



UvA-DARE (Digital Academic Repository)

Sources in Interpretation Theories: The International Law-Making Process

Venzke, I.

DOI

[10.1093/law/9780198745365.003.0020](https://doi.org/10.1093/law/9780198745365.003.0020)

Publication date

2017

Document Version

Author accepted manuscript

Published in

Oxford Handbook of the Sources of International Law

[Link to publication](#)

Citation for published version (APA):

Venzke, I. (2017). Sources in Interpretation Theories: The International Law-Making Process. In S. Besson, & J. d'Aspremont (Eds.), *Oxford Handbook of the Sources of International Law* (pp. 401-421). (Oxford Handbooks). Oxford University Press.
<https://doi.org/10.1093/law/9780198745365.003.0020>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.



UNIVERSITY OF AMSTERDAM

SOURCES AND INTERPRETATION THEORIES: THE INTERNATIONAL LAWMAKING PROCESS

Ingo Venzke

Amsterdam Law School Legal Studies Research Paper No. 2016-44

Amsterdam Center for International Law No. 2016-18



Amsterdam Center for International Law
University of Amsterdam

RESEARCH PAPER SERIES

ACIL Research Paper 2016-18

**Sources and Interpretation Theories:
The International Lawmaking Process**

Ingo Venzke

Amsterdam Center for International Law

Cite as: ACIL Research Paper 2016-18,
available at [SSRN](#)

Forthcoming in: Besson, S. & D'Aspremont, J. (eds.), *Oxford Handbook on
the Sources of International Law*, OUP (2017)

[Amsterdam Center for International Law](#), University of Amsterdam

Chapter 23

Sources and Interpretation Theories: The International Lawmaking Process

Ingo Venzke

I. Introduction

In the process of making international law, what are the roles of the sources of law and of the practice of interpretation? It is for the sources of law to prescribe how valid legal norms come into existence. According to a bygone, orthodox position, that is the be all and end all of the process of lawmaking. Following this position, the practice of interpretation releases or reveals the meaning that lies within that valid legal norm. The practice of interpretation does not contribute to the lawmaking process. It *takes* the meaning from the norms.

It is generally recognized, however, that the practice of interpretation *gives* meanings to norms. Interpretation, at the very least, complements the role of sources in the lawmaking process. There is a close connection between the two: sources, on the one hand, and interpretation, on the other. One way of further articulating this close connection is to stress, as Duncan Hollis does in his chapter in this volume, that the sources of law present themselves as rules that also require interpretation.¹ Interpretation is 'existential', in Hollis' account, as it already partakes in the process of establishing what counts as valid legal norms.² I agree and opt for a different angle.

My argument starts once a valid legal norm has been identified as a reference point for interpretation.³ Interpretation in international law, I submit, is best understood as an argumentative practice about the meaning of a legal norm. Interpreters' argumentative practice, I argue, shifts meanings, offers new reference points for the legal discourse, and thereby contributes to the lawmaking process.

¹ See the chapter by Duncan Hollis in this volume.

² Ibid.

³ See also Jean d'Aspremont, 'The Idea of Rules in the Sources of International Law', *British Yearbook of International Law* 84 (2014): 103–34.

Recognizing that the practice of interpretation contributes to the process of lawmaking, however, is itself only the starting point for a series of further queries (Section II).

A first set of such queries continues to ask how interpreters should go about their business. How should interpreters justify their choices as to which meaning to give to norms? What are the specific reasons that can justify claims about meaning in legal discourse? As is well known, the rule of interpretation in international law points to the ordinary meaning of the norm text, its context, its object and purpose, and to parties' intentions. The rule of interpretation is, as all rules are, of course subject to interpretation. In order to possibly inform interpretations, the present chapter discusses the reasons that may support claims about the meaning of norms from the vantage point of distinct interpretation theories. Answers to what interpreters should do, however, remain largely inconclusive (Section III).

A second set of queries continues to focus not on the rule of interpretation but on the reality of the interpretative practice (Section IV). The driving question is not what interpreters should do, but what they are actually doing. Approaches to the practice of interpretation in this vein place emphasis on how interpreters choose specific claims and justify them in a way that is most likely to make their own preferences prevail. Other approaches notably draw attention to the ways in which interpretations testify to the biases of interpreters and of interpretative communities—biases that undergird both the specific meanings that are given to norm texts just as well as the specific limits of the legal discourse, i.e. the rule of interpretation. This is one way in which this Section IV is in fact closely connected to the previous Section III. The other way is by recognizing that some social expectation on what interpreters *should* (not) do also limit what interpreters *can* actually do. These limitations account for the autonomy of international law as a distinct social practice. The conclusions show how thinking of interpretation as an argumentative practice invites further questions about the balance of reason, rhetoric and violence in that practice (Section V).

Throughout this chapter, reference is made to norm *texts*. That is a straightforward focus when it comes to treaties and other texts (such as unilateral declarations, resolutions of international

organizations, and also judicial decisions, even if their interpretation is not subject to the same argumentative demands). It might be a more questionable focus when it comes to customary international law. I submit that interpretation in international law is generally a matter of interpreting norm texts, even when it comes to customary law.⁴ There will always be a gap between, on the one hand, identifying and somehow articulating a customary norm and, on the other, any conclusion about the meaning of that norm, be it in a specific case or more generally. The practice of interpretation fills that gap and shifts its borders in an ever-creative fashion. Arguments on how a customary norm should be interpreted, to be sure, are not well developed.⁵ That may well be due to the disputed belief that the process of lawmaking ends with the identification of a customary norm according to the received criteria of a general practice and *opinio juris*.⁶ Arguments from the Vienna Convention on the Law of Treaties, in any event, do not travel well within the land of custom, not the least because, when compared to treaty norms, a much higher degree of abstraction, if not mysticism, is necessary to understand a customary norm as the product of authors and their intentions. The chapter continues to speak of norm texts generically, regardless of their source. Differences need to be teased out on a different day.

⁴ For the concrete case of customary international law, see Hans Kelsen, 'Théorie du droit international coutumier', *Internationale Zeitschrift für die Theorie des Rechts* (1939): 252–; more recently, in a compelling fashion, Panos Merkouris, 'Interpreting the Customary Rules on Interpretation' (1 February 2016), <www.ssrn.com/abstract=2749066>, accessed 22 September 2016. For the yet broader theoretical argument in support of this position, Niklas Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004), pp. 26, 54.

⁵ See the short paragraph in Matthias Herdegen, 'Interpretation in International Law', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013), <opil.ouplaw.com/home/EPIL>, para. 61.

