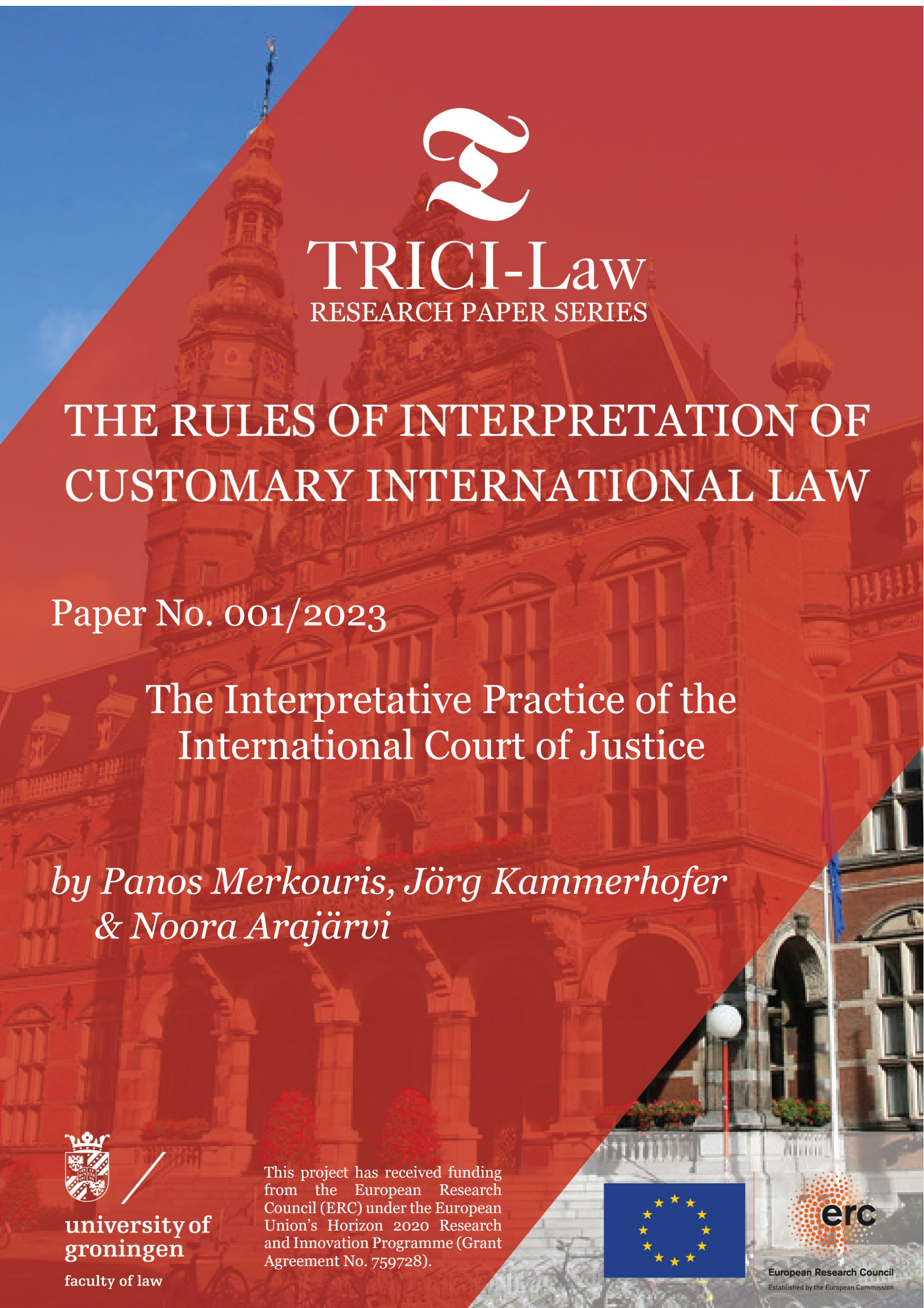

TRICI-Law
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THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

Paper No. 001/2023

The Interpretative Practice of the International Court of Justice

by Panos Merkouris, Jörg Kammerhofer & Noora Arajärvi

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Editors' Response in Book Review Symposium on The Theory, Practice, and Interpretation of Customary International Law

by Panos Merkouris, Jörg Kammerhofer & Noora Arajärvi

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Editors' Response

Panos Merkouris, Noora Arajärvi, Jörg Kammerhofer

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We would like to thank the editors of the *Völkerrechtsblog* for organising this symposium on *The Theory, Practice, and Interpretation of Customary International Law*, and the commentators for thoughtfully and critically engaging with the various themes of our volume. Naturally, as is always the case, the word limit restrictions of this medium require a rather selective engagement with the issues and queries raised by our commentators.

