ARTICLE

AGREEING TO DISAGREE: THE PROBLEMS OF THE TRADITIONAL APPROACHES TO THE INTERPRETATION OF INTERNATIONAL LAW

Nahuel Maisley[*]

ABSTRACT

People disagree about international law. To help them work through these disagreements, the discipline has developed a series of rules on the interpretation of its various sources—most notably, Articles 31 and 32 of the Vienna Convention on the Law of Treaties and the standards developed by the International Court of Justice and the International Law Commission for the identification of custom. The problem, however, is that these norms are themselves subject to disagreement, thereby creating a meta-debate about how to interpret the rules on interpretation. This Article delves into this meta-debate, focusing specifically on the views adopted by the "traditional approaches to international law"—that is, the mainstream, the default paradigm in the minds of most international lawyers. The Article makes two claims, one descriptive and one evaluative. Descriptively, it argues that the common trait among these seemingly uncoordinated views is that they see every discrepancy regarding the interpretation of international law ultimately as a purely empirical disagreement, meaning that it can be fully resolved through the verification of the existence or inexistence of certain social facts. Evaluatively, the Article argues that this empirical approach causes theoretical shortcomings, as it struggles to explain typical interpretive disputes in international law. This, in turn, leads to practical challenges in identifying genuine points of contention and facilitating resolution. These limitations, the Article concludes, diminish the interpretive usefulness of the

* Professor of International Law (Universidad de Buenos Aires), Associate Researcher (Instituto Gioja-CONICET), Global Associate Professor of Law (New York University School of Law).

traditional approaches and call for an alternative account. To process their disagreements, people typically need more than just facts: they need, instead, to exchange arguments about international law. Then, they may convince each other, and build agreements. Or, at least, quite importantly, they may agree to disagree.

I. INTRODUCTION

People disagree about international law. They disagree about the meaning and the validity of treaty clauses, and they disagree about the relation between these clauses and other rights and obligations established elsewhere. They also disagree about the existence of rules of custom. And, once the existence of custom has been established, they sometimes disagree about its content too.

Disagreement is a common feature of social relations, rather than a particularly distinctive feature of international law. But those dealing with international law—such as government officials, international organization bureaucrats, civil society activists, judges, and even ordinary citizens—are in dire need of tools that help them process these disagreements and clarify their rights and obligations. The reason for this is simple: lacking a centralized law-making procedure and a compulsory system of international tribunals, people—scholars, government officials, bureaucrats, civil society activists, judges, ordinary citizens—need to know what they (or the entities they represent) can or cannot do to be able to decide their courses of action. Granted: some people will just not care about what international law really says, and others will manipulate the law in bad faith to suit their own interests and needs. But some other people (if not almost all) will sometimes (if not almost all the time) want to know what their obligations under international law really are, so that they can decide whether to observe them.[1]

1. This line is obviously playing with Louis Henkin's old adage that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." *See* LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).

To help these people in this task, the discipline has developed a series of rules on interpretation— a few tools available for people to evaluate the soundness of their arguments and debate their contrasting visions of the norms.[2] These rules are not univocal or general to the whole discipline; instead, they are specific to each source of international law. The Vienna Convention on the Law of Treaties has rules on treaty interpretation, and the International Court of Justice and the International Law Commission have developed a series of standards for the identification of customary international law. The problem, however, is that these norms are themselves subject to disagreement, thereby creating a meta-debate about how to interpret the rules about interpretation. In other words: people not only disagree about international law; they also disagree about what is relevant when interpreting international law.

This Article will study the meta-debate on the interpretation of international law, focusing on the position adopted by the various views which can be grouped under the moniker of "traditional approaches to international law."[3] "Traditional approaches" means those that have been historically prevalent in the discipline, and which still shape the predominant answers to the question of how to interpret international law. Although these positions usually share a series of theoretical assumptions—most of which could be associated with the broad label of "positivism"—these approaches do not necessarily constitute an elaborate jurisprudential school, with clear postulates and boundaries.[4] The

2. There are substantive rules, guiding people on how they should frame their arguments, and there are institutional procedures, establishing different fora—such as courts, or other international organizations—where arguments can be confronted. In this paper, I will focus on the former, and not the latter. Of course, this does not mean that the latter is unimportant; quite the contrary.

3. The term is championed by Andrea Bianchi in his book on international law theories. *See* ANDREA BIANCHI, INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING 21–43 (2016).

4. Although these views share some of the central tenets of the school that legal theorists call "positivism", the term "positivism" has adopted a meaning of its own in international law, becoming "a label for a whole array of differing approaches to international legal theory." *See* Bruno Simma & Andreas Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 303 (1999). For an exploration of these views, see, for example, Jörg Kammerhofer, *International Legal Positivism*, *in* OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 407 (Florian Hoffmann & Anne Orford eds., 2016); Jean D'Aspremont & Jörg Kammerhofer,

different positions attributable to these approaches are, indeed, not developed as coherent attempts to develop general theories, but rather as responses to specific problems, like how to interpret treaties, or how to identify custom. As such, these traditional approaches emerge from the day-to-day practice of a lawyerly discipline with a traditional and "instinctive distrust of —or, at the very least, a lack of interest in—general jurisprudential works on international law."[5] But despite this spontaneous emergence and lack of explicit cohesiveness, these approaches constitute "a certain way of looking at, and thinking about, international law, which many would easily recognize, if not readily identify themselves with."[6] They are the mainstream, the classics, the default paradigm in the minds of international lawyers. These traditional approaches are "international law as it is taught in most law schools, in most countries, most of the time."[7] They are the "lingua franca" of legal advisors and international judges.[8]

This Article will make two claims about these varied arguments gathered under the label of "traditional approaches to the interpretation of international law." The first one is descriptive. It will study the mainstream readings of the articles of the Vienna Convention on the Law of Treaties dealing with interpretation, and the standards developed by the International Court of Justice and the International Law Commission for the identification of custom, and then will argue that there is a common, distinctive feature to these—seemingly uncoordinated—approaches. These traditional approaches all consider that every disagreement regarding the identification or interpretation of international law is ultimately a purely empirical disagreement, meaning that it can be fully resolved through the verification of the existence or inexistence of certain social facts.[9] Thus, according to the predominant views in

Introduction: The Future of International Legal Positivism, *in* INTERENATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 1, 1–12 (Jean D'Aspremont & Jörg Kammerhofer eds., 2014); Frauke Lachenmann, *Legal Positivism*, *in* MAX PLANK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2011).

5. ANTONIO CASSESE, FIVE MASTERS OF INTERNATIONAL LAW 251–52 (2011).

6. BIANCHI, *supra* note 3, at 21.

7. *Id.* at 22.

8. Steven Ratner, *From Enlightened Positivism to Cosmopolitan Justice: Obstacles and Opportunities*, *in* FROM BILATERALISM TO COMMUNITY INTEREST 155, 155 (Ulrich Fastenrath et al. eds., 2011).

9. They all fall under the category that Ronald Dworkin calls "the plain fact view of the law." *See* RONALD DWORKIN, LAW'S EMPIRE 7 (1986).

the discipline, disagreements about international law can be definitively cracked, for instance, by looking up terms in a dictionary, studying the intentions of those drafting a treaty, or collecting data about the practice of states. The role of interpreters, in this view, is merely to gather material proof for their claims, which can then be assessed in relation to these standards of evidence. This view is common to the textualist and intentionalist schools for the interpretation of treaty clauses and to the conventional views about the identification of custom.

The second claim this Article will make is evaluative. After looking at each of these arguments, and pointing to their specific troubles, the Article will argue that they all ultimately suffer from the same problems, operating on two related levels. First, these views are problematic on a *theoretical* level because they cannot account for the kind of disagreements that are usually in operation in international law. Most of the time, when people disagree about international law, they are not really disagreeing, e.g., about which dictionary definition is the best depiction of the ordinary meaning of a word; rather, they are disagreeing about something deeper, about the role that the international legal system ought to play in the regulation of global affairs. This, in turn, leads to the second kind of problem of the traditional approaches, which operates on a *practical level*. Given their inability to identify the true point of disagreement between people dealing with international law, this Article will argue, the traditional approaches are incapable of effectively allowing people to adequately process those differences and—eventually—resolve them.

The Article will be structured around these two claims. Part I will study the traditional approaches to the interpretation of treaties and the identification of custom (and will also say something, briefly, about the "other sources" of international law). The Article will reconstruct the arguments of the classic textualist, intentionalist, and teleological schools for the interpretation of treaties, and point to the specific problems of each of these approaches. Then, it will study the traditional views of the International Court of Justice and the International Law Commission on the identification of customary rules, and it will suggest that there are also some severe problems specific to these arguments. Finally, it will briefly point to the lack of rules of interpretation of other sources of international law as a final issue

of these traditional approaches. In Part II, this Article will "pull the strings" of these different, punctual problems, and suggest that they all emanate from the same source: the problematic attempt to derive normative consequences from empirical claims. In the third and final Part, this Article will succinctly outline a potential alternative approach to the interpretation of international law, one that acknowledges the fact of disagreement and tries to assist people in their honest efforts to process it.

II. THE TRADITIONAL APPROACHES TO THE INTERPRETATION OF INTERNATIONAL LAW

In municipal legal systems, norms are usually the product of legislative procedures or, in any event, of long jurisprudential traditions. The sources of international law, instead, are a "complex tangle of ideas, commitments and aspirations"[10] in which the lines dividing what is legal and what is merely hortatory are much more blurred.[11] Notwithstanding, the usual point of departure of international lawyers is Article 38 of the Statute of the International Court of Justice.[12] This Article holds that the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it," shall utilize three kinds of sources: "international conventions," "international custom," and "the general principles of law recognized by civilized nations."[13]

Article 38 does not provide any additional guidance regarding the interpretation of the aforementioned sources, other than establishing that "judicial decisions and the teachings of the most

10. Hilary Charlesworth, *Law-Making and Sources*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 187, 187 (James Crawford & Martti Koskenniemi eds., 2012).

11. *See, e.g.*, Charlesworth, *supra* note 10; Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMPAR. L.Q. 850 (1989); Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, *in* THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS 661 (Armin Bogdandy et al. eds., 2010); Prosper Weil, *Towards Relative Normativity?*, 77 AM. J. INT'L L. 413 (1983).

12. Statute of the International Court of Justice, art. 38, June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute]. For an analysis, see, for example, Alain Pellet, *Article 38*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 731 (Andreas Zimmermann et al. eds., 2d ed. 2012).

13. ICJ Statute, *supra* note 12, art. 38.

highly qualified publicists of the various nations" serve as "subsidiary means for the determination of rules of law."[14] There is, then, no general rule for the interpretation of international law. Beyond Article 38, the discipline has developed a series of specific rules and standards to identify and interpret these various sources, which will be studied in this Section. It will begin with the rules for treaty interpretation. Then, it will study the rules for the identification and interpretation of customary international law. And, finally, it will briefly consider the rules for the interpretation of other sources of international law.

A. The Rules for Treaty Interpretation in Articles 31 & 32 of the Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties (VCLT) established the rules for the interpretation of international agreements.[15] The general instruction included in Article 31 states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[16] Article 31 then explains the meaning of the word "context" and states that the subsequent practice of the parties and other related rules of international law must also be considered. Article 32, in turn, establishes that when the method of the previous Article leaves the meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable,"[17] interpreters can refer to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning."[18]

---

14. ICJ Statute, *supra* note 12, art. 38.1.d.

15. Vienna Convention on the Law of Treaties, arts. 31–32, May 23, 1969, 1155 U.N.T.S. 311 [hereinafter VCLT]. The rules are applicable beyond the VCLT, given their customary nature: *See* Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. 6 (Feb. 3), ¶ 41; Oil Platforms (Iran v. U.S.), Preliminary Objections, 1996 I.C.J. 803, ¶ 23(Dec. 12); Kasikili/Sedudu Island (Bots. V. Namib.), Judgment, 1999 I.C.J. 1045, ¶ 18 (Dec. 13); LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. 501, ¶ 99 (Jun. 27); Legality of Use of Force (Serb.-Montenegro v. Belg.), Preliminary Objections, 2004 I.C.J. 318, ¶ 100 (Dec. 15).

16. VCLT, *supra* note 15, art. 31(1).

17. VCLT, *supra* note 15, art 32.

18. *Id.*

The wording of these rules suggests that they are aimed at providing interpreters with the necessary tools to attain more precision in their understanding of international agreements. However, when the International Law Commission (the Commission; the ILC) drafted these provisions, in the 1960s, it clarified that it did not aim at establishing a precise method, but rather that it, "confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties."[19] In a noteworthy paragraph, the Commission stated that:

> [These principles] are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.[20]

The Commission itself acknowledged, then, something that seems evident given the juxtaposition of interpretive methods included in the Convention: that, although the rules in Articles 31 and 32 must be the point of departure of any reading of an international treaty, they are insufficient—in and of themselves—to unequivocally determine the content of a certain provision—that is, to solve disagreements about international law.

---

19. *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. INT'L L. COMM'N, at 187–274, 218–19. The reason for this was that "[a]ny attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable." *Id.*

20. *Id.* at 218.

Historically, as the ILC itself acknowledged, [21] the literature has been divided in three major schools regarding what these other considerations might be[22]: first, the *textualist* school, which suggests that, when in doubt, interpreters should stick to the wording of the treaty. Second is the *intentionalist* school, which refers dubitative interpreters to the intentions of the parties. Third is the *teleological* school, for which the purpose of the treaty is the crucial interpretive canon. This Article will assess the contributions of each of these schools and their suitability as a method to resolve the juxtaposition of tools in Articles 31 and 32 of the VCLT. Then, this Article will try to extract some provisional conclusions.

1. The Three Classic Schools and the Vienna Convention

This Section discusses the three Classic Schools of treaty interpretation and their relationship to the VCLT. The first School is the textualist school, which focuses on the meaning of the text as opposed to parties' intentions. The second is the intentionalist school, which focuses on the intentions of the drafters and views treaty interpretation as an exercise in understanding those intentions. The third is the teleological school, which focuses on the object and purpose of a treaty, as opposed to the meaning of the text or the intention of the parties.

---

21. The classification was classically put forward by Sir Gerald Fitzmaurice (*see* Gerald Fitzmaurice, *Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, 42 (1951)), but it became so mainstream that it was even acknowledged by ICJ judges. *See, e.g.*, Arbitral Award of July 31, 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. 53, at 140–42 (Nov. 12) (dissenting opinion by Weeramantry, J.). For references to these three schools as such, see EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 87 (2014); Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, 18 INT'L & COMPAR. L.Q. 318, 318–19 (1969); GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 58–79 (2007); Oliver Morse, *Schools of Approach to the Interpretation of Treaties*, 9 CATH. U. L. REV. 36, 39 (1960); MARK VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 421–22 (2009).

