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The Illusion of Gold-Digging: Interpretation of State Practice

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1 Introduction

Customary international law (CIL) is particularly vulnerable to the accusation that it is no more than 'mere assertion', a creation of the courts, if not downright fantasy.[1] Yet it is in CIL that one finds the strongest claim to objectivity in international law. It is expressed in the doctrine that one of the elements of CIL is state practice, which represents the 'objective' element of CIL. It is thought to supplement the 'subjective' or 'psychological' element of CIL: *opinio juris*.[2] Elsewhere, I have analysed *opinio juris* and concluded that it is much less 'subjective' than is commonly assumed.[3] Here, I will argue that state practice is much less 'objective' than is commonly assumed.

I will argue that the notion of state practice as a set of 'material facts' that should be 'identified' and from which customary norms can be 'induced' is grounded in obsolete epistemology. The identification of state practice is more adequately described as a selection of what deserves to be *counted* as state practice. I will argue that the starting point for this selective process is *opinio juris*. *Opinio juris* does not come after the fact,

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[1] DH Joyner, 'Why I Stopped Believing in Customary International Law' (2019) 9 Asian JIL 31.

[2] For good – but not uncritical – expositions of the two-element doctrine, see P Haggenmacher, 'La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale' (1986) 1 RGDIP 1; K Wolfke, 'Some Persistent Controversies Regarding Customary International Law' (1993) 24 NYIL 1; M Akehurst, 'Custom as a Source of International Law' (1975) 47 BYBIL 1, 37.

[3] See P Westerman, '*Opinio Juris*: Test, Filter, Ideal or Map?' in K Gorobets, A Hadjigeorgiou and P Westerman (eds), *Conceptual (Re)Constructions of International Law* (Edward Elgar 2022) 127.

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as a subjective feeling of obligation that is superadded to a set of otherwise objective facts. *Opinio juris* is the indispensable conceptual framework without which habits and usages cannot even be 'seen' as state practice.

2 Gold-Digging

It is unclear what the adjectives 'objective' and 'subjective' refer to. To the elements themselves or to the ways in which these elements are studied? The latter option is not very plausible, for why may the convictions of states (*opinio juris*) not be dealt with in an objective manner? Any sociologist can tell you that it is possible to examine convictions and beliefs. And even if that would not be the case, why would one officially announce that half of the process of CIL identification is carried out in a 'subjective' manner?

No, apparently these adjectives refer to the elements themselves and not to the investigator. But then the question arises, why is state practice labelled an 'objective element'? In what sense can we say that acts, words, conventions and usages are objective elements? Can we speak at all about 'objective elements'? Are molecules and stars objective elements? And again, what is so subjective in *opinio juris* if we understand that notion as the conviction that a certain norm is a legal one? The more one thinks about it, the stranger it is.

The only way to make sense of the use of these terms is to take into account another dichotomous pair of words by means of which the two elements are distinguished: the 'normative' and the 'factual'. Apparently, the claim is that whereas *opinio juris* is the 'normative' element, state practice consists of 'facts'. There are three interrelated assumptions at stake here.

(1) The nature of the object that is investigated: facts.
Most authors understand practice as a heap of 'material facts'. State practice is called 'a sort of . . . raw material for custom',[4] an 'inert mass of accumulated usage'[5] or – in a modern version – a set of 'raw data'.[6]

[4] Wolfke (n 2) 4.

[5] HWA Thirlway, *International Customary Law and Codification* (AW Sijthoff 1972) 47, quoted in ILA Committee on Formation of Customary (General) International Law, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law' (London Conference, 2000) 30.

[6] AE Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757, 757, 781, 788. Even Hakimi, despite her rich

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(2) The method to be followed: induction.
The account of state practice as a heap of social facts gives rise to the idea that the analysis of state practice can be conducted as any inquiry into 'facts'. They can be collected as 'data', which should be 'described' and which forms the starting point of an inductive process of reasoning that moves from the described facts upwards to general statements about the rules that are followed.

(3) The aim of the investigation: identification.
The assumption is that state practice should be investigated in such a way that possible candidates for CIL can be 'identified'. The term 'identification' suggests that CIL is thus *found* rather than *constructed*.

The combination of these three related claims can be captured by the metaphor of gold-digging: the gold of CIL can be found by digging the inert material mass of sand and clay, and by bringing it upwards to the surface, after which it can be identified by sieving the sand.

Several authors have criticised this picture by criticising assumption (2). They think that an inductive description of the facts is only half of the work to be done. Roberts,[7] for instance, thinks that the 'descriptive accuracy' of an investigation of state practice should be complemented by a deductive method of searching for 'substantive normativity', starting with normative ideals and then descending to the formulation of rules. In a similar vein, Talmon[8] believes that we should make more room for deduction, especially where state practice is inconclusive, non-existent, contradictory or inconsistent with *opinio juris*. Finally, Merkouris[9] wants to complement the inductive method of rule identification with a deductive method of rule interpretation.

