ARTICLE

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

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ABSTRACT

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

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

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I. INTRODUCTION

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

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

1. This line is obviously playing with Louis Henkin’s old adage that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” See LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).
To help these people in this task, the discipline has developed a series of rules on interpretation—a few tools available for people to evaluate the soundness of their arguments and debate their contrasting visions of the norms. These rules are not univocal or general to the whole discipline; instead, they are specific to each source of international law. The Vienna Convention on the Law of Treaties has rules on treaty interpretation, and the International Court of Justice and the International Law Commission have developed a series of standards for the identification of customary international law. The problem, however, is that these norms are themselves subject to disagreement, thereby creating a meta-debate about how to interpret the rules about interpretation. In other words: people not only disagree about international law; they also disagree about what is relevant when interpreting international law.

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

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


4. Although these views share some of the central tenets of the school that legal theorists call “positivism”, the term “positivism” has adopted a meaning of its own in international law, becoming “a label for a whole array of differing approaches to international legal theory.” See Bruno Simma & Andreas Paulus, The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, 93 AM. J. INT’L L. 302, 303 (1999). For an exploration of these views, see, for example, Jörg Kammerhofer, International Legal Positivism, in Oxford Handbook of the Theory of International Law 407 (Florian Hoffmann & Anne Orford eds., 2016); Jean D’Aspremont & Jörg Kammerhofer,
different positions attributable to these approaches are, indeed, not developed as coherent attempts to develop general theories, but rather as responses to specific problems, like how to interpret treaties, or how to identify custom. As such, these traditional approaches emerge from the day-to-day practice of a lawyerly discipline with a traditional and “instinctive distrust of—or, at the very least, a lack of interest in—general jurisprudential works on international law.”

But despite this spontaneous emergence and lack of explicit cohesiveness, these approaches constitute “a certain way of looking at, and thinking about, international law, which many would easily recognize, if not readily identify themselves with.” They are the mainstream, the classics, the default paradigm in the minds of international lawyers. These traditional approaches are “international law as it is taught in most law schools, in most countries, most of the time.” They are the “lingua franca” of legal advisors and international judges.

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

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6. BIANCHI, supra note 3, at 21.
7. Id. at 22.
8. Steven Ratner, From Enlightened Positivism to Cosmopolitan Justice: Obstacles and Opportunities, in FROM BILATERALISM TO COMMUNITY INTEREST 155, 155 (Ulrich Fastenrath et al. eds., 2011).
9. They all fall under the category that Ronald Dworkin calls “the plain fact view of the law.” See RONALD DWORIN, LAW’S EMPIRE 7 (1986).
the discipline, disagreements about international law can be definitively cracked, for instance, by looking up terms in a dictionary, studying the intentions of those drafting a treaty, or collecting data about the practice of states. The role of interpreters, in this view, is merely to gather material proof for their claims, which can then be assessed in relation to these standards of evidence. This view is common to the textualist and intentionalist schools for the interpretation of treaty clauses and to the conventional views about the identification of custom.

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

The Article will be structured around these two claims. Part I will study the traditional approaches to the interpretation of treaties and the identification of custom (and will also say something, briefly, about the “other sources” of international law). The Article will reconstruct the arguments of the classic textualist, intentionalist, and teleological schools for the interpretation of treaties, and point to the specific problems of each of these approaches. Then, it will study the traditional views of the International Court of Justice and the International Law Commission on the identification of customary rules, and it will suggest that there are also some severe problems specific to these arguments. Finally, it will briefly point to the lack of rules of interpretation of other sources of international law as a final issue
of these traditional approaches. In Part II, this Article will “pull the strings” of these different, punctual problems, and suggest that they all emanate from the same source: the problematic attempt to derive normative consequences from empirical claims. In the third and final Part, this Article will succinctly outline a potential alternative approach to the interpretation of international law, one that acknowledges the fact of disagreement and tries to assist people in their honest efforts to process it.

II. THE TRADITIONAL APPROACHES TO THE INTERPRETATION OF INTERNATIONAL LAW

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

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

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13. ICJ Statute, supra note 12, art. 38.
highly qualified publicists of the various nations” serve as “subsidiary means for the determination of rules of law.” There is, then, no general rule for the interpretation of international law. Beyond Article 38, the discipline has developed a series of specific rules and standards to identify and interpret these various sources, which will be studied in this Section. It will begin with the rules for treaty interpretation. Then, it will study the rules for the identification and interpretation of customary international law. And, finally, it will briefly consider the rules for the interpretation of other sources of international law.

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

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

14. ICJ Statute, supra note 12, art. 38.1.d.
16. VCLT, supra note 15, art. 31(1).
17. VCLT, supra note 15, art 32.
18. Id.
The wording of these rules suggests that they are aimed at providing interpreters with the necessary tools to attain more precision in their understanding of international agreements. However, when the International Law Commission (the Commission; the ILC) drafted these provisions, in the 1960s, it clarified that it did not aim at establishing a precise method, but rather that it, “confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties.” In a noteworthy paragraph, the Commission stated that:

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

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

19. Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. INT’L L. COMM’N, at 187–274, 218–19. The reason for this was that “[a]ny attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable.” Id.
20. Id. at 218.
Historically, as the ILC itself acknowledged, the literature has been divided in three major schools regarding what these other considerations might be: first, the textualist school, which suggests that, when in doubt, interpreters should stick to the wording of the treaty. Second is the intentionalist school, which refers dubitative interpreters to the intentions of the parties. Third is the teleological school, for which the purpose of the treaty is the crucial interpretive canon. This Article will assess the contributions of each of these schools and their suitability as a method to resolve the juxtaposition of tools in Articles 31 and 32 of the VCLT. Then, this Article will try to extract some provisional conclusions.

1. The Three Classic Schools and the Vienna Convention

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

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

23. Draft Articles on the Law of Treaties with Commentaries, supra note 19, at 220; see also Daniel Patrick O’Connell, International Law 253 (1970); Oliver Dörr & Kristen Schmalenbach, Article 31. General Rule of Interpretation, in Vienna Convention On the Law Of Treaties 521, 522–23 (2012); Jean-Marc Sorel & Valerie Boré Eveno, Art.31 1969 Vienna Convention, in The Vienna Convention On The Law Of Treaties 804 (Olivier Corten & Pierre Klein eds., 2011); Ian Brownlie, Principles Of International Law 630 (7th ed. 2008); Alexander Orakhelashvili, The Interpretation Of Acts And Rules In Public International Law 301, 301–92 (2008). It is important to note that, despite Lettsas’ identification of international legal textualism with “public meaning originalism.” See Lettsas, supra note 21, at 60; cf. Lawrence Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 456 (2013). This position does not really seem to have supporters in current international legal scholarship. As Bjorge pointed out, it must be correct to say that there is no presumption in the law of treaties that treaty terms ought to be interpreted contemporaneously. But this is because the controlling element must be the intention of the parties, not because there is a presumption one way or the other. There can be no presumption one way or the other because here as elsewhere in the law of treaties the rule applies that any presumption or consideration which tend to transform the ascertainable intention of the parties into a factor of secondary importance are inimical to the true purpose of interpretation. See Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, 2009 I.C.J. 213 (Jul. 13) (Declaration of Judge Ad Hoc Guillaume); id. (Separate Opinion of Judge Skotnikov). In fact, the idea of evolutionary interpretation as a valid exception from the principle of contemporaneity seems to be consolidated in international law. See Dörr & Schmalenbach, supra, at 533–36.