22. The classification was classically put forward by Sir Gerald Fitzmaurice, *see* Fitzmaurice, *supra* note 21, but it became so mainstream that even ICJ judges acknowledged it*, see, e.g.*, Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment 1991 I.C.J. 53, at 140–42 (Nov. 12)(dissenting opinion by Weeramantry, J.). For references to these three schools as such, see also BJORGE, *supra* note 21; Jacobs, *supra* note 21; LETSAS, *supra* note 21, at 58-79; Morse, *supra* note 21; VILLIGER, *supra* note 21.

a. The Textualist School of Interpretation

The first reading of the rules established in Articles 31 through 33 of the VCLT is textual—the one that holds that the beginning of interpretation is, "the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[23] The supporters of this theory contend that interpreters should cede in their reformist ambitions and accept the preeminence of the text, even when they find it incompatible with the intentions of the parties, with their moral convictions or with more abstract legal principles.[24] These ideas seem to be supported

23. *Draft Articles on the Law of Treaties with Commentaries*, *supra* note 19, at 220; *see also* DANIEL PATRICK O'CONNELL, INTERNATIONAL LAW 253 (1970); OLIVER DÖRR & KRISTEN SCHMALENBACH, *Article 31. General Rule of Interpretation*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES 521, 522–23 (2012); Jean-Marc Sorel & Valerie Boré Eveno, *Art.31 1969 Vienna Convention*, *in* THE VIENNA CONVENTION ON THE LAW OF TREATIES 804 (Olivier Corten & Pierre Klein eds., 2011); IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 630 (7th ed. 2008); ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 301, 301–92 (2008). It is important to note that, despite Letsas' identification of international legal textualism with "public meaning originalism." *See* LETSAS, *supra* note 21, at 60; *cf*. Lawrence Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013). This position does not really seem to have supporters in current international legal scholarship. As Bjorge pointed out,

> it must be correct to say that there is no presumption in the law of treaties that treaty terms ought to be interpreted contemporaneously. But this is because the controlling element must be the intention of the parties, not because there is a presumption one way or the other. There can be no presumption one way or the other because here as elsewhere in the law of treaties the rule applies that any presumption or consideration which tend to transform the ascertainable intention of the parties into a factor of secondary importance are inimical to the true purpose of interpretation.

BJORGE, *supra* note 21, at 124. This is further confirmed by the fact that the opposition to the decision on the evolutionary interpretation of treaties by the ICJ in the *Costa Rica v. Nicaragua* case was not worded as a definite negation of the idea of evolutionary interpretation, but instead, as a misapplication by the Court of that principle in this case. For example, according to Judges Guillaume and Skotnikov, the Court misread the intentions of the parties and the object and purpose of the treaty when it understood that the terms were to be interpreted under their contemporary meaning. *See* Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213 (Jul. 13) (Declaration of Judge *Ad Hoc* Guillaume); *id.* (Separate Opinion of Judge Skotnikov). In fact, the idea of evolutionary interpretation as a valid exception from the principle of contemporaneity seems to be consolidated in international law. *See* DÖRR & SCHMALENBACH, *supra,* at 533–36.

24. According to the modern textualist Alexander Orakhelashvili,

> What is crucial, however, is what is responsible, in the final analysis, for the outcome reached in the case: plain meaning itself or [external factors such as the intentions of the parties]. As the analysis of practice will demonstrate, plain

by the case law of the International Court of Justice (ICJ), which has decided cases using dictionary definitions.[25] The ICJ has also stated that "[i]nterpretation must be based above all upon the text of the treaty"[26] and that the duty of the Court is "to interpret the Treaties, not to revise them."[27]

This textualism is founded on two premises. First, it is based on the idea that —despite some borderline cases[28]— there is in fact a single plain meaning to which the text of a treaty can be associated.[29] The modern textualist Alexander Orakhelashvili, for

---

> meaning is regularly the crucial factor responsible for the outcome of interpretation, and can make extraneous evidence irrelevant.

ORAKHELASHVILI, *supra* note 23, at 320.

25. Oil Platforms (Iran v. U.S.), Judgment, 1996 I.C.J. 803 ¶ 45 (Dec. 12).

26. Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. 6 ¶ 41 (Feb. 3); *see also* Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 5, at 8 (Mar. 3); Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150, at 159–60 (June 8).

27. Interpretation of Peace Treaties, Advisory Opinion, 1950 I.C.J. 221, at 229 (Jul. 18); Rights of Nationals of the USA in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. 176, at 196 (Aug. 27).

28. Orakhelashvili claims that the cases in which the ordinary meaning is insufficient for interpreting a certain clause are exceptional:

> There are further doctrinal suggestions that words are not absolutes but have to be evaluated in the context from which they derive their meaning. The literal meaning of words is thus not considered to be decisive. This argument may prove correct in individual cases but there is little merit in arguing on a general plane that words cannot have a determined meaning of their own.

ORAKHELASHVILI, *supra* note 23, at 320.

29. As one of the contemporary supporters of this position, Orakhelashvili, writes,

> The linguistic debate as to whether there is such a thing as clear and established meaning of words is beside the point in this analysis. The principal factor is that, according to the attitude of the international community as expressed in Article 31 of the Vienna Convention and the respective judicial practice, words do have established meaning and interpreters are able to find it on a regular basis. This exercise is complete as soon as the meaning is objectively and intelligibly identifiable, whether or not it is *See*n as reasonable, satisfactory or sound.

ORAKHELASHVILI, *supra* note 23, at 318. According to McDougal, Lasswell, and Miller, the position ILC adopts "comes perilously close to Vattel's assumption that there are plain and natural meanings that do not admit of interpretation." MYRES S. MCDOUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE 90 (1967). Andrea Bianchi mentions that "the idea that words have a 'plain meaning' is widely shared among international lawyers." Andrea Bianchi, *Textual Interpretation and (International) Law Reading: The Myth of (in)Determinacy and the Genealogy of Meaning*, *in* MAKING TRANSNATIONAL LEGAL WORK IN THE GLOBAL ECONOMY 34, 36 (Pieter H. F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010). Bianchi then criticizes this position. *Id.* Gleider Hernández submits that the textualist position is "underpinned by

instance, argues that the VCLT and judicial practice have suggested that "words do have an established meaning and interpreters are able to find it on a regular basis."[30] Thus, the textualist school is based on what Emmer de Vattel called "the first general maxim of interpretation:" "that interpretation of that which does not require interpretation is not allowed."[31] The second premise assumed by

---

a faith in the determinacy of legal language." Gleider Hernández, *Interpretation*, *in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 317, 331 (Jörg Kammerhofer & Jean D'Aspremont eds., 2014).

30. ORAKHELASHVILI, *supra* note 23, at 319. According to J.G. Merrills,

> [W]e must begin by recognizing that words and phrases do indeed have ordinary or conventional usages. Thus, there is no substance in the objection that the reference to 'ordinary meaning' in the Convention involves a primitive myth, or wholly mistaken view of how words work. As Jacobs has cogently observed, to deny that words have ordinary meanings is to deny the possibility of verbal communication, 'a somewhat unsatisfactory basis for any theory of interpretation whatever.'

J. G. Merrills, *Two Approaches to Treaty Interpretation*, 4 AUSTRALIAN Y.B. INT'L L. 55, 58 (1969) (quoting Jacobs, *supra* note 21, at 340). These views do not seem to be marginal in the discipline; on the contrary, Andrea Bianchi mentions that "[t]he idea that words have a 'plain meaning' is widely shared among international lawyers. It suffices to cast a quick glance at international case law to realise that international tribunals fairly frequent resort to language dictionaries." Bianchi, *supra* note 29, at 36. However, it is true that—despite their preeminence in practice—international legal scholars usually associate these views with the dogmatism of past eras. Already in the 1960s, Richard Falk mocked these positions as "biblical exegesis," and held that, in their account,

> the need for interpretation is attributed to faulty drafting, the implicit ideal of treaty-drafting being to employ language so clear and precise that no reasonable disagreement can arise with regard to the scope or meaning of the rights and duties of the parties. Such an ideal is rarely attained, of course, and when disputes arise, the reference to canons is supposed to resolve the interpretative issue with minimum human intervention between the text and its operational content. These canons or maxims relied upon to vindicate the interpretative act are also intended to give a decision the appearance of definiteness, to nullify the inference that the interpreter is construing a document according to some arbitrary will of his own. This mechanical approach presupposes the autonomy of language and emphasizes the extent to which the task of the interpreter is to construe what has been written down and authorized by the parties to the agreement.

See Richard Falk, *On Treaty Interpretation and the New Haven Approach: Achievements and Prospects*, 8 VA. J. INT'L L. 323, 332 (1968).

31. Jacobs, *supra* note 21, at 322. Contrariwise, McDougal and Gardner argued that "[t]he alleged canon that 'it is not allowable to interpret what has no need of interpretation' or as otherwise stated, that 'one cannot disturb a plain meaning' is little more than a myopic platitude which serves to maintain a primitive and irrational faith in the omnipotence of words." *See* Myres S. McDougal & Richard N. Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 YALE L.J. 258, 264 (1951).

textualists, in turn, is that the text itself is different to the intentions of the parties and, thus, that interpreters should look at "the true meaning of the treaty rather than the intention of the parties distinct from it."[32]

The idea that interpretation must be in accordance with the text itself is uncontestable.[33] However, the two premises put forward by textualists do not seem to hold—and thus, the proposal that looking at the ordinary meaning can be sufficient for interpreting international law does not hold either. This is because the two premises of textualists cannot overcome what Ronald Dworkin famously labeled "the semantic sting."[34] If the first textualist premise were true and there was one single ordinary meaning of legal words, then either (i) all lawyers would agree on the interpretation of those words—which is evidently not the case—or (ii) all disagreements would be based on the "idiocy of people thinking they disagree because they attach different meanings to the same sound."[35] No legal disagreement would then be genuine: for example, the real differences between those who claim that secession is allowed under the U.N. Charter[36] and those who believe that it is not,[37] would merely be based on them

32. RICHARD K. GARDINER, TREATY INTERPRETATION 6 (1st ed. 2008)*; see also* DÖRR & SCHMALENBACH, *supra* note 23, at 522–23; Sorel & Boré Eveno, *supra* note 23, at 804; BROWNLIE, *supra* note 23, at 630. Sir Gerald Fitzmaurice explains that "on this view, the primary question is not 'what did the parties intend by this clause?' but 'what does this clause mean in itself?'" *See* Fitzmaurice, *supra* note 21, at 4.

33. As Dworkin puts it, "[T]ext must have a very important role: we must aim at a set of constitutional principles we can defend as consistent with the most plausible interpretation we have of what the text itself says, and be very reluctant to settle for anything else." *See* RONALD DWORKIN, JUSTICE IN ROBES 129 (2006). This is an example of Dworkin's famous "dimension of fit." DWORKIN, *supra* note 9, at 230 (1986). However, see the contrary position of the New Haven School in MCDOUGAL, *supra* note 29, at xix and Gleider Hernández's response in Hernández, *supra* note 27, at 340–44.

34. DWORKIN, *supra* note 9, at 45.

35. *Id.*

36. *See, e.g.*, ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 144 (1995); Hurst Hannum, *The Specter of Secession: Responding to Claims for Ethnic Self-Determination*, FOREIGN AFFAIRS (Mar.–Apr., 1998), at 13; DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 451 (2002).

37. *See, e.g.*, JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 24 (2007); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 336 (1997); MALCOLM SHAW, INTERNATIONAL LAW 483 (5th ed. 2003).

assigning different meanings to the term "self-determination."[38] Once they agreed on one arbitrary definition of the term, all their problems would be solved. However, following Dworkin, we cannot consider that the international community is really squabbling over which dictionary definition to use: "sensible people do not quarrel over whether Buckingham Palace is really a house; they understand at once that this is not a genuine issue but only a matter of how one chooses to use a word whose meaning is not fixed at its boundaries."[39] Behind the discussion over the legal meaning of "self-determination" there may be a deeper discussion on whether the primary role of international law is to protect individuals or to protect sovereign states, and how either must be carried out. And those discussions will go beyond any vocabulary quarrel.

Now, since the first premise does not hold, the second cannot either. If a single ordinary meaning cannot be derived from the words in question, then "we cannot give a text to 'primacy'—or indeed, any place at all—without *semantics*, that is, an interpretation that specifies what (if anything) the letter and spaces mean."[40] As Oliver Dörr holds in one of the leading commentaries to the Vienna Convention, the Vattelian argument that certain texts do not need to be interpreted is actually circular, "because to know whether the wording is clear or 'makes sense' presupposes a process of interpretation and cannot, therefore, preclude that operation."[41]

Finally, there is quite a paradoxical reason for rejecting textualism as an interpretive method: the wording of the VCLT seems to be openly incompatible with the idea that textualism is a sufficient method to interpret treaties. In fact, Article 31 only states that treaties should be interpreted "in accordance with" the text of the treaty, but also simultaneously considering other elements, such as good faith, other rules of international law, the context, and the object and purpose. As the ICJ explained in 1961, the limits of

38. *See* U.N. Charter, arts. 1(2), 55; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 1(1) (Dec. 16, 1966); G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 1(1) (Dec. 16, 1966).

39. *See* DWORKIN, *supra* note 9, at 40–41.

40. *See* DWORKIN, *supra* note 33, at 129.

41. *See* DÖRR & SCHMALENBACH, *supra* note 23, at 529.

this means of interpretation lie "in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained."[42] The words of the treaty are thus the beginning, but not the end, of the process of interpretation.

b. The Intentionalist School of Interpretation

The second school of treaty interpretation is the intentionalist (or "subjective"[43]) school, which argues that interpreting is equal to deciphering the original intentions of the drafters of the provisions in question.[44] This position is usually attributed to two of the most prominent international legal scholars of the twentieth century, Hersch Lauterpacht[45] and Gerald Fitzmaurice,[46] and is currently very popular among both international legal scholars[47] and international judges.[48] As a result of their quest for the original

42. *See* South West Africa (Liber. v. S. Afr.), Judgment, 1961 I.C.J. 335 (Nov. 30).

43. *See* Jacobs, *supra* note 21, at 318–19.

44. *See e.g.*, Hernández, *supra* note 29, at 332–33 (describing intentionalism); LETSAS, *supra* note 21, at 60.

45. Lauterpacht states the discovery of the intention of the parties is "the principal aim of interpretation," and that "the intention of the authors of the legal rule in question- whether it be a contract, a treaty, or a statute . . . is the starting-point and the goal of all interpretation. *See* Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48, 52 (1949); *see also id.* at 84 ("It is the duty of the judge to resort to all available means- including rules of construction- to discover the intention of the parties . . . "); VILLIGER, *supra* note 21, at 421. *But see infra* Section II.A.1.b (providing nuanced interpretations of Lauterpacht's position).

46. *See* Fitzmaurice, *supra* note 21, at 3 ("[T]his is not only the traditional but also the juridically natural view.").

47. *See, e.g.*, BJORGE, *supra* note 21; VAUGHAN LOWE, INTERNATIONAL LAW 117 (2007); Malgosia Fitzmaurice, *Interpretation of Human Rights Treaties*, *in* HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 745 (Dinah Shelton ed., 2013); EIRIK BJORGE, *The Vienna Rules, Evolutionary Interpretation, and the Intentions of the Parties*, *in* INTERPRETATION OF INTERNATIONAL LAW 189 (Andrea Bianchi et al. eds., 2015); Maarten Bos, *Theory and Practice of Treaty InterpretationI*, 27 NETH. INT'L L. REV. 135, 145–52 (1980). For a list of classic authors defending this view, see Jacobs, *supra* note 21; BIANCHI, *supra* note 3.

