Michigan Journal of International Law

Volume 39 | Issue 3

2018

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Recommended Citation

Nadia Banteka, *A Theory of Constructive Interpretation for Customary International Law Identification*, 39 MICH. J. INT'L L. 301 (2018).
Available at: https://repository.law.umich.edu/mjil/vol39/iss3/2

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A THEORY OF CONSTRUCTIVE INTERPRETATION FOR CUSTOMARY INTERNATIONAL LAW IDENTIFICATION

Nadia Banteka[*]

The definition, scope, and identification of customary international law ("CIL") have been debated since the inception of international law.[1] According to the Statute of the International Court of Justice (the "ICJ") and the Court's jurisprudence, CIL derives from general state practice and *opinio juris*.[2] In other words, an emerging norm rises to the level of a CIL obligation when states who exhibit that behavior act out of a belief or sense of legal obligation, rather than simply out of habit. CIL has since been conceived as a duality interpreted into a set of two elements: the first is quantitative, objective, and material, based on how states have acted in the past; the second is qualitative, subjective, and psychological, based on a notion of legal duty, obligation, or right.

International law has largely expanded since 1945 to include many fields and actors that were completely unarticulated or roughly conceived at that time. Areas such as human rights, environmental law, investment law, human security, and many more receive different attention than that of half a century ago. What Louis Henkin characterized as a move from state values to human values, and from a liberal state system to a welfare state system, has altered both our conception of CIL and the relationship between its two elements.[3]

Due to the emergence of new actors in the international system that reshuffled its normative calibration and priorities, a new environment surfaced where there is neither a clear, common understanding of how CIL norms are identified, nor agreement on the content of those norms. States and scholars argue, for instance, that torture is and is not justifiable under international

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1. Norra Arajarvi, The Changing Nature of Customary International Law: The Methods of Interpreting International Criminal Tribunal 152 (2014).

2. Statute of the International Court of Justice art. 38, *opened for signature* June 26, 1945, 3 U.S.T. 1153; North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 73 (Feb. 20).

3. Louis Henkin, Human Rights (2d ed. 2009).

human rights law;[4] that states are and are not responsible for their failure to prevent injury to the environment or another state;[5] and that states do and do not have an obligation to protect the populations of third-party states when their fundamental rights are being systematically abused.[6] All of these positions are potentially tenable within the current state of CIL indeterminacy due to the absence of a consistent CIL identification method that provides legal certainty. This makes CIL vulnerable to critique that it cannot function as a legitimate source of substantive legal norms in a decentralized world of nations that lacks a broad sense of shared values.

The relationship between CIL's two elements of state practice and *opinio juris* comes in many shades. For instance, in the *Asylum and Fisheries* cases, the ICJ looked equally at both elements of state practice and *opinio juris*[7] and reaffirmed this approach in the *Rights of Nationals of the US in Morocco*[8] and the *Nottebohm* decisions.[9] In the *Nicaragua* decision, the ICJ held that practice ought to be appraised in light of the subjective element of *opinio juris*.[10] The Court here considered it sufficient for conduct to be generally consistent with expressions and statements of rules insofar as contrary state practice has largely been "treated as breaches of that rule, not as indi-

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4. *See* SANFORD LEVINSON ET AL., TORTURE : A COLLECTION (Sanford Levinson ed., 2004); ALAN W. CLARKE, RENDITION TO TORTURE (2012); MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE : A COMMENTARY (2008); John C. Yoo, *A Crucial Look at Torture Law*, *in* CIVIL LIBERTIES VS. NATIONAL SECURITY IN A POST-9/11 WORLD 321, 321–323 (M. Katherine B. Darmer et al. eds., 2004); John Yoo, *The U.S. Military Need Not Obey the Geneva Conventions When Dealing with Suspected Terrorists*, *in* IS TORTURE EVER JUSTIFIED? 26–30 (Tom Head ed., 2005); Memorandum from John Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def. (Mar. 14, 2003), https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-combatants outsideunitedstates.pdf (last visited Oct. 4, 2018).

5. *See* MICHAEL MASON, THE NEW ACCOUNTABILITY: ENVIRONMENTAL RESPONSIBILITY ACROSS BORDERS (2005); TUOMAS KUOKKANEN, INTERNATIONAL LAW AND THE ENVIRONMENT: VARIATIONS ON A THEME (2002); Miron Mushkat & Roda Mushkat, *The Political Economy of Hong Kong's Transboundary Pollution*, 9 J. INT'L TRADE L. & POL'Y 175, 175–192 (2010).

6. *See* Nadia Banteka, *Dangerous Liaisons: The Responsibility to Protect and a Reform of the U.N. Security Council*, 54 COLUM. J. TRANSNAT'L L. 382, 382–423 (2016); GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL (2008); THE OXFORD HANDBOOK OF THE RESPONSIBILITY TO PROTECT (Alex J. Bellamy & Tim Dunne eds., 2016); JAMES PATTISON, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHO SHOULD INTERVENE? (2010); THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW (Marc Weller et al. eds., 2015).

7. Asylum (Colom. v. Peru), Judgment, 1950 I.C.J. Rep. 266, ¶ 276 (Nov. 20); Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116, ¶ 138 (Dec. 18).

8. Rights of Nationals of United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. Rep. 176, ¶ 200 (Aug. 27).

9. Nottebohm (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, ¶ 1 (Apr. 6).

10. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 147–48 (June 27).

cations of the recognition of a new rule."[11] In the *Corfu Channel* case, the Court engaged in a deductive analysis to assess Albania's obligation to notify others of the existence of a minefield in its territorial waters. The ICJ found that this obligation existed based "on certain general and well-recognized principles"[12] and, more specifically, the principle of "elementary considerations of humanity."[13] However, unlike in the *Nicaragua* decision, the Court did not scrutinize whether this principle represented general state practice, *opinio juris*, or an altogether different source of international law.[14]

Despite these different shades, the ICJ always tries to consider both elements of state practice and *opinio juris* in its deliberations on CIL identification. However, due to the indeterminacy of the relationship between its elements, the CIL identification debate has been trapped in a singular methodological dispute between induction and deduction. According to the inductive method, CIL stems from 'facts' of the international life[15] and its identification takes place by collecting and systematizing facts of state conduct—what we know as state practice.[16] Proponents of the inductive approach in CIL identification go as far as to suggest that we dispense with *opinio juris* as an element of CIL altogether and rely instead only on state practice.[17] On the other hand, the deductive method focuses on the abstract and deduces CIL norms from general propositions deriving from non-factual, often normative authorities.[18] Unlike the inductive claim, the deductive process is one that begins with general statements of rules rather than particular instances of practice.[19] Rules of CIL are then deduced from these

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11. *Id.* ¶ 186.

12. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, ¶ 22 (Apr. 9).

13. *Id.*

14. *Id.*; BIRGIT SCHLÜTTER, DEVELOPMENT IN CUSTOMARY INTERNATIONAL LAW 141 (2010).

15. SCHLÜTTER, *supra* note 14.

16. *See, e.g.*, BRUNO SIMMA, INTERNATIONAL HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW: A COMPARATIVE ANALYSIS 153, 216 (1995); S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7) (holding that binding international law derives from the will of states as expressed via their actions and in conventions generally accepted as expressing principles of international law).