24. According to the modern textualist Alexander Orakhelashvili, what is crucial, however, is what is responsible, in the final analysis, for the outcome reached in the case: plain meaning itself or [external factors such as the intentions of the parties]. As the analysis of practice will demonstrate, plain
by the case law of the International Court of Justice (ICJ), which has decided cases using dictionary definitions. The ICJ has also stated that “[i]nterpretation must be based above all upon the text of the treaty” and that the duty of the Court is “to interpret the Treaties, not to revise them.”

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

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

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

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

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

30. ORAKHELASHIVILI, supra note 23, at 319. According to J.G. Merrills, [W]e must begin by recognizing that words and phrases do indeed have ordinary or conventional usages. Thus, there is no substance in the objection that the reference to 'ordinary meaning' in the Convention involves a primitive myth, or wholly mistaken view of how words work. As Jacobs has cogently observed, to deny that words have ordinary meanings is to deny the possibility of verbal communication, 'a somewhat unsatisfactory basis for any theory of interpretation whatever.'

J. G. Merrills, Two Approaches to Treaty Interpretation, 4 AUSTRALIAN Y.B. INT'L L. 55, 58 (1969) (quoting Jacobs, supra note 21, at 340). These views do not seem to be marginal in the discipline; on the contrary, Andrea Bianchi mentions that "[t]he idea that words have a 'plain meaning' is widely shared among international lawyers. It suffices to cast a quick glance at international case law to realise that international tribunals fairly frequent resort to language dictionaries." Bianchi, supra note 29, at 36. However, it is true that—despite their preeminence in practice—international legal scholars usually associate these views with the dogmatism of past eras. Already in the 1960s, Richard Falk mocked these positions as "biblical exegesis," and held that, in their account, the need for interpretation is attributed to faulty drafting, the implicit ideal of treaty-drafting being to employ language so clear and precise that no reasonable disagreement can arise with regard to the scope or meaning of the rights and duties of the parties. Such an ideal is rarely attained, of course, and when disputes arise, the reference to canons is supposed to resolve the interpretative issue with minimum human intervention between the text and its operational content. These canons or maxims relied upon to vindicate the interpretative act are also intended to give a decision the appearance of definiteness, to nullify the inference that the interpreter is construing a document according to some arbitrary will of his own. This mechanical approach presupposes the autonomy of language and emphasizes the extent to which the task of the interpreter is to construe what has been written down and authorized by the parties to the agreement.


31. Jacobs, supra note 21, at 322. Contrariwise, McDougal and Gardner argued that "[t]he alleged canon that 'it is not allowable to interpret what has no need of interpretation' or as otherwise stated, that 'one cannot disturb a plain meaning' is little more than a myopic platitude which serves to maintain a primitive and irrational faith in the omnipotence of words." See Myres S. McDougal & Richard N. Gardner, The Veto and the Charter: An Interpretation for Survival, 60 YALE L.J. 258, 264 (1951).
textualists, in turn, is that the text itself is different to the intentions of the parties and, thus, that interpreters should look at "the true meaning of the treaty rather than the intention of the parties distinct from it." 32

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

32. Richard K. Gardiner, Treaty Interpretation 6 (1st ed. 2008); see also DörR & Schmalenbach, supra note 23, at 522–23; Sorel & Boré Eveno, supra note 23, at 804; Brownlie, supra note 23, at 630. Sir Gerald Fitzmaurice explains that "on this view, the primary question is not ‘what did the parties intend by this clause?’ but ‘what does this clause mean in itself?’" See Fitzmaurice, supra note 21, at 4.
33. As Dworkin puts it, "[T]ext must have a very important role: we must aim at a set of constitutional principles we can defend as consistent with the most plausible interpretation we have of what the text itself says, and be very reluctant to settle for anything else." See Ronald Dworkin, Justice in Robes 129 (2006). This is an example of Dworkin’s famous “dimension of fit.” Dworkin, supra note 9, at 230 (1986). However, see the contrary position of the New Haven School in McDoOgal, supra note 29, at xix and Gleider Hernández’s response in Hernández, supra note 27, at 340–44.
34. Dworkin, supra note 9, at 45.
35. Id.
assigning different meanings to the term “self-determination.” 38 Once they agreed on one arbitrary definition of the term, all their problems would be solved. However, following Dworkin, we cannot consider that the international community is really squabbling over which dictionary definition to use: “sensible people do not quarrel over whether Buckingham Palace is really a house; they understand at once that this is not a genuine issue but only a matter of how one chooses to use a word whose meaning is not fixed at its boundaries.” 39 Behind the discussion over the legal meaning of “self-determination” there may be a deeper discussion on whether the primary role of international law is to protect individuals or to protect sovereign states, and how either must be carried out. And those discussions will go beyond any vocabulary quarrel.

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

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

39. See DWORKIN, supra note 9, at 40–41.
40. See DWORKIN, supra note 33, at 129.
41. See DÖRR & SCHMALENBACH, supra note 23, at 529.
this means of interpretation lie “in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained.”42 The words of the treaty are thus the beginning, but not the end, of the process of interpretation.

b. The Intentionalist School of Interpretation

The second school of treaty interpretation is the intentionalist (or “subjective”43) school, which argues that interpreting is equal to deciphering the original intentions of the drafters of the provisions in question.44 This position is usually attributed to two of the most prominent international legal scholars of the twentieth century, Hersch Lauterpacht45 and Gerald Fitzmaurice,46 and is currently very popular among both international legal scholars47 and international judges.48 As a result of their quest for the original