Although these authors have different objectives in mind, they are united in their view that describing practices is not enough to account for CIL, and that inductivism should be complemented by deductivism. They rightly point out that the problem of a merely inductivist investigation of state practice is both unrealistic and impossible, but they seek the solution of that problem by *adding* a normative or deductive approach. And through this search for an additional approach they leave intact the

conception of practice, describes claims and counterclaims as 'raw data'; M Hakimi, 'Making Sense of Customary International Law' (2020) 118 Mich L Rev 1487, 1493.

[7] Roberts (n 6).

[8] S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417.

[9] P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 ICLR 126.

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doctrinal picture of an initial investigation of state practice as a purely descriptive and inductive enterprise. Inductive 'identification' and deductive 'interpretation' are then seen as separate activities. Assumption (1) (practice as a collection of facts) as well as assumption (3) (identification of rules as the main aim of any investigation of state practice) remain untouched.

I will argue, however, that not only the assumption of induction (2), but the entire picture of gold-digging, is largely illusionary. I will start by addressing the assumption of induction (2) and take advantage of well-known insights that were developed in the philosophy of science. Consequently, I will criticise assumption (3), according to which identification is prior to interpretation. By using the insights of hermeneutics, I will argue that *opinio juris* is the starting point for any investigation of state practice and helps to define both state practice and CIL as a whole.

3 Loaded Perceptions: The Problem of Inductivism[10]

Let us put ourselves in the position of an international court[11] which is confronted with the task of deciding a case or of delivering an advisory opinion by distilling or identifying rules from a raw heap of facts. Such a court has to carry out two types of translation. In the first place, it should proceed from particular instances to general statements that deal with categories; in the second place, it has to proceed from facts to norms. The activity of such a court can be understood as similar to the interpretative activities of a domestic court which is asked to apply a given statutory rule to a concrete fact situation. Both courts are confronted with the task of translation; but they walk in opposite directions. Whereas an international court moves from particular fact situations to general norms, the domestic court moves in the opposite direction by applying general norms to concrete fact situations.

[10] I will refrain from discussing the problem of induction as the logical problem that general statements can never exhaustibly be verified by sense-data and that induction can therefore not be justified without having to rely on sense-data, which leads to infinite regress and circularity. See K Popper, *The Logic of Scientific Discovery* (Hutchinson 1972).

[11] We owe to Mendelson the important distinction between the various points of view from which we address CIL. M Mendelson, 'Formation of International Law and the Observational Standpoint' in ILA Committee on Formation of Customary (General) International Law, 'Report of 63rd Conference: Annex to the 1st Interim Report of the Committee' (Warsaw 1988) 935–72. This paper starts from the question of what courts (as 'third party decision-makers') do if they examine state practice.

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The latter process of interpretation is beset by difficulties that are abundantly analysed in the literature on judicial interpretation and decision-making. But in one aspect these tasks are easier to accomplish than the inductive translation from particular facts into general norms, and that is that in interpretation one knows where to start. It is with a set of possible rules – general and normative statements – in mind that the facts are investigated. Did the defendant buy his knife before or not? Was the will drawn up in the presence of a notary or not? Rules guide the investigation and select the facts or the sets of facts that are relevant in the light of the rule. The rule highlights that part of factual reality which is possibly relevant. This is not to say that those parts that are not highlighted remain in obscurity forever. The outcome of interpretation may be downright undesirable and may provide reason to re-open the investigation and to search for other rules which may highlight other aspects which become relevant and which may generate a different outcome. This is what Llewellyn means when he talks about the necessary creativity of judges to erect alternative ladders through the legal material in order to arrive at the desired outcome. But alternative ladders also start with a rule that guides the investigation.[12]

Such starting points are absent if we consistently think of an inductive investigation of state practice. Then, it is supposed, we start with the facts and nothing but the facts. But which facts? There are a multitude of facts, events, gestures, movements, usages, conventions, declarations and resolutions, and we do not know how to make sense of such facts without any preconception in mind about what we hope or expect to find.[13]

This is obvious in even the most basic form of perception. As Hanson eloquently pointed out as early as 1958,[14] seeing involves recognising patterns. We can of course see black and white pixels and we can be sure everybody sees the same pixels. But as the well-known picture of rabbits

[12] See KN Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School; with a New Introduction and Notes by Steve Sheppard* (Oxford University Press 2008); F Schauer, 'Pitfalls in the Interpretation of Customary Law' in A Perreau-Saussine and JB Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press 2007) 13–34.

[13] As Bradley remarked: 'Merely looking out into the world to see what nations have done and said does not itself reveal rules of international law.' CA Bradley, 'Customary International Law Adjudication as Common Law Adjudication' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 34–61.

[14] NR Hanson, *Perception and Discovery: An Introduction to Scientific Inquiry* (MD Lund ed, Springer 2018).