17. *See* Paul Guggenheim, *Les Deux Eléments de la Coutume en Droit International*, *in* LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC: ÉTUDES EN L'HONNEUR DE GEORGES SCELLE 275 (Charles Rousseau ed., 1950); H. Kelsen, *Théorie du Droit International Coutumier*, 1 REVUE INTERNATIONALE DE LA THÉORIE DU DROIT 253 (1939). Both have, however, revised their opinion in later contributions. *See* HANS KELSEN & ROBERT W. TUCKER, PRINCIPLES OF INTERNATIONAL LAW 440 (Holt et al. eds., 1966) (adding a second element to the definition of custom: that the individuals exercising the relevant action or abstention are convinced that they fulfill a duty or exercise a right); MARCEL SIBERT, TRAITÉ DE DROIT INTERNATIONAL PUBLIC: LE DROIT DE LA PAIX 101 (1951); PAUL GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC (2d ed. 1967).

18. HANS, *supra* note 17; SIBERT *supra* note 17; GUGGENHEIM *supra* note 17

19. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom*, *Jus Cogens*, *and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 89 (1989).

general statements and principles as these are reflected in the conduct and discourse of states.

Modern international judicial lawmaking and scholarship engage with both the inductive and the deductive methods, but largely approach them as opposite and mutually cancelling.[20] However, these two methods represent two ends of a spectrum. International law has yet to engage systematically with other methodological approaches that lay *within* this spectrum. In this Article, I examine a mid-spectrum approach where fact and principle ~~or~~ content and value—are knit together through constructive interpretation.[21] This approach does not strictly divide the two elements of CIL into a binary, but instead views them as interwoven. The goal of constructive interpretation is to impose purpose on a practice in order to put it in the best possible light within the constraints of its factual history and shape.[22] Very often, competing interpretations will arise for the same practice, in which case the preferred interpretation is the one that proposes the most value for the practice, all other things being equal.[23] Where a deductive methodology looks for a connection between principle and law, and an inductive methodology searches for social facts that establish general practice, constructive interpretation asserts that "propositions of law are true if they . . . provide the best constructive interpretation of the community's legal practice."[24] The main proponent of constructive interpretation is Ronald Dworkin, whose in-

20. *See* Rudolf Bernhardt, *Customary International Law*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 898, 900 (Rudolf Bernhardt ed., 1992) (asserting that omissions by states are evidence of customary law and that any state agency can contribute to that state's customary law); Michel Virally, *Le Rôle des "Principes" dans le Développement du Droit International*, *in* LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC: ETUDES EN L'HONNEUR DE PAUL GUGGENHEIM 531, 550 (1968) (demonstrating that a declaration of principle constitutes a method of establishing a rule of customary law); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L. L. 115, 124–25 (2005) (suggesting that "diplomatic correspondence, treaties, public statements by heads of state, [and] domestic laws" can serve to demonstrate state practice); *see also* Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L. L. 1, 4 (1977) (canvassing and criticizing the debate among scholars regarding whether a given category of state action merely confirms the existence of an already recognized custom or whether such state action is being employed by a state with a view to the establishment of custom). Although this broad approach to state practice is disputed, it reflects the majority of academic commentators and the legal jurisprudence. *See* Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523, 525–30 (2004) (distinguishing between the subjective and objective elements, with respect to the formation of customary law, that are present in the practices of any state); Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 871 (Jules L. Coleman et al. eds., 2004); Christian Tomuschat, *Obligation Arising for States Without or Against Their Will*, *in* 241 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 195 (1993).

21. *See* RONALD DWORKIN, LAW'S EMPIRE 48 (1986).

22. *Id.* at 52.

23. *Id.*

24. *Id.* at 225.

sights I will build upon in an attempt to evaluate and transpose the constructive interpretation claim in international law and in CIL identification in particular.

In the first part of this Article, I introduce the most popular theories of CIL identification and connect them to relevant jurisprudence of the ICJ. Then, I address the analytical thread that underlies the different theoretical and jurisprudential approaches: the divide between induction and deduction. As a middle ground in this divide, I introduce Ronald Dworkin's theory of constructive interpretation along with a theory for its application to international law in the second part of the Article. I put forward the guiding principles of constructive interpretation, examine the process of constructive interpretation in the abstract, and apply it specifically to CIL identification. I argue that constructive interpretation holds significant advantages over existing methods of CIL identification because it facilitates the resolution of the two main CIL impasses: (1) the relationship between general state practice and *opinio juris*; and (2) the problem of *opinio juris* circularity. Finally, I discuss certain objections that arise in the context of applying the method of constructive interpretation in international law. In the final part, I illustrate how constructive interpretation applies to the judicial assessment of CIL identification. I argue that the ICJ has already utilized, likely inadvertently, constructive interpretation in reaching parts of its dispositive findings in the *Nicaragua* case, and I will dissect the *Nicaragua* judgment to establish this proposition.

PART I: CUSTOMARY INTERNATIONAL LAW

A. *Theory and Jurisprudence*

Customary law is the oldest source of all law, including international law.[25] The early stages of international law's development revealed the proclivity of international actors to engage in perpetual activity in the form of shaping habits. At the time, this concept of CIL as *jus in gentium* was originally developed through the Roman Empire's dealings with foreign nations and shortly served as a facilitator to emerging nation states by providing a framework for the recognition of reciprocal legitimate expectations based on states' consistent conduct.[26] At this stage, customary law represented only consistent practice among states.

It was not until 1899 that the concept of *opinio juris* first emerged as the subjective element of CIL in expressing the "spirit of a nation."[27] François

25. *See* 1 OPPENHEIM'S INTERNATIONAL LAW: PEACE 25 (Robert Jennings & Arthur Watts eds., Oxford Univ. Press 9th ed. 2008).

26. HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 121 (Malcolm D. Evans ed., 2014).

27. JÖRG KAMMERHOFER, UNCERTAINTY IN INTERNATIONAL LAW: A KELSENIAN PERSPECTIVE 534 (reprinted ed. 2012). Opinio juris is widely said to have been coined in

Gény, who coined the term *opinio juris seu necessitatis*, suggested that CIL requires practice to amount to the "exercise of a right of those who practice it."[28] The practice element of CIL also underwent significant change as the number of new nation states increased substantially after decolonization.[29] The fact that the international community expanded from a handful of states to almost 200 states made it necessary to relax the originally far more stringent participation requirement for the assessement of a general rule of international law from uniform to "widespread and representative."[30] Thus, despite the long life of CIL, it was not until the 1960s that CIL began to resemble what we largely understand it to be today.

