review</i>
Stan J Intl L	<i>Stanford Journal of International Law</i>
Stan L Rev	<i>Stanford Law Review</i>
STL	Special Tribunal for Lebanon
SYBIL	<i>Singapore Year Book of International Law</i>
TRICI-Law	The Rules of Interpretation of Customary International Law
TWQ	<i>Third World Quarterly</i>

U Chi L Rev	<i>University of Chicago Law Review</i>
UCDavis JInt'l L& Pol'y	<i>UC Davis Journal of International Law & Policy</i>
U Ill L Rev	<i>University of Illinois Law Review</i>
UN	United Nations
UNC	University of North Carolina
UNCRC UN	Committee on the Rights of the Child
UNDP	United Nations Development Programme
UNHRC	United Nations Human Rights Council
UNYB	<i>Max Planck Yearbook of United Nations Law</i>
UPR	<i>Universal Periodic Review</i>
UTLJ	<i>University of Toronto Law Journal</i>
Va J Int'l L	<i>Virginia Journal of International Law</i>
Vand J Transnat'l L	<i>Vanderbilt Journal of Transnational Law</i>
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
VfGH	<i>Verfassungsgerichtshof</i>
VUWLR	<i>Victoria University of Wellington Law Review</i>
WdW	<i>De Wijsbegeerte der Wetsidee</i>
WTO	World Trade Organization
Yale J Int'l L	<i>Yale Journal of International Law</i>
Yale LJ	<i>Yale Law Journal</i>
YBILC	<i>Yearbook of the International Law Commission</i>
ZaöRV	<i>Heidelberg Journal of International Law</i>

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