43. See Jacobs, supra note 21, at 318–19.
44. See e.g., Hermández, supra note 29, at 332–33 (describing intentionalism); LETSAS, supra note 21, at 60.
45. Lauterpacht states the discovery of the intention of the parties is “the principal aim of interpretation,” and that “the intention of the authors of the legal rule in question—whether it be a contract, a treaty, or a statute— is the starting point and the goal of all interpretation. See Hersch Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 Brit. Y.B. Int’l L. 48, 52 (1949); see also id. at 84 (“It is the duty of the judge to resort to all available means— including rules of construction— to discover the intention of the parties . . .”); VELLGER, supra note 21, at 421. But see infra Section II.A.1.b (providing nuanced interpretations of Lauterpacht’s position).
46. See Fitzmaurice, supra note 21, at 3 (“[T]his is not only the traditional but also the juridically natural view.”).
47. See, e.g., BJORGE, supra note 21; VAUGHAN LOWE, INTERNATIONAL LAW 117 (2007); Malgosia Fitzmaurice, Interpretation of Human Rights Treaties, in HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 745 (Dinah Shelton ed., 2013); EIRIK BJORGE, The Vienna Rules, Evolutionary Interpretation, and the Intentions of the Parties, in INTERPRETATION OF INTERNATIONAL LAW 189 (Andrea Bianchi et al. eds., 2015); Maarten Bos, Theory and Practice of Treaty Interpretation, 27 NETH. INT’L REV. 135, 145–52 (1980). For a list of classic authors defending this view, see Jacobs, supra note 21; BIANCHI, supra note 3.
48. See, e.g., Gabčíkovo-Nagymaros Project (Hung./Slovak.), Judgment, 1997 I.C.J. 79, ¶ 142 (Sept. 25) (“It is the purpose of the treaty, and the intentions of the parties in concluding it, which should prevail over its literal application.”); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (“Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion . . .”); Land and Maritime Boundary (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. 346 ¶ 59 (Oct. 10) (“In order to interpret this expression, the Court must seek to ascertain the intention of the parties at the time.”); Case Concerning Kasikili/Sedudu Island
intentions of the parties, most of those who apply this method “put more emphasis on drafting history and preparatory works” than other schools of interpretation.49

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

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

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

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

51. NINO, supra note 50, at 93.

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

When an agreement of any importance is effected among two or more nation-states the relevant events include, at the minimum: a great variety of actors (negotiators, drafters, approvers, ratifiers), expressing agreement through verbal forms of all degrees of generality or precision, by all the methods known to international law, for implementation of a great variety of both short-run and long-term objectives, under the peculiar conditions and perspectives of their day, and with certain designed and undesigned effects upon the expectations of all the parties and the distribution of values among them. . . . From this comprehensive perspective of the relevant events, it is wholly fantastic to assume either, first, that the framers of the original agreement can
for the interpretation of a treaty presents the first challenge for interpreters. The problem, more specifically, is what to do when—as is likely to happen with an ambiguous or vague treaty—not all these facts suggest the existence of a similar intention of the drafters. Which intention should prevail?

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

54. Francis Jacobs argues, the most immediate objection to the criterion of the parties’ actual intentions is that in many cases there will be no common intention. In the first place there is the not infrequent case where there is no real agreement between the parties at all, except on a form of words chosen to conceal their differences. Secondly, even where there is real agreement, in many if not most cases the question at issue will simply not have been foreseen by the parties, and it will be necessary to extrapolate from the area of agreement to the unforeseen case . . . . Thirdly, even supposing a genuine agreement between the parties not recorded in the text, the very concept of the intentions of the parties, unless given effect in a formal agreement or in State practice, raises several problems. The subjective approach seems most appropriate to an informal unilateral document such as a deed or will drawn up by a private individual, where there is a real intention, where no one has relied upon the form of words used, where there has been no subsequent conduct based upon the document; here it is at least arguable that the clearly established intention of, say, the testator should prevail over a literal interpretation of the words. This analogy from private law is illuminating because there is almost nothing in common between such a document and a treaty concluded between States.
The decision of choosing one over another cannot be founded on anything other than normative conceptions, given that it is obvious that they cannot be based on the intentions of the legislator themselves, or in texts which then require looking at previous intentions to be interpreted.55

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

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

55. Nino, supra note 50, at 93 (translated by author).
56. Id.
57. Id. Consider, for example, the radically different interpretation of the drafters of Article 38 of the PCIJ Statute about the notion of a “general principle of law.” See, e.g., Pellet, supra note 12, at 833.
58. Nino, supra note 50, at 94.
59. See Dworkin, supra note 9, at 55–57.
updated to allow the deeper message of the play? What were the Shakespeare’s true intentions?60

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

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

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60. See DWORKIN, supra note 9, at 55–57.
61. LETAS, supra note 21, at 70.
62. Id.
63. This difference in the levels of abstraction is independent from the fact that the intentions that must be identified are the “common” intentions of the parties. See BJÖRGE, supra note 21, at 60. Of course, as Nino suggested, each party may have different reasons to sign the treaty, but even the reasons that are shared by all the parties may be based on different levels of abstraction. See NINO, supra note 50, at 94.
64. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). The rationale behind this method can be traced to the very foundations of the Westphalian conception of international law. According to the famous judgments of the Permanent Court of International Justice in the Wimbledon and Lotus cases of the 1920s, the rules of international law bind sovereign states only when they themselves consent to such restrictions to their almost absolute power. Thus, interpreters can only find that States are bound by a certain rule when it is clear that the States had the intention to restrict their sovereignty. Sir Gerald Fitzmaurice, sitting as judge at the European Court of Justice, explained this relation between the idea of consent and the intentionalist method himself: “it is for the States upon whose consent the Convention rests, and from which consent alone it derives its obligatory force, to close the gap or put the defect right by an
interpretation,“ based on the principle of good faith and *pacta sunt servanda.* The debate over whether one or the other is more appropriate does not hinge on the actual intentions of the parties, but instead on the reading each author makes of the purposes of the international legal system (preserving sovereignty versus achieving common goals).

c. The Teleological School of Interpretation

The third classic school of treaty interpretation is the teleological, which does not place the interpretive emphasis on the text, or the intentions, but rather in the treaty’s object and purpose. It is not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them.” Golder v. U.K., App. No. 4451/70, ¶ 37(c) (Feb. 21, 1975), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECR&id=001-57496&filename=001-57496.pdf [https://perma.cc/XWQ3-R7KU]. See also LETSAS, *supra* note 21, at 64.

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

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

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

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

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

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

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

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

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


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

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

72. See Merrills, supra note 30.
73. McDougal & Gardner, supra note 31, at 267.
74. McDougal, supra note 67, at 999. His main point of agreement with the Harvard Research relates to what McDougal calls the “major purposes principle,” according to which “international agreements must be interpreted primarily in terms of the major, general purposes they are intended to serve.” McDougal & Gardner, supra note 31, at 267.
75. Article 19. Interpretation of Treaties, supra note 70, at 947: When interpreting a treaty, the text thereof must, of course, be respected; the interpreter must not alter it or substitute a new text. Nevertheless, the bare words of a treaty have significance only as they may be taken as expressions of the purpose or design of the parties which employed them; they have a ‘meaning’ only as they are considered in the light of the whole setting in which they are employed.
76. "The text is evidence of intention, but it is the intention, not its evidence, that is the object of inquiry. McDougal-Lasswell-Miller offer us a method to conduct this inquiry that promises, if conscientiously applied, to consider all available evidence relevant to the opposing lines of inquiry, but does not purport to settle the matter of interpretation by endowing the text with a clarity it lacks." Falk, supra note 30, at 346. See also Gottlieb, supra note 67, at 127; Venzke, supra note 71.
77. "The most comprehensive and realistic conception of an international agreement . . . is not] that of a mere collocation of words or signs on a parchment, but rather that of a continuing process of communication and collaboration between the parties in the shaping
continuously interactive process, does not consist in deciphering the true content of the norm, but is instead focused on identifying the "genuine shared expectations" by the parties to the treaty, in order to preserve communicative possibilities in the future.78 “The primary aim of a process of interpretation,” McDougal, Lasswell, and James Miller wrote, “can be formulated in the following proposition: discover the shared expectations that the parties to the relevant communication succeeded in creating in each other.”79 As this quote demonstrates, these expectations are not those that the parties had at the time of signing the treaty; they are the ones that they develop in a communicative process that exceeds the negotiation of the text.80 Interpreters must then “consider all relevant signs and deeds taking place at any time before, during, or after the agreement is concluded.”81 They should also “consider the whole process of agreement and its context of conditions, the process of claim and decision, and possible impact on expectations of the current decision process.”82 The ultimate goal is “to honor

