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Institutions of International Law: How International Law Secures Orderliness in International Affairs

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Abstract

This article is a plea for adopting a reinvigorated, analytic perspective on contemporary international law, building on MacCormick's powerful insights into law's essential structure. The article proposes that international law as whole forms an institutional normative order. The idea of institutional normative order has certain conditions. These link a normative conception of international law with the means of achieving it. The article makes three arguments on these conditions. It first argues that the function of international law is to create order in the sense of orderliness for its principal users, States and international organizations. It then claims that international law establishes normative order through international rules that are binding from the viewpoint of States and international organizations. An international process of rule-making embedded in State practice turns norms into such rules. The process is being held as a bindingness-creating mechanism because it formalizes rules through recognized means and organizes collective consent to authorize them. States and international organizations then apply these rules by exercising international legal powers under a defeasible presumption of legality. Third, the article argues that this normative order becomes institutionalized. The institutions of international law are grounded in ideas about agencies, arrangements, and master-norms that integrate the mass of international rules and principles. The article exemplifies these arguments for UN-driven international law with the relating recent jurisprudence of the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and Annex VII tribunals, and the Court of Justice of the European Union. The upshot of this idea of international law as institutional normative order is unity, or indeed a system. No part of international law can be seen outside of this context and hence the burden of argumentation is on those wishing to make the case for divergence.

Keywords

Theory of International Law – UN Law – International Courts and Tribunals

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I. Introduction

Contemporary public international law has quantitatively and qualitatively much evolved over past periods.[1] It is also increasingly specialized. The purpose of this article is to offer a fresh analytic perspective to help international lawyers make sense of their subject as a whole in this rapidly changing picture.[2]

The article thus positions itself within a rich, recent literature. Much debated in that literature is the normative proposal that international law ought to be understood through the prism of constitutional principles.[3] It been also been proposed to extend the positivist conception that law is based on a *Grundnorm* to international law.[4] The suggestion that international law forms a system is legal-reconstructive.[5] Critical approaches see international law as constructive of a particular political economy,[6] or as argumentation.[7] It could furthermore be seen as modes of making assertions about compelled conduct by States.[8] Law and economics and rational choice explain international law through the utility of States.[9] Pluralism places international law's position within the growing 'disorder of normative orders' above the State.[10] Finally, there are several process-based conceptions of international law such as the New Haven School, although these arguably are not very interested in the normativity of international law. Professors Thorpe and Brunnée have recently proposed to see international law as social interaction of States and non-State actors.[11] They argue that international law as all law can only arise in the context of social norms based on shared understandings. International law is built, maintained, and sometimes destroyed through a continuing practice. Internal features, the so-called criteria of legality, are

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[1] Cf J.H.H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 ZaöRV 547 (distinguishing 'layers' in the evolution of international law, the current layer being regulatory).

[2] The terms public international law and international law will be used interchangeably.

[3] J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (OUP 2009).

[4] J. von Bernstorff, *The Public International Law Theory of Hans Kelsen* (CUP 2010).

[5] J. Crawford, *Principles of Public International Law* (8th edn OUP 2012).

[6] Cf TWAIL authors, A. Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) Chinese J Int'l L 77.

[7] M. Koskenniemi, *From Apology to Utopia* (2nd edn CUP 2006) (hereafter referred to as *From Apology*) and *The Politics of International Law* (Hart 2011). In *The Gentle Civiliser of Nations, The Rise and Fall of International Law 1870–1960* (CUP 2001), he advocates for a 'culture of formalism', further J. Klabbers, 'Towards a Culture of Formalism? Martti Koskenniemi and the Virtues' (2013) 27.3 Temple Int'l & Comp L J 417.

[8] D. Patterson, 'Postmodernism' in D. Patterson (ed.), *Companion to the Philosophy of Law and Legal Theory* (2nd edn Blackwell 2012) 375.

[9] From this common starting point, scholars have arrived at divergent conclusions. Compare, for instance, J. Trachtman, *The Future of International Law* (CUP 2011) with A.O. Sykes, 'When is International Law Useful?' (2013) 45.3 NYU J of Int'l L & Politics 723, and J. Goldsmith and R. Posner, *The Limits of International Law* (OUP 2007).

[10] P. Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (CUP 2014); critical A. Galán and D. Patterson, 'The Limits of Normative Legal Pluralism: Review of Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*' (2013) 11.3 International Journal of Constitutional Law 783.

[11] J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law* (CUP 2010).

crucial to international law's ability to inspire 'fidelity'. This article accepts the point of Thorpe and Brunnée that international law ought to be conceptualized from the perspective of its users. In practical terms, these users at least predominantly remain States and international organizations.[12] As Professor Klabbers has noted, international law references the internal viewpoint of States as *opinio iuris*.[13] The internal viewpoint is commonly the starting point of positivist conceptions of law.

The internal viewpoint is also the starting point of an institutional approach to law, originally formulated by the late Professor Neil MacCormick.[14] In distinction from Hart's rule of recognition positivism, he emphasized that law creates orderliness as a peculiar normative order that turns spontaneous norms into binding rules through certain formal processes. These rules then can be applied and become institutionalized. While MacCormick's own work has focused on the law of the constitutional State, it can inspire the idea to see international law institutional normative order.[15] This idea then has certain conditions that need to be met cumulatively. The first such condition is to make a normative argument about international law. The argument is to establish the point or function of international law.[16] It is submitted that the point of international law is to secure international order in the sense of orderliness.[17] It serves to secure the orderly conduct of States in international matters. The two further conditions concern how international law secures such orderliness: it does so by providing a specific normative rather than factual order and then by institutionalizing this normative order.

First, international law provides normative order directing States in the conduct of international affairs. This requires distinguishing norms from international rules.[18] Norms regularize the international conduct of States. But international rules are distinct because they ought to be complied with, they are binding. International rules are recognizable for States because of their formal, conditional structure. An international process of rule-making produces such rules. This process serves to formalize and authorize international rules. Prominent means of formalizing international rules are treaties, but alternatives for formalizing norms into rules exist, such as resolutions of international organizations, texts issued by expert bodies, and judicial decisions. In the international process of legalization, formalization and authorization of norms into

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[12] The article uses these terms in the sense of aggregates. It hence does not need to take a position on the realist or critical argument that behind States and international organizations there are lawyers at work and that they generate a multiplicity of uses and agendas that cannot be reduced to a single use or agenda through the fiction of States or IOs. It is also true that TWAIL scholars have powerfully argued that in the Global South populations are at the 'receiving end' of international law—e.g. of the policies of international financial institutions and also international investment law. But the purpose of this article is analytic rather than normative.

[13] J. Klabbers, *International Institutional Law* (CUP 2011).

[14] N. MacCormick, *Institutions of Law* (CUP 2007). See also F. Schauer, 'Institutions and the Concept of Law: A Reply to Ronald Dworkin (with Some Help from Neil MacCormick)' (2009) University of Virginia Law School, Public Law and Legal Theory Working Paper Series No. 129.

[15] Ibid., at 35, 39.

[16] The descriptive definition becomes circular where it means that international law is the law of its subjects, see Crawford, *Principles*, at 115.

[17] MacCormick, *Institutions*, at 1–2, 281–5.

[18] The concept of rules features prominently in J. D'Aspremont, 'The Idea of 'Rules' in the Sources of International Law' (2014) 84 British Yb of Int'l L 103. This article focuses on the institutional process of making rules rather than ascertaining them.

rules may occur at different points in time. Authorization itself indeed presents a paradox. It results primarily from collective consensuality, for instance by a treaty attracting the determined quorum of ratifying States for its entry into force. The individual consent authorizes the rule for this State, but it is neither sufficient nor necessary for the rule to become binding international law. This single international rule-making process produces international rules on several tiers. The substantive international rules are located on the primary tier. Further rules for application and enforcement fall on a secondary and tertiary tier. This indicates a shift in the application of international rules, away from relational obligations and rights and towards international legal powers that States hold and whose exercise is covered by a defeasible presumption of lawfulness.

