

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, Contras 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