78. LUONG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 329 (3d ed. 2015).
79. MCDougAL ET AL., supra note 29, at xvi. In an earlier text, McDougal argued that the goal should be "to clarify a mode of interpretation which can give the most rational effect to the intent of framers in so far as they can achieve a common intent and express it." McDougal & Gardner, supra note 31, at 266.
80. McDougal argues that
[i]t should be the task of decisionmakers, representing a larger community dedicated to the shaping and sharing of values by persuasion and agreement with a minimum of coercion and violence, to honor and promote individuality, inventiveness and diversity, and to expand the alternatives in co-operation open to as many members of the community as possible on as many occasions as possible. It can only be a debasement of the basic values of such a community to seek to impose upon all parties, whatever their nuances in creativity, the lowest common denominator in conformity. To foreclose or impede inquiry about features of the process of making and performing agreements which in fact affect the parties’ expectations about commitment, and to establish in advance of inquiry fixed hierarchies in significance among features of the process whose significance in fact is a function of the configuration of all other features in any particular context, may be to impose upon one or both of the parties an agreement they never made and completely to disrupt that stability in expectation which is indispensable to effective co-operation.
81. CHEN, supra note 78, at 329.
82. Id.
and promote individuality, inventiveness and diversity, and to expand the alternatives in co-operation open to as many members of the community as possible on as many occasions as possible.”

That is, the ultimate goal of interpretation is to guarantee an open process of communication in which the parties can interact and negotiate case by case their understandings of the rules that govern them.

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

84. This difference between the New Haven school and the drafters of the Harvard Draft regarding the role of the text in the interpretive process explains the hardness of the critiques that McDougal and his colleagues made to the wording adopted by the ILC. See, e.g., id. at 995. Despite what some have argued, BIANCHI, supra note 3, at 105–06, the main objection of these authors to the wording of Article 31 of the VCLT does not have to with the role played by the object and purpose (which is still central in the VCLT), but rather with the primary space assigned by the ILC to the text of the treaty, incompatible with the communicative view of the New Haven authors. This concern is clear when McDougal holds, for example, that “the Commission adopts a ‘basic approach’ which demands merely the ascription of a meaning to a text,” McDougal, supra note 67, at 992, that its principles are “highly restrictive,” McDougal, supra note 67, at 999, and that it “is difficult to escape the assessment that the International Law Commission’s entire formulation of principles of interpretation is based upon a conception of ‘ordinary meaning’ which is impossible of application.” McDougal, supra note 67, at 995.
85. MCDOUGAL ET AL., supra note 29, at 41. On the idea of world values for the New Haven school, see, for example, CHEN, supra note 78, at 535–52.
86. “The important point,” according to McDougal and Lehmann, “is that the shared expectations of commitment, commonly called ‘agreement’, in whatever degree achieved and maintained, are a function not of a single variable, such as text or historic utterance, but of the entire process of interaction that has shaped and affected the expectations of the parties.” MCDOUGAL & LEHMANN, The Application of International Agreements, in INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER xxiv (1994).
probably do most to influence future agreements toward harmony with public order goals.”

Thus, McDougal, Lasswell, and their colleagues seem to establish what Richard Gardiner called, in his book on treaty interpretation, a “false dichotomy”: “The choice offered between ‘a mere collocation of words or signs on a parchment’ and the ‘continuing process of communication’ suggests that the options are [either] an extreme literal approach or a completely open-ended relationship.”

Yet, one could find appropriate intermediate points between these two extremes: both the Harvard Draft and the final wording of the VCLT delineate an interpretive process that requires interpreters to consider, necessarily and simultaneously, two ideals. The first is the text and interpretive legacy of the treaty. The second is the goals of the treaty and of the normative system in which it is inserted, read in good faith. In both cases, the model is not limited to the text (or to other empirical elements, such as context, or ulterior interpretation by the parties), yet this does not open the door for interpreters to completely abandon the norm and renegotiate openly.

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

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87. Id. at 48.
88. Gardiner, supra note 32, at 66. For a critique of these communicative theories of interpretation, see also Gottlieb, supra note 67, at 128–29.
89. Otherwise, the model would lead “to an indetermination of the law which is so big that it deprives it of one of its basic qualities: a minimum of autonomy and independence.” Carlos Espósito, Soberanía, Derecho y Política En La Sociedad Internacional: Ensayo Sobre La Autonomía Relativa Del Derecho Internacional, 34 Revista Jurídica de la Universidad Interamericana de Puerto Rico 1, 21 (1999).
90. There are, of course, some notable exceptions, which will be briefly considered in the final section. What is remarkable, however, is that none of them have been associated with the teleological school.
manipulate the law at their will, based on the principles which constitute their dominant discourse.\footnote{On the relation between the theory of interpretation of the New Haven school and US foreign policy, see Falk, supra note 30, at 331.} For reasons of this kind, teleological, normative oriented approaches to the interpretation of treaties have been relegated from the mainstream, despite their importance in the past.

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

The final balance, after this exploration of the traditional approaches to the rules of treaty interpretation of the Vienna Convention on the Law of Treaties, is somewhat bittersweet. It is true that Articles 31 and 32 of the Convention provide interpreters with a series of useful standards to determine the content of a treaty clause. The VCLT gathers some of the principles which have been central to the discipline for years and clarifies that they are the ones to be used to process interpretive disputes regarding a certain text. However, what the Convention does not do—thanks to the express will of its drafters—is explain what to do when these different methods point toward different solutions. That is, the VCLT is silent about what to do when the juxtaposition of tools ceases to be an advantage and becomes a problem. The ILC was explicit in the 1960s in this sense: “the application of the means of interpretation in the Article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.”\footnote{Draft Articles on the Law of Treaties with Commentaries, supra note 19, art. 28, ¶ 8.}

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

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

B. The Rules for the Identification of Customary International Law

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

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

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

Uncertainty about the regime governing the identification of customary international law is one, perhaps the main, reason for this state of affairs: How do we know whether a particular proposition has acquired (or retains) customary status? How much practice is required; how does a habit become binding, etc.? These questions are part of the law of sources and more particularly of the ‘meta-law’ on custom.
Article 38 of the ICJ Statute does not give any indications in this respect, and there is no treaty equivalent to the VCLT that helps practitioners with this process.\textsuperscript{97} Further, unlike what usually happens with treaties, the problem of the indetermination of custom not only appears when determining the content of the rule, but also previously, at the moment of identifying the existence of the norm itself.\textsuperscript{98}

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

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

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

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


complexity and intangibility,”

“indeterminate and manipulable,”

“malleable, flexible, incoherent and incomplete,”

and whose identification and application generates “frustration and frictions.”