Second, this normative order is institutional. International rules become fully intelligible only when seen in their institutional context. This institutional context is formed by ideas about international law. The institutions of international law coalesce on the foundations, the agencies, arrangements for making international law, and master-norms that give impetus and direction to the rule-making process. Sustainable development, international security and human dignity have emerged as such master-norms. When these master-norms are underpinned by machinery, then international law becomes fully institutionalized.

The article's ambition is to present a conceptual proposal about international law. Yet it also aims to test this proposal against the reality of UN-driven international law and relating recent jurisprudence, comprising the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), UNCLOS Annex VII tribunals, and the Court of Justice of the European Union (CJEU).

The remainder of the article develops the idea that international law is an institutional normative order in three parts. It deals with the condition that international law forms a normative order in two steps. Part I demonstrates that international rules that steer States' conduct are formalized and authorized through a single rule-making process. Part II demonstrates that international rules are applied in a structured manner, by States and international organizations exercising legal powers under a defeasible presumption of lawfulness. Part III then turns to the institutions of international law. It argues that international law generates institutional normative order because it is able to formulate ideas about its own foundations and the common interest, ultimately of humanity. The conclusions point out that this institutional normative order conception comprises all UN driven rules and principles of international law. It also points out some methodological implications.

II. International Law as Normative Order: Formalizing and Authorizing International Rules

This part takes up the condition that international law forms a normative order. Central to this normative order is the concept of international rules. Art. 38 (1) of the ICJ Statute refers to international 'rules' in the context of setting out the sources of international.[19]

[19] Art. 38 (1) (a) Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832 (ICJ Statute): 'international conventions, […] establishing *rules*'; and Art. 21 (1) (b) ICC Statute: '*rules* of international law' (emphases added).

So what characterizes a rule of international law? Taking a cue from MacCormick, the broader category of norm should be the starting point in answering this query.[20] The convergent conduct of States on an international matter over time will result in the formation of a norm, which will attract compliant conduct in turn. International rules are distinct from norms, however, because they *compel* conduct; they ought to be complied with. In the eyes of States and international organizations, international law is immediately recognizable as part of the broad human endeavour of law because it follows the conditional format of a rule: a set of criteria is connected with certain consequences. Of course, international law is decentralized and lacks central organs for producing such rules, with the limited exception of the UN Security Council. It does have, however, a rule-making process. This process is embedded in State practice and affirmed every time that States make use of it. It comprises the two distinct elements of formalizing and of authorizing an international rule. These two elements may coincide. But it is also possible that a norm is first formalized as rule and receives authorization only at a later stage.

The following separately discusses formalization (1) and authorization by States (2) and also by international organizations (3) and by the international community of States (4). Such formalization and authorization produce binding international rules, principles and standards (5).

1. Formalizing the Rules of International Law

Formalization of international rules is a process, not an occurrence.[21] The starting point is a social norm. Where such a norm has attracted compliant behaviour by States, it reaches a tipping point at which it can be formalized as a rule. The uptake is often initiated by the UN General Assembly.[22] Through a resolution, it formalizes the norm and launches the further steps in the process of turning it into a formal rule.[23]

The catalogue of Art. 38 (1) (a)–(d) of the ICJ Statute does not just name sources for the ascertainment of existing law. It defines preferred means for giving the norm the

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[20] Under Art. 38 (1) (b) ICJ Statute, States must be convinced that a general practice is legally motivated. This conviction (*opinio iuris*) is empirical.

[21] See M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change' (1998) 52.4 Int'l Org 887, at 896, 901 (norm-affirming events).

[22] For instance, Written Statement of the EU, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (23 November 2013) ITLOS Case No. 21 (flag State control over IUU fishing starting with UNGA resolution).

[23] Examples abound. The norm against the use of chemical weapons finds a formal embodiment in rules of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (opened for signature 13 January 1993, entered into force 29 April 1997) 1974 UNTS 45, and again by UN Security Council Resolution 2118 (27 September 2013) on the removal of chemical weapons from Syria. The norm against commercial whaling is formalized in the International Convention for the Regulation of Whaling (signed 2 December 1946, entered into force 10 November 1948) 161 UNTS 72, *Whaling in the Antarctic (Australia v. Japan, New Zealand Intervening) (Judgment)* [2014] ICJ Rep 226, at paras 42–48, and *Whaling in the Antarctic (Australia v. Japan, New Zealand Intervening) (Declaration of Judge Keith)* [2014] ICJ Rep 336.

form of a rule.[24] These means shape the rule to a specific degree of explicitness. Treaties usually produce fully explicit rules laid down in writing.[25]

Yet there is no *numerus clausus* of means for formalizing rules. Alternatives to treaty exist.[26] Resolutions adopted by international organizations may serve as such alternative. Expertise-based texts are another.[27] Courts and tribunals developing an *acquis judiciaire* can formalize an international rule.[28] The 2014 *M/V 'Virginia G'* case uses a synthesis of domestic legislation to formalize an international rule. The ITLOS there referenced the practice of coastal States to formulate a rule filling the gap in Art. 73 of the UNCLOS on bunkering in the exclusive economic zone.[29]

A synopsis of consistent State practice also formalizes rules. To compensate for the lack of a textual basis, custom relies on judicial or expert verification.[30] The rule then determines what counts as practice,[31] while actual negative practice can be disregarded where it is overlain by argumentative adherence to the rule.[32] State practice also has rule-making capacity in the dynamic development of treaties.[33] General principles produce international rules from the converging national legal orders, and they also need to be verified.

2. Authorization

Formalization is necessary but not sufficient for a binding international rule. This requires authorization. International law does not carry its authority in itself, but it is authorized by a political community that controls its content.[34] The power to authorize international law rests, primarily, with States. States form political communities that

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[24] See J. D'Aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules* (OUP 2011) (sources as means for the ascertainment of rules).

[25] Art. 38 (1) (a) ICJ Statute: 'establishing rules *expressly* recognized' (emphasis added).

[26] Further, R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making* (Springer 2005).

[27] The WTO Appellate Body has effectively made the Codex Alimentarius the standard for presumed compliance with the Agreement on Technical Barriers to Trade, WTO *EC-Trade Description of Sardines – Report of the Appellate Body* (26 September 2002) WT/DS231/AB/R, DSR 2002:VIII, 3451.

[28] *The People's Republic of Bangladesh v. The Republic of India (Award)* (7 July 2014), at para. 339 (Art. 38 (1) (d) ICJ Statute) (hereinafter *Bay of Bengal Arbitration*).

[29] *M/V 'Virginia G' (Panama v. Guinea-Bissau) (Judgment)* (16 April 2014) ITLOS Case No. 19, at para. 253.

[30] D. Regan, 'International Adjudication' in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 225, at 228.

[31] For instance, relevant practice for State immunity is primarily formed by the decisions of national courts and for acquisition of territory by certain effective exercises of State power (*effectivités*). *Frontier Dispute (Burkina Faso v. Niger) (Judgment)* [2013] ICJ Rep 44, at para. 78.

[32] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (*Merits*) [1986] ICJ Rep 14.

[33] Art. 31 (3) (a) and (b) Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[34] MacCormick, *Institutions*, 39–61.

authorize international law.[35] Such a community can be two States, it can also be a multitude of States or the 'international community of States' (as a whole). International law is hence inevitably authorized collectively, through at least two States.

