

Customary International Law



A sluggish
thing?





Old and decrepit ?

Or a pragmatic,
evolutionary entity, a
dynamic “organism,”
***which can match the
increasing pace of
change?***

In the maritime context, “Customary International Law” has been around for millennia, without being called that.



In name, it has existed for centuries.

Bartolus de Sassoferrato (1313 – 1357) a famous Italian law professor, when comparing statute law with customary international law wrote: “...custom may become apparent through the [tacit] consent of the people and their perseverance [in the **act**].”

William and Mary Law Review, 2013.

<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3466&context=wmlr>



But it is still here TODAY and can possess *more jurisprudential power* than treaty law. Unlike treaties which bind only the parties thereto, once a norm is established as CIL, it is binding on all States, even those new to a type of **activity**, *so long as they did not persistently object during its formation.*



Customary International Law consists of two components:

A) There must be a general & consistent **practice** of states, while agreement exists among them that the **practice** is acceptable.

(Note: the **practice/custom** does NOT have to be universally followed.)

B) There must be a **sense of legal obligation** within the international community (*opinio juris sive necessitates*).

(Note: Silence (i.e. lack of objection) implies consent/acceptance.)



“Practice(s)” is a magic word for CIL.

1) Repeated **acts/actions/activities**

2) Repeated **statements/declarations**

(**Statements** can count as physical State **practice** & repeated **declarations** can shape **custom**, even without *physical* action.

a) within UNGA resolutions

b) by international & national courts

3) **Provisions** within national legislation

See Morris, Philip & Chatherine Brolmann, “Space Mining, Space Law, and Why No State Can Alone Go Boldly Forth,” 2 July 2018 and UNGA Resolution 1721 (XVI) of 20 Dec. 1961 & Resolution 1961 (XVIII) of 13 Dec 1963



Two pathways to international law:

1) **Top Down:**

a) Diplomats & lawyers negotiate a treaty & get nations to ratify & adhere to it.

b) Transparency & Confidence-Building Measures (TCBMs) among governments can lead to national regulation enforced by court cases in each country.

2) **Bottom Up:** National governments collaborate with industry to develop rules, procedures, guidelines, norms (soft law/governance frameworks) leading to “**best practices**” leading to national **legislation** inducing repeated regulated **activities** by entities within or connected to multiple governments eventually leading (sometimes) to codification in treaties.



How can we know if a given **practice**/activity is a “**best**” one?

The International Organization for Standardization (ISO) Technical Committee 20 (Subcommittee 14) develops standards for space systems & operations. Working Group 7’s primary goal is to codify IADC orbital debris **guidelines** & *best* practices (soft law) as international *standards for contractual incorporation* & *potential national regulatory adoption*.



*Without first negotiating an international space treaty, spacefaring nations can establish national regulatory frameworks based on **best** space industry **practices** and norms.*

Such best practices can be standardized internationally with the help of ISO and multilateral agreement, setting the stage for customary international laws dealing with various space activities.



National & international **best practices** can evolve with *judicious, measured* use the “precautionary *approach*,” (not principle), which assesses the circumstances yet recognizes that any new system of travel/transport goes through an early phase, where it is *impossible* to eliminate all risk.



For instance, aircraft travel was once quite risky, but because people took those risks, resulting at times in injury and death, we now have air travel existing as the *very safest way to travel*.

Also, many emerging aviation companies failed. The same will be true for emerging space companies. These are the “growing pains” of any new industry that eventually matures and becomes a mainstay of society.



Not only can space development advance with the precautionary approach, it can also advance *more sustainably*.

Generally, the nearly 8000 metric tonnes of orbital debris & the growing number of debris objects (from accidental & *deliberate* collisions) are not the result of using the precautionary approach. *Now the sustainable use of certain orbits is in doubt.*



Civil & commercial multilateral **actions** for in-situ resource utilization (ISRU), based on industry *best practices* & norms, as *licensed* and *supervised* by *national regulatory authorities*, can eventually evolve into “customary international law.”



OST Article VI states that States Parties to the Treaty bear international responsibility (liability) for national activities in outer space, including the activities of the non-governmental entities, all of which require “authorization and continuing supervision” by the appropriate State Party.



Therefore, per OST Article VI, the *supervision* of the *activities* of non-governmental entities, which would necessarily involve national guidelines and rule-making, can lead to Customary International Law.



