

## INDEX

- Adjudicated Law model of CIL, 60  
coherence and, 71  
common law compared, 60  
ECtHR and, 60–61  
ICJ and, 69  
interpretive path, 70  
as justification-based source, 61, 62  
Legislated Law model of CIL  
  compared, 72  
Negotiated Law model of CIL  
  compared, 61, 69  
  overview, 53
- Adler, Ruth, 266
- aggression, prohibition as *jus cogens*,  
  219–20
- Agreement on the European Economic  
  Area (EEA), 179
- Alexy, Robert, 266
- ambiguity  
  defined, 194  
  of indispensable parties  
  principle, 199  
  judicial effectiveness contrasted,  
  192, 194
- Ammoun, Fouad, 244–45
- analogy, 115–16
- anticipatory self-defence, 63
- application of CIL, interpretation prior  
  to, 20
- arbitration, 204–5
- Articles on Responsibility of States for  
  Internationally Wrongful Acts  
  (ARSIWA)  
  case-by-case analysis, 154  
  control under, 149–50  
  factual context of rules, 142  
  judicial reasoning regarding  
  threshold of control, 150–53  
  legal context of rules, 142  
  non-binding nature of, 131–32  
  overview, 130  
  statement of reasons for tribunal  
  decision, 152, 154–55  
  state-owned enterprises and, 138–41
- attribution  
  Contras and, 132–33  
  ICJ and, 136, 141  
  ICTY and, 133–34, 136, 141  
  state-owned enterprises and, 132,  
  134–35, 150–51
- al-Bashir, Omar, 98–99, 282–83, 291
- basic social entities, 38–39
- Bodansky, Daniel, 18
- Boltzmann, Ludwig, 91
- Bos, Maarten, 189
- Bossa, Solomy Balungi, 94
- Bradley, Curtis A, 13, 29
- Broches, Aaron, 146
- Brussels II Regulation, 182–83
- Caflich, Lucius, 221, 227
- Cassese, Antonio, 28, 97
- chaotic systems, 82
- chess, 39–40, 50
- Choi, Stephen, 17–18, 268–69
- chronological paradox  
  CIL metarule and, 42–43, 47  
  constitutive rules and, 36  
  good faith principle and, 26–27,  
  49–50  
  ILC and, 26  
  *opinio juris* and, 28–29  
  overview, 25–26  
  rejection of obligation element as  
  possible solution, 30  
  risks of, 26  
  rule identification and, 31

- CIL metarule  
 chronological paradox and,  
 42–43, 47  
 conditions, 41–43  
 as constitutive rule, 49  
 first explanation, 43–44, 49  
 good faith principle and, 44–50  
 is/ought gap, 43–44, 49  
*jus cogens* and, 48, 50  
 legal nature of obligation, 44, 49  
 legitimate expectations and, 45–47  
 overview, 40  
 second explanation, 43–44, 49–50  
 as unspoken behind-the-scenes  
 rule, 50
- circularity  
 of CIL, 29–30  
 of identification of CIL, 18  
 of *opinio juris*, 12–13, 16–17
- CJEU. *See* Court of Justice of the  
 European Union (CJEU)
- Clausius, Rudolf, 90
- coherence  
 Adjudicated Law model of CIL  
 and, 71  
 comprehensiveness and, 300,  
 306–7, 308  
 consistency and, 300, 302–4, 308  
 contextualisation and, 320–22. *See*  
*also* contextualisation  
 correctness and, 300, 304–6, 308  
 defined, 300  
 dual role of, 300, 309, 314–16,  
 325  
 framing and, 317–20. *See also*  
 framing  
 ILC on, 301  
 as independent concept with own  
 content, 308–9  
 indicators of, 300, 316–17  
 lack of scholarly attention to, 300–1  
 legal reasoning and, 300, 325  
 Legislated Law model of CIL and, 72  
 methodological dimension, 300, 309,  
 315–16, 325  
 Negotiated Law model of CIL and,  
 72–73  
 overview, 71, 75, 299–300  
 reflexivity and, 322–25. *See also*  
 reflexivity  
 self-defence and, 305  
 substantive dimension, 300, 309,  
 315–16, 325  
 VCLT and, 301  
 collective acceptance, 30–31  
 command responsibility, 273–74  
 Committee against Torture, 226  
 common law  
 Adjudicated Law model of CIL  
 compared, 60  
 state practice compared, 13  
 ‘communities of practice’, 233–34  
 complexity theory  
 complicatedness distinguished, 84  
 diversity of actors, 84–86, 88  
 dynamic complexity, 79, 80–83  
 judicial discretion and, 88  
 shared understanding of CIL and, 86  
 social system, CIL as, 79–80, 83–88  
 two-level complexity in CIL, 88  
 comprehensiveness, coherence and,  
 300, 306–7, 308  
 conflicting norms  
 in ICC, 282  
 as legal dilemma, 293–94  
 overview, 282–84  
 practical concordance. *See* practical  
 concordance  
 reconciliation of, 288, 291–292,  
 295–296  
 consistency, coherence and, 300,  
 302–4, 308  
 constitutive rules, 36, 40, 49  
 constructive interpretation, 32–34, 97  
 constructive rules, 109–10  
 contextualisation, 320–22  
 defined, 320  
 head-of-state immunity and, 321–22  
 ICC and, 321–22  
 interpretation and, 320–21, 322  
 normative contextualisation and,  
 212–14  
 order and priority, imposing, 325  
 overview, 300, 316  
 systemic contextualisation and,  
 212–14