⁶ The International Law Commission (ILC)'s work notably focuses on the 'Identification of customary international law' and does not speak about its interpretation; see ILC, 'Identification of Customary International Law: Text of draft conclusions 1 to 16 [15] provisionally adopted by the Drafting Committee at the sixty-sixth and sixty-seventh sessions' (14 July 2015), UN Doc. A/CN.4/L869, as well as the Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau (29 July 2015), <http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_cil.pdf&lang=EF>, accessed 23 September 2016.

II. Norm Texts and their Meaning

1. Taking Meaning and Giving it

According to an orthodox view, international law is made at the moment when it comes into existence through the recognized channels of legal sources. The imagery of the metaphor is superb: the concept of the legal source pictures lawmaking as a one-time act when the law springs from dark and hidden places into daylight.⁷ The act of interpretation is then imagined as an act of discovery downstream. It is supposed to reveal and release the law that was made elsewhere. The creation of a legally valid norm is accordingly the be all and end all of the lawmaking process. Interpretation gives effect to the law but has nothing to do with its making.

Occasionally, this view continues to resurface in legal scholarship and practice. In the words of one prominent commentary, interpretation is about ‘*releasing* the exact meaning and the content of the rule of law that is applicable to a given situation’.⁸ The international legal norm is supposed to contain within itself what the act of interpretation discovers. This view was already subject to compelling critique at the time that the International Law Commission (ILC) drafted the Vienna Convention on the Law of Treaties (VCLT).⁹ Sir Humphrey Waldock argued that ‘the process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from

⁷ Ingo Venzke, ‘The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation’, *Loyola of Los Angeles International and Comparative Law* 34 (2011): 99–131.

⁸ Jean-Marc Sorel, Valérie Boré Eveno, ‘Article 31’, in *The Vienna Conventions on the Law of Treaties: A Commentary*, edited by Olivier Corten and Pierre Klein (Oxford: Oxford University Press, 2011), 804–37, 806 (italics added). See also, Nguyen Quoc Dinh, Patrick Daillier, and Alain Pellet, *Droit International Public*, 7th ed. (Paris: LGDJ, 2002), p. 253.

⁹ Vienna Convention on the Law of Treaties (VCLT) (Vienna, 23 May 1969, 1155 UNTS 331).

the words in a text . . . In most cases interpretation involves *giving* a meaning to a text.¹⁰ Waldock's view is also reflected in the ultimate wording of Article 31 VCLT, which does not presume that treaty terms come with an inherent meaning that is somehow contained in the norm text. It speaks of the 'ordinary meaning *to be given* to the terms of the treaty'.

Rather than offering a basis that could decide between interpretations, norm texts provide reference points for the argumentative practice of interpretation—for the semantic struggles about what the norm texts mean.¹¹ This position follows on the heels of different theories supporting that a norm text cannot anchor the practice of their interpretation in the sense that it cannot itself decide which interpretation is the right one or whether a concrete interpretation falls within that norm or outside it.¹²

2. Interpretations as a Specific Kinds of Arguments

What follows from this starting point is that interpretations are best understood as arguments about which meaning should be given to a norm text. Interpretations are arguments—claims to the law supported by reasons. Interpretations do not trace the steps that lead to the discovery of the law, preserved in the norm text. Interpretations offer reasons on why one meaning should be given to a

¹⁰ Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, *YILC* (1964) Vol. II (1964), pp. 5–65, 53, quoting Harvard Law School, *Research in International Law*, part III, Law of Treaties, article 19, p. 946 (italics in original).

¹¹ Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press, 2012), pp. 37–64; Ralph Christensen and Michael Sokolowski, 'Recht als Einsatz im Semantischen Kampf', in *Semantische Kämpfe. Macht und Sprache in den Wissenschaften*, edited by Ekkehard Felder (Berlin: De Gruyter, 2006), 353–71; Jean Combacau and Serge Sur, *Droit international public* (Montchrestien 2010), p. 172.

¹² Already Immanuel Kant convincingly argued that it is impossible to deduce decisions in a concrete case from abstract concepts; Immanuel Kant, *Kritik der Reinen Vernunft* (Frankfurt am Main: Suhrkamp, 1974 [1781]), p. 183, A 131–48. The meanings of words can notably not be revealed through their connection with something that they represent. For that position, characteristic of classic times, see Michel Foucault, *The Order of Things: An Archeology of the Human Sciences* (New York: Vintage Books, 1994), especially pp. 58–61.

norm text rather than another.¹³ It further follows that the practice of interpretation partakes in the process of lawmaking.¹⁴ An equation of lawmaking by way of interpretation with politico-legislative lawmaking that passes through the channels of the sources of law, however, does not follow from recognizing the lawmaking side of interpretative practice.

One way of supporting the distinction between different modes and moments of lawmaking places emphasis on the different kinds of reasons that can support claims in a politico-legislative context of lawmaking, on the one hand, and in a context of interpretative lawmaking, on the other.¹⁵ An example from international legal practice may be illustrative: The majority in the controversial *Abaclat* award argued that ‘it would be *unfair* to deprive the investor of its right to resort to arbitration based on the mere disregard of the 18 months litigation requirement.’¹⁶ In his compelling dissenting opinion, Georges Abi-Saab critiques that the majority ‘strike[s] out a clear conventional requirement, on the basis of its purely subjective judgment.’¹⁷ It is easy to see that Abi-Saab would have struck the balance differently.¹⁸ That is not the point. A balance has been struck ‘at the appropriate legislative level, by the parties themselves’, he argues.¹⁹ The balance is reflected in the treaty text opening up an avenue towards international arbitration but subjecting it to an 18 months domestic litigation requirement. Arguments of fairness or expediency were on the table when drafting the treaty text and

¹³ Ulfried Neumann, ‘Theorie der juristischen Argumentation’, in *Rechtsphilosophie im 21. Jahrhundert*, edited by Winfried Brugger et al. (Frankfurt am Main: Suhrkamp, 2008), 233–60.

¹⁴ One may think of large portions of judicial lawmaking, see Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014). See also already Vaughan Lowe, ‘The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?’, in *The Role of Law in International Politics* edited by Michael Byers (Oxford: Oxford University Press, 2000), 207–26.

¹⁵ See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996), pp. 170, 190.

¹⁶ *Abaclat and Others v. The Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), para. 583 (italics added).

¹⁷ *Abalcat*, Dissenting Opinion, George Abi-Saab, 28 October 2011, para. 30.

¹⁸ *Ibid.*, para. 33.

¹⁹ *Ibid.*, para. 31.

they have led to a certain outcome. The tribunal must not unravel the legislative agreement. It needs to stay within the confines of the practice of interpretation.