CIL is also the most widely attacked source of international law.[31] One of the first points of debate is an ontological critique, doubting that CIL really counts as law at all. Certain international relations accounts view CIL norms as, at best, "regimes" that reflect conventions states follow with no attendant obligation to obey and thus largely dependent on political self-interest.[32] A wave of legal scholars echoed the view that CIL does not exercise any "exogenous influence on state behavior" and cast doubt on whether CIL qualifies as law.[33] H.L.A. Hart concludes that international law was not at a point that it could represent a full-fledged legal system due to the absence of a general "rule of recognition."[34] He argued that CIL's foundational premise—that "states should behave as they have customarily behaved"—was not a basic rule of recognition but simply "an empty repetition of the mere fact that the society concerned observes certain standards of conduct as obligatory rules."[35]

In this environment of ontological doubt, and for the purpose of our conceptual taxonomy, scholars who accept the inclusion of CIL as a source of international law roughly form two groups. First, there are those who advocate that only state practice is relevant for CIL identification; second, there are those who stress the additional importance of the psychological

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FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF: ESSAI CRITIQUE (2d ed. 1919).

28. GÉNY, *supra* note 27, at X.

29. KELSEN & TUCKER, *supra* note 17, at 452.

30. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 73 (Feb. 20).

31. Andrew T. Guzman & Timothy L. Meyer, *Customary International Law in the 21st Century*, *in* PROGRESS IN INTERNATIONAL LAW 197, 199 (Russell A. Miller & Rebecca M. Bratspies eds., 2008) (summarizing the criticisms).

32. *See* Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L. ORG. 299, 320 (1982).

33. Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 42–43 (2005).

34. H.L.A. HART, THE CONCEPT OF LAW 226–31 (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012).

35. *Id.* at 230.

element of *opinio juris*, in varying degrees.[36] Despite the theoretical debate on CIL's nature and authority, states largely recognize CIL's status in their international relations and their national legal orders. For example, as early as the *Paquete Habana* case, the U.S. Supreme Court recognized the existence of a CIL norm exempting coastal fishing vessels from capture during an armed conflict.[37] At the same time, domestic courts are apprehensive about relying too much on CIL due to its alleged uncertain legal content and character.[38] This critique focuses on the difficulty of delineating the content of CIL norms, as well as the difficulty of identifying the stage when a certain practice is no longer followed purely out of mere habit or convenience but out of legal obligation.

The ICJ Statute is the main instrument currently in place that provides guidance on how to identify a CIL norm.[39] But the rules of Article 38 of the ICJ Statute reflect a world that is significantly different compared to today. Similar to how the increase of the number of states due to decolonization affected the formation and identification of CIL, the proliferation of non-state actors in the international system caused the normative identification of rules and standards to appear somewhat outdated. But, at the same time, these rules are sufficiently vague and flexible to avoid hindering, at least directly, the ability of states and other actors to creatively traverse the current lawmaking landscape.

The methodology of detecting a norm of CIL is a Pandora's box of its own. The content of CIL is considered more fluid and open to interpretation compared to other sources of international law.[40] It is this quality that makes CIL norms more susceptible to indeterminacy and difficult to ascertain.[41] How do we detect the existence and content of CIL rules? An answer is to review how the ICJ approached this issue in the past. The Court usually begins by declaring the need to ascertain the two elements of state practice and *opinio juris*.[42] Often though, as the Court moves to the analysis of the merits, it refrains from performing this type of empirical test. Instead of reviewing state practice extensively in order to establish the sum of the actual conduct of states, it tends to quickly move into highlighting what constitutes

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36. ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 49 (1971).

37. *See generally* The Paquete Habana, 175 U.S. 677, 701–14 (1900) (surveying various legal documents and opinions of jurists and authors which supported the existence of this exemption).

38. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 729–30 (2004).

39. Statute of the International Court of Justice, *supra* note 2, art. 38, ¶ 1(b) (defining "international custom" as "a general practice accepted as law").

40. GIDEON BOAS, PUBLIC INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PERSPECTIVES 74 (2012).

41. *Id.*

42. *See* North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 37 (Feb. 20).

opinio juris.[43] In other words, the ICJ sometimes quickly accepts the norm in question if it finds a widespread belief in its existence by deduction from the single sources that constitute *opinio juris*, such as statements, recognition contained in written documents of widespread acceptance, and multilateral treaties with very broad participation.[44]

As early as the 1950s, the International Law Commission (the "ILC") was faced with the problem of the "ways and means for making the evidence of customary law more readily available" in an effort to better elucidate the nature of CIL's elements.[45] Yet, to this day, the elements of CIL remain murky and conflicted as the ILC attempts to codify the CIL identification process.[46] Anthony D'Amato argues that "the theory of custom must provide for change and adaptation in customary law, yet it must also establish enough stability so that it can exert a pressure on decisionmakers to refrain from certain contemplated actions that would violate the customary rule."[47] In a circular system, where states are simultaneously the lawmakers and the objects of legal constraint, striking this balance can prove particularly difficult.[48] Sir Robert Jennings addresses the inherent tension in discerning CIL by arguing that what we understand as CIL today "is not only *not* customary law: it does not even faintly resemble a customary law."[49] He concludes that "perhaps it is time to face squarely the fact that the orthodox tests of custom—practice and *opinio juris*—are often not only inadequate but even irrelevant for the identification of much new law today."[50]

This climate of uncertainty set apart CIL theories in the so-called "old" and "modern" CIL. These two different schools of thought diverge on the questions of whether the two elements of CIL are mutually constitutive or if

43. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 37 (June 27); *see also* Continental Shelf (Libya/Malta), Judgment, 1985 I.C.J. Rep. 13, ¶ 27 (June 3); Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT'L L. 7, 7 (2009).

44. *See* Luigi Condorelli, *Customary International Law: The Yesterday, Today, and Tomorrow of General International Law*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 147 (Antonio Cassese ed., 2012).

45. Int'l Law Comm'n, Ways and Means of Making the Evidence of Customary International Law more Readily Available, U.N. Doc. A/CN.4/6, at 4–5 (1949).

46. *See Analytical Guide to the Work of the International Law Commission*, INT'L LAW COMM'N, http://legal.un.org/ilc/guide/1_13.shtml (last visited Oct. 4, 2018) (describing the International Law Commission's most recent efforts to establish the identification of CIL).

47. D'AMATO, *supra* note 36, at 274.

48. *See* Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173, 176 (2010).

49. Robert Y. Jennings, *The Identification of International Law*, *in* INTERNATIONAL LAW: TEACHING AND PRACTICE 3, 5 (Bin Cheng ed., 1982) (emphasis in original).

50. *Id.* at 71.

either should predominate in the formation of CIL.[51] Old CIL developed inductively from consistent widespread practice of states accepted as law. It bases the expression of state consent for a rule on the states' own actions and practices.[52] A court should then examine if states undertake these practices as part of what they consider to be a legal duty in order to confirm or reject the existence of a CIL rule. For "old CIL," the two cumulative elements of state practice and *opinio juris* represent the *conditio sine qua non* for the existence of a CIL rule.[53] Modern CIL has a deductive character,[54] relies primarily on *opinio juris*, and recognizes the potential influence in the process of non-state actors such as IOs and NGOs.[55]

The reasons behind the emergence of modern CIL theories vary, but their roots probably lie with the decreased relevance of old CIL in today's international relations. Both the increase of treaty law and the structural inability of old CIL to address imminent contemporary problems such as climate change, terrorism, international financial regulation, proliferation of weapons, and systematic human rights violations pushed states to find alternative means to law-creation.[56] The idea of modern CIL clashes with some traditional conceptions of CIL as "backward-looking and conservative,"[57] giving it instead a more dynamic and aspirational quality.[58] Combined with the incorporation and voicing of a wider set of actors and interests,[59] modern CIL expands the scope of problems it is equipped to address.[60] For "modern CIL," the relevance of state practice is reduced "as the normativity of the obligation increases."[61] This means that CIL on highly normative issues

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51. *Compare, e.g.*, Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 146–47 (1987), *with* Anthony D'Amato, *Trashing Customary Law*, 81 AM. J. INT'L L. 101, 102 (1987).