48. *See, e.g.*, Gabčíkovo-Nagymaros Project (Hung./Slovak.), Judgment, 1997 I.C.J. 79, ¶ 142 (Sept. 25) ("It is the purpose of the treaty, and the intentions of the parties in concluding it, which should prevail over its literal application."); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 53 ("Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion . . ."); Land and Maritime Boundary (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. 346 ¶ 59 (Oct. 10) ("In order to interpret this expression, the Court must *See*k to ascertain the intention of the parties at the time."); Case Concerning Kasikili/Sedudu Island

intentions of the parties, most of those who apply this method "put more emphasis on drafting history and preparatory works" than other schools of interpretation.[49]

Once again, just like in the case of textualists with the text, intentionalists are correct in pointing out that interpretation must seriously consider the intentions of the parties.[50] However, intentions are—once again—insufficient in and of themselves to provide an appropriate answer to interpretive questions. Carlos Nino has mentioned at least three problems associated with determining the content of a rule from scrutinizing the intentions of the author of the legal text, all of which are applicable to the arguments of the intentionalist school in relation to treaties.

The first of these problems is the selection of "the facts which constitute manifestations of the intention,"[51] such as, in the case of a treaty, the different positions contained in the *travaux préparatoires*, the conversations that took place in the hallways of a multilateral conference, the public statements by State representatives, etc.[52] Identifying which of these facts are relevant

---

(Bots./Namib.), Judgment, 1999 I.C.J. 1045, ¶ 87 (Dec. 13); Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar/Bah.), Dissenting Opinion of Vice-President Schwebel, 1995 I.C.J. 6, at 27–30 (Feb. 15); Case Concerning Arbitral Award of July 31, 1989 (Guinea-Bissau v. Sen.), Dissenting Opinion of Judge Weeramantry, 1991 I.C.J. 53, at 140–45 (Nov. 12); GILBERT GUILLAUME, *Methods and Practice of Treaty Interpretation by the International Court of Justice*, *in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 472–73 (Giorgio Sacerdoti et al. eds., 2006).

49. LETSAS, *supra* note 21, at 60. Some modern intentionalists, like Erik Bjorge, reduce the importance of these documents, defending an evolutionary interpretation of intentions. *See* BJORGE, *supra* note 19, at 2–3.

50. *See* DWORKIN, *supra* note 33, at 120; CARLOS SANTIAGO NINO, DERECHO, MORAL Y POLÍTICA: UNA REVISIÓN DE LA TEORÍA GENERAL DEL DERECHO 91 (2014).

51. NINO, *supra note 50*, at 93.

52. McDougal and Gardner point to this problem, which they solve paying attention to current intentions of the parties of the communicative process:

> When an agreement of any importance is effected among two or more nation-states the relevant events include, at the minimum: a great variety of actors (negotiators, drafters, approvers, ratifiers), expressing agreement through verbal forms of all degrees of generality or precision, by all the methods known to international law, for implementation of a great variety of both short-run and long-term objectives, under the peculiar conditions and perspectives of their day, and with certain designed and undesigned effects upon the expectations of all the parties and the distribution of values among them. . . . From this comprehensive perspective of the relevant events, it is wholly fantastic to assume either, first, that the framers of the original agreement can

for the interpretation of a treaty presents the first challenge for interpreters.[53] The problem, more specifically, is what to do when—as is likely to happen with an ambiguous or vague treaty—not all these facts suggest the existence of a similar intention of the drafters.[54] Which intention should prevail?

> project their vision and anticipate all the more specific details of the evolving future or agree upon a common purpose with respect to all these details or draft so precisely as to remove all ambiguity with respect to such common purpose, or, secondly, that the later interpreters of the agreement working in a new total context, with their own contemporary objectives and conscious of many changes in conditions since the making of the agreement, can resurrect in detail the subjectivities of the original framers of the agreement and ascertain what was their clear intent concerning the new events confronting the interpreter.

McDougal & Gardner, *supra* note 31, at 264–65. For a full discussion of the New Haven school, see *infra* Section A.1.c.

53. In 1934, the Supreme Court of the United States held, for example, that "oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body" should not be considered as preparatory works of a treaty. *Arizona v. California*, 292 U.S. 341, 360 (1934). In the 2005 *Iron Rhine* arbitration, the tribunal understood that the extracts of the negotiation presented by the parties could not be considered under Article 32 of the VCLT; it found that the "extracts may show the desire or understanding of one or other of the Parties at particular moments in the extended negotiations, but do not serve the purpose of illuminating a common understanding as to the meaning of the various provisions." *Award in the Arbitration regarding the Iron Rhine ("IJzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 27 REP. INT'L ARB. AWARDS 25, 48 (2008). Both approaches *seem* to suggest that the only valid expressions are those which have been endorsed by all the parties, thereby limiting the reach of this resource.

54. Francis Jacobs argues,

> The most immediate objection to the criterion of the parties' actual intentions is that in many cases there will be no common intention. In the first place there is the not infrequent case where there is no real agreement between the parties at all, except on a form of words chosen to conceal their differences. Secondly, even where there is real agreement, in many if not most cases the question at issue will simply not have been foreseen by the parties, and it will be necessary to extrapolate from the area of agreement to the unforeseen case . . . . Thirdly, even supposing a genuine agreement between the parties not recorded in the text, the very concept of the intentions of the parties, unless given effect in a formal agreement or in State practice, raises several problems. The subjective approach *seems* most appropriate to an informal unilateral document such as a deed or will drawn up by a private individual, where there is a real intention, where no one has relied upon the form of words used, where there has been no subsequent conduct based upon the document; here it is at least arguable that the clearly established intention of, say, the testator should prevail over a literal interpretation of the words. This analogy from private law is illuminating because there is almost nothing in common between such a document and a treaty concluded between States.

> The decision of choosing one over another cannot be founded on anything other than normative conceptions, given that it is obvious that they cannot be based on the intentions of the legislator themselves, or in texts which then require looking at previous intentions to be interpreted.[55]

The second problem is that of "describing an intention out of the intervention of a plurality of organs, or from the workings of collective organs."[56] In the case of an international treaty drafted by the secretariat of an international organization, which was then modified after comments from non-governmental organizations, and was finally the object of an agreement after a series of tradeoffs between states with differing positions, whose intentions should be followed? "Reconstructing the intentions of a collective body is particularly difficult," Nino writes, "those who voted for the initiative may harbor very different intentions, some of them implicit; further, even among explicit intentions there may be contradictory contents."[57] In the case of international treaties, this may be even harder than in the case of domestic legislation, given that the actors involved in the law-making process are themselves collective: it is not unusual that, for example officials from the Ministry of Health of one state harbor different intentions than those from the Ministry of Finance—and it is unclear whose should be followed.

Finally, and crucially, there is the problem of "the level of abstraction with which the intention of the legislator must be described."[58] As Ronald Dworkin famously explained, there are various, simultaneous levels of intentions in the process of law-creation.[59] Dworkin gives the analogy of a theater director who wants to produce *The Merchant of Venice* today but is mindful of Shakespeare's original intentions regarding the play's message: Should they respect the details of the characters as they were thought four hundred years ago? Or should their features be

---

Jacobs, *supra* note 21, at 339.

55. NINO, *supra* note 50, at 93 (translated by author).

56. *Id.*

57. *Id.* Consider, for example, the radically different interpretation of the drafters of Article 38 of the PCIJ Statute about the notion of a "general principle of law." *See*, *e.g.*, Pellet, *supra* note 12, at 833.

58. NINO, *supra* note 50, at 94.

59. *See* DWORKIN, *supra* note 9, at 55–57.

updated to allow the deeper message of the play? What were the Shakespeare's true intentions?[60]

The same problem is present in the law, and in international law in particular. George Letsas studies the case of the European Convention on Human Rights: "Drafters in 1950 had an *abstract* intention to promote and safeguard human rights in Europe but they also had a more *concrete* intention about which situations, in their view, human rights cover."[61] Now, when interpreting the Convention today, which should be more important: their intention to protect a list of fundamental freedoms of their citizens, whatever these may be (intentions of principle), or their intention to protect what they, fifty years ago, believed these freedoms to be (intentions of detail)?[62]

The problem arises when these different levels of abstraction in the intentions are contradictory. In those cases, the intentionalist model has no way of solving the interpretive problem without referring to other elements, such as normative considerations.[63] In fact, Gerald Fitzmaurice and Hersch Lauterpacht, who some consider to be the founding fathers of this school, provide radically different answers to this question. While Fitzmaurice calls for a "restrictive interpretation," based on the perennial idea that "restrictions upon the independence of States cannot . . . be presumed,"[64] Lauterpacht calls for an "effective

60. *See* DWORKIN, *supra* note 9, at 55–57.

61. LETSAS, *supra* note 21, at 70.

62. *Id.*

63. This difference in the levels of abstraction is independent from the fact that the intentions that must be identified are the "common" intentions of the parties. *See* BJORGE, *supra* note 21, at 60. Of course, as Nino suggested, each party may have different reasons to sign the treaty, but even the reasons that are shared by all the parties may be based on different levels of abstraction. *See* NINO, *supra* note 50, at 94.

64. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). The rationale behind this method can be traced to the very foundations of the Westphalian conception of international law. According to the famous judgments of the Permanent Court of International Justice in the *Wimbledon* and *Lotus* cases of the 1920s, the rules of international law bind sovereign states only when they themselves consent to such restrictions to their almost absolute power. Thus, interpreters can only find that States are bound by a certain rule when it is clear that the States had the intention to restrict their sovereignty. Sir Gerald Fitzmaurice, sitting as judge at the European Court of Justice, explained this relation between the idea of consent and the intentionalist method himself: "it is for the States upon whose consent the Convention rests, and from which consent alone it derives its obligatory force, to close the gap or put the defect right by an

interpretation," based on the principle of good faith and *pacta sunt servanda.*[65] The debate over whether one or the other is more appropriate does not hinge on the actual intentions of the parties, but instead on the reading each author makes of the purposes of the international legal system (preserving sovereignty versus achieving common goals).[66]

c. The Teleological School of Interpretation

The third classic school of treaty interpretation is the teleological,[67] which does not place the interpretive emphasis on the text, or the intentions, but rather in the treaty's object and

---

amendment—not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them." Golder v. U.K., App. No. 4451/70, ¶ 37(c) (Feb. 21, 1975), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-57496&filename=001-57496.pdf [https://perma.cc/XWQ3-R7KU]. *See also* LETSAS, *supra* note 21, at 64.

65. Lauterpacht's position thus departs from a real *intentionalism* and brings it much closer to a Dworkinian approach to international law as integrity. In a passage of his Article on interpretation, he states the following:

> In all these, and similar cases, although the common intention of the parties may have been to avoid giving a definite meaning to the clauses in question-that is to say, although there was no common intention of the parties to adopt a positive and clear-cut solution on the particular subject—it is the right and duty of international judicial and arbitral agencies to impart an effect to these clauses by reference to the purpose of the treaty as a whole and to other relevant considerations, including the finality of adjudication. *Interest rei publicae ut sit finis litium*. Undoubtedly the treaty is the law of the adjudicating agencies. But, at the same time, the treaty is law; it is part of international law. As such it knows no gaps. The completeness of the law when administered by legal tribunals is a fundamental-the most fundamental-rule not only of customary but also of conventional international law.

Lauterpacht, *supra* note 45, at 78. As is evident, for Lauterpacht, the ultimate consideration for the interpretation of international legal rules is not based on the original intentions of the parties, but it is instead founded on "the purpose of the treaty" and "the finality of adjudication," considering the completeness of the legal system as a whole. Lauterpacht, *supra* note 45, at 78. The original intentions are only useful as long as they are in accordance with these general considerations. For more on Lauterpacht's interpretativism, see Patrick Capps, *Lauterpacht's Method*, 82 BRITISH Y.B. INT'L L. 248 (2012).

66. On these two (contradictory) goals of the international system, see, famously, MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF THE INTERNATIONAL LEGAL Argument (2005).

67. *See, e.g.,* Gidon Gottlieb, *The Interpretation of Treaties by Tribunals*, 63 AM. SOC'Y INT'L L. PROCS. 122 (1969); MCDOUGAL ET AL., *supra* note 29; Myres S. McDougal, *The International Law Commission's Draft Articles upon Interpretation: Textuality Redivivus*, 61 AM. J. INT'L L. 992 (1967).

purpose.[68] A group of researchers from Harvard in 1935 drew up the *Harvard Draft Convention on the Law of Treaties*, which contains the most classic formulation of this idea,[69] as a proposal to the international community in the pre-VCLT era. Article 19(a) of that Draft established the following:

> "A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve."[70]

Thirty years later, and after long discussions, the ILC finally adopted a more balanced approach than the Harvard Draft, yet one which also assigns a preeminent place to the "object and purpose" of the treaty. Throughout the years, the proposal from the Harvard Draft became no more than a relic, and few authors have tried to update its proposal, and to see how it fit with the provisions in the VCLT. In its place, the teleological method came to be identified with the New Haven School, an approach to international law that Yale University professors in the 1960s developed.[71] Indeed, in the discussions at the International Law Commission where the

68. More specifically, the differences between this view and the two previous ones lie on, first, the preeminence given to the object and purpose of the treaty, and second, the way in which this object and purpose is found. Francis Jacobs suggests, "[a]ll methods of interpretation *seem* to accept some recourse to the objects and purposes of the treaty, but they differ on the question how these are to be ascertained." Jacobs, *supra* note 21, at 336. While intentionalists look for this purpose in the intentions of the parties (e.g. via preparatory works), and textualists look for the purpose in the text itself, those who subscribe to the teleological school recognize "that the objects and purposes of a treaty may be independent of the original intentions of the parties, and, in some measure, independent also of the text." *Id.*

69. On the centrality of the *Harvard Draft*, see Jacobs, *supra* note 21, at 323.

70. *Article 19. Interpretation of Treaties*, 29 AM. J. INT'L L. 937, 937 (1935).

71. On the New Haven school holding (at least, partially) a teleological approach to treaty interpretation, see Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq*, 13 EUR. J. INT'L L. 21, 25 (2002); Jacobs, *supra* note 21, at 323–24; Ingo Venzke, *Sources in Interpretation Theories: The International Law-Making Process*, *in* OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW 401 (Jean D'Aspremont & Samantha Besson eds., 2017).

Vienna Convention was drafted, it was the American delegation, led by Yale professor Myres S. McDougal, that argued for a wording that prioritized this canon of interpretation.[72]

McDougal and his colleagues describe Article 19(a) of the Harvard Draft as, "concise, comprehensive, and definitive"[73] and "an excellent model both in statement of appropriate goal and in perception of relevant features of the process of agreement and its context."[74] However, there is a crucial difference between the teleological method of the Harvard Draft and that proposed by the New Haven School. The Harvard Draft preserved a central place for the text of the treaty in the interpretive process: it used the object and purpose to operationalize the text, to provide it with a meaning sufficient to use the text to provide a solution to a legal problem.[75] The New Haven School, instead, gave the text quite a marginal place in the process.[76] McDougal, political scientist Harold Lasswell, and their Yale University colleagues understood that international law was not a system of rules, but a continuous decision-making process, in which the text of the rules is only relevant as a stabilizer of the expectations of the actors in the international law realm.[77] The crucial role of the interpreter, in this

72. *See* Merrills, *supra* note 30.