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and ducks illustrates, we can see these pixels in different ways, ordered in different patterns. And these ordering patterns are to a large extent informed by what we expect to see in a particular context as well as by our background knowledge. If I stare into the microscope, I might see beautiful colours but I do not really know what I see and I therefore see nothing at all. There is no simple observation, therefore, of 'what is there'. Our perception is loaded with preconceptions, conceptions, expectations and patterns that all lurk in the background. They should not be shunned and avoided, for if we were to succeed in discarding them, we would no longer know what we see. Or, as Heidegger succinctly put it: 'Only those who understand can hear.'[15]

If it is already difficult to make sense of dots and lines without any context that guides expectation and makes meaningful observation possible, how would we be able to understand things as elusive as 'acts', 'usages' and 'conventions'? I am not referring here to Hart's emphasis on an internal point of view. My claim is that even researchers who take an external point of view and regard people's doings like the movements of ants just have to start from *some* theory in order even to study such ants. As any sociologist or anthropologist knows, without a basic theoretical framework it would be impossible to select what kinds of phenomena are worth observing. If we add to this that international lawyers are supposed to investigate not only 'practice' (a complex phenomenon in itself) but 'state' practice, which is a legal notion, it is clear that the facts which are observed cannot possibly be considered as 'raw data' or 'raw material'.

4 Law as Theory and Object

Fortunately, that is not what legal scholars or courts do. Just like natural and social scientists, they start with a theoretical hypothesis that provides for the patterns that order the sense data in a meaningful way. Physics conceptualises light as either 'wave' or 'particle' and hence we 'see' light as waves or particles. Psychological concepts such as 'hysteria' and 'burnout' are not merely different terms for the same phenomena but *constitute* different phenomena because they order facts in a different way.

So, too, courts and legal scholars start from a background theory. But there are three important differences between the background theories of social scientists and those of legal experts.

[15] 'Nur wer schon versteht, kann zuhören.' M Heidegger, *Sein und Zeit* (Max Niemeyer Verlag 1979) 164.

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(1) Law as theoretical framework

As I have argued elsewhere,[16] legal research also starts from a theoretical framework, but, unlike social scientists who develop a theoretical framework that is independent from the object they investigate, the framework for legal research is the law itself. Legal notions and conceptions form the framework and pattern by means of which facts are ordered. Not only terms such as 'seabed' but also 'sovereignty' or 'specially affected' are notions that guide the investigation and furnish the patterns that enable us to see a point in the 'raw data'. Whereas in the social sciences there is a certain distance between theory and object, the peculiar feature of legal scholarship is that its theoretical framework and its object are identical. Of course, this does not apply to empirical legal studies or, for that matter, to philosophy of law, where the theoretical framework may (and should) be broader, but most doctrinal legal research revolves around the question of how certain novel social or technical developments or problems can be regulated such that they can be fitted into the legal system or in a way that is coherent with underlying principles, or, alternatively, how different legal arrangements from different legal orders can be integrated and harmonised. In all these studies, law is not only the object of research but also provides the theoretical framework consisting of legal concepts, standards and exemplars.

(2) Definitional concepts

The fact that the function of a theory is taken over by the law itself and that therefore the facts are examined by means of legal concepts entails another peculiarity, which has to do with the nature of legal concepts. Legal concepts are not descriptive but definitional. In law, such definitions are usually couched in terms of conditions, although one also encounters enumerative definitions.[17] When we say that some paper p is a 'contract', we say that this paper p meets the conditions that should be fulfilled in order to count as a contract. Legal general statements are of the form: For all X, if conditions a, b and c apply, they count as Y.

[16] P Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in M van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart 2011) 87.

[17] In the Rome Statute, for instance, concepts such as 'crimes against humanity' are defined in part by enumerating instances and examples. See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

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This statement does not generate new knowledge but is a definition of Y.

If we start investigating state practices by means of such definitional concepts and apply the filter of the law to the facts, we examine that factual reality by enquiring into whether reality can be categorised into these definitions. We differentiate between items that do and items that do not, or only partially, fulfil the conditions that are contained in the general statement.

This strategy is applied at all levels. At the micro-level, we start for instance by investigating whether a certain contract x meets the conditions for 'contract' and can be considered a valid one; at the meso-level, we might ask whether conditions for 'sovereignty' are met; and at the most abstract level, we inquire into the degree to which a certain usage counts as 'practice'. Definitional concepts are very useful in a deductive process in which particular instances are examined for their conformity to the conditions and thus 'put to the test', but they are emphatically not the result of generalisations from particular facts. They are the result of our decision or of convention that defines a concept in terms of conditions. Their existence cannot be tested by reference to empirical facts but by referring to these conditions. That is why Kelsen could say that 'the existence of a legal norm is its validity'.[18] Contracts, sovereign states and practices exist insofar as they meet the conditions.

