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Addressing the Chronological Paradox of CIL

From Good Faith to *Opinio Juris*, and *Opinio Juris* to New Customary Rules

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1 Introduction

Most social groups have rules[1] about how the people in that group should behave. In many cases, these rules develop from custom; they are called 'customary rules'. New customary rules arise from two elements: (i) the repeated practice of certain acts by the people in a group (*diuturnitas*); and (ii) a shared expectation that this practice will continue. This expectation leads people to sense or feel that they should act in a certain way. That is, people continue to engage in a particular practice because they believe they are obligated to do so (*opinio juris sive necessitatis*, or simply *opinio juris*). By contrast, practice without a sense of obligation leads to habits rather than customary rules.[2]

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[1] This chapter follows Wittgenstein's broad understanding of 'rule' as covering not only rules *sensu stricto* but also principles and other kinds of legal and non-legal rules such as norms, postulates, and standards. L Wittgenstein, *Philosophical Investigations* (GEM Anscombe tr, 3rd edn, Blackwell 1986) paras 207–32; H-J Glock, *A Wittgenstein Dictionary* (Blackwell 1996) 324–25.

[2] R Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press 1976) 49; T Treves, 'Customary International Law' (MPEPIL 2006) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1393> accessed 27 March 2024; HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) ch III.

Customary rules have become less important in domestic law, but the opposite is true in international law. International lawyers frequently rely on customary international law (CIL), and many of the most important rules of international law have come from CIL. The prohibition of genocide, torture, slavery, and piracy are relevant examples.[3] We can also see the importance of CIL for topics not yet regulated by treaties and topics addressed by treaties that are not universally ratified. The Law of the Sea Convention[4] is a good example of this. The Convention has helped codify CIL rules already in place and blended them with treaty rules, smoothing some of the differences between CIL and non-CIL rules.[5]

As a source of international law, CIL is not only important but also complex. Like international law in general, CIL results from a bottom-up process, where subjects of the law are also its makers. To complicate matters further, CIL develops informally and by implication. In CIL, unlike treaty law, there is no standard way for states to gather and decide on creating new rules. Instead, CIL rules seem to appear out of nowhere; they are just here, and it is sometimes unclear how long they have been with us.[6]

Another complication that affects CIL is the well-known chronological paradox. Despite its name, the paradox is not merely chronological: it raises a broad conceptual issue that threatens the coherence of (customary) international law. The paradox lies in the fact that for a new CIL rule to be created states must believe that the law already requires them to act in a certain way (*opinio juris*), but until the rule is created they are not legally required to do so as the rule establishing such a requirement has yet to exist.[7]

Since there does not seem to be any way out of the chronological paradox's vicious circle, the making of a new CIL rule would seem

[3] MH Mendelson, 'The Formation of Customary International Law' (1998) 272 RdC 155.

[4] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

[5] M Lee, 'The Interrelation between the Law of the Sea Convention and Customary International Law' (2006) 7 SDILJ 405.

[6] J d'Aspremont, *The Discourse on Customary International Law* (Oxford University Press 2021) ch 1.

[7] DH Levine, 'The Chronological Paradox in Customary International Law (Or, the Virtue of Sloppy Timing in a Messy World)' (PhD thesis, Georgetown University 2005); D Lefkowitz, '(Dis)Solving the Chronological Paradox in Customary International Law: A Hartian Approach' (2008) 21 CJLJ 129; V Jeutner and F Paddeu, 'Three Paradoxes of Customary Law' (Logic of International Law conference, Maastricht University 2022).

impossible, or, at the very least, our understanding of CIL would appear incoherent. Given that we know CIL rules *do* exist, their creation is not impossible, so we must entertain the possibility that our understanding of CIL is incoherent.[8] This is critical, as the legitimacy of a legal system depends in part on its coherence. If legitimacy is what makes us want to carry out our legal obligations, then coherence – the intelligibility of such obligations – is a requirement for legitimacy. After all, we can only effectively comply with what we understand.

Given that CIL rules are being used more and more against states, the chronological paradox is both a theoretical and a practical problem.[9] If the paradox is true (and, thus, our understanding of CIL is incoherent), states may be less inclined to follow CIL rules, which would be a blow to international law. Given how critical the paradox is, there is reason to think that the International Law Commission (ILC) would have directly addressed it in its 2018 report on identifying CIL.[10] Unfortunately, this was not the case. Ignoring the paradox's significance is problematic, as it casts a large shadow over CIL. In a landscape where CIL is a primary source of international law, practitioners should not be left stumbling in the dark.[11]

This chapter tries to shed some light on this topic by addressing the paradox in a way that ensures the coherence, and thus legitimacy, of (customary) international law. It does so by offering an interpretation of CIL that accounts for the creation of CIL rules through distinct, non-paradoxical steps. The chapter argues that the belief in a legal obligation (*opinio juris*) derives from the general principle of good faith. Good faith leads to legal obligations, which compel a subgroup of states to engage in specific behaviour. Then, as a result of this subgroup's repeated behaviour, a new CIL rule develops, obligating the entire community of states

[8] For this chapter, coherence means the possibility of intelligible argument. See S Haack, 'Coherence, Consistency, Cogency, Congruity, Cohesiveness, &c.: Remain Calm! Don't Go Overboard!' (2004) 35 NLH 167. See also Y Radi, 'Coherence' in J d'Aspremont and S Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019).

[9] J Tasioulas, 'Customary International Law and the Quest for Global Justice' in A Perreau-Saussine and JB Murphy (eds), *The Nature of Customary Law* (Cambridge University Press 2007) 307, 321–22.

[10] 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.

[11] P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 ICLR 126. See also L Blutman, 'Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail' (2014) 25 EJIL 529.

to follow that behaviour. In elucidating the shift from good faith to legal obligations and from legal obligations to CIL rules, this chapter draws on interpretivism, social ontology, and contemporary research on constitutive rules.

In terms of structure, the chapter is divided into four sections. Following this introductory section, Section 2 discusses CIL and the chronological paradox. Section 3 examines constructivism in legal interpretation. Section 4 then focuses on the application of rules and on constitutive rules, explaining the role of good faith and how constitutive (meta)rules create new CIL rules. Section 5 concludes the chapter by reaffirming earlier conclusions.

2 CIL and Its Paradox

Article 38(1)(b) of the Statute of the International Court of Justice (ICJ)[12] states that CIL rules evince general practices that are accepted as law. The Statute thus refers to the two constituent elements of customary rules mentioned in Section 1 – namely, (i) the existence of a general practice in the form of repeated acts (*diuturnitas*), and (ii) performance of these acts in the belief that they are required by law (*opinio juris*).

Scholarship traditionally considers practice (*diuturnitas*) to refer to the practice of states. There have been fruitful discussions about the contribution of non-state actors to CIL.[13] For instance, the ILC has recognised that '[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law'.[14] For the purposes of this chapter, the question of whether non-state actors' behaviour qualifies as 'practice' is beside the point; although an interesting debate, it has no bearing on the chapter's explanation of how CIL rules are created. Thus, although the chapter addresses state practice, it can also be read as encompassing non-state practice.

Acceptance as law (*opinio juris*) means that states believe a specific action is required under the law. In other words, states believe that a particular practice is legally obligatory. It should be pointed out that the term 'obligation' is used in this chapter to designate a basic normative

[12] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

[13] S Droubi and J d'Aspremont (eds), *International Organisations, Non-State Actors, and the Formation of Customary International Law* (Manchester University Press 2020).

