

CUSTOMARY INTERNATIONAL LAW AND ITS INTERPRETATION BY INTERNATIONAL COURTS

It is notorious that international courts and tribunals have greatly contributed to the development of customary international law (CIL) by, for instance, articulating the constituent elements of custom and clarifying the conditions required for its modification. This volume demonstrates that they have also been actively engaged in the interpretation of CIL. In elucidating CIL interpretation before and by international courts and tribunals, the volume chooses three focal points: theory, method and normative interactions. Viewing CIL and its interpretation from these vantage points leads to a more complete picture of the role and function of CIL interpretation in international courts. The volume encourages readers to question orthodox theories on CIL and its interpretation, to look anew at what has long been labelled as mere identification of custom, and to take a systemic approach to CIL, which, even in the process of interpretation, remains unwaveringly connected to treaties and general principles of law.

This title is also available as Open Access on Cambridge Core.

MARINA FORTUNA is Assistant Professor at the University of Groningen and member of the TRICI-Law project team. Her research focuses primarily on the practice of international courts, which she examines from the perspective of various topics in general international law.

KOSTIA GOROBETS is Assistant Professor of International Law at the University of Groningen. He specialises in analytical jurisprudence and philosophy of international law, as well as in their interplay.

PANOS MERKOURIS is Professor of International Law at the University of Groningen. He is Principal Investigator of the TRICI-Law project (ERC Grant Agreement No. 759728). Professor Merkouris has written extensively on the law of treaties, sources and interpretation, most recently authoring *Interpretation of Customary International Law: Of Methods and Limits* (2024).

ANDREAS FOLLESDAL is Professor of Political Philosophy at the Faculty of Law, University of Oslo. He co-directed PluriCourts and was Principal Investigator of ERC Advanced Grant MultiRights 2011–16. He publishes in the field of political philosophy, mainly on international political and legal theory, globalisation/Europeanisation and human rights. He is Fellow at Wissenschaftskolleg zu Berlin 2023–24.

GEIR ULFSTEIN is Professor Emeritus of International Law at the University of Oslo, where he also co-directed PluriCourts. He is President of the Norwegian Branch of the International Law Association (ILA) and winner of the University of Oslo Research Award 2021 (with Andreas Follesdal). He has published in various areas of international law, including the law of the sea, international environmental law, international human rights, international institutional law and international courts.

PAULINE WESTERMAN is Professor of Philosophy of Law at the University of Groningen, a member of staff at the Academy for Legislation in The Hague and a member of the Royal Dutch Academy of Sciences. Her research focuses on the making of law, the formation of soft law and the emergence and development of international law.

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 thanks to the generous funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No 759728) and the University of Groningen.

General Editor
Panos Merkouris
University of Groningen

CUSTOMARY
INTERNATIONAL LAW
AND ITS
INTERPRETATION BY
INTERNATIONAL
COURTS

Theories, Methods and Interactions

Edited by

MARINA FORTUNA

University of Groningen

KOSTIA GOROBETS

University of Groningen

PANOS MERKOURIS

University of Groningen

ANDREAS FOLLESDAL

University of Oslo

GEIR ULFSTEIN

University of Oslo

PAULINE WESTERMAN

University of Groningen



CAMBRIDGE
UNIVERSITY PRESS



CAMBRIDGE
UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment,
a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of
education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781009541329

DOI: [10.1017/9781009541312](https://doi.org/10.1017/9781009541312)

© Cambridge University Press & Assessment 2024

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, with the exception of the Creative Commons version the link for which is provided below, no reproduction of any part may take place without the written permission of Cambridge University Press & Assessment.

An online version of this work is published at doi.org/10.1017/9781009541312 under a Creative Commons Open Access license CC-BY-NC-ND 4.0 which permits re-use, distribution and reproduction in any medium for non-commercial purposes providing appropriate credit to the original work is given. You may not distribute derivative works without permission. To view a copy of this license, visit <https://creativecommons.org/licenses/by-nc-nd/4.0>

When citing this work, please include a reference to the DOI [10.1017/9781009541312](https://doi.org/10.1017/9781009541312)

First published 2024

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Merkouris, Panos, editor. | Føllesdal, Andreas, editor. | Ulfstein, Geir, 1951– editor. | Westerman, Pauline, editor. | Gorobets, Kostia, editor. | Fortuna, Marina, 1995– editor.

Title: Customary international law and its interpretation by international courts : theories, methods, and interactions / edited by Panos Merkouris, Rijksuniversiteit Groningen, The Netherlands; Andreas Føllesdal, Universitetet i Oslo; Geir Ulfstein, Universitetet i Oslo; Pauline Westerman, Rijksuniversiteit Groningen, The Netherlands; Kostia Gorobets, Rijksuniversiteit Groningen, The Netherlands; Marina Fortuna, Rijksuniversiteit Groningen, The Netherlands.

Description: Cambridge, United Kingdom; New York, NY : Cambridge University Press, 2024. | Series: Tric the rules of interpretation of customary international law | Includes bibliographical references and index. | Contents: The illusion of gold-digging : interpretation of state practice / Pauline Westerman – Addressing the chronological paradox : constitutive rules and the constructive interpretation of CIL / Henrique Marcos – Interpreting the plural sources of CIL / Harlan Grant Cohen – Interpretation dynamics in CIL : an entropic approach / Eleni Micha – The application of logic and reason in CIL interpretation / William Worster – The interpretation of 'direction and control' in the investor state arbitration : the case of state-owned enterprises / Paula Baldini Miranda da Cruz – The Court of Justice of the EU and CIL interpretation : close encounters of a third kind? / Tamaš Molnár – Judicial effectiveness or judicial ambiguity : is CIL an instrument for judicial activism in excess? / Leoni Ayoub – Judicial dialogue between international courts in the interpretation of customary international human rights law / Silviana Cocan – 'General principles of law' and the interpretation of CIL / Craig Eggett – The role of treaties and general principles of law in the interpretation of customary rules / Marina Fortuna – Reconciling conflicting norms of CIL-towards a mode of practical concordance at the ICJ / Raphael Oidtmann – Indicators of coherence and interpretation of CIL / Charalampos Giannakopoulos.

Identifiers: LCCN 2024020480 | ISBN 9781009541329 (hardback) | ISBN 9781009541312 (ebook)

Subjects: LCSH: Customary law, International – Interpretation and construction. | International courts.

Classification: LCC KZ1277 .I58 2024 | DDC 340.5–dc23/eng/20240509

LC record available at <https://lcn.loc.gov/2024020480>

ISBN 978-1-009-54132-9 Hardback

Cambridge University Press & Assessment has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.