

Schrödinger's Custom

Implications of Identification on the Interpretation of Customary International Law

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One can even set up quite ridiculous cases. A cat is penned up in a steel chamber, along with the following diabolical device (which must be secured against direct interference by the cat): in a Geiger counter there is a tiny bit of radioactive substance, so small, that perhaps in the course of one hour one of the atoms decays, but also, with equal probability, perhaps none; if it happens, the counter tube discharges and through a relay releases a hammer which shatters a small flask of hydrocyanic acid. If one has left this entire system to itself for an hour, one would say that the cat still lives if meanwhile no atom has decayed. The first atomic decay would have poisoned it. The ψ -function of the entire system would express this by having in it the living and the dead cat (pardon the expression) mixed or smeared out in equal parts.

Erwin Schrödinger, "The Present Situation in Quantum Mechanics"¹

¹ Translation taken from JD Trimmer, "The Present Situation in Quantum Mechanics: A Translation of Schrödinger's "Cat Paradox" Paper" (1980) 124(5) Proceedings of the American Philosophical Society 323, 328. The original reads:

Man kann auch ganz burlleske Fälle konstruieren. Eine Katze wird in eine Stahlkammer gesperrt, zusammen mit folgender Höllenmaschine (die man gegen den direkten Zugriff der Katze sichern muß): in einem Geigerschen Zählrohr befindet sich eine winzige Menge radioaktiver Substanz, so wenig, daß im Lauf einer Stunde vielleicht eines von den Atomen zerfällt, ebenso wahrscheinlich aber auch keines; geschieht es, so spricht das Zählrohr an und betätigt über ein Relais ein Hämmerchen, das ein Kölbchen mit Blausäure zertrümmert. Hat man dieses ganze System eine Stunde lang sich selbst überlassen, so wird man sich sagen, daß die Katze noch lebt, wenn inzwischen kein Atom zerfallen ist. Die ψ -Funktion des ganzen Systems würde das so zum Ausdruck bringen, daß in ihr die lebende und die tote Katze (s. v. v.) zu gleichen Teilen gemischt oder verschmiert sind.

See E Schrödinger, 'Die gegenwärtige Situation in der Quantenmechanik' (1935) 23(49) Die Naturwissenschaften 807, 812.

1 Introduction

Normative efforts in international law – including interpretation – must be grounded on a sound ascertainment of the sources of legal obligation. What might appear as a comforting truism for followers of black letter law seems an almost unattainable quest when it comes to the identification of international custom. This chapter proposes a pragmatic positivist approach to the identification of non-consensual, unwritten law: Schrödinger's custom. If the classic textbook 'two-element' theory of customary international law (CIL) is valid – and the ILC still seems to think it is² – then at least half of the identification process consists of an empirical assessment. It requires to look at – to follow the title of Louis Henkin's seminal work³ – how nations behave. Under the classical view of realism, states act according to a set of inherent interests. These may provide a compass for orientation through the haze of normative propositions. The chapter begins by characterising CIL among the sources from which international rights and obligations arise (Section 2). It then moves on to depict the process of identification referred to here as Schrödinger's custom including its implications for the issue of custom interpretation (Section 3). On that basis, it discusses how international relations theory may help predict the outcome of the identification process (Section 4). A conclusion rounds it all off. (Section 5).

2 Custom as a Source of Legal Obligation

If one accepts the catalogue of manifestations of international law in Article 38(1)(a)–(c) of the Statute of the International Court of Justice as an expression of universal state consensus,⁴ one must look for 'international custom, as evidence of a general practice accepted as law'. Without overthinking the implications of the wording referring to custom *as* the evidence as opposed to being evidenced *by* 'a general practice

² See ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 122, Conclusion 2.

³ See L Henkin, *How Nations Behave. Law and Foreign Policy* (2nd ed, Columbia University Press 1979).