73. McDougal & Gardner, *supra* note 31, at 267.

74. McDougal, *supra* note 67, at 999. His main point of agreement with the *Harvard Research* relates to what McDougal calls the "major purposes principle," according to which "international agreements must be interpreted primarily in terms of the major, general purposes they are intended to serve." McDougal & Gardner, *supra* note 31, at 267.

75. *Article 19. Interpretation of Treaties*, *supra* note 70, at 947:

> When interpreting a treaty, the text thereof must, of course, be respected; the interpreter must not alter it or substitute a new text. Nevertheless, the bare words of a treaty have significance only as they may be taken as ex-pressions of the purpose or design of the parties which employed them; they have a 'meaning' only as they are considered in the light of the whole setting in which they are employed.

76. "The text is evidence of intention, but it is the intention, not its evidence, that is the object of inquiry. McDougal-Lasswell-Miller offer us a method to conduct this inquiry that promises, if conscientiously applied, to consider all available evidence relevant to the opposing lines of inquiry, but does not purport to settle the matter of interpretation by endowing the text with a clarity it lacks." Falk, *supra* note 30, at 346. *See also* Gottlieb, *supra* note 67, at 127; Venzke, *supra* note 71.

77. "The most comprehensive and realistic conception of an international agreement . . . [is not] that of a mere collocation of words or signs on a parchment, but rather that of a continuing process of communication and collaboration between the parties in the shaping

continuously interactive process, does not consist in deciphering the true content of the norm, but is instead focused on identifying the "genuine shared expectations" by the parties to the treaty, in order to preserve communicative possibilities in the future.[78] "The primary aim of a process of interpretation," McDougal, Lasswell, and James Miller wrote, "can be formulated in the following proposition: discover the shared expectations that the parties to the relevant communication succeeded in creating in each other."[79] As this quote demonstrates, these expectations are not those that the parties had at the time of signing the treaty; they are the ones that they develop in a communicative process that exceeds the negotiation of the text.[80] Interpreters must then "consider all relevant signs and deeds taking place at any time before, during, or after the agreement is concluded."[81] They should also "consider the whole process of agreement and its context of conditions, the process of claim and decision, and possible impact on expectations of the current decision process."[82] The ultimate goal is "to honor

---

and sharing of demanded values." MCDOUGAL ET AL., *supra* note 29, at xxiii. For a broader explanation, see for example BIANCHI, *supra* note 3, at 94–95.

78. LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 329 (3d ed. 2015).

79. MCDOUGAL ET AL., *supra* note 29, at xvi. In an earlier text, McDougal argued that the goal should be "to clarify a mode of interpretation which can give the most rational effect to the intent of framers in so far as they can achieve a common intent and express it." McDougal & Gardner, *supra* note 31, at 266.

80. McDougal argues that

> [i]t should be the task of decisionmakers, representing a larger community dedicated to the shaping and sharing of values by persuasion and agreement with a minimum of coercion and violence, to honor and promote individuality, inventiveness and diversity, and to expand the alternatives in co-operation open to as many members of the community as possible on as many occasions as possible. It can only be a debasement of the basic values of such a community to *seek* to impose upon all parties, whatever their nuances in creativity, the lowest common denominator in conformity. To foreclose or impede inquiry about features of the process of making and performing agreements which in fact affect the parties' expectations about commitment, and to establish in advance of inquiry fixed hierarchies in significance among features of the process whose significance in fact is a function of the configuration of all other features in any particular context, may be to impose upon one or both of the parties an agreement they never made and completely to disrupt that stability in expectation which is indispensable to effective co-operation.

McDougal, *supra* note 67, at 997–98.

81. CHEN, *supra* note 78, at 329.

82. *Id.*

and promote individuality, inventiveness and diversity, and to expand the alternatives in co-operation open to as many members of the community as possible on as many occasions as possible."[83] That is, the ultimate goal of interpretation is to guarantee an open process of communication in which the parties can interact and negotiate case by case their understandings of the rules that govern them.

The New Haven School's reference to object and purpose must, then, be understood in this context.[84] McDougal, Lasswell, and Miller agree with the Harvard Draft in that, if interpreters find that there are gaps, contradictions, or ambiguities in the communication between the parties, they should make reference "to the basic constitutive policies of the larger community which embraces both parties and decision-maker."[85] But the purpose of this reference is not that of determining the law governing the parties at a given time, but rather—again—to stabilize reciprocal expectations in order to allow a fluid communication among the different actors participating in the continuous decision-making process.[86] The goal of interpreters, then, is not to identify the relevant obligations, but rather to choose the reading that "will

83. McDougal, *supra* note 67, at 997–98.

84. This difference between the New Haven school and the drafters of the *Harvard Draft* regarding the role of the text in the interpretive process explains the hardness of the critiques that McDougal and his colleagues made to the wording adopted by the ILC. *See*, *e.g.*, *id.* at 995. Despite what some have argued, BIANCHI, *supra* note 3, at 105–06, the main objection of these authors to the wording of Article 31 of the VCLT does not have to with the role played by the object and purpose (which is still central in the VCLT), but rather with the primary space assigned by the ILC to the text of the treaty, incompatible with the communicative view of the New Haven authors. This concern is clear when McDougal holds, for example, that "the Commission adopts a 'basic approach' which demands merely the ascription of a meaning to a text," McDougal, *supra* note 67, at 992, that its principles are "highly restrictive," McDougal, *supra* note 67, at 999, and that it "is difficult to escape the assessment that the International Law Commission's entire formulation of principles of interpretation is based upon a conception of 'ordinary meaning' which is impossible of application." McDougal, *supra* note 67, at 995.

85. MCDOUGAL ET AL., *supra* note 29, at 41. On the idea of world values for the New Haven school, see, for example, CHEN, *supra* note 78, at 535–52.

86. "The important point," according to McDougal and Lehmann, "is that the shared expectations of commitment, commonly called 'agreement', in whatever degree achieved and maintained, are a function not of a single variable, such as text or historic utterance, but of the entire process of interaction that has shaped and affected the expectations of the parties." MCDOUGAL & LEHMANN, *The Application of International Agreements, in* INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER xxiv (1994).

probably do most to influence future agreements toward harmony with public order goals."[87] Thus, McDougal, Lasswell, and their colleagues seem to establish what Richard Gardiner called, in his book on treaty interpretation, a "false dichotomy": "The choice offered between 'a mere collocation of words or signs on a parchment' and the 'continuing process of communication' suggests that the options are [either] an extreme literal approach or a completely open-ended relationship."[88] Yet, one could find appropriate intermediate points between these two extremes: both the Harvard Draft and the final wording of the VCLT delineate an interpretive process that requires interpreters to consider, necessarily and simultaneously, two ideals. The first is the text and interpretive legacy of the treaty. The second is the goals of the treaty and of the normative system in which it is inserted, read in good faith. In both cases, the model is not limited to the text (or to other empirical elements, such as context, or ulterior interpretation by the parties), yet this does not open the door for interpreters to completely abandon the norm and renegotiate openly.[89]

The problem is that this false dichotomy has had a significant impact in the literature after McDougal and his colleagues: few authors have taken seriously the need to construct a teleological model that acknowledges the text of treaties as a starting point in the inquiry.[90] The Harvard Draft, after the adoption of the VCLT, has become a sort of prehistoric relic, and the teleological school has been associated almost exclusively with the policy-oriented approach of the New Haven School. What is more, recourse to the object and purpose as an interpretive method has been—on occasions—associated with imperialist practices where hegemons

87. *Id.* at 48.

88. GARDINER, *supra* note 32, at 66. For a critique of these communicative theories of interpretation, see also Gottlieb, *supra* note 67, at 128–29.

89. Otherwise, the model would lead "to an indetermination of the law which is so big that it deprives it of one of its basic qualities: a minimum of autonomy and independence." Carlos Espósito, *Soberanía, Derecho y Política En La Sociedad Internacional: Ensayo Sobre La Autonomía Relativa Del Derecho Internacional*, 34 REVISTA JURIDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 1, 21 (1999).

90. There are, of course, some notable exceptions, which will be briefly considered in the final section. What is remarkable, however, is that none of them have been associated with the teleological school.

manipulate the law at their will, based on the principles which constitute their dominant discourse.[91] For reasons of this kind, teleological, normative oriented approaches to the interpretation of treaties have been relegated from the mainstream, despite their importance in the past.

2. Partial Conclusion: The Traditional Approaches to Treaty Interpretation and the Fact of Disagreement

The final balance, after this exploration of the traditional approaches to the rules of treaty interpretation of the Vienna Convention on the Law of Treaties, is somewhat bittersweet. It is true that Articles 31 and 32 of the Convention provide interpreters with a series of useful standards to determine the content of a treaty clause. The VCLT gathers some of the principles which have been central to the discipline for years and clarifies that they are the ones to be used to process interpretive disputes regarding a certain text. However, what the Convention does not do—thanks to the express will of its drafters—is explain what to do when these different methods point toward different solutions. That is, the VCLT is silent about what to do when the juxtaposition of tools ceases to be an advantage and becomes a problem. The ILC was explicit in the 1960s in this sense: "the application of the means of interpretation in the Article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the *crucible*, and their interaction would give the legally relevant interpretation."[92]

The ultimate effect of the reference to this crucible is, inevitably, the acceptance of a high degree of discretion for legal practitioners, who will ponder the different interpretive methods juxtaposed in the VCLT in a way they believe convenient for a case, without too much guidance from international law. The problem, of course, is that this does not help interpreters to process their disagreements. While some would refer to arguments based on one interpretive method, others would point to arguments based

91. On the relation between the theory of interpretation of the New Haven school and US foreign policy, see Falk, *supra* note 30, at 331.

92. *Draft Articles on the Law of Treaties with Commentaries*, *supra* note 19, art. 28, ¶ 8.

on another method. The outcome would be a shouting match and not a real exchange of arguments and reasons.

What this Section has attempted to prove is not that the "crucible problem" is unsolvable, but rather that the traditional approaches to the interpretation of international law (that is, the three schools) have not been successful in solving it—or that, in any event, they solve it in an arbitrary fashion.[93] The concluding Section of this Article will outline some key features of a theory capable of providing interpreters with a more solid basis to process their disagreements about international law. But before exploring that, the following Section will determine whether these problems also appear in relation to the second source of international law: custom.

B. The Rules for the Identification of Customary International Law

International custom is a source of law equal in hierarchy and value to treaties.[94] The classic theory of sources states that for a customary rule of this kind to exist, two elements must be present. First, there must be a constant and generalized practice of states, and, second, there must be *opinio juris*—that is, said practice must be accepted as law by those states carrying it out.[95]

The problem, as may already be evident, is determining how much practice is sufficient, and when it must be considered that said practice has been accepted as law by the States in question.[96]

---

93. On the problems of arbitrariness derived from the juxtaposition of interpretive methods, see Roberto Gargarella, *De La Alquimia Interpretativa al Maltrato Constitucional: La Interpretación Del Derecho En Manos de La Corte Suprema Argentina*, *in* INTERPRETACION JURIDICA: MODELOS HISTORICOS Y REALIDADES 53, 62–63 (Javier Espinoza de los Monteros & José Ramón Narváez H. eds., 2011); ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION. THE THEORY OF RATIONAL DISCOURSE AAS THEORY OF LEGAL JUSTIFICATION 3 (1989).

94. ICJ Statute, *supra* note 12, art. 38.1.

95. ICJ Statute, *supra* note 12, art. 38.1.b; *see, e.g.*, Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH Y.B. INT'L L. 1 (1975).

96. Christian J. Tams, *Meta-Custom and the Court: A Study in Judicial Law-Making*, 14 L. & PRAC. INT'L CTS. & TRIBUNALS 51, 52 (2015):

> Uncertainty about the regime governing the identification of customary international law is one, perhaps the main, reason for this state of affairs: How do we know whether a particular proposition has acquired (or retains) customary status? How much practice is required; how does a habit become binding, etc.? These questions are part of the law of sources and more particularly of the 'meta-law' on custom.

Article 38 of the ICJ Statute does not give any indications in this respect, and there is no treaty equivalent to the VCLT that helps practitioners with this process.[97] Further, unlike what usually happens with treaties, the problem of the indetermination of custom not only appears when determining the content of the rule, but also previously, at the moment of identifying the existence of the norm itself.[98]

For this reason, there are those who claim that "in customary international law nearly everything remains controversial,"[99] and there are those who describe it, to paraphrase Winston Churchill, as "a riddle inside a mystery wrapped in an enigma."[100] Unlike what happens with treaties, which (usually) have a high degree of formalization and regulation, custom is a source with "notorious

97. "The usual techniques by which the international community *seeks* to clarify and/or codify international law have only rarely been employed: No treaty on meta-custom has been concluded, in fact the treaty clause that most obviously speaks to the matter — Article 38(1)(b) of the Statute of the International Court of Justice (ICJ) — is formulated as a direction to one particular court, not as a general provision on sources. If, nevertheless, Article 38(1)(b) has come to be *See*n as the natural starting point for discussions about custom, this is for reasons of convenience. More than a starting point it can hardly be, as it says so little, and in such a curious manner. As for other law-making processes, General Assembly resolutions do not provide guidance on how custom should be ascertained; and few States have traditionally pronounced on the matter in the abstract." *Id.* at 52–53.

98. Jean D'Aspremont and Duncan Hollis distinguish between processes of *content-determination* and of *law-ascertainment*. The first is the classic process regulated by, e.g., the VCLT. There is no discussion regarding the validity of the norm; only about its content. In the second, instead, the discussion has to do with the very existence of the norm:

> There is a distinct interpretive process whereby any professional is also called upon to interpret the pedigree of rules in order to ascertain whether a given rule can claim to be part of the international legal order. This will usually involve the interpretation of a doctrine of sources of law. Significantly, this interpretive process of rule-ascertainment cannot be conflated with that of content-determination. The main point to be made here is that our understanding of interpretation should not be limited to content- determination.

Jean D'Aspremont, *The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished*, *in* INTERPRETATION IN INTERNATIONAL LAW 111, 117 (Andrea Bianchi et al. eds., 2015). *See also* Duncan Hollis, *The Existential Function of Interpretation in International Law*, *in* INTERPRETATION IN INTERNATIONAL LAW (Andrea Bianchi et. al. eds., 2014).

99. K. Wolfke, *Some Persistent Controversies Regarding Customary International Law*, 24 NETH. Y.B. INT'L L. 1, 2 (1993).

