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‘Change in International Law: Rules of Change or Changing Rules?’ Series Concluding Note

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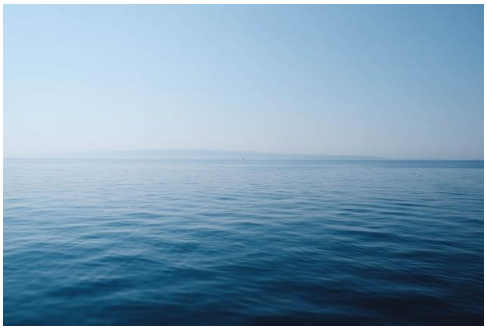

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I. Change in International Law

International law, much like any law, sits at the centre of a tug of war between competing forces; stability and change, motion and rest.[1] On the one hand, it must accommodate the need for stability and predictability that is essential to any legal system. On the other hand, it must remain responsive to the exigencies of an ever-changing world, lest it loses its relevance and becomes obsolete. It is noteworthy that, according to H.L.A. Hart, the rules by which other rules are altered (rules of change)

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[1] M Fitzmaurice and P Merkouris, *Treaties in Motion* (CUP 2020) 1.

are a marked feature and indispensable condition of any legal system.[2] But what are the rules that govern the change of rules of international law?

This question inevitably calls attention to the regulation of change within the body of rules and principles that comprise the theory of sources of international law. As far as treaties are concerned, the Vienna Convention on the Law of the Treaties (VCLT) enumerates various formal ways in which treaty rules can change, including through modification, amendment, or termination.[3] Yet, when it comes to many important treaty rules, like those provided in broadly ratified multilateral treaties, procedures on change are cumbersome and politically unrealistic, and termination runs the risk of regression. In practice, changes to the content of treaty provisions come about predominantly through (re)interpretation of this content by states, international organisations, international courts and tribunals, and actors at the national and sub-national level.

To illustrate this point, almost forty years after the adoption of the VCLT, the ILC decided to include the topic 'Treaties over Time' in its programme of work, alluding to the notion of rules of change in the law of treaties.[4] However, the prevalence of interpretation in bringing about change is such that the ILC decided eventually to limit the scope of its study and final output to the topic of 'Subsequent Agreements and Practice in Relation to the Interpretation of Treaties'.[5] How does the rule of interpretation enable change to treaty rules? And does the rule of interpretation strike an adequate balance between stability and change, predictability and evolution, in the context of treaty rule determination? Has the rule of interpretation itself evolved, or should it evolve, as a result of the tension between stability and change? In its Draft Conclusions, the ILC tried to answer some of these questions, but when it had to confront the question of where one draws the line between interpretation and modification, which lies at the core of a rule's identity and how it can change, the ILC opted to remain somewhat agnostic on the matter, choosing to go for a rebuttable presumption in favour of interpretation, as provided for in Draft Conclusion 7(3).[6]

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[2] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 95-6.

[3] eg C Binder, *Die Grenzen der Vertragstreue im Völkerrecht: am Beispiel der nachträglichen Änderung der Umstände* (Springer 2013).

[4] eg UNGA Res 63/123 (11 December 2008) [6].

[5] ILC, 'Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties', annexed to UNGA Res 73/202 (3 January 2019).

[6] Draft Conclusion 7(3) provides: 'It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the 1969 Vienna Convention and under customary international law'; ILC, 'Draft Conclusions on Subsequent