[14] ILC (n 10) 130 (Conclusion 4.2).

or deontic concept.[15] When we say that a particular behaviour is obligatory or required, or that someone must act or is responsible for acting, we mean that there is an obligation to act in a certain way. Some obligations, such as the obligation to pay taxes, are imposed by the law and legal rules. These are legal obligations. However, there are also non-legal obligations, like the obligation to honour a promise made to a friend. It is worth noting that obligations can be used as a basis from which to derive prohibitions or permissions.[16] A prohibition against using force, for example, is an obligation not to use force. Being permitted to use force in self-defence is tantamount to not being prohibited from using force in self-defence (a non-obligation not to use force in self-defence). Thus, while continuing to refer only to obligations, we use the term broadly to cover permissions and prohibitions, too.

When it comes to CIL, states act in the belief they are bound by a legal obligation (*opinio juris*). By belief, we to refer to a general acceptance of something as being the case.[17] Different beliefs move us in different ways. Some beliefs are about things we know for sure, while others are about things we only vaguely sense or feel. No matter how strong or weak, these are all beliefs. Besides, believing in something does not mean we have to think about it or do it all the time. For example, most of us believe that the moon is not made of cheese, but we do not usually think about it. Let it be said that there is nothing controversial about attributing beliefs to states: following Cassese, we can say that it is humans acting on behalf of states who believe that certain acts are obligatory.[18]

Opinio juris allows us to distinguish practices that are merely habitual from those that create normative expectations in the community and

[15] Duties being here treated as a kind of obligation; see J Hage, *Foundations and Building Blocks of Law* (Eleven International Publishing 2018) ch VI.

[16] SO Hansson, 'The Varieties of Permission' in DM Gabbay and others (eds), *Handbook of Deontic Logic and Normative Systems* (College Publications 2013) 204–06.

[17] E Schwitzgebel, 'Belief', *The Stanford Encyclopedia of Philosophy* (Winter edn, 2021) <https://plato.stanford.edu/entries/belief/> accessed 1 April 2022.

[18] A Cassese, *International Law* (2nd edn, Oxford University Press 2005) 4. See also A Waltermann, 'Why Non-Human Agency?' in A Waltermann and others (eds), *Law, Science, Rationality* (Eleven International Publishing 2020) 51. Also, the cognitive sciences teach us that human brains do not have a single, top-level decision-maker. So, when we assign a belief held by a group of humans to a state, we are simply going a step further than when we assign mental acts to humans rather than parts of their brains. See DC Dennett, *Consciousness Explained* (Little Brown 1991) 102–03; J Hage, 'Are the Cognitive Sciences Relevant for Law?' in B Brożek, J Hage, and N Vincent (eds), *Law and Mind: A Survey of Law and the Cognitive Sciences* (Cambridge University Press 2021) 17, 40–41.

consequently lead to the creation of CIL rules.[19] It should be borne in mind that what we are referring to here is the belief that a practice is required by law. States feel compelled to perform these acts because they consider them to be legally obligatory, not for any other, non-legal reason, no matter how strong it may be. As stated in Section 1, the chronological paradox suggests that CIL is caught in a vicious circle: to create a new CIL rule, states must believe that the law obligates them to act in a certain way (*opinio juris*), yet until this CIL rule is created the act in question is not required by law.[20]

To add colour to this explanation, let us imagine that a group of wealthy states begins donating vaccines to developing states during a pandemic. Suppose this practice continues to the point where states believe that they are under a legal obligation to donate vaccines. Lawyers then identify a new CIL rule, according to which wealthy states are obligated to donate vaccines to developing states during pandemics. The problem is that if this new 'vaccine donation CIL rule' exists simply because states believe the practice to be legally obligatory, then the rule cannot as such impose the obligation to donate vaccines. For it actually to be a legal obligation, a legal rule imposing the obligation is needed. As Bradley puts it: 'If State practices do not become binding as CIL until the States involved act out of a sense of legal obligation, how do the States develop that sense of legal obligation in the first place?'[21] In our example, if wealthy states are legally obligated to donate vaccines only by virtue of a CIL rule, how did they come to believe that the law obligates them to donate vaccines in the first place?

The paradox is disconcerting, because if it correctly accounts for the creation of new CIL rules, then CIL is fated to chase its tail. Such circular reasoning is problematic: it uses its conclusion as a premise, while giving us no reason to accept its premise other than that we already believe its conclusion. We have to assume that the law requires specific behaviour on the part of states (there must be a legal obligation) before we can conclude that a given CIL rule exists. But to assume that the law requires such behaviour of states (i.e. that there is indeed a legal obligation), we

[19] Hart (n 2) ch I. See also GJ Postema, 'Custom in International Law: A Normative Practice Account' in A Perreau-Saussine and JB Murphy (eds), *The Nature of Customary Law* (Cambridge University Press 2007).

[20] Levine (n 7); Lefkowitz (n 7); Jeutner and Paddeu (n 7).

[21] CA Bradley, 'Customary International Law Adjudication as Common Law Adjudication' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 34.

need a pre-existing CIL rule commanding such behaviour (i.e. we need a CIL rule to impose that legal obligation).

Gény gives a straightforward (but unsatisfactory) answer to the paradox. He says that states are wrong to think they are legally required to act: their *opinio juris* is mistaken.[22] That is, states have – or feign – a false view about what is happening,[23] whereas there is no obligation at all. Gény says that when this mistake is made repeatedly by a lot of states, it generates mutual expectations that turn into a legal obligation. Gény's response admittedly short-circuits the paradox, but in avoiding one problem it falls into another, for if states are mistaken, then CIL is incoherent and its entire structure based on a delusion. As exposed in Section 1, such a workaround falls short of what this chapter sets out to do, which is to address the paradox in a way that preserves the coherence, and thus the legitimacy, of (customary) international law.

Some authors have made intriguing attempts to re-imagine *opinio juris* as more than just a description of the law, arguing that it helps to create the law. To put it differently, these authors claim that *opinio juris* goes beyond a descriptive stance on the existence of legal obligations, because it also plays a prescriptive role in determining the content of these legal obligations. In Westerman's words: '*Opinio juris* can better be regarded as a map, which represents the law by selecting and highlighting those aspects that are deemed important. It describes and prescribes at the same time.'[24] When states believe that a certain act is legally obligatory, they are not simply describing a pre-existing reality. Their belief is effectively building reality as we know it. This – the constructive role of our collective beliefs – is a topic central to social ontology; as a field of study, it investigates how the combined action of our minds can shape the world around us. According to social ontology, our minds are not (just) describing reality; they are projecting meaning onto it.[25] For example, when people believe that a river marks the frontier between two communities, they are not only acknowledging that fact but also creating it. If it

[22] PE Benson, 'François Gény's Doctrine of Customary Law' (1983) 20 CYIL 267, 276.
[23] Tasioulas (n 9) 321.
[24] P Westerman, 'Test, Filter, Ideal or Map?' in K Gorobets, A Hadjigeorgiou and P Westerman (eds), *Conceptual (Re)Constructions of International Law* (Edward Elgar 2022) 127. See also O Elias, 'The Nature of the Subjective Element in Customary International Law' (1995) 44 ICLQ 501.
[25] J Searle, *The Construction of Social Reality* (Free Press 1995) 31; J Searle, *Mind, Language, and Society: Philosophy in the Real World* (Basic Books 1999) 85; J Searle, *Making the Social World: The Structure of Human Civilization* (Oxford University Press 2010) 25.

were not for people collectively believing that the river is a frontier, it would be just another watercourse.

