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# The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation

Ingo Venzke  
*University of Amsterdam*

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# The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation

INGO VENZKE\*

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## I. DIAGNOSIS

The main task of international courts usually lies with applying the law to questions and facts in accordance with the standards of the legal profession. The view persists that interpretation, a necessary part of this task, is about uncovering the law that is already out there, contained and conserved in given norms. International courts and the outward show of legal argument nourish this view. In prototypical fashion, the International Court of Justice (ICJ) stressed that “the Court, as a court of

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law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.”<sup>1</sup> In its *Nuclear Weapons* advisory opinion, the ICJ reiterated that it “cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather, its task is to engage in its normal judicial function of ascertaining the existence of legal principles and rules applicable to the threat or use of nuclear weapons.”<sup>2</sup> Further examples abound, also from other international judicial institutions.<sup>3</sup> Even if the metaphorical report of judges as the *bouche de la loi* no longer directs—if it ever did—the thought on what judges actually do, the understanding is still ubiquitous that judges find and give voice to the applicable law in individual cases by examining the relevant norms in the context of the legal system. Interpretation looks like an act of discovering meanings and of uncovering the law, very much like an exercise in archaeology. At the same time, it is not at all uncommon to see that international courts not only interpret the law in this sense but also develop the law in their practice. As a matter of fact, for many key protagonists, like Sir Hersch Lauterpacht, developing the law was actually the ICJ’s “essential function.”<sup>4</sup> During the First World War, Hans Wehberg, another influential voice in international legal scholarship at the time, also emphatically pled that international law be developed by way of more international adjudicatory practice.<sup>5</sup>

Upon closer inspection, however, the concept of development starts to blur.<sup>6</sup> It seems to suggest the creation of something new, or at

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1. Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. 3, ¶ 53 (July 25).

2. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 18 (July 8).

3. See, e.g., Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, at 8 (Mar. 3); Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, at 11, WT/DS8/AB/R, WT/DS10/AB/R, WTDS11/AB/R (Oct. 4, 1996) [hereinafter *Alcoholic Beverages Appellate Body Report*].

4. HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 42 (1958) [hereinafter LAUTERPACHT, DEVELOPMENT] (arguing that it is the court’s “essential function . . . to contribute by its decisions to the development of international law”). Cf. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 249 (1933).

5. HANS WEHBERG, THE PROBLEM OF AN INTERNATIONAL COURT OF JUSTICE 11, 55 (1918) (explicitly exclaiming that the solution is “[a] further development of international law through international decisions!”).

6. See Georges Abi-Saab, *De la jurisprudence: Quelques réflexions sur son rôle dans le développement du droit international*, in HACIA UN NUEVO ORDEN INTERNACIONAL Y EUROPEO 19, 25 (1993) (suggesting that the role of case law in the development of public international law is the archetypical case of a *claire-obscur* subject).

the very least, an addition to that which already exists.<sup>7</sup> But in this sense the concept of development would challenge the idea that international courts *apply* and do not *make* law. As such, it stands almost as an antithesis to “proper” adjudication. Couched within the prevailing idea about the main international judicial task, the concept of development has overall lost its contours. Notably, Lauterpacht and Wehberg use *development* interchangeably with *clarification*. In their arguments, development means making law visible.<sup>8</sup> This legacy resonates in more recent writings just as well. Christopher Greenwood, for example, writes about the development of international criminal law by the International Criminal Tribunal for the Former Yugoslavia, in contradistinction to the making of new law, which is not part of the task and function of the tribunal.<sup>9</sup> On this account, in both their roles as interpreters and developers of the law, international courts give voice to the existing law—or, in Lauterpacht’s parlance, to the law that lies behind the cases.<sup>10</sup>

Views on interpretation as discovery and development as clarification have certainly not been without critique. These views do not stand up to theoretical scrutiny and, to be sure, they are usually not taken at face value. However, they are influential nonetheless. Legal reasoning compels all actors to base their arguments on the law as it is; everything else would defeat their claims from the outset. As Stanley Fish puts it, “the very point of the legal enterprise requires that its practitioners see continuity where others, with less of a stake in the enterprise, might feel free to see change.”<sup>11</sup> For international courts, it is all the more important to portray their practice as firmly based on the law as it stands because this is an important source of their legitimacy. Whenever the impression gains currency that they are not engaged in the proper business of applying the law given to them, they are usually in trouble.

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7. See Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Institutions as Lawmakers*, 12 GERMAN L.J. 979 (2011) (explaining that the concept of judicial lawmaking would emphasize precisely this creative dimension of international adjudication).

8. See LAUTERPACHT, DEVELOPMENT, *supra* note 4, at 42–43; see also WEHBERG, *supra* note 5, at 11–12.

9. Christopher Greenwood, *The Development of International Law by the International Criminal Tribunal for the Former Yugoslavia*, 2 MAX PLANCK Y.B. U.N. L. 97, 111 (1998).

10. See LAUTERPACHT, DEVELOPMENT, *supra* note 4, at 3–74 (discussing “The Law Behind the Cases”).

11. STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERATURE AND LEGAL STUDIES 157 (1989).

The problem is that the outward show of legal reasoning—depicting interpretation as discovery and development as clarification—overburdens the language of law with aspirations it cannot meet. More precisely, this reasoning suggests that legal rules contain within themselves the yardsticks that separate correct from incorrect applications of the law.<sup>12</sup> Typically, interpretations should not fill the law with that which it does not already contain, but should uncover what is already there.<sup>13</sup> The text should separate permissible from impermissible interpretations.<sup>14</sup> The myth that sustains this view is the idea that legal provisions come with meanings attached to them. If one had access to the underlying meaning, then the law could be found, correct applications could be distinguished from incorrect readings, and development could be distinguished from a mere statement of what the law really is. Alas, this premise crumbles under a little closer reflection and with a little distance from the legal enterprise.

The present article unfolds the central proposition of the *linguistic turn* and contends that law only exists in its interpretative practice and is not something ready to be discovered. The content of the law is shaped in the creative acts of interpretation—its jurigenerative practice.<sup>15</sup> This move first of all redirects attention toward the actors of interpretation. Notably then, the argument continues that international courts generally enjoy outstanding semantic authority. Their decisions weigh heavily in disputes about what the law really means. At the same time, it is rather evident that this authority in interpretation is not boundless, but constrained. But how can the practice of international adjudication be understood as both creative and constrained under the premise that law does not have a meaning other than that contributed to it in its use? With greater emphasis on what is at stake from a normative angle, the question is who rules, the law or the courts? Working out these questions will be the crux of the present article addressing the role of international courts as interpreters and developers of the law.

This article will illustrate the persistently influential view regarding the role of international courts that belittles their qualities as

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12. J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 774 (1987).

13. *See infra* Part II.C.

14. *See id.*

15. *See generally* INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW: ON SEMANTIC CHANGE AND NORMATIVE TWISTS (2012, *forthcoming*) [hereinafter VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW] (leaning on developments in linguistics and developing a theoretical account of interpretation as a practice that is both creative and constrained).

actors in the making of international law. It summarizes why the outward show of judicial argument eclipses this dimension of judicial practice and then speaks on the metaphor of sources, and how it has (mis)shaped accounts of international lawmaking (Part II). The third part then takes a step back and asserts the proposition that it is impossible to find meaning anywhere else other than in the concrete use of legal provisions. It highlights how law comes to life in the practice of interpretation and argues that this practice itself has to bear the burden of distinguishing correct from incorrect applications of the law (Part III). The next step first elucidates international courts' semantic authority by focusing on the mighty spell of judicial precedents in international legal discourse and then turns to sketching the principal normative implications (Part IV). Finally, the concluding prognosis recommends paying closer regard to the qualities of international courts as actors in the jurisgenerative practice of interpretation. It ends with the suggestion to develop a better understanding of the role of international courts in a normative pluriverse in which they interact with actors on other levels of governance and negotiate spheres of authority (Part V).

## II. MYTHS IN THE FIELD OF ADJUDICATION

### *A. The Field of Adjudication*

International courts portray their practice as applying the law that is given to them.<sup>16</sup> In one of its very early Advisory Opinions the ICJ exemplarily stated “it is a duty of the Court to interpret treaties, not to revise them.”<sup>17</sup> Other institutions have recurrently made similar pronouncements in their case law. Court statutes also frequently testify that applying the law, rather than revising it, is precisely what they are supposed to do. The renowned Article 3.2 of the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO) explicitly provides that the dispute settlement system serves “to clarify the existing provisions of [the covered] agreements in accordance with

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16. Pierre-Marie Dupuy, *Le juge et la règle générale*, 93 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 569, 569 (1989); Maurice Kamto, *La volonté de l'état en droit international*, 310 RECUEIL DES COURS 9, 284 (2004); see generally LAURENCE BAUM, JUDGES AND THEIR AUDIENCES (2006) (showing how courts cater to the expectations of their audience).

17. Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment 1952 I.C.J. 176, 196, 200, 206 (Aug. 27). See also Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Second Phase, Advisory Opinion, 1950 I.C.J. 221, 229 (July 18).

customary rules of interpretation of public international law.”<sup>18</sup> It further stresses that the recommendations and rulings of the WTO Dispute Settlement Body (DSB) “cannot add to or diminish the rights and obligations provided in the covered agreements.”<sup>19</sup> While it is reassuring with regard to the nature of the main judicial task, this provision also reflects an apprehension that reality frequently does not live up to the tidiness of orthodox doctrine.<sup>20</sup>

The WTO Appellate Body (AB) has relied on Article 3.2 of the DSU to corroborate the view that its reports do little more than give voice to the law.<sup>21</sup> Ever since its very first decision, *US – Gasoline*, the court embraced the customary rules of interpretation of public international law for its task, seeking the most solid ground for ascertaining the law.<sup>22</sup> In particular, in its early years, the AB sought to augment its authority with uncertain success to the extent that its practice has sharply been termed to portray a “textual fetish.”<sup>23</sup> For example, in the hard-fought and crucial report of the *US – Shrimp* case, the AB criticized the panel for not having followed the international law rules of interpretation and underscored that “[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted.”<sup>24</sup>

While the hermeneutics of international courts differ, other bodies, also renowned for their dynamism, are just as eager to sustain the view of their practice as impeccable applications of the law. If there are

18. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 2, Art. 3.2, 33. I.L.M. 1125 (1994). See also Jan Klabbers, *On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization*, 74 NORDIC J. INT’L LAW 405, 408 (2005).

19. *Id.* at 412.

20. *Id.* at 412–13.

21. See, e.g., Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, at 17, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *Gasoline Appellate Body Report*]; Alcoholic Beverages Appellate Body Report, *supra* note 3, at 10.

22. *Gasoline Appellate Body Report*, *supra* note 21, at 17; Alcoholic Beverages Appellate Body Report, *supra* note 3, at 10.

23. See Douglas A. Irwin & Joseph H.H. Weiler, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)*, 7 WORLD TRADE REV. 71, 89–95 (2008). Cf. Georges Abi-Saab, *The Appellate Body and Treaty Interpretation*, in THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 453, 461 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds., 2006) (suggesting with less of an edge that the emphasis on the text in interpretation might be too much). See generally ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 106 (2009) (discussing the patterns in the Appellate Body’s interpretative practice more generally).

24. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 114, WT/DS58/AB/R (Oct. 12, 1998).

changes in the law without anything that could sensibly be termed legislation, they have come about outside the practice of the court. Courts only make what has already happened visible. The European Court of Human Rights (ECtHR), for instance, is known for its method of evolutive interpretation and its characterization of the European Convention of Human Rights (Convention) as a living instrument.<sup>25</sup> With this notion, the ECtHR recognizes that the law changes through societal processes even where the Convention it applies has not been amended to reflect those processes. However, in the same breath with which the ECtHR pronounces a dynamic interpretation, it usually voices limits to this method by habitually reiterating that it cannot create new law or add rights to the Convention that it does not already contain.<sup>26</sup>

International courts have an interest in sustaining the view that they simply apply existing law because the view nourishes the main source of their authority. They purport to respect the parties' consent to international adjudication and deny any agency.<sup>27</sup> Legal reasoning is critical to this effect. Hersch Lauterpacht and Hans Wehberg saw the development and clarification of the law as the most important international judicial function, precisely because only if the law were sufficiently clear and predictable would states submit to international adjudication.<sup>28</sup> International courts would unleash the potential of the pacifying language of the law, which builds exactly on its distance from the muddy business of politics and diplomacy.<sup>29</sup> Elihu Root, one of President Theodore Roosevelt's Secretaries of State and a key figure at the Second Hague Peace Conference of 1907, expressed this unrelenting

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25. *Tyrer v. United Kingdom*, App. No. 5856/72, Eur. Ct. H.R. A 26 ¶ 31 (1978). Among the more recent cases in this regard, see *Bayatyan v. Armenia*, App. No. 23459/03, ¶ 63 (Oct. 27, 2009); *Scoppola v. Italy* (No. 2), 2009-17 Eur. Ct. H.R. 104; *Emonet and others v. Switzerland*, 49 Eur. Ct. H.R. 11, ¶¶ 66, 83 (2007). Cf. Rudolf Bernhardt, *Evolutive Treaty Interpretation of the European Convention on Human Rights*, 42 GERMAN Y.B. INT'L L. 11 (1999).

26. *E.g.*, *Johnston v. Ireland*, App. No. 9697/82, 112 Eur. Ct. H.R. (ser. A) ¶ 53 (Dec. 18, 1986) (“[T]he Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate.”).

27. *See, e.g.*, *Rights of Minorities in Upper Silesia (Minority Schools)* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15, at 22 (Apr. 26); *Corfu Channel* (U.K. v. Alb.) 1948 I.C.J. 15, at 27 (Mar. 25); *Continental Shelf* (Libyan Arab Jamahiriya/Malta), 1984 I.C.J. 3, ¶ 34 (Mar. 21); *East Timor* (Port. v. Austl.), 1995 I.C.J. 90, at 101 (June 30); *see also* Cesare P.R. Romano, *The Shift from Consensual to Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT'L L. & POL. 791, 816–29 (2007) (suggesting a paradigm shift from consensual to compulsory jurisdiction, with notable exceptions for the ICJ and IACHR).

28. LAUTERPACHT, DEVELOPMENT, *supra* note 4, at 42.

29. *See* WEHBERG, *supra* note 5, at 55.

advocacy for a strong international judiciary when he eloquently and emphatically argued: "What we need for the future development of arbitration is the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility."<sup>30</sup>

Whenever it is more than sporadically disputed that courts do something other than apply the law given to them, the courts are usually in trouble. Their response to finding themselves in this kind of trouble is to try even harder to portray their practice as impeccable rule-following.<sup>31</sup> Psychologist Dan Simon persuasively argues that no matter how plagued with doubt and uncertainty the process of coming to a decision may have been, judges would still present the outcome as the only possible solution and all alternatives as next to absurd.<sup>32</sup> It is precisely this legitimacy angst that leads to rather apodictic reasoning, even though this may not be the best long-term strategy. However, not only outside pressure and outside expectations hold international judges to the outward show of legal argument; their ethos and genuine conviction may also push them towards embracing their activity as one of finding the law to be applied to the facts in front of them.<sup>33</sup>

Moreover, the juridical language itself contributes to the image of impersonality and objectivity. Sociologist Pierre Bourdieu has remarked that the law's language contains both a neutralization and universalization effect.<sup>34</sup> He claims that this is "[f]ar from being a simple ideological mask," but rather, "the basis of a real autonomy of thought and practice, the expression of the whole operation of the juridical field."<sup>35</sup> It is an attitude much more than a mask for domination or for the cunning exercise of power, he suggests.<sup>36</sup> The ICJ expresses this thought clearly when it maintains that "[I]aw exists . . . to serve a

30. *Id.* (quoting Elihu Root).

31. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 12–13 (1964). *See also* BAUM, *supra* note 16, at 25–49 (discussing how judges manage their own appearance in view of considerations of social legitimacy).

32. Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 *RUTGERS L.J.* 1, 19–22 (1998). *Cf.* Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 *BRITISH Y.B. INT'L L.* 48, 53 (1949) ("[I]t is elegant—and it inspires confidence—to give the garb of an established rule of interpretation to a conclusion reached as to the meaning . . . of a treaty.").

33. SHKLAR, *supra* note 31, at 12.

34. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 814, 820 (1987).

35. *Id.*

36. *Id.*

social need; . . . precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.”<sup>37</sup> Drawing on the Weberian study of the legitimating effect of rationalization, Bourdieu finally contends that

[t]he ritual that is designed to intensify the authority of the act of interpretation . . . adds to the collective work of sublimation designed to attest that the decision expresses not the will or the world-view of the judge but the will of the law or the legislature (*voluntas legis* or *legislatoris*).<sup>38</sup>

In short, the outward show of legal argument is part and parcel of the social legitimacy in the field of adjudication. It also generally responds to expectations of other participants in legal discourse and has the aptitude to constrain and allow for critique. Argumentative standards in legal discourse harbor a potential to contribute to the normative legitimation of international adjudication.<sup>39</sup> There is thus little purchase in suggesting that judges are liars when they portray their practice as one of finding the law that is given to them.<sup>40</sup> It is problematic, however, if the outward show of legal practice directs our thinking on what really happens.

### B. The Metaphor of Sources

Two ideas are complicit in misdirecting our thought on the role of international courts in interpreting and developing the law: thinking of lawmaking in terms of sources, and thinking of interpretation as uncovering what is already out there. Both these ideas are myths, not in the strong sense of the word that sometimes carries a subtle and possibly stingy accusation of naïveté, but in the sense of assumptions that are so deeply embedded in prevailing narratives of what happens

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37. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, ¶49 (July 18). The case is a textbook example of how such a retreat to a narrow, if not poor, version of legal positivism masks very clear and palpable political choices. See Edward McWhinney, *Judicial Settlement of Disputes: Jurisdiction and Justiciability*, 221 RECUEIL DES COURS 9, 36–46 (1990).

38. Bourdieu, *supra* note 34, at 828.

39. See *infra* Part IV.A. In closer detail, see Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GERMAN L.J. 1341, 1344 (2011) [hereinafter Bogdandy & Venzke, *Democratic Legitimation*].