- continental shelf, 42, 114, 115–16, 265, 313–14
- control  
 under ARSIWA, 149–50  
 case-by-case analysis, 136, 153–54  
 Contrás and, 132–33  
 corporate plus effective control, 141, 150  
 ‘effective control’ test. *See* ‘effective control’ test)  
 hybrid control tests, 141  
 ICJ and, 136, 141  
 ICTY and, 133–34, 136, 141  
 international investment, control tests in, 137–42  
 interpretation of, 132  
 judicial reasoning regarding threshold of control, 143, 150–53  
 lower thresholds for control, 138–41  
 statement of reasons for tribunal decision, 152, 154–55  
 state-owned enterprises, control tests, 132, 134–35, 138–41, 151–52  
 Convention against Torture (1984), 223, 272  
 Convention on the Continental Shelf (1958), 265  
 Convention on the Law of the Sea (UNCLOS) (1982), 114  
 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (1965), 145–46, 148, 152, 314
- correctness  
 coherence and, 300, 304–6, 308  
 demonstrable correctness, 304–5  
 determinate correctness, 304, 305
- Court of Justice of the European Union (CJEU)  
 Advocates General, 167–69  
 boundaries of EU law and, 162  
 determination of CIL in, 122  
 as domestic court, 184  
*erga omnes* obligations and, 166  
 EU institutions and, 162  
 EU law, interpretation of, 164–65, 181–83
- ICJ rulings, reliance on, 158–59  
 identification of CIL in, 176  
 importance of CIL in, 160–63  
 indispensable parties principle in, 205–6  
 interpretation of CIL generally, 156–60, 163–64, 165–66, 185  
 ‘mirroring’ of CIL norms, 178  
 ‘multiplying’ effect in, 166  
 natural resources, state sovereignty over, 170–78, 183  
 obligation not to defeat object and purpose of treaties and, 178–80, 182  
 PCIJ rulings, reliance on, 158–59  
 reluctance to analyse CIL, 183–84  
 ‘re-packaging’ of CIL norms, 178  
 resources of, 184  
 self-determination and, 170–78, 183  
 ‘snowball’ effect in, 166  
 state immunity from jurisdiction and, 166–70, 182–83  
 territorial scope of treaties and, 180–81, 182  
 two-pronged test for interpretation, 183  
 VCLT and, 161, 182
- crimes against humanity  
 ICTR and, 95  
 individual criminal responsibility for, 289  
 inhumane acts as, 95  
*jus cogens*, prohibition as, 219–20  
 systemic interpretation and, 272–73
- customary rules  
 acceptance of, 121–22  
 applicability of, 38  
 application of, 38  
 basis for interpretation of, general principles of law as, 249, 252  
 CIL metarule. *See* good faith principle  
 conflicting norms. *See* conflicting norms  
 constitutive rules, 36, 40, 49  
 constructive rules, 109–10  
 critical mass for creation of, 105–6  
 facts, emerging from, 11–12

- customary rules (cont.)  
 general principles of law,  
 interpretation by reference to,  
 275–78, 280  
 hierarchy of, 220–21  
 obligation element, 24, 27  
 ‘outer rules’, 47  
 practice element (*diuturnitas*), 24, 27  
 system of rules as a whole,  
 interpretation by reference to,  
 278–79  
 treaties, interpretation by reference  
 to, 268–74, 280  
 cyberspace, 119
- d’Aspremont, Jean, 35, 42, 156  
 Daudet, Yves, 46  
 declaratory treaties, 269  
 deduction  
 from analogy, 115–16  
 defined, 108  
 in determination of CIL, 119–20,  
 123–24, 127, 165  
 in ICJ, 105, 112–21, 128–29  
 in identification of CIL, 105, 108–10,  
 118–19, 124–26  
 from legal principles, 116–18  
 normative deduction, 113–14  
 in PCIJ, 105  
 ‘triangular reasoning’, 116–17  
 without resort to elements, 112–21  
 definitional concepts, 9–10, 12  
 demonstrable correctness, 304–5  
 Descamps, Baron Édouard, 42, 44  
 descriptive interpretation, 32–33  
 determinate correctness, 304, 305  
 determination of CIL  
 in CJEU, 122  
 deduction in, 119–20, 123–24,  
 127, 165  
 foreign ministry determinations,  
 122–23  
 ICJ on, 122  
 identification distinguished, 106  
 by inference, 127–28  
 interpretation prior to, 20  
 judicial function and, 189  
 judicial process and, 189  
 UN General Assembly resolutions  
 and, 123–24  
 deterministic chaos, 82  
 Dewey, John, 322–23  
 diplomatic immunity, 116  
*diuturnitas* (practice)  
 in customary rules, 24, 27  
 as state practice, 27  
 doctrine of sources, 52, 325  
*dolus eventualis*, 278  
 domestic courts  
 CJEU as, 184  
 general principles of law originating  
 in, 245, 246–47  
 head-of-state immunity in, 115  
 human rights law, role in, 232  
 due process, 69–70  
 Dworkin, Ronald, 33–34  
 dynamic complexity, 79, 80–83  
 dynamic interpretation, 159
- Eboe-Osuji, Chile, 94  
 ECtHR. *See* European Court of Human  
 Rights (ECtHR)  
 ‘effective control’ test  
 Geneva Conventions and, 274  
 in ICJ, 132–33, 137–38, 141, 149–50  
 in ICTY, 134  
 international armed conflict and, 274  
 international investment law,  
 flexibility in, 141, 143, 148–50, 154  
 limitations of, 153–54  
 as standard of evaluation, 152–53  
 state-owned enterprises and, 138  
 entropic approach to interpretation  
 in ICC, 94, 95–97  
 in ICJ, 98–100  
 in ICTR, 95  
 in ICTY, 95  
 in international criminal courts,  
 93–100, 101  
 overview, 80, 93, 101  
 shared understanding of CIL and, 94  
 in Special Tribunal for Lebanon,  
 97–98  
 entropy  
 in CIL, 93  
 information entropy, 90, 91