The depiction of *opinio juris* as a belief with both descriptive and prescriptive functions does not contradict traditional views on CIL. In fact, the ILC's explanation of acceptance as law (*opinio juris*) corresponds to social ontology's account of collective acceptance. The ILC explains that acceptance as law implies there is a 'subjective' or 'psychological' dimension to the 'binding character of the practice in question', in the sense that 'the practice must be undertaken with a sense of legal right or obligation.'[26] According to social ontology, collective acceptance is when the members of a social group come to share and maintain a relevant social attitude (a 'we-attitude') towards a certain practice.[27] Like the constructive role of beliefs in the river-frontier example mentioned above, when states believe they have an obligation to engage in a particular practice, this belief is both descriptive and prescriptive. It should be added that participants must be committed to what they believe, though their belief can range from enthusiastic endorsement to simply going along with the group.[28] As a result, the lines between passive acceptance and active support or desire are frequently blurred.

3 Constructive Interpretation

In Section 2, we discussed the two constituent elements of CIL, dissected the chronological paradox, and began to discuss how our collective beliefs can shape the social world. We saw that the crux of the paradox lies in the manner in which a new CIL rule is created: how can the existence of a CIL rule be dependent on a condition (belief in a legal obligation – *opinio juris*) that appears to be itself dependent on an already existing CIL rule? The challenging feature of the chronological paradox is thus the transition from the first point in time when a CIL rule does not yet exist to a second point in time when it does. To understand the transition between these two points, we must first understand how CIL rules are identified.

The identification of a CIL rule involves gathering evidence that its two constituent elements – repeated practice (*diuturnitas*) and a belief in legal obligation (*opinio juris*) – are present. Such evidence is sought in prior

[26] ILC (n 10) 138.
[27] R Tuomela, 'Collective Acceptance, Social Institutions, and Social Reality' (2003) 62 AJES 123.
[28] Searle (n 25) 57.

pronouncements and empirical data relating to state behaviour. Through observation of relevant materials (wherever these materials are found), the aim is to determine whether a specific CIL rule exists. If sufficient evidence of the two constituent elements is found, a new CIL rule is said to exist. If the evidence is insufficient, there is (as yet) no new CIL rule.

The search for corroborative materials should not be thought of as 'gold-digging' for evidence.[29] Far from being based on neutral observation, the identification of CIL rules is a highly interpretive activity. As philosophers have long recognised, no evidence is 'given' neutrally, because all observation is theory-laden:[30] the theoretical framework of the observer/interpreter determines the meaning of what they observe. Likewise, how people choose, see, and judge evidence is affected by the theories they hold.[31] In a legal context, as explained by Hart, 'situations do not await us neatly labelled, creased, and folded; nor is their legal classification written on them to be simply read off by the judge.'[32] On the contrary, evidentiary materials call for purposeful interpretation: it is the responsibility of the interpreter to determine the import of the words and actions.[33]

The question therefore arises as to what role and purpose interpretation has in relation to CIL rules. There are at least two possible answers to this question, for legal interpretation may be of two kinds: descriptive or constructive. The former simply describes what the law is and what rules exist. The latter not only tells us what the law is but also creates the law and its rules. The descriptivist viewpoint has 'realist'[34] undertones, because it presupposes the existence of a legal reality independent of the interpreter, whose task is therefore merely to point out answers that are

[29] See Chapter 1.

[30] On the (widely rejected) idea that experience gives points of certainty that can be used as absolute bases for knowledge, see JR O'Shea, 'What Is the Myth of the Given?' (2021) 199 Synthese 10543.

[31] NR Hanson, *Patterns of Discovery* (Cambridge University Press 1965) 4; PK Feyerabend, 'Science Without Experience' (1969) 66 Journal of Philosophy 791; TS Kuhn, *The Structure of Scientific Revolutions* (2nd edn, University of Chicago Press 1970) 35. See also RW Proctor and EJ Capaldi, *Psychology of Science: Implicit and Explicit Processes* (Oxford University Press 2012) 1–10.

[32] HLA Hart, 'Positivism and the Separation of Law and Morals' in Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983) 63.

[33] HG Gadamer, *Truth and Method* (J Weinsheimer and DG Marshall trs, 2nd edn, Continuum 2004) 383.

[34] This chapter uses the term 'realism' not in the sense of legal realism but to express the idea that true statements are true because they reflect the content of an independently existing reality. See M Devitt, *Realism and Truth* (2nd edn, Princeton University Press 1997) ch 2.

already there. By contrast, the constructivist viewpoint is based on the premise that legal interpretation is more than just a search for answers; it considers the interpreter to be engaging in an act of creation when assigning meaning to what they interpret.[35]

This chapter discounts the descriptivist point of view for a number of reasons,[36] one of which is that descriptivism ignores the fact that observation is theory-laden. As previously stated, all observation, including interpretation, is coloured by the observer's theoretical bias. Consequently, observation (or interpretation) can never be purely descriptive; it always has, to some extent, a constitutive role. Furthermore, the descriptivist viewpoint is unable to account for the necessary role argumentation plays in the interpreter's efforts to solve 'hard cases'.[37] Consider the discussions currently taking place over whether there is a customary rule that allows states to intervene in the territories of other states to stop human rights violations;[38] whether there is a level of gravity below which small-scale armed attacks are not considered acts of aggression under international law;[39] and whether it is illegal for states to conduct military exercises or manoeuvres in foreign exclusive economic zones.[40] The answers to these questions are not a 'given', but rather depend on the quality of the interpreters' arguments. In other words, the ideas of those who interpret the law shape the contents of international law and international legal rules.

Dworkin took a similar constructivist approach to legal interpretation in saying that interpretation is a creative process in which meaning is imposed on the object of interpretation to make it the best instantiation of a given form or genre.[41] However, he did not think interpreters should be able to

[35] P Lorenzen, *Constructive Philosophy* (University of Massachusetts Press 1987) ix.

[36] For a comprehensive argument against the descriptivist view, see J Hage, 'Construction or Reconstruction? On the Function of Argumentation in the Law' in C Dahlman and E Feteris (eds), *Legal Argumentation Theory: Cross-Disciplinary Perspectives* (Springer 2012) 125; J Hage, 'Legal Reasoning and the Construction of Law' (2012) i-Lex 81.

[37] R Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 81. See also G Dorota, 'Hard Cases' (2013) 2 UMSLR 240.

[38] J Vidmar, 'The Use of Force as a Plea of Necessity' (2017) 111 AJIL 302.

[39] T Ruys, 'The Meaning of "Force" and the Boundaries of the *Jus ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?' (2014) 108 AJIL 159; O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd ed, Hart 2021) ch 2.

[40] S Yee, 'Sketching the Debate on Military Activities in the EEZ: An Editorial Comment' (2010) 9 Chinese JIL 1.

