



UvA-DARE (Digital Academic Repository)

The Practice of Interpretation in International Law: Strategies of Critique

Venzke, I.

DOI

[10.1017/9781108551878.014](https://doi.org/10.1017/9781108551878.014)

Publication date

2022

Document Version

Submitted manuscript

Published in

International Legal Theory

[Link to publication](#)

Citation for published version (APA):

Venzke, I. (2022). The Practice of Interpretation in International Law: Strategies of Critique. In J. L. Dunoff, & M. A. Pollack (Eds.), *International Legal Theory: Foundations and Frontiers* (pp. 305-324). Cambridge University Press. <https://doi.org/10.1017/9781108551878.014>

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

THE PRACTICE OF INTERPRETATION IN INTERNATIONAL LAW: STRATEGIES OF CRITIQUE

Ingo Venzke

Amsterdam Law School Legal Studies Research Paper No. 2018-22

Amsterdam Center for International Law No. 2018-07

The Practice of Interpretation in International Law: Strategies of Critique

Forthcoming in: *International Legal Theory: Foundations and Frontiers*
(edited by Jeff Dunoff & Mark A. Pollack, CUP 2020)

Ingo Venzke*

Abstract

The practice of interpretation brings the law to life. It takes part in shaping and making the law. What then is this practice of interpretation? The present chapter distinguishes four different approaches to that question in light of their strategy of critique—whether that critique is formalist, instrumentalist, realist, or immanent. The Chapter first discusses the well-received internal critique in the guise of formalism, followed by external critique in the guise of instrumentalism. These two strategies are united in their focus on what interpreters should do—which interpretation to adopt and how to justify it. A cursory overview of concrete interpretative practice then shows that interpreters tend to adopt one or the other approach not depending on strong theoretical commitments, but rather strategically with a view of justifying certain claims before specific audiences. One may thus well ask what is really going on. Realism, in turn, approaches interpretations as expressions of power and bias. While appealing, realism faces difficulties of its own when it tries to account for the role of reasons, and when it commits to strong empiricism. The Chapter finally places emphasis on the strategy of immanent critique. It presents and discusses immanent critique by asking how it thinks of the possibility, direction, and mode of change. In conclusion, the Chapter connects the discussion of different strategies of critique to arguments in the troubled, crisis-prone present.

Keywords: Interpretation in International Law; Immanent Critique; Formalism; Instrumentalism; Realism; Strategies of Critique

* Amsterdam Center for International Law (ACIL), University of Amsterdam. Email: i.venzke@uva.nl. I am indebted to the editors, Jeffrey Dunoff and Mark A. Pollack, and to my colleagues at ACIL for their insightful comments on earlier versions of this contribution; and to Katherine Skinner for her assistance with finalizing the text.

I. Introduction	2
II. The Internal Critique of Formalism	4
III. The External Critique of Instrumentalism	7
IV. Intermission: Hollow Words?	9
V. The External Critique of Realism	11
A. Power, situated	11
B. Reasons, really	13
C. Which reality?	13
VI. The Strategy of Immanent Critique	15
A. Thinking about change	15
B. Static and dynamic standards	16
C. Possibility and progress	17
VII. Conclusion	18

I. INTRODUCTION

The practice of interpretation brings the law to life. It takes part in shaping and making the law, and does not just give effect to the law that is out there. To the extent that international law affects peoples' every day life, so does the practice of interpretation. Even more so than other fields of law, international law is in large parts the product of interpretative practice. What then is this practice of interpretation?

Interpretation is best understood as an argument about what the law means. While such an understanding of interpretation enjoys considerable common ground, it immediately begs the question of how to then understand that practice of *arguing*. I will distinguish four different approaches to that question in light of their strategy of critique—whether that critique is *formalist*, *instrumentalist*, *realist*, or *immanent*.¹ In other words, what are the arguments and broader strategies with which to criticize a specific interpretation or a broader interpretative practice? This question will provide the pathway for approaching the practice of interpretation.

Proponents of *formalism* espouse a standard for criticism that lies within the law itself. The standard is *internal* to the practice that is being criticized. As such, it may be less controversial and more effective as it purports to stay on the territory of the law and of parties' prior consent. At the same time, it has its limits. Formalists recognize that the law does not readily give away the answer as to how it should be interpreted. In cases of controversy, the law provides the battleground for argument. What is more, internal critique does not subject the standard of the law itself to scrutiny. It is also questionable whether formalism's internal critique is at all possible, and whether it amounts to more than hollow words. Are interpreters not always incorporating other, external standards? Does the real action not lie elsewhere?

¹ My exposition of these types of critique primarily draws on RAHEL JAEGGI, KRITIK VON LEBENSFORMEN 261-309 (2014).

Proponents of *instrumentalism* thus reach for standards other than the law, at least other than the law understood in a relatively narrow, positivist fashion. Instrumentalism's standard for critique is *external* to the practice it criticizes. It puts the law into the service of a given goal—human dignity, peace, justice, etc.—and critiques interpretations on the basis of whether or not they contribute to the goal. Advantages here might include the additional normative guidance that interpreters receive, the honesty of making broader reasons explicit, and the possibility of subjecting those reasons to criticism. One of the problems then is of course: What is the remaining role of the law if interpreters reached right through it for something else—human dignity, peace, or justice? And where does that something else come from? Do such standards not claim universality at the cost of excessive abstraction? What guidance does a demand to do the just thing possibly offer for an interpreter in any concrete case? And are those considerations not equally, if not more so, prone to reflect individual and structural biases?

In contrast to such normative strands of external critique, there is an empirical, *realist* variation, which wants to understand precisely that: what is really going on in the practice of interpretation? For example, with regard to the *Marshall Island* decision, formalists would discuss whether the decision is legally convincing and instrumentalists might critique that it dashes ambitions of nuclear disarmament or that it lets down the relatively weak complainant who had suffered from nuclear testing. A realist critique would, in contrast, point to issues such as the judges' voting pattern (all judges from states possessing nuclear weapons voted in favor of rejecting the Court's jurisdiction). There is much to gain from such a realist approach, as the languages of both law and morality indeed blend out the acting subject and the situated politics that always comes with any acting subject. While revealing, there are surely problems that include the question of whether realist critique actually gets closer to reality.

The strategy of *immanent* critique, finally, has few explicit precursors in international law and it will require a more nuanced introduction. For now, it should be noted that, similar to internal critique, immanent critique resorts to standards that are said to lie within the practice to be critiqued. Unlike internal critique, however, it does not suppose that those standards are already given; instead they must first be laid bare. Similar to realist critique, immanent critique starts with an analysis of what is going on. But it does not see reality as a given either. Rather, reality is normatively constituted and prone to transformation through the process of critique. Immanent critique does not only point to a deficit of a certain practice in light of a given standard for criticism, but instead seeks to transform both the practice *and* the standard.