Professor Brunnée has pointed out that treaties present a paradox.[36] Treaties require consensuality, that is, independent approval of States to become binding international law. But each approval on its own does not suffice to bring the treaty into existence. There must be matching decision(s), in the case of a bilateral treaty that of another sovereign or in the case of a multilateral treaty of several other sovereigns. This paradox is key to conceiving of authorization of international rules. Authorization of international law lies in the hands of *several* States.[37]

The authorization of treaties is collective in the sense that the support of several States is indispensable for the rule to become binding at all. Collective consent provides primary authority in the sense that it brings the international rule into existence. The collective authorization can be provided by groupings of States. A representative group of States may authorize a rule for the entire international community of States.[38] That is evidently so for multilateral treaties. Multilateral treaties determine the quorum of accessions for their entry into force. This quorum is the abstractly determined critical mass of States for the matter at hand, but not any concrete individual State. The individual consent of each State supplies secondary authority that determines the geographical scope of the rule. Even this role of individual reciprocal consent has been diminishing, as treaties may compel conduct by a party also towards non-treaty third States. Collective authorization also pertains to customary international law, with only the persistent objector rules providing for individual (non-)consent.

3. International Organizations

In addition to States, international organizations and, increasingly, the organized meetings of the parties to a treaty have authority, even beyond the express or implied authorization through the constitutive treaty—functionalism—.[39] Thus, resolutions and decisions of international organizations have the legal effect that the members have provided for through the constitutive treaty, expressly or impliedly.[40] That includes

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[35] The article here considers States and international organization as political entities. In Part IV it will show that international law, in turn, is capable of institutionalizing both States and international organizations as its agencies.

[36] J. Brunnée, 'Treaties' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2008–) <http://www.mpepil.com/> (accessed 15 April 2019).

[37] International law recognizes unilateral acts as binding, see *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile) (Judgment)* (1 October 2018) General List No. 153, at para. 146. But the bindingness of unilateral acts in turn is grounded in an international rule.

[38] *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands*) [1969] ICJ Rep 4 (there applied to rules of international customary law).

[39] UNGA Res 60/1 '2005 World Summit Outcome (16 September 2005), paras 138–149, launched the ongoing process of legalizing the Responsibility to Protect that comprises mandatory measures of the UN Security Council and State practice.

[40] Art. 25 and Chapter VII of the UN Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16; Art. III International Convention for the Regulation of Whaling (signed 2 December 1946, entered into force 10 November 1948) 161 UNTS 72.

making rules binding for States without their (explicit) consent.[41] The so-called tacit-consent procedure substitutes collective decision-making for consent of all members in this manner.[42] Beyond this functionalism of conferred competences, there is a shift towards own institutional authority. The ILC Reports on Art. 31 (3) (a) and (b) of the VCLT recognize the role of meetings of parties for the dynamic development of the underlying treaties.[43] Decisions of such meetings, which institutionalize collective membership, have authority. They enrich the normative content of the treaty.

This shift towards institutional authorization is reflected in the recent international jurisprudence. Prominently, in *Whaling in the Antarctic*,[44] the ICJ accepted that recommendatory resolutions adopted by an international organization at unanimity gain legal significance as aid in interpretation of the constitutive treaty.[45] But even non-unanimous resolutions carry authority. They will have a legal effect of a taking-into-account-type because of the general duty of all members to cooperate with the international organization.[46] In *Pulp Mills*, the ICJ has furthermore indicated that international bodies may issue texts under an own institutional authority.[47] The text at issue was UNEP's 1987 Goals and Principles for Environmental Impact Assessments. The principles not only formalize a rule-book that can be applied. The Court accords legal weight to them because UNEP was the body entrusted by the international community of States with safeguarding the shared value of environmental protection. The Court then referred to the principles to concretize the customary international law rule that States carry out an EIA for projects with a significant transboundary impact. The Advisory Opinion in *Chagos* is the culmination of this jurisprudence. There the Court found the UN Charter to entrust the UN General Assembly with broad oversight over the implementation of the principle of self-determination.[48] In the exercise of this oversight function, the UN General Assembly could then pass resolutions for the binding rule that former colonies must gain their independence in full territorial integrity. The Court hence recognizes that the authority of an international body that rests on its functions for global governance, rather than narrower and specific competences, underpins its resolutions with binding force.[49]

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[41] J. Brunnee, 'Legislation' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2008–) <http://www.mpepil.com/> (accessed 15 April 2019).

[42] N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 AJIL 1.

[43] UN ILC 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation by Georg Nolte, Special Rapporteur' (19 March 2013) UN Doc A/CN.4/660.

[44] *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening) (Judgment).*

[45] The technical basis advanced by the Court is the VCLT, Art. 31 (3) (a) or (b), on subsequent agreement to an interpretation or subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty. *Whaling in the Antarctic*, at para. 83.

[46] *Whaling in the Antarctic*, at para. 83: 'The Court however observes that the States parties to the ICRW have a duty to co-operate with the IWC and the Scientific Committee and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives.'

[47] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment)* [2010] ICJ Rep 14, at para. 205.

[48] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (*Advisory Opinion*) (25 February 2019) General List No. 169.

[49] Para. 139: '[T]he Court, in determining the obligations reflected in these resolutions, will have to examine the functions of the General Assembly in conducting the process of decolonization.'

4. The International Community of States

This 'international community of States' is, among other things, a concept for thinking about the collective authorization of international rules. The literature offers a range of definitions.[50] A systems theory guided approach, favoured here, would locate the concept in the international political system. It then describes the central organization of that system. This organization is the aggregate of States and each State is included *eo ipso*.[51] Non-State actors are not but can be admitted.[52] The point of this organization is to enable iterative cooperation on matters of common interest.[53] That cooperation is aided by shared values, even though these may be thinner than within each State.[54] The collaboration between States to respond to their political priorities may then lead to international rule-making.[55] The international community of States has unlimited access to international law, on the basis of the principle that most international law is dispositive and hence can be changed where priorities change. It starts the above described rule-making process, for instance through a UN General Assembly resolution.[56] The resulting international rules then evidence the values of that community.

Cooperation is generally an expectation that leaves the choice of means to States.[57] There is no general duty for States to cooperate, although area-specific cooperation duties exist.[58] States may enshrine in international law a specific obligation to cooperate, or to negotiate and even to negotiate towards a certain objective.[59] However, general international rules enable cooperation.[60] The Vienna Conventions enable safe communication and hence cooperation between States.[61] Their protection is therefore a

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[50] These cannot be discussed in detail here. Influential is T. Franck, *Fairness in International Law and Institutions* (OUP 1995), at 12 ('a community is defined by having a corpus of rules that it deems legitimate and by having agreed on a process that legitimizes the exercise of authority').

[51] B. Simma, 'From Bilateralism to Community Interest' (1997) 250 Recueil des Cours 229, at 233 ('international community of States').

[52] Crawford, *Principles*, at 126.

[53] A. Hurrell, *On Global Order* (OUP 2007), at 95–117 ('complex global governance' to refer to managerial element of the present international political system).

[54] Further M. Hakimi, 'Constructing an International Community' (2017) 111 AJIL 317.

[55] For the institutional economics of international cooperation see Trachtman, *Future*, at 24–31.

[56] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Judgment)* [2012] ICJ Rep 422, at para. 99.

[57] UNGA Res 2625 (XXV) 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations' (24 October 1970) emphasizes international cooperation, yet does not define it.

[58] *Access to the Pacific*, at para. 163 (discussing Art. 2 (3) UN Charter).

[59] See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom) (Preliminary Objections) (Judgment)*, concerning applications brought by the Marshall Islands against nine States for alleged failure to fulfil their obligation to negotiate under the treaty to end the nuclear arms race at an early date.

[60] Trachtman, *Future*, at 255 (distinguishing enabling, constraining and supplemental constitutional functions of international law).