[41] R Dworkin, *Law's Empire* (Harvard University Press 1986) 52. See also DO Brink, 'Originalism and Constructive Interpretation' in W Waluchow and S Sciaraffa (eds), *The Legacy of Ronald Dworkin* (Oxford University Press 2016) 273.

interpret sources however they wished. Although interpretation must allow for innovation to ensure that the object as interpreted best serves its purpose, its scope is limited by the object's history.[42] Thus, legal interpretation is Janus-faced, looking both backwards and forwards.[43] While based on the observation of pre-existing materials, it is also creative in that it is not a mere reproduction of those materials; rather, it creates something new by giving them meaning. This is equally true of CIL interpretation, for once evidence of the two constituent elements of CIL has been established, CIL interpretation fulfils a constructive role by shaping and determining its content.

It is important to note that we can still talk about 'interpreting' CIL even when the evidence of its two constituent elements is not in textual form. True, interpretive activity in the legal sphere is often directed at pieces of text, as when we extract rules from the text of a treaty. This, for instance, happens when we read Article 8 of the Rome Statute[44] to determine the content of the rule punishing aggression. But interpretation goes beyond textual hermeneutics. It is possible to distinguish between two types of interpretation – (i) source interpretation, which is the interpretation of (formal and material) sources of law; and (ii) rule-to-case interpretation, which is the classification of a case according to the conditions under which a given rule is applicable to it.[45] In both cases, interpretation may be directed at unwritten materials. For example, when lawyers identify a new CIL rule on the basis of empirical evidence (source interpretation), or determine, on the basis of visual evidence of armed conflict, that the crime of aggression has been committed (rule-to-case interpretation), they are relying on unwritten materials.

Both the ICJ and the ILC believe that CIL is susceptible to interpretation. In *Nicaragua*, the ICJ held that rules derived from CIL could be distinguished from those derived from international treaties by 'reference

[42] GJ Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer 2011) 425; R Porto Macedo Júnior, *Do Xadrez à Cortesia: Dworkin e a Teoria do Direito Contemporânea* (Saraiva 2013) 219.

[43] A Peczenik, *Scientia Juris: Legal Doctrine as Knowledge of Law and as a Source of Law* (Springer 2005) 6.

[44] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

[45] On interpretation (or classification) of rules in relation to cases, see J Hage, *Reasoning with Rules: An Essay on Legal Reasoning and Its Underlying Logic* (Springer 1997) 95–97. See also J Raz, 'Why Interpret?' (1996) 9 Ratio Juris 349; F Perin Shecaira, 'Sources of Law Are Not Legal Norms' (2015) 28 Ratio Juris 15.

to the methods of interpretation and application.'[46] Likewise, in *North Sea Continental Shelf* Judge Tanaka asserted that '[c]ustomary law ... requires precision and completion about its content. This task, in its nature being interpretative, would be incumbent upon the Court.'[47] The ILC has taken a similar line: when commenting on materials that may be consulted to help identify CIL, it stated that specific 'texts may assist in collecting, synthesizing or interpreting practice relevant to the identification of customary international law'.[48] It furthermore explained that '[e]ach of the forms [of state practice] listed is to be interpreted broadly to reflect the multiple and diverse ways in which states act and react'.[49] Therefore, it cannot be considered controversial to claim that CIL is interpretable.[50]

To conclude this discussion of the interpretive nature of identifying CIL rules, it is crucial to keep in mind that there is no absolute separation in how evidence for the two CIL elements is interpreted. Although the ICJ held in the *Asylum* case that *diuturnitas* and *opinio juris* should be determined separately,[51] this view has gradually been replaced by one that allows evidence of both constituent elements to be extracted from the same act. D'Aspremont discerned signs of this change in the *Gulf of Maine* and *Nicaragua* cases.[52] The most recent rebuttal of the ICJ's initial position came from the ILC in its 2018 Draft Conclusions. When defining what materials may serve as evidence of repeated practice and the belief that such practice is legally required, the ILC acknowledged that one and the same act may provide evidence of both.[53]

[46] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [178].
[47] *North Sea Continental Shelf* (Judgment, Dissenting Opinion of Judge Tanaka) [1969] ICJ Rep 172 [182].
[48] ILC (n 10) 142.
[49] ibid 134.
[50] Merkouris (n 11); O Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 EJIL 235; K Gorobets, 'Practical Reasoning and Interpretation of Customary International Law' in P Merkouris, J Kammerhofer and N Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022) 370.
[51] *Colombian-Peruvian Asylum Case* (Judgment) [1950] ICJ Rep 266 [276].
[52] D'Aspremont (n 6) ch 2. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14; *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Judgment) [1984] ICJ Rep 246.
[53] ILC (n 10) 133, 140–41.

4 The Formation of CIL Rules

This section will break down the formation of CIL rules into distinct steps. It is a process that begins with the principle of good faith, which leads to legal obligations, and these legal obligations in turn contribute to the development of a new CIL rule. But before we can discuss these steps, some general ideas must first be addressed – namely, rule applicability and application, constitutive rules, and rules about rules (metarules). Although these matters might not seem directly related to the chronological paradox, their elucidation is important to further discussion of the paradox. Given that problems are best solved when broken down into their most basic parts and then put it back together again, this section will focus on deconstructing and rebuilding the problem.

4.1 Rule Applicability and Rule Application

Section 3 distinguished between two types of interpretation: source interpretation, which, through an examination of formal and material sources, written and unwritten, allows us to determine the existence and content of legal rules; and rule-to-case interpretation, which, in situations where a rule already exists, allows us to determine whether that rule is applicable – and applies – to a particular case. When examining evidence of the existence of a CIL rule that holds states responsible for internationally wrongful acts, we are engaging in source interpretation.[54] When we then go on to consider whether that rule is applicable to a specific case in which Uganda commits a wrongful act against the Democratic Republic of the Congo (DRC), we are engaging in rule-to-case interpretation.[55]

To say that a rule is applicable is not to say that it actually applies to a specific case.[56] In the example given above, there is a distinction to be drawn between admitting that the state responsibility rule is applicable to the case between Uganda and the DRC and concluding that this rule

[54] The ILC's formulations on state responsibility reflect CIL. See 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; F Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63 ICLQ 535.

[55] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2022] ICJ Rep 1.

[56] Hage (n 45); J Hage and A Waltermann, 'Logical Techniques for International Law' in D Krimphove and G Lentner (eds), *Law and Logic: Contemporary Issues* (Duncker und Humblot 2017) 125; H Marcos, A Waltermann and J Hage, 'From Sovereignty to International Cooperation: Lessons from Legal Logic and Social Ontology' (2021) Maastricht

indeed applies to that case. If Uganda's action against the DRC is wrongful, then the rule is applicable. If an international court decides that the rule applies to this case, Uganda is not only responsible for its actions but also obligated to make reparations to the DRC. In other words, a rule *is applicable* to a case when the conditions for its application are met; a rule *applies* when its consequences take effect in a case.[57]

In practice, it is often hard to differentiate between the two types of interpretation and between a rule's applicability and its application to a specific case. We tend to look at a source, decide whether a rule is applicable to a case, and conclude that it applies to the case, all in one go. For present purposes, however, it is relevant to distinguish between these different notions. One way to grasp the differences between the stages of interpretation is to remember that a rule and its source are distinct. For example, the ILC's report on state responsibility[58] is distinct from the rules holding states accountable for wrongful acts that are derived from that document (and other sources). We can further distinguish between applicability and application by framing rules as a conditions–conclusion formula.[59] For instance, the CIL rule on state responsibility can be simplified as follows:

Conditions: 'X and Y are states' and 'X commits a wrongful act against Y' – Conclusion: 'X is obligated to make reparations to Y'

In this formula, 'X' and 'Y' are variables for states like Uganda and the DRC. The conjunction 'and' means that all conditional blocks must be satisfied for a case to meet that rule's conditions. The dash separates the conditions from the conclusion, and the inverted commas mark out the conditional and conclusion blocks. If both Uganda and the DRC are states and Uganda has committed a wrongful act against the DRC, then when this rule applies, it obligates Uganda to make reparations to the DRC.