100. David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GER. Y.B. INT'L L. 198, 198 (1996). *See also* Daniel Bodansky, *Does Custom Have A Source?*, 108 AJIL UNBOUND 179, 179 (2014); Tams, *supra* note 96, at 52.

complexity and intangibility,"[101] "indeterminate and manipulable,"[102] "malleable, flexible, incoherent and incomplete,"[103] and whose identification and application generates "frustration and frictions."[104] Given that "there is neither a common understanding of how customary international legal norms are formed, nor agreement on the content of those norms,"[105] custom seems to be, according to some, no more than "a matter of taste."[106]

The defenders of the classical theory of customary international law disagree with those skeptical views. Omri Sender and Michael Wood argue, for example, that custom is more present than ever in the international legal system, and that its content is clearer every day.[107] This is due, according to these authors, to the fact that decades of practice have greatly clarified the operation of custom, providing practitioners with clear standards and metrics for its identification.[108] In sum, Sender and Wood say, "considerable clarity has been achieved over the decades, and some long- standing questions . . . do appear to have been settled. Throughout this time, customary international law has very much retained its core elements and characteristics."[109]

Two developments have been particularly notable in relation to the practice Sender and Wood mentioned. First, tribunals such as the International Court of Justice have solved hundreds of cases in which they had to identify rules of custom.[110] The criteria and

101. Wolfke, *supra* note 99, at 2.

102. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 451 (2000).

103. Tams, *supra* note 96, at 69.

104. Fidler, *supra* note 100, at 198.

105. Kelly, *supra* note 102, at 450.

106. *Id.* at 451.

107. Omri Sender & Michael Wood, *A Mystery No Longer? Opinio Juris and Other Theoretical Controversies Associated with Customary International Law*, 50 ISR. L. REV. 299, 300 (2017) ("Customary international law today is not only as present in the international legal system as it has always been; it is perhaps also better understood than before.").

108. *See id.* at 299.

109. *Id.* at 308.

110. For studies of the ICJ's method for identifying custom, see, for example, Akehurst, *supra* note 95; Alberto Alvarez-Jiménez, *Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009*, 60 INT'L & COMPAR. L.Q. 681 (2011); Stephen J. Choi & Mitu Gulati, *Customary International Law: How Do Courts Do It?*, *in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 117

the standards used in those decisions have been internalized by the discipline, and now they constitute guidelines for practitioners working with customary rules.[111] And then, second, the International Law Commission—led by Special Rapporteur Michael Wood—has recently carried out a series of studies to clarify the methods for the identification of customary international law.[112]

But, despite the efforts of both institutions and the development of these standards, some scholars doubt the sufficiency of the classical theory to deal with the indeterminations in a source like custom.[113] The following Sections will first study

(Curtis A. Bradley ed., 2016); Rudolf Geiger, *Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 673 (Ulrich Fastenrath et al. eds., 2011); Robert Kolb, *Selected Problems in the Theory of Customary International Law*, 50 NETH. INT'L L. REV. 119 (2003); Maurice Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE (1998); Niels Petersen, *The International Court of Justice and the Judicial Politics of Identifying Customary International Law*, 28 EUR. J. INT'L L. 357 (2017); BIRGIT SCHLÜTTER, DEVELOPMENTS IN CUSTOMARY INTERNATIONAL LAW: THEORY AND THE PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL AD HOC CRIMINAL TRIBUNALS FOR RWANDA AND YUGOSLAVIA (Nijhoff ed., 2010); Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion*, 26 EUR. J. INT'L L. 417 (2015); Tams, *supra* note 96; Tullio Treves, *Customary International Law*, *in* MAX PLANCK ENCYC. PUB. INT'L L. ¶ 1 (Oxford Public International Law ed., 2006).

111. *See* Michael Wood (Special Rapporteur on the Formation and Evidence of Customary International Law) *First Rep. on Formation and Evidence of Customary International Law*, ¶ 64, U.N. Doc. A/CN.4/663 (May 17, 2013) [hereinafter *First Rep. on Formation and Evidence of Customary International Law*]. Special Rapporteur Wood argues that, "[i]t is widely recognized in the literature that the International Court, through its jurisprudence, has enhanced the role of customary international law and clarified some of its aspects." *Id*.

112. *See infra* Section II.B.1.b; *see, e.g.*, G.A. Res. 73/203, Identification of Customary International Law (Dec. 20, 2018).

113. For different perspectives, see, for example, Bodansky, *supra* note 100; Choi & Gulati, *supra* note 110; Fidler, *supra* note 100; Geiger, *supra* note 110; Emily Kadens & Ernest A. Young, *How Customary Is Customary International Law*, 54 WM. & MARY L. REV. 885 (2013); Kelly, *supra* note 102; Frederic Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146 (1987); BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS (2012); Nahuel Maisley & Isaías Losada Revol, *¿Dworkin En La Haya? Las Reglas de Interpretación de La Costumbre En La Jurisprudencia de La Corte Internacional de Justicia*, *in* LIBER AMICORUM ALEJANDRO TURYN (Romina Pezzot & Silvina González Napolitano eds., 2016); Talmon, *supra* note 110; John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. LEGAL STUD. 85 (1996); John Tasioulas, *Customary International Law and the Quest for Global Justice*, *in* THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL, AND PHILOSOPHICAL

the oscillations in the methodology for the identification of custom in ICJ's jurisprudence. These Sections then review some deficits in the conclusions of the ILC. In both cases, this Article suggests that the application of the classical theory inevitably needs to inconsistent or arbitrary interpretations. Thus, in line with a growing number of authors,[114] this Section will suggest the need for a new theoretical framework—a matter to which it will get back to in the following sections of the Article.

1. The Traditional Approaches to the Identification of Custom

This Section discusses the approaches of the ICJ and the ILC in identifying custom. In discussing the ICJ, this Section analyzes common concerns that arise when discussing the ICJ's approach: inconsistency and arbitrariness. Later, this Section discusses the ILC's role in identifying custom.

a. The Approach of the International Court of Justice

There is some consensus that the International Court of Justice—the prominent reference in this subject[115]—has shown a remarkable lack of rigor in its methods for the identification of rules of customary international law.[116] Two issues have been

---

PERSPECTIVES 307 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2009); Joel P. Trachtman, *The Growing Obsolescence of Customary International Law*, *in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 172 (Curtis A. Bradley ed., 2016); Wolfke, *supra* note 99.

114. *See, e.g.*, Bodansky, *supra* note 100; Geiger, *supra* note 110; Kirgis, *supra* note 113; LEPARD, *supra* note 113; Maisley & Losada Revol, *supra* note 113; MÓNICA PINTO, LAS FUENTES DEL DERECHO INTERNACIONAL EN LA ERA DE LA GLOBALIZACIÓN 13 (2009); Talmon, *supra* note 110; Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, *supra* note 113; Tasioulas, *Customary International Law and the Quest for Global Justice*, *supra* note 113.

115. Historically, the most important court in terms of determinations of customary international law has been the International Court of Justice. It is the highest court in the hierarchy of international courts and the principal legal organ of the United Nations. This is the court whose determinations are cited most often by scholars and other courts as the key authority in terms of what CIL is and how it should be determined. *See* Choi & Gulati, *supra* note 110, at 126. *See also, e.g.*, Tams, *supra* note 96, at 54–78.

116. *See* Talmon, *supra* note 110, at 418 (suggesting that methodology is likely not the ICJ's strong point). Talmon also writes that, "[u]nlike its approach to methods of treaty interpretation, the Court has hardly ever stated its methodology for determining the existence, content and scope of the rules of customary international law that it applies." *Id*. *See also* ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 278–85

frequently underlined in this respect: first, an inconsistency of the Court in relation to its own standards in this matter and, second, a tendency towards arbitrariness. That is, the Court has a propensity for identifying customary norms without providing sufficient explanations for these decisions.

b. Inconsistencies Between Traditional and Modern Approaches

The first problem concerning the ICJ's inconsistencies in relation to custom has been thoroughly covered in the literature, where there seems to be some agreement on the matter.[117] For example, Alan Boyle and Christine Chinkin state in their book that "[w]hile the ICJ has identified a methodology for identifying rules of customary international law, it follows it neither consistently nor rigorously."[118] Further, according to these authors, "[i]t is hard to reach any conclusion except that where the Court's own requirements present an obstacle it will discount them in order to find custom—or not—where it wishes to do so and to find supporting evidence in either case as it seems fit."[119]

These inconsistencies are such that the literature has classified ICJ decisions on custom into two groups, according to the method used by the Court to identify customary rules.[120] What is remarkable—and thus the inconsistency—is that there is no single set of criteria for the Court to assign a case to one group or another;

(2007); GLEIDER HERNÁNDEZ, THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION 91 (2014); Maisley & Losada Revol, *supra* note 113; Pinto, *supra* note 114, at 29.

117. *See, e.g.*, Alvarez-Jiménez, *supra* note 110; Bodansky, *supra* note 100; BOYLE & CHINKIN, *supra* note 116, at 278–85; Harlan Grant Cohen, *Methodology and Misdirection: Custom and the ICJ*, EJIL: TALK! (Dec. 1, 2015), https://www.ejiltalk.org/methodology-and-misdirection-a-response-to-stefan-talmon-on-custom-and-the-icj [https://perma.cc/A8R8-PGTC]; Geiger, *supra* note 110; LEPARD, *supra* note 113; Talmon, *supra* note 110.

118. BOYLE & CHINKIN, *supra* note 116, at 284.

119. *Id.* at 284–85.

120. Anthea Roberts first set out the distinction between "traditional" and "modern" custom, Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001), and it then took certain centrality in the discussion when Alan Boyle and Christine Chinkin addressed it in their book on the making of international law, BOYLE & CHINKIN, *supra* note 116, at 278–85. The distinction was then taken up by the ILC, and by ICJ judges as well. *See, e.g.*, *First Rep. on Formation and Evidence of Customary International Law*, *supra* note 111, ¶¶ 95–101; PETER TOMKA, THE JUDGE AND INTERNATIONAL CUSTOM 27 (2013).

this rather seems to depend entirely on the will and discretion of judges.

On the one hand, there are those decisions which respond to the "*traditional approach*" of the tribunal: a stricter one, holding to the necessary presence of both elements (practice and *opinio juris*), typically associated with the inductive method.[121] The clearest example of this kind of reasoning is probably the decision of the Court in the *North Sea Continental Shelf* cases of 1969.[122] In 1964, Germany, Denmark, and the Netherlands submitted to the ICJ a dispute in relation to the delimitation of their continental shelves. While Denmark and the Netherlands held that there was a customary norm establishing that situations of the like had to be solved through the rule of equidistance, Germany held that such a norm did not exist and that, even if it existed, it would not lead to an equitable situation.[123] The Court left aside every consideration of principle, and decided the case based on a strict scrutiny of the existing practice and *opinio juris*. For there to be custom, the Court held that

> 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

121. *See* Alvarez-Jiménez, *supra* note 110, at 686 ("Under the strict inductive method, the Court declares the existence of customary norms only once it has been demonstrated that the two requirements of article 38 are present."). Special Rapporteur Wood has a similar take on this matter:

> The 'traditional' approach, reflected in Article 38.1 (b) of the Statute of the International Court of Justice, has been widely understood as requiring two components for the formation of a rule of customary international law: (a) general State practice and (b) acceptance of such practice as law. . . . Indeed, this approach remains loyal to a classical understanding of customary law formation as an empirical, decentralized, and bottom-up process; when situated on the international plane, customary international law is to be ascertained through inductive reasoning that is both State-centred and devoid of independent normative considerations.

First Rep. on Formation and Evidence of Customary International Law, *supra* note 111, ¶ 96. For a different take on inductive and deductive reasoning in the identification of custom (seen as complementary, rather than alternative), see Talmon, *supra* note 110.

122. North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20). On the case as an example of a traditional, or strict, approach, *See,* e.g., Alvarez-Jiménez, *supra* note 110, at 686; Maisley & Losada Revol, *supra* note 113.

123. North Sea Continental Shelf ¶¶ 13–17; 21–24.

> belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[124]

Further, it held that the process through which the rules contained in a treaty become part of custom "is not lightly to be presumed."[125] Thus, the Court concluded that there was not sufficient practice to consider the principle of equidistance as customary,[126] and that the only applicable rule was the obligation of states to negotiate an "equitable" solution.[127] Now, this mention of equity, the Court clarified, did not refer to abstract considerations, but to positive law: when a Court speaks of justice, the ICJ said, "what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field, it is precisely a rule of law that calls for the application of equitable principles."[128]

On the other hand, there are those cases that are usually associated with a "*modern approach*" of the ICJ to custom, one that is more flexible, and sometimes related to the deductive method.[129] An early example of this approach is the decision of the Court in the *Anglo-Norway Fisheries* case, of 1951.[130] In that occasion, the parties submitted a dispute relating to the maritime zones in which Norway could claim exclusiveness for its fishermen, excluding British citizens who wanted to fish in those waters.[131] Although there were some rules on the determination of these zones, their application to the case was tricky, given the peculiar features of the Norwegian coastline and its fjords. To solve this problem, the Court decided to leave aside the multilateral practice contained in, for

124. *Id.* ¶ 77.
125. *Id.* ¶ 28.
126. *Id.* ¶ 74.
127. *Id.* ¶ 101(C)(1).
128. *Id.* ¶ 88.
129. The defenders of the classic approach usually deny that the ICJ has really done anything differently in the cases usually associated with the "modern approach." Michael Wood and Omri Sender, for example, claim that "[i]n fact, it is not at all clear that the Court ever applies a truly 'deductive' method to the determination of customary international law." *See* Omri Sender & Michael Wood, *The International Court of Justice and Customary International Law: A Reply to Stefan Talmon*, EJIL: TALK! (Nov. 30, 2015), https://www.ejiltalk.org/the-international-court-of-justice-and-customary-international-law-a-reply-to-stefan-talmon [https://perma.cc/U44W-AUG8].
130. Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116 (Dec. 18).
131. *Id.* at 124–25.

example, the 1930 Conference for the Codification of International Law, and focused on the concrete practice in the relation between the two states with respect to this situation.[132] In the context of an extensive analysis of the historical positions of the parties, the ICJ held that:

> too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court.[133]

As it is evident, the tone and the position of the Court are very different from those adopted in the cases associated with the traditional approach. As opposed to what it did in the *North Sea Continental Shelf* cases, for example, the Court adopts an explicitly relaxed criterion regarding the uniformity of the practice and dismisses the contradictions in the elements of custom in light of other considerations.[134] This is even more explicit in another passage of the decision, in which the ICJ momentarily abandons the analysis of the elements of custom and decides to consider other matters that it deems relevant to solve the case. There, it holds that

> certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.[135]

The Court includes among those criteria several elements. These include

> "the close dependence of the territorial sea upon the land domain;" "the more or less close relationship existing between certain sea areas and the land formations which divide or surround them;" and, notably, a consideration "which extends beyond purely geographical factors: that of certain economic

132. *See id.* at 128–39.
133. *Id.* at 138.
134. *See generally id.*
135. *Id.* at 133.

> interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage."[136]

In other words, in this case, the Court was flexible regarding the elements of custom because it took into account—among other considerations—the economic reality of Norwegian fishermen and the importance of preserving their means of subsistence.

