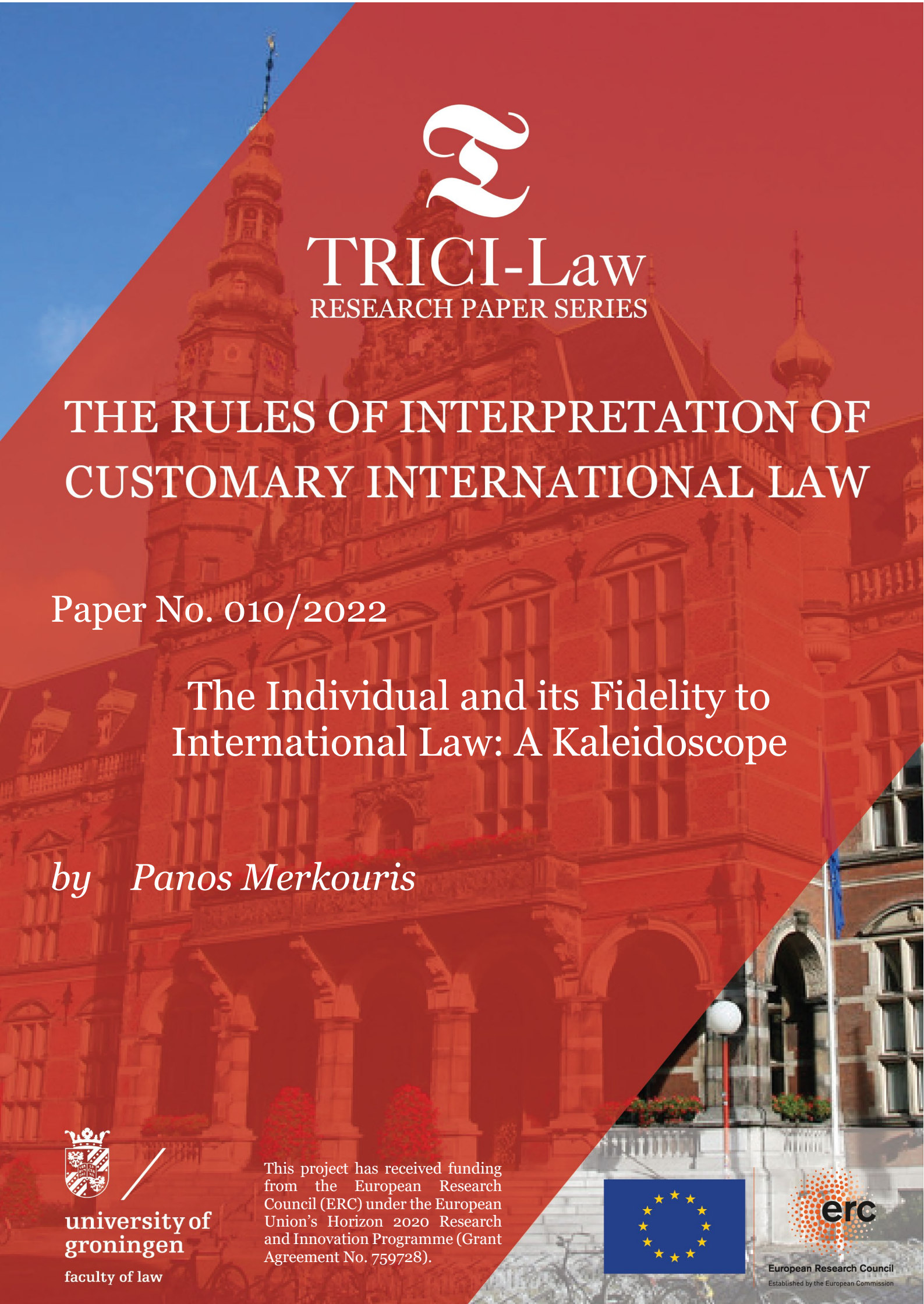

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The Individual and its Fidelity to International Law: A Kaleidoscope

by Panos Merkouris

university of groningen
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18. The individual and its fidelity to international law: A kaleidoscope – reply to Tamar Megiddo

Panos Merkouris

In the present edited volume, Dr Megiddo, in her contribution 'International Law as a Ground for Action', starts from a passionate call to arms for international lawyers to embrace 'constructivist methodological individualism', which places the individual's practice of international law centre stage in international law research.[1] Using that as a springboard, Dr Megiddo then examines international law's 'compliance pull' for individuals through the lens of two types of commitment, namely a disposition to comply with law and a fidelity to law.

In international law and the field of the subjects of international law, the debate surrounding the need to rethink who are the subjects of international law and the conditions for being considered as one is *nihil novum sub sole*. Voices such as the former President of the International Court of Justice (ICJ), Dame Rosalyn Higgins, and the former President of the Institut de Droit International, Emmanuel Roucounas, have long argued for the need of international law and research to focus on individuals, and other entities, as 'users' and 'participants' of international law[2] and for an analysis that goes beyond the classical two-level game analysis, to something more akin to a 'matryoshka-doll' or 'pluri-level game' analysis.[3] Several developments in international law as well have had as their focus not only the individual,[4] but

[1] Megiddo, T. (2019), 'Methodological Individualism', 60 *Harvard International Law Journal* 219.