The chapter's approach of asking about strategies of critique places beyond doubt that the practice of interpretation can be seen as—and *is*—many different things at the same time, without all those things possibly being captured at once. It is a practice that gives meaning to the law, aims at justice, expresses biases, exerts power, and may be troubled or spurred by inherent contradictions. How to see it is, well, a matter of strategy.

I will continue by discussing internal critique in the guise of formalism (II.) followed by external critique in the guise of instrumentalism (III.). These two strategies are united in their focus on what interpreters should do—which interpretation to adopt and how to justify it. A cursory overview of interpretative practices then shows that actors tend to adopt one or the other approach not depending on strong commitments, but rather with a view of plausibly defending certain claims before specific audiences (IV.).

Realism wishes to respond and to expose interpretations as expressions of power and bias (V.A). While appealing, realism faces difficulties of its own when it comes to the role of reasons (V.B) and when it commits to all too strong empiricism (V.C). Next, I present and discuss the strategy of immanent critique by asking how it thinks about the possibility (VI.A), direction (VI.B), and mode of change (VI.C.). In conclusion, I draw attention to inherent contradictions between strategies of critique and connect their discussion to arguments in the troubled, crisis-prone present (VII.).

II. INTERNAL CRITIQUE: FORMALISM

Formalism in law is a project that seeks to channel the exercise of power and to facilitate the pursuit of justice by means of legal rules. As guidance for the practice of interpretation, it suggests that the interpreter should stick to a clearly defined set of argumentative standards. In practice, this has meant that she should stick to a rather narrow scope of reasons in support of her claims, the foremost basis of which should be the text of the legal norm.² Accordingly, ‘texts must be interpreted as they stand ... without reference to extraneous factors’.³ Formalist critique remains essentially internal in the sense that the standard for critique rests within the practice that is being critiqued and is not external to it.

Formalism has oftentimes been taken to mean textualism.⁴ Sir Humphrey Waldock, the International Law Commission’s final Special Rapporteur on the law of treaties, attests the Commission a ‘strong predilection for textual interpretation.’ That predilection is arguably reflected in the rule of interpretation of Art. 31 of the Vienna Convention on the Law of Treaties (VCLT), even though that rule is itself rather open-textured.⁵ On Waldock’s account, the VCLT ‘takes as a basic rule of treaty interpretation the primacy of the text’.⁶ It is also the text that ‘must be presumed to be the authentic expression of the intentions of the parties’.⁷

Judicial practice has frequently embraced a formalist interpretive posture, especially in its textualist version.⁸ Early on, the International Court of Justice (ICJ) held that

the first duty of a tribunal which is called upon to interpret and apply provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur.⁹

² That is also the case for norms that may find their source in custom; they too need to be somehow textually expressed in order to be interpreted.

³ Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice. Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT’L 203, 212 (1957).

⁴ Fuad Zarbiyev, *A Genealogy of Textualism in Treaty Interpretation* in INTERPRETATION IN INTERNATIONAL LAW 251 (Andrea Bianchi et al. eds., 2015).

⁵ Vienna Convention on the Law of Treaties Art. 31, May 23, 1969, 1155 U.N.T.S. 331: ‘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.’

⁶ Int’l Law Comm’n, Third Rep. on the Law of Treaties, U.N. Doc. A/CN.4/167, at 56 by Sir Humphrey Waldock (Special Rapporteur), (1964) quoted in Zarbiyev *supra* note 4, at 256.

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

⁸ See, *seminal*, JUDITH N SHKLAR, LEGALISM (1964).

Perhaps the clearest embrace of formalism stems from the Court's infamous 1966 judgment in *South West Africa*, when the new majority argued that

Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It 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. Law exists, it is said, to serve a social need; but 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.¹⁰

The World Trade Organization (WTO) Appellate Body (AB) is renowned for its extensive use of dictionaries when interpreting the covered agreements to the extent that it was diagnosed with a 'textual fetish'.¹¹ In its seminal *US-Shrimp* case, it for example underscored that '[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted'.¹²

The embrace of formalism is unsurprising, especially for international adjudicators. It sits well with the VCLT and with the view that it is not them but the law that creates obligations and grants rights. The WTO Dispute Settlement Understanding puts it plainly: adjudicators must not 'add to or diminish the rights'.¹³ Basic ideas about legitimate order and about the relationship between law and justice are reflected in the project of formalism. It can build on the Kantian tradition that categorically separates (international) law—the rights and the obligations that it creates—from morality, not the least so as to defend a formal approach to law and to avoid that it be taken over by moral intuitions.¹⁴

Hans Kelsen clearly stands in this tradition when he expresses his deep skepticism about the sheer possibility, as well as political implications, of trying to base the law and legal interpretation in vague notions of universal justice. As justice lies in the eye of the beholder, that would inevitably lead onto entirely shaky terrain.¹⁵ In spite of occasional assertions to the contrary, Kelsen, just like Kant, was far from believing that the law can determine decisions in any concrete case. But whereas claims about morality were inherently subjective, dissolving into arbitrary opinion, the law and formalism at least provided a basis for objectivity and meaningful argument to curb the exercise of power.

Still today, formalism carries that potential of a 'legal culture [that] compels a move away from one's idiosyncratic interests and preferences by insisting on their

⁹ Competence of General Assembly for Admission of a State to United Nations, Advisory Opinion, 1950, I.C.J. Rep. 4, 8 (Mar. 3).

¹⁰ *South West Africa (Eth.v. S. Afr.; Liber. v. S. Afr.)* Second Phase, Judgment, 1966 I.C.J. ¶ 49 (July 18).

¹¹ D. A. Irwin & J. H. H. Weiler, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)*, 7 WORLD TRADE REV. 71, 89–95 (2008).

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

¹³ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S.

¹⁴ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 324-25 (1797) See Jochen von Bernstorff and Ingo Venzke, *Ethos, Ethics and Morality in International Relations*, MPEPIL ¶ 5 (Rüdiger Wolfrum ed., 2010).

¹⁵ HANS KELSEN, *WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE* 1-24 (1971).

justification in terms of the historical practices.’¹⁶ Also Martti Koskenniemi, who starts his argument from the malleability of the law, sees that ‘[w]hatever historical baggage, including bad faith, such a culture [of formalism] entails, its ideals include those of accountability, equality, reciprocity and transparency, and it comes to us with an embedded vocabulary of (formal) rights’.¹⁷ The strategy of internal critique wants to tap into the promise of the law to offer protection for the weak against strategies of moralization that tend to favor the strong.