Given that “there is neither a common understanding of how customary international legal norms are formed, nor agreement on the content of those norms,”
custom seems to be, according to some, no more than “a matter of taste.”

The defenders of the classical theory of customary international law disagree with those skeptical views. Omri Sender and Michael Wood argue, for example, that custom is more present than ever in the international legal system, and that its content is clearer every day. This is due, according to these authors, to the fact that decades of practice have greatly clarified the operation of custom, providing practitioners with clear standards and metrics for its identification.

In sum, Sender and Wood say, “considerable clarity has been achieved over the decades, and some long-standing questions . . . do appear to have been settled. Throughout this time, customary international law has very much retained its core elements and characteristics.”

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

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103. Tams, supra note 96, at 69.
104. Fidler, supra note 100, at 198.
105. Kelly, supra note 102, at 450.
106. Id. at 451.
107. Omri Sender & Michael Wood, A Mystery No Longer? Opinio Juris and Other Theoretical Controversies Associated with Customary International Law, 50 ISR. L. REV. 299, 300 (2017) (“Customary international law today is not only as present in the international legal system as it has always been; it is perhaps also better understood than before.”).
108. See id. at 299.
109. Id. at 308.
the standards used in those decisions have been internalized by the discipline, and now they constitute guidelines for practitioners working with customary rules. And then, second, the International Law Commission—led by Special Rapporteur Michael Wood—has recently carried out a series of studies to clarify the methods for the identification of customary international law.

But, despite the efforts of both institutions and the development of these standards, some scholars doubt the sufficiency of the classical theory to deal with the indeterminations in a source like custom. The following Sections will first study...
the oscillations in the methodology for the identification of custom in ICJ’s jurisprudence. These Sections then review some deficits in the conclusions of the ILC. In both cases, this Article suggests that the application of the classical theory inevitably needs to inconsistent or arbitrary interpretations. Thus, in line with a growing number of authors, this Section will suggest the need for a new theoretical framework—a matter to which it will get back to in the following sections of the Article.

1. The Traditional Approaches to the Identification of Custom

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

a. The Approach of the International Court of Justice

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

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

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

116. See Talmon, supra note 110, at 418 (suggesting that methodology is likely not the ICJ’s strong point). Talmon also writes that, “unlike its approach to methods of treaty interpretation, the Court has hardly ever stated its methodology for determining the existence, content and scope of the rules of customary international law that it applies.” Id. See also Alan Boyle & Christine Chinkin, The Making of International Law 278–85.
frequently underlined in this respect: first, an inconsistency of the Court in relation to its own standards in this matter and, second, a tendency towards arbitrariness. That is, the Court has a propensity for identifying customary norms without providing sufficient explanations for these decisions.

b. Inconsistencies Between Traditional and Modern Approaches

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

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

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119. Id. at 284–85.

120. Anthea Roberts first set out the distinction between “traditional” and “modern” custom, Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 Am. J. Int’l L. 757 (2001), and it then took certain centrality in the discussion when Alan Boyle and Christine Chinkin addressed it in their book on the making of international law, Boyle & Chinkin, supra note 116, at 278–85. The distinction was then taken up by the ILC, and by ICJ judges as well. See, e.g., First Rep. on Formation and Evidence of Customary International Law, supra note 111, ¶¶ 95–101; Peter Tomka, The Judge and International Custom 27 (2013).
this rather seems to depend entirely on the will and discretion of judges.

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

two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a

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

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

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


\textsuperscript{123} North Sea Continental Shelf ¶¶ 13–17; 21–24.
belief that this practice is rendered obligatory by the existence of a rule of law requiring it.124

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

On the other hand, there are those cases that are usually associated with a "modern approach" of the ICJ to custom, one that is more flexible, and sometimes related to the deductive method.129 An early example of this approach is the decision of the Court in the Anglo-Norway Fisheries case, of 1951.130 In that occasion, the parties submitted a dispute relating to the maritime zones in which Norway could claim exclusiveness for its fishermen, excluding British citizens who wanted to fish in those waters.131 Although there were some rules on the determination of these zones, their application to the case was tricky, given the peculiar features of the Norwegian coastline and its fjords. To solve this problem, the Court decided to leave aside the multilateral practice contained in, for

124. Id. ¶ 77.
125. Id. ¶ 28.
126. Id. ¶ 74.
127. Id. ¶ 101(C)(1).
128. Id. ¶ 88.
129. The defenders of the classic approach usually deny that the ICJ has really done anything differently in the cases usually associated with the "modern approach." Michael Wood and Omri Sender, for example, claim that "[i]n fact, it is not at all clear that the Court ever applies a truly 'deductive' method to the determination of customary international law." See Omri Sender & Michael Wood, The International Court of Justice and Customary International Law: A Reply to Stefan Talmon, EJIL: TALK! (Nov. 30, 2015). https://www.ejiltalk.org/the-international-court-of-justice-and-customary-international-law-a-reply-to-stefan-talmon [https://perma.cc/U44W-AUG8].
131. Id. at 124–25.
example, the 1930 Conference for the Codification of International Law, and focused on the concrete practice in the relation between
the two states with respect to this situation. In the context of an
extensive analysis of the historical positions of the parties, the ICJ
held that:

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

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

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

The Court includes among those criteria several elements. These include

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

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133. *Id.* at 138.
134. *See generally id.*
135. *Id.* at 133.
interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage.”

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

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

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

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

136. Id.
138. Id. ¶ 186.
139. Alberto Alvarez-Jiménez says, about the 2000–2009 period in the case law of the Court in relation to custom, that:
The most important things were those that did not occur: the flexible deductive approach was not particularly important. . . . However, there are certainly also events to highlight: the re-emergence of the strict inductive approach and the identification of non-traditional methods that, although still marginal, may well remain as tools to justify decisions in the coming years.

Alvarez-Jiménez, supra note 110, at 711.