This example does not represent an exception, but rather a pattern as to the reaction that any discussion on change in international law elicits. Even during the Vienna Conference on the Law of Treaties and the preceding debates in the ILC, topics relating to change were always contested, and often intentionally left out to allow for agreement to be achieved on the draft text of the proposed articles. For instance, whether the rules on amendment/modification of treaties even reflected customary international law, or whether they should even be included in the draft Convention, were hotly contested issues.[7] This was also true for the draft Article on intertemporal law, which eventually did not make it onto the VCLT.[8] The same fate was reserved for any explicit choices regarding the principle of contemporaneity or evolutive interpretation as far as the principle of systemic integration was concerned.[9] To make matters even more complicated, at least in the case of the law of treaties some discussion has indeed taken place on the concept of change, and rules of change. When it comes to the other primary sources of international law, customary international law and general principles of law, the issue of change remains relatively underexplored. In recent years, the ILC has set about to study the rules relating to the identification of customary international law, general principles of law, and *jus cogens*.[10] Yet, it is remarkable that the Commission has for the most part implicitly or explicitly excluded the issue of change from the remit of its works and final outputs.[11] What rules govern the change of unwritten international law, if any? The dominant account is that rules of unwritten international law can only be changed either by a subsequent rule of the same pedigree or that they constantly evolve. By implication, rules of unwritten international law might appear virtually unchangeable once formed or merely transient in the sense that they never fully form. Is there a way to strike a better balance between stability and change? How is change determined in the content of the rules of unwritten international law? Is there a role for processes akin to interpretation in the law of treaties?

Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries 2018' reproduced in [2018/II Part Two] YBILC 25, 47-8; Draft Conclusion 7(3).

[7] For an overview of the debate, see Fitzmaurice and Merkouris (n 1) Ch 5.

[8] P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Palto's Cave* (Brill 2015) 101-62.

[9] Merkouris (n 8) 13-101.

[10] ILC, 'Conclusions on the Identification of Customary International Law' in ILC, 'Report of the International Law Commission—Seventieth Session (30 April-1 June and 2 July-10 August 2018)' General Assembly Official Records Seventy-third Session Supplement No 10 (A/73/10) [66] ('CICIL'); ILC, 'General Principles of Law–Texts and Titles of Draft Conclusions 1, 2 and 4 provisionally adopted by the Drafting Committee' (28 July 2021) A/CN.4/L.955; ILC, 'Peremptory Norms of General International Law (*jus cogens*)–Text of the Draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Committee on First Reading' (29 May 2019) A/CN.4/L.936

[11] eg CICL (n 11), Commentary to Conclusion 1 [5].

The Symposium 'Change in International Law: Rules of Change or Changing Rules', is based on a Workshop that took place in Groningen on 30 September 2022[12] and tackles the above questions, attempting to map out and assess the rules and principles that govern the change of rules of international law including through interpretation. It comprises contributions, which elucidate the processes that drive change of rules of international law within the framework of sources of international law. These contributions, which have been featured as *ESIL Reflections*, revolve around three main axes: i) the law of treaties, ii) customary international law, and iii) peremptory norms of general international law (*jus cogens*). The common thread permeating all contributions and all thematic cycles is that of change and the rules that govern such change. What is evident in all the contributions is that change and the rules governing it represent extremely complex mechanisms in which no easy cookie-cutter solutions are available, yet they are an essential and often overlooked part of the lifecycle of international legal rules. The contributions of the Symposium do not claim to offer the final word on the issue of change, but merely attempt to peak behind the curtain in an effort to better understand the function of international law.

II. Change and the Sources of International Law

1. Change in Treaties and in the Law of Treaties

The first thematic cycle in this Symposium debates the regulation of treaty change, also within the law of treaties. In 'Change and the Law of Treaties: The Accommodation of Change under General International Law and in Specific Treaty Regimes', Professor **Christina Binder** starts by examining through what means change can be accommodated under the general law of treaties, with a particular focus on treaty interpretation. She arrives at the conclusion that although the law of treaties provides ways to account for subsequent changes, it also presents limitations. These limitations become even more pronounced in the case of treaty regimes that are subject to rapid social or global developments, as for instance in the case of environmental and climate change treaties. The need for such treaties to change with greater speed and adaptability has led to the adoption of procedures that are specifically designed to address the particular requirements of such regimes. This alone is not enough and has also led to a change and development of the actors that are operationalised in such a change. As **Binder** concludes, 'the rules of change, as well as the methods and actors for incorporating them

[12] The videos and podcasts of the presentations can be accessed at: https://tricilawofficial.wordpress.com/videos-sept30workshop/ and https://tricilawofficial.wordpress.com/podcastschangeintllawsept302022/

are continually evolving and diversifying, especially in highly sophisticated treaty regimes, such as those on climate change'.