Interpretations may thus be understood as claims about meaning that are supported by specific, limited set of reasons. The limits are sustained by a ‘culture of formalism’, a professional ethos.²⁰ Where the borders of such a culture lay—i.e., what kinds of arguments are allowed and which are not—differs between contexts and audiences.²¹ The demands vary significantly with regard to who is interpreting—a scholar in a law journal or a judge in a decision. Bearing those differences in mind, positions on where to draw the line are not the least expressions of what the interpreter should do. To which degree should the interpreter stick to the norm text? Might she even be allowed to invoke considerations such as those of fairness?

III. The Rule of Interpretation

The outer limits of the interpretative discourse are shaped by the rule of interpretation.²² As is well known, Article 31 of the VCLT spells out the general rule of interpretation—in the singular, notably: ‘(1) 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.’

²⁰ Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2001), p. 494; Ingo Venzke, ‘Multi-disciplinary Reflections on the Relationship Between Professionals and the(ir) International Law’, *European Society of International Law* (4 December 2013), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363630>, accessed 23 September 2016; Jean d’Aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press, 2011), pp. 27–9.

²¹ Ingo Venzke, ‘Judicial Authority and Styles of Reasoning: Self-Presentation Between Legalism and Deliberation’, in *Establishing Judicial Authority in International Economic Law*, edited by Joana Jemielniak, Laura Nielsen, and Henrik Palmer Olsen (Cambridge: Cambridge University Press, 2016), 240–62 (on the role of audiences for judicial reasoning). See already Martti Koskenniemi, ‘Letter to the Editors of the Symposium’, *American Journal of International Law* 93 (1999): 351–61.

²² Armin von Bogdandy and Ingo Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and its Democratic Justification’, *European Journal of International Law* 23 (2012): 7–41, 16.

Article 31 VCLT does not stop there, of course, but specifies what counts as context in paragraph two and lists, in paragraph three, what else should be taken into account, together with the context. Article 32 points to the supplementary means of interpretation, especially the preparatory work of the treaty.²³

The rule of interpretation is certainly subject to the same fate of interpretation. Following Ludwig Wittgenstein, it ‘hangs in the air along with what it interprets, and cannot give it any support.’²⁴ The practice of using Articles 31 and 32, not their text itself, can offer some cues—albeit loose and fluctuating—of where the outer limits of the interpretative discourse might be located.²⁵ Apart from that practice, some reasons in support of interpretative claims fare better than others from the vantage point of interpretative theories.

1. The Common, Ordinary Meaning

A first and arguably foremost reason for giving a certain meaning to a norm would be that it is simply the ordinary one.²⁶ Taking his cues from Wittgenstein, Dennis Patterson argues from a theoretical angle that interpretation in fact needs common, ordinary usage as a basis. Interpretation is, in his words, parasitic on the understandings that common usage sustains.²⁷ Interpretation cannot itself establish the meaning of a norm text without an already present practice of rule-following.²⁸ We can only interpret a practice that is already there—the common usage. Whether we do so successfully, Patterson further submits, can only be known if we join the practice, i.e. in a pragmatic sense.²⁹

²³ For an exposition see also Richard K. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008).

²⁴ Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1958), para. 198.

²⁵ For a discussion of the central role of the VCLT for the international legal system, see Gleider I. Hernandez, ‘Interpretation’, in d’Aspremont and Kammerhofer, eds., *International Legal Positivism*, 317–48, 322–6.

²⁶ And there are no indications that the parties intended to give the a special meaning to the term according to Art 31 (4) of the VCLT.

²⁷ Dennis Patterson, ‘Interpretation in Law’, *San Diego Law Review* 42 (2005): 685–710.

²⁸ Wittgenstein, *Philosophical Investigations*, para. 198.

²⁹ Patterson, ‘Interpretation in Law’.

The thought of Robert Brandom further supports and clarifies this position. Reaching deep into theories of linguistics, Brandom explains his approach in a way that speaks to (international) lawyers, namely with a case law model of communication in which the interpreter takes the prototypical role of the judge. ‘The current judge’, Brandom writes, ‘is held accountable to the tradition she inherits by the judges yet to come.’³⁰ In other words, whether an interpretation is correct depends on how it fits with past practices (i.e. common, ordinary usage) as assessed by the next interpreter down the line. Interpreters in the present are tied to the past by interpreters of the future.³¹ Future judges tie them to the common, ordinary meanings that they inherit. At the same time, interpretative practice can and does shift common, ordinary meanings.

For example, when interpreters in the context of the World Trade Organization (WTO) argue about what it means that a trade-restrictive measure must be ‘necessary’ in the sense of Article XX GATT, they support their claims with references to that term’s ordinary meaning, not the least as taken from dictionaries.³² The Appellate Body (AB) did so as well and found that a measure is ‘necessary’ if there is no less restrictive alternative that is reasonably available. The AB has thoroughly shaped the legal discourse, which has accepted its interpretative claim and now continues to develop further what it means that an alternative trade measure must be ‘reasonably available’. Interpretative practice has shifted the meaning of what it means that a measure must be necessary and it has offered new reference points for interpretation (i.e. ‘reasonably available’).³³

³⁰ Robert B. Brandom, ‘Some Pragmatist Themes in Hegel’s Idealism: Negotiation and Administration in Hegel’s Account of the Structure and Content of Conceptual Norms’, *European Journal of Philosophy* 7 (1999): 164–89, 181. For a concise introduction and summary, see Jasper Liptow, *Regel und Interpretation. Eine Untersuchung zur sozialen Struktur sprachlicher Praxis* (Weilerswist: Velbrück, 2004), pp. 220–6; see also Ralph Christensen, ‘Neo-Pragmatismus: Brandom’, in *Neue Theorien des Rechts*, edited by Sonja Buckel, Ralph Christensen, and Andreas Fischer-Lescano (Stuttgart: Lucius und Lucius, 2009), 239–62, 242.

³¹ Makus Winkler, ‘Die Normativität des Praktischen’, *Juristenzeitung* 64 (2009): 821–9.

³² On that use of dictionaries, see Douglas A. Irwin and Joseph H. H. Weiler, ‘Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)’, *World Trade Review* 7 (2008): 71–113.

³³ See, e.g., Appellate Body Report, *Brazil—Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007.