It may further speak in favor of an internal, formalist critique that it simply proves to be effective in a legal argument, be it in a setting with or without the possibility of third party adjudication. Formalist interpretations invoke the law as a point of reference that is already shared. Also the AB’s extensive use of dictionaries seems above all strategic in that sense, working towards increased authority vis-à-vis the Member States.¹⁸

What is more, legal procedures channel and mediate larger conflicts precisely by squeezing them into the strictures of the law and by placing limits on what can practically be said when and where.¹⁹ On such an account, formalism is an indispensable part of the social function that the law performs. Still more drastically, formalism defines a distinctly legal mode of arguing which practically constitutes the legal sphere that cannot, without loss, be reduced to something else—be it an expression of morality, power, or culture, for instance.

Occasionally, formalism is charged with a mistaken belief in the determinacy of legal rules and in the possibility of logical deduction. Those charges indeed stick to views such as that ‘interpretation methods must be those which deduce the meaning exactly of what has been consented to and agreed.’²⁰ Or, in the words of a commentary on Art. 31 VCLT, that interpretations must ‘release [*dégager*] the exact meaning of and the content of the law’.²¹ Judicial practice sometimes evokes a similarly mythical image of interpretation as an act of archeological discovery, suggesting that the law comes with one specific meaning that is hidden, but somehow already contained within, underneath or behind the law. The common denominator of modern linguistics rejects such an image with its proposition that words do not gain their meaning by what they represent but through the difference between them (Ferdinand de Saussure) and that they do not have a meaning other than that attributed to them by their use (Ludwig Wittgenstein). But neither is formalism premised on such a belief of determinacy, nor Art. 31 VCLT on the possibility of deducing or releasing meaning. Art. 31 notably speaks

¹⁶ Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT’L L. 455, 478 (1996).

¹⁷ MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA. THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 616 (2005).

¹⁸ Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT’L L. 9, 45(2016).

¹⁹ Seminaly, NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN (1983).

²⁰ ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 55 (2008).

²¹ Jean-Marc Sorel & Valérie Boré Eveno, *Article 31*, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 806 (Olivier Corten & Pierre Klein eds., 2011).

of the ordinary meaning that should be *given* to the terms of the treaty, not of a meaning that should be taken.²²

A weak-spot of formalism may however be its solipsism and the lack of guidance on what an interpreter should do. For Kelsen, the law provides a ‘frame’ within which the interpreter needs to choose one of the possible interpretations. Kelsen leaves the interpreter alone with this choice, adding only in a very short section on ‘the so-called methods of interpretation’ that the “‘weighing of interests” is merely a formulation of the problem, not a solution.’²³ Within the legal frame, the interpreter decides on her own.

Deeper-running criticism of formalism draws attention to what it misses or must almost by necessity leave inarticulate. By squeezing broader social conflicts into a legal form, some considerations are necessarily left out. Formalism has thus been challenged for its inability to provide an account of what is really going on. It appears to be neither attuned to what moves interpreters, nor to the biases that they maintain. It does not seem to have a sharp eye for even the most glaring instances of injustice either. The use of force that leads to great suffering may be legal, just as well as the practices that partake in starving on average about 20,000 people per day.

III. EXTERNAL CRITIQUE: INSTRUMENTALISM

Whereas advocates of formalism see references to moral considerations as slipping into subjectivity, the argument is upside down for instrumentalists: the law must be seen as a means to an end, not as an end of its own. Interpretations must be guided by the point of it all. It is clear that also formalism can, and probably should, consider ends. After all, Art. 31 VCLT asks the interpreter to consider the context of the terms to be interpreted, just as well as the object and purpose of the treaty. It speaks of a rule of interpretation—in the singular, notably—and judicial practice yields about as many expressions of textualism as assertions that the act interpretation is a holistic exercise that cannot establish the relevant terms’ ordinary meaning other than in their context and in light of their object and purpose. It is thus easy to contrast examples of textualism, put in scene in the battle of dictionaries at the WTO, with other instances of teleological interpretation, even with instances of interpretation that look like ‘acts of violence against a text.’²⁴

One of the best contrasts with the ICJ’s embrace of formalism in its 1966 Judgment in *South West Africa* stems from its 1962 decision on jurisdiction in the same case when it averred that

the natural and ordinary meaning of the words... is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.’²⁵

The question is how far to take the reference to general goals or to specific objectives, and with which consequences? More specifically, when does instrumentalism

²² Part of the problem here is the similarly mistaken belief that interpretations are arguments about how to *find* the law, rather than *justifications* of different claims to that law.

²³ HANS KELSEN, *PURE THEORY OF LAW* 352 (Max Knight transl., 2005).

²⁴ Philip Allott, *Interpretation—An Exact Art*, in *INTERPRETATION IN INTERNATIONAL LAW* 373 (Andrea Bianchi et al. eds., 2015).

²⁵ *South West Africa* (Eth.v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, Judgment, I.C.J. Rep. 1962, ¶ 336 (Dec. 21).

become an *external* rather than internal critique? When does it no longer critique on the basis of the law, but on the basis of a standard that is external to the law? Occasionally the law explicitly refers to moral standards such as ‘the laws of humanity and the requirements of the public conscience.’²⁶ Then even a formalist, textualist strategy of critique is bound to turn to moral arguments.

Generally, the boundary between formalism and instrumentalism is porous. There is a difference, however, which becomes clear in cases of conflict between requirements of law and justice. Even if the ICJ’s 1962 decision placed emphasis on the law’s spirit and purpose, it maintained an internal strategy of critique. It was a teleological interpretation, but its basis was ‘the clause or instrument in which the words are contained.’²⁷

That is different with the policy-oriented jurisprudence à la New Haven as it was proposed by one of its protagonists, Myres McDougal. On McDougal’s account, all interpretations must be directed towards the overarching aim of human dignity. That is an overarching postulation, not necessarily tied to the spirit or purpose of the instrument to be interpreted. More importantly, concerns for human dignity should not only justify claims about what the law requires, but in case of conflict, they should trump the law, at least as traditionally understood. The policy-oriented jurisprudence ‘require[s] the rejection of the parties’ explicit expectations which contradict community policies.’²⁸ The critique is clearly external. The law itself is put to the test.