52. *See* Vincy Fon & Francesco Parisi, *Stability and Change in International Customary Law*, 17 SUP. CT. ECON. REV. 279, 294 (2009).

53. *See id.*

54. *See* Simma & Alston, *supra* note 19, at 84.

55. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 838–42 (1997); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 759 (2006).

56. Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT'L L. 1, 7 (2010).

57. Emily Kadens & Ernest A. Young, *How Customary is Customary International Law?*, 16 WM. & MARY L. REV. 885, 909 (2013).

58. *See* Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23 (1965).

59. *See* Roberts, *supra* note 55, at 757.

60. *See, e.g.*, Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 546–47 (1993).

61. Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 206 (2010).

would become binding even under a lower threshold of state practice.[62] The ICJ decision in the *Nicaragua* case is often considered a prime example of this approach to CIL.[63] Before analyzing this decision, however, it is necessary to dissect the two approaches of induction and deduction to identifying CIL.

A. *Induction and Deduction as Methods of CIL Identification*

Most theories and works of law require a methodology of gathering and stabilizing research findings, coupled with a set of criteria to determine their authoritativeness and validity.[64] Under the inductive method, one attempts to induce CIL-making from "facts" of international life.[65] The deductive method focuses on the abstract and deduces CIL norms from general propositions, usually deriving from an extra-legal, non-factual, often normative authority.[66]

The inductive method of CIL determination traces back to Comte's school of sociological positivism that based science on facts and awareness on experience.[67] Patterns of behavior in science were determined solely from abstraction of facts. Due to the primarily prescriptive nature of the law,[68] the inductive method was liberally transferred in order to base international law on social reality[69] using behavior as a means to reconcile law with fact.[70] CIL formation under the inductive method is determined by collecting and systematizing facts of state conduct—what we know as state practice.[71] Within this school of thought, it comes as no surprise that authors

62. *See id.*

63. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 37 (June 27); *see also* Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, ¶¶ 30–37 (Oct. 16); Legal Consequences for States of Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 16, ¶¶ 30–31 (June 21).

64. *See* Kammerhofer, *supra* note 20, at 537.

65. *Id.*

66. *Id.*

67. AUGUSTE COMTE, A GENERAL VIEW OF POSITIVISM 42 (J.H. Bridges trans., Routledge 1908) (1844).

68. *See* Craig Haney, *Psychological and Legal Change: On the Limits of a Factual Jurisprudence*, 4 LAW & HUM. BEHAV. 147, 163 (1980) (distinguishing between prescriptive and descriptive disciplines).

69. *See id.* at 148 (describing the emergence in the nineteenth century of a concept of law whereby the law was viewed as an instrument for achieving positive goals).

70. Niels Petersen, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT'L L. REV. 275, 301 (2007).

71. *See, e.g.*, SIMMA, *supra* note 16, at 153, 216; S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7) (holding that binding international law derives from the will of states as expressed via their actions and in conventions generally accepted as expressing principles of international law).

such as Guggenheim and Kelsen proposed at times to dispense with *opinio juris* altogether as an element of CIL and rely only on state practice.[72]

Despite the application of a stricter inductive method in the early days of international law, the increased range of actors involved in CIL and their effect on its scope drove modern scholarship to utilize both an expansive inductive methodology as well as a deductive methodology.[73] In contrast to the inductive claim, the deductive process of international law is one "that begins with general statements of rules rather than particular instances of practice."[74] Early naturalist scholars were the first to introduce the deductive methodology into international law. These accounts rely on more abstract normative principles, ethics, or morality as forming the backdrop of the international legal order.[75] Particular rules of CIL are deduced primarily from these principles as reflected in the conduct and discourse of international actors. Nevertheless, positivist scholars also make use of the deductive methodology. Kelsen contends that international norms are based on a "Grundnorm," which forms the underlying basis of all other norms.[76] Tomuschat advocates for a more comprehensive deductive approach toward CIL formation in which fundamental principles of common mankind—values from which certain individual norms are deduced—govern a constitutive international community.[77]

The ICJ also often follows a more deductive method in deriving CIL norms despite the inductive approach of its own sources under Article 38 of the ICJ Statute. In assessing Albania's obligation to notify the international

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72. *See* Guggenheim, *supra* note 17, at 275–84; Kelsen, *supra* note 17, at 253. Both have, however, revised their opinion in later contributions. *See* KELSEN & TUCKER, *supra* note 17 (adding a second element to the definition of custom: that the individuals exercising the relevant action or abstention are convinced that they fulfill a duty or exercise a right); SIBERT, *supra* note 17.

73. *See* Bernhardt, *supra* note 20 (asserting that omissions by states are evidence of customary law and that any state agency can contribute to that state's customary law); Virally, *supra* note 20, at 550 (demonstrating that a declaration of principle constitutes a method of establishing a rule of customary law); Guzman, *supra* note 20, at 124–25 (suggesting that diplomatic correspondence, treaties, statements by heads of state, and domestic laws can serve to demonstrate state practice); *see also* Akehurst, *supra* note 20, at 4 (canvassing and criticizing the debate among scholars regarding whether a given category of state action merely confirms the existence of an already recognized custom or whether such state action is being employed by a state with a view to the establishment of custom). Although this broad approach to state practice is disputed, it reflects the majority of academic commentators and the legal jurisprudence. *See* Kammerhofer, *supra* note 20, at 525–30 (distinguishing between the subjective and objective elements, with respect to the formation of customary law, that are present in the practices of any state).

74. Simma & Alston, *supra* note 19, at 89.

75. *See* Tesón, *supra* note 20.

76. HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg trans., 1945).

77. Tomuschat, *supra* note 20, at 291.

community about the existence of a minefield in its territorial waters in the Corfu Channel, the Court found that the obligation existed based:

> [o]n certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principles of freedom of maritime communication; and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.[78]

The Court deduced a prohibition from a greater principle—the "elementary considerations of humanity" —without scrutinizing further its role within the Article 38(1) sources of international law.[79] In the *Barcelona Traction* and *Genocide Convention* cases, the Court spoke of a distinct set of fundamental rights that lead to normative obligations, such as the prohibition of aggression, genocide, slavery, and racial discrimination.[80] Under a deductive approach, the Court considered that these rights were of such fundamental and universal character that they formed the basis of further customary obligations, with little attention paid to how states previously acted in the face of these instances.