There are a series of other lingering questions, of course. Not the least: at which point in time does the meaning of norm text need to be ordinary—at the time of concluding a treaty or at the time of applying it?³⁴ The case between Nicaragua and Costa Rica before the International Court of Justice (ICJ) illustrates the problem. By virtue of a 1858 boundary treaty, Nicaragua had obliged itself to respect Costa Rica’s right to use the San Juan River for ‘free navigation . . . for the purposes of commerce’.³⁵ It seems correct, as Nicaragua had argued in its submissions, that commerce meant trade in goods at the time when the treaty was concluded. No one could then have foreseen that commerce would one day extended to a services industry such as ecotourism.³⁶ But it seems equally clear that ecotourism is today a (significant) commercial activity. As the meaning of commerce has changed, Nicaragua’s obligations have changed with it. According to the majority of the ICJ, it may even be presumed that the parties to the boundary treaty intended to use terms whose ‘meaning or content is capable of evolving.’³⁷ In sum, the law changes through changes in the ordinary meaning of norm texts—those changes may be part of larger societal process (e.g. ‘commerce’ in the boundary treaty), or they may primarily be the product of the legal discourse itself (e.g. ‘necessary’ in Article XX GATT).

2. The Context

Texts do not stand alone, but come with context, object and purpose.³⁸ The minority in the ICJ case between Nicaragua and Costa Rica did not find the claims to the ordinary meaning of commerce

³⁴ See also Ulf Linderfalk, ‘Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making’, *European Journal of International Law* 26 (2015): 169–89, 174–5.

³⁵ *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213 (the Court takes ‘free navigation . . . for the purposes of commerce’ as the English translation of the Spanish treaty text; see para. 56).

³⁶ ICJ, *Navigational and Related Rights*, Counter-memorial of Nicaragua, Vol. I, 27 May 2007, pp. 154–61; Rejoinder of Nicaragua, 15 July 2008, pp. 8–9.

³⁷ ICJ, *Navigational and Related Rights* (Judgment), para 64.

³⁸ It is repeatedly claimed that the Arts 31 and 32 of the VCLT ought to be applied in a holistic fashion. See, inter alia, WTO, *US—Continued Zeroing, Appellate Body Report* (4 February 2005) WT/DS350/AB/R, para. 268.

persuasive and instead placed emphasis on the context in which that term had been used.³⁹ One way of theoretically supporting the reference to the context of norm texts is to highlight how it credits the position that meaning is relational, not representational—that the meaning of ‘combatant’, for example, emerges from its distinction with ‘civilian’ and not from something that the term ‘combatant’ really represents.⁴⁰ Modern linguistics would speak of semantic webs of meanings—the meaning of a term is essentially embedded within a web of others.⁴¹

Article 31 (3) notably lists a series of considerations that ‘shall be taken into account, together with the context.’ It extends to ‘subsequent agreements’, ‘subsequent practice’, and ‘other relevant rules of international law’. This larger context has received great attention in debates about interpretation in international law, including in the work of the ILC.⁴² A lot of doctrinal questions of how to understand this paragraph, however, remain open.

3. The Object and Purpose

a. Policy-Oriented Jurisprudence

Another set of reasons that can support claims about what a norm text means connects to the text’s object and purpose. In the process of drafting the VCLT, these reasons were strongly favoured by

³⁹ See in detail Georg Nolte, ‘Between Contemporaneous and Evolutive Interpretation: The Use of “Subsequent Practice” in the Judgment of the International Court of Justice Concerning the Case of *Costa Rica v. Nicaragua* (2009)’, in *Coexistence, Cooperation and Solidarity*, edited by Holger P. Hestermeyer et al., vol. II (Leiden: Martinus Nijhoff, 2011), 1675–84.

⁴⁰ Ferdinand de Saussure, *Course in General Linguistics* (Chicago: Open Court, 1983), pp. 65, 106. In further detail with a critical assessment, Ingo Venzke, ‘Is Interpretation in International Law a Game?’, in *Interpretation in International Law*, edited by Andrea Bianchi, Paniel Peat, and Matthew Windsor (Oxford: Oxford University Press 2015), 352–72.

⁴¹ Jasper Liptow and Georg W. Bertram, eds., *Holismus in der Philosophie. Ein zentrales Motiv der Gegenwartsphilosophie* (Weilerswist: Velbrück, 2002). See also Foucault, *The Order of Things*, p. 16.

⁴² See the ILC’s completed project on the ‘Fragmentation of international law’ and its ongoing work on ‘Subsequent agreements and subsequent practice in relation to interpretation of treaties’, <<http://legal.un.org/ilc/>>, accessed 23 September 2016.

Myres McDougal. In his view, an interpreter should ask herself what the purpose of the law is in the concrete case. She should then adopt the interpretation that best meets that purpose.⁴³ McDougal was certainly aware that the purpose is hard to determine, and that different claims might easily compete in this regard. Together with his colleagues in New Haven, he thus constructed a whole set of guiding moral principles, all of which would ultimately be directed towards the protection of human dignity.⁴⁴ The norm text in fact recedes quite far into the background of the interpretative practice. Michael Reisman for instance elaborated further that international legal doctrine and practice had setup a myth—the myth namely that international law could be found by looking at the sources of law.⁴⁵ Instead, he opined, international law emerges from the myriad of legal communications that a plethora of actors utter every day. That practice should be guided by—and be interpreted in light of—overarching concerns of humanity.⁴⁶

These two elements of the policy-oriented jurisprudence *à la* New Haven are central: first, it contends that interpretation ought to be directed at the overarching purpose of international law, the protection of human dignity or humanity. Second, it recognized the creativity of interpretative practice and sees lawmaking as a process of communication. The main points of critique, in turn, have centred on the

⁴³ Myres S. McDougal, *International Law, Power, and Policy: A Contemporary Conception*, vol. 82, Collected Courses of the Hague Academy of International Law (Leiden: Brill/Nijhoff, 1954), 133–259; Myres S. McDougal, Harold D. Lasswell, and James C. Miller, *The Interpretation of Agreements and World Public Order* (New Haven: Yale University Press, 1967).

⁴⁴ See *ibid.* The inheritance of classic legal realism and its functionalism are clear; see especially Felix S. Cohen, ‘Transcendental Nonsense and the Functional Approach’, *Columbia Law Review* 35 (1935): 809–49. With different theoretical baggage but coming close to the arguments from New Haven, also see Hans J. Morgenthau, ‘Positivism, Functionalism, and International Law’, *American Journal of International Law* 34 (1940): 260–84.

⁴⁵ Michael W. Reisman, ‘International Lawmaking: A Process of Communication’, *American Society of International Law Proceedings* 75 (1981): 101–20.