Instrumentalism encourages the interpreter to articulate more candidly why one rather than another interpretation should be adopted. All too often it seems that formalism offers but a mask for the real reasons that carry interpretative choices. Plus, when the interpreter does not state the reasons on which she bases her decision, those reasons cannot be questioned either. There may thus be a degree of honesty in making the considerations explicit that are in fact guiding the interpreter.²⁹

The most far-reaching and most delicate advantage of an instrumentalist posture is that it may allow for external criticism that is not tied to the law. In contrast to internal critique, which relies on the standards that the law itself provides, external critique relies on standards that are projected onto the law from the outside, for instance, that a certain military intervention is illegal but legitimate or, the other way around, that it is legal but illegitimate. It is entirely clear, also for formalists who place their bets on formal legal rules to constrain power and to pursue justice, that questions of legality and legitimacy are not the same. But a nearby problem for external critique is where those external standards should come from—are they not just a ‘view from nowhere’ in the sense that they subject the law to the particular biases and preferences of whoever happens to critique it?³⁰

For policy-oriented jurisprudence, the overarching goal of human dignity is not an

²⁶ This is from the so-called Martens Clause in the Preamble of the 1899 Second Hague Convention on the Laws and Customs of War and Land.

²⁷ South West Africa, *supra* note 25, at 336.

²⁸ MYRES SMITH MCDUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE* 42 (1967).

²⁹ ARMIN VON BOGDANDY & INGO VENZKE, *IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION* 186–189 (2014).

³⁰ THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986).

abstract postulation, but is supposed to be at work as a ‘social fact’ within the ‘world public order’ that is marked by a myriad of actors other than governments, especially by an expansive civil society. The international legal process that includes all those actors gives rise, on this account, to norms that may be at odds with formal treaty or customary international law, even with cardinal legal norms such as the UN Charter’s prohibition on the use of force so that, for example, NATO’s military intervention in Kosovo would be deemed not only legitimate, but also legal—not because the provisions of the UN Charter are interpreted that way, but because humanitarianism provides a point of reference for legal judgment with a considerable degree of autonomy from positive legal norms.³¹ The ambition was thus to take standards for critique from social practices and to reconstruct them in the guiding light of human dignity, not to impose idiosyncratic external standards. This did not change the fact, however, that policy-oriented jurisprudence in the name of human dignity has ‘had an uncomfortable tendency to coincide with the outlook of the United States’.³²

Another problem is that external standards for critique typically claim universality at the expense of great abstraction. While few people would disagree with pursuing objectives of justice, peace, or human dignity, those objectives in fact offer rather little guidance. ‘As for philosophers’ Francis Bacon wrote, ‘they make imaginary laws for imaginary commonwealths, and their discourses are as the stars, which give little light, because they are so high.’³³ It is thus not so clear what is gained when Ronald Dworkin asks that the UN Charter be interpreted in light of international law’s underlying aim of ‘creat[ing] 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’.³⁴ Not only do different aims frequently compete, but a single aim can support quite different interpretations.³⁵ While one side in a debate on humanitarian intervention would for instance argue that allowing such practices opens an avenue towards external aggression, another side would argue that prohibiting humanitarian intervention protracts domestic barbarism. And a third side would decry the terms of the debate, pointing out that references to domestic barbarism are clearly a projection of neo-colonial attitudes.

IV. INTERMISSION: HOLLOW WORDS?

Formalism and instrumentalism reflect deep-seated commitments on core questions such as the relationship between law and morality, about how power is exercised, and about the possibilities of using the law to advance the purist of justice. In legal practice and

³¹ Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: the Special Problem of Humanitarian Intervention*, 11 EUR. J. INT’L L. 3, (2000); see also Hongju Harold Koh, *Transnational Legal Process* 75 Neb. L. Rev. 181 (1996).

³² Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L. J. 1991–2008, 2001 (1995).

³³ SIR FRANCES BACON, ON THE ADVANCEMENT OF LEARNING (1605), quoted in E. H. CARR, THE TWENTY YEARS’ CRISIS 1919–1939 (1964 [1939]), epigram.

³⁴ Ronald Dworkin, *A New Philosophy for International Law*, PHIL. & PUB. AFF. 41 2, 22 (2013).

³⁵ Similarly, Başak Çali, *On Interpretivism and International Law*, 20 EUR. J. INT’L L. 805, 822 (2009).

scholarship, the argument about arguments is alive and well. Large parts of judges' dissenting opinions in *Marshall Islands* lament the majority's formalism. They argue that 'today the most unsettling danger remains an excess of formalism,'³⁶ that such formalism leads to a jurisprudence deprived of all relevance for the future and for humanity,³⁷ and that the Court 'shelter[s] behind purely formalistic considerations which both legal professionals and ordinary citizens would find difficult to understand.'³⁸

On other occasions, be it at the ICJ or elsewhere, judges or arbitrators take issue with instances of excessive instrumentalism. Georges Abi-Saab wrote a jarring critique of the majority's decision in *Abalcat* affirming the tribunal's jurisdiction because, according to that majority, requiring the claimant to first wait for the 18 months would be 'unfair'.³⁹ For Abi-Saab, a balance between competing interests had been struck in the treaty while the majority now 'strike[s] out a clear conventional requirement, on the basis of its purely subjective judgment'.⁴⁰ As in practice, the question of how interpreters should justify their claims remains a prominent evergreen in scholarship just as well—be it in general jurisprudence or specifically in international law.⁴¹

But in the practice of interpretation, commitments to formalism or instrumentalism easily give way to more pragmatic considerations of how to win an argument here and now. This is not only the case for scholars, who are generally less constrained in their choices of interpretative strategy, but also for practitioners, including judges.⁴² Already for Hersch Lauterpacht, the mode of interpretation was not the determining cause of judicial decision, but the form in which the judge cloaks the results arrived at by other means. According to Lauterpacht, the contrast between instrumentalism and formalism 'partakes of some degree of artificiality inasmuch as it tends to exaggerate their importance.'⁴³ Judge Jessup wrote as much in his 1966 dissent in which he critiqued the Court's formalism at great length, and at the same time granted that interpretative arguments provide 'a cloak for a conclusion reached in other ways and

³⁶ Negotiations relating to Cessation of Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J. Rep. 255 ¶ 22 (Oct. 5) (dissenting opinion by Ad Hoc Bedjaoui), my translation.

³⁷ Negotiations relating to Cessation of Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J. Rep. 255 ¶11 (Oct. 5) (dissenting opinion by Cançado Trindade); (dissenting opinion by *ad hoc* Bedjaoui).

³⁸ Negotiations relating to Cessation of Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India) Judgment, 2016 I.C.J. Rep. 255, 315 (Oct. 5) (dissenting opinion by Bennouna).

³⁹ *Abalcat and Others v. Arg. Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion, ¶ 29 (Aug. 4, 2011).

⁴⁰ *Id.*, at ¶ 30.

⁴¹ See Daniel Peat & Matthew Windsor, *Playing the Game of Interpretation: On Meaning and Metaphor in International Law*, in INTERPRETATION IN INTERNATIONAL LAW 3-33 (Andrea Bianchi et al. eds., 2015).