⁴ See in this regard the slightly ambiguous wording of the ICTY in *Đorđević* considering Article 38(1) of the Statute of the International Court of Justice as customary international law, *Prosecutor v Vlastimir Đorđević* (Judgment) IT-05–87/1-A (27 January 2014) [33].

accepted as law',⁵ one could simply take the provision at face value: references to custom as a source of legal obligation imply the existence of evidence as to 'a general practice accepted as law'. Invocation of custom proposes the possibility of identifying both state practice and *opinio juris*, making 'international custom' and 'evidence of a general practice accepted as law' synonymous sides of an equation.⁶ In this view, 'international custom' comprises both the process of identification (*Rechtserkenntnis*) and the underlying acts of law creation (*Rechtserzeugung*).⁷

How may these underlying acts be characterised? The element of 'practice' reaches directly into international relations as they are conducted on a daily basis. In addition, for something to constitute custom, the respective behaviour must follow a sense of legal obligation. This has led certain strands in the literature to equate custom with tacit agreements.⁸ Yet the general principles of law *ut res magis valeat quam pereat*⁹ and *favor contractus*¹⁰ carry the assumption that states adopting Article 38 of the Statute of the International Court of Justice intended to give meaning to its words. That custom is unwritten, unless it is codified, seems uncontested. But following 'international conventions, whether general or particular, establishing rules expressly recognized', 'a general practice accepted as law' must also mean something other than a consensual agreement. Unless one were to stretch the word 'convention' beyond its ordinary meaning under international law (for the lay use of the term might actually be synonymous with custom), Article 38(1)(a) refers to 'agreements'. As such, these may be written or unwritten, even implicit in the form of a tacit agreement.¹¹ When the Statute of the International Court of Justice requires that they establish 'rules expressly

⁵ See on this already M Beham, *State Interest and the Sources of International Law: Doctrine, Morality, and Non-Treaty Law* (Routledge 2018) 90.

⁶ The equation being 'international custom = evidence of a general practice accepted as law'.

⁷ On the distinction between creation and identification, see H Kelsen, *Reine Rechtslehre* (2nd ed, Franz Deuticke 1960).

⁸ See Beham (n 5) 81–83.

⁹ That a provision should rather be given effect than ignored.

¹⁰ That, in doubt, an agreement be upheld.

¹¹ Confirming this understanding also American Law Institute, *Restatement of the Law. The Foreign Relations of the United States: Vol 1* (American Law Institute Publishers 1987) 149 [301] Comments a & b; ILC, 'Report on the Work of the Sixty-fifth Session' (6 May–7 June and 8 July–9 August 2013) UN Doc A/68/10, 32 [5] Commentary to Conclusion 4 'Definition of Subsequent Agreement and Subsequent Practice'.

recognized by the contesting states', this refers to the express recognition inherent in the process of reaching an 'agreement'.

If one were now to equate 'a general practice' with 'international conventions, whether general or particular' and 'accepted as law' with 'establishing rules expressly recognized', no sense would be given to the two separate provisions included in Article 38(1) of the Statute of the International Court of Justice. In short, *opinio juris* cannot simply be equated to an oral or tacit agreement. Still, it represents a quasi-consensual element, in that states could equally choose to answer the question 'did you just behave that way because you thought there is a legal obligation to do so' negatively.¹²

3 Identification

The state of CIL is in constant flux. The paradox that a customary norm must first be broken in order for a new one to arise, follows the Linnaean urge of scholars to sort and categorise their surroundings. But this approach does not do justice to the dynamic nature of a set of norms that is largely dependent upon the interaction of states.¹³ While an awareness of certain trends within a particular area of law is both useful

¹² See however on the difficulties of determining *opinio juris* S Verosta, *Theorie und Realität von Bündnissen: Heinrich Lammasch, Karl Renner und Der Zweibund (1897–1914)* (Europa Verlag 1971) XXI:

Das Vorhandensein – oder Nichtvorliegen – der Rechtsüberzeugung kann aus den Regierungserklärungen und Parlamentsdebatten nicht immer eindeutig festgestellt werden. Sowohl die Rechtslage als auch die Tatsachen sind, wenn die Entscheidungen – meist unter Zeitdruck – gefällt werden, oft nur einer kleinen Zahl von Personen bekannt. Erst wenn die Akten, vor allem der Außenämter, freigegeben werden und Memoiren erschienen sind, läßt sich völkerrechtlich ein abschließendes Urteil bilden. Das erfordert ein eingehendes und mühseliges Studium, das oft überraschende Ergebnisse hat, wie sich auch aus dieser Untersuchung ergibt. [The existence – or non-existence – of a legal conviction cannot always be clearly ascertained from governmental statements and parliamentary debates. When a decision is made – oftentimes under time pressure – the legal situation as well as the facts are mostly only known to a small circle of people. Only once the files, especially of foreign offices, are released and memoirs have been published, can there be a final determination as pertaining to international law. This requires detailed and arduous study that often brings forth surprising results as also evident from this analysis. Translation by the author.]