In this environment of methodological discord, I propose a middle ground approach, where value and fact are interwoven through constructive interpretation. At the heart of this interpretive thesis lies the idea that the international community consists of a social system of ongoing, structured relationships among the different actors within this system, as well as their perpetual interactions.[81] Understanding the world as such an international community represents a conceptual shift from focusing on the given identity of actors to analyzing their functions. This allows us to focus on the actors' activities and effects as well as their specific ties to other actors at any point throughout the community's legal history.[82] This conceptual shift of interpretive theory can incorporate the wider spectrum of state and non-state actors whose unaccounted practice and effect contribute to the current CIL indeterminacy.

Constructive interpretation's goal is to impose purpose on a practice in order to place it in the best possible light within the constraints of its history.[83] The constructive interpreter proposes a value for the practice by attaching it to a set of goals or principles that it can be taken to express or exem-

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78. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9).

79. *See* SCHLÜTTER, *supra* note 14, at 141.

80. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Second Phase, 1970 I.C.J. Rep. 3, ¶ 34 (Feb. 5).

81. *See* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 10–12 (1995).

82. *See* Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 ETHICS & INT'L. AFF. 1, 1 (2004).

83. *See* DWORKIN, *supra* note 21, at 52.

plify.[84] Very often, competing interpretations will arise for the same practice, in which case the preferred interpretation is the one that proposes the most value for the practice *ceteris paribus*.[85] Where a natural law theorist would look for a connection between law and morality, and a positivist would look to social facts, a theory of constructive interpretation contends that "propositions of law are true if they . . . provide the best constructive interpretation of the community's legal practice."[86]

PART II: AN INTERPRETIVE THEORY OF CUSTOMARY INTERNATIONAL LAW

A. *Ronald Dworkin's Interpretive Theory of International Law*

Dworkin based his theory of interpretivism on an important principle that he calls "law as integrity."[87] "Law as integrity" establishes that the law ought to be created or interpreted in such a way to form one integral cohesive whole.[88] It does not accept that legal propositions are either backward-looking descriptive reports of facts or forward-looking instrumental normative prescriptions. Instead, by combining backward- and forward-looking elements in the analysis of legal propositions, "law as integrity" aims to interpret these propositions as unfolding narratives.[89]

With integrity as the overriding principle across his theory, Dworkin made his first and only direct contribution to the international law debate in an article published posthumously, in which he argued that states have a *prima facie* obligation to follow international law.[90] According to his international law theory, a coercive government has a duty to improve its own legitimacy. This duty stems from what Dworkin introduces as the 'principle of mitigation' that demonstrates the "most general structural principle and interpretive background of international law."[91] According to this principle, all types of coercive government have a duty to pursue all possible and available means to mitigate the problems and failures of their system.[92] To abide by this duty in the international system, states ought to establish laws in accordance with certain normative standards and improve their political

84. *Id.*

85. *See id.*

86. *Id.* at 225.

87. *Id.* at 166.

88. *See id.* at 118, 225–58, 410.

89. *Id.*

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

91. *Id.* at 16, 19.

92. *Id.* at 19.

legitimacy in their international relations.[93] States therefore have an active duty to mitigate their coercive power and to "accept feasible and shared constraints" based on international law.[94] Mitigation recognizes that systems of governance carry endemic insufficiencies and addresses how these systems can develop across time and through changing circumstances.

The principle of mitigation also imposes on states the obligation to compensate for their inability to solve global coordination problems alone.[95] "[I]t follows that the general obligation to try to improve [the states'] political legitimacy includes an obligation to try to improve the overall international system."[96] For Dworkin, this obligation extends to cooperative duties[97] and is based on states rectifying the shortcomings of the Westphalian state-sovereignty system that they created.[98] The principle of mitigation is what drives states out of the older notions of Westphalian sovereignty into a more dynamic and reciprocal conception of sovereignty that emphasizes protection for individuals, as well as cooperation and coordination in addressing the common interests of humanity.[99]

In sum, "law as integrity" serves as the backdrop of Dworkin's cohesive jurisprudential theory. The principle of mitigation serves as a pragmatic approach to the entropy to which any closed system, such as the international system, is susceptible.[100] These two principles form the cornerstone of a comprehensive interpretive theory of international law that Dworkin does not provide us with. Nonetheless, Dworkin's proposed theory of international law offers some guiding principles to build a more comprehensive in-

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93. *Id.*

94. *Id.* at 17.

95. Adam S. Chilton, *A Reply to Dworkin's New Theory of International Law*, 80 U. CHI. L. REV. DIALOGUE 105, 105 (2013).

96. DWORKIN, *supra* note 21, at 17.

97. Dworkin, *supra* note 90, at 17–18 ("Any state . . . improves its legitimacy when it promotes an effective international order that would prevent its own possible future degradation into tyranny."). It does the same also when it can protect its people, on whom it has monopoly of force, from invasions of other peoples. Moreover, a state fails further if it discourages cooperation to prevent economic, commercial, medical, or environmental disaster. As to cooperation in international law, see, for example, Myres S. McDougal & W. Michael Reisman, *The Changing Structure of International Law: Unchanging Theory for Inquiry*, 65 COLUM. L. REV. 810 (1965).

98. Dworkin, *supra* note 90, at 27.

99. *Id.* Insofar as the Westphalian system was the apex of state sovereignty, developments in international law, particularly in fields such as human rights, environmental law, and international criminal law, have been premised on the rise of a general duty of states to protect individuals. *See* Gianluigi Palombella, *The Principles of International Law: Interpretivism and Its Judicial Consequences* 7 (Robert Schuman Ctr. for Advanced Studies, Research Paper No. RSCAS 2014/70, 2014).

100. *See* Joshua S. Martin et al., *Removing the Entropy from the Definition of Entropy: Clarifying the Relationship Between Evolution, Entropy, and the Second Law of Thermodynamics*, EVOLUTION: EDUC. & OUTREACH, Oct. 31, 2013, https://evolution-outreach.biomedcentral.com/track/pdf/10.1186/1936-6434-6-30 (last visited Oct. 4, 2018).

terpretive theory for understanding CIL. In the following parts of the paper, I will fill in the gaps by unpacking some key ideas from Dworkin's theory and apply them to the context of CIL identification.

B. *A Comprehensive Interpretive Theory of Customary International Law*

Unlike his international law theory that was brief and unfinished, Dworkin wrote systematically on the nature of law as a normative social practice often in response to the jurisprudential camps of positivism, natural law, pragmatism, and legal realism.[101] For Dworkin, law is a constructive social phenomenon based on argumentative practice that "aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past."[102] Actors involved in legal practice engage in constructive interpretation through which they test certain propositions that shed light on what this practice authorizes or regulates.[103] Oddly, even though most of the other jurisprudential schools transcended into the international law debate, irrespective of their domestic origins,[104] interpretivism has not received equal systematic attention.[105] In order to understand how interpretivism can enhance CIL identification, it is first important to understand the interpretive process.

1. The Theoretical Basis of Interpretivism

Interpretivism is based on the idea that, even when parties agree on all empirical facts, they may still disagree on what the law and its contents

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101. *See* RONALD DWORKIN, JUSTICE IN ROBES (2006) [hereinafter DWORKIN, JUSTICE]; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22, 26 (Bloomsbury Acad. 2013) (1977); DWORKIN, *supra* note 21, at 175.