- interpretation, entropic approach to.
  - See entropic approach to interpretation
- overview, 80
- in social context, 91–92
- in statistical mechanics, 92–93
- in thermodynamics, 90–91
- equidistance rule, 14, 42
- equilibrium, 92
- erga omnes* obligations
  - CIL norms as, 172
  - CJEU rulings and, 166
  - Geneva Conventions Common Article 3 and, 95
  - in human rights law, 234
  - ICJ and, 234
  - self-determination as, 118, 174
  - state sovereignty over natural resources as, 174–75
- EU–China Comprehensive Agreement on Investment, 47
- European Convention on Human Rights, 225, 226–27, 260, 267–68
- European Court of Human Rights (ECtHR)
  - Adjudicated Law model of CIL and, 60–61
  - general principles of law in, 260
  - harmonisation through interpretation, 283
  - indispensable parties principle in, 206–7
  - judicial dialogue and, 220–22, 224, 225, 226–28
  - provisional measures and, 225, 226–28
  - state policy, impact on, 100
  - systemic interpretation and, 267–68
- European Union
  - CIL, lack of consent to, 184
  - CJEU. See Court of Justice of the European Union (CJEU)
- exceptions, 165–66
- Extraordinary Chambers in the Courts of Cambodia (ECCC), 272–73, 278
- facts
  - customary rules emerging from, 11–12
  - no falsification by, 10–11
  - state practice as fact element of CIL, 4
- fair and equitable treatment clauses, 74, 143–44
- fairness, 69–70
- falsification by facts, 10–11
- Fitzmaurice, Gerald, 47, 255–56
- foreign ministry determinations, 122–23
- formal activism, 194–95
- Forrester, Jay, 83
- fragmentation
  - ILC on, 301
  - judicial dialogue as remedy for, 233–35
  - Legislated Law model of CIL and, 72
  - Negotiated Law model of CIL and, 56
- framing, 317–20
  - goals, formulating, 318
  - order and priority, imposing, 318–19, 325
  - overview, 300, 316
  - practice, identifying, 319
  - prima facie legal relevance and, 320
- France, practical concordance in, 293
- Gaja, Giorgio, 122
- general principles of law
  - ascertainment of, 244–47
  - as basis for interpretation of customary rules, 249, 252
  - as category of rules, 241–44, 251
  - CIL compared, 239–40
  - courts and tribunals, role of, 241, 244–47
  - customary rules, interpretation by reference to general principles of law, 275–78, 280
  - disagreement regarding, 240–41
  - domestic courts, originating in, 245, 246–47
  - in ECtHR, 260
  - elements of crime and, 278
  - embeddedness with custom, 275–77
  - ICJ and, 276, 277
  - under ICJ Statute, 241–44, 251, 260
  - ICTY and, 260–61, 277–78

- general principles of law (cont.)  
 identification of CIL contrasted to  
 ascertainment of, 247  
 ILC on, 240–41, 276  
 international law, originating in, 245,  
 246–47  
 interpretation generally, 240, 263–64  
 overview, 239–40, 261–62  
 PCIJ and, 276  
 principles *stricto sensu* distinguished,  
 242–44, 251, 260  
 as ‘relevant rules of international  
 law’, 259–61  
 as secondary rules, 240  
 as source of rules of interpretation,  
 252–55  
 systemic interpretation and, 240,  
 258–59, 260, 275–78, 280  
 ‘systemic officials’, role of, 241,  
 244–47  
 transposition of, 245–46  
 Geneva Conventions (1949)  
 Additional Protocols, 271, 273–74  
 Common Article 3, 95  
 ‘effective control’ test and, 274  
*erga omnes* obligations and, 95  
 torture prohibition as *jus cogens*  
 and, 223  
 genocide  
 CIL and, 25  
*jus cogens*, prohibition as, 219–20  
 Genocide Convention (1948), 58, 289  
 Gény, François, 30, 41  
 Germany, practical concordance in,  
 283, 291, 292–93  
 gold-digging metaphor, 5  
 good faith principle  
 chronological paradox and, 26–27,  
 49–50  
 CIL, metarule and, 44–50  
 ICJ Statute and, 44, 45  
 legitimate expectations and, 45–46  
*opinio juris*, as basis of, 26–27  
 in PCIJ, 45  
 Gorobets, Kostiantyn, 313  
 grammatical interpretation, 164–65  
 Grotian moment, 79  
 Grotius, Hugo., 44  
 Guillaume, Gilbert, 234–35, 271  
 Gulati, Mitu, 17–18, 268–69  
 Hague Convention (1907), 116  
 Hakimi, Monica, 12, 56, 129, 318  
 Hanson, Norwood Russell, 7  
 Hart, HLA, 8, 32, 78  
 head-of-state immunity  
 contextualisation and, 321–22  
 in domestic courts, 115  
 foreign ministers and, 118–19  
 ICC and, 94, 285, 286, 291, 321–22  
 ICJ and, 98–100, 284–85, 286  
 ICTR and, 286  
 ICTY and, 286  
 ILC on, 284  
 impunity and, 282–83, 284  
 individual criminal responsibility  
 versus, 282–83, 284, 286–87,  
 288–89, 290–91, 296–98  
 interpretation of, 98–100  
 practical concordance and, 296–98  
 rationale for, 284  
 shared understanding of CIL  
 and, 94  
 shift from absolute to qualified  
 immunity, 287–88  
 unease regarding, 288  
 VCLT and, 285  
 Heidegger, Martin, 8, 12, 20  
 Helsinki Final Act, 174  
 Hesse, Konrad, 292  
 Higgins, Rosalyn, 69, 185  
 Hofmanski, Piotr, 94  
 Hollis, Duncan, 248  
 humanitarian intervention, 86–88  
 human rights law  
 domestic courts, role of, 232  
*erga omnes* obligations in, 234  
 identification of, 215, 216  
 judicial dialogue, role of in  
 identification and interpretation,  
 214, 219–24  
*jus cogens* and, 216–17  
 provisional measures, 225–28  
 public international order and,  
 230–31  
 hypothetical inference, 128