¹³ Which does not imply that CIL is little more than a discursive recognition process. See for instance M Hakimi, 'Making Sense of Customary International Law' (2020) 118 *MichLRev* 1487.

and necessary to satisfy expectations towards the rule of law, a full assessment is only necessary once a specific argument is put forward. Like a snapshot photograph, CIL is identified at a certain point in time, be it within judicial proceedings or in a scholarly publication.¹⁴ Since custom implies both identification and creation, their temporal dimensions collapse. The view that CIL is made in the past becomes a myth.¹⁵

Custom forms only in the present, once it is invoked and an observer is introduced. Explanatory aid may be sought from the famous thought experiment of Austrian physicist Erwin Schrödinger.¹⁶ In his (for pet lovers luckily only theoretical) experimental set-up, a cat is placed in a steel chamber together with a vial of deadly acid that is released the moment an atom from a piece of radioactive material decays. However, it is equally probable that the radioactive material does not decay. Without an observer, there is no knowing whether the atom has decayed. Until that point in time, both the living and the dead cat must be assumed to exist. They are 'mixed or smeared' together.¹⁷ What Schrödinger intended as an illustration of the paradox between reality and theoretical quantum-mechanics may easily be transposed to the problem of CIL formation. Until an observer is introduced, it is unclear how many states have already engaged in practice accompanied by *opinio juris*.

This should not be mistaken with the identification of an exact point in time at which a particular norm of CIL was created. The question is only as to the present existence of 'evidence of a general practice accepted as law'. As Maurice Mendelson pointedly illustrated,

it makes no more sense to ask a member of a customary law society 'Exactly how many of you have to participate in such-and-such a practice for it to become law' than it would to approach a group of skinheads in the centre of The Hague and ask them, 'How many of you

¹⁴ See in this sense also M Mendelson, 'The Subjective Element in Customary International Law' (1995) 66 BYBIL 177, 203:

One way of dealing with this difficulty [the paradox of CIL formation] is to ignore it. Often, the 'consumer' of legal rules does not need to know when the fruit ripened, but simply whether it is ripe when he comes to eat it, or is still too hard or sour to eat. Indeed (to change the metaphor), to ask a follower of fashion at what point exactly something became the mode is in a sense to miss the point of informal rule-systems.

¹⁵ See Chapter 2 by d'Aspremont in this volume.

¹⁶ This analogy was first formulated by the author as a helpful illustration of the paradoxical formation of CIL in M Beham, M Fink & R Janik, *Völkerrecht verstehen* (Facultas 2015) 49; see also Beham (n 5) 91–93.

¹⁷ Schrödinger (n 1).

had to start wearing a particular type of trousers for it to become the fashion – and, indeed, *de rigueur* – for members of your group? ... The customary process is in fact a continuous one, which does not stop when the rule has emerged, even if one could identify that exact moment. To illustrate the point, I would like to introduce a simile. ... My simile is the building of a house. It is often not easy or even possible to say exactly when a house has been created. Clearly, it is not when the first foundation stone is laid. But it is not when the last lick of paint has been added either. It is problematic at exactly what point we could say ‘This is a house’. Do we have to wait for the roof to go on, for the windows to be put in, or for all of the utilities to be installed? So it is with customary international law.¹⁸

Rather than the point of formation, the observer will ‘take a still photograph, so to speak, of the state of the (customary) law at a given moment’,¹⁹ the *lex lata*. The relevant question in practice – and in scholarship, for that matter – will mostly be the application of a certain rule to a particular set of circumstances, rather than a historic narrative of when and how a rule has formed.²⁰ In Charles De Visscher’s words, ‘[i]n international relations more than elsewhere, the fact precedes its classification’.²¹ The result is simply a manifestation of the dynamic character of international relations.

In our experiment, what do we imagine this observer to look like? Obviously, it cannot be a lobbyist or policymaker, nor an idealist international lawyer.²² So, should it be a judicial robot, an algorithm fed with empirical data? While this idea of an objective assessment seems attractive at first, it is hard to see how this would deliver equitable results; more

¹⁸ M Mendelson, ‘The Formation of Customary International Law’ (1998) 272 RdC 155, 173–75, 284.

¹⁹ *ibid* 253.