102. DWORKIN, *supra* note 21, at 13.

103. *See id.*

104. *See* Basak Çali, *How Would You Like Your 'Legal Change' Done Today, Madam?*, ESIL (Inaugural Conference International Theory Agora Paper), http://esil-sedi.eu/wp-content/uploads/2018/04/Cali_0.pdf (last visited Oct.. 4, 2018); TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES (1999). *See generally* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L 413 (1983) (positivism); Terry Nardin, *International Pluralism and the Rule of Law*, 26 REV. INT'L STUD. 95 (2000) (same); Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302 (1999) (same); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (pragmatism); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2d ed. 2006) (anti-foundationalism); D. KENNEDY, THE STRUCTURE OF LEGAL ARGUMENT (1986) (same).

105. *See* Basak Çali, *On Interpretivism and International Law*, 20 EUR. J. INT'L L. 805, 805–06 (2009). *But see* John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. LEGAL STUD. 85, 85–128 (1996); Roberts, *supra* note 55.

are.[106] According to interpretivism, this discrepancy exists because there is disagreement about which values lie at the core of the law.[107] The values that lie at the core of the law are overarching propositions instead of merely valuable or guiding rules in specific contexts. For instance, specific international humanitarian law ("IHL") rules on precautions in attack are valuable to allow participants and non-participants in hostilities to operate more safely.[108] A rule such as "those who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives" provides states with valuable guidance on target verification.[109] But this specific rule stems from one of the core overarching values of IHL: the principle of distinction. Distinction establishes that the parties to a conflict must always distinguish between civilians and combatants in their treatment and attacks.[110] For interpretivism, the values that are at the core of the law allow us to make better sense of the important parts of a practice.

The method we have for identifying both the values that are at the core of the law as well as the contents of the law is constructive interpretation.[111] Constructive interpretation is "a matter of imposing purpose on an object in order to make the best possible example of the form or genre to which it is taken to belong."[112] It is a process that includes three separate stages: (1) pre-interpretation, (2) interpretation, and (3) post-interpretation.[113] The pre-interpretive stage is the stage where the interpreter identifies a practice as well as any relevant standards, rules, and patterns that help determine the content of this practice.[114] This stage requires a high degree of consensus regarding what counts as part of this practice.[115] For instance, a practice such as "pawns may only be moved forward on the chessboard" meets the level of description and reasonable consensus required for a practice at the pre-interpretive stage.[116]

The second stage is the interpretive stage, where the interpreter formulates a general justification for the practice and its elements as identified

106. *See* DWORKIN, JUSTICE, *supra* note 101, at 146.

107. *See id.* at 141.

108. *Precautions in Attack*, INT'L COMMITTEE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter5 (last visited Oct. 4, 2018).

109. *Rule 16. Target Verification*, INT'L COMMITTEE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule16 (last visited Oct. 4, 2018).

110. *See generally id.* at 3; THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

111. *See* DWORKIN, JUSTICE, *supra* note 101, at 145–62.

112. DWORKIN, *supra* note 21, at 62.

113. *See id.* at 66.

114. *Id.* at 65.

115. *Id.* at 62.

116. *See* STEPHEN GUEST, RONALD DWORKIN 66 (3d ed. 2013).

during the pre-interpretive stage.[117] Even though this justification does not need to accommodate all aspects of the practice identified at the pre-interpretive stage, it must be sufficiently connected so as "to count as an interpretation of [this practice] rather than the invention of something new."[118] At this stage there are three possible outcomes: (1) there are no eligible interpretations; (2) there is only one eligible interpretation; or (3) there are many eligible interpretations due to unsettled or conflicting practice.[119]

Finally, the post-interpretive stage is the stage where the interpreter "adjusts his sense of what the practice 'really' requires so as better to serve the justification he accepts at the interpretive stage."[120] This is the stage where interpretation " 'folds back into itself.' "[121] The interpreter decides to settle upon a particular meaning that makes the practice appear in the best light and thus establishes legal obligation.[122] With the passing of time or the establishment of new practices, this meaning conversely becomes pre-interpretive and the interpretive process may begin all over again.[123] To assist this analytical process, Dworkin borrows the concept of a "reflective equilibrium," which also finds application in CIL identification.

2. The Concept of Reflective Equilibrium and Its CIL Application

Constructive interpretation employs the heuristic notions of "fit" (practice) and "justification" (purpose) to assess the relationship between a practice, on the one hand, and its purpose or value on the other.[124] According to these notions, a purpose puts a practice in its best light when it fits and justifies it better than any rival purpose. A purpose fits a practice to the extent that it recommends that the practice [*sic*] exists or that it has the properties it has.[125] Similarly, the purpose is justified insofar as it is a purpose worth pursuing.[126] The purpose fits and justifies the practice in that without the purpose we would lose our claim to talk about the practice.[127]

Reflective equilibrium represents the state of affairs one reaches after having the opportunity to evaluate the notions of practice and purpose—in

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117. *See* DWORKIN, *supra* note 21, at 62.

118. *Id.* at 67.

119. *See* Roberts, *supra* note 55, at 771.

120. DWORKIN, *supra* note 21, at 62.

121. GUEST, *supra* note 116, at 70 (quoting Dworkin).

122. *See* DWORKIN, *supra* note 21, at 256.

123. *See* GUEST, *supra* note 116, at 70.

124. *See* DWORKIN, *supra* note 101, at 169–71.

125. Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, *in* RONALD DWORKIN 22, 35 (Arthur Ripstein ed., 2007).

126. *Id.*

127. *See* Çali, *supra* note 105.

other words, of fit and justification.[128] The reflective process works back and forth between practice and purpose until the interpreter arrives at an interpretation that is coherent and justified from both ends rather than prioritizing one description or value over another.[129] Through this back and forth, which sometimes alters the conditions of the presumed practice and other times amends our justification of what constitutes purpose or principle, the interpreter eventually finds a description of the practice that expresses reasonable conditions and principles to match our duly adjusted justifications.[130] This coincidence of practice and purpose yields the equilibrium that represents a temporarily stable normative proposition.[131] But this equilibrium is not permanent. The reflective process is ongoing, as conditions and judgments often change throughout time, prompting further examination and revision, which, in turn, initiates a new reflective process that may yield a different reflective equilibrium.[132]

The reflective equilibrium is often divided between a "narrow" and a "wide" reflective equilibrium. Simply put, a narrow reflective equilibrium represents coherence between our considered judgments about a particular case or type of cases and our set of principles about this case. A wide reflective equilibrium adds a third dimension to the same process through a backdrop of general principles and beliefs that are relevant to normative judgment. In international law, this set of principles includes general principles of international law as incorporated in Article 38(1)(c) of the ICJ Statute.[133] These general principles of international law reflect the third dimension of a wide reflective equilibrium that allows us to better comprehend and assess CIL formation.

Even though, formalistically, general principles represent a distinct source of international law, they are propositions of law so fundamental that they are common to all, or almost all, legal systems. General principles are not simply an integrative tool that can fill in gaps when there is no provision in an international treaty or CIL available for application in an international dispute.[134] They are the basic, necessary rules of the international legal sys-

128. Rawls popularized the idea of reflective equilibrium that Nelson Goodman first introduced. JOHN RAWLS, A THEORY OF JUSTICE 18, 40–44 (rev. ed. 1999); *see* NELSON GOODMAN, FACT, FICTION, AND FORECAST (1955).