40. See generally Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL’Y 155 (1994). At best it may point to precisely this paradox. See Ralph Christensen, *Die Paradoxie richterlicher Gesetzesbindung*, in RECHT VERHANDELN. ARGUMENTIEREN, BEGRÜNDEN UND ENTSCHIEDEN IM DISKURS DES RECHTS 1, 4–7 (Kent D. Lerch ed., 2005).

that they are not questioned.<sup>41</sup> Making those assumptions evident and subject to critique is the purpose of this section.

The idea that international courts can confine themselves to applying the law hinges on the notion that the law is made by someone else. In international law, the argument goes, the law is made in ways that are recognized by the doctrine of sources. Thinking of international lawmaking in terms of sources can be traced back to the heyday of classic liberalism in international law when domestic contractual theories were projected onto the international level.<sup>42</sup> As a bottom line, legitimacy rests on consent and each of the individual sources listed in Article 38 of the ICJ Statute pretends to be a manifestation of such consent by the states.<sup>43</sup>

A quick run-through of Article 38 of the ICJ Statute shows that treaty law most straightforwardly credits state consent.<sup>44</sup> The source of international custom gives rise to more protracted difficulties, but the understanding here also prevails that the formation of customary international law holds state practice and *opinio juris* to be decisive precisely because they are manifestations of state consent.<sup>45</sup> A look at

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41. On such an understanding of myths and their production in societal processes, see generally ROLAND BARTHES, *MYTHOLOGIES* (1972).

42. See Gerry Simpson, *Imagined Consent: Democratic Liberalism in International Legal Theory*, 15 *AUSTL. Y.B. OF INT'L L.* 103, 103 (1994); JULIUS GOEBEL, *THE EQUALITY OF STATES: A STUDY IN THE HISTORY OF LAW* 34 (1925). Cf. Paul Guggenheim, *Contribution à l'histoire des sources du droit des gens*, 4 *RECUEIL DES COURS* 5, 20–35 (1958) (arguing that the need for a sophisticated positive doctrine of sources increased while natural law thinking receded into the background).

43. Statute of the International Court of Justice art. 38, June 24, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. See also GODEFRIDUS J.J. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 76–82 (1983).

44. See Karin Oellers-Frahm, *The Evolving Role of Treaties in International Law*, in *PROGRESS IN INTERNATIONAL LAW* 173, 176–79 (Russell A. Miller & Rebecca Bratspies eds., 2008); see also ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 16–32, 94–121 (2d ed. 2007). This proposition holds even if there are by now many odd cases and noteworthy tendencies to curtail the consent requirement in amendment procedures. For instance, see JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 15–36 (1996); *DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING* (Rüdiger Wolfrum & Volker Röben eds., 2005); Malagosa A. Fitzmaurice, *Modifications to the Principle of Consent in Relation to Certain Treaty Obligations*, 2 *AUSTRIAN REV. INT'L & EUR. L.* 275, 280–82 (1997) (detailing the aspects of consent within environmental treaty regimes).

45. Tullio Treves, *Customary International Law*, *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (Rüdiger Wolfrum ed. 2006); Alain Pellet, *Article 38*, in *STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 677, 749–59 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds., 2006) (explaining in detail the definition of custom in international law); Peter Hagenmacher, *La doctrine des deux éléments du droit coutumier dans la pratique de la cour internationale*, 90 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 5, 6–7 (1986). On the quaint understanding of customary law as a form

the use of general principles, however, may turn out to be most dizzying.<sup>46</sup> Oftentimes, general principles are closely intertwined with such notions as equity that are usually not themselves taken as sources of the law, but as guiding yardsticks on the level of interpretation, or as rescue kits when gaps in the law need to be filled.<sup>47</sup> Jurisprudence has been both unproductive and ambiguous in this regard.<sup>48</sup> The ICJ once famously spoke of “general and well-recognized principles [such as] elementary considerations of humanity.”<sup>49</sup> But on a later occasion the ICJ reasserted its decidedly legalistic ethos arguing that

[i]t is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form . . . . Humanitarian considerations may constitute the inspirational basis for rules of law . . . . Such considerations do not, however, in themselves amount to rules of law.<sup>50</sup>

There is abundant treatment of the details of each source, its elements, and its problems.<sup>51</sup> It is also true that there is considerable flux and significant developments in the understanding of sources.<sup>52</sup> The

of tacit agreement, see Maurice Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 264 (1998).

46. Martti Koskenniemi, *General Principles: Reflexions on Constructivist Thinking in International Law*, 18 Oikeustiede-Jurisprudentia [Yearbook of the Finnish Law Society] 120, 125 (1985). Cf. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT’L L. 82, 99–100 (1988) (arguing that more lenient approaches to the formation of customary law are better treated in terms of general principles).

47. ULRICH FASTENRATH, LÜCKEN IM VÖLKERRECHT: ZU RECHTSCHARAKTER, QUELLEN, SYSTEMZUSAMMENHANG, METHODENLEHRE UND FUNKTIONEN DES VOLKERRECHTS 127–34 (1991); Michael Akehurst, *Equity and General Principles of Law*, 25 INT’L & COMP. L.Q. 801, 801 (1976).

48. The field of international criminal law might count as an exception. See Fabián O. Raimondo, *General Principles of Law, Judicial Creativity and the Development of International Criminal Law*, in JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 45, 46 (Shane Darcy & Joseph Powderly eds., 2010).

49. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 22 (Apr. 9). Cf. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), (Judgment) 1986, I.C.J. 14, ¶ 218 (June 27) (speaking of “fundamental principles of humanitarian law” and referring to its dictum in Corfu Channel). See also Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 183 (Dec. 10, 1998).

50. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, Judgment, 1966, I.C.J. 6, ¶ 49 (July 18).

51. See, e.g., Abi-Saab, *supra* note 6, at 19, 25–26; Pellet, *supra* note 45, at 749–59; VAN HOOF, *supra* note 43, at 76–81; MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 360–65 (2005).

52. See Abi-Saab, *supra* note 6, at 19, 25–26; Pellet, *supra* note 45, at 749–59, 783–84; VAN HOOF, *supra* note 43, at 76–81; KOSKENNIEMI, *supra* note 51, at 360–65.

main contention here is that the concept of source will continue to sustain the idea that acts and instruments that come under its heading fill out all the space where the law is made. In this vein, Article 38(1)(d) of the ICJ Statute speaks of “judicial decisions and the teachings of the most highly qualified publicists” as “subsidiary means for the determination of rules of law.”<sup>53</sup> It thus gives them a standing similar to factors influencing the meaning of a legal norm. Judicial decisions are not themselves considered sources, but means for identifying legal norms—a source for recognizing the law (*Rechtserkenntnisquelle*) but not a source of law (*Rechtsquelle*).<sup>54</sup> It may well be suggested that this distinction should be played down.<sup>55</sup> In particular, the mighty spell of precedents in legal discourse indicates that it is at least partially out of sync with legal practice, which is the ultimate arbiter about what counts as a source of law and what does not.<sup>56</sup>

The main issue to address here lies in the very concept of source and its impact on our imagination. Sources picture lawmaking as a one-time act—ideally captured in the journalist’s snapshot of state representatives signing an international treaty in festive environments.<sup>57</sup> Legal doctrine seems to have been caught in this image very much in the way Ludwig Wittgenstein described: “A *picture* held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably.”<sup>58</sup> Similarly, the metaphor of sources has helped to sustain an understanding of lawmaking that is held prisoner in its confines, systematically pointing to a narrow segment of reality while eclipsing the rest.<sup>59</sup> This metaphor suggests that legal norms spring from dark and hidden places into daylight and it overshadows incremental lawmaking in processes of interpretation where actors argue about what the law really means.

53. United Nations, *Statute of the International Court of Justice*, art. 38, Apr. 18, 1946.

54. Pellet, *supra* note 45, at 783–84.

55. Abi-Saab, *supra* note 6, at 26.

56. H.L.A. HART, *THE CONCEPT OF LAW* 100–10, 120–28, 130 (1997). *See also infra* Part IV.A on the spell of precedents.

57. *See* the photograph of Anwar al-Sadat, Jimmy Carter and Menachem Begin at the signing of the Egyptian-Israeli peace treaty in 1979 that adorns the cover of AUST, *supra* note 44.

58. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 115 (1958).

59. On metaphor and perception, see Philipp Sarasin, *Diskurstheorie und Geschichtswissenschaft*, in *HANDBUCH SOZIALWISSENSCHAFTLICHE DISKURSANALYSE* 53, 68–69 (Reiner Keller et al. eds., 2006); Marga Reiner & Elisabeth Camp, *Metaphor*, in *OXFORD HANDBOOK OF PHILOSOPHY OF LANGUAGE* 845, 845 (Ernest Lepore & Barry C. Smith eds., 2006).