⁴² Martti Koskenniemi, *Between Commitment and Cynicism. Outline for a Theory of International Law as Practice*, in COLLECTION OF ESSAYS BY LEGAL ADVISERS OF STATES, LEGAL ADVISERS OF INTERNATIONAL ORGANIZATIONS AND PRACTITIONERS IN THE FIELD OF INTERNATIONAL LAW 495 (United Nations ed. 1999).

⁴³ H Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. YB. INT'L LAW 48, 53 (1949).

not a guide to a correct conclusion.’⁴⁴

Choices for one interpretative stance rather than another are frequently subordinate to the overriding goal of defending a certain claim with the maximum available plausibility in the eyes of the relevant audience. Judge Abraham for example supported the ICJ’s ‘strictly realistic and practical view, free of all hints of formalism’ in *Georgia v. Russia*⁴⁵ and then adopted a decidedly formalistic posture in *Marshall Islands*, when he saw himself ‘bound by ...established jurisprudence’.⁴⁶ One may thus well question what is really going on when interpreters interpret.

Interpreters are invested in a struggle in which they seek to align the law with their interests or convictions. They seek to pull the law onto their side. More often than not, justifications for one rather than another interpretation, and claims about how to justify interpretations, are subordinate to the goal of winning the argument. As strategies of critique, both formalism and instrumentalism do not only provide principled reasons on how to argue, but also guidance on what is strategically advisable. For formalists that tends to be an appeal to what is shared between the parties—the law—and for instrumentalists it is the point of it all—the underlying goals. In each and every case, the interpreter presents herself as a servant of a higher order, as a mouthpiece and of something that lies outside her reach—the law or the underlying goals. In the practice of interpretation, the interpreter notably hides as a subject and actor in claims to universality.⁴⁷ A further possibility for critique then rests in unraveling the pretense to universality and in highlighting interpreters’ specific choices, their preferences and particular convictions.

V. REALISM AND THE QUEST TO UNDERSTAND WHAT IS REALLY GOING ON

A. *Power, situated*

One common way of understanding arguments is as reasons that rationally motivate an addressee to accept the claims those arguments support. That is how the practice of interpretation tends to be seen from the perspectives of both formalism and instrumentalism. When understood as expressions of power, a concern for the *acceptability* of interpretations is replaced with the brute fact of their *acceptance*. The criterion by which arguments are assessed then is their sheer success.⁴⁸ A possibility for critique would be to carve out the factors that support the success of one rather than another interpretation—their felicity structures, in other words. Better understandings of

⁴⁴ South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, Judgement, 1966 I.C.J. Rep. 6, ¶ 355 (July 18) (dissenting opinion by Jessup).

⁴⁵ Application of International Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment, 2011 I.C.J. Rep. p. 223, ¶ 14 (Apr. 1) (separate opinion by Abraham).

⁴⁶ Negotiations Relating to Cessation of Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J. Rep. 255, ¶ 9 (Oct. 5) (separate opinion by Abraham).

⁴⁷ Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT’L AFF. 197–218 (2004).

⁴⁸ Ralph Christensen & Michael Sokolowski, *Die Krise der Kommunikation und die Möglichkeit juristischen Argumentierens*, in DIE SPRACHE DES RECHTS. RECHT VERHANDELN (Kent D Lerch ed., 2005) 105-154.

structural biases and of silenced views are then closer by.⁴⁹ The key question here is what the presuppositions are on which a going interpretation rests.⁵⁰

Even if interpreters were driven by the sincere conviction of giving the true, right or just meaning to the law, those convictions are bound to remain partial, not necessarily because universal positions do not exist, but because they are unattainable due to every interpreter's situatedness. While the categorical rejection of universal positions is as unconvincing as their faithful affirmation, no interpreter can escape her context, time and space. In a debate about the laws of war it is clear that '[n]o one, after all, experiences the death of her husband or sister as humanitarian and proportional'.⁵¹ Suggesting that the widow is irrational for not agreeing with a claim about the legality of her husband's killing would only add insult to injury. And even if, with shaky confidence, one were to abstract from the perspective of the widow, it is still hard to deny that interpretative claims stand under the spell of everyone's situatedness.

While the international legal doctrine blends out the interpreter in any act of interpretation and, in turn, struggles with every interpreter's situatedness, increasing the awareness of the choices that interpreters make is possibly the best retainer of hope for betterment.⁵² The analysis of interpretation should foreground what the interpreter must have been thinking, mapping her socially constructed consciousness.⁵³ Rather than steaming ahead to interpret international law in the service of what is considered best, such a stance would reveal the biases in interpretation and instruct the interpreter about her own practice.

It is also clear that individual biases do not come out of nowhere but are part of collective, social dynamics. Stanley Fish argued prominently that specific interpretations reflect the positions of communities of interpreters. What accounts for an interpretation's acceptance is that it corresponds to the interpretative angle from which other interpreters also approach the law. Disagreement about how to interpret the law is, according to Fish, 'not . . . a disagreement that could be settled by the text because what would be in dispute would be the interpretative "angle" from which the text was to be seen, and in being seen, made'.⁵⁴ This thought has gained traction in international legal scholarship where it is used to explain the relative stability of some shared interpretations as well as persisting divergence between others.⁵⁵ And as such it has purchase—how else should the divide between commercial and public lawyers in international investment law be understood or between military and humanitarian lawyers when it comes to what they respectively call

⁴⁹ See Fleur Johns, *Critical International Legal Theory*, in this volume. Also see, FUAD ZARBIYEV, *LE DISCOURS INTERPRÉTATIF EN DROIT INTERNATIONAL CONTEMPORAIN. UN ESSAI CRITIQUE* 54 (2015).

⁵⁰ See e.g., Martti Koskenniemi, 'The Lady Doth Protest Too Much': *Kosovo, and the Turn to Ethics in International Law*, 65 *MOD. L. REV.* 159 (2002).

⁵¹ DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* 275 (2016).

⁵² Isabel Feichtner, *Critical Scholarship and Responsible Practice of International Law. How Can the Two be Reconciled?*, 29 *LEIDEN J. INT'L L.* 979 (2016); Sundhya Pahuja, *Laws of Encounter: A Jurisdictional Account of International Law*, 1 *LONDON REV. INT'L L.* 63 (2013).

⁵³ David Kennedy, *The Turn to Interpretation* 58 *S. CAL. L. REV.* 251, 255 (1985).

⁵⁴ STANLEY FISH, *DOING WHAT COMES NATURALLY* 141–2 (1989).