Professor **Fuad Zarbiyev** continues to explore the theme of change in treaties in his contribution 'Are Joint Interpretive Agreements Controlling? The International Law Commission and the Black Box of Authentic Treaty Interpretation'. There he discusses change both in the form of joint interpretative agreements and change in the form of the position and importance that such agreements hold in the interpretative process of Article 31 VCLT. His Reflection inquires whether the old adage that treaty parties are the masters of their treaties still holds true, or whether the International Law Commission's recent work has led to a surprising change to the manner in which such joint interpretive agreements feature in the interpretative process provided under Article 31 VCLT. He concludes that "having received too much attention, the black box of the authority of joint interpretive agreements has become fragile…[and that] their authority has become more vulnerable to changes in the landscape of treaty interpretation". This is due, in his view, to a congruence of multiple factors such as the crystallization of the rules of interpretation in the text of Articles 31-33 VCLT, the rise of competing interpreters, the emergence of treaties with third party beneficiaries and the rise of investor-state arbitration.

2. Change in Customary International Law

The discussion on change within the law of treaties, and in particular Article 31 VCLT, which - as international courts and tribunals are often fond of repeating - reflects customary international law, takes us then into the second thematic cycle, i.e. exploring the change of customary rules. **Katie Johnston** and **Enzo Cannizzaro** shine a light on the theme of change by examining two areas that they believe highlight it best, namely modification of and conflict between customary rules. In 'Rules of Change and the Nature of Customary International Law' Dr. **Katie Johnston** argues that there is no specific subset of secondary rules that govern the modification of customary international legal rules. Rather, any change to the content of the customary rule is simply the product of a (re-)application of the standard two-element test for the identification of customary international law at a different point in time. Thus, 'modification' of customary international law is a term that does not refer to a set of secondary rules specific to customary international law. Rather, it is a term that describes an existing difference between the contemporary evaluation of state practice and *opinio juris* compared to an evaluation conducted at an earlier point in time. Thus, the only applicable secondary rule is the two-element test for the identification of customary international law.

Professor **Enzo Cannizzaro** continues this discussion in his Reflection on 'How Custom Evolves'. Taking a different position than Johnston's Reflection, he argues that "the theoretical purity of the dualist doctrine of custom, rather than promoting the development of the law, works as an impediment to this development". In **Cannizzaro**'s view, the two-element doctrine allows for change only at a slow pace and is premised on the existence of a community of states that is both internally cohesive and whose members share common values and principles. Sudden transformations in customary law cannot be explained through the two-element doctrine, but rather should be viewed as a change of law, to which a state or the international community acquiesces. However, all these perspectives offer at best only a fragmented picture of how customary rules evolve. In order to fully grasp the potential and process of customary rules change, one has to examine them in the system within which they operate, and in the context of their interactions with other rules. Such interactions may lead to conflict with preexisting customary rules, and it is through such conflicts that change may come about, and new rules may be created.

3. *Change in* jus cogens *Norms*

This idea of conflict as a catalyst for change is put to the test when it comes to *jus cogens* norms, i.e. norms from which no derogation is possible. How can one speak in such a case of a conflict[13] and also of change? These musings colour the third thematic cycle of the Symposium. Within this theme, the Reflections of both Judge **Dire Tladi** and Prof. **Thomas Kleinlein** grapple with the two competing forces of stability and change, which feature most prominently in the context of potential modification of an existing peremptory norm. In the case of *jus cogens*, this tension is even more pronounced compared to the other two thematic cycles, as *jus cogens* is connected to natural law and thus to ideas of immutability. Consequently, the question that inexorably arises is whether in the case of *jus cogens* norms this tension reaches such a level that paradoxes emerge or that the concept of *jus cogens* is rendered unworkable.

Judge **Dire Tladi** in 'Between Stability and Responsiveness in International Law - The Example of *Jus Cogens'* elaborates on the two competing forces of stability and change as far as *jus cogens* rules are concerned. Whereas, on the one hand, *jus cogens* is connected to natural law and thus to ideas of immutability, on the other, the potential of change is one that the ILC, albeit not without objections,[14]

[13] As the rule allegedly conflicting with a peremptory norm, should either be interpreted to avoid conflict, or if its content cannot be harmonised with that of the *jus cogens* rule, should be considered as null and void.