The international obligations of CIL can evolve from State authorized & supervised *practices* (civil/commercial *activities*), regulated via legislative *provisions* & court *pronouncements* -- *as opposed to international obligations arising from formal, written international treaties.*



Examples of customary international law:

- 1) Doctrine of non-refoulement.
- 2) Immunity for visiting heads of state & diplomats.
- 3) Maritime salvage *customs* & norms (go back to Greek & Roman times).
- 4) Peremptory norms (jus cogens) forbidding slavery, torture, genocide, wars of aggression, & crimes against humanity.

“Customary International Law” that emerged long ago concerning salvage on the high seas was eventually codified by the 1989 International Convention on Salvage.



The same thing can happen in the space environment!

Customary multilateral *actions/statements* by civil and commercial actors *authorized by states* can evolve into customary international law and eventually be codified within an international space agreement or formal treaty.



Customary, multilateral “best industry *practices*,” *allowed by the Outer Space Treaty*, to clean up orbital debris or for the utilization of lunar, asteroidal, & Martian resources *within national supervisory frameworks (per OST Art. VI)* could evolve into Customary International Law with time.



Eventually to be refined and codified with an
international space treaty.



First step in “bottom up” process:

National governments formulate regulation based on standardized *best industry practices*.

Simultaneously, reps of the space industry with reps of spacefaring countries evolve building blocks for an *international* governance framework – based on current & potential space *activities* within 25-year time frame.



Examples of “bottom up” *practices* that can evolve into international space law if they replicated internationally:

1) U.S. space *legislation, leading to further regulated activities/practices.*

Ex: U.S. Commercial Space Launch Act (CSLCA)

2) Luxembourg’s space *legislation & initiatives* leading to commercial and civil best **practices**.

3) The Hague Space Resources Governance Working Group (members are major stakeholders from government, industry, universities and research centers) formulating international building blocks for an *adaptive* governance framework.

4) Orbital debris mitigation guidelines evolving into national policies and regulations.



But wouldn't customary international law in space take a long time to establish?



Let's compare with treaty law first:

- 1) LOS Convention negotiations began in 1973. Convention concluded in 1982. LOS came into force 1994. Treaty took 21 years.
- 2) Vienna Convention on the Law of Treaties began in 1949. Convention concluded in 1969. Came into force 1980. Treaty took 31 years.
- 3) ILC began its work on the Statute for an International Criminal Court in 1949. Concluded in 1998. Entered into force in 2002. Treaty took 53 years!



In contrast to earlier times, in the modern era of instantaneous electronic communications, and a proliferation of diplomatic conferences, organizations and other forums for multinational diplomatic exchanges, *State practice is being generated at an increasing pace*, while information about state practice is becoming more and more widely disseminated over the internet. This means that the requisite quantity of claims and responses can be reached much more quickly than in the past leading to a *general acceleration of the formation of customary rules*.

(Emphasis mine.)

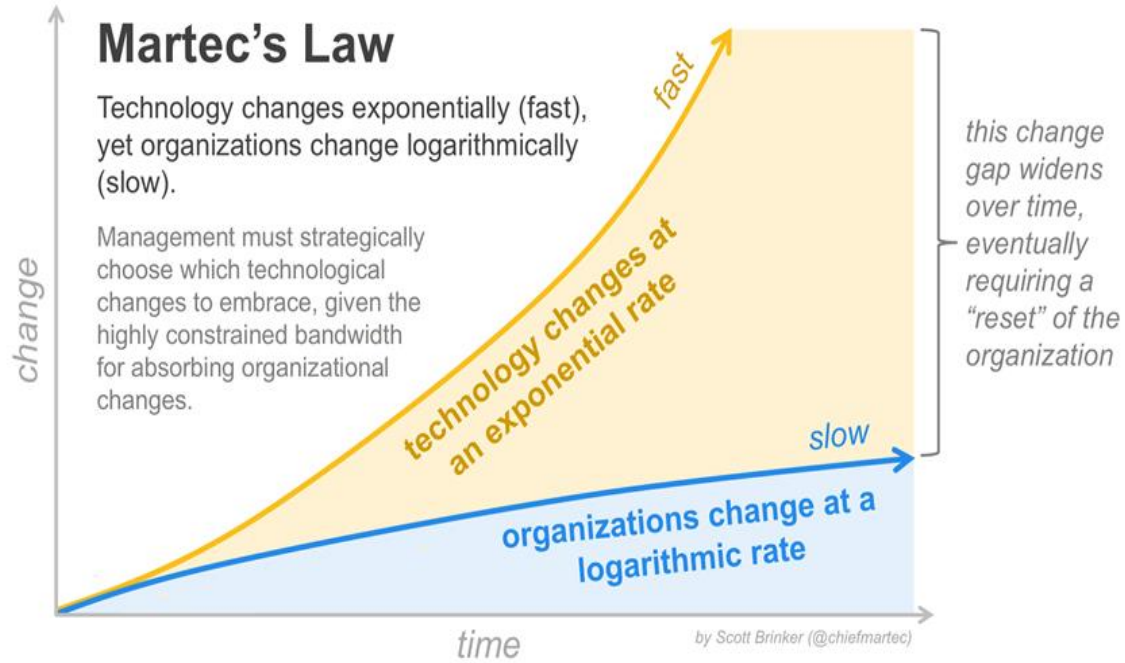
Tullio Treves, "Customary International Law," in Max Planck Encyclopedia of Published International Law ¶ 25 (2006)