[61] Namely the Vienna Conventions on Diplomatic Relations (done 18 April 1961, entered into force 24 April 1961) 500 UNTS 95, and on Consular Relations (concluded 24 April 1963, entered into force 19 March 1967) 596 UNTS 261, and the customary law on the immunity of States and certain State organs.

priority of the international community.[62] These cooperation-enabling rules are complemented by the foundational principles of the UN Charter constraining States acting unilaterally to advance their interests. The categorical prohibition of the use of force by Art. 2 (4) UN Charter precludes States from pursuing change through military pressure.[63] Sovereign equality, Art. 2 (1) UN Charter, precludes unilateral action undermining cooperative approaches.[64] Sovereign immunity prevents States from pursuing change interests though domestic law pressures.[65] The ICJ judgment in *Jurisdictional Immunities* reflects this role of sovereign immunity in stabilizing cooperative approaches and outcomes, in this case the final agreement reached on war reparations when challenged by unilateral action based on human rights. Essentially, treaty-based normative hierarchies serve the same purpose of stabilizing collective cooperation, by constraining individual States or groups of States from setting rules that deviate from the multilateral treaty. Art. 103 UN Charter is a well-known instantiation. The arbitral tribunal in the *South China Sea* case has powerfully reinforced this function of treaty-internal normative hierarchy for Art. 311 UNCLOS, setting aside all rules on the law of the sea that might empower States unilaterally to claim ocean resources and conflict with the concepts by which the UNCLOS allocates those resources.[66]

The international community of States has been consolidating its position within the international rule-making process. This consolidation translates into exclusive competence over certain matters. *Ius cogens* is such a matter. The international community exclusively may confer peremptory status on an international rule.[67] As such, it becomes a conflict rule determining the validity of any, bilateral or multilateral treaty-based rule.[68] The peremptory rule thus precludes any contracting out by States. The international community is also exclusively competent to regulate spaces beyond national jurisdiction, the deep seabed, the high seas, and outer space. Other global public goods fall under the proviso that the matter is of common concern. That is namely the case for the global climate. The competence of the international community is not exclusive but rather concurrent: the collectively agreed rules permit bilateral treaties, but preclude any deviation.

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[62] *US Diplomatic and Consular Staff in Tehran (US v. Iran)* (*Request for the Indication of Provisional Measures*) [1979] ICJ Rep 7, at 19 (priority of the international community).

[63] By denying a right to unlimited warfare for any belligerent party, humanitarian law contains armed conflicts with a view to reinstating the political process. D. Kennedy, *Of Law and War* (Princeton University Press 2006), for critical assessment of international law's constraints on warfare.

[64] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia) (Provisional Measures) (Order)* (3 March 2014) (hereinafter *Documents Seized*).

[65] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening) (Judgment)* [2012] ICJ Rep 99, paras 94, 104, where the Court places the respect sovereign immunity within the context of the negotiated settlement of the consequences of war.

[66] See *South China Sea Arbitration (Philippines v. China) (Award)* (12 June 2018) **{** HYPERLINK "https://en.wikipedia.org/wiki/Permanent_Court_of_Arbitration" \o "Permanent Court of Arbitration" **}** Case No. 2013-19, at para. 89.

[67] VCLT, Art. 53.

[68] *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Preliminary Objections) (Judgment)* [2007] ICJ Rep 832, at paras 79–81 (Nicaragua barred from defeating a treaty for invalidity on other grounds because it had complied with it before).

5. Rules, Principles and Standards

There is thus a single rule-making process for international rules. The resulting rules fall on several tiers, though. There are substantive rules to steer conduct on a primary tier, rules on application on a secondary tier and rules on enforcement on a third tier. Standards are open rules that serve to incorporate external events.[69]

This process produces international rules that are general and abstract. They are general in the sense that that they have the same content for all States and abstract in the sense that they apply to indeterminate instances. Reservations to treaties break this generality, by creating exceptions for one State party in relation to all others. Multilateral treaties often seek to ensure generality of their rules for all parties by prohibiting reservations. The geographical scope of application of each rule then of course varies.[70] It can be bilateral, regional or universal. Multilateral treaties aspire to establish quasi-universality. Customary international rules are universal by default.[71]

International rules are supplemented by principles. Principles are also binding and hence distinct from norms. They are distinct from rules in that they are imbued with unlimited application while the scope of application of a rule is limited.[72] International law uses the term 'principle' in three senses.[73] The principle may establish a broad synthesizing conception;[74] it may indicate a larger idea of as yet incomplete realization;[75] or, the principle may be a rationale from which rules can be deduced.[76] The UN Charter, in Art. 2, enshrines principles in the sense of rationales. In *Jurisdictional Immunities,* the ICJ qualified these principles as 'constitutive' for international law. [77] It there referred to the principle of sovereign equality (Art. 2 (1) UN Charter) as the rationale of the customary law of State immunity. In *Documents*

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[69] In this sense, 'standards' for the prevention of pollution from vessels are referred to alongside rules in Art. 211 UNCLOS. Like rules and principles, standards steer conduct *ex ante* although they are sometimes said to be applicable *ex post*, D. Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010).

[70] In instances of contention, this is a treaty's scope of application *ratione personae*, *temporae* and *materiae*; A. Aust, *Modern Treaty Law and Practice* (3rd edn CUP 2013).

[71] See A. Cassese, *International Law* (2nd edn OUP 2005), at 162; nuanced Crawford, *Principles*, at 28, also on the persistent objector.

[72] Cf Art. 38 (1) (c) ICJ Statute: 'the general principles of law' and in Art. 21 (1) (b) ICC Statute: 'principles […] of international law'.

[73] On this distinction generally, A. Halpin, *Definition in the Criminal Law* (Hart 2006).

[74] For instance market access in WTO law.

[75] The Rio Principles are legally incomplete, and hence in need of continuing legal realization and concretization. In *Pulp Mills*, the ICJ has recognized that the EIA principle has now been realized in customary international law. *Mox Plant (Ireland/UK)* (*Provisional Measures*) (*Order)* (3 December 2001) ITLOS Case No. 10, at 95, qualifies cooperative protection of the marine environment as a 'fundamental principle' of the law of the sea, suggesting as yet incomplete realization in the United Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

[76] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, at para. 70, implies that extending the rationale of self-determination to non-colonial context was for the international political process, rather than adjudication. The ICJ settled the exclusively State–State rationale of self-defence different from legislative tendencies in *Armed Activities in the Congo (DR Congo v. Uganda) (Judgment)* [2005] ICJ Rep 168, at para. 147.

[77] *Jurisdictional Immunities*, at para. 57.

Seized, the Court used the principles of peaceful settlement of disputes and equality of States to protect the integrity of legal proceedings between States against interference by either party, overcoming the lack of extant procedural rules for inter-State disputes.[78]

III. Applying and Enforcing International Rules

As international rules are general and abstract, they must be applied in any given instance. McCormick has shown that normative order comprises rules, but also a structured process of applying these rules. This part hence moves from international rules to analysis of their application of international law. It first clarifies that the rules of international law are of either discretionary or strict application. It then explores that the obligation is a vehicle for applying a rule, to which legal power is an alternative. Finally, the part demonstrates that international courts are making increasing use of the concept of international legal powers that States hold and exercise under a defeasible presumption of lawfulness.

1. Strict and Discretionary Application

A fundamental distinction, then, is between strict and discretionary application of international rules. An international rule is for strict application if States must apply the rule in all instances and have no choice. Application is discretionary where a State is free to make the initial decision to apply the rule. This distinction corresponds to the categories of law-making treaties and contract-making multilateral treaties. That categorization primarily relates to the content of treaties, with the former comprising treaties on a public interest of the international community of States and the latter referring to treaties to establish reciprocal exchanges.