[14] In more detail, see D Tladi, 'ESIL Reflection – Between Stability and Responsiveness in International Law – The Example of *Jus Cogens*' (2024) 13/5 ESIL Reflections 1.

accepted, as can be seen in its Draft Conclusions 3, 6 and 14.[15] Yet despite this acknowledgement, the ILC also avoided going into too much in depth on this issue,[16] and in **Tladi**'s view the concept of *jus cogens* modification remains largely theoretical, as *jus cogens* is meant to be resilient to change.[17] However, such resilience and tension with change should not be seen only in a negative light. As **Tladi** notes, this tension is not unique to *jus cogens* but permeates all rules of international law irrespective of their source. Such tension should not fill us with dread and anxiety, but should be seen as something that nourishes the international legal system. As he notes: "[t]his delicate balance, where sources of international law reflect both stability and responsiveness to change, is transposed on *jus cogens,* which is, at once, resistant to change and yet the norms of which emerge principally as a response development. This tension … is both necessary and, more importantly, reflective of the mature legal system that international law is becoming".

Echoing these thoughts, Prof. **Thomas Kleinlein** in 'Change of Peremptory Norms of General International Law (*Jus Cogens*)' engages also with the notion of change of *jus cogens* norms, and particularly the rules that govern such change. In his Reflection, Kleinlein explores how *jus cogens* norms resist change if the relevant rules of change are uncertain. He then goes on to question whether it is this very uncertainty that functions as a gatekeeper for the stability of *jus cogens,* in as much as states are hesitant to enter the unchartered waters of *jus cogens* modification or even conflict. In his exploration of these rules of change, **Kleinlein** concludes that "[t]he threshold for a formal modification of *jus cogens qua jus cogens* is high, but not categorically different from the threshold for a modification of 'ordinary' general international law" and that this high threshold "is consistent with *a presumption against both formal and informal norm change* [italics added]". [18]

III. Joining the Dance

As can be seen from the above, change, in the multifariousness of its forms, was, is and shall remain central to the functioning of international law. Regardless of whether one examines this phenomenon from the perspective of different sources of international law (be they treaties, custom, or general principles), or that of the rules governing the process, or even by considering the different stages in

[15] See also Articles 53 and 64 VCLT.
[16] See, in more detail, Tladi (n 15).
[17] This strong resilience to change that *jus cogens* exemplifies, leads also to situations where it is difficult for rules to achieve a *jus cogens* status, even if one would deem them to deserve such a label.
[18] Emphasis added.

the life-cycle of an international rule in which change can occur (for instance, emergence, interpretation, modification or even termination of a legal rule), some commonalities do emerge.

Namely, even when it may be impossible to precisely pinpoint when change occurs (yet another manifestation of the *sorites* paradox),[19] the fact remains that change is central to international law. Discussions on change and the rules that govern it are essential to understanding the nature of international law: its rules, its systems, and - in a delightfully self-referential manner - its own potential for change. It is no surprise that considerations of identity and change have with unwavering consistency crept into the work of the ILC and international courts and tribunals, regardless of the topic, work or case under consideration. The pull of change is ubiquitous, irrespective of source, actor or regime.

The difficulty of grappling with this topic should not cause us to shy away from it. On the contrary. There is much to be gained by such an engagement, and much to lose if we cower away from it in fear. Only by examining change in international law, as the contributing authors[20] have, can we hope to make some sense of it. Or as Alan Watts more eloquently put it: "The only way to make sense out of change is to plunge into it, move with it and join the dance". We would argue that this applies not only to change but to the study of change. This dance (of change and its study) may be structured or frenetic, slow or fast-paced, evolved or primeval, harmonious or confrontational depending on the context. Yet, it is a dance that we should all join with reckless abandon.

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[19] On this paradox, see D Hyde and D Raffman, 'Sorites Paradox' (*Stanford Encyclopedia of Philosophy*, 26 March 2018) <https://plato.stanford.edu/entries/sorites-paradox/> (last accessed 30 September 2023).
[20] And we are deeply indebted to them for engaging in such intellectual heavy lifting.