In addition, we felt constrained in that, as editors, we could not possibly justify responding to critiques of our other authors' points. This book brings together very different views and approaches on customary international law (CIL) and the three editors are no exception. We have diverging views on many points, including on interpretability, and our focus lies on different aspects of the topic. Therefore, we each wrote a section of this post which, we hope, will provide readers with a more nuanced response than if we had amalgamated our views.

1. CIL in the Structure of International Law (Kammerhofer)

For me, the most important question about CIL is the most basic one: why is it a 'source of international law' – what does 'source of law' even mean – and how does it fit in the overall structure of the international legal order? For some colleagues, this kind of question may appear superfluous, something for the inhabitants of ivory-towers to ponder over, but certainly of no interest to courts, foreign ministries or even to the ILC. Some others will be attracted to this type of question, but for the wrong reason: as an excuse to trot out their cultural-philosophical musings or their favourite moral or ideological views, all the while believing that they conduct meaningful legal-theoretical research. Only a third group, of whom the authors of our volume are certainly members, will realise that these questions – if asked in the right way and answered using the right method – are relevant: they are relevant for doctrinal arguments about CIL, they are relevant to legal practice and they are relevant as an attempt to advance scholarship. The members of this third group do not, of course, all follow the particular theoretical approach which I apply to the question, the Pure Theory of Law (Kelsen, Merkl) and, since I would not want to ask them to do so, I can only speak for myself.

My approach is based on the view that the scholarship of international law – a *Wissenschaft* in this very Germanic sense, with its highly ambitious attempt to conduct legal scholarship in the most stringent manner, reminiscent of the natural sciences (but not *as* natural science) – has the primary task of finding out what 'the law' says. How trivial, one might respond; how very much an exercise in rule-accountancy and ledger-keeping! But it is neither trivial nor are many of the function of a claimed true or 'higher' jurisprudence (Jhering) scholarly in the strict sense. The primary point of legal scholarship is to advance the *structural analysis* of (one's

chosen corner of) the law, the analysis of the structure and interaction of norms. Elsewhere, I have likened this enterprise to a 'mechanics' of norms: nomostatics for norms at rest and nomodynamics for norms in movement (e.g. Kelsen, pp. 3-109, 110-162).

In the jargon of my chosen approach, this is the *Stufenbau*, the hierarchy (a better word is: structure) of norms in complex legal orders. And thus, we return to the fields tilled by doctrinal international legal scholarship, for what is this question but the one which every budding international lawyer asks on day one of their training: what are the sources of international law? Using the *Stufenbau* analysis, we turn to this question with fresh eyes; we no longer rely blindly on the orthodox 'dogmatic stop' usually employed – 'It's Article 38 ICJ Statute, stupid!' – nor do we attempt to base our source-theory on pie-in-the-sky thinking ('it might be nice if the sources were based on x, hence x!').

Rather, and this holds for both the larger question of the number of sources as well as for the question of how CIL in particular is created, the answer of the *Stufenbau* theory is and must be: what does the law say? The sources are but nodes in the network of norms that is international law – international law is connected via so-called 'empowerment norms', norms authorising the creation of further norms. Each of these norms (and they may be highly complex) not only authorises, but in doing so prescribes certain conditions for the creation of that type of subordinate norm. The point is, then, that the sources of law are not determined by one's philosophy or ideology nor based on fact alone [see, however, the so-called 'historically first constitution' (Kelsen, p. 200)], but by the law itself: law regulates its own creation and must do so, because if it did not, the oughtness of norms would collapse.