### C. *The Semantics of Interpretation*

The second myth partially responsible for misdirecting our thinking about the practice of international courts is that interpretation uncovers the law already out there, hidden in or behind the rules to be applied.<sup>60</sup> There is a difficulty here that stems from the fact that views on interpretation tend very much to be shaped by asking how interpreters should interpret and by amassing accounts of what interpreters themselves say about their acts of interpretation. The rules of interpretation then say what interpretation is. With regard to treaties, these rules are spelled out in Article 31 in paragraph 1 of the Vienna Convention on the Law of Treaties (VCLT), providing 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.”<sup>61</sup> The nuanced debates by the International Law Commission (ILC) on this article remain tremendously intriguing regarding the differing views on the definition of interpretation.<sup>62</sup>

According to Sir Humphrey Waldock, one of the ILC’s special rapporteurs on this topic, any interpreter should quite naturally first look at a treaty’s wording.<sup>63</sup> The text of a treaty “must be presumed to be the authentic expression of the intentions of the parties.”<sup>64</sup> An interpreter should turn to the text as a proxy for finding that to which the parties have consented. In its early years, the ICJ has held that “the first duty of a tribunal which is called upon to interpret and apply provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur.”<sup>65</sup> The ICJ has on occasion reasserted that “[i]nterpretation must be based above all upon the text of

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60. Cf. Andrea Bianchi, *Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning*, in *MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY* 34, 48–49 (Pieter H.F. Bekker et al. eds., 2010).

61. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

62. See Bianchi, *supra* note 60, at 36; see generally VENZKE, *HOW INTERPRETATION MAKES INTERNATIONAL LAW*, *supra* note 15 (reading the debates at the ILC through the lens of a quest for certainty).

63. Special Rapporteur on the Law of Treaties, *Third Report on the Law of Treaties*, at 56, Int’l L. Comm’n, U.N. DOC. A/CN.4/167 (July 7, 1964) (by Sir Humphrey Waldock).

64. *Id.*

65. Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, at 8 (Mar. 3).

the treaty.”<sup>66</sup> The AB also found that Article 31 of the VCLT “provides that the words of the treaty form the foundation for the interpretive process.”<sup>67</sup> The words should provide stable ground for international adjudication. Legal doctrine and scholarship continue to uphold the assumption that the text itself could distinguish permissible from impermissible interpretations, firmly assigning interpretation its place within the confines of what is permissible by the text of the norm.<sup>68</sup>

But what happens when the meaning of the text is contested? The work of international courts usually sets in precisely when disputing parties make diverging claims about what the law means.<sup>69</sup> On a preliminary note, it may help to clarify that sometimes a case may of course, above all, revolve around questions of fact. The decisive issue may thus be finding out what really happened.<sup>70</sup> This may then involve little disagreement about law. But, as soon as the question is raised as to whether certain facts can really come within the ambit of a provision—whether, for example, something really amounted to an armed attack under Article 51 of the United Nations Charter—then this question becomes one of competing claims about what such a provision really means. The wording itself can then in all probability not provide a convincing answer to the dispute. It provides the battleground for semantic struggles but it does not provide the answer for their resolution.<sup>71</sup>

The task of interpretation would then be to carve out the real meaning of the text—its true sense, as it were. Article 31 of the VCLT thus continues that the ordinary meaning should be given to the terms of

66. Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, ¶ 41 (Apr. 3); Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 1995 I.C.J. 6, ¶ 33 (Feb. 15).

67. Alcoholic Beverages Appellate Body Report, *supra* note 3, at 11. The Appellate Body continued to cite the ICJ with the proposition that “interpretation must be based above all upon the text of the treaty.” Territorial Dispute, 1994 I.C.J. 6, ¶ 41.

68. See, in an exemplary fashion, RICHARD K. GARDINER, TREATY INTERPRETATION 87 (2008). In closer detail, see ROBERT KOLB, INTERPRÉTATION ET CRÉATION DU DROIT INTERNATIONAL: ESQUISSE D’UNE HERMÉNEUTIQUE JURIDIQUE MODERNE POUR LE DROIT INTERNATIONAL PUBLIC 412–13 (2006) (setting out to develop a fresh look at doctrine by drawing on studies in hermeneutics and arguing that interpreters must not fill the text with anything that it does not already contain).

69. Bourdieu, *supra* note 34, at 818.

70. It is another question whether international courts are really well-equipped or even willing to whole-heartedly engage in this task.

71. Ralph Christensen & Michael Sokolowski, *Recht als Einsatz im semantischen Kampf*, in SEMANTISCHE KÄMPFE: MACHT UND SPRACHE IN DEN WISSENSCHAFTEN 353, 353 (Ekkehard Felder ed., 2006). *Cf.* Bourdieu, *supra* note 34, at 818 (suggesting that “control of the legal text is the prize to be won in interpretative struggles”).

a treaty “in their context and in the light of its object and purpose.”<sup>72</sup> Not the naked word itself, but its meaning in the totality of its context would then provide certainty about how a treaty needs to be interpreted.<sup>73</sup> Interpretation would then be about finding real meaning in a holistic view of the words to be interpreted by looking at their proximity in the text and at what the words aspire to do.

Some protagonists in the ILC pointed out that this method of finding out the real meaning of the text would ultimately be futile because it would actually introduce more uncertain elements into the process of interpretation. Rather than look at interpretation, these protagonists prefer to look to the force that makes the treaty—the will behind the text. Hersch Lauterpacht, for example, vehemently argued that looking at the text without determining the will of the parties would be as bad as engaging in a kind of *Begriffsjurisprudenz* of the worst kind.<sup>74</sup> He continued to argue that something so mysterious as an ordinary meaning should most certainly not be decisive.<sup>75</sup> Importance should rather be placed on the *travaux préparatoires* as a fundamental, possibly the most important, element in treaty interpretation. Isolating the text from the intentions of its drafters is simply not permitted in his view.<sup>76</sup> On this account, interpretation would be about finding the will of the parties as a yardstick for determining what the law really means.<sup>77</sup>

There are a number of evident problems with reaching through the text and analyzing the force behind it. On the fragile assumption that the drafting process was neatly documented and readily available, even in good faith, it is frequently impossible to find a uniform intention of the drafters.<sup>78</sup> Anything found in the negotiating records would also be in need of interpretation and resorting to the force behind the treaty, with all the methodological challenges this would involve, might ultimately render the law to be rather outdated.

It is neither necessary nor possible to resolve these difficulties here. Canvassing the different views on how to interpret in a

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72. Vienna Convention on the Law of Treaties, *supra* note 61, art. 31(1).

73. *Id.*

74. Hersch Lauterpacht, *De l'interprétation des traités: Rapport*, 43 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 366, 389, 397 (1950).

75. *Id.* at 380.

76. *Id.* at 389. Cf. Jan Klabbers, *International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?*, 50 NETH. INT'L L. REV. 267, 277 (2003).

77. Klabbers, *supra* note 76, at 278.

78. Philip Allott, *The Concept of International Law*, 10 EUR. J. INT'L L. 31, 43 (1999). (drastically suggesting that “[a] treaty is a disagreement reduced to writing”).

rudimentary fashion rather serves the purpose of highlighting what interpretation is thought to be about: finding a treaty's meaning in whatever way it might be done best, by looking closely at the words themselves, their context, or the force behind them. Views on this matter differ among individuals and institutions, shaped by a number of factors including education, institutional culture, and general outlooks on the legitimacy basis or nature of international law.<sup>79</sup> With regard to the last factor, it is interesting to see that over the past decades there may have been a subtle shift in understandings of interpretation that tends to detract from strong emphases on the will of parties.<sup>80</sup> Interpretative practice, in some fields like human rights protection and international criminal law in particular, increasingly invokes notions of fundamental values or community interests, possibly indicative of a deeper structural transformation of international society that influences understandings of interpretation.<sup>81</sup>

Interpretation may then not only be about finding what the parties wanted, but also what interests the community, what is required by human rights, or what is morally the best answer.<sup>82</sup> Any of these approaches tends to share the assumption—this merits emphasis—that interpreters find something that is already out there: the parties' will, the community's interest, human rights' imperatives, or morality's best answer. In case of dispute about what the law means, international courts seek stable ground to portray their practice as based on something that already exists. Turning this understanding on its head, any of these targets of adjudication, and of legal interpretation more generally, are the products of its own practice.

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79. See Jochen von Bernstorff & Ingo Venzke, *Ethos, Ethics and Morality in International Relations*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 4 (Rüdiger Wolfrum ed., 2010).

80. See, e.g., Klabbers, *supra* note 76, at 270–72 (detailing various methods for interpreting treaties).

81. Among the truly rich literature on such possible transformation, see Georges Abi-Saab, *Whither the International Community?*, 9 EUR. J. OF INT'L L. 248, 255 (1998); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 221, 233 (1994); ANDREAS L. PAULUS, *DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT: EINE UNTERSUCHUNG ZUR ENTWICKLUNG DES VÖLKERRECHTS IM ZEITALTER DER GLOBALISIERUNG* 97–115 (2001); Joseph H.H. Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 ZAÖRV 547, 552 (2004).

82. Cf. Ronald Dworkin, *Law as Interpretation*, 60 CRITICAL INQUIRY 179–200 (1982).

### III. THE JURISGENERATIVE PRACTICE OF ADJUDICATION

The concept of sources suggests that a rule is set in place at one point in time and then applied at a later stage.<sup>83</sup> The corollary understanding of interpretation suggests that it is concerned with uncovering the rule already set in place.<sup>84</sup> Both these elements build on the assumption that words come with a meaning that lies outside their use. Semantic pragmatism, however, teaches that it is not possible to find meaning anywhere else other than in the concrete use of words.<sup>85</sup> Law is made in its communicative practice (Part III.A). What does this mean for the international judicial function? It does not mean that judicial interpretation is unbound or subject to the pure volition of the interpreter. Adjudication rather unfolds against the stabilizing background of an interpretative community. But how exactly is it possible that adjudicators are constrained by the law that they themselves make (Part III.B)? This is also a formidable challenge for the idea of the rule of law that international courts are supposed to promote. Who rules, the law or the courts?