Martec's Law

Technology changes exponentially (fast), yet organizations change logarithmically (slow).

Management must strategically choose which technological changes to embrace, given the highly constrained bandwidth for absorbing organizational changes.



The Learning Organization

Main Themes

1. Speed of change – as technology and business activities increase speed of change is essential for sustained competitive advantage.
2. Keep up with the rate of change in your external Environment or else you will decline quickly or slowly.
3. An organization if it is to adapt must be able to learn across functions as well as in specialist areas.

To avoid becoming irrelevant, both governments *and legal entities* also have to *adapt* to the increasing rate of technological change.



Governments are striving to catch up!

QUESTION OF THE DAY

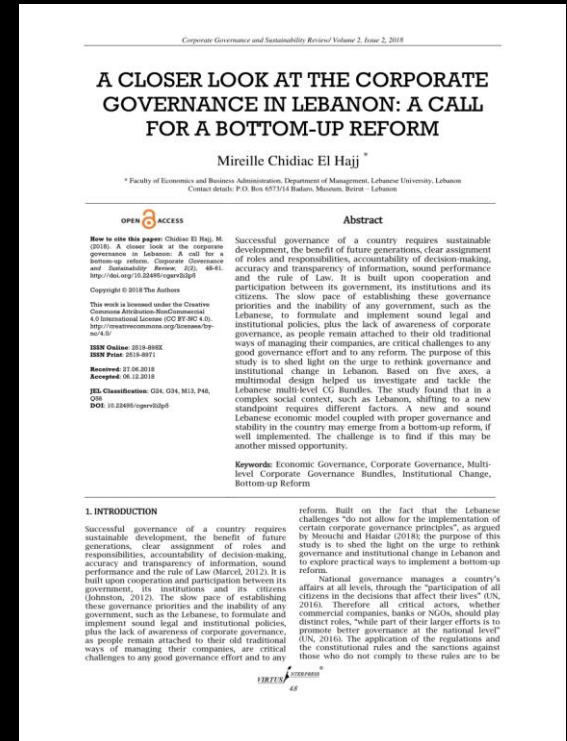
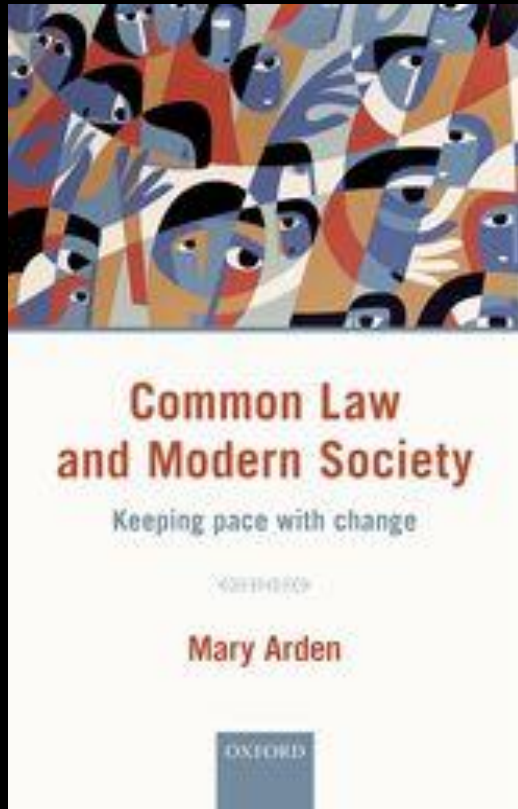
How can we streamline the legislative process to keep up with the pace of technological change in society?