- ICC. *See* International Criminal Court (ICC)
- ICJ. *See* International Court of Justice (ICJ)
- ICJ Statute  
 CIL under, 27  
 general principles of law under, 241–44, 251, 260  
 good faith principle and, 44, 45  
 indispensable parties principle as ‘embodied’ in, 198–99, 210  
 on interpretation, 34–35  
 on legitimate expectations, 45–46  
 two-element test for CIL, 52
- ICSID Convention (1965), 145–46, 148, 152, 314
- ICTR. *See* International Criminal Tribunal for Rwanda (ICTR)
- ICTY. *See* International Criminal Tribunal for the Former Yugoslavia (ICTY)
- identification of CIL  
 circularity of, 18  
 in CJEU, 176  
 deduction in, 105, 108–10, 118–19, 124–26  
 determination distinguished, 106  
 Draft Conclusions on Identification of Customary International Law (ILC), 52, 157–58, 177, 264, 268, 272  
 general principles of law, contrasted to ascertainment of, 247  
 human rights law, 215, 216  
 in ICJ, 106, 109–10  
 ILC on, 106, 111, 254–55  
 indispensable parties principle, 191  
 induction in, 105, 108–10, 126–27, 165  
 as ‘interconnected judicial operation’, 217–18  
 interpretation and, 32, 217–18  
 investigation of state practice and, 5  
 lack of precision in, 187  
 non-textual evidence, 34  
*opinio juris* and, 215–16  
 in PCIJ, 111  
 state practice and, 215–16  
 textual evidence, 31–32  
 uncertainty regarding, 77
- immunities *rationae personae*. *See* head-of-state immunity
- immunity, 63
- impunity, head-of-state immunity and, 282–83, 284
- indigenous peoples, 86
- indispensable parties principle  
 ambiguity of, 199  
 application of, 191  
 application versus recognition, 208  
 in arbitration, 204–5  
 in CJEU, 205–6  
 consolidation of, 207–8  
 development of, 190–91  
 in ECtHR, 206–7  
 effect on absent state and, 201–2  
 as ‘embodied’ in ICJ Statute, 198–99, 210  
 expansion of, 201–2  
 in ICC, 206  
 in ICJ, 198–203  
 identification of, 191  
 judicial activism and, 188, 200, 202, 203, 209–10  
 judicial effectiveness and, 209  
 judicial restraint and, 200, 205–6, 208  
 lack of relevance, 205–7  
 in other international tribunals, 204–5  
 overview, 188, 210  
 public function, 208–9  
 temporal preconditions, 202–3  
 uncertainty in, 210  
 in WTO, 206
- individual criminal responsibility  
 for crimes against humanity, 289  
 head-of-state immunity versus, 282–83, 284, 286–87, 288–89, 290–91, 296–98  
 ICTY and, 290  
 ILC on, 289–90  
 Nuremberg Principles, 289–90  
 for piracy, 289  
 practical concordance and, 296–98
- induction  
 within application of state practice and *opinio juris* elements, 121–28

- induction (cont.)  
 criticism of, 5–6  
 defined, 107–8  
 in identification of CIL, 105, 108–10,  
 126–27, 165  
 problems with, 6–8  
 in Special Tribunal for Lebanon, 126  
 state practice and, 5
- inference  
 determination of CIL by, 127–28  
 hypothetical inference, 128  
 predictive inference, 127–28  
 universal inference, 128
- information entropy, 90, 91
- Institut de Droit International, 266
- Inter-American Court of Human  
 Rights (IACtHR), 60–61, 226
- Inter-American Treaty of Reciprocal  
 Assistance (Rio Treaty) (1947),  
 270–71
- international armed conflict, ‘effective  
 control’ test and, 274
- International Court of Justice (ICJ)  
 Adjudicated Law model of CIL  
 and, 69  
 analogy in, 115–16  
 attribution and, 136, 141  
 CJEU reliance on rulings of, 158–59  
 control and, 136, 141  
 deduction in, 105, 112–21, 128–29  
 on determination of CIL, 122  
 ‘effective control’ test, 132–33,  
 137–38, 141, 149–50  
 ‘elementary considerations of  
 humanity’ and, 113  
 entropic approach to interpretation  
 in, 98–100  
*erga omnes* obligations and, 234  
 general principles of law and,  
 276, 277  
 head-of-state immunity and, 98–100,  
 284–85, 286  
 identification of CIL in, 106, 109–10  
 indispensable parties principle in,  
 198–203  
 induction in, 125–26, 128–29  
 inference in, 128  
 interpretation in, 98–100  
 judicial dialogue and, 221–22,  
 223, 225  
 jurisdiction, 211  
 non-compliance with obligations  
 and, 98–100  
*opinio juris* in, 111–12  
 practical concordance in, 294,  
 295–97  
 provisional measures and, 225  
 state practice in, 111–12  
 Statute. *See* ICJ Statute  
 systemic interpretation and, 266  
 on torture prohibition as *jus*  
*cogens*, 223  
 on treaties, 270–72, 273  
*uti possidetis* and, 115, 319
- International Covenant on Civil and  
 Political Rights, 174, 223
- International Covenant on Economic,  
 Social and Cultural Rights, 174
- International Criminal Court (ICC)  
 conflicting norms in, 282  
 contextualisation and, 321–22  
 entropic approach to interpretation  
 in, 94, 95–97  
 gap-filling and, 82–83  
 head-of-state immunity and, 94, 285,  
 286, 291, 321–22  
 indispensable parties principle  
 in, 206  
 interpretation in, 94, 95–97  
 judicial discretion and, 88  
 Rome Statute. *See* Rome Statute  
 war crimes and, 95–97
- international criminal courts  
 entropic approach to interpretation  
 in, 93–100, 101  
 interpretation in, 80, 93–100
- International Criminal Tribunal for  
 Rwanda (ICTR)  
 crimes against humanity and, 95  
 entropic approach to interpretation  
 in, 95  
 head-of-state immunity and, 286  
 interpretation in, 95
- International Criminal Tribunal for the  
 Former Yugoslavia (ICTY)  
 attribution and, 133–34, 136, 141