⁵⁵ Andrea Bianchi, *The Game of Interpretation in International Law: The Players, The Cards, and Why the Game is Worth the Candle*, in *INTERPRETATION IN INTERNATIONAL LAW*, 34–60 (Andrea Bianchi et al. eds., 2015).

the laws of war or humanitarian law?⁵⁶

B. *Reasons, really*

This take on the reality of interpretative practice is as revealing as it is problematic. First of all, the reasons that interpreters offer in support of their claims tend to fall off the radar, or they are recast as rhetoric, if not as violence.⁵⁷ That is most evident for Fish's position, where arguments are accepted if they resonate with the interpretative angle that a specific community shares. That the community shares such an angle is a premise, not possibly the result of the practice of arguing. If the interpretative angle anchors the community, what happens between communities other than competition? As emancipating as it may be to study such competition between fragmented interpretative communities within international law, it leads to the conclusion that between communities, international law is awkwardly silent.

For ages, a realist stream of thinking in international relations has held that self-interest is the unshakable foundation for all action—including interpretative choices. Arguments, some have suggested, are nothing but cheap rhetoric, which could at best provide new information, but would not change any actor's predisposition.⁵⁸ The competing constructivist stream has always questioned the foundational role of self-interest. It has pushed the point that interests may indeed change through the process of arguing.⁵⁹ There really is no good reason for restricting the role of arguments to instrumentalist questions of how to get what we want and not to extend it to questions of what we want in the first place. What actors want is a given for realists at such a level of abstraction—power, wealth, maximizing interests (well, which?)—that it is often practically meaningless. Questions that seem instrumental—how to pursue given interests?—then quickly become questions of what we really want.

It follows that a successful interpretation may indeed be well understood as an expression of power.⁶⁰ It may just as well meet with something like genuine agreement, or even induce a change in other actors' predispositions, either because they learn how they can better get what they want or what they really want.

C. *Which reality?*

Realists claim to get closer to reality, but it is not so clear that they do. It is not evidently wrong—unreal or surreal—to say that the ICJ declined the exercise of its jurisdiction in

⁵⁶ David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J. INT'L L. 315 (2013); Stephan W. Schill, *Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator*, 23 LEIDEN J. INT'L L. 401, 430 (2010).

⁵⁷ See Iain Scobbie, *Rhetoric, Persuasion, and Interpretation in International Law*, in INTERPRETATION IN INTERNATIONAL LAW 61–77 (Andrea Bianchi et al. eds., 2015).

⁵⁸ E.g. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). The founding father of realism was much more nuanced and would defend the national interest as a point of reference but be less dismissive about the possibility of meaningful legal argument. See OLIVER JÜTERSONKE, *MORGENTHAU, LAW AND REALISM* (2010).

⁵⁹ See, classically, Thomas Risse, *'Let's Argue!': Communicative Action in World Politics*, 54 INT'L ORG. 1 (2000). Also see NICOLE DEITELHOFF, *ÜBERZEUGUNG IN DER POLITIK* (2006).

⁶⁰ See, in agreement, Gregory Shaffer, *The New Legal Realist Approach to International Law* 28 LEIDEN J. INT'L L. 189, 206 (2015).

Marshall Islands because of the formal, legal reason that it found no dispute between the parties. Such an understanding of the decision is clearly partial and a series of dissenting Judges have rightly lamented how the majority's reasoning all too easily reveals that the real reasons lie elsewhere, certainly not in the existence *vel non* of a dispute. Other, realist understandings that place other reasons centre stage—the distribution of atomic weapons and judges' nationality, for instance—are equally partial as they no longer offer a view of how the law presents itself.⁶¹ Just as interpretations in law cut out what cannot be squeezed into the scope of legal reasoning, realist approaches cut out an understanding of interpretations as a practice of normative argument. As part of the law's self-presentation, as Ino Augsberg has put it, the practice of legal argumentation 'is both "real", in the sense that it is part of our modern world, and "unreal" since it cannot be conceived of as an empirical object.'⁶²

For the law to function as law it must have its own causes—such as the existence of a legal dispute between the parties as a condition for the ICJ's jurisdiction. And in order to succeed in law, actors need to argue with those causes to support one interpretation rather than another. That, and nothing more or less, is what notions of legal autonomy or legal rationality refer to. That this rationality is real has been recognized time and again, for instance by Max Weber when he suggests studying the states of mind of legal practitioners, above all judges, in order to get closer to the reality of the law.⁶³ Pierre Bourdieu likewise mocked attempts at understanding a social practice such as legal interpretation through distanced external descriptions that explained those practices without regard for the reasons that the actors themselves have for their action. For him, 'far from being a simple ideological mask, such a rhetoric of autonomy, neutrality, and universality, ... is the expression of the whole operation of the juridical field'.⁶⁴ A judge cannot justify an interpretation with reference to the breakfast she ate that morning, not even with reference to the fact that her country possesses nuclear weapons. The legal field imposes constraints on the way of arguing that may well be the basis of law's autonomy, which, in turn, makes it a real thing.

It might be suggested that all should be done at once, to piece together a full picture of reality by understanding, among other things, the power constellation behind the *Marshall Islands* decision and, at the same time, its formal legal reasons with which the Court declined its jurisdiction. It is indeed rather like Wittgenstein's famous drawing that sometimes looks like a rabbit, and sometimes like a duck; once we see the duck, we can no longer see the rabbit and the other way around—arguments cannot be seen as

⁶¹ Ino Augsberg, *Some Realism about New Legal Realism: What's New, What's Legal, What's Real?*, 28 LEIDEN J. INT'L L. 457, 462 (2015).

⁶² *Id.* at 262; CHRISTOPH MÖLLERS, *DIE MÖGLICHKEIT DER NORMEN—ÜBER EINE PRAXIS JENSEITS VON MORALITÄT UND KAUSALITÄT* 69 (2015); JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG* 436 (1992).

⁶³ Alf Ross and Scandinavian legal realism made very similar suggestions. See Jakob V. H. Holtermann & Mikael Rask Madsen, *European New Legal Realism and International Law: How to Make International Law Intelligible?*, 28 LEIDEN J. INT'L L. 211, 217-219 (2015).

⁶⁴ Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 814, 820 (1987).

expressions of power and as normative justifications at the same time.⁶⁵ Neither the rabbit nor the duck are more real. Nor can we see them both as part of something else that would bring the different images together—there is no escape from adopting a particular perspective.