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

142. In a recent study, Stephen Choi and Mitu Gulati considered 175 decisions of international tribunals (mainly the ICJ, but also others) in which the existence of custom was under discussion. The results were overwhelming: "The data suggest that international courts do not come anywhere close to engaging in the type of analysis the officially stated two-part rule for the evolution of CIL sets up.” See CHOI & GULATI, supra note 110, at 146–47. A. Mark Weisburd reached a similar conclusion after studying in detail 27 cases in which the ICJ considered state practice: "It is clear then that what the Court has not been doing in CIL cases is basing its judgments on carefully described state
large majority of cases, the Court does not offer any (inductive or
deductive) reasoning but simply asserts the law as it sees fit.”143
Similarly, Alain Pellet suggests that—unlike the ILC, which is more
careful—the Court “has a marked tendency to assert the existence
of a customary rule more than to prove it.”144 Daniel Bodansky uses
a Latin expression to formulate the same idea: in many cases of
custom, the Court simply decides “ex cathedra.”145

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

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

See A. Mark Weisburd, The International Court of Justice and the Concept of State

143. Talmon, supra note 110, at 434. Patrick Kelly states the same, referring
specifically to the subjective element:
Even the International Court of Justice (“I.C.J.”), in most cases, declares rules of
law without investigating the attitude of states on the legal character of a
customary norm or undertaking an investigation of the actual practice of the
majority of states. On the few occasions when the I.C.J. has required direct proof
of the opinio juris element, the Court has found the evidence inadequate.

See Kelly, supra note 102, at 469. Furthermore, Eyal Benvenisti argues that in the
Gabcikovo-Nagymaros case, the Court invented an international custom regarding
transboundary resources through an “unsupported assertion.” According to him, however,
the I.C.J and other tribunals frequently “cheat” by inventing what they refer to as custom,
and this is justified, because it contributes to the efficiency of the international legal
system. See Eyal Benvenisti, Customary International Law as a Judicial Tool for Promoting
Efficiency, in The Impact of International Law on International Cooperation 85, 85–86
(Eyal Benvenisti & Moshe Hirsch eds., 2004).

144. Alain Pellet, Shaping the Future of International Law: The Role of the World Court
in Law-Making, in Looking to the Future: Essays on International Law in Honor of W.
Michael Reisman 1065, 1076 (Mahmoush H. Arsanjani et al. eds., 2010).

145. Bodansky, supra note 100, at 180. See also Talmon, supra note 110, at 437.
Gleider Hernández holds that “it is true that the methodology of how the Court
has addressed custom belies its claim to authority: despite the Court’s doctrinal insistence
on State practice and opinio juris, it in fact rarely refers to these elements in its judgments.”
See Hernández, supra note 116, at 91.
engages in a more detailed analysis of State practice and *opinio juris* in order to determine the existence or otherwise of a rule of customary international law... It is particularly these latter cases that are helpful in illustrating the Court’s approach to the formation and evidence of customary international law.\(^{146}\)

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

\(^{146}\). *First Rep. on Formation and Evidence of Customary International Law*, supra note 111, ¶ 62.

\(^{147}\). In an article with Omri Sender, Wood clarifies this point: “Unlike induction and deduction, assertion is self-evidently *not* a methodology for determining the existence of a rule of customary international law. It is essentially a way of drafting a judgment, a way of stating a conclusion familiar to lawyers working in certain national systems.” See Sender & Wood, *supra* note 129. As a descriptive point, this is absolutely true. What’s notable are the normative consequences of this practice, which Wood avoids considering. As Stefan Talmon states, Wood and Sender are, correct that assertion is ‘not a methodology’ (something never claimed) but it can be a ‘method’—in plain English ‘a way or manner’—of determining the existence of rules of international law. What the authors call a “pragmatic” approach, i.e. the reliance on ‘the considered views expressed by States and bodies like the International Law Commission’ or the use of ‘rules that are clearly formulated in a written expression’ is, in my opinion, nothing else but judicial window-dressing.


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

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

A coherent methodology does come into sight in these (individually and even more so in the aggregate), even if not all questions relating to it have been fully addressed. It is one thing to suggest, as some have, that the Court does not consistently adhere to this stated methodology; it is a different thing altogether to argue, as Professor Talmon does, that the Court “has hardly ever stated” such methodology.
In a 2012 lecture, then-President of the ICJ, Peter Tomka, defended this approach of the Court to customary international law:

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

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

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

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

d. The Approach of the International Law Commission

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

152. The ILC actually uses other sources beyond the ICJ case law, but the centrality of the latter is undeniable. For more information on this, see First Rep. on Formation and Evidence of Customary International Law, supra note 111, ¶ 54. For works underscoring the importance of the ICJ’s case law to the ILC’s work, see Sender & Wood, supra note 129; Tams, supra note 96, at 53, 54–55.
The work began in 2012, with Sir Michael Wood’s designation as Special Rapporteur. On top of a series of reports compiling the standards present in the case law, Wood presented a proposal with eleven “conclusions” concerning “the methodology for determining the existence and content of rules of customary international law.” After receiving comments from States and a discussion among its members, the Drafting Committee expanded the number of conclusions to sixteen. In 2018, the ILC adopted the Draft Conclusions, and the UN General Assembly took note of this development.

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

156. G.A. Res. 73/203, supra note 112.
157. Id. annex, Conclusion 2.
158. Id. Conclusion 3.
159. Conclusion 4.1 states that “[t]he requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.” Id. Conclusion 4.1. This seems to open the door to the possibility that the practice of other actors (armed groups, NGOs, etc.) could have a role in the identification of custom. However, Conclusions 4.3 and 4.2 seem to limit this interpretation. See id. Conclusions 4.2, 4.3.
160. Id. Conclusion 8.
161. Id. Conclusion 9.
or decisions of domestic courts. Finally, the conclusions provide some criteria regarding the interaction between custom and other sources of international law, they acknowledge the possibility of persistent objection, and establish some standards regarding regional or particular customs.

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

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

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

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162. Id. Conclusion 10.  
163. Id. Conclusions 11–14.  
164. Id. Conclusion 15.  
165. Id. Conclusion 16.  
166. Talmon, supra note 147 (“It seems as if the ILC has developed a little machine into which the two elements of ‘general practice’ and ‘opinio juris’ are put according to the recipe found in the ILC’s cookery book entitled ‘Conclusions on the Identification of Customary International Law’ and out come rules of customary international law.”).  
167. See supra Section II.B.1.a.i.  
168. See supra Section II.B.1.a.ii.  
169. Something similar happens with other actors, not just with the ICJ. “The International Law Association (ILA), for example,” says Daniel Bodansky, “cited only seven examples of state practice in support of its conclusion that the duty to inform is a norm of customary international law, out of the presumably countless instances in which states have undertaken activities with a significant risk of transboundary harm.” See Bodansky, supra note 97, at 180. And even the ILC itself, although its analyses are usually quite exhaustive, is deficient in its studies of custom if measured by the standards proposed by Wood.
these rules simply demand too much: they require a depth in the research that is simply impossible to carry out.\footnote{Id. at 179 ("If we take seriously the ‘official story’ of identifying customary international law, summarized extremely well in Sir Michael Wood’s report, then I think most efforts to identify customary international law will end, like mine, in failure."); Tams, supra note 96, at 66 ("If custom needs to be based on a widespread practice of States accompanied by a sense of legal obligation, it becomes extremely difficult to ascertain. The problem is fairly straightforward: even if not merely following a head count analysis, how can an extensive practice be established in a world of 200 States?"). Then, beyond the number of States, some authors notice a problem regarding the availability of materials. See, e.g., Bodansky, supra note 100, at 179–80; Petersen, supra note 110, at 277; Tams, supra note 96, at 66.} According to the ILC Draft Conclusions, interpreters should consider every action (material and verbal), but also every inaction of the executive, legislative, and judicial powers ("or other functions"\footnote{G.A. Res. 73/203, supra note 112, annex, Conclusion 5.}) of the almost 200 States of the world, plus the practice of international organizations. Then, they should consider,