²⁰ G Scelle, ‘Essai sur les Sources Formelles du Droit International’ in C Appleton (ed), *Recueil d’Études sur les Sources du Droit en l’Honneur de François Gény: Tome III: Les Sources des Diverses Branches du Droit* (Sirey 1934) 400: ‘Mais la source suppose une nappe souterraine, parfois inconnue ou mal connue, dont l’existence est pourtant indiscutable, puisque les sources sans elle n’existeraient pas’. [‘But the source assumes an underground water level, sometimes unknown or poorly known, though its existence is indisputable since the sources would not exist without it.’ Translation by the author.] Of course, the establishment of CIL at a certain point in time will require engaging with the existing narrative.

²¹ C De Visscher, *Theory and Reality in Public International Law: Revised Edition* (Princeton University Press 1968) 153.

²² See, with regard to the efforts of the International Committee of the Red Cross in collecting and codifying customary international humanitarian law, JB Bellinger III & WJ Haynes II, ‘A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law’ (2007) 89 IRRC 443.

likely, such a sterile approach to law identification – which ultimately relies on the interaction of states as raw data – might result in a ‘Bizarro World’ image of international law. The fact that states torture with the conviction that they have a legitimate basis for doing so – one must only think of the ‘ticking time bomb’ scenario²³ – would result in a permissive rule allowing torture under such circumstances.

The analysis requires an underlying human corrective. It is in the same sense that Andreas Paulus and Bruno Simma speak of the need for an ‘enlightened positivism’.²⁴ It would seem fitting to rely on the proverbial man on the Clapham omnibus. This reasonable – we might also imagine ‘extra-terrestrial’ – is neither an idealist, nor a cynic, neither a revisionist, nor an innovator. As little is he driven by a particular national interest, as by the ideal of the international community as a *civitas maxima*. Admittedly, this is a ‘you know it, when you see it’ approach, but in combination with the identification of CIL restricted to a certain point in time it will surely allow for a more grounded assessment of the body of CIL than any elaborate game theory model or natural law-based impulse. Occam’s razor will easily help in the identification of state practice and *opinio juris*.²⁵

What does this imply for the act of interpretation? If the temporal dimensions of creation and identification collapse, it can only result in ‘instant interpretation’. As custom is frozen in the moment of its invocation, any statement about its future application becomes meaningless. Instead, custom must be repeatedly reassessed, unless there is a good faith assumption that the original invocation still constitutes ‘evidence of a general practice accepted as law’. Any subsequent practice always paves the road towards new custom. Taking the example of a codification, if one were to ‘interpret’ its content for purposes of clarification, one would either be interpreting ‘subsidiary means for the determination of rules of law’²⁶ to help identify such ‘international custom, as evidence of a general practice accepted as law’,²⁷ or again

²³ See in this respect for example *Gäfgen v Germany* [GC] ECtHR, App No 22978/05 (1 June 2010).

²⁴ AL Paulus & B Simma, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’ (1999) 93(2) AJIL 302, 307.

²⁵ See JJ Paust, ‘The Complex Nature, Sources and Evidences of Customary Human Rights’ (1996) 25 GaJInt'l&CompL 147, 149–50.

²⁶ Article 38(1)(d) Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

²⁷ On the process of courts engaging in the interpretation of custom see Chapter 21 by Mileva in this volume.

engage in the identification of the underlying acts of law creation, thereby acting as an observer to ‘Schrödinger’s custom’.

4 State Interest

Are the implications of this mode of identification on the interpretation of CIL that it simply becomes unpredictable? As Malcolm Shaw writes, ‘[c]hange is rarely smooth but rather spasmodic’.²⁸ If state practice follows day-to-day world affairs, international relations theory might help. As Louis Henkin convincingly laid out in his seminal work *How Nations Behave*, states act according to carefully calculated interests and dependent upon the consequences of their conformity to or violation of international law.²⁹ This approach is, generally, quite similar to the economic theory of negligence that ‘[w]hen the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability’.³⁰

The term ‘interest’ derives from the Latin *interesse*, which carries the meaning ‘to differ’ or ‘to make a difference’. The interest is something that makes a difference to someone – or, if speaking of a juridical entity, to something. In discussing these issues, one is always confronted with the problem of anthropomorphising states.³¹ Some writers have gone as far as to argue that states are not capable of holding such interests, ‘as if artificial entities could have discernible motivations’.³² However, this position overlooks the idea of statehood as represented through the collective of individual actors with a common agenda. Just as what makes a difference for an individual employee does not necessarily make a difference for a corporation, it does not necessarily make a difference for a state.³³

²⁸ M Shaw, *International Law* (8th ed, Cambridge University Press 2017) 65.