- control and, 133–34, 136, 141
- crimes against humanity and, 95
- ‘effective control’ test and, 134
- entropic approach to interpretation in, 95
- gap-filling and, 82–83
- general principles of law and, 260–61, 277–78
- head-of-state immunity and, 286
- individual criminal responsibility and, 290
- interpretation in, 95
- judicial dialogue and, 222, 224
- state responsibility and, 278–79
- systemic interpretation in, 272
- on torture prohibition as *jus cogens*, 222, 224
- on treaties, 273–74
- international humanitarian law, nuclear weapons and, 271
- international investment law
  - case-by-case analysis, 154
  - control tests in, 137–42
  - corporate plus effective control in, 141, 150
  - ‘effective control’ test, flexibility of, 141, 143, 148–50, 154
  - fair-and-equitable-treatment clauses, 74, 143–44
  - investment neutrality, 154
  - judicial reasoning regarding threshold of control, 143, 150–53
  - legal reasoning in, 313
  - most-favoured-nation clauses, 143–44
  - state-led investment activities, caution regarding, 143–47
- international law
  - general principles of law originating in, 245, 246–47
  - harmonisation, role of judicial dialogue in, 231–32
  - judicial activism in context of, 196–98
  - judicial restraint in context of, 196–98
  - modern perception of, 188
  - ‘relevant rules of international law’, 259–61
- International Law Association (ILA), 111, 122–23, 163–64
- International Law Commission (ILC)
  - on ascertainment of general principles of law, 244–47
  - chronological paradox and, 26
  - on coherence, 301
  - Draft Articles on State Responsibility, 57–58, 124–25
  - Draft Conclusions on Identification of Customary International Law, 52, 157–58, 177, 264, 268, 272
  - on fragmentation, 301
  - on general principles of law, 240–41, 276
  - on head-of-state immunity, 284
  - on identification of CIL, 106, 111, 254–55
  - on individual criminal responsibility, 289–90
  - on interpretation, 35
  - legal reasoning and, 313
  - on non-state actors, 27
  - on *opinio juris*, 215–16, 254–55
  - on state practice, 215–16, 254–55
  - on state responsibility, 37
- international organisations, role in interpretation, 157
- International Tin Council, 110
- International Tribunal for the Law of the Sea (ITLOS), 205
- interpretation
  - in Adjudicated Law model of CIL, 70
  - of agreements, 68
  - application, prior to, 20
  - of arguments, 64–65
  - in CJEU. *See* Court of Justice of the European Union (CJEU)
  - constructive interpretation, 32–34, 97
  - contextualisation and, 320–21, 322
  - of control, 132
  - of customary rules, role of general principles of law, 249, 252
  - of decisions, 70

- interpretation (cont.)  
 defined, 264  
 descriptive interpretation, 32–33  
 determination, prior to, 20  
 dynamic interpretation, 159  
 entropic approach to. *See* entropic approach to interpretation  
 evolutive function of, 94  
 of exceptions, 165–66  
 general principles of law generally, 240, 263–64  
 grammatical interpretation, 164–65  
 harmonisation through, 283  
 of head-of-state immunity, 98–100  
 in ICC, 94, 95–97  
 in ICJ, 98–100  
 ICJ Statute on, 34–35  
 in ICTR, 95  
 in ICTY, 95  
 identification of CIL and, 32, 217–18  
 LLC on, 35  
 as ‘interconnected judicial operation’, 217–18  
 in international criminal courts, 80, 93–100  
 international organisations, role of, 157  
 judicial activism and, 195  
 legal reasoning and, 313–14  
 in Legislated Law model of CIL, 68  
 legitimacy of, 52–53, 64  
 maxims of, 249–51  
 in Negotiated Law model of CIL, 64–65  
 norms of, 249–51  
 reflexivity and, 324–25  
 rules of. *See* rules of interpretation  
 rule-to-case interpretation, 34, 36, 37  
 source interpretation, 34, 36, 37  
 source of rules of, general principles of law as, 252–55  
 in Special Tribunal for Lebanon, 97–98  
 of state immunity from jurisdiction, 182–83  
 systemic interpretation. *See* systemic interpretation
- teleological interpretation, 97, 159, 164–65, 218  
 of text, 18–19, 21  
 treaties generally, 263–64  
 ‘treaty focus’ of, 248  
 VCLT and, 67–68, 97, 248, 252–53  
 written versus unwritten rules, 248–49
- investigation of state practice  
 identification of CIL and, 5  
*opinio juris* as starting point for, 6
- investor–state arbitration. *See* international investment law
- Iran–US Claims Tribunal (IUSCT), 135–36, 137, 142
- is/ought gap, 43–44, 49
- Israel, individual criminal responsibility in, 290
- iteration. *See* reflexivity
- Jennings, Robert, 253–54
- judicial activism  
 abstract principles, deriving legal reasoning from, 197–98  
 in context of international law, 196–98  
 defined, 194–95  
 formal activism, 194–95  
 indispensable parties principle and, 188, 200, 202, 203, 209–10  
 interpretation and, 195  
 judicial effectiveness, relation to, 191  
 judicial restraint compared, 194, 195–96  
 legal reasoning and, 197–98  
 modification of law, 197  
 overview, 187–88  
 process or procedure, changing, 197  
 substantive activism, 194–95  
 will of parties and state consent, ruling against, 197
- judicial dialogue  
 ‘communities of practice’ and, 233–34  
 defined, 212  
 ECtHR and, 220–22, 224, 225, 226–28

