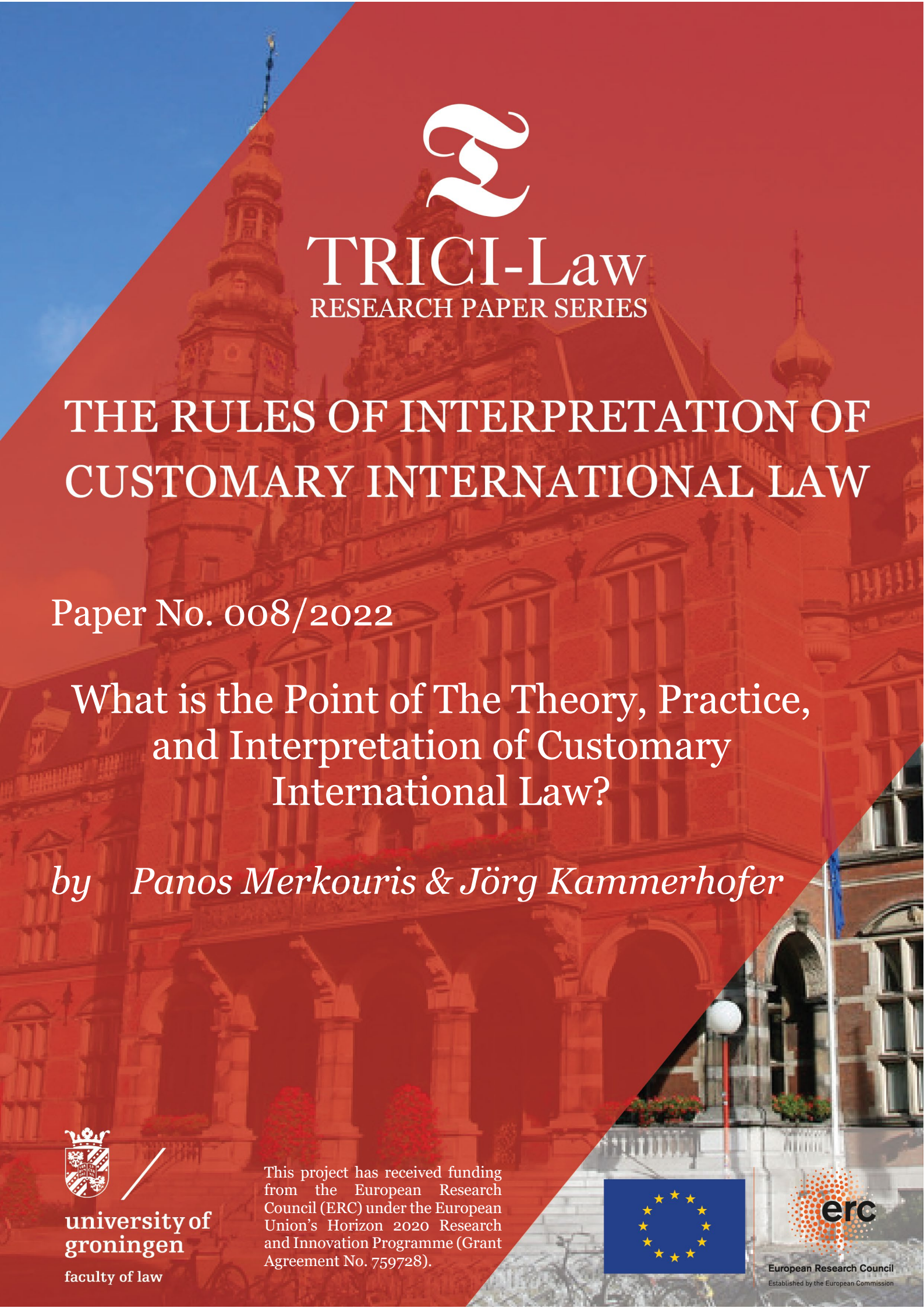

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RESEARCH PAPER SERIES

THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

Paper No. 008/2022

What is the Point of The Theory, Practice, and Interpretation of Customary International Law?

by Panos Merkouris & Jörg Kammerhofer

university of groningen
faculty of law

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Symposium Introductory Blog

What is the Point of *The Theory, Practice, and Interpretation of Customary International Law*?

by Jörg Kammerhofer & Panos Merkouris

Published on 15 November 2022

I.