(3) No falsification by facts

This difference between descriptive and definitional concepts implies a third difference as well. Whereas scientific general statements can be refuted or falsified by recalcitrant facts, that is not the case in legal research. Scientific theory does not merely contain general statements such as 'if light has a wavelength of 400 nm we call it "violet"'. If that were the case, science would be just like legal scholarship and would proceed by definitional concepts based on convention. But although science makes use of conventions, and although observations on colours cannot be conducted without such conventions on numerical values, its general statements express new – hypothesised – correlations: hypotheses like 'violet flowers attract more butterflies than red ones', which can be falsified when a species of butterflies is discovered preferring red

[18] H Kelsen, *General Theory of Law and State* (A Wedberg tr, Harvard University Press 1945) 48.

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flowers. In legal research, it is not the theory that is falsified but the facts that are proven to be deficient. If we encounter papers that fulfil only half of the conditions for contracts, we do not think that our general statement is falsified; we just say that those papers are not 'proper' or valid contracts.

Is there then no sense in the idea that rules can be inferred by means of induction? Could we not say, 'Here is a contract which is signed and there is a contract which is not signed, so maybe signature is not a decisive condition'?

That can happen indeed. In international law (IL), the conditions for validity are often not clearly defined, are ambiguous or contested, and indeed it is possible to adjust our set of conditions somewhat to match reality, but that can be done only in the presence of other features that qualify a certain item as a suitable candidate for being examined as a potential 'contract'. If none of the conventional conditions are fulfilled, we do not even start investigating whether a paper counts as a contract or whether we should adjust our notion of contract in light of such divergent practices. We may for instance investigate the practices around marriage and see how in different cultures marriages are conducted and eventually end up with a wider concept of marriage than we initially had in mind. But such practices at least should have a credible claim to be considered as 'marriages'. If they do not even remotely look like marriages, we would not take the trouble to contemplate them as serious candidates for being considered as marriage.

This also applies to concepts such as 'sexual slavery'. They do not have a claim to validity, of course, but it should be possible to claim or suggest that the term might be appropriate to the case at hand. Further investigation may lead to limitation or expansion of the concept (and may even be extended to such an extent that it borders on 'marriage'), but again there should be some shared features in order to conduct such an investigation in the first place.

To say that rules cannot be *inferred* from facts is not the same as saying that rules cannot *emerge* out of facts. I think that this is very well possible and discernible in all those instances in which patterns of behaviour slowly develop into rules.[19] But we should make a difference between

[19] See GJ Postema, 'Custom, Normative Practice, and the Law' (2012) 62 DLJ 707, 707–38; K Gorobets, 'Practical Reasoning and Interpretation of Customary International Law' in P Merkouris, J Kammerhofer and N Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022).

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ontological views on how rules are formed and epistemological views on how they can be identified.[20]

In investigating state practice, legal decision-makers necessarily see the practices, usages and customs through the filter of rules and definitional concepts that they already have in mind. It is not necessary that these rules have an unambiguous status or are already legally valid. As Hakimi remarked, it is more to the point to refer to them as 'normative positions which may not be fully supported'.[21] But whether they are formally valid, endorsed by a majority, soft law or only half-baked rules in the making, they nevertheless function in the same way as theoretical hypotheses do in the sciences: they guide our perceptions and investigations by selecting the items that are 'relevant' and have 'legal salience'.[22]

At this point one may wonder, how is it possible to distil and identify rules if all we can do is to investigate the facts by means of . . . rules? The apparent circularity of *opinio juris*, much criticised on the ground that it presupposes the existence of law in order to identify law, seems to be repeated also in the examination of state practice! And indeed, circles abound. Any examination of practices or facts presupposes the guidance of rules. But which rules should be selected? In order to decide on the appropriate filter, the facts should be consulted. And how can the facts be consulted? By the guidance of rules. This treadmill is a well-known feature of interpretation and is called the hermeneutical circle.

According to Heidegger, such circles should not be shunned, as they reflect the structure of our existence.[23] But even without such metaphysics, it is important to see that it would be a misunderstanding to discard such circles as mistaken methodology or faulty logic. The preconceptions which are necessary to select that which is meaningful may be seen as 'prejudice', but it is a kind of prejudice which is essential for any understanding.[24] It is therefore worthwhile to be open about the inevitability of such circles. Instead of sweeping them under the carpet it is better to acknowledge them and to make clear where such circles arise and which points they cover. If we talk, therefore, about the identification

[20] Mendelson (n 11) 249. See also Bradley (n 13). A similar distinction is elaborated by Eugen Ehrlich, who distinguished between rules of conduct and norms for (juridical) decision. See E Ehrlich, *Fundamental Principles of the Sociology of Law, with an Introduction by Roscoe Pound* (Walter L Moll tr, first published 1936, Routledge 2017) esp ch XIX.

[21] Hakimi (n 6) 1511.

[22] ibid 1521.

[23] Heidegger (n 15) 153.

[24] HG Gadamer, *Wahrheit und Methode* (4th edn, JCB Mohr 1975) 255.