- fragmentation, as remedy for, 233–35
- harmonisation of international law, role in, 231–32
- ICJ and, 221–22, 223, 225
- ICTY and, 222, 224
- identification of human rights law, role in, 214, 219–24
- as improving legal decisions, 230
- interpretation of human rights law, role in, 214, 219–24
- jurisprudential objectivism, impact on, 214, 228–32
- normative contextualisation and, 212–14
- overview, 211–12, 233–35
- provisional measures and, 225–28
- systemic contextualisation and, 212–14
- judicial discretion, 88
- judicial effectiveness
- ambiguity contrasted, 192, 194
  - elements of, 192–93
  - harmonisation and, 192–93
  - indispensable parties principle and, 209
  - judicial activism, relation to, 191
  - of judicial function, 191–92
  - overview, 186–87, 188
  - public versus private function, 192
  - rapprochement and, 192–93
  - role of judge in, 193
- judicial function
- determination of CIL and, 189
  - judicial effectiveness of, 191–92. *See also* judicial effectiveness
- judicial process, determination of CIL and, 189
- judicial restraint
- abstract principles, deriving legal reasoning from, 197–98
  - in context of international law, 196–98
  - defined, 195
  - indispensable parties principle and, 200, 205–6, 208
  - judicial activism compared, 194, 195–96
  - legal reasoning and, 197–98
  - jure gestionis*, 167, 168–69
  - jure imperii*, 167, 168–69
  - jurisprudential objectivism, 214, 228–32
  - jus cogens*
    - aggression and, 219–20
    - CIL as basis for, 219–20
    - CIL metarule and, 48, 50
    - crimes against humanity and, 219–20
    - Geneva Conventions and, 223
    - genocide prohibition as, 219–20
    - human rights law and, 216–17
    - ICJ and, 223
    - ICTY and, 222, 224
    - as overriding conflicting non-peremptory norms, 220–21
    - piracy and, 219–20
    - racial discrimination and, 219–20
    - slavery and, 219–20
    - torture and, 214, 219–20, 222–24
    - VCLT and, 216
- Kassoti, Eva, 181
- Khalilian, Tags Seyed Khalil, 135–36
- Kolver, Anatoly, 227
- Kooijmans, Pieter, 195, 198, 208
- Koskenniemi, Martti, 18
- Kylián, Jiří, 77, 101
- Lachs, Manfred, 120
- Lauterpacht, Hersch, 195, 198, 200
- Law of the Sea Convention, 25
- legal reasoning
- action intended by, 312–13
  - coherence and, 300, 325
  - defeasible nature of, 314
  - ILC and, 313
  - in international investment law, 313
  - interpretation and, 313–14
  - judicial activism and, 197–98
  - judicial restraint and, 197–98
  - as practical reasoning, 312–14
  - as purposive activity, 313
  - theoretical versus practical reasoning, 309–11

- Legislated Law model of CIL, 57  
 Adjudicated Law model of CIL  
   compared, 72  
 coherence and, 72  
 fragmentation and, 72  
 interpretive path, 68  
 as justification-based source, 61, 62  
 modern custom and, 59  
 Negotiated Law model of CIL  
   compared, 59–60, 67, 68, 72  
 overview, 53  
 treaties and, 58  
 VCLT and, 57–58, 68  
 legitimate expectations, 45–46  
 Lerche, Peter, 293  
 Llewellyn, Karl, 7, 13  
 Luhmann, Niklas, 83
- MacCormick, Neil, 303  
 Mahoney, Paul, 195–96  
 Mallarmé, Stéphane, 77  
 maritime boundaries, 115, 319  
 marriage, 11  
 McDougal, Myres, 55  
 McLachlan, Campbell, 259  
 Mendelson, Maurice, 18  
 Mengozzi, Paolo, 168  
 Merkouris, Panos, 5, 67–68, 165  
 Morrison, Howard, 94  
 most-favored nation clauses, 143–44
- natural resources, state sovereignty  
 over, 170–78, 183  
 Negotiated Law model of CIL, 57  
 Adjudicated Law model of CIL  
   compared, 61, 69  
 coherence and, 72–73  
 forward-looking nature of, 66  
 fragmentation and, 56  
 interpretive path, 64–65  
 as justification-based source, 61, 62  
 Legislated Law model of CIL  
   compared, 59–60, 67, 68, 72  
 overview, 53  
 textual interpretation and, 66  
 traditional custom and, 56  
 traditional model, 59  
 Nicaragua, Contrás in, 132–33
- non-state actors  
 CIL and, 27  
 ILC on, 27  
 self-defence and, 62  
 normative contextualisation, 212–14  
 normative deduction, 113–14  
 nuclear weapons, international  
   humanitarian law and, 271  
*nullum crimen sine lege*, 69–70  
 Nuremberg Principles, 289–90
- obligation element  
 in customary rules, 24, 27  
 in *opinio juris*, 27–28  
 Odermatt, Jed, 181  
*opinio juris*  
 belief in obligation, 28  
 chronological paradox and, 28–29  
 circularity of, 12–13, 16–17  
 as claims, 17–18  
 collective acceptance of, 30–31  
 conditions of, 15–16  
 as element of CIL, 111–12  
 evidence gathering, 31–32, 35  
 good faith principle as basis  
   of, 26–27  
 habitual practice distinguished,  
   28–29  
 in ICJ, 111–12  
 identification of CIL and, 215–16  
 ILC on, 215–16, 254–55  
 investigation of state practice, as  
   starting point for, 6  
 as normative element of CIL, 4  
 obligation element, 27–28  
 in PCIJ, 111–12  
 plural form of, 22  
 prescriptive role of, 30–31  
 presumption of, 121  
 rejection of obligation element,  
   30, 41  
 state practice as based in, 3–4, 16  
 as subjective element of CIL,  
   refutation of, 3, 4  
 usage distinguished, 14–16  
 Organization of American States  
   (OAS), 270–71, 272  
 ‘outer rules’, 47