²⁹ Henkin (n 3). For a rational choice version of this approach see JL Goldsmith & EA Posner, *The Limits of International Law* (Oxford University Press 2005). For a general overview of the various compliance theories see M Burgstaller, *Theories of Compliance with International Law* (Martinus Nijhoff 2005).

³⁰ R Posner, ‘A Theory of Negligence’ (1972) 1 JLS 32.

³¹ See J Frankel, *National Interest* (Macmillan 1970) 115: ‘More generally, the tendency to personalize the state and to compare its goals and needs with those the individuals, if pushed too far, inevitably leads to confusion.’

³² A D’Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 271.

³³ Dino Kritsiotis sarcastically refers to this construction of states as ‘corporate Hobbesian offspring’. D Kritsiotis, ‘Reappraising Policy Objections to Humanitarian Intervention’ (1998) 19(4) *MichJIntlL* 1005, 1008–13.

Each entity, the natural person as well as the juridical body, carries distinct goals and purposes. Some may correlate, some may differ. It is the nature of the respective actor that determines the interest.

The expression 'state interest' or 'national interest',³⁴ as it is sometimes found in the literature, confers the idea that there must be a common set of factors that are important to the existence of the abstract entity of the state. At the same time, it has been suggested that 'no agreement can be reached about its ultimate meaning'.³⁵ Still, it seems to be an important factor in decision-making of political stakeholders,³⁶ best reflected in the anecdotal quotes of Charles De Gaulle and Henry Kissinger that their respective states had 'no friends' but 'only interests'. That states ultimately strengthen and enrich themselves at the cost of others cannot shock an international lawyer since Emer de Vattel's 1758 publication of *Le Droit des Gens*.³⁷

The idea that law formation follows the interplay of interests is also not particularly new. Carl Schmitt – the Dooyeweerd of German people³⁸ – already argued that public international law in the nineteenth century rested less on ideas of sovereignty than on a selection of specific state interests.³⁹ Jean d'Aspremont found that '[e]ven liberals and constitutionalists agree that States first strive to promote their own interests' and that 'they naturally act to maximize the interest of their constituency given their perception of the interests of other States and the distribution of State power'.⁴⁰ Martti Koskenniemi has called reference to this fact a 'truism, present since Vattel'.⁴¹ Richard Steinberg convincingly showed how different schools of international legal thought and international relations theory resorted to realism whenever

³⁴ For a general caveat on the use and usefulness of the term 'state interest' see B Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge* (Duncker & Humblot 1972) 75–77.

³⁵ Frankel (n 31) 15.

³⁶ *ibid* 18.

³⁷ E de Vattel, *Le Droit des Gens: Ou Principes de la Loi naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains. Tome I* (London 1758) 268 [16] (misprinted as [17]).

³⁸ See Chapter 5 by Regalado Bagares in this volume.

³⁹ C Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien* (Duncker & Humblot 1963) 115.

⁴⁰ J d'Aspremont, 'The Foundations of the International Legal Order' (2007) 18 *FYBIL* 219, 228.

⁴¹ M Koskenniemi, 'The Place of Law in Collective Security' in M Koskenniemi (ed), *The Politics of International Law* (Hart 2011) 79, 91.

they dealt with states.⁴² Today, Martin Dixon begins his introductory textbook on international law by finding that '[i]t is true of all legal systems that vital interests of its subjects may prevail over the dictates of the law'.⁴³ According to Malcolm Shaw, the motivation behind an act of a state lies within the way in which 'it perceives its interests', which again depends upon 'the power and role of the State and its international standing'.⁴⁴

What are these supposed interests that determine the probability of state action? For any realist, states are driven by two principal considerations: first, national security, comprising the protection of statehood, territorial integrity, as well as sovereignty, and, second, a functioning economy. Gerhard Hafner identified five traditional areas of state interest: 'the protection of statehood, territorial integrity, sovereignty, security and economic wealth'.⁴⁵ Nicholas Onuf speaks, in the Hobbesian tradition, of 'standing, security, and wealth'.⁴⁶ Recalling the definition of what constitutes a state, these 'traditional' interests are inextricably linked to its 'survival'.⁴⁷ Each student of international law knows that the 'primary subjects'⁴⁸ of international law consist of a permanent population, a defined territory and a government.⁴⁹ Recalling this definition, these

⁴² See RH Steinberg, 'Wanted – Dead or Alive: Realism in International Law' in JL Dunoff & MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press 2013) 146.