#### A. Lawmaking in Communicative Practice

Legal provisions cannot talk. Nor can human rights, the interests of the international community, or morality for that matter. These concepts are talked about and gain meaning through the practice of interpretation. In Ludwig Wittgenstein's succinct formulation that would trigger the linguistic turn, words do not have a meaning other than that given to them by their use.<sup>86</sup> Wittgenstein solemnly maintained that the best one can do is to observe and find rules that describe the use of a rule.<sup>87</sup> The meaning of such rule, however, would again only be given by its use, so

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83. Hugh Thirlway, *Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning*, 294 RECUEIL DES COURS 265, 320 (2002).

84. See Klabbers, *supra* note 76, at 270.

85. Wittgenstein, *supra* note 58, ¶43.

86. *Id.* Insightful and cunning on the notion of the linguistic turn, see Richard Rorty, *Wittgenstein, Heidegger, and the Reification of Language*, in 2 ESSAYS ON HEIDEGGER AND OTHERS 1, 50 (Richard Rorty ed., 1991).

87. Wittgenstein, *supra* note 58, ¶46.

that one is caught in an infinite regress.<sup>88</sup> Only practice can help. In his notes *On Certainty*, Wittgenstein writes pithily: “You must look at the practice of language, then you will see it.”<sup>89</sup> This idea holds true all the same for (international) law.

The field of adjudication suggests that interpretation in law is a statement of fact in the sense that it declares what the law is. Carrying on Wittgenstein’s legacy, John Langshaw Austin showed persuasively that “there can hardly be any longer a possibility of not seeing that stating is performing an act.”<sup>90</sup> To illustrate his argument, Austin coins the concept of performative speech, by which he refers to communicative utterances that change the world.<sup>91</sup> The worn example is the utterance of the words “I do,” which in the right context may create the bond of marriage. In a sly move, Austin tries to come up with distinctions that separate such creative *performative* speech acts from simple *constative* acts like “this is an apple.”<sup>92</sup> If an international court only engaged in constative acts of the kind “this is what the law is,” then it could withdraw from any charge of making the law in its practice. Austin suggests, however, that this is simply not possible.<sup>93</sup> He ultimately comes to the conclusion that every attempt at distinguishing performative from constative acts fails because it is impossible to withhold from interpreting even simple objects like apples, let alone complex ideas like the law.<sup>94</sup> Austin thus lets this distinction collapse, thereby adding on to the strand of thinking that follows from the linguistic turn and its proposition that communicative practice shapes meanings.<sup>95</sup>

Judicial interpretations that present themselves as declaring what the law really is contribute to its creation. Austin, a colleague of H.L.A. Hart at Oxford, wrote that “[o]f all people, jurists should be best aware

88. SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE 24 (1982). Kant’s work already offers an early account of infinite regress that concerns the application of general norms to concrete facts. See IMMANUEL KANT, CRITIQUE OF PURE REASON 132–33, 171–72, 177 (Norman Kemp Smith trans. 1929) (1781) (“If [general logic] sought to give general instructions how we are to subsume under these rules, that is, to distinguish whether something does or does not come under them, that could only be by means of another rule. This in turn, for the very reason that it is a rule, again demands guidance from judgment.”).

89. LUDWIG WITTGENSTEIN, ON CERTAINTY ¶ 501 (1969).

90. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS: THE WILLIAM JAMES LECTURES DELIVERED AT HARVARD UNIVERSITY IN 1955, 4, 139 (2d ed. 1976).

91. *Id.* at 138–39.

92. *Id.* at 140–41.

93. *Id.* at 141.

94. *Id.* at 142–43; FISH, *supra* note 11, at 488–91.

95. See AUSTIN, *supra* note 90, at 138–39.

of the true sense of affairs . . . [y]et they succumb to their own timorous fiction, that a statement of ‘the law’ is a statement of fact.”<sup>96</sup> Quite the contrary, a statement of the law forms part of lawmaking. This bears repeating: it is impossible not to interpret the law, and only in its practice does law come to life.<sup>97</sup> Practice itself has to bear the burden of completing the lawmaking process in concrete instances by interpreting the relevant facts and legal materials. The law is not fixed in and at its source; rather, it gains meaning and shape in its interpretation.

Only occasionally does this thought still raise eyebrows. Hans Kelsen already formulated a similar argument almost a century ago when he forcefully critiqued orthodox judicial methodology for wanting to make believe that the act of interpretation is nothing but an act of understanding and clarification, whereas it really depends on a choice, an act of will.<sup>98</sup> Kelsen maintained that acts of law-application are also acts of law-creation and argued that in the individually disputed case the law cannot be *discovered* but only *created*.<sup>99</sup> His critique of methodological orthodoxy led him in his late writings so far as to conclude that there is “no imperative without an imperator.”<sup>100</sup> Kelsen had in effect pulled the rug from under traditional ideas of legal subsumption. However, the dynamism he introduced into legal practice seems to have stopped short of extending its considerations to the underlying rule that is being applied. While on his account judicial decisions do create norms in concrete cases, decisions appear to leave the general and abstract underlying provisions on which they are based untouched.

Other scholars have since gone further, but have encountered other limitations. The architects of the New Haven School were, for example, most outspoken about their disdain for thinking in terms of formal sources. Myres McDougal found that international law should be “regarded not as mere rules but as a whole *process* of authoritative

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96. *Id.* at 4.

97. Cf. NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 256 (1993) (“Alles schriftlich fixierte Recht ist mithin zu interpretierendes Recht. . . . Jeder aktuell geltende Text setzt sich der Interpretation aus, ja ist Text nur im Kontext von Interpretation.”); Dworkin, *supra* note 82, at 179–200 (reaching the same conclusion from a different theoretical angle).

98. HANS KELSEN, REINE RECHTSLEHRE 95 (1934). On this point Kelsen draws heavily on Adolf Merkel, *Das doppelte Rechtsantlitz*, 47 JURISTISCHE BLÄTTER 425 (1918).

99. *Id.* at 95.

100. HANS KELSEN, GENERAL THEORY OF NORMS 29 (Michael Hartley trans. 1991).

decisions in the world arena.”<sup>101</sup> Michael Reisman argued in his article, *International Lawmaking: A Process of Communication*, that scholarly teachings and judgments had developed a myth—the myth that international law could be found by looking at what Article 38 of the ICJ Statute claims to be the sources of all law.<sup>102</sup> He maintains that international law rather emerges from the myriad of legal communications that a plethora of actors utter every day.<sup>103</sup> The main problem with this theoretical strand is that it follows a purely instrumental understanding of international law that places legal interpretation in the service of given substantive goals. Legal practice has nothing distinct from politics.<sup>104</sup>

More recent voices from New Haven have also developed the theory of transnational legal processes that suggests analyzing the dynamic and jurisgenerative interactions among a multitude of actors rather than the formal sources of the law.<sup>105</sup> However, this theory remains oddly torn between an endeavor to explain compliance with a given norm through transnational legal processes, on the one hand, and the development of norms, on the other.<sup>106</sup> The emphasis is, after all, on the former element while the latter remains oblique.<sup>107</sup>

A quite similar picture of lawmaking in communicative processes emerges in the theoretical framework of systems theory. Systems theory pictures law as a system within society constituted by communications that operate with reference to the binary code of legal versus illegal.<sup>108</sup> Interestingly, understanding law as a system of legal communications replaces answers to the question of legal validity that look at a norm’s

101. MYRES S. MCDUGAL, *STUDIES IN WORLD PUBLIC ORDER* 169, 170 (1960). See also Rosalyn Higgins, *Policy Consideration and the International Judicial Process*, 17 *INT’L & COMP. L.Q.* 58, 58 (1968).

102. W. Michael Reisman, *International Lawmaking: A Process of Communication. The Harold D. Lasswell Memorial Lecture*, 75 *AM. SOC’Y INT’L L. PROC.* 101, 107 (1981).

103. *Id.*

104. This comes out most clearly in Myres S. McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 *RECUEIL DES COURS* 137, 157 (1954).

105. Hongju Harold Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996). It borrows the concept of “jurisgenesis” from Robert Cover, *Nomos and Narrative*, 97 *HARV. L. REV.* 4, 194 (1983). Cf. Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 *YALE J. INT’L L.* 301, 301–305 (2007) (developing the idea of jurisgenerative practices but relating his argument to ideas of global legal pluralism, thus focusing on the generation of new norms in societal processes).

106. Hongju Harold Koh, *Bringing International Law Home*, 35 *HOUS. L. REV.* 623, 626–27 (1998).

107. *Id.* at 653–55.

108. LUHMANN, *supra* note 97, at 61.

formal pedigree with the test of practice. Only communicative operations can tell what the law is.<sup>109</sup> Views from New Haven neglect the intrinsic logic of legal practice by subjecting interpretation in law to the logics of the political, economic, or cultural system. Conversely, systems theory recognizes legal practice as a distinct enterprise, but loses any adequate grasp on the actual interpretative acts performed by living human beings.