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of rules by examining state practice, we should acknowledge that such an examination can be carried out only if we have standards, rules and normative positions in mind as a background theory. This does not imply that we can only discover what we already have in mind. After the initial selection of the relevant material, its weight should still be assessed. But to represent this 'material' as a heap of objective facts is a mischaracterisation.

5 Common Law?

Schauer and Bradley suggested that this process is very similar to common law adjudication.[25] They rightly point out that the examination of state practice is not the kind of inductivist enterprise that is commonly and officially announced. They propose that the identification of rules by an investigation of state practice should be regarded as an attempt to construct chains of precedents. Schauer refers to the fact that different chains of precedents can be constructed, just as Llewellyn pointed out that different ladders can be built by means of which it is possible to motivate different outcomes.

At first sight, one may question the wisdom of the term 'precedents'. State practice comprises not only precedents but acts, usages and conventions of all kinds. It is only in the eyes of a judicial decision-maker that such acts can be labelled as 'precedents': events that preceded a new case and might have a bearing on the ways in which a new case should be resolved. But this is not necessarily a problem. Both authors start from the perspective of the adjudicator and in such a perspective state practice is examined in the light of the theoretical framework of the law. The clear advantage of this comparison with common law adjudication is therefore that it openly concedes that the adjudicator runs in the hermeneutical circle. It makes clear that the examination of state practice is not just an investigation of raw material facts but presupposes a selective filter of possibly relevant legal perspectives, from which acts and usages are indeed regarded as 'precedents' for the case at hand. The plausibility of the perspectives is judged by means of a further investigation of the facts, which necessarily presupposes a theoretical background perspective, etc.

However, it seems to me that this account, although much more realistic than official objectivist inductivism, assumes too much: it

[25] Bradley (n 13); Schauer (n 12).

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presupposes that it is clear what counts as precedent. In domestic common law adjudication that may be indeed the case, at least to a certain degree. The legal material is to some extent clearly defined, although here, too, the weight of the precedents may vary. Yet, it is within the domain of this legal material that the interpreter can choose to construct different chains of precedents leading to the decision in the new case.

In CIL, the boundaries of the legal material are less clearly demarcated. The questions to be answered are therefore not only how to construct different chains of precedents. Before those questions can arise, a prior question must be answered and that is whether a certain usage may count as precedent: is a certain act, text, omission weighty enough to count? This is clear for instance from the wording of the 1969 *North Continental Shelf* case, in which it is argued that despite the fact that the principle of equidistance is used by the majority of states and in numerous cases, there are 'several grounds which *deprive them of weight as precedents in the present context*'.[26] State practice is not examined in order to decide on the applicable chain of precedents and cannot merely be regarded as a matter of choice between various applicable chains. The court that examines state practice does so in order to find out which instances might qualify to be labelled 'precedents'. Only after that can their respective weight be ascertained and the connecting chains constructed.

6 The Double Function of *Opinio Juris*

Surprisingly, this prior question is usually answered by referring to *opinio juris*. In the *Asylum* case between Colombia and Peru (1950), for instance, the ICJ asserts that all the instances of granting asylum, mentioned by Colombia, simply do not count as precedents:

> The facts which have been laid before the Court show that in a number of cases the persons who have enjoyed asylum were not, at the moment at which asylum was granted, the object of any accusation on the part of the judicial authorities. In a more general way, considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation.
>
> If these remarks tend to reduce considerably the value as precedents of the cases of asylum cited by the Government of Colombia, they show, none the less, that asylum as practised in Latin America is an institution which, to a very great extent, owes its development to extra-legal factors.

[26] *North Sea Continental Shelf Cases* (*Germany/Netherlands; Germany/Denmark*) (Judgment) [1969] ICJ Rep 3, 75 (emphasis added).

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> The good-neighbour relations between the republics, the different political interests of the governments, have favoured the mutual recognition of asylum apart from any clearly defined juridical system.[27]

Institutions that arose in an extra-legal context lack legal relevance and do not count as 'precedents'. In the *Nicaragua* case, too, state practice is examined by reference to *opinio juris*, where it is argued that intervention is not undertaken with a sense of a legal right:

> The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.[28]

The reader might observe that these passages show exactly what is expressed by the official doctrine, which requires the presence of both an objective and a subjective element. *Opinio juris* is explicitly invoked.[29]

I would, however, say that the influence of *opinio juris* is much stronger than is officially conceded. The official claim is that there is first an – independent – examination of state practice, and that that practice can only be regarded as CIL if it is accompanied by *opinio juris*. What we see here, however, is that without *opinio juris* a recurrent and widespread usage simply does not count as legally relevant state practice. It counts as mere 'convention', as comity, etiquette or rules that are followed merely with a view to 'expediency' or 'international policy'. *Opinio juris* is required in order to 'see' something as relevant practice instead of merely a heap of facts or usages.

Opinio juris, therefore, indeed 'counts twice':

(1) A usage/act counts as 'practice' if carried out with a sense of legal obligation (*opinio juris*).
(2) A practice counts as an element of CIL if carried out with a sense of legal obligation (*opinio juris*).