⁴³ M Dixon, *Textbook on International Law* (7th ed, Oxford University Press 2013) 15.

⁴⁴ Shaw (n 28) 58.

⁴⁵ G Hafner, 'Some Thoughts on the State-Oriented and Individual-Oriented Approaches in International Law' (2009) 14 ARIEL 27, 29. He goes on: 'Under the traditional perspective, international law generated by states had to reflect a behaviour of states that was deemed to be reasonable. Such reasonable state conduct was expected to be motivated by the intention of maximising power, comparable with the REM hypothesis, i.e., the conduct of a rational, egoistic and maximising man.' See *ibid.*

⁴⁶ N Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (USC Press 1989) 258–79.

⁴⁷ See Frankel (n 31) 131–32; Onuf (n 46) 278. See on this notion in jurisprudence also *Legality of the Threat and Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 241 [96–97]; furthermore, Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts 2001 (ARSIWA) allows necessity as a ground for precluding wrongfulness if the act 'is the only way for the State to safeguard an essential interest against a grave and imminent peril' and 'does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole', ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, reproduced in [2001/II – Part Two] YBILC 31, art 25 (hereinafter ARSIWA).

⁴⁸ A Cassese, *International Law* (2nd ed, Oxford University Press 2005) 71.

⁴⁹ See G Jellinek, *Allgemeine Staatslehre* (3rd ed, O Häring 1914) 71.

'traditional' interests are inextricably linked to the 'survival' of a state. In a sense, to anthropomorphise states once more, this feature is not so different from the 'survival instinct' of individuals. The latter are equally interested in escaping the Hobbesian *bellum omnium contra omnes* before all else. The social contract that allows for this escape wants to be upheld. Thereby, state interest is equated with the survival of the state.⁵⁰ Without territory, without governmental control, it lacks its constitutive elements.

While states require individuals to take action on their behalf, these 'do not act on their own account but as State officials, as the tools of the structures to which they belong',⁵¹ a view that is further reflected in the rules of attribution in the International Law Commission's Articles on State Responsibility.⁵² The state organs are limited by the framework that is the respective state, even if this is little more than the collectivity of individual decisions. Its economy, social structure, and cultural heritage will largely determine what is opportune. Thus, states may weigh their interests differently and in accordance with additional factors such as ideology, be it liberal democracy, socialism, or some pan-territorial or ethnic component.⁵³ Still, the definition of the state is tainted by the fact that individuals act on its behalf. The way it is externally perceived is shaped by its successive governments. Therefore, it is important to differentiate between the state, its organs, and its population in making any determinations as to its character. Brierly defined the state exactly along these lines as 'a system of relations which men establish among themselves as a means of securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on'. At the same time, he cautioned that the state 'should not be confused with the whole community of persons living on its territory', as 'it is only one among a multitude of other institutions, such as churches and corporations, which a community established for securing different objects'.⁵⁴ Yet

⁵⁰ See M Wight, 'Why Is There No International Theory?' (1960) 2 *International Relations* 35, 48: 'International theory is the theory of survival'; see also *Legality of the Threat or Use of Nuclear Weapons* [96–97].

⁵¹ Cassese (n 48) 4.

⁵² ILC, 'ARSIWA', arts 4–11.

⁵³ What Yadh Ben Achour calls 'civilisation', giving the states 'its cohesive spiritual power, its ideology' [translation by the present author]. YB Achour, *Le Rôle des Civilisations dans le Système International (Droit et Relations Internationales)* (Editions Bruylant/Editions de l'Université des Bruxelles 2003) 19.

⁵⁴ JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Humphrey Waldock ed, 6th ed, Clarendon Press 1963) 126.

this is little different from the way that multi- or transnational corporations such as Walmart, Royal Dutch Shell, or ExxonMobil are perceived against the background of a change in the board of directors. Only in extreme situations such as a revolution, is it likely that states entirely change their character on the initiative of a government or other persons or groups of persons exercising authority. States, as all other legal entities, are fictions to express the idea that individuals may come together to create an entity that pursues goals not necessarily representing their own and vice-versa. Even Immanuel Kant, one of those authors most championed for the cause of lofty values, pointed out that the wellbeing of the state – the ‘*Heil des Staates*’ – does not necessarily correspond with the wellbeing or happiness of its respective citizens.⁵⁵