129. *See* RAWLS, *supra* note 128, at 15–18.

130. *See id.* at 18–19; *id.* at 18 n.7 (adding that "[t]he process of mutual adjustment of principles and considered judgments is not peculiar to moral philosophy.").

131. *See* John Mikhail, *Rawls' Concept of Reflective Equilibrium and Its Original Function in 'A Theory of Justice*,*'* 3 WASH. U. JURIS. REV. 1, 12 (2010).

132. *See* RAWLS, *supra* note 128, at 18–19 (1971).

133. Statute of the International Court of Justice, *supra* note 2, art. 38, ¶ 1(c).

134. *See* Alain Pellet, *Article 38*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 764–83 (Andreas Zimmermann et al. eds., 2006).

tem that are often induced from the legal reasoning of judicial decisions.[135] Principles such as laches, good faith, *res judicata*, equity, and self-determination are foundational aspects of the international legal system. General principles are also embodied in treaties or become CIL.[136] The position of general principles as a separate source of international law does not affect their status as the principles and beliefs relevant to normative judgment within the wide reflective equilibrium. The interpretive process of an emerging or established CIL norm in a wide reflective equilibrium is therefore one that best fits and justifies a practice in light of these general principles of international law, including the fundamental principles of interpretivism: integrity and mitigation.

But how does this process apply to CIL identification? To begin, imagine an invented community of states where all its members follow a set of rules that they call 'rules of courtesy.'[137] States may say that these courtesy rules require financially developed states to provide developing states with financial aid. Developed states then provide this type of aid to developing ones out of adherence to this courtesy. For some time, these rules of courtesy exist but are neither questioned nor consciously accepted as legal duty. This may begin to change if some states realize that this courtesy serves a specific purpose, or that it enforces a particular principle.[138] In other words, states may come to realize that these 'rules of courtesy' do not exist in a vacuum but instead reflect a certain purpose or principle and ought to be applied, extended, or modified in its light.[139] At this point, the 'rules of courtesy' are no longer a mechanical or isolated act; they are given meaning and purpose and are reshaped accordingly.[140]

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135. *See* Giorgio Gaja, *General Principles of Law*, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 370, 370–78 (Rüdiger Wolfrum ed., 2007). Instances where the Court has used general principles include: *Factory at Chorzów (Ger. v Pol.*), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 48 (Sept. 13); Corfu Channel, 1949 I.C.J. Rep. 4, ¶ 18 (Apr. 9); Effect of Awards of Compensation Made by United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47, ¶ 53 (July 13); Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. Rep. 6, ¶ 26 (June 15); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. Rep. 6, ¶ 88 (July 18); Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 16 (June 21); Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, ¶ 23 (May 28); Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, ¶ 59 (Oct. 16).

136. See the Monetary Gold case where the ICJ stated, "to adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent." Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., & U.S.), Preliminary Questions, 1954 I.C.J. Rep. 19, ¶ 32 (June 15).

137. DWORKIN, *supra* note 21, at 57.

138. *Id.*

139. *See id.*

140. *Id.*

States could realize, for instance, that extending financial aid to developing states serves the purpose of establishing a democratic regime in these countries. This would cause states to try to better understand the practice of establishing a democratic regime in developing states as a conscious duty and to decipher the best way to make it happen. At this point, constructive interpretation decides not only why the rules of courtesy exist, but also what their content and form are.[141] In this process, fit and justification play the role of descriptive practice and normative purpose respectively. This interaction between description and normativity is akin to the two elements of CIL. State practice and *opinio juris* largely take the form of descriptive and normative respectively and can be used as the means to flesh out the proposed reflective process in CIL identification. But first, the notions of fit and justification must be elaborated on, specifically in connection to the two CIL elements.

This is not an entirely new attempt. Even though interpretive theory is underdeveloped in international law, some scholars now engage with it and, in that process, discuss the correlation between the two CIL elements and the notions of fit and justification. First, John Tasioulas builds on the interpretive theory of law to balance the descriptive assessment of what the law is with the question of what the law should ethically reflect.[142] In this process, Tasioulas sees the dimension of fit as incorporating both state practice and *opinio juris*.[143] Anthea Roberts introduces the idea of 'modern custom,' giving primary importance to *opinio juris* instead of giving largely equal weight to the CIL elements.[144] Roberts suggests that, while state practice is integral to fit due to its descriptive nature, *opinio juris* can be both descriptive and normative. This depends on whether it expresses *lex lata* in instances of persistence of an existing CIL norm or *lex ferenda* in some instances of a new CIL norm.[145] In juxtaposition to these propositions, I will argue that the nature of the concepts of fit and justification within constructive interpretation indicate whether they match with state practice, *opinio juris*, or both. I will also argue that the distinction between *lex lata* and *lex ferenda* is not so fundamental to the interpretive process and that this realization instructs how we are to understand the dimensions of fit and justification in CIL identification through this process.

On the one hand, the dimension of fit in interpretivism incorporates an articulation of descriptive practice.[146] The establishment of a general justifi-

141. *Id.* at 48.

142. *See* Tasioulas, *supra* note 105.

143. *Id.* at 112.

144. *See* Roberts, *supra* note 55, at 758.

145. For a similar methodological disjunction of *opinio juris*, see Tasioulas, Comment, *Opinio Juris and the Genesis of Custom: A Solution to the "Paradox,"* 26 AUSTL. Y.B. INT'L L. 199, 202 (2007); *see also* Roberts, *supra* note 55, at 775.

146. *See* DWORKIN, *supra* note 21, at 65.

cation for this descriptive practice—the dimension of justification—comes as a separate step.[147] This places the dimension of fit at the pre-interpretive stage of the interpretive process as it requires a degree of consensus regarding the descriptive nature of the practice without necessitating a reason to justify the act beyond habitual or mechanical repetition. For CIL, this dimension of fit best mirrors what we have come to understand as general state practice. The notions of "constant and uniform" practice stipulated in the *Asylum Case*,[148] reflecting a "widespread and representative"[149] level of international community consensus, mirror the requirements of description of the pre-interpretive stage in line with the purely descriptive nature of the dimension of fit.[150]

On the other hand, justification represents a normative account of a descriptive practice leading to either one or multiple interpretations of this practice during the interpretive stage. Unlike state practice, *opinio juris* requires that "[t]he [s]tates concerned must . . . feel that they are conforming to what amounts to a legal obligation."[151] *Opinio juris* is not satisfied by the habitual character of an act, especially if this act is motivated merely by convenience, tradition, or courtesy—conditions that satisfy the dimension of fit.[152] Instead, the normative character of *opinio juris* mirrors the dimension of justification that is limited to normative expressions of an identified descriptive practice.[153] Considering this distinction, general state practice and opinio juris belong to different notions and stages of the interpretive process.

This distinction further elucidates the diminished importance of the *lex lata-lex ferenda* debate in the interpretive process. Justification, also in the CIL identification process, expresses some articulation of a duty or obligation of a legal nature.[154] This articulation of legal duty may be either descrip-

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147. *Id*. at 62.