The concept of *practice* can transcend this divide. While practice has long been predominantly coined in strong structuralist (and mainly Marxist) traditions, it has come to be increasingly used in a way that includes elements of agency. Maurice Merleau-Ponty has brought life into the concept of practice, describing practice as historically-situated speaking, thinking, and acting.<sup>110</sup> Pierre Bourdieu also picked up the concept and developed his sociology with the notion of a praxeological epistemology, seeking to overcome the divide between approaches centered on structures and those focused on actors.<sup>111</sup> In the jurisgenerative practice of interpretation, international courts are alive as actors, not unbound, but constrained in their behavior.

### *B. Objectivism, Subjectivism, and the Normative Force of Practice*

The suggestion that international courts make law in the practice of adjudication challenges the idea of the rule of law and questions the concept of law even more fundamentally. In H.L.A. Hart's words, "[l]egal theory has in this matter a curious history; for it is apt either to ignore or to exaggerate the indeterminacies of legal rules."<sup>112</sup> In order to avoid yet another twist to this curious history, the concept of practice mediates between unconstrained agency and determinative structures that leave no room for the choice of actors.<sup>113</sup> But how does it do so? Hart writes that it is necessary to distinguish a core of settled meanings from disputed meanings,<sup>114</sup> which may offer stability. It seems,

109. *Id.* at 110 ("Der einzige Geltungstest liegt deshalb im Gelingen einer laufenden Änderung des Geltungszustandes des Systems, im laufenden Anschluß von Operation an Operation, in der Autopoiesis des Systems."). Cf. HART, *supra* note 56, at 123–28.

110. See generally MAURICE MERLEAU-PONTY, *ADVENTURES OF THE DIALECTIC* (1973) (contending that thought and politics are situated in intersubjectively instituted practice).

111. See generally PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (Richard Nice trans., 1977) (arguing that theories that treat practice as a mechanical reaction should be rejected, but the intention and significance of works can still be more than the conscious intentions of their authors).

112. HART, *supra* note 56, at 130.

113. See *id.* at 129.

114. *Id.* at 120–28.

however, that stable meaning is the result of the absence of dispute. While there is at times some plausibility to the recurrent argument that there is no dispute because the norm is clear, the line of reasoning should more often than not be turned into its exact opposite. Most of the time norms are clear because there is no dispute. When it comes to international adjudication, the norm is at least unclear enough that each side can make an arguable claim for its position.

Judicial decisions then involve a choice between at least two alternatives. The concept of decision itself already defies the idea that a clear norm could be found.<sup>115</sup> The suggestion that words do not have a meaning other than that contributed to them by their use further adds to the challenge. How is it possible to understand the practice of adjudication as an activity that oscillates between the snares of objectivism (the plain meaning of the text) and pure subjectivism (subjecting the text to the pure volition of the reader)? In other words, how is it possible that the law can constrain the interpreter if only the practice of interpretation makes the law?

First of all, interpretation in law is limited by the fact that it needs to be accepted as a *legal* interpretative claim. Rules of interpretation and standards upheld by the legal profession prescribe how participants in legal discourse have to craft their arguments.<sup>116</sup> Interpretation in law is a distinct enterprise whose particularity is upheld by a combination of moral choice, beliefs, ethos, and habit. It has also been suggested that interpreters need to convey their argument as based on the law as it stands if they want to succeed in a way that is marked precisely by the rules of interpretation.<sup>117</sup> Ultimately, however, the rules of interpretation are themselves nothing but rules and subject to the same fate of interpretation. This first attempt thus begs the question of how the practice of interpretation can be constrained by rules that are only the produce of that same practice.

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115. See Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 CARDOZO L. REV. 919, 961–67 (1990); LUHMANN, *supra* note 97, at 308; cf. Andreas Fischer-Lescano & Ralph Christensen, *Auctoritatis Interpositio. Die Dekonstruktion des Dezionismus durch die Systemtheorie*, 44 DER STAAT 213, 213–42 (2005).

116. See Friedrich V. Kratochwil, *How do Norms Matter?*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 35, 47 (Michael Byers ed., 2000); Abi-Saab, *supra* note 6, at 25; cf. Jean-François Lévesque, *Traité de verre: Réflexions sur l'interprétation*, 19 REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL 53, 53–64 (2006) (offering an illuminating reconstruction of the rules of interpretation in view of developments in the theory of language).

117. See *supra* Part II.A.

The more promising answer to this question can be found by considering that interpretations need to be accepted by interlocutors within an interpretative community.<sup>118</sup> Assessments of whether a decision of an international court was correct can only be part of the practice of interpretation itself. In order to succeed, an interpretation of a rule needs to connect to the past in a way that shapes future applications.<sup>119</sup> To illustrate this point, Robert Brandom, spear-heading the discussion of these questions in the philosophy of language, resorts to a case law model of communication in which “[t]he current judge is held accountable to the tradition she inherits by the judges yet to come.”<sup>120</sup> Present international courts are constrained by considerations of how their interpretations will be received. Notably, this constraint will depend on how the courts connect to the past.<sup>121</sup> In this sense, the role of international courts in the development of the law is interstitial; it stands between the past and the future.<sup>122</sup> The law gains shape and develops in this interpretation in which actors demand and give reasons for or against a particular interpretation of a provision. Practice itself generates and upholds the law—it contains the yardstick of what should legally be and how a provision should be interpreted.

Brandom further draws attention to the fact that the authority of speakers matters in this practice.<sup>123</sup> An interpreter who has interpreted correctly in the past has a certain credit.<sup>124</sup> Further considerations of social legitimacy may also come into play. Notably then, international courts are recognized in the international legal system, almost by

118. See FISH, *supra* note 11, at 141–60 (on the concept of interpretative communities).

119. Robert Brandom, *Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms*, 7 EUR. J. PHIL. 164, 181 (1999).

120. *Id.* For a concise introduction and summary, see JASPER LIPTOW, REGEL UND INTERPRETATION. EINE UNTERSUCHUNG ZUR SOZIALEN STRUKTUR SPRACHLICHER PRAXIS 220–26 (2004). See also Markus Winkler, *Die normative Kraft des Praktischen*, 64 JURISTENZEITUNG 821–29 (2009).

121. Brandom, *supra* note 120, at 181 (summarizing his thought when he writes that “[t]he current judge is held accountable to the tradition she inherits by the judges yet to come”). See also Ralph Christensen, *Neo-Pragmatismus: Brandom*, in NEUE THEORIEN DES RECHTS 239 (Sonja Buckel, Ralph Christensen & Andreas Fischer-Lescano eds., 2009).

122. See the famous words of Judge Oliver Wendell Holmes in his dissent in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (“I recognize without hesitation that judges do and must legislate, but they can do so only interstitially . . .”).

123. See Brandom, *supra* note 119, at 180.

124. See ROBERT BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT xiv (1998) (explaining that successful interpretations in the past show on an actor’s “deontic scorekeeping account,” granting credit, so to speak, in semantic disputes).

default, as ultimate arbiters of what the law really means.<sup>125</sup> What matters in the development of international law by way of interpretation is the *semantic authority* of particular actors, above all international courts.<sup>126</sup> The notion of semantic authority refers to an actor's capacity to influence and shape meanings, as well as the ability to establish their communications as authoritative reference points in legal discourse. In fact, the interpretations of international courts usually carry weight in the communicative practice of international law and therefore have also significant potential to bear heavily on its development.

#### IV. THE SEMANTIC AUTHORITY OF INTERNATIONAL COURTS

Part IV.A elucidates the spell of precedents in judicial practice as one of the main factors sustaining international courts' semantic authority, transcending any distinction between their roles as developers or interpreters of the law. Part IV.B then turns to the normative implications that follow from international courts' authority in the making of the law.

##### *A. The Spell of Precedents*

International courts enjoy an outstanding position in semantic struggles about the meaning of law.<sup>127</sup> With concrete case decisions and reasoning that supports their findings, international courts exercise a great deal of authority over the legal discourse. Quite a few judgments even appear to be geared towards providing authoritative reference points for future discourse, making general and abstract formulations that may not even be compelled by the case.<sup>128</sup> A combination of sociological predispositions, as well as the law itself, sustains courts' semantic authority. In case of dispute, the law points to them for resolution. In Bourdieu's words,

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125. Such recognition is nothing natural or necessary and it may indeed shift. The histories of many legal systems show this.

126. VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW, *supra* note 15, at 57–64.

127. *Cf.* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (submitting generally and too drastically that judges are murderers because they kill alternative meanings).

128. Stephan Schill, *System-Building in Investment Arbitration and Lawmaking*, 12 GERMAN L.J. 1083 (2011) (discussing authority exercised by investment treaty tribunals); *see* Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, 12 GERMAN L.J. 1111 (2011) (discussing authority exercised by adjudicating bodies in trade law).

[t]he judgment represents the quintessential form of authorized, public, official speech . . . magical acts which succeed because they have the power to make themselves universally recognized. They thus succeed in creating a situation in which no one can refuse or ignore the point of view, the vision, which they impose.<sup>129</sup>

If one considers the mighty spell of precedents in the practice of international law, then success of international decisions appears less magical but more in line with participants' normative expectations.<sup>130</sup> International courts enjoy semantic authority above all because of the working of precedents.