VI. THE STRATEGY OF IMMANENT CRITIQUE

We must not believe, the realist argument goes, that the reasons interpreters give for their claims are the real reasons for which they argue one way rather than another. In the universalizing language of the law interpreters struggle to make their particular preferences prevail and, in passing, enact individual or structural biases. Realism's move is thus to understand the political, social, and psychological reasons behind the outward show of interpretative practice. The practice of legal interpretation creates false images that, in classic critical parlance, contribute to the alienation of power. They function as an 'ideological mask', hiding power's ugly face. Scholarship should arguably be emancipatory, discard ideology, work against the alienation of power, inform practice about itself, lay responsibility where it belongs, and show how interpretative practice could have been otherwise.⁶⁶ It is this last hallmark of critique—showing how it could be otherwise—that most clearly marks immanent critique's difference from both internal and external strategies of critique.

A. *Thinking about possibility*

Internal critique in the guise of formalism finds the standard for criticism in the law and exposes how interpretations possibly fall short of that standard—how a certain interpretation does not square with the law. External critique in the guise of instrumentalism likewise points to a given standard for evaluating practices and for exposing their deficiency. The direction of adjustment is clear in both cases: interpretations need to change to approximate the normative ideal. Normative reasoning is, in that sense, always counterfactual. Its characteristic feature is precisely to take distance in the world from that world.⁶⁷

In both cases of formalism and instrumentalism, the possibility of different interpretations tends to be presumed, rather than argued for. That is clearly the case, and rather unproblematic, for formalist critique that centers on law's own reasons for one interpretation rather than another. Presuming the possibility of a different interpretation is only slightly more delicate for instrumentalism because it is not entirely clear that demands arising from the goal to be pursued can always be easily translated into practically compelling interpretations of the law.

In contrast to the outright normative critiques of formalism and instrumentalism, the critique of realism does not come with a standard to point out the direction in which

⁶⁵ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (Gertrude Elizabeth Margaret Anscombe ed.) (1958), Part II, §xi. See also MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* 513 (2001).

⁶⁶ Classically, Jürgen Habermas, *Knowledge and Interest*, *INQUIRY: AN INTERDISC. J. PHIL.* 285, (1966).

⁶⁷ CHRISTOPH MÖLLERS, *DIE MÖGLICHKEIT DER NORMEN—ÜBER EINE PRAXIS JENSEITS VON MORALITÄT UND KAUSALITÄT* (2015).

interpretations should change. Its claims are at best emancipatory and negative: the practice of interpretation should not be like this. The possibility of change, of different interpretations cannot simply be presumed because the ‘real’ causes are what realism cares about. While realism takes its cues from law’s indeterminacy—legal rules are not the reasons for specific interpretations, but other socio-political factors are—those other factors quickly close down in practice the indeterminacy that exists in theory. For example, there is nothing logically implausible about interpreting the UN Charter’s prohibition of the use of force to also prohibit economic force. Yet, it is rather clear that those interpretations do not fly, and there is a sense of why they do not.

B. Static and dynamic standards

The normative critiques of formalism and instrumentalism leave the standards for criticism intact. Those standards are, in fact, static and the practice of interpretation should meet them. Realism, in turn, leaves reality intact and seeks to understand and explain it. Immanent critique wants to transform both, the norms and the world. The standard for its critique is dynamic, as is its conception of reality.

Immanent critique, like internal critique, locates the standard for criticism within the social practice it criticizes. The difference is that for immanent critique those standards are not readily given, but the product of thorough analysis, which centres on presuppositions and possible contradictions. With regard to the conception of reality and the possibility of its transformation, immanent critique understands reality as normatively constituted, zooms in on the reasons why social practices remain deficient, and tries to locate those reasons in conflicting normative standards. It is not just that an interpreter should and could have adopted a different interpretation and did not do so because of socio-political factors, but that there are structurally opposing normative standards that hold the interpreter back.⁶⁸

The classic Hegelian example for such a critique starts from an analysis of the contradictions in bourgeois society between autonomy and interdependence, which Karl Marx then famously picked up with a twist in his analysis of contradictions between formal freedom and material dependence.⁶⁹ Within international law, newly independent states’ critique in the 1970s can be read in this light when they showed how their formal independence left them materially dependent and how the norm of sovereign equality was effectively meaningless, not just because reality did not live up to it, but because the normative structure itself contained a contradiction: As sovereigns, newly independent states had to live up to their commitments, which included the sanctity of those arrangements that subjected them to material dependence.⁷⁰ The interpretations of investment arbitrators were then not critiqued on the basis of the law (formalism), nor justice (instrumentalism), or with a view to the biases or power relations they enact (realism). They were critiqued in light of structurally opposing normative standards. In

⁶⁸ For further reference and for a theoretical-philosophical contextualization of these core claims of immanent critique see Robert J Antonio, *Immanent Critique as the Core of Critical Theory: Its Origins and Developments in Hegel, Marx and Contemporary Thought* 32 BRIT. J. SOC. 330 (1981); JAEGGI, *supra* note 1; TITUS STAHL, *IMMANENTE KRITIK: ELEMENT EINER THEORIE SOZIALER PRAKTIKEN* (2013).

⁶⁹ GFW HEGEL, *GRUNDLINIEN DER PHILOSOPHIE DES RECHTS* (1820); KARL MARX, *DAS KAPITAL*, (1867). Also see JAEGGI, *supra* note 1, at 284-5.

⁷⁰ MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 77-81 (1979).

the concrete example, newly independent states were recognized as sovereign, but not free. International law rather tied them into an order that cemented their dependence. In fact, they were just sovereign enough to be part of that order in which competing, contradictory standards held each other at bay.⁷¹

In international law, this is what David Kennedy, Martti Koskenniemi and others have shown with such great impact: The *structure* of international legal argument is indeterminate because it inescapably oscillates between the antinomies of apology and utopia.⁷² But this is only a first part of the programme of immanent critique as a description of contradictions must be followed by their more thorough understanding and explanation, oftentimes through a mode of historical, genealogical inquiry.

That inquiry, in turn, brings immanent critique closer to external, realist critique. But whereas realist critique is negative and destructive—it should not be like this—immanent critique is affirmative and productive. As for Theodor Adorno, ‘the wrong, once expressly recognized and specified, is already the index of the right, the better.’⁷³ Thus newly independent states’ analysis of the structures of international law in the 1970s led them to the notion of economic sovereignty that would have combined, if not transcended, the elements of formal independence and material dependence.

Against utopian tendencies, immanent critique does not want to confront reality doctrinally with new principles, but wants, as Marx put it, to find the new world through the critique of the old.⁷⁴ So the standard for criticism is a product of critique. Interpretative practice would not be critiqued for its deficiency in light of an opposing norm because the reason for that deficiency is already located in the contradictions between these opposing standards. Economic sovereignty would arguably be the new standard that was already immanent in the practice of interpretation.

In sum, four core features distinguish immanent critique. First, the direction of critique does not flow from a given standard to reality, but rests within the contradictions of a normatively constituted reality. Second, immanent critique starts with an analysis that establishes and reveals those contradictions and then tries to understand and explain them. Third, immanent critique is affirmative and productive. Fourth, the standard of criticism is a product of critique.