But those treaty categories also reflect critical differences in application. Law-making treaties contain strictly applicable rules, while a contract-making treaty presupposes the exercise of discretion. The UN Charter, the UN Law of the Sea Convention, UN human rights treaties, and also WTO-based world trade law are law-making treaties laying down strictly applicable rules. Of the contract-making type are the Vienna Conventions on diplomatic and consular relations, which leave it to each party to decide whether and with whom it wants to enter into a relation governed by the Convention. However, that initial discretionary decision then triggers further rules that are to be applied strictly, for instance on diplomatic immunity etc.[79]

2. From Rights and Obligations to Defeasible Powers

Whether strict or discretionary, application of a rule is different from the rule itself. Application is about individualizing the general and abstract international rule for a specific actor in a situation. This requires a constructive unit through which his individualizing function can be performed. The obligation in international law is such a unit. In *Access to the Pacific*, the ICJ has confirmed that obligation in international

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[78] In *Documents Seized*, the Court deduces from Art. 2 (3) UN Charter the rule that communications between a State and counsel must not be interfered with by the other State party to the legal dispute.

[79] Arts 2 and 9 of the Vienna Convention on Diplomatic Relations.

law only arises under an extant rule of international law.[80] The obligation defines a concrete legal relationship: the obligated State owes a specific conduct to another State, to several States in the case of *erga omnes (partes)* obligations,[81] or to the international community. To the international obligation can correspond the right of another State to demand that the obligation be performed.

International rules are traditionally applied through this relational unit, expressed in the obligation of one State and the right of another. This is conventional for bilateral treaties. But there is no reason to deny that multilateral treaties also create *obligations* and the right for each party to demand of any other that it perform its obligations. Sovereignty under the UN Charta and customary international law can also be construed as the right of each State to demand that all others meet their obligation to respect its jurisdiction.[82] This relational structure of obligation and right is continued into the reaction to the 'primary' obligation going unfulfilled. In such case, a 'secondary' obligation becomes incumbent on that State to cease the violation and to make reparation.[83] To such secondary obligation corresponds the right of the injured State to invoke those obligations for itself, and a right of non-injured other States to invoke those obligations for the benefit of a collective interest a law-making treaty protects.[84]

This relational unit of obligation and rights gives international law a subjective, quasi-contractual and static appearance. Yet, obligation and right is merely one of several possible units for applying international rules. In thinking about alternatives, the international rule remains the principal reference. International rules enable States, as much as they constrain them. They confer international legal powers where such power is the capability of a State of altering the legal situation of other actors. States hold such international power towards other States. They may also hold it towards a private party.

A State in exercising such power produces decisions covered by a presumption of lawfulness. This presumption of lawfulness is defeasible, however. The principal ground of defeasibility remains that the decision does not conform to the power-conferring rule. This is not new. In *Certain German Interests in Polish Silesia*, the Permanent Court of International Justice had already affirmed that it could review national legislation for its conformity with a State's international obligations.[85] Yet, contemporary international law now recognizes supplementary grounds of defeasibility. Such grounds results from the constraints that the international rule of law and human rights place generally on States when exercising any of their powers.[86]

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[80] *Access to the Pacific*, at para. 91.

[81] *Obligation to Prosecute*, at para. 69.

[82] *East Timor (Portugal v. Australia) (Judgment)* [1995] ICJ Rep 90, at para. 29 (self-determination as an obligation on every State owed to all others—*erga omnes*).

[83] Art. 42 (b) and Art. 48 (1) (a) of the UN ILC 'Draft Articles on the Responsibility of States for Unlawful Acts' (2001), annexed to UNGA Res 56/83 (12 December 2001) (ARSIWA).

[84] See also J. Crawford, 'Responsibility to the International Community as a Whole' (2001) 8 Indiana Journal of Global Legal Studies 303, at 313–14.

[85] *Certain German Interests in Polish Upper Silesia (Germany v. Poland) (Merits)* PCIJ Series A No. 7.

[86] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France*) (*Separate Opinion of Judge Keith*) [2008] ICJ Rep 177, at paras 127–28 (rule of law); *{ HYPERLINK "https://www.itlos.org/index.php?id=264&L=0" }{ HYPERLINK "https://www.itlos.org/index.php?id=264&L=0" }(Provisional Measures) ({ HYPERLINK*

These constraints entail the duty to disregard facts established unlawfully through their violation.[87]

The presumption of lawfulness can be defeated in several fora. The default forum remains each State, under the rule that it is for the sovereign to auto-apply international law including through its domestic courts. This forum is increasingly overlain by international fora with jurisdiction to settle disputes through decisions capable of becoming *res iudicata*. The ICJ remains the only international court with general jurisdiction. But it is complemented by a range of courts and tribunals with jurisdiction over particular international law. These courts and tribunals have begun to fulfil an international judicial function.[88] The international judicial function is organizationally specialist, but procedure and remedies are converging.[89] The conceptual problems of adjudication arising are not substantially different from those on the national plane, including the judicial review of State decisions potentially resulting in a declaration of invalidity.[90] Incidental review of decisions by State officials against the fundamental prohibitions on waging wars on aggression and committing genocide and crimes against humanity takes place through international criminal courts.[91] The international judicial function remains based on consent.[92] The constitutive role of consent for adjudication has been diminishing marginally, though. For instance, advisory proceedings do not require consent, not even of directly concerned States,[93] while increasingly settling important legal questions. The presumption of a lawful decision can also be defeated in non-judicial fora, such as the UN. Such executive control is distinguished from judicial control by the fact that it does not generate *res iudicata*.[94]

The concept of rule-application through international legal powers can be transferred to international organizations. These, under their constitutive treaty, hold limited powers over their Member States and sometimes also over individuals.[95] Decisions taken in the exercise of such powers may be defeasible before the organization's own

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"https://www.itlos.org/index.php?id=264&L=0" }(*Joint Separate Opinion of Judges Wolfrum and Kelly*) (22 November 2013) ITLOS Case No. 22, at para. 13 (human rights as constraints on the exercise of a State's powers in its exclusive economic zone).

[87] *Kosovo*, at para. 81; G.I. Hernandez, 'A Reluctant Guardian: The International Court of Justice and the Concept of International Community' (2012) 83 British Yb Int'l L 13.

[88] *Frontier Dispute (Burkina Faso v. Niger) (Judgment)* [2013] ICJ Rep 44, paras 45–46.

[89] The *Namibia Opinion*, [1971] ICJ Rep 16, had stressed the invalidity of legal acts that South Africa had taken in relation to Namibia after the revocation of its mandate by the Security Council. *Mutual Assistance*, at para. 203, implies that the declaratory relief of illegality of a decision would be available.

[90] See L. Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' (2017) 28 EJIL 13 (international courts and tribunals are adopting a managerial approach to coordinating the exercise of their respective jurisdiction).

[91] The International Criminal Court and the UN Security Council established international criminal tribunals.

[92] *Mutual Assistance*, at para. 48.

[93] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*Advisory Opinion*) [1950] ICJ Rep 221.

[94] UNGA 'Territorial Integrity of Ukraine. Canada, Costa Rica, Germany, Lithuania, Poland and Ukraine: Draft Resolution' (24 March 2014) UN Doc A/68/L.39.

[95] *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* (*Advisory Opinion*) (1 February 2011) ITLOS Case No. 17 (for the International Seabed Authority).

court.[96] Or they may be defeasible, as an incidental question, before an external court or tribunal.[97]

3. Defeasible Legal Power and International Judicial Review

The defeasible international legal power is not just a theoretical construct. As will be demonstrated, international courts and tribunals are making use of the concept to structure the judicial review of whether a certain State conduct has been internationally lawful.