In early 2018, we started planning a conference on the theoretical aspects of customary international law (CIL) as the first instalment of the European Conference Series on the Theory and Philosophy of International Law. This conference, co-organised by Panos Merkouris' ERC-funded research project TRICI-Law and by the European Society of International Law's Interest Group on International Legal Theory and Philosophy (IGILTP), then chaired by Jörg Kammerhofer, was held in May 2019 at the University of Groningen. In early 2022, we published an edited volume with Cambridge University Press whose chapters are based on the papers presented at the conference, edited by us with Noora Arajärvi; Nina Mileva as assistant editors. It is available open access on Cambridge Core.

But why do we need yet another treatment of this evergreen topic, particularly since the International Law Commission (ILC) revisited CIL from 2013 to 2018, ably directed by Michael Wood? Aiming to provide guidance to scholars and practitioners alike on how CIL could (or should) be 'identified', the ILC presented the world with an authoritative reading of CIL 'theory', including a resolute affirmation of the 'state practice plus *opinio iuris*' formula, after all? What possible use could such a book have

when the Commission had, by its own admission, 'put to rest' the majority of problems we are likely to be faced with?

II.

Frankly speaking, we need more theory, not less; we need to be conscious of the fact that truly theoretical debates cannot be put to rest by any United Nations organ, however exalted its status. The ILC project is just the latest and most prominent in a long line of arguments which subconsciously attempt to excise legal theory *properly speaking* from this inherently theoretical topic. CIL does raise doctrinal questions—e.g. 'how many instances of "state practice" by how many states does it take to create a norm?'—but it also raises genuinely legal-theoretical and legal-philosophical questions which cannot be answered by looking at the International Court of Justice's (ICJ) case-law, e.g. 'is the creation of CIL itself regulated by legal rules – or does it merely "emerge"?' This type of question cannot be answered by collecting tribunal case-law; the ILC's—and practitioner-oriented international legal scholarship's—usual *modus operandi* cannot help us in this respect.

And this is exactly where the contributions in our book come in. Because there is still much to do before we can understand customary international law in all its complexity, we have asked colleagues with a broad range of backgrounds, using diverse theoretical approaches, to analyse a number of questions relevant to the theoretical problems of CIL, including *inter alia*:

1. *What are the rules that regulate CIL?* This aims at an analysis of the meta-rules governing the sources of international law, in order to sketch the rules governing the creation and identification of CIL.
2. *Is the classical paradigm of state practice and opinio iuris still valid today?* This question invites a critique of the classical paradigm, an exploration of its origins
3. *Are there alternative approaches that can offer better modelling?* This includes the question in which sense an alternative model could be called 'better'.
4. *(How) can customary international law be interpreted?* Are rules of customary international law open to interpretation in the same way as those of treaty law?
5. *Do domestic approaches to customary law differ from those in international legal scholarship?* What lessons can be learned (or tools adopted) from domestic approaches to customary law?
6. *What is 'identification', 'interpretation', 'application' and 'modification' of CIL and how do they differ?*

III.

A specific issue, however, which was equally not part of the official work of the ILC, but made its presence felt—both in this as well as other topics of research—was that of the interpretation of customary international law. It may seem obvious to wish to 'interpret' CIL; it had not yet been the object of in-depth study, at least not to the level, frequency and intensity of attention which treaty interpretation has received. Yet it regularly pops up not only in international (e.g. in *North Sea Continental Shelf*, in *Prosecutor v Hadžihasanović, Alagić and Kubura,* and in *EC-Biotech*) and domestic case-law (e.g. in *Her Majesty the Queen in Right of Canada v Edelson and others*, in *Re Al M (Immunities)*, and in the *Comfort Women* case) across different regimes and legal traditions, but also in the work of the ILC, for instance, in the recent discussions of *jus cogens* and immunity of state officials.

The latter chapters of our book attempt a first foray into this *terra incognita* from both a theoretical and practical perspective. They examine whether there are any insurmountable obstacles to the interpretability of customary international law from a theoretical standpoint and supplement this analysis with an examination of whether international and domestic case-law can furnish us with concrete examples where not only an interpretation of customary international law occurred but also whether there are some patterns that repeat themselves, some 'interpretative attractors', and what is their similarity, if any at all, with treaty interpretation.

IV.

The reports of CIL's death have indeed been greatly exaggerated—but so have reports of the death of its conceptual and theoretical problems. CIL was, is and shall remain one of the formal sources of international law central to its functioning and adaptability to new challenges. Yet, its importance does not mean that the problems of its creation, identification and interpretation are any less foundational and critical, even if some remain under-researched. Our project is but one attempt at shedding some light into some of these areas and potentially acting as a warning not to let complacency take over—as may have occurred to some extent in the wake of the ILC's very successful state responsibility project. The unsettled nature and functioning of CIL should not be seen as a cause of existential *angst* but as a call 'to strive, to seek, to find and not to yield!'

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