 SingularityNET
community.singularitynet.io

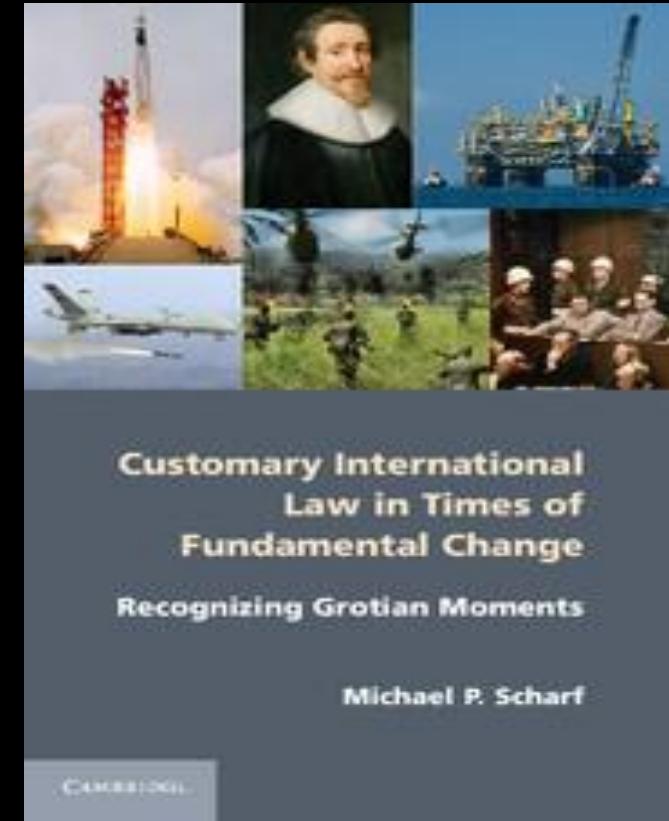
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National and international legal institutions will also have to become much more agile & adaptive to changing circumstances!



The CIL process is
inherently *adaptive*
because it can evolve
best practices as it
reacts to a situation
over time.



What is the space situation today?

- 1) Development is at an inflection point/*Grotian Moment* similar to aviation between WWI & WWII.
- 2) Technology/development/**activities** are emerging and evolving at an increasing pace & in ways that cannot always be predicted.
- 3) Emerging private companies are becoming restless as space launch & development costs plummet. As with early aviation, most will fail, but some will not.
- 4) They (and connected governments) will not wait 50 years for an internationally recognized “Authority” to be set up to administer resource utilization in space. They will not even wait 5 years.
- 5) So far, only Customary International Law has the potential to adapt quickly to these changing circumstances.



NSS believes that it is an advantage to evolve enabling industry regulation (with protections) apace with (and not ahead of) space development, so as not to strangle a young and growing extraterrestrial presence with excessive bureaucratization & over-regulation.



Internationally, Customary International Law appears to be the best suited system of law to carry this out.

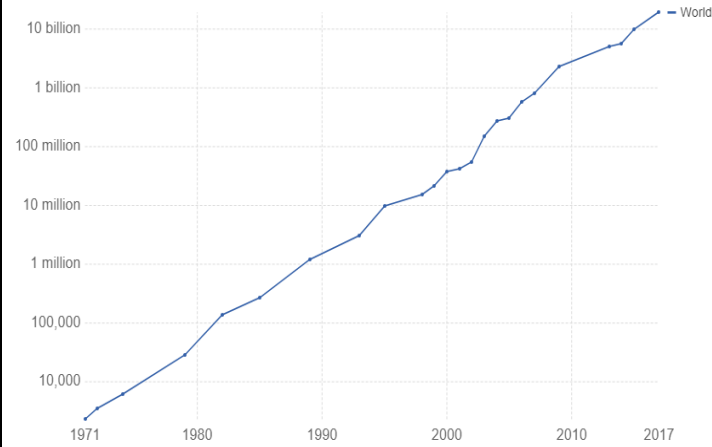


Extra slides



Moore's Law: Transistors per microprocessor

Number of transistors which fit into a microprocessor. This relationship was famously related to Moore's Law, which was the observation that the number of transistors in a dense integrated circuit doubles approximately every two years.



Source: Karl Rupp. 40 Years of Microprocessor Trend Data.

OurWorldInData.org · CC BY-SA