International legal doctrine strikes a different tone. It is trite and commonplace that international law knows no *stare decisis* rule, that judgments are binding only *inter partes*,<sup>131</sup> and that Article 38(1)(d) of the ICJ Statute mentions judicial decisions only as subsidiary means of interpretation, as a *Rechtserkenntnisquelle* (source for recognizing the law) and not a *Rechtsquelle* (a source of law).<sup>132</sup> While it is not bare of all merit, this distinction in doctrine does overshadow the actual working of precedents. Judges frequently relate their argument to earlier decisions, thus boosting the authority of past, present, and future decisions. This practice responds to international courts' aspiration to portray their practice as objective and rule-bound and it responds to all actors' expectations. Notably, such expectations persist regardless of whether participants have stronger civil- or common-law backgrounds.

In many judgments, precedent amounts to influential arguments, and actors in legal interpretation fight about the meaning of previous decisions just like they do about the meaning of instruments that come under the heading of sources. In most practical circumstances, interpreters cannot escape the discussion of case law. Judicial decisions significantly redistribute argumentative burdens and courts are expected to decide consistently or, if they deviate from precious jurisprudence, to give reasons why they do so.<sup>133</sup> There is both a force as a matter of fact,

129. Bourdieu, *supra* note 35, at 838.

130. See Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, 12 GERMAN L.J. 1005, 1015 (2011) (further making the salient point that, while the working of precedents accounts in large part for the authority of international courts, they also constrain the later interpretative practice, including that of the courts themselves).

131. Rudolf Bernhardt, *Article 59*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, A COMMENTARY 1231, 1232 (Andreas Zimmermann et al. eds., 2006).

132. See Pellet, *supra* note 45, at 677.

133. Abi-Saab, *supra* note 6, at 19, 25; ALAN E. BOYLE & CHRISTINE M. CHINKIN, THE MAKING OF INTERNATIONAL LAW 267 (2007).

as well as an attitude that interpretation should relate to relevant earlier decisions.

For a long time, courts have continuously stressed the significance of precedents and have contributed to their power. In its *Mavrommatis* case, the Permanent Court of International Justice (PCIJ) found that it had “no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound.”<sup>134</sup> In his thorough analysis of the PCIJ, Ole Spiermann shows that the court portrayed an increasing inclination to actively engage in international lawmaking, and that the working of precedent was crucial in this endeavor.<sup>135</sup> In 1958, Hersch Lauterpacht also found that “the practice of referring to its previous decisions has become one of the most conspicuous features of the Judgments and Opinions of the Court.”<sup>136</sup> Certainly, the use and influence of precedents is not a new phenomenon, but it has lately gained increasing magnitude, together with the establishment of new institutions and increasing frequency of international adjudication.<sup>137</sup>

Adjudication in the WTO context offers persuasive examples. In one of its first cases, *Japan – Alcoholic Beverages II*, the AB relied on Article 3.2 of the DSU, which provides that “[t]he dispute settlement of the WTO is a central element in providing security and predictability to the multilateral trading system,” to argue that its reports “create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.”<sup>138</sup> In a renewed appeal on the issue of zeroing, a measure to calculate anti-dumping duties, the AB recalled that WTO Members have repeatedly stressed “the importance of consistency and stability” in interpretation.<sup>139</sup> The AB then continued to emphasize that its findings

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134. Readaptation of the *Mavrommatic Jerusalem Concessions*, Jurisdictions, 1927 P.C.I.J. (ser. A) No. 11, at 18 (Oct. 10); cf. MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 16–29 (1996); Jacob, *supra* note 130, at 1015.

135. OLE SPIERMANN, INTERNATIONAL LEGAL ARGUMENT IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE: THE RISE OF THE INTERNATIONAL JUDICIARY 394 (2005).

136. LAUTERPACHT, DEVELOPMENT, *supra* note 4, at 9.

137. Cf. Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L 73 (2009); Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification*, in 23 EUR. J. INT'L L. 1, 7 (2012) [hereinafter Bogdandy & Venzke, *In Whose Name?*].

138. *Alcoholic Beverages Appellate Body Report*, *supra* note 3, at 14; see also *Zeroing in Anti-Dumping Measures Involving Products from Korea*, ¶ 7.6, WT/DS402/R (Jan. 18, 2011).

139. *Appellate Body Report, United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 161, WT/DS344/AB/R (Apr. 30, 2008).

are clarifications of the law and, as such, are not limited to the specific case.<sup>140</sup> Finally, it attacked the Anti-Dumping Panel for failing to follow its earlier reports, stating: “We are deeply concerned about the Panel’s decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel’s approach has serious implications for the proper functioning of the WTO dispute settlement system . . .”<sup>141</sup>

The European Communities had joined the proceedings as a third party and attempted to push the argument even further, suggesting that the Panel would fail to conduct an “objective assessment” of the matter before it, in connection with its claim under Article 11 of the DSU, if it did not follow the AB’s precedent.<sup>142</sup> Although the AB itself did not go that far, it created a lingering threat by suggesting that disregard for its precedent might actually amount to a failure of exercising a proper judicial function.<sup>143</sup>

The weight that the AB explicitly attaches to its previous reports almost makes a mockery out of the view that reports have no legal effects beyond the parties to the dispute. Relevant actors have come to recognize the systemic impact of adjudication onto trade law in general. In the discussion of one of the first AB reports in the DSB, the Brazilian representative stated:

It was well-known that in practice any decision of a panel or the Appellate Body with regard to a specific case would go beyond such a specific case. Although no binding precedents had been created, the findings and conclusions of panels and the Appellate Body adopted by the DSB had created expectations concerning future interpretations of the DSU and the WTO Agreement. Therefore, in light of these systemic implications of decisions and recommendations pertaining to a specific case, Brazil wished to state its position with regard to certain findings of the Appellate Body.<sup>144</sup>

The powerful working of precedent fuelling international courts’ semantic authority in legal discourse is particularly strong in the WTO,

140. *Id.*

141. *Id.* ¶ 162. See also Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, ¶¶ 362–65, WT/DS350/AB/R (Feb. 4, 2009) [hereinafter *Zeroing Methodology Appellate Body Report*].

142. Anti-Dumping Appellate Body Report, *supra* note 139, ¶ 51.

143. *Id.* ¶ 161. See also *Zeroing Methodology Appellate Body Report*, *supra* note 141, ¶ 362.

144. *Minutes of Meeting*, Dispute Settlement Body, WT/DSB/M/50 (Nov. 6, 1998), <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DSB/M50.doc> (the meeting concerned the adoption of the Appellate Body Report in *US – Shrimp*).

not least due to the dynamics associated with a system of appellate review.<sup>145</sup> However, this authority is not a phenomenon of such a context alone. The field of international investment arbitration could comparatively be a hard case because of its decentralized and slightly disparate institutional and legal structure. It is true that investment tribunals have largely played it safe, suggesting that they can find “inspiration” in earlier decisions of other courts and tribunals.<sup>146</sup> Yet the authority of precedent is remarkable when it is used as shorthand for what the law is. References to earlier decisions have in fact been used as substitutes for a tribunal’s own reasoning.<sup>147</sup> It is also noteworthy that the tribunal in *Saipem v. Bangladesh* recognized that it might not only seek inspiration from earlier decisions as it pleases, but that it must pay due consideration to earlier decisions of international tribunals.<sup>148</sup> The tribunal believed that, subject to compelling contrary grounds, it had a duty to adopt solutions established in a series of consistent cases.<sup>149</sup> It also believed that, subject to the specifics of a given treaty and of the circumstances of the actual case, it had a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.<sup>150</sup>

This seems all the more true and pertinent when, as the Tribunal in *El Paso Energy International Company v. The Argentine Republic* put

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145. Cf. *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, ¶¶ 92–115 (Mar. 24, 2000); *Prosecutor v. Kuprekcic*, Case No. IT-95-16-T, Judgment, ¶ 540 (Jan. 14, 2000) (showing this is similar in the institutional setting of international criminal law, even if jurisprudence is slightly less clear in this regard).

146. See, e.g., *AES Corp. v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶¶ 31–32 (Apr. 26, 2005), 12 ICSID Rep. 308 (2005); *Romak S.A. v. Uzbekistan*, UNCITRAL, Case No. AA280, Award, ¶ 170 (Nov. 26, 2009) (Perm. Ct. Arb. 2009); *Chevron Corp. v. Ecuador*, PCA Case No. 34877, Partial Award on the Merits, ¶ 164 (Mar. 30, 2010); *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, ¶ 391 (July 14, 2006).

147. Schill, *supra* note 128, at 131 n.88.

148. *Saipem S.P.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Provisional Measures, ¶ 67 (Mar. 21, 2007).

149. *Id.*

150. *Id.* See also Schill, *supra* note 128, at 1154–55 (pointing out the virtually identical reiterations of this statement in *Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 189 (July 30, 2010)); *Noble Energy, Inc. & Machalapower CIA. LTDA v. Ecuador & Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, ¶ 50 (Mar. 5, 2008); cf. Catherine Kessedjian, *To Give or Not to Give Precedential Value to Investment Arbitration Awards?*, in *THE FUTURE OF INVESTMENT ARBITRATION* 43, 43–44 (Catherine A. Rogers & Roger P. Alford eds., 2009) (arguing that the use of certain legal terms has blurred the field of investment law).

it, “parties, in their written pleadings and oral arguments, have heavily relied on precedent.”<sup>151</sup> Parties’ pleadings are usually not accessible, but it can safely be assumed that counsels usually unfold their argument with supporting precedent.