A number of structural arguments have been brought against this view. For example, the need of states ‘to include [NGOs] in their foreign policy analysis and respect their interests in the process of creating norms of international law’ as a result of ‘the power exercised by them through the use of media and similar means’.⁵⁶ However, these are means to an end:⁵⁷ the survival of states and, in this case, governments. These will likely set acts in the name of a state that aim at preventing civil unrest, cultivating a happy electorate,⁵⁸ attracting investment and highly skilled labour, securing development aid, gaining admission to an international organisation – the list goes on.⁵⁹ There is also still a certain impetus of morality determining action in the face of mass human rights violations or unrestrained warfare.⁶⁰ But this altruistic impulse seems often by itself too weak to spur any form of meaningful intervention.⁶¹ Notwithstanding, the constitutionalist or Kantian argument still stands strong within international legal scholarship, spurred by Wolffian ideas

⁵⁵ I Kant, *Die Metaphysik der Sitten. Erster Theil: Metaphysische Anfangsgründe der Rechtslehre* (2nd ed, Friedrich Nicolovius 1798) 202.

⁵⁶ See Hafner (n 45) 35; Paulus & Simma (n 24) 306; Paust (n 25) 160–61.

⁵⁷ See PH Imbert, ‘L’Utilisation des Droits de l’Homme Dans les Relations Internationales’ in Société Française pour le Droit International (ed), *Colloque de Strasbourg: La Protection des Droits de l’Homme et l’Évolution du Droit International* (Éditions Pedone 1998) 282–83.

⁵⁸ See on these two considerations vis-à-vis foreign policy interests Frankel (n 31) 132.

⁵⁹ See Goldsmith & Posner (n 29) 109–19.

⁶⁰ See HJ Morgenthau & KW Thompson, *Politics Among Nations: The Struggle for Power and Peace* (6th ed, Alfred A Knopf 1985) 249–60; HJ Morgenthau, ‘The Twilight of International Morality’ (1948) 58(2) *Ethics* 79, 82.

⁶¹ See in this regard also M Walzer, ‘The Moral Standing of States: A Response to Four Critics’ (1980) 9(3) *Phil&PubAff* 209, 226–27.

of a *civitas maxima*.⁶² Its moral superiority is, after all, compelling.⁶³ Equally, state interest is not a one-way street. Interests of other states must be taken into account at some level, in particular in an international relations reality that has become dominated by a universal international organisation that is the United Nations.⁶⁴ Yet, this is a simple outcome of the discourse within which international relations take place,⁶⁵ already identified and incorporated by structural realism.⁶⁶ Yet 'subsidiary interests' will not necessarily predict what states will do, when competing core interests of survival arise. In such cases, states will usually resort to 'Realpolitik'.⁶⁷ They will, generally, not compromise on their interests out of altruistic motives – in this case vis-à-vis states – or out of concern for public opinion.⁶⁸ Even Gerhard Hafner, who takes a position that emphasises the role of the individual in international law, concedes that states take all the weight in this balance of interests when he writes that 'the reflection of the – nevertheless increasing – individual-oriented interests in norms of international law still depends on the will of states'.⁶⁹

Equally, the constitutionalist argument does not stand empirical scrutiny. Just as states will bulldoze over public image considerations, whenever their survival interests are at stake, states will limit their activism with regard to *jus cogens* and *erga omnes* obligations to situations in which their own interests are concerned.⁷⁰ In the competition of 'first-order reasons', to borrow Joseph Raz's terminology,⁷¹ interests related to the survival of the states will, naturally, prevail. In absence of an

⁶² See for such a Wolfian *civitas maxima* view of the international community MC Bassiouni, 'Advancing the Responsibility to Protect Through International Criminal Justice' in RH Cooper & J Voïnov Kohler (eds), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Palgrave Macmillan 2009) 31, 36–37.

⁶³ See in this regard also A Somek, 'From the Rule of Law to the Constitutional Makeover: Changing European Conceptions of Public International Law' (2011) 18(4) *Constellations* 576, 578.

⁶⁴ See also the wording of Article 25 of ILC ARSIWA (n 47).

⁶⁵ MC Bassiouni, 'Revisiting the Architecture of Crimes Against Humanity: Almost a Century in the Making, with Gaps and Ambiguities Remaining – the Need for a Specialized Convention' in LN Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011) 43.

⁶⁶ See fundamentally KN Waltz, *Theory of International Politics* (Addison Wesley 1979).