Prominently in *Whaling in the Antarctic*, the ICJ reviewed the power that Art. VIII of the International Convention for the Regulation of Whaling confers on States to permit the taking whales for scientific purposes for its proportionate exercise by Japan.[98] In *Obligation to Prosecute*, the Court clarified the powers of a State under the UN Convention against Torture regarding private parties. It then reviewed the (non-)exercise of that power.[99] In *Navigational and Related Rights*, the Court reviewed the power of a State party under a bilateral treaty to regulate private commerce on a navigable river, interpreting it in the light of subsequent multilateral law development.[100] And in *Mutual Assistance*, the Court reviewed a State's exercise of an international legal power regarding another State under a bilateral extradition treaty.[101]

The ITLOS, adjudicating under the 1982 UN Law of the Sea Convention, also refers to defeasible powers. For instance, the 2014 *M/V 'Virginia G'* case involved the regulation of offshore bunkering for fishing vessels. The Tribunal first determined that the Convention conferred such power on the coastal State.[102] It then reviewed the coastal State's exercise of that power, including the proportionality of any enforcement

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[96] Crawford, *Principles*, at 196–9. On internal judicial review of staff matters see *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (*Advisory Opinion*) [2012] ICJ Rep 10. Judicial control of UNSC action may occur in contentious and in advisory proceedings both direct and incidentally, see *Kosovo*, at paras 94–100.

[97] The CJEU has pointed out (Case C-584/10 P – *Commission and Others v. Kadi* (2013) ECLI:EU:C:2013:518, at para. 131) that such diffuse defeasibility of the decisions of international organizations rests of the convergence of human rights on the universal level and regional levels.

[98] *Whaling in the Antarctic*, at paras 59–61, 62–69; *Pulp Mills*, at paras 80 and 169 (power to authorize the operation of a factory under a bilateral treaty with constraining procedural and substantive obligations).

[99] *Obligation to Prosecute*, at paras 98–95, identifies parties' power under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 112 (CAT) to prosecute for torture, as well as the need to exercise that power. *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (*Advisory Opinion*) [2004] ICJ Rep 136, at para. 159, identifies the power of States to prosecute under the Fourth Geneva Convention and then the need to do so.

[100] *Case Concerning Navigational and Related Rights (Costa Rica v. Nicaragua) (Judgment)* [2009] ICJ Rep 213, at paras 85–133.

[101] *Mutual Assistance*, at para. 145 (power to refuse to carry out extradition request); also *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece) (Judgment)* [2011] ICJ Rep 644, at para. 70 (power to object to membership of another State in an international organization).

[102] *M/V 'Virginia G'*, at para. 220.

action.[103] In its *SRFC Advisory Opinion*, ITLOS indicates that Parties' exercise of their powers under UNCLOS will be subject, generally, to their responsibility for the achieving the broader and evolving objectives of the Convention.

4. Enforcing International Law

In addition to rules and application, normative order is concerned with enforcement. The bindingness of international rules would be called into question were there to be no reaction to non-compliance. Enforcement is such a reaction, to bring about compliant behaviour through the exercise of an international legal power. Enforcement powers for States do not inhere in the substantive international rules, not even those of *ius cogens* quality.[104] They must be conferred by separate rules.

Such enforcement powers are conferred by the customary law of State responsibility, under which non-compliance by a State creates powers for other States to bring about compliance by the offender. This is the function of countermeasures another State may take.[105] The law of treaties empowers one State Party to terminate a treaty in cases of material breach by another.[106] Such reciprocal enforcement works well for rules that provide for the exchange between States of concessions or other advantages. These rules are self-enforcing in the sense that non-compliance can be addressed effectively by the reaction of another State Party. Much of international trade law is in that sense self-enforcing, although it makes suspending compliance subject to quasi-judicial authorization.[107]

By contrast, treaty-specific enforcement mechanisms are needed for non-reciprocal international rules. These mechanisms range from incentives for compliance to sanctions for non-compliance.[108]

But enforcement may also recombine rules from different subject-matters of international law. For instance, human rights law provides enforcement for international environmental law that is deficient in its own enforcement. This turns private parties into enforcers of international law.[109]

IV. Institutions of International Law

International rules constitute international law as a normative order. This normative order then becomes institutionalized. The term 'institution' requires some clarification.

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[103] Ibid., at para. 225.

[104] *Jurisdictional Immunities*, at para. 93.

[105] Art. 49 ILC Draft Articles on State Responsibility.

[106] Art. 60 (1) VCLT.

[107] Further A.O. Sykes, 'When Is International Law Useful?' (2013) 45.3 NYU J Int'l L & Politics 787.

[108] There is centralized, administrative enforcement of the international law of the ozone layer and to an extent for international human rights law. Further M.E. O'Connell, *The Power and Purpose of International Law* (OUP 2011).

[109] The judgment of the Netherlands Appeals Court in *Urgenda Foundation v. The State of the Netherlands* (9 October 2018) ECLI:NI:GHDHA:2018:2610 provides enforcement of the international law of climate change, through the channel of the European Convention of Human Rights and the fundamental rights to life and a private and family life thereunder.

There is a more technical use of legal institution that international lawyers will often have in mind when they refer to institutions.[110] This contrasts with broader understandings of the term in the literature.[111]

This article adopts such a broader understanding. As understood here, institutions articulate ideas about international law.[112] Institutions, then, are schemes of international law's own making. They ensure the autonomy of international law. This autonomy extends to the very subjects of international law. International law is hence able to institutionalize both States and international law. It can institutionalize the foundations of its own functioning.

Yet institutions do not generate law by themselves. Rather, the institutional idea must be turned into law to be operational through the usual rule-making process. The following discussion of the institutions of international law is hence predicated on the international rule-making process that has been explained above. There cannot be institutionalization without a generally available rule-making process. There is, however, a template that guides the requisite rule-making. That template foresees rules on starting and ending the institution, and what the legal consequences are. These may be labelled the institutive, the terminative, and the consequential rules of the institution. Full institutionalization happens where rules are underpinned by machinery for judicial or quasi-judicial interpretation and application.

Extant institutions of contemporary international law revolve around agencies (1), law-making arrangements (2), and master-norms to direct the development of international law (3).

1. Institution-Agencies

International law institutionalizes organizations whose purpose it is to act on the international plane. These organizations may be labelled institution-agencies.[113]

The sovereign State is the primary agency of international law. It is the residual holder of competences. The international law of the State follows the template of institutive, terminative and consequential rules, laid down in customary law. The institutive rule for statehood pertains to the three elements of effective government over a people on a territory. This rule is underpinned by the principle of self-determination of peoples. The principle normatively anticipates lacking effective control in decolonization contexts. In a non-colonial context, self-determination may come to

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[110] S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (OUP 1998).

[111] A. Buchanan, 'Legitimacy of International Law' in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 79, at 80 (institution is 'a persisting pattern of organized, rule-governed, coordinated behaviour', such as treaty-making, customary law, and global governance institutions); S. Oeter, 'Theorising the Global Legal Order—An Institutionalist Perspective' in A. Halpin and V. Roeben (eds), *Theorising the Global Legal Order* (Hart 2009) 61 (institutionalism depicting rational-choice based self-coordination of States); V. Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?' in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 207; R. Keohane, *Power and Governance in a Partially Globalized World* (2002), at 13 (discussing the broader sense of belief and expectation necessary for the maintenance of institutions).

[112] MacCormick, *Institutions*, at 36.

[113] Ibid., at 35.

underpin the claim of a people to statehood.[114] It then needs to be balanced with the countervailing principle of the territorial integrity of the extant State. Conflicts between two countervailing principles are reconciled through political or judicial channels.[115] Statehood may be terminated, by the people, triggering State succession rules. The consequences of statehood are international legal subjectivity and sovereignty. Sovereignty denotes the bundle of competences that each State holds. Comprised is the competence to engage in international rule-making and jurisdiction to apply and enforce international law with effect to the territory. The *domaine réservé* competence over internal matters is dispositive.[116] These are complemented by functionally delimited competences over portions of the oceans, of the flag in areas beyond national jurisdiction, and also over disputed land territory.[117] States generally hold these competences for autonomously determined priorities, yet increasingly they must exercise them for internationally determined priorities.[118] These competences are then protected against interference by other States. International rules prohibit transboundary physical harm, intervention, the use of force and any other interference with its political independence or territorial integrity.