Opinio juris is a condition not only for 'identifying' CIL, but also for differentiating those usages that might be seen as legally relevant practice ('precedents') and those which are not.[30]

[27] *Asylum (Colombia v Peru)* (Judgment) [1950] ICJ Rep 266, 276–77.
[28] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 16 [207].
[29] ibid.
[30] To make matters worse, the argument in paragraph 77 of the *North Sea Continental Shelf* judgment runs that not only for CIL but also for *opinio juris* both elements are required.

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This second function is usually not recognised in the official accounts of state practice as an objective element but it is in line with what I remarked on above about the necessity of a theory. In order to 'see' something as practice, the law functions as the indispensable theoretical searchlight – a searchlight which is only deemed fit if it has passed the test of *opinio juris*! That is why torture or pollution, although they are clearly practices that are widespread, uniform and consistent, do not 'count' as practices. That is why granting asylum can be regarded as legally irrelevant and as mere friendliness towards neighbours, as is maintained in the *Asylum* case. The objective element is therefore not only connected to the subjective element:[31] state practice cannot even be investigated without *opinio juris*. *Opinio juris* is the starting point for any meaningful investigation of state practice.

Of course, this is not to say that state practices cannot be normatively meaningful without *opinio juris*. As I noted above, we should be careful to distinguish the (ontological) formation of normative rules as emerging in and from practices from the (epistemological) identification of such rules. I am now just referring to how the courts in their investigation of state practice identify legally meaningful and relevant normative positions that might qualify as precedents in a certain case. And in order to do so, the *opinio juris* plays a major role as a theoretical searchlight.

7 A Practice of Claims

It seems then that my reading leads to an even more incongruous result than official doctrine. There, *opinio juris* is already troublesome because of its circularity. As is pointed out repeatedly, *opinio juris* identifies a rule of CIL by reference to the conviction of states that they are under an

Probably this is a mistake. In paragraph 77 it is stated: 'The essential point in this connection – and it seems necessary to stress it – is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of *a belief that this practice is rendered obligatory by the existence of a rule of law requiring it*. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore *feel that they are conforming to what amounts to a legal obligation*. The frequency, or even habitual character of the acts is not in itself enough.' (emphasis added).

[31] See Haggenmacher (n 2).

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obligation to comply with that same rule. My contention seems to be even more bewildering than this: only those acts, usages and conventions that are carried out with a sense of legal obligation (*opinio juris* 1) count as state practice, as a set of potentially meaningful precedents, which can only give rise to CIL if coupled with *opinio juris* (2). There is not one circle; there are two – or more specifically, there is a spiral.

However, as I have pointed out elsewhere,[32] the circularity is not so devastating if we understand *opinio juris* not as a conviction or a belief that one is under a legal obligation but as an articulated and publicly accessible claim.[33] These claims are usually couched in general and descriptive terms: 'this is the rule/law/principle we maintain and cherish'. Because of this particular descriptive form we might easily mistake them for descriptions of facts (we *are* under this legal obligation) and then circularity is indeed vicious. But in fact they are declarative statements: statements that *constitute* the law by means of a declarative form.[34] They are not expressions *of* legality but claims *to* legality.[35]

If we understand that state practice can only be – and is only – investigated by means of such claims to legality that form the searchlight for the investigation of practices, a number of confusions can be clarified. In the first place, it has already been remarked that a lot of the ICJ's judgements refer, not to state practice as it is traditionally defined,[36] but to resolutions, declarations and the like. In a fascinating article Choi and Gulati[37] presented statistics of the kind of evidence found by the ICJ under the banner of 'state practice'. They found that acts and practices were hardly investigated at all, and the official sources of state practice

[32] See Westerman (n 3).

[33] That is why Anthony d'Amato has a point in emphasising articulation. See A d'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971).

[34] In a similar vein, see M Mendelson, 'The Formation of Customary International Law' (1998) 272 RdC 155, 176. For an analysis of such declarative propositions, see JR Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge University Press 1979) 17.

[35] See Westerman (n 3).

[36] External conduct of States with each other as well as 'diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts'. see ILC, 'Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee' (30 May 2016) UN Doc A/CN.4/L.872, art 6(2).

[37] SJ Choi & M Gulati, 'Customary International Law: How Do Courts Do It?' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 117.

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(diplomatic correspondence, domestic legislation, etc.) in only a small minority of cases. Instead, in an overwhelming majority of cases treaties and other 'aspirational and forward-looking documents' were cited. The authors find that amazing: states enter into treaties in the absence of CIL and it would therefore be strange to cite treaties as proof of the CIL.

Choi and Gulati confirm empirically the uneasiness expressed by Mendelson more than two decades ago, who observed, while commenting on the *Nicaragua* case (Merits):

> And even if we grant, for the sake of argument, that the resolutions represented the *opinio juris*, where then is the practice which, the Court seemed to be saying, is an independent element? If we say that the resolutions constitute verbal practice, then we are guilty of double-counting them – both as the objective and as the subjective elements.