But probably the most famous case in which the Court adopted an explicitly elastic position regarding the construction of customary international law is that of the *Military and Paramilitary Activities in and against Nicaragua* of 1986. There, the Court—citing its own case law— held that common Article 3 of the Geneva Conventions was applicable to the case because it reflected "elementary considerations of humanity."[137] And then, analyzing the applicability of a customary norm prohibiting the use of force, it pronounced one of its most-cited paragraphs regarding custom:

> It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[138]

What is surprising—especially in light of the terminological choice of the "traditional" and "modern" approaches—is that the oscillation of the tribunal among these two methodological poles does not respond to a certain evolution in its thinking during a certain period of time. Instead, it seems to be a constant in the history of its decisions.[139] This is proven, e.g., by the fact that the

---

136. *Id.*

137. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 218 (June 27).

138. *Id.* ¶ 186.

139. Alberto Alvarez-Jiménez says, about the 2000–2009 period in the case law of the Court in relation to custom, that:

North Sea Continental Shelf case comes eighteen years after *Anglo-Norwegian Fisheries*. And it is not necessary to go back so far in time: in recent years, the Court has also oscillated in this respect. For instance, years after quoting "elementary considerations of humanity" as the basis for the existence for custom in *Nicaragua*, the Court refused to apply said standard in two cases related to immunities and their exceptions in which that sensitivity towards human rights would have been key.[140] In sum, Boyle and Chinkin explain,

> [E]ven a brief examination of the way the Court has addressed the making of customary international law shows both the law-making potential in this process and how the Court has not been consistent in applying its own criteria for the determination of customary international law.[141]

On the contrary, the ICJ has oscillated between what has been classified as two "approaches" to custom—the traditional and the modern—with no other consideration than the will of the judges as an explanation for the assignment of cases to one or another group.

c. Arbitrariness in the Identification of Custom

The second problem, perhaps even graver than the first one, is the direct lack of justification of certain ICJ decisions identifying customary international law.[142] Stefan Talmon writes that "[i]n the

---

> The most important things were those that did not occur: the flexible deductive approach was not particularly important. . . . However, there are certainly also events to highlight: the re-emergence of the strict inductive approach and the identification of non-traditional methods that, although still marginal, may well remain as tools to justify decisions in the coming years.

Alvarez-Jiménez, *supra* note 110, at 711.

140. *See*, *e.g.*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 58 (Feb. 14); Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Judgment, 2012 I.C.J. 99, ¶ ¶ 56–91, 101, 106 (Feb. 3).

141. BOYLE & CHINKIN, *supra* note 116, at 279.

142. In a recent study, Stephen Choi and Mitu Gulati considered 175 decisions of international tribunals (mainly the ICJ, but also others) in which the existence of custom was under discussion. The results were overwhelming: "The data suggest that international courts do not come anywhere close to engaging in the type of analysis the officially stated two-part rule for the evolution of CIL sets up." *See* CHOI & GULATI, *supra* note 110, at 146–47. A. Mark Weisburd reached a similar conclusion after studying in detail 27 cases in which the ICJ considered state practice: "It is clear then that what the Court has not been doing in CIL cases is basing its judgments on carefully described state

large majority of cases, the Court does not offer any (inductive or deductive) reasoning but simply asserts the law as it sees fit."[143] Similarly, Alain Pellet suggests that —unlike the ILC, which is more careful—the Court "has a marked tendency to assert the existence of a customary rule more than to prove it."[144] Daniel Bodansky uses a Latin expression to formulate the same idea: in many cases of custom, the Court simply decides "*ex cathedra.*"[145]

The Court's lack of argumentation in certain cases is so evident that Special Rapporteur Michael Wood acknowledged it in his report to the International Law Commission. Wood tackles the issue with a striking naturalness and suggests that only those cases in which the Court *does* carry out the two-element (practice and *opinio juris*) analysis are those that are useful to decipher its method for the identification of custom:

> [I]t may be said that there are two main approaches to the identification of particular rules of customary international law in the case law of the Court. In some cases the Court finds that a rule of customary international law exists (or does not exist) without detailed analysis. . . . In other cases the Court

practice." *See* A. Mark Weisburd, *The International Court of Justice and the Concept of State Practice*, 31 U. PA. J. INT'L L. 295, 352 (2010).

143. Talmon, *supra* note 110, at 434. Patrick Kelly states the same, referring specifically to the subjective element:

> Even the International Court of Justice ("I.C.J."), in most cases, declares rules of law without investigating the attitude of states on the legal character of a customary norm or undertaking an investigation of the actual practice of the majority of states. On the few occasions when the I.C.J. has required direct proof of the *opinio juris* element, the Court has found the evidence inadequate.

See Kelly, *supra* note 102, at 469. Furthermore, Eyal Benvenisti argues that in the *Gabcikovo-Nagymaros* case, the Court invented an international custom regarding transboundary resources through an "unsupported assertion." According to him, however, the ICJ and other tribunals frequently "'cheat' by inventing what they refer to as custom," and this is justified, because it contributes to the efficiency of the international legal system. *See* Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, *in* THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION 85, 85–86 (Eyal Benvenisti & Moshe Hirsch eds., 2004).

144. Alain Pellet, *Shaping the Future of International Law: The Role of the World Court in Law-Making*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 1065, 1076 (Mahnoush H. Arsanjani et al. eds., 2010).

145. Bodansky, *supra* note 100, at 180. *See also* Talmon, *supra* note 110, at 437. Gleider Hernández holds that "it is true that the methodology of how the Court has addressed custom belies its claim to authority: despite the Court's doctrinal insistence on State practice and *opinio juris*, it in fact rarely refers to these elements in its judgments." *See* HERNÁNDEZ, *supra* note 116, at 91.

> engages in a more detailed analysis of State practice and *opinio juris* in order to determine the existence or otherwise of a rule of customary international law. . . . It is particularly these latter cases that are helpful in illustrating the Court's approach to the formation and evidence of customary international law.[146]

What Wood is omitting, of course, is that in the first type of cases the Court also identifies custom and that a method that only contemplates the second type of cases is not truly reflective of the real practice of the tribunal.[147] If the Court, as Rudolf Geiger states, "does not follow its self-proclaimed method of finding customary international law,"[148] then it can hardly be said that what the Court has is a real *method* that the other actors in the international legal system can follow.[149]

---

146. *First Rep. on Formation and Evidence of Customary International Law*, *supra* note 111, ¶ 62.

147. In an article with Omri Sender, Wood clarifies this point: "Unlike induction and deduction, assertion is self-evidently *not* a methodology for determining the existence of a rule of customary international law. It is essentially a way of drafting a judgment, a way of stating a conclusion familiar to lawyers working in certain national systems." *See* Sender & Wood, *supra* note 129. As a descriptive point, this is absolutely true. What's notable are the normative consequences of this practice, which Wood avoids considering. As Stefan Talmon states, Wood and Sender are,

> correct that assertion is 'not a methodology' (something never claimed) but it can be a 'method'—in plain English 'a way or manner'—of determining the existence of rules of international law. What the authors call a '"pragmatic" approach,' i.e. the reliance on 'the considered views expressed by States and bodies like the International Law Commission' or the use of 'rules that are clearly formulated in a written expression' is, in my opinion, nothing else but judicial window-dressing.

Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology and the Idyllic World of the ILC*, EJIL: TALK! (Dec. 3, 2015).

148. Geiger, *supra* note 110, at 692. According to Geiger, the tribunal "does not produce evidence that a specific customary rule which it wants to apply can actually be based on an equally specific *opinio juris* and widespread State practice. Although the Court keeps emphasizing that both of these cornerstones of custom are necessary to show that rule, it does not observe its own precept." *Id*.

149. In a reply to Stefan Talmon's article, Michael Wood—writing with Omri Sender— returns to this point and argues that even if the Court does not follow it, it has established a methodology:

> A coherent methodology does come into sight in these (individually and even more so in the aggregate), even if not all questions relating to it have been fully addressed. It is one thing to suggest, as some have, that the Court does not consistently adhere to this stated methodology; it is a different thing altogether to argue, as Professor Talmon does, that the Court "has hardly ever stated" such methodology.

In a 2012 lecture, then-President of the ICJ, Peter Tomka, defended this approach of the Court to customary international law:

> [The authors pointing to these oscillations in the case law of the tribunal] are correct in drawing attention to the prevalent use of general statements of rules in the Court's modern practice, although they take the point too far by insisting on theorizing this development. In fact, the Court has never abandoned its view, firmly rooted in the wording of the Statute, that customary international law is "general practice accepted as law"—that is, in the words of a recent case, that the existence of a rule of customary international law requires that there be a 'settled practice' together with opinio juris". *However, in practice, the Court has never found it necessary to undertake such an inquiry for every rule claimed to be customary in a particular case* and instead has made use of the best and most expedient evidence available to determine whether a customary rule of this sort exists. Sometimes this entails a direct review of the material elements of custom on their own, while more often it will be sufficient to look to the considered views expressed by States and bodies like the International Law Commission as to whether a rule of customary law exists and what its content is, or at least to use rules that are clearly formulated in a written expression as a focal point to frame and guide an inquiry into the material elements of custom.[150]

What is remarkable about Tomka's declaration, just as in Wood's, is not only the naturalness with which he holds that the Court does not need to carefully justify all of its determinations of the existence of customary international law, but also the fact that

---

See Sender & Wood, *supra* note 129. The point seems more semantic than substantive. Whatever it is called, what is true is that there is nothing "coherent" in the ICJ's practice, even when the methodology explicitly described by the Court were indeed coherent. In Talmon's words, in his reply to Wood and Sender:

> The fact that the ICJ is paying lip-service to the two constituent elements of international custom does not say anything about the method it actually uses to determine the existence of rules of customary international law. As its case law shows, the ICJ does not live up to its self-proclaimed duty to prove the existence of customary international law by producing evidence of general and consistent State practice and opinio juris.

Talmon, *supra* note 147.

150. Peter Tomka, *Custom and the International Court of Justice*, 12 LAW & PRAC. INT'L CTS. & TRIBUNALS 195, 197–98 (2013).

he does so reaffirming the traditional, strict rule. According to that rule, the rules of custom can only be proven through an empirical and detailed study of both material elements (practice and *opinio juris*). In other words, Tomka states that X must be done, but then, immediately, he holds that the Court does Z, because X would be impractical for its quotidian operation. Further, Tomka suggests that the matter should not be theorized that much, even when the practice is—evidently—incapable of solving the problem, because it is the very practice the one becoming an obstacle for the Court doing what it itself says it should do.

In sum, the methodology through which the International Court of Justice has identified norms of customary international law has been quite problematic, and it does not give interpreters a clear guideline for processing disagreements in the area. Although the tribunal has established a series of standards, it has oscillated quite explicitly in its approach to them, and, in many cases, it has even solved a matter without sufficient justification. The next Section will study whether Special Rapporteur Wood and the ILC's effort in identifying a clear method based on these precedents was successful or whether these interpretation issues extend to their work as well.

d. The Approach of the International Law Commission

The International Law Commission, an organ of the United Nations composed by thirty-four independent members of recognized competence in international law,[151] has recently assumed the role of clarifying the meaning of the ICJ's case law on the matter of identifying custom.[152] In particular, the ILC has the ambitious aim of "offer[ing] some guidance to those called upon to apply rules of customary international law on how to identify such rules in concrete cases."[153]

---

151. *See* G.A. Res 174(II), Statute of the International Law Commission, art 2 (Nov. 21, 1947).

152. The ILC actually uses other sources beyond the ICJ case law, but the centrality of the latter is undeniable. For more information on this, see *First Rep. on Formation and Evidence of Customary International Law*, *supra* note 111, ¶ 54. For works underscoring the importance of the ICJ's case law to the ILC's work, see Sender & Wood, *supra* note 129; Tams, *supra* note 96, at 53, 54–55.

153. *First Rep. on Formation and Evidence of Customary International Law*, *supra* note 111, ¶ 14.

The work began in 2012, with Sir Michael Wood's designation as Special Rapporteur. On top of a series of reports compiling the standards present in the case law, Wood presented a proposal with eleven "conclusions" concerning "the methodology for determining the existence and content of rules of customary international law."[154] After receiving comments from States and a discussion among its members, the Drafting Committee expanded the number of conclusions to sixteen.[155] In 2018, the ILC adopted the Draft Conclusions, and the UN General Assembly took note of this development.[156]

The conclusions reaffirm the two-element approach (practice and *opinio juris*)[157] and establish that, when evaluating their presence, "regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found."[158] Then, they identify specific standards for each of the elements. Regarding the practice, for example, the conclusions state that it must be "primarily" from states,[159] and that it "must be general, meaning that it must be sufficiently widespread and representative, as well as consistent."[160] Regarding *opinio juris*, the conclusions hold that it must allow the distinction of customary practice "from mere usage or habit."[161] They also identify a series of material sources that can be used to prove the acceptance as law, such as public declarations of officials,

154. Michael Wood (Special Rapporteur on the Formation and Evidence of Customary International Law), *Second Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/672 (May 22, 2014), Annex, Draft Conclusion 1.

155. Int'l L. Comm'n, *Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee*, U.N. Doc. A/CN.4/L.869 (July 15, 2015); Int'l L. Comm'n, *Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee*, U.N. Doc. A/CN.4/L.872 (May 30, 2016).

156. G.A. Res. 73/203, *supra* note 112.

157. *Id.* annex, Conclusion 2.

158. *Id.* Conclusion 3.

159. Conclusion 4.1 states that "[t]he requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law." *Id.*, Conclusion 4.1. This seems to open the door to the possibility that the practice of other actors (armed groups, NGOs, etc.) could have a role in the identification of custom. However, Conclusions 4.3 and 4.2 seem to limit this interpretation. *See id.* Conclusions 4.2, 4.3.

160. *Id.* Conclusion 8.

161. *Id.* Conclusion 9.

or decisions of domestic courts.[162] Finally, the conclusions provide some criteria regarding the interaction between custom and other sources of international law,[163] they acknowledge the possibility of persistent objection,[164] and establish some standards regarding regional or particular customs.[165]

The result is a series of instructions that, as Stefan Talmon suggests, "give the impression that the determination of the existence and content of rules of customary international law is an exact science."[166] The problem is that—as in the case of treaty interpretation—, the ILC rules have their own defects, which push the identification process away from the "scientific" ideal, turning the interpretation of law, once again, into more of an "art."

Two points are particularly problematic regarding the ILC conclusions. The first, as the previous Section suggested, is that the Commission validates a method which has been *de facto* dismissed time and time again by the central actors in the discipline.[167] Although the International Court of Justice affirms, abstractly, that practice and *opinio juris* are constitutive requisites of custom, in most cases—as the previous Section explained[168]—it simply affirms the (non-)existence of a customary rule without proving or providing an extensive argumentation regarding the existence of the two elements.[169]

Some have suggested that this breakdown between the actual practice and the classic rules codified by the ILC happens because

---

162. *Id.* Conclusion 10.

163. *Id.* Conclusions 11–14.

164. *Id.* Conclusion 15.

165. *Id.* Conclusion 16.

166. Talmon, *supra* note 147 ("It seems as if the ILC has developed a little machine into which the two elements of 'general practice' and '*opinio juris*' are put according to the recipe found in the ILC's cookery book entitled 'Conclusions on the Identification of Customary International Law' and out come rules of customary international law.").