- Pair, Lara, 195  
 Parsons, Talcott, 83  
 Pellet, Alain, 122  
 Permanent Court of Arbitration (PCA), 204  
 Permanent Court of International Justice (PCIJ)  
   CJEU reliance on rulings of, 158–59  
   deduction in, 105  
   general principles of law and, 276  
   good faith principle in, 45  
   identification of CIL in, 111  
   *opinio juris* in, 111–12  
   state practice in, 111–12  
 Pescatore, Pierre, 194  
 piracy  
   CIL and, 25  
   individual criminal responsibility for, 289  
   *jus cogens*, prohibition as, 219–20  
 Postema, Gerald, 20, 56, 65, 66  
 practical concordance  
   as balancing of interests, 291, 292–93  
   broader picture, consideration of, 295–96  
   defined, 291  
   fundamental rights and, 292–93  
   head-of-state immunity and, 296–98  
   in ICJ, 294, 295–97  
   individual criminal responsibility and, 296–98  
   in international courts, 294–95  
   as methodological lens, 295, 296  
   overview, 283–84, 298  
   proportionality and, 292  
   ‘thinking outside the box’, 296  
   unequal legal norms, inapplicable to, 291  
 practical reasoning  
   challenging, 311  
   legal reasoning as, 312–14  
   plausibility and, 311  
   reconciling and prioritising in, 310–11  
   theoretical reasoning versus, 309–11  
 precedents, 13–14  
 predictive inference, 127–28  
   principles *stricto sensu*, general  
   principles of law distinguished, 242–44, 251, 260  
   provisional measures, 225–28  
   questions of fact, 106–7, 129  
   questions of law, 106–7, 129  
   racial discrimination, prohibition as *jus cogens*, 219–20  
   rape, 277–78  
   Rawls, John, 322–23  
   reflective equilibrium, 323  
   reflexivity, 322–25  
     interpretation and, 324–25  
     order and priority, imposing, 325  
     overview, 300, 316  
     reflective equilibrium, 323  
   Ricoeur, Paul, 21  
   Roberts, Anthea Elizabeth, 5  
   Robinson, Patrick Lipton, 114  
   Rome Statute. *See also* International Criminal Court (ICC)  
     gap-filling and, 82–83  
     Legislated Law model of CIL and, 58  
     non-compliance with obligations, 98–100  
     war crimes and, 95–97  
   Rozakis, Christos, 221  
   rule-based social entities, 39, 40  
   rules of interpretation  
     candidates for, 255–58  
     general principles of law as source of, 252–55  
     overview, 249–51  
     VCLT and, 252, 255–56  
   rule-to-case interpretation, 34, 36, 37  
   Russell, Bertrand, 42  
   Scelle, Georges, 81, 96  
   Schauer, Frederick, 13  
   secondary rules, 129, 240  
   self-defence  
     anticipatory self-defence, 63  
     coherence and, 305  
     non-state actors and, 62  
     treaties and, 270–71

- self-determination  
 CJEU and, 170–78, 183  
 as *erga omnes* obligation, 118, 174  
 state sovereignty over natural  
 resources, relation to, 170–78, 183
- sexual slavery, 11
- Shahabuddeen, Mohamed, 201, 273–74
- Shannon, Claude E, 92–93
- shared understanding of CIL  
 complexity theory and, 86  
 entropic approach to interpretation  
 and, 94  
 head-of-state immunity and, 94  
 humanitarian intervention and, 88
- slavery  
 CIL and, 25  
*jus cogens*, prohibition as, 219–20
- social entities  
 basic social entities, 38–39  
 defined, 38  
 rule-based social entities, 39, 40
- social ontology, 30–31, 38
- social system, CIL as, 79–80, 83–88
- Société Nationale des Autoroutes du  
 Maroc (Moroccan state-owned  
 enterprise), 140
- SODIGA (Spanish state-owned  
 enterprise), 139–40
- Sørensen, Max, 273
- source interpretation, 34, 36, 37
- sources of CIL  
 Adjudicated Law model, 60. *See also*  
 Adjudicated Law model of CIL  
 doctrine of sources, 52  
 justification-based sources, 61, 62  
 Legislated Law model, 57. *See also*  
 Legislated Law model of CIL  
 multiplicity of, 76  
 Negotiated Law model, 57. *See also*  
 Negotiated Law model of CIL  
 overview, 54
- Special Court for Sierra Leone, 290
- Special Tribunal for Lebanon  
 entropic approach to interpretation  
 in, 97–98  
 induction in, 126  
 interpretation in, 97–98  
 state immunity from jurisdiction  
 in CJEU, 166–70, 182–83  
 interpretation of, 182–83  
*jure gestionis* and, 167, 168–69  
*jure imperii* and, 167, 168–69  
 torture and, 221–22
- state-owned enterprises  
 ARSIWA and, 138–41  
 attribution of conduct to state, 132,  
 134–35, 150–51  
 control tests, 132, 134–35, 138–41,  
 151–52  
 corporate plus effective control,  
 141  
 defined, 130  
 ‘effective control’ test, 138  
 hybrid control tests, 141  
 international investment law,  
 caution regarding in, 143–47  
 lower thresholds for control, 138–41  
 political risk and, 143
- state practice  
 common law compared, 13  
 definitional concepts, 12  
*diuturnitas* as, 27  
 as element of CIL, 111–12  
 evidence gathering, 31–32, 35  
 as fact element of CIL, 4  
 in ICJ, 111–12  
 identification of CIL and, 215–16  
 ILC on, 215–16, 254–55  
 induction and, 5  
 investigation of, 5, 6  
 as objective element of CIL,  
 refutation of, 3, 4, 22  
*opinio juris*, as based in, 3–4, 16  
 in PCIJ, 111–12  
 presumption of, 121  
 treaties and, 270
- state responsibility  
 applicability versus application of  
 rule, 37  
 ARSIWA and. *See* Articles on  
 Responsibility of States for  
 Internationally Wrongful Acts  
 (ARSIWA))  
 Draft Articles on State Responsibility  
 (ILC), 57–58, 124–25  
 ICTY and, 278–79