- public statements made on behalf of States;
- official publications;
- diplomatic correspondence;
- decisions of national courts;
- treaty provisions;
- and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference\footnote{Id. Conclusion 10.2.} of all those States in order to determine whether the practice was a simple use or habit, or whether it was accepted as law. They must also consider the lack of reaction (of the almost two hundred states) regarding the practice, because this "may serve as evidence of acceptance as law (opinio juris), provided that States were in a position to react and the circumstances called for some reaction."\footnote{Id. Conclusion 10.3.} And all of this must be done without a principled point of departure guiding the inquiry, but rather with purely inductive logic, in which the only relevant consideration is the empirical material that is gathered. As Bodansky holds,

> The evidentiary demands are just too high to be satisfied in the real world. Inducing the rules of customary international law from state practice would be a Herculean task—a task, by the
way, more appropriate for an empirically oriented social scientist than for a lawyer.\textsuperscript{174}

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

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

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

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

\begin{footnotesize}
\textsuperscript{174} Bodansky, \textit{supra} note 100, at 179.
\textsuperscript{175} See Talmon, \textit{supra} note 147.
\textsuperscript{176} See Talmon, \textit{supra} note 147.
\textsuperscript{177} Talmon, \textit{supra} note 147.
\textsuperscript{178} \textit{Id.}
\end{footnotesize}
interpretable practice has, at least prima facie, notable inconsistencies. The methods require Herculean efforts—impossible to perform in practice—and the rules are indeterminate. They lack general principles that allow interpreters to process disagreements regarding the application of standards the ICJ and ILC developed.

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

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

179. Sender & Wood, supra note 107, at 299.
180. See generally supra Section II.B.1.a.
181. See generally supra Section II.B.1.a.
182. Kelly, supra note 102, at 451.
so as to be included within it as well as so as to be excluded from it. The problem is that it is simply not true that “anything” can be described as international custom by legal practitioners. The very definition of custom and the standards defined in the case law and in the practice of the discipline have prevented interpreters from including or excluding certain situations from rules of custom. For example, even the most skillful lawyer could hardly prove that there is a customary rule allowing States to use force against other States to retrieve natural resources from their territory. It is simply impossible to construct that argument in a manner consistent with the theory of customary international law. Likewise, it would be difficult to deny that there is a customary rule establishing immunities for heads of state. People could then argue about the limits of those immunities and the potential exceptions, but not that said customary rule exists.

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

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

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


184. With differing proposals, the following scholars have tried to re-read the standards for the identification of custom under a different theoretical light: Bodansky, supra note 100; Choi & Gulati, supra note 110; Cohen, supra note 117; Fidler, supra note 100; Geiger, supra note 110; Kirgis, supra note 113; Kalb, supra note 110; Lepard, supra note 113; Anne Peters, Realizing Utopia as a Scholarly Endeavour, 24 Europ. J. Int'l L. 553, 550 (2013); Petersen, supra note 110; Schütter, supra note 110; Talmon, supra note 110; Tams, supra note 96; Tasioulas, In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case, supra note 113; Tasioulas, Customary International Law and the Quest for Global Justice, supra note 113.
the interpretation of other sources of international law—or, more precisely, to their notable nonexistence.

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

On the other hand, legal practitioners have acknowledged the growing normativity of a series of sources not contained in Article 38 of the Statute, traditionally grouped under the label of “soft law.”\textsuperscript{190} This category usually includes,

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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{185} See, e.g., Julio A. Barberis, Los Principios Generales de Derecho Como Fuente Del Derecho Internacional, 14 Revista Del Instituto Interamericano De Derecho Humanos 11, 21 (1991); Wolfgang Friedmann, The Uses of “General Principles” in the Development of International Law, 57 Am. J. Int’l L. 279, 280 (1963); Jan Klabbers, Goldmann Variations, in The Exercise of Public Authority By International Institutions 713, 714 (Armin von Bogdandy et al. eds., 2010); Robert Kolb, Principles as Sources of International Law (with Special Reference to Good Faith), 53 Neth. Int’l L. Rev. 1, 36 (2006); Pellet, supra note 12, at 832–41.
\item ICJ Statute, supra note 12, art 38, ¶ 1.
\item Pellet, supra note 12, at 834.
\item Id. at 833.
\item Id. at 836.
\item On soft law and different degrees and kinds of legality, see, for example, Chinkin, supra note 11; Goldmann, supra note 11; Benedict Kingsbury, The Concept of ‘Law’ in Global Administrative Law, 20 Eur. J. Int’l L. 23 (2009); Sally Engle Merry, Global Legal Pluralism and the Temporality of Soft Law, 46 J. Legal Pluralism & Unofficial L. 108 (2014); Sally Engle Merry, Firming Up Soft Law, in Transnational Legal Orders 374 (Terence Halliday & Gregory Shaffer eds., 2015); Daniel Thürer, Soft Law, in Max Planck Encyclopedia of Pub. Int’l L. (2009); Weil, supra note 11.
\end{enumerate}
\end{footnotesize}
binding for a particular actor, interpretative declarations to international conventions, non-binding agreements and codes of conduct, recommendations, and [various] reports [of different kinds].

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

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

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

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

That other norm, in Kelsen’s reasoning, is a “superior” norm,

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191. Thürer, supra note 190.
192. HANS KELSEN, PURE THEORY OF LAW 193 (1967). George Letsas applies this reasoning to international law, and explains that “if our question is why a certain fact is relevant [e.g., the text of the preamble] and we answer it by citing another fact [e.g., that the parties included it in the treaty], then there will be new a question as to what makes that further fact relevant” George Letsas, Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer, 21 EUR. J. INT’L L. 509, 534 (2010).
which authorizes the creation of an “inferior” norm whose validity was at stake.\textsuperscript{193} But then there must be yet another norm, again superior, which determines the validity of that which authorizes the creation of the inferior one. And so on, and on.\textsuperscript{194}

To avoid this infinite regress, the international legal community needs to find a non-legal prescription that can give validity, at some point in the chain, to a legal norm. For Kelsen, this non-legal prescription is his famous Grundnorm, a basic norm that authorizes inferior norms, but which is not authorized by other norms itself; its validity, unlike that of the rest of the norms, is not derived, but rather presupposed.\textsuperscript{195} This presumption, then, is “normative”—it presents a premise structured around an ought to be (“we must presuppose that norms are valid”) and not around an is ("norms are valid"). Kelsen's Grundnorm is not the only way of avoiding this infinite regress but rather one among many others.\textsuperscript{196}

In any event, what all these formulations attempting to close the regress inevitably share—following the logic that Kelsen derives from Hume—is a normative structure, a value judgment contained in them, a proposition related to what ought to be.\textsuperscript{197}

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

\textsuperscript{193} Kelsen, supra note 192, at 193–95.