[2] Higgins, R. (2010), *Problems and Process: International Law and How We Use It*, Oxford: Oxford University Press; Roucounas, E. (2010), 'The Users of International Law' in M. H. Arsanjani *et al* (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman,* The Hague: Brill, p. 217.

[3] Fabbricotti, A. (ed) (2016), *The Political Economy of International Law: a European Perspective*, Cheltenham: Edward Elgar.

[4] Human rights and international criminal law being the classical 'go to' examples, but also recent climate change litigation, see, for instance: Hesselman, M. (2021),

also other entities.[5] However, Dr Megiddo is right in her assertion that all these engage with the individual's practice of international law in a fragmented fashion and what is missing is a more systemic and systematic examination of the individual's engagement with the practice of international law in all its manifestations, which may assist in both theorising and comprehending this phenomenon.

Interestingly, however, if that is the case, it seems somewhat bizarre to focus solely on individuals and not also include other non-State legal entities, such as NGOs and corporations, that even in the example offered by Dr Megiddo (the 'We Are Still In' Declaration 2017) seem to have a vested interest in the engagement with and practice of international law. This can be further underlined if one considers two recent climate change cases, the *Urgenda* and *Shell* cases brought before Dutch courts. In the former, it was the Urgenda Foundation, which, on behalf of 886 Dutch citizens, brought a case before The Hague District Court that the Netherlands was in violation of its domestic and international duties to its citizens for not reducing greenhouse gas (GHG) emissions (*Urgenda Foundation v The State of the Netherlands*). In the latter, individuals, NGOs and corporations were not only the plaintiffs but also the defendants, which goes to show that the practice of international law cuts both ways. The environmental group Friends of the Earth together with six other bodies and more than 17,000 Dutch citizens brought a case in 2019 against Shell for its GHG emissions. The Hague District Court ruled that Shell must cut its CO_2 emissions by 45% compared to 2019 levels (*Friends of the Earth and others v Royal Dutch Shell Plc*).

Leaving aside the issue of whether 'constructivist methodological individualism' could be better served by a somewhat wider set of entities falling under the rubric 'individual' (so as to include also certain legal entities), let us now turn our attention to Dr Megiddo's very poignant and interesting analysis of fidelity. It is on this point that certain questions in need of an answer or at least further study arise (which in all honesty is part of Dr Megiddo's core argument and she herself provides examples where identifying the type or addressee of fidelity may not always be an easy task).

'Domestic Climate Litigation's Turn to Human Rights and International Climate Law' in Fitzmaurice, M., M. Brus and P. Merkouris (eds), *Research Handbook on International Law*, 2nd ed., Cheltenham: Edward Elgar; Alogna, I., C. Bakker and J.-P. Gauci (eds) (2021), *Climate Change Litigation: Global Perspectives*, The Hague: Brill; Kahl, W. and M.-P. Weller (2021), *Climate Change Litigation: A Handbook*, Oxford: Hart Publishing.

[5] See, for instance, the 2011 Ruggie Principles; Karavias, M. (2013), *Corporate Obligations under International Law*, Oxford: Oxford University Press.

Since international law is a decentralised system, what is the recipient of an individual's fidelity? Is it international law as whole, or specialised regimes? In the case of the former, what happens then in cases of conflict, since international law may require compliance in a situation that engages not only human rights, but also the protection of the environment, and/or investment rights which may be conflicting with each other? Will then the criterion not be more one of self-interest, thus rendering fidelity as nothing but one of the criteria, and not even a predominant one to that effect, if any at all? The same line of reasoning applies in the second scenario. If it is fidelity to a specialised regime, then are we not simply fragmenting international law, and also the concept of fidelity, with once again the driving force being one of self-interest as to which type of fidelity should be the overriding one?

The same could be asked even if a particular situation involves the same set of rights (for example, human rights), but for which multiple (quasi)-judicial remedies in different fora may be available. Take, for instance, the *Folgero and others v. Norway* case. This case involved a complaint lodged by non-Christian parents, whose children had not been granted by the Norwegian authorities full exemption from a compulsory subject in Christianity, religion and philosophy ('the KRL subject'). The complaint was lost at the domestic level, but the applicants then, potentially as a means of strategic litigation, split into two groups, with one lodging an application at the European Court of Human Rights (ECtHR) (*Folgero and others v Norway*) and the other a Communication to the Human Rights Committee (HRCttee) (*Leirvåg and others v Norway*). In this scenario, should we then characterise this as fidelity to international law *in abstracto*, as fidelity of one group to the ECHR system, and the other to the ICCPR system, or self-interest, coupled with risk diversification, 'forum shopping' with a dash (or not) of fidelity.