⁶⁷ See in this regard Imbert (n 57) 283; Frankel (n 31) 154–55.

⁶⁸ See Frankel (n 31) 152.

⁶⁹ Hafner (n 45) 28–29, 39.

⁷⁰ See Cassese (n 48) 210.

⁷¹ See J Raz, *The Authority of Law: Essays on Law and Morality* (2nd ed, Oxford University Press 2009) 34.

exclusionary rule, a state will balance these interests in accordance with their respective 'strength' or 'weight'.⁷² A ready example is the primacy that states accord to national security considerations over basic citizens' rights in the face of terrorism.⁷³ Altruistic obligations, in particular, do not seem likely candidates for custom.

How can these considerations on state interest help identify possible trends in CIL? Add to this effectivity and reciprocity, the catalysers of international law formation,⁷⁴ as the vertical and horizontal angles for the realist's theodolite and a credible prediction should be the likely result. After all, it is not just international law that guides the behaviour of states, but politics of interest. In turn, interest determines the formation of international law.⁷⁵ There might also exist areas of law in which compliance is not necessarily rewarded by reciprocal behaviour, but it seems that CIL will, at least, likely reflect an equilibrium of interests.⁷⁶

⁷² See HS Richardson, 'Moral Reasoning', *The Stanford Encyclopedia of Philosophy* (Winter ed, 2014) <<http://plato.stanford.edu/archives/win2014/entries/reasoning-moral>> accessed 1 March 2021.

⁷³ See also with regard to the balancing of interests of democratic states between ending human rights abuses abroad and the risk of its own citizens S McFarland & M Mathews, 'Who Cares About Human Rights?' (2005) 26(3) *Political Psychology* 365.

⁷⁴ Reciprocity has been found to serve as a 'motivation' and a 'starting mechanism' that 'helps to initiate social interaction'. See AW Gouldner, 'The Norm of Reciprocity: A Preliminary Statement' (1960) 25(2) *AmerSociolRev* 161, 176; B Simma, *Das Reziprozitätselement in der Entstehung des Völkergewohnheitsrechts* (Wilhelm Fink 1970) 51; see also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA)* (Judgment) [1984] ICJ Rep 246 [111].

⁷⁵ See A Somek, 'Kelsen Lives' (2007) 18(3) *EJIL* 409, 446:

The usual view is that international law is a check on state interests, causing a state to behave in a way that is contrary to its interests. In our view, the causal relationship between international law and state interests runs in the opposite direction. International law emerges from states' pursuit of self-interested policies on the international stage. International law is, in this sense, endogenous to state interests. It is not a check on state self-interest; it is a product of state self-interest.

This is not to say that interest alone is determinative of state behaviour, as some neo-realists have argued. See Goldsmith & Posner (n 29) 39. This view has been rightly criticised by Norman and Trachtman for ignoring that compliance with legal obligations may in itself be considered an 'exogenous influence' as Goldsmith and Posner say. G Norman & JP Trachtman, 'The Customary International Law Game' (2005) 99(3) *AJIL* 541, 571.

⁷⁶ See A D'Amato, 'Trashing Customary International Law' (1987) 81 *AJIL* 101, 102; C Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993-IV) 241 *RdC* 195, 290–91.

5 Outlook

The 'cliché'⁷⁷ two-element theory of CIL can provide a simple solution against the legion of alternative theories. As a manifestation of international law that does not directly spring from the 'will' or 'consent' of states, it reflects their perpetual international relations. States do not voluntarily form a will at the international level but consciously or unconsciously influence its creation through their actions. Following the metaphor of 'Schrödinger's custom', until an observer is introduced to determine what the particular customary rule is in a certain moment, CIL remains 'mixed or smeared'.

Once an observer is introduced and the temporal dimensions of creation and identification collapse, 'interpretation' can only mean the assessment of 'evidence of a general practice accepted as law' at a certain point in time. Subsequent practice will always only ever pave the road towards new custom.

This should not suggest a nihilistic view of custom. While the literature may already now concede the instructive value of realism when dealing with states, stronger attention should be given to the interplay of this 'truism' with the formation of CIL. It is obvious that parties bring their interests to the table when negotiating a treaty. Strangely, it appears less obvious whenever scholars seek to harness custom for the normative project of international law. More even than other sources, CIL will most likely reflect an equilibrium of interests.

⁷⁷ L Condorelli, 'Customary International Law: The Yesterday, Today, and Tomorrow of General International Law' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 148.