- ILC on, 37  
 systemic interpretation and, 278–79, 280  
 statistical mechanics, entropy in, 92–93  
 Stockholm Declaration, 58  
 substantive activism, 194–95  
 Sudan, head-of-state immunity and, 94  
 Switzerland, practical concordance in, 293  
 Syria, air strikes in, 86–88  
 system dynamics, 83  
 systemic contextualisation, 212–14  
 systemic interpretation  
   in CJEU, 159, 164–65  
   crimes against humanity and, 272–73  
   ECtHR and, 267–68  
   gap-filling and, 266–67, 268, 280  
   general principles of law and, 240, 258–59, 260, 275–78, 280  
   ICJ and, 266  
   ICTY and, 272  
   normative conflict, resolving, 267–68, 280  
   ordinary meaning of words and, 265–66, 268, 280  
   state responsibility and, 278–79, 280  
   systemic argument and, 266, 268, 280  
   torture and, 272  
   treaties and, 268–74, 280  
   VCLT and, 265–68, 280  
 systems theory, 83  
 Szpunar, Maciej, 157
- Talmon, Stefan, 5, 69, 108, 113, 116, 127, 129  
 Tanaka, Kotaro, 34–35, 218  
 Tarski, Alfred, 47  
 Tassinis, Orfeas Chasapis., 65, 177–78  
 teleological interpretation, 97, 159, 164–65, 218  
*telos*, 20–21  
 Templeman, Lord Sydney, 110  
 text  
   identification of CIL, textual evidence, 31–32  
   interpretation of, 18–19, 21  
   Negotiated Law model of CIL, textual interpretation and, 66  
   theoretical framework, law as, 9  
   theoretical reasoning  
   challenging, 310  
   practical reasoning versus, 309–11  
   thermodynamics, entropy in, 90–91  
 Thirlway, Hugh, 194–95  
 Tladi, Dire, 219–20  
 Tokyo Charter, 289–90  
 torture  
   CIL and, 25  
   Geneva Conventions and, 223  
   ICJ on, 223  
   ICTY on, 222, 224  
   *jus cogens*, prohibition as, 214, 219–20, 222–24  
   state immunity from jurisdiction and, 221–22  
   systemic interpretation and, 272  
 treaties  
   customary rules, interpretation by reference to treaties, 268–74, 280  
   declaratory treaties, 269  
   elements of treaty interpretation, interpretation of CIL and, 270  
   ICJ on, 270–72, 273  
   ICTY on, 273–74  
   interpretation generally, 263–64  
   Legislated Law model of CIL and, 58  
   obligation not to defeat object and purpose of, 178–80, 182  
   provisions, interpretation of CIL and, 270  
   as running parallel with custom, 269–71  
   self-defence and, 270–71  
   state practice and, 270  
   systemic interpretation and, 268–74, 280  
   territorial scope of, 180–81, 182  
   *travaux préparatoires*, 269  
   ‘treaty focus’ of interpretation, 248  
   VCLT. *See* Vienna Convention on the Law of Treaties (VCLT)  
 Treaty on European Union (TEU), 156  
 ‘triangular reasoning’, 116–17  
 Trindade, Antônio Augusto Cançado, 277  
 Truman, Harry, 313–14

- Türmen, Riza, 227  
 two-level complexity, 88  
 Tzekvelos, Vassilis, 265
- uncertainty  
   content of rules, regarding, 77  
   identification of CIL, regarding, 77  
   in indispensable parties  
     principle, 210  
   unpredictability and, 78
- United Kingdom, humanitarian  
   intervention and, 86–88
- United Nations  
   ARSIWA. *See* Articles on  
     Responsibility of States for  
     Internationally Wrongful Acts  
     (ARSIWA)  
   Charter, 58, 244, 271  
   Commission on International Trade  
     Law (UNCITRAL), 152, 318–19  
   Conference on Trade and  
     Development (UNCTAD),  
     318–19  
   Convention on the Law of the Sea  
     (UNCLOS), 114  
   Declaration on Friendly  
     Relations, 58  
   General Assembly resolutions, 123–24  
   Human Rights Committee, 60–61,  
     216–17, 226  
   Resolution on Principles of  
     International Law Concerning  
     Friendly Relations and Co-  
     operation among States, 173  
   Security Council, 282  
   Universal Declaration of Human  
     Rights, 223, 229  
   universal inference, 128  
   usage, *opinio juris* distinguished, 14–16  
   *uti possidetis*, 115, 319
- vaccine donation, 29, 48–49
- Van den Wyngaert, Christine, 116,  
 123
- Verdross, Alfred, 266
- Vienna Convention on the Law of  
 Treaties (VCLT)  
   ‘any relevant rules of international  
   law’, 263, 265  
   capacity to bind states under, 124–25  
   CJEU and, 161, 182  
   coherence and, 301  
   head-of-state immunity and, 285  
   interpretation and, 67–68, 97, 248,  
     252–53  
   *jus cogens* and, 216  
   Legislated Law model of CIL and,  
     57–58, 68  
   obligation not to defeat object and  
     purpose of treaties and,  
     178–79, 182  
   provisional measures and, 225  
   rules of interpretation and, 252,  
     255–56  
   systemic interpretation and,  
     265–68, 280  
   territorial scope of treaties and, 180,  
     181, 182
- war crimes, 95–97
- Washington Convention, 140–41
- Wathelet, Melchior, 209
- Westerman, Pauline, 30
- Wittgenstein, Ludwig, 40, 41–42
- World Bank, 144
- World Trade Organization (WTO)  
   Appellate Body, 60–61, 73–74  
   Dispute Settlement Understanding  
     (DSU), 73  
   indispensable parties principle  
     in, 206