⁴⁶ Michael W. Reisman, ‘Unilateral action and the transformations of the world constitutive process: the special problem of humanitarian intervention’, *European Journal of International Law* 11 (2000): 3–18; see Ingo Venzke and Jochen von Bernstorff, ‘Ethos, Ethics, and Morality in International Relations’, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2011), <opil.ouplaw.com/home/EPIL>.

abundant faith in the moral judgment of the interpreter, on the one hand, and on the fate of the authors of the law, who recede all too far into the background, on the other.⁴⁷

b. Integrity and Fit

Coming from a decidedly different angle, Ronald Dworkin similarly places emphasis on the purpose of the law. An interpretation should conform to the best justification possible in terms of practical morality. This principle of integrity, however, stands next to the consideration of how well an interpretation fits with past practices. In contrast to connecting interpretations to common usage alone, Dworkin's position directs emphasis to the more forward-looking concerns of practical morality ('integrity'). But in contrast to policy-oriented jurisprudence, it matters how present interpretations connect to the past ('fit').⁴⁸

Dworkin recognizes the creativity of interpretative practices and takes on the task of guiding interpreters in those moments of creativity.⁴⁹ While he acknowledges the political nature of this practice, he does not see law as a matter of personal or partisan politics.⁵⁰ In fact, such a view would misunderstand legal practice, he argues. Leaning on comparisons with the practice of interpretation in the field of literature, he submits that the best understanding of the practice of interpretation sees it as presenting norm texts in their best light. This is what an interpreter should do, and it offers the best understanding of what interpreters are doing. There might well be disagreement about which

⁴⁷ Georges Abi-Saab, 'Les sources du droit international: Essai de déconstruction', in *El derecho internacional en un mundo en transformación. Liber amicorum en homenaje al Profesor Eduardo Jiménez de Aréchaga*, edited by Manuel Rama-Montaldo, vol. 1 (Montevideo: Fundación de Cultura Universitaria, 1994), 29–49. Gerald Fitzmaurice, 'Vae Victis or Woe to the Negotiator! Your Treaty or Our Interpretation of It?', *American Journal of International Law* 65 (1971): 358–73; Richard A. Falk, 'Casting the Spell: The New Haven School of International Law', *Yale Law Journal* 104 (1995): 1991–2008, 2001 (noting that judgments as to what human dignity required have neatly coincided with the interests of United States foreign policy).

⁴⁸ Ronald Dworkin, 'Law as Interpretation', *Critical Inquiry* 9 (1982): 179–200.

⁴⁹ Ronald Dworkin, *Law's Empire* (Cambridge: Belknap, 1986), pp. 249, 256. Dworkin developed the steps of the interpretative process in his *Justice for Hedgehogs* (Cambridge: Belknap, 2013), see in particular pp. 131–2.

⁵⁰ Dworkin, 'Law as Interpretation'.

interpretation presents a text in its best light, but pursuing that ambition is all the same what interpretation is about.⁵¹

Dworkin turned to international law, rather than law generally, shortly before the end of his life. In his posthumously published ‘New Philosophy for International Law’, he posits that best sense is made of a text like the UN Charter⁵² in light of the aim that underlies international law. That is: ‘the creation of an international order that protects political communities from external aggression, protects citizens of those communities from domestic barbarism, facilitates coordination when this is essential, and provides some measure of participation by people in their own governance across the world.’⁵³ Interpretations must take these goals together and seek to make them compatible.⁵⁴

But how should specific goals—the law’s object and purpose—decide between competing interpretations?⁵⁵ Not only may different goals frequently compete, a single may also plausibly be claimed to support different interpretations. Taking the aim of the UN Charter as Dworkin describes it, it is not so clear, for example, whether anything would at all be gained by referring to that aim in debates about the legality of humanitarian intervention. One side would argue that allowing humanitarian intervention provides a pathway for external aggression and thus clearly go against the aim. Another side would argue that prohibiting humanitarian intervention protracts domestic barbarism and therefore contravenes the UN Charter. A third side would decry the terms of the debate and argue that the reference to domestic barbarism is clearly a projection of neo-colonial attitudes, etc. And what happened to the text of Article 2(4) UN Charter in these debates?

⁵¹ Dworkin, *Law’s Empire*, p. 243, also pp. 14 and 49 (noting that, of course, ‘any adequate account of interpretation must hold true of itself.’). See also Samantha Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Oxford: Hart, 2005), pp. 69–71.

⁵² Charter of the United Nations (San Francisco, 26 June 1945, 1 UNTS 16).

⁵³ Ronald Dworkin, ‘A New Philosophy for International Law’, *Philosophy & Public Affairs* 41 (2013): 2–30, 22.

⁵⁴ *Ibid.*

⁵⁵ Similarly, Başak Çali, ‘On interpretivism and international law’, *European Journal of International Law* 20 (2009): 805–22, 822.

4. Authors and Their Intentions

Article 32 of the VCLT opens up the way to ‘supplementary means of interpretation, including the preparatory work of a treaty’ when interpretations otherwise remain ambiguous or obscure. Within the ILC debates on the VCLT, Hersch Lauterpacht argued strongly that looking at the text without determining the will of the parties would be as bad as engaging in a kind of *Begriffsjurisprudenz* (conceptual jurisprudence) of the worst kind.⁵⁶ According to Lauterpacht, an ordinary meaning, even if placed in its context, object and purpose, could at best create a refutable presumption; it should most certainly not be decisive. He averred that importance should rather be attached to the *travaux préparatoires* as ‘a fundamental, if not the most important, element in the matter of treaty interpretation’.⁵⁷

More recently, and with much theoretical distance, Stanley Fish argued in a crisp, though drastic, fashion that an interpreter must look at the authors’ intentions, and at those intentions only. He submits that an interpreter cannot but understand the meaning of a text through the intentions of the author. If an interpreter did not try to understand authors’ intentions, Fish contends, she would not actually be interpreting the text but make up her own mind of what it should mean.⁵⁸ Whoever reads a treaty does so ‘explicitly or implicitly . . . with an author in mind. *And they have no choice but to do so.*’⁵⁹ Aiming at the authors’ intentions, in other words, is not a method for Fish, but it defines the nature of interpretation.⁶⁰

⁵⁶ Hersch Lauterpacht, ‘De l’Interprétation des Traités: Rapport’, *Annuaire de l’Institut de Droit International* 43 (1950-II): 366–460.

⁵⁷ *Ibid.*, p. 397.

⁵⁸ Stanley Fish, ‘Intention is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law’, *Cardozo Law Review* 29 (2008): 1109–1146, 1122 (this is the only way to ‘keep[] the game honest’).

⁵⁹ Larry Alexander and Salkrishna Prakash, “‘Is that English You’re Speaking?’ Why Intention Free Interpretation is an Impossibility”, *San Diego Law Review* 41 (2004): 967–95, 976, quoted in Fish, ‘Intention is All There Is’, 1111-1112 (italics added).

⁶⁰ Stanley Fish, ‘There Is No Textualist Position’, *San Diego Law Review* 42 (2005): 629–35, 629.