167. *See supra* Section II.B.1.a.i.

168. *See supra* Section II.B.1.a.ii.

169. Something similar happens with other actors, not just with the ICJ. "The International Law Association (ILA), for example," says Daniel Bodansky, "cited only seven examples of state practice in support of its conclusion that the duty to inform is a norm of customary international law, out of the presumably countless instances in which states have undertaken activities with a significant risk of transboundary harm." *See* Bodansky, *supra* note 97, at 180. And even the ILC itself, although its analyses are usually quite exhaustive, is deficient in its studies of custom if measured by the standards proposed by Wood.

these rules simply demand too much: they require a depth in the research that is simply impossible to carry out.[170] According to the ILC Draft Conclusions, interpreters should consider every action (material and verbal), but also every inaction of the executive, legislative, and judicial powers ("or other functions"[171]) of the almost 200 States of the world, plus the practice of international organizations. Then, they should consider,

> public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference[172]

of all those States in order to determine whether the practice was a simple use or habit, or whether it was accepted as law. They must also consider the lack of reaction (of the almost two hundred states) regarding the practice, because this "may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction."[173] And all of this must be done without a principled point of departure guiding the inquiry, but rather with purely inductive logic, in which the only relevant consideration is the empirical material that is gathered. As Bodansky holds,

> The evidentiary demands are just too high to be satisfied in the real world. Inducing the rules of customary international law from state practice would be a Herculean task—a task, by the

170. *Id.* at 179 ("If we take seriously the 'official story' of identifying customary international law, summarized extremely well in Sir Michael Wood's report, then I think most efforts to identify customary international law will end, like mine, in failure."); Tams, *supra* note 96, at 66 ("If custom needs to be based on a widespread practice of States accompanied by a sense of legal obligation, it becomes extremely difficult to ascertain. The problem is fairly straightforward: even if not merely following a 'head count analysis,' how can an extensive practice be established in a world of 200 States?"). Then, beyond the number of States, some authors notice a problem regarding the availability of materials. *See, e.g.*, Bodansky, *supra* note 100, at 179–80; Petersen, *supra* note 110, at 277; Tams, *supra* note 96, at 66.

171. G.A. Res. 73/203, *supra* note 112, annex, Conclusion 5.

172. *Id.* Conclusion 10.2.

173. *Id.* Conclusion 10.3.

> way, more appropriate for an empirically oriented social scientist than for a lawyer.[174]

The second problem, Talmon notes, is that the rules the ILC established are—again—indeterminate.[175] In other words, the rules are insufficient to appropriately process interpretive disputes regarding customary international law.[176] On the one hand, the ILC does not explain what to do in situations "in which State practice is non-existent or precarious, State practice is conflicting or too disparate and thus inconclusive, the *opinio juris* of States cannot be established, or there is a discrepancy between State practice and *opinio juris.*"[177] One option would be to cease finding custom there, but instead, "the ICJ has not been prevented from finding rules of customary international law" in these kinds of cases, as the *Anglo-Norwegian Fisheries* or *Nicaragua* cases cited above have proven. On the other hand, then, "[t]here is also nothing in the conclusions addressing the subjectivity and selectivity of any assessment of State practice and *opinio juris.*"[178]

It would seem that various interpreters can reach different conclusions applying the same rules and that nothing can be done about it. In other words, the ILC Draft Conclusions do not provide an univocal principle resolving whether custom does really exist (or not) when the empirical material is ambiguous, that is, when it is at the margins of the standards established in the case law. The only solution proposed by the Commission to solve the potential indeterminations in the empirical material is to insist with more empirical enquiries until the elements eventually become clearer and solve the dilemma.

2. Partial Conclusion: The Traditional Approaches to the Identification of Custom and the Fact of Disagreement

The traditional mechanisms for the identification and interpretation of the norms of customary international law—those the ICJ and the ILC Draft Articles defend—are, then, quite deficient to guide legal practitioners in their quotidian operations. The

174. Bodansky, *supra* note 100, at 179.
175. *See* Talmon, *supra* note 147.
176. *See* Talmon, *supra* note 147.
177. Talmon, *supra* note 147.
178. *Id.*

interpretive practice has, at least prima facie, notable inconsistencies. The methods require Herculean efforts—impossible to perform in practice—and the rules are indeterminate. They lack general principles that allow interpreters to process disagreements regarding the application of standards the ICJ and ILC developed.

Given this scenario, three kinds of reactions have appeared among international legal scholars and practitioners. The first one, which could be called "the ostrich's reaction," consists in denying these problems and insisting on the classic methodology, as though this were actually sufficient to solve the interpretive problems that may occur. Sender and Wood, for example, argue that the problems this Article have pointed out have "proven to be, well, theoretical. They have not stood in the way of courts, practitioners and writers in regularly identifying and applying customary international law: the academic torment that accompanied this source of law in the books has not impeded it in action."[179] There are at least two problems with this position. The first is that it is false that practitioners are really identifying custom according to this method.[180] As noted earlier, most of them do not necessarily follow the steps Special Rapporteur Wood proposed because those steps take them to dead-end streets.[181] The second problem, perhaps graver, is that the inconsistencies of the courts, the supererogatory nature of the empirical inquiry mechanism, and the indetermination of the interpretive method have high costs in terms of the rule of law and create a fertile ground for arbitrariness. Sender and Wood's argument supposes that the only standard to evaluate the method to identify custom is whether legal practitioners can, by using it, reach any conclusion. It is true that courts do come to conclusions regarding custom, but what they do not do is really use this method to reach those conclusions.

The second reaction in the face of these inconsistencies has been holding that custom is a truly radically indeterminate source—that its identification is simply "a matter of taste."[182] There are those who claim that "modern legal argument lacks a determinate, coherent concept of custom. Anything can be argued

179. Sender & Wood, *supra* note 107, at 299.
180. *See generally supra* Section II.B.1.a.
181. *See generally supra* Section II.B.1.a.
182. Kelly, *supra* note 102, at 451.

so as to be included within it as well as so as to be excluded from it."[183] The problem is that it is simply not true that "anything" can be described as international custom by legal practicioners. The very definition of custom and the standards defined in the case law and in the practice of the discipline have prevented interpreters from including or excluding certain situations from rules of custom. For example, even the most skillful lawyer could hardly prove that there is a customary rule allowing States to use force against other States to retrieve natural resources from their territory. It is simply impossible to construct that argument in a manner consistent with the theory of customary international law. Likewise, it would be difficult to deny that there is a customary rule establishing immunities for heads of state. People could then argue about the limits of those immunities and the potential exceptions, but not that said customary rule exists.

The final Section of this Article will outline the third reaction to the assertion that the methods the ICJ and the ILC outline lead to dead ends. The idea, broadly shared by a portion of the literature,[184] is that in the quotidian practice of identification of customary international law there are other mechanisms in play that neither the ICJ nor the ILC make explicit in their reasonings. Nonetheless, there is more to discuss before exploring this issue. This Article will return to this idea in its final Section.

C. The Rules for the Interpretation of Other Sources of International Law

Before moving on to a general evaluation of these traditional approaches, a reference can be made briefly to the mechanisms for

183. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF THE INTERNATIONAL LEGAL ARGUMENT 409 (2005).

184. With differing proposals, the following scholars have tried to re-read the standards for the identification of custom under a different theoretical light: Bodansky, *supra* note 100; Choi & Gulati, *supra* note 110; Cohen, *supra* note 117; Fidler, *supra* note 100; Geiger, *supra* note 110; Kirgis, *supra* note 113; Kolb, *supra* note 110; LEPARD, *supra* note 113; Anne Peters, *Realizing Utopia as a Scholarly Endeavour*, 24 EUR. J. INT'L L. 533, 550 (2013); Petersen, *supra* note 110; SCHLÜTTER, *supra* note 110; Talmon, *supra* note 110; Tams, *supra* note 96; Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, *supra* note 113; Tasioulas, *Customary International Law and the Quest for Global Justice*, *supra* note 113.

the interpretation of other sources of international law—or, more precisely, to their notable nonexistence.

These "other" sources of international law can be classified into two groups. On the one hand, there is the remaining source of law formally recognized by Article 38 of the ICJ Statute, though quite abandoned by the practice of the discipline[185]: "the general principles of law recognized by civilized nations."[186] The problem with this source is that "international lawyers have never reached agreement on the definition of the general principles."[187] From the very moment of their incorporation to the Statute of the Permanent Court of International Justice in the 1920s, there has been a dispute about their condition. While some equate these principles to "the fundamental law of justice and injustice,"[188] others emphasize the difference between natural law and general principles, and hold that these are only those "which were accepted by all nations *in foro domestico*."[189] There is, then, no settled, univocal method to process indeterminations in this source of international law.

On the other hand, legal practitioners have acknowledged the growing normativity of a series of sources not contained in Article 38 of the Statute, traditionally grouped under the label of "soft law."[190] This category usually includes,

> [R]esolutions of international organizations, programmes of action, the texts of treaties which are not yet in force or are not

185. *See*, e.g., Julio A. Barberis, *Los Principios Generales de Derecho Como Fuente Del Derecho Internacional*, 14 REVISTA DEL INSTITUTO INTERAMERICANO DE DERECHO HUMANOS 11, 21 (1991); Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 280 (1963); Jan Klabbers, *Goldmann Variations*, *in* THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS 713, 714 (Armin von Bogdandy et al. eds., 2010); Robert Kolb, *Principles as Sources of International Law (with Special Reference to Good Faith)*, 53 NETH. INT'L L. REV. 1, 36 (2006); Pellet, *supra* note 12, at 832–41.

186. ICJ Statute, *supra* note 12, art 38, ¶ 1.

187. Pellet, *supra* note 12, at 834.

188. *Id.* at 833.

189. *Id.* at 836.

190. On soft law and different degrees and kinds of legality, see, for example, Chinkin, *supra* note 11; Goldmann, *supra* note 11; Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009); Sally Engle Merry, *Global Legal Pluralism and the Temporality of Soft Law*, 46 J. LEGAL PLURALISM & UNOFFICIAL L. 108 (2014); Sally Engle Merry, *Firming Up Soft Law*, *in* TRANSNATIONAL LEGAL ORDERS 374 (Terence Halliday & Gregory Shaffer eds., 2015); Daniel Thürer, *Soft Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. (2009); Weil, *supra* note 11.

> binding for a particular actor, interpretative declarations to international conventions, non-binding agreements and codes of conduct, recommendations, and [various] reports [of different kinds].[191]

In all of these cases, and given the mild legality of each of these instruments, the discipline has not developed univocal mechanisms of interpretation, leaving these in the hands of each practitioner—even more than in the cases of treaty and custom.

III. THE PROBLEM WITH THE TRADITIONAL APPROACHES: DISAGREEMENT AND INTERPRETATION

The previous Section showed how the insistence on the importance of empirical evidence by each of the traditional approaches to the interpretation of the various sources of international law generates both *practical* problems, that is, deficiencies in the resolution of the indetermination of the norms, and *theoretical* problems, that is difficulties in capturing the true point of disagreement of many interpretative disputes. This section intends to "pull the strings" of these problems and suggest that both types of deficiencies are connected by an issue that affects these views on interpretation from their very foundations.

The problem is that these approaches attempt to derive a prescriptive conclusion ("the subjects of international law must do X") from a series of exclusively descriptive premises (e.g., "states have carried out practice X in a constant and uniform manner", or "the intention of the drafters of this treaty was that subjects did X"). Hans Kelsen, following David Hume, explained over fifty years ago that "[f]rom the circumstance that something *is* cannot follow that something *ought to be*; and that something *ought to be* cannot be the reason that something *is*. The reason for the validity of a norm", Kelsen concluded, "can only be the validity of another norm."[192] That other norm, in Kelsen's reasoning, is a "superior" norm,

---

191. Thürer, *supra* note 190.

192. HANS KELSEN, PURE THEORY OF LAW 193 (1967). George Letsas applies this reasoning to international law, and explains that "if our question is why a certain fact is relevant (e.g., the text of the preamble) and we answer it by citing another fact (e.g., that the parties included it in the treaty), then there will be new a question as to what makes that further fact relevant" George Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer,* 21 EUR. J. INT'L L. 509, 534 (2010).

which authorizes the creation of an "inferior" norm whose validity was at stake.[193] But then there must be yet another norm, again superior, which determines the validity of that which authorizes the creation of the inferior one. And so on, and on.[194]

To avoid this infinite regress, the international legal community needs to find a non-legal prescription that can give validity, at some point in the chain, to a legal norm. For Kelsen, this non-legal prescription is his famous *Grundnorm*, a basic norm that authorizes inferior norms, but which is not authorized by other norms itself; its validity, unlike that of the rest of the norms, is not derived, but rather presupposed.[195] This presumption, then, is "normative"—it presents a premise structured around an *ought to be* ("we must presuppose that norms are valid") and not around an *is* ("norms are valid"). Kelsen's *Grundnorm* is not the only way of avoiding this infinite regress but rather one among many others.[196] In any event, what all these formulations attempting to close the regress inevitably share—following the logic that Kelsen derives from Hume—is a normative structure, a value judgment contained in them, a proposition related to what *ought to be.*[197]

With all this in mind, this Article returns to the traditional approaches to the interpretation of international law. Following from the reasoning in the previous paragraphs, it is possible that the interpretive disagreement in relation to a certain norm of international law is, as the traditional approaches suggest, indeed at the inferior part of the chain of competence, having an

193. KELSEN, *supra* note 192, at 193–95.

194. *See* KELSEN, *supra* note 192, at 193–95; Andrei Marmor, *The Pure Theory of Law*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, Spring 2016 ed. 2016). For an application of these ideas to international law, See Letsas, *supra* note 192, at 534.

195. *See* KELSEN, *supra* note 192, at 193–95.

196. It could be said that the most prominent political theories today, for example, hold—broadly—that what gives validity to norms is their democratic legitimacy. *See generally, e.g.,* Roberto Gargarella, *Full Representation, Deliberation, and Impartiality*, *in* DELIBERATIVE DEMOCRACY 260 (Jon Elster ed., 1998); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (1996); JOSÉ LUIS MARTÍ, LA REPÚBLICA DELIBERATIVA: UNA TEORÍA DE LA DEMOCRACIA (2006); CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY (1996).