And he adds to this:

> It might be responded that all that is needed is for the act of practice to be accompanied by *opinio juris*; so that what is required is not two completely separate elements, but both combined; however, *to count the act of voting for the resolution as practice still looks rather like pulling oneself up by one's own bootstraps*.[38]

And indeed it is. This is exactly the case. To lift oneself up by one's own bootstraps accurately describes the hermeneutic circle.

8 Interpretation Prior to Identification and Application

The observation that the identification of CIL is circular is hardly novel. Koskenniemmi had already observed that 'doctrine about customary law is indeterminate because circular. It assumes behaviour to be evidence of the *opinio juris* and the latter to be evidence of which behaviour is relevant as custom.'[39] However, as we have seen, 'behaviour' and 'evidence' are not as unproblematic as even Koskenniemi assumes. As Bodansky correctly asserts,[40] if it were only behaviour that is investigated, sociologists would be much better equipped. Legal investigation revolves around texts: an abundance of claims to legality such as resolutions, conventions and treaties. They form the object of investigation.

[38] Mendelson (n 34) 381–82 (emphasis added).
[39] M Koskenniemi, *From Apology to Utopia* (Cambridge University Press 2006) 437.
[40] D Bodansky, 'Customary (And Not So Customary) International Environmental Law' (1995) 3(1) IJGLS 105, 105–19.

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And they figure at the two levels that we distinguished in Section 7. First of all, they are investigated in order to determine the legally relevant precedents, and secondly they are investigated in order to choose between potentially applicable precedents in order to apply them to a particular case. Both activities are usually conducted in one big sweep. In the judgments of the courts it is just pointed out which texts are considered legally relevant, weighty or convincing. They may be labelled differently, as either 'state practice' or '*opinio juris*', but they are all just texts the relevance of which is assessed and weighed.[41]

It is not possible to weigh precedents and to apply rules without prior interpretation. That interpretation can be grammatical or historical, but most importantly it is teleological. The texts should be interpreted as having a point. This is noticeable both in the attempt to determine the precedents and in the way in which chains of such precedents are constructed. To begin with the latter: it is obvious that in order to make a choice between different chains of precedents, as in common law adjudication, they should first be constructed as a chain. That can be done by discovering analogies or some aspects these precedents have in common. But this discovery of shared aspects can be conducted only by constructing an underlying principle or rationale. There *are* no shared features between 'books', 'electricity' and 'personal data'. We can only *construct* their shared features as 'goods' to which property law can be applied. And usually this construction is carried out by hypothesising an underlying aim or rationale. Do we follow all those solemn prohibitions of weapons and conclude by analogy that nuclear weapons should be prohibited as well? Or do we follow all – equally solemn – declarations of sovereignty and conclude that such a prohibition of nuclear weapons is not part of CIL?

The same applies, however, also to the first round in which different official acts and texts are examined in order to establish the legally relevant precedents. Here, too, there are numerous candidates, and they can be linked together in different chains, each focusing on different shared features and different underlying principles. Those texts, rules and claims which are not constructed as precedents are denied

[41] The unity of the two elements is also observed by R Müllerson, 'The Interplay of Objective and Subjective Elements in Customary Law' in K Wellens (ed), *International Law, Theory and Practice* (Kluwer 1998) 161–78; O Elias, 'The Nature of the Subjective Element in Customary International Law' (1995) 44 ICLQ 501, 501–20; and, of course, Haggenmacher (n 2).

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legal relevance and figure as 'technical rules' or as rules of etiquette, comity and friendliness. These 'legally irrelevant' rules are obviously not *found* but *interpreted* as lacking legal relevance, and they are interpreted by reference to texts that embody claims to legality. Postema adequately described the process of such interpretation of practices and compared this to discerning a pattern: 'the pattern is likely to be salient because it is meaningful within the practice, rather than meaningful because it is salient'.[42] The degree to which customs can be integrated in such a pattern is therefore decisive, according to Postema.

Although I distinguished for analytical reasons between the two rounds of legal interpretation in which legally relevant material is (a) determined and (b) applied, we should not think of determination and application as sequential in time. As noted above, they are usually carried out in one big sweep: both are the result of interpretation in the light of *opinio juris*, and they are intricately connected. The more successful the attempt in the first round to deny legal relevance to normative positions and, consequently, the narrower the selection of legally relevant material, the easier the task to choose a preferred ladder in the second round of application. Or, to put it differently, those normative positions that fail to be elevated to the status of 'legally relevant' state practice do not need to be examined as candidates for CIL. That is why the double-counting of *opinio juris* does not come to the surface. *Opinio juris* is usually already applied in the first round of determining relevant precedents and need not be re-emphasised in the determination of CIL.