Fish dismisses the proposition that meaning is ordinary because we readily adapt our understanding if we learn about the intentions of authors. For example, if somebody reads a sign instructing her that she may not cross the yellow line on the platform of a train station, that somebody remains with little doubt that this sign is not meant to prohibit her from crossing the line to step aboard a train. Such a sign at a train station highlights the limits of textual interpretation that clings to the ordinary meaning to the exclusion of everything else. Interpretations need to consider what the author of the law had in mind, or draw inferences about it—for instance by taking into account the extended context, which Article 31 (3) of the VCLT already suggests, or by turning to the preparatory work in accordance with Article 32.

It may just as well be said that interpretations need to be supported with references to the purpose of the law (which, in the example, was supposedly geared towards ensuring everyone's safety when trains pass or approach). There is a close connection between referring to intentions and referring to the object and purpose. The difference is, however, that the latter may take the law further away from what might have been intended, which is precisely why Lauterpacht and others wished to elevate the role of parties' intentions.

Problems for the intentionalist approach to treaty interpretation mirror some of the problems that exist with placing emphasis on the object and purpose. First and foremost, how can the interpreter establish the intentions of authors, especially when they are many and when they connect to collective actors such as states? Philipp Allott wrote pithily of a treaty as 'disagreement reduced into writing'.⁶¹ Parties agree on the text of the law. More often than not they had different intentions when signing it—differences that resurface in later arguments about what a norm text means.

⁶¹ Philip Allott, 'The Concept of International Law', *European Journal of International Law* 10 (1999): 31–50.

IV. The Reality of Interpretation

The previous Section has discussed different answers to how an interpreter should go about her business. Given that these answers remained largely inconclusive, the question is all the more pressing of what interpreters are actually doing when they interpret. The present Section turns from the rule of interpretation to that reality.

1. Struggle, Hegemony, and Rhetoric

A first answer may be that interpreters use justifications for their claims about the meaning of the law in an opportune fashion, in a way that aims at persuading audiences. They seek to make their own preference prevail. By way of legal interpretation actors seek to pull the law onto their side. They try to align the meaning of norm texts with their interests or convictions. In other words, they are invested in a semantic struggle.⁶²

In this vein, Martti Koskenniemi and others have thought of all legal interpretation as hegemonic:

International actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract their opponents. . . . To think of this struggle as *hegemonic* is to understand that the objective of the contestants is to make their partial view of that meaning appear as the total view, their preferences seem like the *universal preference*.⁶³

Any interpretation would be hegemonic because it makes inevitably particular claims appear in the universalizing language of the law, in a cloak of universal rightness.⁶⁴

⁶² See above, note 11.

⁶³ Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration', *Cambridge Review of International Affairs* 17 (2004): 197–218, 199 (italics in original).

⁶⁴ With regard to the specific example of international trade law, see Jason Beckett, 'Fragmentation, Openness and Hegemony: Adjudication and the WTO', in *International Economic Law and National Autonomy*, edited by Meredith Kolsky Lewis and Susy Frankel (Cambridge: Cambridge University Press, 2010), 44–70.

This perspective on the argumentative practice of interpretation zooms in on the forces and dynamics that make one claim prevail rather than another. Whereas Jürgen Habermas sees arguments as reasons that rationally motivate their addressees to accept what the arguments purport to justify,⁶⁵ hegemonic contestation replaces the focus on the *acceptability* of interpretations with an emphasis on the brute fact of *acceptance*. The criterion by which arguments are assessed is their success and the currency is power. The reasons for which an interpretation is accepted either fall off the radar, or they are rethought as rhetoric, if not as violence.⁶⁶ If the factors that contribute to the acceptance of one interpretation of the law rather than another are understood, then it is possible to come closer to understanding the power dynamics that undergird the practice of interpretation.⁶⁷ Better understandings of structural biases, of dominating concerns and silenced perspectives, are then closer by.⁶⁸ The key question is: what are the presumptions on which going interpretations rest?⁶⁹

Understanding interpretations as the expressions of particular preferences that try to prevail in the general language of international law offers a powerful perspective on the practice of interpretation. But can interpreters not be driven by sincere convictions or the genuine ambition to find the morally best answer? That may well be the case, but it might then be suggested that those convictions are bound to remain partial and the acceptance of an interpretation therefore ought to be understood as an expression of power relations rather than something like genuine agreement.⁷⁰ Support for this

⁶⁵ Habermas, *Facts and Norms*, pp. 226–7; Josef Kopperschmidt, *Argumentationstheorie* (Hamburg: Junius, 2000); Hans Wohlrapp, *The Concept of Argument* (Berlin: Springer, 2014).

⁶⁶ On the rich tradition of rhetorical thought in the context of international law, see Iain Scobbie, ‘Rhetoric, Persuasion, and Interpretation in International law’, in Bianchi et al., eds., *Interpretation in International Law*, 61–77. On violence in legal interpretation and in law, see Robert M Cover, ‘Violence and the Word’, *Yale Law Journal* 95 (1986): 1601–1630; Christoph Menke, *Recht und Gewalt* (Berlin: August 2011).

⁶⁷ David Kennedy, ‘The Turn to Interpretation’, *Southern California Law Review* 58 (1985): 251–76.

⁶⁸ See Fuad Zarbiyev, *Le discours interprétatif en droit international contemporain. Un essai critique* (Brussels: Bruylant, 2015), p. 54.

⁶⁹ See e.g., Martti Koskenniemi, ‘“The Lady Doth Protest Too Much” Kosovo, and the Turn to Ethics in International Law’, *Modern Law Review* 65 (2002): 159–75.

⁷⁰ Koskenniemi, *Gentle Civilizer*, p. 492.

position may be found in the rejection of something like a universal morality so that every claim to it is inevitably hegemonic. That, however, is itself a questionable metaphysical claim.

Better support for challenging interpreters' reach for the morally best answer comes from reminders of their situatedness. With an example of competing interpretations in the laws of war, David Kennedy thus contends that '[n]o one, after all, experiences the death of her husband or sister as humanitarian and proportional.'⁷¹ Considering the widow irrational for not agreeing with a claim about the legality of her husband's killing would add insult to injury. And even if, with shaky confidence, one were to abstract from the perspective of the widow, it is hard to deny that '[p]ersuasion and consensus also rest on status of forces and are the product of coercive struggle.'⁷² Interpretations are expressions of power—be it power vested in the interpreter or in the background structures and biases that render some interpretations more likely to succeed than others.