Intergovernmental international organizations are secondary agencies. Their point is to organize cooperation of States on common interests. Under the institutive rules for all international organizations, States must agree to set them up and confer on them competences for achieving specific objectives. States remain free to terminate any international organization. The principal legal consequence is that the international organization enjoys autonomy in rule-making, application and enforcement. It is placed above the members in the sense that these have to carry out the law of the organization in good faith. This hierarchy is reversed where States direct the organization through treaty change or other means. The point of organizing international cooperation can, however, also be realized in the alternative formation of the meeting of the parties to multilateral treaties, with the consequence that these fulfil substantial quasi-legislative functions in developing and implementing the treaty beyond the traditional confines of an international organization: The less autonomous formation ends up holding more authority.

2. Institution-Arrangements: The Role of the Law of Treaties

Institution-arrangements share the point that they are not agencies in themselves, but result from their acts.[119] From the acts of States and international organizations result

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[114] *Kosovo*, at para. 82 (the principle's realization for non-colonial contexts requires rule-development).

[115] The Separate Opinion of Judge Keith in *Jurisdictional Immunities* explains State immunity as the result of the reconciliation through State practice of the principle of territorial integrity of the forum State on the one hand and the sovereign equality on the other.

[116] Crawford, *Principles*, at 455.

[117] *S.S. Lotus (France v. Turkey)* (1927) PCIJ Series A No. 10, implies that sovereignty confers territorial and extraterritorial prescriptive jurisdiction.

[118] In *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (*Provisional Measures*) (*Order)* [2011] ICJ Rep 6, at paras 79–80, the Court recognizes that the Ramsar Convention confers the competence on Costa Rica to protect aspects of the global environment in the disputed territory.

[119] N. MacCormick, 'Institutions, Arrangements, and Practical Information' (1988) 1 Ratio Juris 73.

treaties. As codified in the VCLT, the law of treaties becomes the principal institution-arrangement of the contemporary, treatified international law.

The VCLT defines the template for the life-cycle of treaty. It determines how to institute and terminate treaty. The Convention's rules apply to the substantive treaty by default, unless that treaty specifically derogates from them. The VCLT overarches all treaties.[120] It ensures the autonomy of treatified international law.[121]

It also prescribes the consequence of treaty, and hence the four characteristics of treaty-based international law: *pacta sunt servanda*, systemic unity, *effet utile* and dynamic development, and rights of individuals. Art. 26 of the VCLT enshrines the bindingness of a treaty, with supremacy over domestic law (Art. 27) and regional law.[122] Art. 42 shores this up, mandating that a treaty can be impeached only under certain conditions. In Art. 31 (3) (c), the VCLT secures the systemic unity of all treaty-based international law. It is the lever to internalize rules from separate and independent treaties, within the limit of the wording. The prioritization of object and purpose of the treaty among the means of interpretation injects dynamism, again within the terms used.[123] Parties can also change the treaty through subsequent agreement, explicitly or through concordant practice.[124] Finally, all treaties are susceptible of conferring rights and obligations on individuals. Those are normally justiciable before international courts, such as the ICJ. The point of *LaGrand* is precisely this: the State may bring an action to enforce rights of the individual created by a treaty that traditionally had been considered as creating rights only between the parties. [125]

Effective, *effet utile* orientated approaches to treaty are grounded in Art. 31 (1) of the VCLT, which makes 'object and purpose' of the substantive treaty the paramount reference of the entire interpretative exercise. One has to focus on the legislative programme of the treaty, rather than the object and purpose of its individual provisions. This focus goes beyond the established interpretive principle of effectiveness, understood as the technique that the interpreter of a treaty must normally seek to give the terms of each treaty provision a meaning which leads them to have practical effect.[126] That legislative programme is to be ascertained from the treaty preamble, which otherwise only has the contextual weight that Art. 31 (2) of the VCLT accords it. The recent jurisprudence has driven forward the paramountcy of the legislative programmes. In the case of UNCLOS, the 2012 *Territorial and Maritime Dispute* case

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[120] In its *Wightman* judgment of 10 December 2018, the European Court of Justice (Full Court) accepted that the Vienna Convention applies to the founding treaties of the European Union (Case C-621/18 – *Wightman and Others* (2018) ECLI:EU:C:2018:999, at paras 70 and 71).

[121] UNILC 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682.

[122] *Obligation to Prosecute.*

[123] Art. 31 (1) VCLT.

[124] Art. 31 (3) (a) (b) VCLT.

[125] *LaGrand Case (Germany v. United States of America) (Judgment)* [2001] ICJ Rep 466.

[126] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (Preliminary Objections) (Judgment)* [2011] ICJ Rep 70, at para. 133. A broader principle of effectiveness has been propagated by Judge Lauterpacht in *Admissibility of Hearings of Petitioners by the Committee on South Africa (Advisory Opinion)* [1956] ICJ Rep 23, at 48–49; *Norwegian Loans (France v. Norway)* [1957] ICJ Rep 9, at 94–5; and *Interhandel (Switzlerland v. USA) (Judgment)* [1957] ICJ Rep 6, at 65–6.

has powerfully effectuated the legislative programme of the Convention. There, the ICJ referenced the preamble that UNCLOS is to establish the legal order of the oceans. It concluded that meant that Nicaragua as a State party had to apply the Convention rules regarding the outer continental shelf and to submit its claim to the Continental Shelf Commission in the instance, even though Colombia was not a party.[127] This interpretation affects the role that the consent of each party to a treaty has. Any such consent has been thought to be limited, *ratione personae*, *temporae*, and *materiae*.[128] But effective and uniform application requires that a party apply the treaty beyond these limits. Thus, it must apply the treaty irrespective of whether the contesting other State is also bound to do so. In that case, the Court also effectuated UNCLOS, Art. 121 on islands, which as indissociable regime crystallized into custom, including its third paragraph on the own continental shelf of each island, regardless of whether that rule actually was supported by State practice.[129] In the 2012 *Maritime Dispute* case between Peru and Chile, the Court effectuated a UNCLOS legislative programme of universal rules. The Court prioritized the Convention's general rules of equidistance, special circumstances and proportionality for overwhelming maritime zone at issue. By contrast, the specific bilateral delimitation agreement between the parties was interpreted restrictively.[130] The evolutive interpretation ensures that the treaty programme itself can adapt to subsequent broader developments in international law unforeseeable at the time of adoption can still be covered. In *Navigational Rights* the Court expressly favours the evolutive interpretation of a bilateral treaty on commercial river navigation so that it covers the progressive development of international economics and law since its inception.[131]

The judgment in *Obligation to Prosecute* effectuates the legislative programme of the UN Convention against Torture (CAT). The case concerned the requested extradition of former dictator Habré from Senegal to Belgium under the CAT. The Court referred to the preamble to opine that the Convention's objective was to render the fight against torture more effective. This finding then informed both procedure and substance. Procedurally, it meant that each State Party can invoke instances of non-compliance by any other so that Belgium had standing to invoke the CAT *qua* being a party even though no national was concerned.[132] Substantively, the Court read preamble and key provisions together to conclude that the Convention establishes a mechanism for effectively combating torture, with the concrete consequence that Senegal had to prosecute the alleged torture case and could not simply choose extradition.[133] The Court then also ensured that the thus determined programme was uniformly applied over time. The Court stressed that States Parties could not prosecute acts committed before the

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[127] *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Judgment)* [2012] ICJ Rep 624, at paras 125–127.

[128] Arts 11 and 34, and 54 VCLT.

[129] *Territorial and Maritime Dispute*, at para. 139.

[130] *Maritime Dispute (Peru v. Chile) (Judgment)* [2014] ICJ Rep 3, at paras 103–51.

[131] *Navigational Rights*, at paras 57–70.

[132] *Obligation to Prosecute*, at para. 70. In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (*Order for Interim Protection*) [2008] ICJ Rep 353, Georgia had standing in a dispute concerning ethnic Georgians.