That sounds sensationalist, but the point is easily made in more specific terms: it is a norm of international law which tells us that we require state practice and *opinio iuris* to create CIL, not the ICJ, nor the *communis opinio doctorum* nor state acceptance nor a philosophical precept. And if that rule is shaped differently, if, for example state practice were to mean a different thing (ICRC) or if *opinio iuris* were to suffice (Cheng, p. 548), then the legal requirements are different. Yet, the point of the *Stufenbau* theory is this: we cannot posit or assume such a difference, because we felt that it would be better or more convenient if it were so – or felt that international law could not work otherwise. Rather, we *must* prove that the law, in this case the law on law-making of CIL, is shaped that way, just like we routinely do as legal scholars or lawyers in other contexts. There is no categorical difference between proving that there is a rule allowing innocent passage in international law and that CIL is a source of international law.

2. Non-compliance and (mis)interpretation as catalysts for change in CIL (Arajärvi)

Instances of State conduct inconsistent with a given rule should *generally* have been treated as breaches of that rule, not as indications of the recognition of a new rule (*Nicaragua v. United States of America*, para. 186).

My short interjection draws on the relationship of non-compliant practice, (mis)interpretation, and change in CIL, and poses some questions for further consideration.

The reasons for entering the interpretative process in the first place – usually – arise from the need to determine whether an act constitutes a breach of international law. More precisely, in determining a breach of CIL, oftentimes we must look at the specific elements of CIL and how they can and should be interpreted. Full and uncontested compliance with international law rarely, if ever, induces the need for interpretation. Sometimes, the interpreter may – accidentally or not – engage in misinterpretation of CIL and its elements. Nonetheless, as I argue, both "interpretation" and "misinterpretation" – however subjective the line between the two may be – can act as catalysts for change in international law.

In my chapter 'Misinterpreting Customary International Law: Corrupt Pedigree or Self-Fulfilling Prophecy?', I introduce three categories of misinterpretation:

1. The extension (or reduction) of CIL through *exitus acta probat* – the end-justifies-the-means approach – where analysis of the elements of CIL is modified to fit the desired outcome;
2. The negligent interpretation where methodology/ies of interpretation are overlooked in full or in part;
3. The fallacious method of misinterpretation, where the interpreter finds false CIL or considers flawed or incomplete evidence of its elements.

Change in customary international law can be brought on by (mis)interpretation, non-compliance, or both. (Mis)interpretation and non-compliance can exist in a cyclic relationship (but neither is a prerequisite for the other): Interpretation – or misinterpretation – may stem from non-compliance and can lead to non-compliance, and *vice versa*. In this sense, (mis)interpretation can complement non-compliance: a non-compliant act may be incorrectly interpreted – under any of the three above-mentioned categories – as being in compliance with the existing rules of international law. Then, this flawed interpretation could be exploited to establish *opinio juris* to supplement the practice (should the act sprout into actual practice), resulting in change in CIL.

On occasions, all this may occur organically with little strategy or forethought, but sometimes – starting from the act of (non-)compliance to the interpretation of CIL – there is a cognisant push for a change of a rule of international law, or at a metalevel, for the interpretative practice. How, then, to conceptualise a non-compliant act that is committed with the knowledge of the law and with the explicit or implicit intention of driving a normative change? How (mis)interpretation affects the future compliance or non-compliance? Further, with a view of the cyclic relationship between non-compliance and (mis)interpretation, if and how may these translate into practice and *opinio juris*, and hence, into CIL?

Much has been written in the past years on how normative disputes and contestations as bringing on change in international law, and I would align this short reflection within that discourse: in the best case, there may be exist the potential for

improving specific norms and the system as a whole, while simultaneously eroding those that may be deemed out-dated or ineffective. Nonetheless, we should not lose sight of the dangers: especially in CIL, change is a long process – like a path forming in a forest – and forcefully accelerating or diverting this path can push the boundaries to the point we no longer can recognise the source of law or situate its interpretative rules.

3. Interpretation of CIL (Merkouris)

Unwritten does not mean non-interpretable. One of the main claims made against the interpretability of CIL is that it is because it is unwritten (see also Bjorge's contribution, who critically refers to the problems of such arguments). I have elsewhere addressed the fallacies of this and similar arguments. Suffice it to repeat here, that as Alland has very eloquently put it, every rule, even an unwritten one has a 'lexical garment', a 'vêtement lexique' (Alland, p. 83). One of the main points made in the contributions of the edited volume relating to CIL interpretation is that CIL interpretation seems to be occurring both domestically and internationally. In fact, the practice is so pervasive that one can find instances of acceptance of the interpretation of unwritten instruments not only in domestic and international case-law, but in statements of States and also in the works of the International Law Commission (ILC). See, for instance:

- Guiding Principle 7 on Unilateral Acts, discussing their interpretation, and Guiding Principle 5, unequivocally establishing that '[u]nilateral declarations may be formulated orally or in writing'.
- Conclusion 20 of the ILC's work on *Jus Cogens*, according to which '[w]here it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former'. Conclusions 20 makes no distinction between treaties, custom and general principles.
- Or, how about the former Special Rapporteur on CIL Identification, Sir Michael Wood, who acknowledges the interpretation of State practice (here – On why it is more appropriate to use a different term than 'interpretation' for State practice, but rather 'qualification' or 'assessment' see here), and Conclusion 6 on *CIL Identification*, which clarifies that '[p]ractice may take a wide range of forms. It includes both physical and verbal acts'.
- A final example is that of the *Fifth Report on Immunities of State Officials*, by former Special Rapporteur Concepción Escobar Hernández, which is replete with references to logical, teleological and systemic interpretation of CIL.

These are but a few examples of the ubiquitousness of CIL interpretation, and that interpretation of unwritten rules or acts is nothing new under the sun. For most of these, none really raised any objections. Only when the words CIL and interpretation are combined for some bizarre reason this causes an almost knee-jerk rejection.

Why focus on examples illustrating the interpretability and interpretation of CIL? On why we present and focus a lot on instances of interpretation of CIL (see Chasapis-Tassinis' contribution), it is not just for demonstrating interpretability, but

rather the actual interpretation of CIL. Not only can such engagement bolster the theoretical analysis of interpretability, but can also lead to a discussion on what are the prevailing methods/rules of interpretation of CIL. An additional paradoxical point here is that proponents of the non-interpretability of CIL – who hold the two-element approach as the alpha and omega of content determination of CIL – somewhat bizarrely disregard the rather extensive State practice and *opinio juris* on the interpretation of CIL. (For more detailed examples see here, and the forthcoming TRICI-Law Guidelines on CIL Interpretation, which will be uploaded in the coming months here.) That is without mentioning the whole debate that said practice, can be evidence of the existence of CIL interpretation methods/rules being either customary rules or general principles themselves.

The danger of analogising. Connected to the discussion on methods/rules of CIL interpretation, Bjorge and Chasapis-Tassinis raise the concern that treaty interpretation is not the same as CIL interpretation, and that there are dangers in analogising. To that, the only thing I have to say is – precisely! That is exactly what the TRICI-Law project is all about. To have an honest and transparent conversation about what rules of interpretation truly apply to CIL. If we don't have such an exercise, which aims at contributing to greater clarity as to the rules applicable, and to the establishment or at least confirmation of an accepted vocabulary for CIL interpretation, we run the danger of misinterpretations due to lack of methodological rigour. This concern has been raised in TRICI-Law writings (here, here and in the forthcoming Guidelines on CIL Interpretation). Most recently, in July 2023, the International Court of Justice (ICJ) in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, in interpreting the customary rule enshrined in Article 76(1) of UNCLOS, relied on the text of provisions constituting the context of that provision, mainly Article 82(1) and Article 76(4)–(9) UNCLOS, which, however, are of a debatable customary nature. Although such 'by proxy' textual interpretation is not uncommon, it needs to be exercised with great care to avoid overstepping the limits of the rule on interpretation (see here). This lack of methodological rigour was rightly called out and heavily criticised in Judge Charlesworth's dissenting opinion.

Interpretability: Is it about the Object or the Subject? Finally, although not strictly connected to the topic, I cannot resist commenting on the final musings in Chasapis-Tassinis' comment. In my view, it is an interesting angle of inquiry, one that perhaps deserves more than the few sentences here, and definitely not one that can be downplayed as mere 'semantic' games, although the term 'interpretation' in that section seems to be used in a variety of different ways, which may explain some of the eventual issues. His ChatGPT example, like a similar one in his EJIL Article, are reminiscent of the Chinese Room thought experiment. The meaning and implications of this have and will continue to be debated (see here). But I would somewhat reverse the final question. What does the rejection of the interpretability and/or interpretation of CIL remove from the added value that human nature can bring to the application of these norms? I for one am all for CIL interpretation. I leave it up to the readers to make up their own mind.

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