2. Interpreter's Biases

The situatedness and biases of the interpreter are a theme that has originally been worked out in the field of hermeneutics—the field that is concerned precisely with the theory and method of establishing meaning. Closely connected to the notion of exegesis, hermeneutics first developed in religious sciences focused on the interpretation of holy texts.⁷³ Through the contrasting work of Friedrich Schleiermacher and Wilhelm Dilthey, hermeneutics advanced into a more encompassing theory of textual interpretation. Whereas Dilthey still defended the possibility of objective understanding across space and time, Martin Heidegger, and then Hans-Georg Gadamer in his wake, argued that any attempt at understanding is premised on an interpreter's biases and prior

⁷¹ David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016), p. 275.

⁷² *Ibid.*, p. 7.

⁷³ See also Matthias Goldmann, 'Dogmatik als rationale Rekonstruktion: Versuch einer Metatheorie am Beispiel völkerrechtlicher Prinzipien', *Der Staat* 52 (2014): 373-99.

understanding.⁷⁴ The key point is that the interpreter cannot but approach any object with background knowledge. What the interpreter should seek to do is to make the structure of her own situatedness explicit. She should try and make explicit what she brings into the process of interpretation and what she learns about herself in that process.⁷⁵

Gadamer argued that the process of understanding actively resists and inevitably escapes any attempt at being squeezed into a method, any set of rules.⁷⁶ He modelled his hermeneutic approach on the example of works of art, the understanding of which ought to be grasped as the product of an experience in which the spectator and the work of art stand in a dialogue with one another. Meaning is the product of this experience and not, according to Gadamer, the product of a reconstruction (Schleiermacher) or of decryption (Dilthey). In his seminal *Wahrheit und Methode (Truth and Method)*, Gadamer thus developed a ‘theory of hermeneutical experience’, which takes its cues from the fact that all understanding is premised on prior understandings, on biases. The subjectivity that hermeneutics introduces into the quest for meaning should not be understood as problematic, according to Gadamer. His theory of hermeneutical experience rather demands that the interpreter learns about her biases through dialogue. Hermeneutics, for Gadamer, is a mode of reflexion.⁷⁷

The main challenge that hermeneutics thus introduces to theories of interpretation in international law is the emphasis on the situatedness and finite subjectivity of the interpreter.⁷⁸ Outi Korhonen has

⁷⁴ For the the hermeneutics of Paul Ricoeur, as attuned to issues of international law, Janne E. Nijman, ‘Paul Ricoeur and International Law: Beyond “The End of the Subject”. Towards a Reconceptualization of International Legal Personality’ *Leiden Journal of International Law* 20 (2007): 25–64.

⁷⁵ Ralf Poscher, ‘Hermeneutics, Jurisprudence and Law’, in *Routledge Companion to Philosophical Hermeneutics*, edited by Jeff Malpas and Hans-Helmuth Gander (Abingdon: Routledge, 2015), 451–65.

⁷⁶ Hans-Georg Gadamer, *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*. Gesammelte Werke, Bd. 1 (Tübingen: Mohr Siebeck, 1999), p. 3.

⁷⁷ Hans-Georg Gadamer, *Philosophical Hermeneutics* (Berkeley: University of California Press, 1976), pp. 18–43.

⁷⁸ For a different application of Gadamer’s hermeneutics to international law, placing emphasis on changes of meaning over time, see Emmanuel Voyiakis, ‘International Law, Interpretative Fidelity and the Hermeneutics of Hans-Georg Gadamer’, *German Yearbook of International Law* 54 (2011): 385–420.

shown well how international legal doctrine has tried to blend out the interpreter in any act of interpretation and how it struggles, in turn, with the challenge of every interpreter's situatedness.⁷⁹ The language of international law helps the interpreter to hide. It prevents her from revealing her situatedness and demands that she keep her biases well hidden.⁸⁰ For Korhonen, however, as for many other scholars leaning towards critical thinking, the choices of the interpreter are the retainer for any hope of betterment.⁸¹ What is more, an analysis of interpretation, as Kennedy has argued, can foreground what the interpreter must have been thinking, mapping her socially constructed consciousness.⁸² Rather than steaming ahead to interpret international law in the service of what is considered best, a hermeneutic stance would reveal the biases in interpretation and instruct the interpreter about her own practice.

3. Interpretative Communities

Biases may not only play a role at the individual level of the interpreter, but also on a more collective level of a community of interpreters. According to Fish, what makes an interpretation acceptable is that it corresponds to the interpretative angle from which other interpreters also approach the text: Disagreement about what a text means is 'not . . . a disagreement that could be settled by the text

⁷⁹ Outi Korhonen, 'New International Law: Silence, Defence of Deliverance?', *European Journal of International Law* 7 (1996): 1–28, 28.

⁸⁰ *Ibid.*, pp. 7–9.

⁸¹ See further, Isabel Feichtner, 'Critical Scholarship and Responsible Practice of International Law. How Can the Two be Reconciled?', *Leiden Journal of International Law* 29 (2016) (forthcoming); also Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law', *London Review of International Law* 1 (2013): 63–98; Jan Klabbers, 'Virtuous Interpretation', in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, edited by Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (Leiden: Martinus Nijhoff, 2010), 17–39.

⁸² Kennedy, 'The Turn to Interpretation', p. 255.

because what would be in dispute would be the interpretative “angle” from which the text was to be seen, and in being seen, made.’⁸³

Specifically with regard to international law, Andrea Bianchi has argued that interpretative communities shape the bare text through the interpretative angles that they embrace.⁸⁴ Building on the work of Fish, he submits that social dynamics and prevailing standards on how to read the law within an interpretative community shape that law. Interpretation is about playing that game well with the purpose of finding acceptance.⁸⁵

That view has purchase, but it also has shortcomings. For Fish, the idea of interpretative communities is an afterthought that has not eased its way into a compelling theoretical set-up.⁸⁶ What, in particular, is the point of engaging in an argument about the meaning of a text, according to Fish? There seems to be no room for arguments in the sense that they can actually induce acceptance. According to Fish, an interpretation finds acceptance if it resonates with the interpretative angle that a community shares. That is a premise, not an effect of argumentation. The approach is silent on the mechanisms that might work towards such a premise or that lead an interpreter to adopt a specific angle rather than another.⁸⁷ If the interpretative posture is what anchors the community, what happens between communities other than competition? Understanding and exploring competition opens up an insightful perspective on the relationship between fragmented interpretative communities within international law and within specific fields. One may consider, for example, the divide between military and

⁸³ Stanley Fish, *Doing What Comes Naturally. Change, Rhetoric, and the Practice of Theory in Literature and Legal Studies* (Durham: Duke University Press, 1989), pp. 141–2. In further detail, see Stanley Fish, ‘What Makes an Interpretation Acceptable’, in *Is There a Text in This Class? The Authority of Interpretative Communities* (Cambridge: Harvard University Press, 1980), 338–55.