Faculty of Law Working Paper Series 2021/01 <www.maastrichtuniversity.nl/maastricht-faculty-law-working-paper-series-2021> accessed 15 April 2024.

[57] On the different kinds of rule application, see L Duarte d'Almeida, 'What Is It to Apply the Law?' (2021) 40 Law Philos 361.

[58] ILC (n 54).

[59] While it is possible to formulate a rule as a statement, we should not conclude that rules are statements. See J Hage, 'Consistency of Rules and Norms' (2000) 9 ICTL 219; H Marcos, 'A Study on Defeasibility and Defeaters in International Law: Process or Procedure Distinction against the Non-discrimination Rule' in W Menezes, A Nunes Filho and PH Reis de Oliveira (eds), *Tribunais Internacionais e a Garantia dos Direitos Sociais* (Academia Brasileira de Direito Internacional 2021) 199, 208.

Before moving on, it is essential to note that the application of a rule presupposes interpretation. It is only after we have extracted a rule from its source (source interpretation) and inferred its applicability to a case (rule-to-case interpretation) that the rule will apply. Rule application, like interpretation, is a constructive exercise. When rules apply to cases, they create legal consequences. So, when the state responsibility rule applies to Uganda and the DRC's case, this is not a mere description of the fact that Uganda must make reparations to the DRC; the rule's application to the case puts Uganda under an obligation to make reparations to the DRC.

4.2 Constitutive Rules

As explained in Section 2, social ontology studies how our collective beliefs shape the world around us. We gave the example of a river, which can mark the frontier between two communities only if people believe it does. If no one held such a belief, the river would simply be a stretch of water. Rules are similar in that they exist only because people believe in them. Interestingly, unlike the river-frontier, which has a physical presence in the natural world, rules are abstract. Rules have no corporeal form that we can touch, but they still exist because people collectively believe they do.[60] Let us develop these ideas in the following paragraphs.

Anything that exists can be called an 'entity', and anything that exists because of people can be called a 'social entity'.[61] A frontier is a social entity. A business, a state, and an international organisation are all examples of social entities. Lawyers, judges, obligations, and rules are all social entities. All of these things exist because of people. There would be no borders, businesses, states, international organisations, lawyers, judges, and, most importantly, no obligations or rules if people did not exist.

Social entities can be separated into two levels.[62] At the first level are what we may call 'basic social entities' – that is, entities that directly

[60] B Smith, 'John Searle: From Speech Acts to Social Reality' in B Smith (ed), *John Searle* (Cambridge University Press 2003) 19.

[61] Some authors prefer to use 'object', 'being', or 'existent' instead of 'entity.' See B Rettler and AM Bailey, 'Object', *The Stanford Encyclopedia of Philosophy* (Winter edn, 2017) <https://plato.stanford.edu/entries/object/> accessed 2 April 2022.

[62] The terminology 'basic social entities' and 'rule-based entities' used in this chapter reflects the influence of Hage's work on legal logic and social ontology. See J Hage and B Verheij, 'Reason-Based Logic: A Logic for Reasoning with Rules and Reasons' (1994) 3 ICTL 171; Hage, *Foundations and Building Blocks of Law* (n 15); J Hage, 'Constructivist Facts as the Bridge between Is and Ought' (2022) 1 IJSL 1. Following Anscombe, basic entities and

depend on people's beliefs. We often find these basic social entities in simple groups. For instance, if two tribal groups use a river as a frontier to separate their respective territories, that frontier is a basic social entity. Its existence is directly dependent on a belief held by the members of a group. A rule stating that the eldest descendant of a deceased tribe leader becomes the new leader is another example of a basic social entity.

At the second level we find entities that are not directly grounded in people's beliefs. Although they again exist because of what people believe, it is only in an indirect way, for these entities are based on other entities and are only secondarily grounded in a group's collective beliefs. Suppose, for example, that when Chief Umoro dies, his firstborn son, Raoni, becomes the leader of his tribe, the Kayapo, by virtue of a rule according to which the deceased tribe leader is succeeded by the eldest descendant. Raoni's position as the new leader is thus a direct result of that rule and is only indirectly grounded in the Kayapo's collective beliefs.

These second-level entities are the result of rule application. Let us call them 'rule-based entities'. To understand how rules can lead to the existence of social entities, we must first consider a few aspects of how rules work. To begin with, rules are not limited to the law;[63] Language, etiquette, games, and inferences rely frequently on rules, too. Consider the conceptual rule qualifying a plane figure with three straight sides and three angles as a triangle; or the etiquette rule dictating that guests should offer to lend a hand to the host; or the chess rule permitting the bishop to move diagonally in any direction; or the inference rule allowing 'Q is true' to be deduced from the premises 'P implies Q' and 'P is true'. These are not legal rules in the strict sense, but they are still rules.

Most rules operate tacitly in the background without our being aware of them.[64] Consider chess: we think about the rules telling us how to move each piece only if we are still learning the game; once we know how to play, we focus on choosing the best moves and strategies to win. Even

rule-based entities may also be called 'conventional' and 'institutional' entities, respectively. See GEM Anscombe, 'On Brute Facts' (1958) 18 Analysis 69; N MacCormick and O Weinberger (eds), *Institutional Theory of Law: New Approaches to Legal Positivism* (Springer 1986).

[63] F Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press 1991) 10.

[64] Wittgenstein (n 1) para 219; R Brandom, *Making It Explicit: Reasoning, Representing, and Discursive Commitment* (Harvard University Press 1994) 649–50.

though we no longer think about the rules, they are still there in the background and affect how the game is played. As Wittgenstein pointed out, a person who follows rules does not usually think about or check them; when following a rule, they may even be unaware that they are doing so.[65]

We often focus on how rules regulate behaviour (rules tell us our obligations, permissions, and prohibitions), but some rules also constitute social practices. Philosophers call them 'constitutive rules'.[66] The rules for games are a good example: It is only thanks to its rules that we can play a game like chess; without them, chess would not exist. Legal rules are similarly constitutive; for example, together they may create a certain kind of political system that determines how people are put into power. Another way in which constitutive rules operate is by making something count as something else.[67] Chess rules make certain positions on the board count as checkmate. The rule according to which the eldest descendant becomes the new leader makes the eldest descendant count as the new leader when the incumbent dies. In this respect, constitutive rules can create social entities. For example, there is no such thing as checkmate without the rules of chess, so checkmate is a rule-based entity. The same goes for Raoni: he is the leader of the Kayapo tribe because of the rule that makes the eldest descendant of the deceased tribe leader the new leader.

Some second-level rule-based entities exist through the application of other rules called 'metarules'.[68] A metarule is a rule about rules, meaning that a rule forms part of its conditions or conclusion. Certain metarules, when applied, create entities that are also rules. There are many examples in present-day legal systems. Think of the domestic rules enacted when parliament passes a bill into law or the international rules created when state representatives ratify treaties. These rules of law are directly based on the metarules that give members of parliament or state representatives the power to make rules of law. Second-level rules are still indirectly based on what people collectively believe, for they would not exist if it were not for people.