[133] *Obligation to Prosecute*, at paras 94–5.

entry into force of the convention for them.[134] But it made clear that the torture prohibition was enshrined in customary law so that each State could prosecute.[135] The Court has also effectuated the programme of the Genocide Convention. In the *Bosnia* case, it read into it a prohibition for States Parties to commit genocide, in addition to their expressly stipulated obligation to criminalize the individual commitment of genocide.[136] This renders the Genocide Convention effective in protecting human dignity.[137]

3. Institution-Norms

In addition to institutionalizing agencies and arrangements, international law also institutionalizes its meta-norms. Meta-norm is a value-bound, evaluative concept. Such master-norms are situated at a level of abstraction above international rules and principles. A master-norm then embodies a value applicable horizontally to the whole or most of international law. As such master-norms currently arguably qualify sustainable development,[138] international security,[139] and human dignity.[140]

A master-norm is not rule-producing by itself, though. Rather, it is operationalized pursuant to a general template. The template calls for the master-norm to be articulated through an agenda-setting UN conference and then to be formalized in a central multilateral treaty aspiring to universal membership, either as a stand-alone convention or as a framework convention-cum-implementing treaty.[141] Thus, global security is centred on the UN Charter, sustainable development of the oceans on UNCLOS and that of the climate on the UNFCCC[142], and human dignity in the UN Covenants and supplementary human rights treaties. These multilateral treaties institute general rules, removing the power to make reservations that States by default hold under the

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[134] Ibid., at para. 100.

[135] Ibid., at paras 99 and 102.

[136] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, at paras 155–179.

[137] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) (Additional Pleadings of the Republic of Croatia) (J. Crawford)*.

[138] UNGA Res 66/288 'The Future We Want' (27 July 2012).

[139] The UN Security Council interprets the term international security widely. It has declared international terrorism and the proliferation of weapons of mass destruction as such to be a threat, requiring action on a 'global level', UNSC Res 2129 (2013) (17 December 2013). Further J. Brunnée and S.J. Toope, 'The Use of Force: International Law after Iraq' (2004) 53 International and Comparative Law Quarterly 785.

[140] Reaffirming the Universal Declaration of Human Rights and the two UN Covenants, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993 (UN Doc A/CONF.157/23), recalls in its preamble the faith of the Charter in the dignity and worth of the human person restates the organizing principles for international human rights law in I. 1.: 'All human rights are universal, indivisible and interdependent and interrelated.'

[141] An alternative technique are treaty networks or 'serial bilateral treaties'. E. Benvenisti and G.W. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60.2 Stanford L Rev 595, at 610, 611.

[142] UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

VCLT.[143] They substitute uniform rules for the particular-plural ordering of international matters.[144] They establish machinery for centralized rule-making on harmonization, coordination or mutual recognition of domestic law, and for centralized application and enforcement.[145] They also allocate to parties international legal powers to apply these rules. The multilateral treaty may then be further implemented by parties entering into bilateral and regional treaties.

As a consequence, the master-norm becomes the institutional context for all treaties within its ambit. This calls for the foundational multilateral treaty to be integrated with all other applicable treaties. The following discussion highlights how the recent international jurisprudence reflects this approach, selectively for the master-norms of international security and human dignity.

The master norm of international security is founded in the UN Charter. The Charter sets forth the supporting principles in Art. 2, on sovereign equality, pacific settlement of disputes, the prohibition to use force, and the self-determination of peoples. The ICJ has integrated those principles with other treaties external to the Charter. This is well illustrated by two cases concerning the 1955 Treaty of Amity between Iran and the US. There, the UN Charter bears on the interpretation of that treaty' exemption clause for national security measures. In the 2003 case *Oil Platform*, the Court construed this clause narrowly to comply with Art. 51 UN Charter on self-defence and Art. 2 (4) on non-use of force.[146] In the 2018 provisional measures of *Iran v US*, the Court has construed the clause equally narrowly to comply with the demand for humanitarian relief.[147]

A similar approach of integrating the Charter with external treaties has been adopted by other international courts. In *Polisario*, the European Court of Justice gave effect to the principle of self-determination for a treaty on trade and development concluded by the European Union with Morocco.[148] Referring to the ICJ jurisprudence, the ECJ classified self-determination as an *erga omnes* principle of international law. It deduced the presumption that States and international organizations such as the EU intend to act consistently with this principle. The Court then turned the VCLT into an instrument to effectuate this presumption. Thus, the Convention's third-party rule means here that the parties cannot have intended to extend the treaty to the territory belonging to the people of West Sahara. And the Convention's later-in-time rule means here that the parties cannot have intended for the earlier treaty that was consistent with self-determination to have been modified by later agreements.

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[143] Arts 28, 30 VCLT; UN ILC 'Guide to Practice on Reservations to Treaties' in 'Report of the International Law Commission on Its Sixty-Third Session (26 April–3 June and 4 July–12 August 2011)' UN Doc. A/66/10, 19.

[144] *South China Sea* (UNCLOS concept of the EEZ displaces any pre-existing customary rights to marine resources).

[145] See S. Krasner (ed.), *International Regimes* (Cornell University Press 1983) ('regime' deemed to be present where a treaty also provides the organization for its implementation).

[146] *Oil Platforms (Iran v. United States) (Judgment)* [2003] ICJ Rep 161, at para. 43.

[147] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America) (Provisional Measures*) (*Order*) (3 October 2018) General List No. 173.

[148] Case C-104-16 P – *Council of the European Union v. Front Populaire pour la liberation de la saguia—el-harmra et du rio de oro (Front Polisario)* (21 December 2016) ECLI:EU:C:2016:973.

The *Sadio Diallo* judgments demonstrate how the International Court of Justice pursues this integrating approach to the master norm of human dignity and the supporting human right law. The Court found that the human right to liberty of Mr Diallo could be enforced through diplomatic protection by his State of nationality against a host State.[149] In ruling on the merits, the Court then shaped a single standard of unlawful detention from a synopsis of the universal UN Covenant on Civil and Political Rights with regional human rights treaties, integrating these instruments.[150]

V. Conclusions

This article has cast a particular light on how international lawyers ought to think about their subject, without aiming to revisit all theoretical work where international lawyers discuss the project of international law. It has spelled out an analytic perspective building on MacCormick's insights, making visible that international law forms an institutional normative order directing States in the conduct of international affairs.

If this idea of institutional normative order describes the essence of international law convincingly, then it is indeed a system contrary to Hart's criticism, unifying its increasingly specialized subject-matters. Order becomes the overarching function for all international law. An international rule-making process embedded in practice serves to turns norms into binding international rules. This process formalizes the rules through treaties and alternatives such as resolutions, institutional decisions and expert texts. It also organizes their authorization through collective consent of States while individual consent authorizes the rule for that State. The produced international rules in all areas are applied through international legal powers, with the exercise of a power by a State being contestable and increasingly subject to judicial control as to lawfulness. And international law has institutionalized the agencies—the State and international organizations—, the legal arrangements—treaty—, and the master-norms of sustainable development, international security and human dignity that integrate all international rules.

This unity entails obvious methodological consequences. International lawyers cannot see any part of international law in isolation of the whole, but rather each part must be seen as operating in this institutional order. The burden of argumentation is on those wishing to dispute that in any specific field the defining features do not apply. The rule-making process formalizes rules increasingly through alternatives to treaty, collective authorization, and these rules confer a power on States that they apply under a defeasible presumption of legality and generally applicable constraints. This burden is also on those wishing to argue that the institutions of international law and its master norms and foundations in multilateral treaties do not extend to a given matter.

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[149] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Preliminary Objections) (Judgment)* [2010] ICJ Rep 639.

[150] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Judgment) [2010] ICJ Rep 639; Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea (Guinea v. DRC) (Judgment)* [2012] ICJ Rep 324, at paras 13 and 39.