In the practice of adjudication, international courts exercise semantic authority and thereby contribute to the making of international law. One of the main mechanisms that fosters their position in the international legal discourse is the working of precedent that redistributes argumentative burdens, shapes the normative expectations of all actors involved, and thus serves as a vehicle that drives international courts’ role as interpreters and developers of the law, or, more clearly, as lawmakers. This understanding of their practice then places the emphasis on international courts’ exercise of authority and ultimately challenges prevailing narratives of legitimation. Which normative implications follow from international courts semantic authority?

### *B. Normative Implications*

The semantic authority that international courts exercise in the practice of adjudication challenges the narrative of legitimacy that is embedded in the traditional view, which sees international decisions as flowing from the consent of the subjects they address. International courts tend to keep with this script even at great stretch.<sup>152</sup> When this stretch becomes all too difficult, functional considerations frequently step in to help and to complement the justificatory basis of consent.<sup>153</sup> Viewed from this angle, international decisions are justified by way of functional accounts in the sense that adjudication is taken to promote values, goals or community interests, and above all, international peace.<sup>154</sup> The institutional design of some international judicial

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151. *El Paso Energy Int’l Co. v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 39 (Apr. 27, 2006), 21 ICSID Rev. 488 (2006).

152. *Cf.* *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, Judgment, ¶ 66 (July 13, 2009) (“where the parties have used generic terms in a treaty, [they] must be presumed, as a general rule, to have intended those terms to have an evolving meaning”); Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 396, WT/DS363/AB/R (Dec. 21, 2009).

153. Karin Oellers-Frahm, *Nowhere to Go? The Obligation to Settle Disputes Peacefully in the Absence of Compulsory Jurisdiction*, in *A WISER CENTURY?* 435, 439–40 (Thomas Giegerich ed., 2009).

154. *Id.* at 440.

institutions does, at least in part, support this view.<sup>155</sup> The international criminal tribunals and the International Criminal Court are, for example, supposed to also gain legitimacy by way of ending impunity for international crimes.<sup>156</sup> Such functional narratives appear to be a little weaker with regard to the WTO and arbitration in investment disputes, but it is also possible to find legitimation in these fields by means of the goals of increased economic welfare or economic development.<sup>157</sup>

There are a number of situations in which these sources of legitimacy might carry the justification of an international court's authority quite far. But in light of the growing autonomy of some courts, as well as in view of the breadth of controversial fields in which international courts are involved, there are now also many constellations in which neither the original consent nor the functional goal can any longer convincingly settle legitimacy concerns. International courts' function of successfully settling disputes in the service of peace certainly remains most relevant, not least for the promotion of democratic governance, which, after all, flourishes better in a peaceful world.<sup>158</sup>

And yet, like other justifications that hinge on the goals to be pursued, this theory misses large chunks of the scope of international judicial practice and ignores other principled considerations that speak against placing too much weight on functional legitimacy. "[A]s important as a certain goal may be, it cannot fully settle the justification of public authority. The aim cannot offer sufficient basis for concrete decisions that inevitably entail critical normative questions and redistributions of power. Moreover, functional arguments offer no

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155. See Romano, *supra* note 27, at 794–95.

156. Antonio Cassese, *The Rationale for International Criminal Justice*, in OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 127 (Antonio Cassese ed., 2009).

157. Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUM. J. TRANSNAT'L L. 221, 221 (2006); Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT 149 (2008); Thomas W. Wälde, *The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INV. & TRADE 185–86 (2005) (analyzing the relationship between economic growth and the honoring of contracts).

158. Apart from this, international courts can, for instance, foster democratization through a democracy oriented human rights jurisprudence. See *Matthews v. United Kingdom*, 28 Eur. Ct. H.R. 361, 361 (1999) (finding that absence of elections in Gibraltar to the European Parliament violated right to participate in elections). Cf. Georg Ress, *Das Europäische Parlament als Gesetzgeber: Der Blickpunkt der EMRK*, 2 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 219, 226 (1999); Jenny Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 461 (2003) (suggesting that this is the main function of international jurisdiction).

solution for the unavoidable competition between different goals.”<sup>159</sup> It may sometimes be true that international adjudication achieves what everyone wants and yet fails to deliver.<sup>160</sup> Yet even those may be lucky hits. History cautions that too much confidence should not be placed even on the benevolent and enlightened ruler, not even if they are judges.

Considerations of democratic legitimation remain the gold standard against which any kind of public authority ultimately needs to be assessed, including international public authority.<sup>161</sup> Under this basic premise it is possible to sketch a number of strategies that may help justify the authority international courts exercise by way of their legal interpretations. Such strategies first of all include elements of the procedural law of international judicial institutions, particularly rules pertaining to transparency, third-party participation, and the openness towards *amici curiae*.<sup>162</sup> Reconsidering mechanisms in the election of judges may also help. Developments geared towards improving the politico-legislative process, both within the particular regimes in which international courts are embedded, as well as within the international legal order more generally, may further respond to legitimacy concerns that spring from the authority that international courts exercise in the practice of adjudication. Such strategies harbor a legitimating potential that is slowly set free, even if their concrete effects need to be tested on an empirical basis and in view of a number of possible downsides and alternatives. Notably, quite a few suggestions are met halfway by recent trends in practice, driven above all by courts themselves. Trends towards greater transparency and improved avenues for participation, for example, are indicative of a deeper change in the thinking about judicial interpretation, which increasingly recognize and come to terms with the role of international courts in lawmaking.

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159. Bogdandy & Venzke, *Democratic Legitimation*, *supra* note 39, at 1342. On the concept of international public authority, see generally Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN L.J. 1375 (2008).

160. Robert Howse & Susan Esserman, *The Appellate Body, the WTO Dispute Settlement System and the Politics of Multilateralism*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* 61 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds., 2006) (convincingly pointing to a number of instances in which adjudication in the WTO overcame deadlocks in processes of political negotiation).

161. Bogdandy & Venzke, *In Whose Name?*, *supra* note 137, at 29.

162. Ingo Venzke, *Antinomies and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law*, in *INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS* (Rüdiger Wolfrum & Ina Gätzschmann eds., forthcoming).

## V. PROGNOSIS

Working out the jurisprudential practice of adjudication in international law and drawing attention to the role international courts play in semantic struggles about what the law means challenge orthodox narratives about the legitimation of their practice. There is much room for exploring the precise parameters of legitimation and the different strategies that may respond to this challenge. As part thereof, and going beyond such efforts, there are two concrete tasks that may be particularly salient. The first would be a plain sociological endeavor. If international courts are indeed significant actors who exercise public authority, then it would simply be helpful to know more about those actors, both as institutions and in their personal composition. Both professional as well as cultural preferences—elements that sustain a vision of the world and of (international) law more generally—are very powerful factors in processes of communicative lawmaking. Who are the rulers? While such studies are far advanced in many domestic legal systems, the international judge has more successfully escaped closer scrutiny, even if international legal scholarship is catching up.<sup>163</sup>

The second task would be more straightforwardly normative. It relates to political theory as well as an assignment for legal doctrine. Responses to problems regarding the justification of international courts' authority will ultimately have to extend to considerations regarding the allocation of authority in a multilevel system of governance.<sup>164</sup> In this context, it happens that actors on competing levels of governance can offer good reasons, also under basic premises of democratic legitimation, for why their claims to legality should prevail. The AB may, for example, give voice to an international bargain and find that the European import prohibition of hormone-treated beef is illegal under trade law. The European polity may still find that it really does not like hormone-treated beef and continue to live in breach of its international obligations while respecting the wishes of European

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163. See, e.g., DANIEL TERRIS, CESARE P.R. ROMANO & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INQUIRY INTO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* 15–48 (2007) (discussing international judges, including how they are selected); Ruth Mackenzie & Philippe Sands, *Judicial Selections For International Courts: Towards Common Principles and Practices*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 213, 214 (Kate Malleson & Petter Russel eds., 2006).

164. Bogdandy & Venzke, *Democratic Legitimation*, *supra* note 39, 1368–69; NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* 13, 273–75 (2010) (“legitimacy questions have to be framed for the entirety of the order, not just for one (domestic or international) part of it”).

citizens. There is competition between levels of governance and between legal orders. No single actor has the ultimate say on how to treat the issue.<sup>165</sup> Also, in terms of political theory, it is difficult if not impossible to find sufficient hold in order to settle the issue.<sup>166</sup> It would thus be well advised and critical to further develop ideas about legitimate public authority in a system of multilevel governance in which actors accommodate and contest international courts' practice and where international courts stay attuned to competing spheres of authority. While international and domestic courts will be the main actors governing the borders between levels of governance, legal doctrine could help in shaping the vocabulary for their interaction. A critical place of work would be a refined understanding of standards of review that reflects their functioning on the lines of legal orders, allocating authority in a normative pluriverse.

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165. See in detail *id.* at 273–75. See also JANNE E. NIJMAN & ANDRÉ NOLLKAEMPER, NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 341, 350 (Janne E. Nijman & André Nollkaemper eds., 2007).

166. Robert Howse & Kalypso Nicolaïdis, *Democracy without Sovereignty: The Global Vocation of Political Ethics*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 163, 164 (Tomer Broude & Yuval Shany eds., 2008); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 258 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) (offering a hermeneutic framework for looking at actual negotiations regarding the allocation of authority).