As a final point, when discussing the demand on a legal system of not making conflicting demands on individuals, Dr Megiddo very soberly raises the question on which system this demand should be made. The tendency, as she also very rightly points out, is for this to be a somewhat amphidromous (two-way) demand, although that is not always the case, as not all States share some type of 'Charming Betsy' principle. This is further evidenced by a series of recent cases, where domestic courts have gone down a rather dark path and instead of interpreting domestic law to cohere with international law, have gone the other way, namely interpreting (customary) law to cohere with domestic rules, either directly or indirectly (for example, by claiming a *lacuna* of international law that needs to be filled by domestic law, or by adopting a *Kadi*-like approach) (*Case No 2016 Ga-Hap 505092*; *Right of Canada v*

Edelson and others; *Sentenza No 238/2014*).[6] This is also something to be considered between international special regimes as well, as was evidenced in the aforementioned *Kadi* cases (UN and EU) but also more recently in the post-*Achmea* fallout between the EU and international investment law.

However, leaving the multifariousness of the solutions adopted by various States and international law to avoid apparent conflicts,[7] one additional point needs to be made regarding the example of the rules of interpretation enshrined in the Vienna Convention on the Law of Treaties (VCLT) (and their customary law counterparts) as a method of potentially ensuring that domestic and international law cohere. The example provided by Dr Megiddo is that of Article 31(3)(b), which provides that together with the context account shall be taken of 'any subsequent practice in the application of the treaty'. The issue, however, with this example is the following. As Article 31(3)(b) VCLT continues, such practice must establish 'the agreement of the parties regarding its interpretation'. Consequently, not only is such a practice not focused on a single State, but rather a 'common denominator' of the practice of State parties, but also it focuses more on the actions and practice of the States, thus, not clearly falling under the 'constructivist methodological individualism' that Dr Megiddo argues for. For that purpose and also the overall argument of avoiding conflict, it is the present author's view that two other interpretative venues[8] might be more apt for this line of argumentation. The first one is the principle of systemic integration as enshrined in Article 31(3)(c) VCLT, according to which account shall be taken of 'any relevant rules of international law applicable in the relations between the parties'. This interpretative tool has in recent years witnessed a flowering in case-law where it has been utilised as one of the main tools to avoid normative conflict and ensure harmonization through interpretation, while taking into account during the interpretative process the normative environment of the treaty or provision under interpretation.[9] The second and perhaps the one most relevant

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6 Which Peters has lamented is a deplorable return to Triepel: Peters, A. (2014), 'Let Not Triepel Triumph – How To Make the Best Out of Sentenza No 238 of the Italian Constitutional Court for a Global Legal Order', *EJIL Talk!,* https://www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/ (last accessed 30/06/2021).

7 Pauwelyn, J. (2003), *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge: Cambridge University Press.

8 There could be additional ones, such as Article 32 VCLT, but these two seem to be sufficient for the purpose of illustration.

9 Merkouris, P. (2015), *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave*, The Hague: Brill.

for the purposes of 'constructivist methodological individualism' is evolutive interpretation. Irrespective of whether one considers evolutive interpretation as a *praeter*-VCLT interpretative rule, as a mere exception to the principle of contemporaneity, or as falling under 31(1) or as an expression of the interpretative outcome arrived at through a proper application of Articles 31–2 VCLT,[10] it encapsulates several elements that could easily be seen as the influence of individuals[11] on international law. During evolutive interpretation, elements such as medical and scientific advancements (*Gabčíkovo–Nagymaros Project*; *Vo v France*; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*), societal and cultural changes (*The Right to Information on Consular Assistance*; *Öztürk v Germany*), moral developments (*Cossey v UK*), and even the socio-economic situation of a State, including current living conditions (*India – Certain Measures Relating to Solar Cells and Solar Modules*; *Argentina – Measures Relating to Trade in Goods and Services*; *Yakye Axa Indigenous Community v Paraguay*; *Case of the 'Street Children' v Guatemala*), have all been considered in order to interpret an international rule, and seem to be more aligned with the idea behind 'constructivist methodological individualism'.

In sum, the comments provided above are mere musings and cautious forays into the uncharted areas that Dr Megiddo's chapter beckons us to venture into. Further clarity is required in finding methods and frameworks by which we can account for and distinguish between not only different types of fidelity but also between fidelity and other factors that may come into play and affect the compliance pull of international law or not. Irrespective of whether one broadens the focus on the individual so as to include other entities as well, it is undeniable that they engage with and practise international law, that in their own small or large way contribute to its development and that they deserve further, systemic and systematic study both from a theoretical and a practical perspective.

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[10] Merkouris, P. (2014), '(Inter)temporal Considerations in the Interpretative Process of the VCLT: Do Treaties Endure, Perdure or Exdure?' 45 *Netherlands Yearbook of International Law* 121; Bjorge, E. (2014), *The Evolutionary Interpretation of Treaties*, New York: Oxford University Press; Djeffal, C. (2016), *Static and Evolutive Treaty Interpretation: A Functional Reconstruction*, Cambridge: Cambridge University Press.

[11] And of legal entities such as NGOs and corporations.

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