197. "It is inevitable," then, Nino explains, "to draw on value principles to determine which legal materials are relevant to justify an action or decision, leaving the legal discourse immersed in a broader justificatory discourse." NINO, *supra* note 50, at 87. The same logic is fully applicable to international law. *See* Letsas, *supra* note 192, at 534–35.

empirical nature.[198] It is not implausible that two interpreters agree on the relevant legal premises, but that their disagreement is based on a mere dispute of the evidence. The interpreters may disagree on whether there was sufficient practice, or they may disagree on the actual intentions of the drafters of a treaty. So far, so good. However, it is also possible that— particularly in hard cases—the dispute reflects a deeper, *normative* disagreement located at a higher point in the chain of competence. This disagreement may have to do with the legal value of a certain source, that is, whether something is or is not law.[199] More frequently, however, it deals with the effect that a certain source may have over the content of the obligation—that is, what it mandates.[200] Such a disagreement over content may come about as a consequence of the existence of lacunae (that the system does not offer an explicit solution for a specific case);[201] contradictions (that the solution provided by a norm is prima facie incompatible with the solution provided by another for the same case);[202] semantic indeterminations (such as vagueness or ambiguity in the words[203]); syntactic indeterminations (ambiguity in the sentences);[204] or pragmatic indeterminations (hesitations on whether the terms in question ask, prescribe, suggest, promise,

198. Dworkin calls these kinds of arguments in the inferior part of the chain "propositions of law," and defines them as "the various statements and claims people make about what the law allows or prohibits or entitles them to have." DWORKIN, *supra* note 9, at 4. According to Dworkin, disagreements in this level presuppose an agreement in what he calls "the grounds of law," that is, the propositions which are higher in the normative chain or pyramid. *See* DWORKIN, *supra* note 9, at 4–5; Scott Shapiro, *The "Hart–Dworkin" Debate*, *in* RONALD DWORKIN 22, 35–37 (Arthur Ripstein ed., 2007). For an application to international law, see Fernando Tesón, *International Obligation and the Theory of Hypothetical Consent*, 15 YALE J. INT'L L. 84, 87 (1990).

199. *See* Dale Smith, *Theoretical Disagreement and the Semantic Sting*, 30 OXFORD J. LEGAL STUD. 635, 641 (2010).

200. *See id.*

201. *See* NINO, *supra* note 50, at 98.

202. *See id.* at 99.

203. *See id.* at 95–96 (describing vagueness "by gradient," "combinatorial," and "by open textura"); *id.* at 96 (defining ambiguity as the situation in which a word has more than one meaning).

204. *See id.* ("sentences may express more than one proposition, not only when one of their words is ambiguous, but also when the syntactic connections allow for various interpretations.") (translated by author).

etc.).[205] Thus, even when there is agreement about the empirical evidence (e.g., the practice of States or the intentions of drafters), there may still be doubts about said evidence's effects on legal obligations.

In all these cases, the mere observation of the rules does not provide clear answers. Interpreters must thus perform an exercise of identification of the law that is similar to (or that is, in itself, an instance of) the exercise of identifying the law in a superior instance of the chain of competence.[206] In other words, they must carry out a value judgment, which allows them to resolve the indetermination in question.

The vast presence of these kind of indeterminations in international law[207] explains both the theoretical and practical problems of the traditional approaches. By adopting what Dworkin calls "a plain fact view of the law,"[208] these theories are not able to capture the true points of disagreement among interpreters (which usually combine empirical and normative factors), depriving them of a solid basis to resolve their controversy about the norm in question. This creates two different risks. The first is that international law becomes a shouting match, where there is no real exchange of reasons among the interlocutors. The second is that interpretive decisions are made on the basis of evaluative judgments, but in a concealed manner, hiding normative

205. *See id.* ("[T]he pragmatic aspect of language rests not on the meaning of sentences, which constitutes their locutionary aspect, but on what is done with the sentence in question; that is, whether it affirms, questions, prescribes, suggests, promises, etc.").

206. *See id.* at 97, 100.

207. Sometimes these disagreements are, in Dworkin's terms, "empirical disputes," that is, disputes about whether the particular acts that function as sources of law (custom, treaties, etc.) have in fact taken place. The most interesting disputes, however, are theoretical, relating to the actual grounds of international legal principles. The search for the appropriate grounds of international legal propositions is the search for appropriate substantive principles of international justice. Every bit of history has to be interpreted, and for that task, the interpreter has to rely on some second-order principle. It follows that positivism, the view that international law can be ascertained by just examining some facts that have occurred in the past (or, as Dworkin calls it, "the plain-fact" view), must be called into serious question. On the inescapable normativity of international law, see generally Sebastián Guidi & Nahuel Maisley, *Who Should Pay for COVID-19? The Inescapable Normativity of International Law,* 96 N.Y.U. L. REV. 375 (2021). *See* also Tesón, *supra* note 198, at 87.

208. DWORKIN, *supra* note 9, at 7.

considerations behind fake empirical discussions. The risk in this case is that "the normative judgments in the interpretation of the law are not subject to the control of critical discussion."[209]

Instead of sweeping normative disagreements under the carpet of empirical disputes, interpreters need a theory of the interpretation of international law that can account for normative disagreements and that establishes a framework for the exchange of reasons behind these disagreements. Although the development of such a theory exceeds the purpose of this Article, the next, concluding Section will further discuss this.

IV. CONCLUSION: TOWARDS AN ALTERNATIVE ACCOUNT: INTERPRETATION AS CONSTRUCTIVE ARGUMENTATION

In 1966, the International Law Commission warned that "the interpretation of documents is to some extent an art, not an exact science."[210] This warning could be seen as a premonition of the failures of what this Article calls the "traditional approaches to the interpretation of international law." The various theories gathered under this label all tried to associate the interpretive processes of international law to the scientific method, insisting that they should be empirical, inductive, and value neutral. These attempts were all unsuccessful, or so this Article argues. The interpretation of international law is, indeed, not an exact science.

But the ILC's suggestion that legal interpretation is to some extent an art is also problematic: it fundamentally consists of an abdication of any attempt to limit arbitrariness in the law. Artists face no strict limits to what they can do as part of their discipline; the method of aesthetic judgment is one in which the cognitive powers at play "engage[] in a free play, since no determinate concept restricts them to a particular rule of cognition."[211] In the arts, imagination is encouraged "to spread its flight over a whole host of kindred representations that provoke more thought than admits of expression in a concept determined by words."[212] Legal interpretation, on the

209. NINO, *supra* note 50, at 107.

210. *Draft Articles on the Law of Treaties with Commentaries*, *supra* note 19, art. 27, ¶ 4.

211. IMMANUEL KANT, CRITIQUE OF JUDGMENT 48 (2007).

212. *Id.* at 144. "They furnish an aesthetic idea, which serves the above rational idea as a substitute for logical presentation, but with the proper task, however, of animating the

contrary, must be expressed in words—in rational ideas that can be intersubjectively assessed. The aesthetic method, then, is not a suitable model for the interpretation of international law; an alternative must be sought.

One viable alternative would be to conceive international law neither as an art, nor as a science, but rather as an "argumentative practice,"[213] in which participants exchange both empirical information and normative (e.g., political and moral) arguments to convince each other that their own reading of a set of rules is the most appropriate one.[214] In this conception, legal discourse is no more than "a special case of general practical discourse."[215] Any participant in legal discourse, as any participant in any other kind of rational discourse, presents arguments with the intention of convincing others that their views are more reasonable—and therefore acceptable—than those of their counterparts.[216] For that purpose, they need to assess said views in light of some sort of "intersubjectively shared (or sufficiently 'overlapping') background understanding,"[217] which, in the case of the law, equates to a general understanding of the legal system and its purpose.[218] In this view, then, disagreements about international law could consist of disputes on the relevant social facts, such as the ordinary meaning of the words, the intention of the drafters,

---

mind by opening out for it a prospect into a field of kindred representations stretching beyond its ken." *Id.*

213. "Legal practice, unlike many other social phenomena, is *argumentative*. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions." DWORKIN, *supra* note 9, at 13. *See* also HABERMAS, *supra* note 196, chs. 4–5; ALEXY, *supra* note 93. See also the author's own suggestion in this direction: Nahuel Maisley, *Better to See International Law This Other Way: The Case Against International Normative Positivism*, 12 JURISPRUDENCE 151, 173–74 (2021).

214. *See* PATRICK CAPPS, HUMAN DIGNITY AND THE FOUNDATIONS OF INTERNATIONAL LAW 5 (2009).

215. ALEXY, *supra* note 93, at 15.

216. Participants in this kind of discourse have "the intention of winning the assent of a universal audience to a problematic proposition in a noncoercive but regulated contest for the better arguments based on the best information and reasons." HABERMAS, *supra* note 196, at 228.

217. JÜRGEN HABERMAS, *Some Further Clarifications of the Concept of Communicative Rationality*, *in* ON THE PRAGMATICS OF COMMUNICATION 339 (1998).

218. This is why, as Jürgen Habermas states, "[a]n individual legal decision can be right only if it fits into a coherent legal system." HABERMAS, *supra* note 196, at 232.

the amount of state practice, or the belief of state officials. But, these disagreements typically also hinge on deeper, normative differences regarding the role that those particular norms under dispute ought to play in the broader legal system.

Some versions of this alternative approach to the interpretation of international law have had important defenders in the history of the discipline—with more or less jurisprudential sophistication.[219] For example, Lauterpacht wrote that, "[t]he notion of law with the help of which the international lawyer gauges and determines the nature of the rules which form the subject-matter of his science is necessarily an *a priori* one."[220] That is, interpreters need not only rely on the facts of the case, but also, necessarily, on a certain conception of the system. He specifically defended one such notion of the international legal system that is not based on the "spurious theory of an international law of co-ordination,"[221] but rather on "a hypothesis which, by courageously breaking with the traditions of a past period, incorporates the rational and ethical postulate, which is becoming a fact, of an international community of interests and function."[222] More

219. *See*, *e.g.*, Başak Çali, *On Interpretivism and International Law*, 20 EUR. J. INT'L L. 805 (2009); CAPPS, *supra* note 214; Capps, *supra* note 65; CASSESE, *supra* note 5, at 252; Kirgis, *supra* note 113; Hersch Lauterpacht, *Westlake and Present Day International Law*, 15 ECONOMICA 307 (1925); Hersch Lauterpacht, *The Nature of International Law and General Jurisprudence*, 37 ECONOMICA 301 (1932); Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1 (1946); Lauterpacht, *supra* note 45, at 48–85; LETSAS, *supra* note 21, at 71; Letsas, *supra* note 192, at 534; Anne Peters, *There Is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law*, 44 GERMAN Y.B. INT'L L. 25 (2001); Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT'L L. 579 (2006); Peters, *supra* note 184, at 550; Anne Peters, *International Legal Scholarship Under Challenge*, *in* INTERNATIONAL LAW AS A PROFESSION 117 (André Nollkaemper et al. eds., 2017); Roberts, *supra* note 120; Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, *supra* note 113; Tasioulas, *Customary International Law and the Quest for Global Justice*, *supra* note 113, at 313; Emmanuel Voyiakis, *International Law and the Objectivity of Value*, 22 LEIDEN J. INT'L L. 51 (2009); Mónica Pinto, *L'Emploi de La Force Dans La Jurisprudence Des Tribunaux Internationaux*, 331 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 9 (2007).

220. Lauterpacht, *The Nature of International Law and General Jurisprudence*, *supra* note 219, at 320.

221. *Id.* at 317.

222. *Id.* For an analysis of the similarities between Lauterpacht's and Dworkin's theories, see Capps, *supra* note 65.

recently, Antonio Cassese has somewhat timidly defended what he called a "critical positivism," according to which interpreters "should feel free critically to appraise the rule or institution . . . in light of the . . . general values upheld in the international community."[223] Anne Peters has taken a similar position by underlining the need for normative analysis in any instance of interpretation of international law.[224]

It is important to note that, in all of these proposals, the normative portion of the argument—that is, that which derives from the conception of the international legal system sustained by the interpreter—is not an arbitrary conclusion or a mere matter of taste subjective to its author. This portion is, instead, part of a deep political discussion about the appropriate role that law ought to play in global order, which must be sustained with rational arguments. As any other part of practical discourse, rules and standards shape this discussion. Yet, the normative portion of the interpretive argument certainly provides more space for interpreters to translate their own views into the interpretive process as compared to the traditional approaches, which forced interpreters to defend their claims based on facts only.

Thus, interpretation as constructive argumentation takes the best of both worlds. As in artistic expression, this conception leaves significant room for subjectivity and for a "human approach" to solving ultimately human problems. But, simultaneously, as in scientific inquiry, it conceives of legal interpretation as a process burdened with a number of procedural safeguards meant to ensure the success of the interpretive endeavor and to avoid arbitrariness and caprice.[225]

---

223. CASSESE, *supra* note 5, at 259.

224. Normative analysis means justifying or criticizing existing norms and making reform proposals. It also means evaluating the application of the law and criticizing such practice. Because of the leeway inherent in any interpretation and application of a rule to the facts, any evaluation of legal practice is, in the sense of a theory of science, a "normative" and not merely a "positive" analysis. Peters, *supra* note 184, at 550.

225. "The conditions of rational practical argumentation can be summed up in a system of discourse rules. Some of these rules formulate general demands of rationality which are also valid independently of discourse theory. They include freedom from contradictions, universalisability in the sense of a consistent use of the predicates employed, linguistic-conceptual clearness, empirical truth, consideration of consequences, and weighing." *See* Robert Alexy, *Discourse Theory and Human Rights*, 9 RATIO JURIS 209, 211 (1996). *See generally* ALEXY, *supra* note 93.

The problem, of course, is that even after this process, disagreement may persist. This is because the "success" of the interpretive endeavor does not—and cannot—consist in finding *the* perennial right answer to the interpretive question, the elimination of disagreement. Jürgen Habermas explains that "rights are a social construction that one must not hypostatize into facts."[226] Thus, even the best interpretive judgments "remain something provisional, a coherent order of reasons constructed for the time being and exposed to ongoing critique."[227] Success in the interpretive process does not necessarily amount to finding consensus, either. In the best scenario, of course, "we bring argumentation to a de facto conclusion . . . when reasons solidify against the horizon of unproblematic background assumptions into such a coherent whole that an uncoerced agreement on the acceptability of the disputed validity claim emerges."[228] But in another scenario, where disagreement persists, a proper theory of interpretation should aim at revealing the true differences in perspective between the participants of the process, which should then be rationally assessed and, eventually, resolved through the appropriate institutional methods in place, whatever those may be.

Thus, the rules and theories on the interpretation of international law must not be aimed at fully resolving disagreements. That task may, in any event, pertain to institutional mechanisms, be them jurisdictional or political.[229] What interpretive rules and theories must do is rule out inadmissible positions, clarify what kind of disagreements are in place, and confront the rational arguments of those who defend the different views on the matter. The problem with the traditional approaches is that they fail in these tasks: they are incapable of identifying the true issues—turning the conversation into a shouting match. "The validity of a judgment" of this kind, of a legal kind, then,

226. HABERMAS, *supra* note 196, at 226.

227. *Id.* at 227.

228. *Id.*

229. The theory of interpretation will solve the indetermination from the internal perspective of the participant, of course, but it will not be necessarily able to resolve the intersubjective disagreement (although it may). *See generally* HERBERT LIONEL ADOLPHUS HART, THE CONCEPT OF LAW, 89–91 (1961).

> is certainly defined by the fact that its validity conditions are satisfied. Whether those are satisfied, however, cannot be clarified by direct access to empirical evidence or to facts given in an ideal intuition, but only discursively, precisely by way of a justification that is carried out with arguments.[230]

To process their disagreements, those dealing with international law—such as government officials, international organization bureaucrats, civil society activists, judges, and even ordinary citizens—need to exchange arguments about international law. Then, they may convince each other, and build agreements around international law. Or, at least, quite importantly, they may agree to disagree.

230. HABERMAS, *supra* note 196, at 226.