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

\textsuperscript{195} See Kelsen, supra note 192, at 193–95.

\textsuperscript{196} It could be said that the most prominent political theories today, for example, hold—broadly—that what gives validity to norms is their democratic legitimacy. See generally, e.g., Roberto Gargarella, Full Representation, Deliberation, and Impartiality, in DELIBERATIVE DEMOCRACY 260 (Jon Elster ed., 1998); Jürgen Habermas, Between Facts And Norms (1996); José Luis Martí, La República Deliberativa: Una Teoría De La Democracia (2006); Carlos Santiago NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY (1996).

\textsuperscript{197} “It is inevitable,” then, Nino explains, “to draw on value principles to determine which legal materials are relevant to justify an action or decision, leaving the legal discourse immersed in a broader justificatory discourse.” Nino, supra note 50, at 87. The same logic is fully applicable to international law. See Letsas, supra note 192, at 534–35.
empirical nature.198 It is not implausible that two interpreters agree on the relevant legal premises, but that their disagreement is based on a mere dispute of the evidence. The interpreters may disagree on whether there was sufficient practice, or they may disagree on the actual intentions of the drafters of a treaty. So far, so good. However, it is also possible that—particularly in hard cases—the dispute reflects a deeper, normative disagreement located at a higher point in the chain of competence. This disagreement may have to do with the legal value of a certain source, that is, whether something is or is not law.199 More frequently, however, it deals with the effect that a certain source may have over the content of the obligation—that is, what it mandates.200 Such a disagreement over content may come about as a consequence of the existence of lacunae (that the system does not offer an explicit solution for a specific case);201 contradictions (that the solution provided by a norm is prima facie incompatible with the solution provided by another for the same case);202 semantic indeterminations (such as vagueness or ambiguity in the words203); syntactic indeterminations (ambiguity in the sentences);204 or pragmatic indeterminations (hesitations on whether the terms in question ask, prescribe, suggest, promise,
Thus, even when there is agreement about the empirical evidence (e.g., the practice of States or the intentions of drafters), there may still be doubts about said evidence's effects on legal obligations.

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

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

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

206. See id. at 97, 100.

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

208. DWORKIN, supra note 9, at 7.
considerations behind fake empirical discussions. The risk in this case is that “the normative judgments in the interpretation of the law are not subject to the control of critical discussion.”

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

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

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

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

212. Id. at 144. "They furnish an aesthetic idea, which serves the above rational idea as a substitute for logical presentation, but with the proper task however, of animating the...
contrary, must be expressed in words—in rational ideas that can be
intersubjectively assessed. The aesthetic method, then, is not a
suitable model for the interpretation of international law; an
alternative must be sought.

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

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

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

215. ALEXY, supra note 93, at 15.

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

217. JÜRGEN HABERMAS, Some Further Clarifications of the Concept of Communicative

218. This is why, as Jürgen Habermas states, “[a]n individual legal decision can be
right only if it fits into a coherent legal system.” HABERMAS, supra note 196, at 232.
the amount of state practice, or the belief of state officials. But, these disagreements typically also hinge on deeper, normative differences regarding the role that those particular norms under dispute ought to play in the broader legal system.

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


221. Id. at 317.

222. Id. For an analysis of the similarities between Lauterpacht’s and Dworkin’s theories, see Capps, supra note 65.
recently, Antonio Cassese has somewhat timidly defended what he called a "critical positivism," according to which interpreters "should feel free critically to appraise the rule or institution ... in light of the ... general values upheld in the international community." Anne Peters has taken a similar position by underlining the need for normative analysis in any instance of interpretation of international law.

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

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

223. CASSese, supra note 5, at 259.
224. Normative analysis means justifying or criticizing existing norms and making reform proposals. It also means evaluating the application of the law and criticizing such practice. Because of the leeway inherent in any interpretation and application of a rule to the facts, any evaluation of legal practice is, in the sense of a theory of science, a "normative" and not merely a "positive" analysis. Peters, supra note 184, at 550.
225. "The conditions of rational practical argumentation can be summed up in a system of discourse rules. Some of these rules formulate general demands of rationality which are also valid independently of discourse theory. They include freedom from contradictions, universalisability in the sense of a consistent use of the predicates employed, linguistic-conceptual clearness, empirical truth, consideration of consequences, and weighing." See Robert Alexy, Discourse Theory and Human Rights, 9 Ratio Juris 209, 211 (1996). See generally ALEXY, supra note 93.
The problem, of course, is that even after this process, disagreement may persist. This is because the “success” of the interpretive endeavor does not—and cannot—consist in finding the perennial right answer to the interpretive question, the elimination of disagreement. Jürgen Habermas explains that “rights are a social construction that one must not hypostatize into facts.” 226 Thus, even the best interpretive judgments “remain something provisional, a coherent order of reasons constructed for the time being and exposed to ongoing critique.” 227 Success in the interpretive process does not necessarily amount to finding consensus, either. In the best scenario, of course, “we bring argumentation to a de facto conclusion … when reasons solidify against the horizon of unproblematic background assumptions into such a coherent whole that an uncoerced agreement on the acceptability of the disputed validity claim emerges.” 228 But in another scenario, where disagreement persists, a proper theory of interpretation should aim at revealing the true differences in perspective between the participants of the process, which should then be rationally assessed and, eventually, resolved through the appropriate institutional methods in place, whatever those may be.

Thus, the rules and theories on the interpretation of international law must not be aimed at fully resolving disagreements. That task may, in any event, pertain to institutional mechanisms, be them jurisdictional or political. 229 What interpretive rules and theories must do is rule out inadmissible positions, clarify what kind of disagreements are in place, and confront the rational arguments of those who defend the different views on the matter. The problem with the traditional approaches is that they fail in these tasks: they are incapable of identifying the true issues—turning the conversation into a shouting match. “The validity of a judgment” of this kind, of a legal kind, then,
is certainly defined by the fact that its validity conditions are satisfied. Whether those are satisfied, however, cannot be clarified by direct access to empirical evidence or to facts given in an ideal intuition, but only discursively, precisely by way of a justification that is carried out with arguments.  

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

230. HABERMAS, supra note 196, at 226.