⁸⁴ Bianchi, ‘Textual interpretation and (international) law reading’.

⁸⁵ Andrea Bianchi, ‘The Game of Interpretation in International Law: The Players, The Cards, and why the Game is Worth the Candle’, in Andrea Bianchi et al., eds., *Interpretation in International Law*, 34–60.

⁸⁶ Dennis Patterson, *Law and Truth* (Oxford: Oxford University Press, 1996), p. 100.

⁸⁷ Patterson, *Law and Truth*, p. 124.

humanitarian lawyers in the laws of war or between commercial and public lawyers in international investment law.⁸⁸ Between communities, international law is silent.

4. Meaningful Limitations

Acknowledging the role of the status of forces and of biases in legal discourse does not per se reduce the practice of interpretation to an expression of power or culture only. In other words, there is a quality to the interpretative practice of international law that makes it distinct. This difference is the autonomy of international law.

The fact that only some arguments are allowed in international legal discourse and not others—however porous and fluctuating the limits may be—defines interpretation in law as something distinct. A professional ethos of lawyers is probably one of the most important elements that sustains the limits and maintains the autonomy of international law.⁸⁹ External descriptions of legal practices that do not take this ethos seriously—this internal point of professional practice—fail as external descriptions.

This point has been made strongly by Pierre Bourdieu, who has offered a view of law as a product of the struggle between different actors.⁹⁰ He pays tribute to the idea that this struggle is one for power, for dominance over the law, and thus over others. But it is a struggle that has to take shape within the strictures imposed by the limits of the legal discourse. What Bourdieu brings back into the equation is the mode of arguing, which maintains limitations that are meaningful. Those limitations are part of

⁸⁸ David Luban, 'Military Necessity and the Cultures of Military Law', *Leiden Journal of International Law* 26 (2013): 315–49; Stephan W. Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator', *Leiden Journal of International Law* 23 (2010): 401–30, 430.

⁸⁹ See above, note 20.

⁹⁰ Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', *Hastings Law Journal* 38 (1987): 814–53.

the social reality that structures the practice.⁹¹ ‘Far from being a simple ideological mask’, Bourdieu argues, ‘such a rhetoric of autonomy, neutrality, and universality, which may be the basis of a real autonomy of thought and practice, is the expression of the whole operation of the juridical field and, in particular, of the work of rationalization to which the system of juridical norms is continually subordinated.’⁹² The autonomy of interpretative practice stems itself against its immediate alignment of the law with the interests of the most powerful. This autonomy is the product of the dominant mode of arguing. While it is itself caught up in power dynamics, it maintains meaningful limitations. It is in this way that arguments about what interpreters should do in the previous Section are closely linked to accounts of what interpreters are actually doing in this Section. Plus, conversely, beliefs about what interpreters should and the limitations that they impose on the legal discourse, themselves reflect actors’ interests, their convictions, and their power relations.

V. Conclusion

This chapter has proceeded on an understanding of interpretation as an argumentative practice concerned with the meaning of legal norms. In Section II it has left behind understandings of interpretation as releasing or revealing meaning. Interpretations do not take meaning from norm texts but give meaning to them. In Section III it has then discussed how interpreters should go about their business. Which reasons can be invoked so as to justify choices about the meaning to a norm text? Section IV has turned from the rule of interpretation to the reality of the practice. What are interpreters actually doing when they interpret?

Examining the rule of interpretation places emphasis on the reasons that justify a claim about the meaning of norm texts. Turning to the reality of interpretation mostly exposes those reasons as rhetoric—they aim at inducing acceptance to make individual preferences prevail. Moving from the

⁹¹ Pierre Bourdieu and Loïc J. D. Wacquant, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992); Yves Dezalay and Mikael Rask Madsen, ‘The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law’, *Annual Review of Law and Social Science* 8 (2012): 433–52.

⁹² Bourdieu, ‘Force of Law’, p. 820.

interpreter to her interlocutors: do others accept an interpretation because they are convinced by it, genuinely agree with it, or because they succumb to it as they either falsely agree or as they submit due to material forces at play? It will hardly ever be only one or the other. At the abstract level of theory, just as well as in the study of concrete instances of interpretative practice, it is necessary to account for both, the possibility of reason just as well as the role of power, rhetoric and violence.

As significant parts of international law are made by way of interpretation, it is a pressing task to keep a keen eye on the balance of reason, rhetoric and violence in that practice. Whereas power dynamics are mostly obvious in the practice of lawmaking through the channel of sources, especially in treaty negotiations, those elements tend to be hidden in the practice of interpretation. The limits of the interpretative discourse impact what interpreters can practically do, but they also allow those actors to hide their choices.

Research Questions

- The practice of interpretation in international law reflects the interests of individual actors and the constellation of power at any given time. What is the place, if any, of reason in this practice? How can the role of reason be studied in this argumentative practice of international law without overlooking the many faces of power, including the ways in which it shapes normative beliefs?
- The kinds of reasons that interpreters can practically use to support their claims about the meaning of international legal norms vary with regard to who they are and in which context they argue. Especially international courts and tribunals tend to interpret in a rather narrow, formalist way that might not articulate the core considerations that actually carry a decision. How should the requirement be interpreted that international courts and tribunals state the reasons on which their decisions rest? What scope of reasons should they be allowed to use?

Selected Bibliography

Bianchi, Andrea, '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, edited by Pieter H. F. Bekker, Rudolf Dolzer, and Michael Waibel (Cambridge: Cambridge University Press 2010), 34–55.

Andrea Bianchi, Daniel Peat, Matthew Windsor, eds., *Interpretation in International Law* (Oxford: Oxford University Press, 2015).

Fastenrath, Ulrich, ‘A Political Theory of Law: Escaping The Aporia of the Debate on the Validity of Legal Argument in Public International Law’, in *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma*, edited by Ulrich Fastenrath et al. (Oxford: Oxford University Press 2011), 58–78.

Kennedy, David, ‘The Turn to Interpretation’, *Southern California Law Review* 58 (1985): 251–76.

Korhonen, Outi, ‘New International Law: Silence, Defence of Deliverance?’, *European Journal of International Law* 7 (1996): 1–28.

Koskenniemi, Martti, ‘International Law and Hegemony: A Reconfiguration’, *Cambridge Review of International Affairs* 17 (2004): 197–218.

Venzke, Ingo, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press, 2012).

Zarbiyev, Fuad, *Le discours interprétatif en droit international contemporain. Un essai critique* (Brussels: Bruylant, 2015).