[65] Wittgenstein (n 1) paras 207–32; Glock (n 1) 324–25.

[66] Searle (n 25) 97. See also J Hage, 'Two Concepts of Constitutive Rules' (2018) 4 Argumenta 21; C Roversi, 'In Defence of Constitutive Rules' (2021) 199 Synthese 14349; Hage, 'Constructivist Facts as the Bridge between Is and Ought' (n 62).

[67] Smith (n 60).

[68] Hage calls them 'rule-based rules'. See Hage, *Foundations and Building Blocks of Law* (n 15) 87; Hage, 'Constructivist Facts as the Bridge between Is and Ought' (n 62).

4.3 The CIL Metarule

This section argues that CIL rules exist as rule-based entities. It will explain that individual CIL rules are created through a metarule – the CIL metarule, or 'M' for short. But before discussing M, it is worth reiterating that, unlike Gény, this chapter does not suppose that states are mistaken in their *opinio juris*. On the contrary, it assumes they are correct in believing themselves to be under a legal obligatio. So, both the belief and the obligation to which the belief relates are taken as accurate. The rationale behind this assumption is simple: as pointed out in Section 2 when discussing Gény's answer to the chronological paradox, if the belief held by states is wrong, then CIL is built on a delusion and is therefore incoherent. The alternative is that the belief is correct and that states have a legal obligation. After all, if we believe something (that today is Monday, for example) and that belief is correct, then what we believe is a fact (today is in fact Monday).

M's conditions are the two elements needed to identify a CIL rule: the practice (*diuturnitas*) and the belief that this practice is legally obligatory (*opinio juris*). If M's conditions are satisfied, M is applicable. If M applies, M leads to the consequence that a particular CIL rule exists. Let us call this generic CIL rule 'R'. If 'Φ' stands for engaging in a named act or activity, such as 'not using force', 'donating vaccines', or 'granting immunity to heads of state', we can write M as the following conditions–conclusion formulation:

Conditions: 'states generally Φ' and 'states are under the legal obligation to Φ' – Conclusion: 'there is a CIL rule R obligating states to Φ'

When M applies to a case, M gives rise to a CIL rule R. But R must still be interpreted in light of M's application to a case (rule-to-case interpretation).[69] It is important to note that R is not derived directly from the formulation of M, but is the result of M's application. Knowledge of R comes only from lawyers interpreting M's application to a specific case. This frequently occurs when lawyers debate possible interpretations in cases where a court recognises that a specific CIL rule applies to the disputants.

How is it that M can lead to the creation of new CIL rules if no one has ever talked about M before? As previously stated, the truth is that many rules control what we do without us even realising it.[70] According to

[69] See Section 3.
[70] See Section 4.2.

Wittgenstein, obeying a rule is a matter of practice, whereas understanding a rule is to know what counts as acting by it.[71] In 1920, Descamps implicitly described how M works when he said that CIL rules are 'established by the continual and general usage of nations, which has consequently obtained the force of law'.[72] Despite not mentioning M or discussing constitutive (meta)rules, Descamps is unknowingly referring to M in this explanation of how a new CIL rule is created. As Russell stated, anyone who engages in a practice has some knowledge of the logical rules behind that practice, but this knowledge is in most cases implicit.[73]

M works behind the scenes, much like many other rules that make up our world. As mentioned in Section 4.2, most rules operate implicitly in the background, and no conscious effort is required for their interpretation or application. Chess exists only because of its rules, but most people do not think about the rules when they play. In international law, the metarules that empower state representatives to ratify treaties and that make treaties legal sources are similar; whenever a rule from a specific treaty is recognised, both of these metarules are interpreted and applied, even if only implicitly. The same goes for M.

We should also consider the ICJ's decision in *North Sea Continental Shelf*. When deciding if the equidistance principle was based on custom, the ICJ said: 'It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character, such as could be regarded as forming the basis of a general rule of law.'[74] This passage is important because it shows a rule-creating aspect of the standards used to find a CIL rule, which d'Aspremont calls the 'third element' for identifying CIL.[75] In relation to the present discussion, M is an example of such standards with rule-creating dimensions.

Framing M in terms of a conditions⇒conclusion formula helps to show the chronological paradox at work. For M to be applicable, states must Φ and be obligated to Φ. The consequence of M is that a CIL rule R will emerge, obligating states to Φ. The paradox is that for states to be

[71] Wittgenstein (n 1) para 201; Glock (n 1) 327.
[72] Advisory Committee of Jurists, 'Procès-Verbaux of the Proceedings of the Committee' (Permanent Court of International Justice 1920) 322.
[73] B Russell, *Our Knowledge of the External World: As a Field for Scientific Method in Philosophy* (Routledge 2009) 49.
[74] *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep 3 [72].
[75] D'Aspremont (n 6) ch 3.

obligated to Φ in the first place, we would need a CIL rule R obligating states to Φ. Let us recall the earlier example of a hypothetical CIL rule obligating wealthy states to donate vaccines. If wealthy states donate vaccines because of an obligation to donate vaccines, M is applicable. If M applies, M constitutes a CIL rule R that obligates wealthy states to donate vaccines. But how can wealthy states be obligated to donate vaccines if the rule that obligates them comes into existence only once M applies?

The answer is that this depiction of CIL needs to be revised. While M does constitute a CIL rule R that imposes an obligation to Φ, the initial obligation to Φ is imposed neither by M nor by R. There are two alternative explanations for the origin of the obligation to Φ.

4.3.1 First Explanation

The first explanation is straightforward. The obligation to Φ is a basic social entity with deontic content that comes directly from what states believe. A subgroup of states creates an obligation to Φ when these states believe they have an obligation to Φ. (This is similar to how groups of people create social entities by believing in them.[76]) Since this subgroup of states believes that they are obligated to Φ, they engage in Φ. If states generally are engaging in Φ because they are obligated to Φ, M is applicable. If M applies, M constitutes a CIL rule R, the effect of which is that all states have an obligation to Φ.[77]

This first explanation raises two problems. The first concerns the distinction between 'is' and 'ought'.[78] It is unclear why states ought to Φ because of a social entity in which they have only recently started to believe. In other words, how can a social entity that exists as a matter of social fact ('is') be used to judge what states are obligated to do ('ought')? There have been some intriguing philosophical attempts to bridge the is/ought gap through reference to deontic entities.[79] It could be argued that states ought to Φ because a deontic entity has imposed on them an obligation to Φ. Deontic entities are social entities that are factual and normative at the same time. Although belonging to the sphere of what is,

[76] See Section 4.2.

[77] We will discuss persistent objectors later in Section 4.3.2.

[78] As first explained by Hume, the is/ought problem arises when we derive an 'ought judgement' from premises based on 'is' and vice versa. D Hume, *A Treatise of Human Nature* (Floating Press 2009) 715–16.

[79] See Hage, *Foundations and Building Blocks of Law* (n 15) ch IX; Hage, 'Two Concepts of Constitutive Rules' (n 66). See also J Searle, 'How to Derive "Ought" From "Is"' (1964) 73 Philosophical Review 43.

they can be used to judge what ought to be. As a result, they can bridge the gap between what is and what ought to be. So, an 'ought judgement' like 'states ought to Φ' could be derived from a factual entity that imposes an obligation to Φ, on condition that this factual entity is deontic.