It is important to see that both the determination of relevant precedents and the choice between rival chains of precedents presuppose interpretation of the normative material as material that is patterned around its point or *telos*. The degree to which a claim can be fitted into a pattern is to a large extent dependent on how we construct that *telos*. As Heidegger in his more lucid moments pointed out, it is not possible to identify something as something ('Etwas als etwas') without understanding it as something 'in order to' ('Um-zu').[43] Precedents, and also candidate-precedents, are constructed as parts of a Dworkinian chain-novel,[44] or at least – more modestly – as threads weaving a plot in a story.

[42] Postema (n 19) 715.
[43] Heidegger (n 15) 149.
[44] R Dworkin, *Law's Empire* (Harvard University Press 1986) 228–38.

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We should not think of this *telos* as a set of intentions, the honesty of which can be examined on the basis of diplomatic correspondence between officials. Interpretation is different from grasping intentions at face value. It may very well be the case that the states which signed a treaty had no serious intention at all of furthering the aim of the treaty. They might simply have thought about the reputational costs of making reservations to that treaty, or they were mistaken in thinking that they would not be burdened too much, or had already seen gaps in the treaty that would allow them an exit. If we interpret such texts in terms of intentions, many of those texts can indeed be disregarded as specimens of 'cheap talk'.[45]

However, as Ricœur pointed out, a text (any text, whether novel or academic publication or treaty) gains a certain distance from its drafter or writer. It is this distance that harbours the possibility for the interpreter to discern and to reconstruct several meanings of such texts. According to Paul Ricoeur, 'what must be interpreted in a text is a proposed world which I could inhabit and wherein I could project one of my ownmost possibilities'.[46]

This does not merely apply to my interpretation of literary works; it also relates to how legal texts can be understood.[47] Interpretation is an activity to understand not only what exists but also what is possible.[48] In fact, legal texts – as well as communiqués – are also *written* with an eye to such possible readings. The importance of textual subtleties can only be understood on the basis of this distantiation. If it were a matter of just unravelling intentions, such care for texts would be unnecessary. But they are highly important in view of the fact that texts live a life of their own. Even if such texts do not reflect the serious intentions of the signatories and are indeed no more than 'cheap talk', they can be read as elements of a purposive pattern, that can be constructed as meaningful by the interpreter.

[45] JL Goldsmith and EA Posner, *The Limits of International Law* (Oxford University Press 2005).

[46] P Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (JB Thompson ed, Cambridge University Press 2016) 104.

[47] For a nice application of Ricœur's insights, see the dissertation by P Phoa, *EU Law as a Creative Process: A Hermeneutic Approach for the EU Internal Market and Fundamental Rights Protection* (Europa Law 2021).

[48] ibid; Ricœur (n 46).

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9 Conclusion: Possible Worlds

If we take seriously the notion of interpretation as delineating possible meanings, that means that different chains and patterns are conceivable that order the textual material in different ways. Depending on the choice of such patterns, a certain text is interpreted as a more or a less weighty claim, as a legally binding rule, as a normatively binding standard, as a technical standard or as just a convenient habit.

We should not think that there is one correct pattern. As I argued in my earlier article,[49] *opinio juris* should be understood in its plural form. There are different *opiniones juris*: official claims that propose different ordering patterns and which function as maps. The main function of such maps is not merely to represent reality. Maps typically highlight some elements at the expense of others. The cyclist map ignores the highways; underground maps emphasise the underground stations and may even be extremely unrealistic in the sense that they distort the physical distance between stations. The value of such maps does not depend on their realism but on the use – the 'point' – of such a map. The investigation of state practice, but also of CIL as a whole, can best be seen as a map drawn on a transparent sheet that is laid over the abundance of official documents and texts, by means of which this legal material is ordered in different ways.

All this implies that the claim cannot be justified that there is an objective examination of state practice and a neutral 'identification' of rules that precedes their interpretation. The transparent sheet cannot be removed without risking being plunged into a bewildering multitude of incomprehensible texts. But, and this is important, this does not imply that judgments are completely arbitrary. The courts are not 'objective', but neither are they 'subjective'. They do not deal exclusively with the factual, but nor are they condemned to the realm of normative ideals. Their judgments are never completely apologetic or utopian, because the interpretation of legal texts is not exclusively limited to what *is*, nor to what *ought* to be. The task of courts is to choose a path among possible worlds.

This implies a somewhat nuanced answer to the common objection against CIL as mere fantasy. It seems exaggerated to speak of judicial discretion in the strong sense of the word, according to which the judge is simply not bound by any rules. In fact, even in the advisory opinions

[49] See Westerman (n 3).

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where the ICJ is just required to answer very open questions, there is always plenty of legal material that may or may not support the opinion. Courts do not fantasise. But neither are they unreservedly bound by that material. The texts are not determinate strongholds. Their weight is (co-)determined by the patterned transparent sheets. The plurality of these sheets leaves room for choice.[50]

[50] See the empirical study by SA Lindquist and FB Cross, 'Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent' (2005) 80 NYUL Rev 1156.

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