C. Modes of change

This leaves me with the question of how immanent critique thinks about the possibilities of change, of different interpretations. Like realism, immanent critique starts with an analysis of what is really going on, only that it grants norms a reality that realism tends to deny.⁷⁵ It sees reality as normatively constituted and thus offers a first blunt answer to the

⁷¹ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

⁷² Classically, David Kennedy, *Theses About International Law Discourse*, 23 GERMAN Y.B. INT’L L. 353(1980); KOSKENNIEMI, *supra* note 17.

⁷³ Theodor Adorno, *Kritik*, in 10 GESAMMELTE SCHRIFTEN 793 (1997), my translation. Also see Michael Teunissen, *Negativität bei Adorno*, in ADORNO-KONFERENZ 1989 41, 47 (L. v. Friedeburg & J. Habermas eds., 1983).

⁷⁴ See SEYLA BENHABIB, *CRITIQUE, NORM, AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY* (1986) 41.

⁷⁵ That is notably not the case for Gregory Shaffer, in this volume, whose realism claims that legal arguments are a real thing.

possibilities of change: once the norms change, reality changes. Such change is the product of immanent critique's analysis, which destabilizes and transforms both norms and reality by establishes and exposing its inherent contradictions.

To bring down such a grand claim onto more compelling grounds, immanent critique thinks of change as a process of experience and learning, arguing that critique should work on consciousness. It thereby links up to arguments that an interpreter must first be aware of her biases in order to possibly confront. More generally, it connects to the classic Aristotelian mantra of informing practice about itself for the sake of better practice.⁷⁶

Of course, immanent critique does not always, perhaps not all that often, succeed in the process of its mere execution. The idea of economic sovereignty, if that was indeed the way to go, has never really caught on, not the least because many powerful actors never had to experience the contradictions between sovereign independence and material dependence and could resist learning about them. They could draw different lessons, directing attention not to material dependence but to supposedly greater wealth for all through economic liberalization.

The prevailing normative standard for interpretative practices in international economic law did not become a concern for economic sovereignty, but rather for economic development through investment protection and trade liberalization. While that objectively looks like progress for some, it looks like a perpetuation of injustice for others.

If immanent critique does not want to impose an external standard of criticism onto a social practice of interpretation, how can it tell which possible interpretation to prefer? Part of an answer is that immanent critique looks at whether different interpretative practices have resolved previously existing contradictions. A certain interpretative practice cannot be assessed other than in comparison to other instances of practice, typically interpretations that existed earlier. In such an assessment, it does not seem that the emphasis on economic development has done anything about the still unresolved contradiction between sovereign independence and material dependence. Another part of an answer is that at least some strands of immanent critique are committed to a standard of individual and collective freedom in a broad sense, so that any new practice that increases such freedom should be preferred.⁷⁷ Nevertheless the nature of such a standard, albeit minimal, is uncertain.

VII. CONCLUSIONS

This chapter has pursued the question of how an interpretation can be critiqued. The first two strategies of formalism and instrumentalism are outright normative, respectively providing internal and external standards for criticism. While both strategies may reflect deep commitments, it seems that the choice for one rather than the other is more often than not subordinate to the specific position that an interpreter wants to defend before a given audience. A third strategy of critique, realism, thus seeks to understand what really

⁷⁶ In agreement, TITUS STAHL, *IMMANENTE KRITIK* 10 (2013).

⁷⁷ See ALEX HONNETH, *DAS RECHT DER FREIHEIT: GRUNDRIß EINER DEMOKRATISCHEN SITTlichkeit* (2011), in English: *The Right of Freedom: Outline of a Democratic Ethical Life*.

drives interpreters, and it does so with the suggestion, sometimes implicit, that those reasons are sinister or corrupt, or even if sincere and commendable, still have undesirable consequences. The fourth strategy of immanent critique may be called reconstructive in kind in the sense that it produces the standard of criticism through an analysis of what is going on—an analysis that centers on the reasons why reality does not live up to the standards to which it aspires and that locates those reasons in opposing normative standards.

It might now be possible to engage in an immanent critique of the different strategies of critique themselves. Formalism clearly has an instrumentalist core that could hardly be expressed better than the ICJ did in *South West Africa*: ‘law exists ... to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline’. And instrumentalism conversely has a formalist core since the practice of interpretation in law can never leave the law behind entirely. Dworkinian jurisprudence, for instance, urges the interpreter to approach the law in light of the point of it all (to adopt the interpretation that is best justified in terms of practical morality) and to simultaneously consider how that interpretation *fits* with past legal practice.⁷⁸ Moreover, both formalism and instrumentalism rest on strong empirical assumptions about how the law and legal reasoning work in the world. Realism in turn cannot do without presuming the reality of formal legal reasoning, nor without normative assumptions about what matters and why. The programme of immanent critique would demand that those internal tensions be pursued further, that they be understood in their nature and, possibly, mutual necessity.

It is clear, furthermore, that immanent critique depends in its appeal on who interprets when and where. Speaking to whom? It may be an ill-advised strategy, for instance, for a legal counsel before the bench of the ICJ. To the extent that the chapter has still shown a preference for this strategy of critique it is also because of how it suggests understanding and approaching arguments in the troubled, crisis-prone present. What is that crisis? For formalism, it is mostly the turn away from rules and international institutions—be it away from the laws on the use of force or from international trade law, to name but two virulent examples. For instrumentalists, it is above all the fact that international law does not get the job done—be it to secure a peaceful or a socially more equitable world. For realists, the crises may just be a strong reminder of law’s vanishing point—the law recedes into the background as it is overtaken by military might or financial prowess that are pushed along by nationalist, populist, or macho dynamics.

Immanent critique is generally much less troubled by crises because they are built into its programme, not anomalies but opportunities for something new. More than a cliché, this is part of its emphasis on contradictions and transformations. For other strategies of critique, crises prompt the reaction of trying to realign reality with a given standard at a moment when that is in fact most unlikely. Immanent critique sees the causes for crises, also at present, not in a simple discrepancy between reality and normative aspiration, but within normative standards and aspirations. The contemporary crisis is also a normative crisis and it is neither settled nor clear that it will lead to worse outcomes when compared to the practices that existed before. In order to engage effectively in the struggle about the directions to take from here, it may not be the best

⁷⁸ Ronald Dworkin, *Law as Interpretation*, 9 CRIT. INQUIRY 179 (1982).

strategy to oppose nationalism and populism with well-received mantras of internationalism and liberalism but to rather proceed on the basis of a better understanding of their mutual dependence and inherent contradictions.