The second problem with this first explanation is that it does not clarify how there can be a legal obligation to Φ before a legal rule imposes that obligation. As explained in Section 2, the paradox stems from the prerequisite that for a new CIL rule to be created states must believe that the law obligates them to act in a certain way (*opinio juris*). Yet, according to the first explanation, the obligation to Φ is a basic social entity sourced in states' collective beliefs. Thus, a legal rule does not impose this obligation. However, it could be argued that the obligation to Φ acquires the status of a legal obligation due to the longstanding practice of engaging in Φ, which reinforces shared expectations within the international community. This argument follows Descamps's explanation of CIL rules as rules set up by the continued use on the part of states, which, over time, would give these obligations the force of law.[80]

If we agree that deontic entities can bridge the is/ought gap and that the legal nature of obligations can be derived from a longstanding practice, then this first explanation works. But we must admit that it can be challenged by those who contend there is an absolute separation between 'is' and 'ought', and by those who maintain that a legal rule must impose an obligation for that obligation to be legal. To address these challenges, an alternative explanation of the paradox is needed.

4.3.2 Second Explanation

The second explanation deals with the two problems the first explanation left unsolved by putting the legal obligation to Φ in the context of the general principle of good faith. Good faith is of fundamental importance to all contemporary legal orders, making it a general principle of law under Article 38(1)(c) of the ICJ Statute.[81] In fact, Grotius stated in *De Jure Belli ac Pacis* that good faith was one of the most significant legal standards. He also mentions how Aristotle and Cicero saw it as the foundation of all human interaction.[82] The general principle of good

[80] Advisory Committee of Jurists (n 72) 322.

[81] Statute of the International Court of Justice (n 12). On good faith as a general principle of law, see R Kolb, *Good Faith in International Law* (Hart 2017); S Reinhold, 'Good Faith in International Law' (2013) 2 UCLJLJ 40.

[82] H Grotius, *The Rights of War and Peace* (Richard Tuck ed, Liberty Fund 2005) bk III, ch XXV, s I.1.

faith has a broad, value-oriented scope, allowing us to derive a variety of legal by-products from it. In similar vein, the ICJ declared in *Nuclear Tests* that good faith governs 'the creation and performance of legal obligations, whatever their source'.[83] So it is safe to say that good faith is the basis for many rules of international law, including (meta)rules on how to interpret and apply legal rules.[84]

One of the by-products of the general principle of good faith is that it protects legitimate expectations by prohibiting states from acting inconsistently with such expectations (or obligating states to act consistently with them).[85] There have been several precedents affirming the legal protection of legitimate expectations. In *Certain German Interests in Upper Silesia*, for instance, the Permanent Court of International Justice held that Germany could not act against good faith by frustrating expectations.[86] In the Megalidis award, the arbitral tribunal considered the prohibition on frustrating the object of a treaty before it enters into force to be linked to the protection of legitimate expectations, thereby acknowledging this prohibition as an expression of good faith.[87] We can find similar references to protecting legitimate expectations in the *Preah Vihear* and *North Sea Continental Shelf* judgments.[88] In the recent *Obligation to Negotiate Access to the Pacific Ocean* case, however, the ICJ ruled otherwise:

> [R]eferences to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that

[83] *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253 [46].

[84] K Schmalenbach, 'Article 26' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 473.

[85] B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 1994) s 5.C; Reinhold (n 81) 54. As explained in Section 2, a prohibition on acting is equivalent to an obligation not to act. We might wonder if the general principle of good faith is not itself this rule on legitimate expectations. As pointed out above, good faith leads to many legal by-products. Some of them are tied to prohibiting states from acting inconsistently, but others are focused on legal interpretation and rule application. We can also think of *pacta sunt servanda*, *rebus sic stantibus*, and the prohibition of *abus de droit*, which are also derivatives of good faith. In any case, it is theoretically possible to perceive good faith as a rule protecting legitimate expectations. But in this chapter we formulate it as a general principle which has as a corollary the rule that protects legitimate expectations by prohibiting acts inconsistent with such expectations. This theoretical choice allows for a simple conditions⇒conclusion formulation, as will become clear.

[86] *Case Concerning Certain German Interests in Polish Upper Silesia* (Merits) [1926] PCIJ Rep 5 Series A No 7.

[87] 'A. A. Megalidis v Turkey' [1932] 4 ADPILC 395.

[88] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits, Separate Opinion of Vice-President Alfaro) [1962] ICJ Rep 39; *North Sea Continental Shelf* (Judgment, Separate Opinion of Judge Fouad Ammoun) [1969] ICJ Rep 101.

> apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.[89]

Consequently, there is some controversy over whether there is a general rule of international law protecting legitimate expectations. But that does not affect the second explanation's account of how the legal obligation materialises. The legal obligation to Φ emerges from the general principle of good faith, particularly from a rule that obligates states to Φ if the practice of engaging in Φ generates legitimate expectations. Let us call this rule 'L'. We can formulate it like this:

Conditions: 'X is a state' and 'X engages in Φ' and 'X engaging in Φ generates legitimate expectations' – Conclusion: 'X is obligated to Φ'

The ICJ's statement in *Obligation to Negotiate Access to the Pacific Ocean* puts us in a predicament. If we were to ignore its pronouncement, we could say that L is a rule of international law that creates an international legal obligation enforceable under international law, full stop. However, this is not the line taken in this chapter, which therefore contemplates that L may not be a general rule of international law. Even so, it is still possible to say that L leads to a legal obligation in a broad sense, because L is a by-product of the general principle of good faith.

According to the ICJ in *Obligation to Negotiate Access to the Pacific Ocean*, L alone does not create an obligation under general international law. Nonetheless, L can still create an enforceable obligation if a source can be found in a specific provision of international law. As pointed out by Judge ad hoc Daudet, invoking good faith to protect legitimate expectations is effective only when it comes with a clear legal underpinning.[90] Even if L's obligation may not be directly enforceable under general international law, it is still a legal obligation because it results from good faith, which is a general principle of law. This is precisely why states feel they have a legal obligation even before a CIL rule exists. The obligation materialised in L is legal because it follows from the general principle of good faith. Even though the ICJ says that L is not a rule of general international law, this does not mean that L does not constitute law. If we can trace L back to a specific provision of

[89] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Merits) [2018] ICJ Rep 507 [162].

[90] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Merits, Dissenting Opinion of Judge ad hoc Daudet) [2018] ICJ Rep 607 [45].

international law (source interpretation), the obligation in L becomes enforceable under international law.

Saying that L is 'outside' general international law may even support the second explanation's account of CIL. This is because this claim would match Fitzmaurice's explanation about 'outer rules' being the basis for the coherence of international law:

> The system of international law cannot be clothed with force by a principle that is part of the system itself; for unless the system already had force, that principle itself would have no validity, and there would be a *circulus inextricabilis* or *viciosus*.[91]

If we try to solve the problem posed by the chronological paradox without using elements that are not part of international law, we might run into a problem similar to the 'this sentence is false' self-reference antinomy: if 'this sentence is false' is false, then it is true; if it is true, then it is false.[92] One way of dealing with such antinomies is to follow Tarski, who suggested separating elements into distinct, hierarchically arranged sets to prevent them from looping back on themselves.[93] Accordingly, if L lies above international law, then L is a legal rule *about* international law, but not *of* international law. This arrangement allows us to avoid the chronological paradox, because we are outside international law when adducing L. However, we are still within the law when L applies, because L is still part of a legal set. In other words, we are outside of international law but within the general framework of the law.[94]

We are now in a position to understand how a CIL rule R is created according to the second explanation. Suppose that a state S1 engages in Φ and that S1's engaging in Φ generates legitimate expectations among states S2, S3 . . . Sn that S1 will continue to Φ. Thus, L is applicable. If L applies, L imposes on S1 the obligation to Φ. L's obligation is legal because it comes from the principle of good faith, a general principle of law. Now, imagine that, in addition to S1, a large group of other states also start to Φ. Their action creates legitimate expectations among the

[91] See G Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1954–9: General Principles and Sources of International Law' (1959) 35 BYIL 183, 195.

[92] G Priest, 'The Structure of the Paradoxes of Self-Reference' (1994) 103 Mind 25.

[93] On Tarski's escape from the self-reference antinomy, see M Gruber, *Alfred Tarski and the 'Concept of Truth in Formalized Languages'* (Springer 2016).

[94] This ensures that L and M are a part of the same activity or 'language game'. Wittgenstein (n 1) para 23. On international law and language games, see A Carty, 'Language Games of International Law' (2012) 13 Melb JIL 1.

rest of the international community. L applies to each of these states, such that any state that engages in Φ is now obligated to Φ. So, M becomes applicable as states generally engage in Φ and (due to L) these states are obligated to Φ. If M applies, it creates a CIL rule R that imposes on all states the obligation to Φ.

There are two main differences between L and R. The first is that L applies only to states that are actively engaging in Φ. This means that, under L, only states that are actively engaging in Φ are obligated to Φ. Conversely, R applies to all states (not just those that are engaging in Φ). R obligates all states to Φ. In other words, L applies individually, and R applies universally. Nonetheless, an exception to R can be made for persistent objectors.[95] The ILC explains that if a state objects to a CIL rule while it is still being created, the rule does not apply to that state as long as it maintains its objection.[96] So, R does not apply to any objecting states. The exception to the exception is when R is a peremptory rule of international law (*jus cogens*),[97] in which case it will also apply to persistent objectors. The second difference between L and R is shown by the ICJ's decision in the *Obligation to Negotiate Access to the Pacific Ocean* case. While L imposes a legal obligation to Φ, that obligation might not be enforceable within general international law. Conversely, when M applies and creates R, the obligation to Φ that R imposes is perfectly enforceable as this obligation is now sourced in (customary) international law. Because R is a CIL rule, it is fully enforceable by international courts and legal officials.

A simple illustration may help to clarify this explanation, highlighting how M, L, and R can address the chronological paradox. Let us go back to our vaccine donation example. Suppose a subgroup of wealthy states began donating vaccines to developing states during a pandemic. These wealthy states donate vaccines without any prior obligations. But these donations create legitimate expectations in developing states that vaccines will continue to be provided by wealthy states. L is thus applicable. If L applies, it imposes a legal obligation on that subgroup of wealthy states to continue donating vaccines to developing states. Because of the legal obligation imposed by L, that subgroup of wealthy states continues to donate vaccines. Suppose that an increasing number

[95] On exceptions see J Hage, A Waltermann and G Arosemena Solorzano, 'Exceptions in International Law' in L Bartels and F Paddeu (eds), *Exceptions and Defences in International Law* (Oxford University Press 2018) 11.
[96] ILC (n 10) 152.
[97] ibid.

of wealthy states start to adopt this practice. Due to L's application to each of these states, this practice becomes a general, legally obligatory practice. So, the two CIL elements (*diuturnitas* and *opinio juris*) are satisfied. M is now applicable. If M applies, a CIL Rule R is created, imposing on all wealthy states the obligation to donate vaccines to developing states. R, unlike L, is an enforceable rule of general international law.

5 Final Remarks

This chapter argued that CIL rules result from applying a constitutive metarule. A constitutive metarule is a metarule (a rule about rules) that creates another rule when applied. When the constitutive CIL metarule (which we call M) applies, it creates an individual CIL rule (referred to as R). This chapter has proposed two alternative explanations for how a belief in a legal obligation (*opinio juris*) can arise prior to the imposition of such an obligation by a CIL rule. In doing so, it assumes in both cases that states are correct in believing they are legally obligated. So there is not just a belief in a legal obligation; there actually is a legal obligation.

The first explanation presented the obligation as a basic social entity based directly on what states believe. Some may be satisfied with this explanation. However, others might criticise it for failing to bridge the gap between 'is' and 'ought'. It could also be argued that this first explanation does not clarify how this basic social entity can impose a *legal* obligation. For these reasons, this chapter laid aside this first explanation and went on to develop an alternative explanation.

The second explanation addresses the chronological paradox by breaking down the creation of a new CIL rule R into three non-contradictory steps:

Step 1: A subgroup of states starts to act in a certain way. Their behaviour leads to legitimate expectations that they will continue acting that way. This subgroup of states is now obligated to continue acting pursuant to a rule derived from the principle of good faith (we call this rule L). However, because this obligation arises from a rule (L) outside general international law, its enforceability is questionable.

Step 2: The practice of this subgroup of states spreads among other states to the point where it becomes a general practice accepted as law. So,

the two CIL elements – *diuturnitas* and *opinio juris* – are present. Therefore, the CIL metarule, M, is now applicable.

Step 3: M applies, thus creating a specific CIL rule, R. This CIL rule R imposes an obligation to act on all states except for persistent objectors (unless R is a *jus cogens* rule, in which case it applies even to persistent objectors).

The creation of a new CIL rule as a three-step process allows us to unravel the apparent circularity of the chronological paradox. It also allows the creation of CIL rules to be explained in such a way as not to jeopardise the coherence (and legitimacy) of (customary) international law.

Some of the claims made in this chapter might seem controversial, because it is unusual to think of CIL rules as being created through the application of a (meta)rule. We are more inclined to think that it is a matter of finding already formed CIL rules rather than creating them. But that intuition is not incompatible with the contention made in this chapter. For when we find CIL rules, we are doing more than just describing; we are giving meaning to the things being interpreted. In the case of CIL, these things are the proof of practice (*diuturnitas*) and belief in a legal obligation (*opinio juris*). We should consider the CIL metarule as an unspoken rule that operates behind the scenes. Even if its action is unannounced, this metarule helps international lawyers interpret the law to identify individual CIL rules. The point is that for lawyers in their daily work the three steps set out above occur simultaneously, giving the impression that CIL rules are paradoxical. By looking at CIL analytically, however, we have been able to pinpoint these separate steps and show that CIL is not flawed by circular reasoning.

Like the rules of chess, the CIL metarule operates in the background. When experts play chess, they do not have to keep referring to the rules and reminding themselves that, for example they are using the checkmate rule: when they look at the chessboard, they know it is checkmate. The same is true in international law, with the important difference, however, that law is an argumentative activity.[98] Unlike chess, it is not an activity where all the rules are laid down categorically. On the contrary, the law involves deploying and disputing the very rules that constitute it. Part of what it means to be a lawyer is the ability to understand and question the law itself. In this respect, one of the goals of legal philosophy is to make the implicit background rules of legal activity explicit.

[98] Dworkin (n 41) 13. See also Brandom (n 64) 649–50.