148. Asylum (Colom. v. Peru), 1950 I.C.J. 266, ¶ 276 (Nov. 20).

149. Kelsen, *supra* note 17, at 445.

150. *See* 1 OPPENHEIM'S INTERNATIONAL LAW: PEACE, *supra* note 25, at 29.

151. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 73 (Feb. 20).

152. *Id.*

153. *See* DWORKIN, *supra* note 21, at 62, 67.

154. *See* D'AMATO, *supra* note 36, at 49 (*citing* GÉNY, *supra* note 27, at 110)); *see also* Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369, 369–70 (1999) ("A norm is a social rule that does not depend on government for either promulgation or enforcement [..] Norms may be independent of laws, as in the examples just given, or may overlap them; there are norms against stealing and lying, but also laws against these behaviors. The two kinds of rule reinforce each other through differences in the mode of creation, the definition of the offense, the procedure for administering punishment, and the punishments themselves. Laws are promulgated by public institutions, such as legislatures, regulatory agencies, and courts, after well-defined deliberative procedures, and are enforced by the police power of the state, which ultimately means by threat of violence. Norms are not necessarily promulgated at all. If they are,

tive or prescriptive in the sense that any given CIL norm may already exist (descriptive), may not exist (prescriptive), or its existence may be contested and uncertain (mix of descriptive and prescriptive). But the potential descriptive character of justification does not equate it with fit. Rather, the differentiating factor is that the nature of the dimension of justification is normative whether it describes or prescribes—in other words, whether it represents *lex lata* or *lex ferenda*. Thus, in the process of constructive interpretation, *opinio juris* as the dimension of justification may represent *lex lata*, *lex ferenda*, or both.

The qualities of description and prescription are not incompatible with the notion of *opinio juris* as justification. The idea of a concept that is both descriptive and normative is not new. Bernard Williams famously distinguished between "thin" and "thick" ethical concepts.[155] "Thick concepts" pierce through the distinction between description and normativity.[156] The term represents a concept that includes both descriptive and normative content as it creates conditions for action and represents an action simultaneously.[157] This allows the concept to straddle the descriptive and normative spheres.[158] Through this quality, thick concepts are able to both convey a sense of how the world *is* as well as a sentiment and guide of how the world *ought to be*[159] by imbuing fact with value.[160]

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it is not by the state. Often a norm will result from (and crystallize) the gradual emergence of a consensus. Norms are enforced by internalized values, by refusals to interact with the offender, by disapproval of his actions, and sometimes by private violence."); *cf.* MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION 56–57 (Michel Senellart et al. eds., Graham Burchell trans., 2007). The common Foucauldian line is that "law is not what is important" in understanding modern governance. Instead, individuals are seen as basing their conduct on norms rather than formal law. Foucault himself said that "the role and function of the law therefore—the very operation of the law—is to codify a norm[.]" *Id.*

155. BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 140–42, 150–52 (1985).

156. The idea of 'thick concepts' is hotly debated in philosophy. While all philosophers accept the definition of a 'thick concept' as one that is simultaneously both 'descriptive' and 'evaluative,' they disagree over the nature of the relationship between the two aspects of the concept. Their disagreement over the relationship—whether the 'descriptive' and the 'evaluative' relate 'conceptually' or 'conventionally'—has further implications in philosophy in determining one's positions on epistemological, metaphysical, and semantic issues in the debate over realism. For an excellent discussion of 'thick concepts' applied to legal judgments and objectivity in law, see Heidi Li Freeman, Legal Judgments, Thick Concepts, and Objectivity (1993) (unpublished Ph.D. dissertation, University of Michigan) (on file with the Harvard Law School Library); *cf.* Roberts, *supra* note 55, at 761–62.

157. *See* Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513 (2005).

158. A few standard examples of thick concepts are fairness, compassion, honesty, kindness, justice, selfishness, and cowardice. *See* Michael Smith, *On the Nature and Significance of the Distinction Between Thick and Thin Ethical Concepts*, *in* THICK CONCEPTS 97 (Simon Kirchin ed., 2013).

159. WILLIAMS, *supra* note 155, at 140–42, 150–52.

160. *See* Freeman, *supra* note 156.

A thicker conception of *opinio juris* as the dimension of justification not only evades the *lex lata*-*lex ferenda* debate but also *opinio juris*' circularity paradox.[161] According to this paradox, *opinio juris* requires conscious action in accordance with preexisting law in the process of new normative formation.[162] Yet many emerging CIL norms deviate from existing ones. In other words, a state needs to believe that what it is doing is already permissible under CIL (*lex lata*), even though in practice it is not (*lex ferenda*).

Gény and Cheng offered the first proposal to solve this paradox. They suggested that states acted in error during the formation of CIL, thinking that they were acting under a legal obligation that was in fact nonexistent.[163] This solution, while in line with the traditional letter of *opinio juris*, is unsatisfactory as it would base the entire CIL-making process on a "persistent misconception."[164] Kelsen also proposed a variation of this error theory, positing that states felt they were acting under a normative duty, which was not a legal norm but a sentiment of morality, equity, or justice.[165] Later, he argued instead that it was sufficient for actors to "believe that they apply a norm, but they need not believe that it is a legal norm which they apply."[166] However, these proposed solutions to the CIL paradox in fact convolute further the distinction between *lex lata* and *lex ferenda* in CIL identification. The irrelevance of the *lex lata*-*lex ferenda* binary through constructive interpretation in CIL identification avoids altogether this circularity paradox. Instead, the inclusion of both descriptive and prescriptive qualities in the normative dimension of justification, as well as the specific relationship between a given descriptive practice and its justification, are what determine the reflective equilibrium.

3. The Relationship Between Fit and Justification

Even if we understand state practice to represent the dimension of fit and *opinio juris* to represent the dimension of justification, how does this help us in identifying a CIL norm? The identification of a CIL norm happens through the *inter se* balancing of the dimensions of fit (state practice) and justification (*opinio juris*) that yields a reflective equilibrium representing a given CIL norm. This balancing may, at first, appear incommensurate as there is no set of specific metrics to quantify it. The primary criticism against such presumed incommensurable concepts is that they are inherently subjective because they are not measurable or quantifiable. However, the balancing process that yields the reflective equilibrium represents a state of "shared" or "mutual understanding," which can escape the incommensura-

161. *See* Cheng, *supra* note 58; Kelsen, *supra* note 17, at 265.

162. *Id.*

163. Cheng, *supra* note 58.

164. Kelsen, *supra* note 17, at 265.

165. KELSEN, *supra* note 76, at 114.

166. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 307 (1952).

bility objection[167] through the idea of "intersubjectivity"[168] as represented in the theory of phenomenology.[169] Husserl bases his theory of phenomenology on the premise that individuals are surrounded by their own world experience, which constitutes the source of all human thought and knowledge. But individuals are also not isolated from one another and instead communicate intersubjectively.[170] This intersubjective communication is the source of interpretive structure, which controls individuals' experience in the world.[171] These shared understandings allow for comprehension of events, facts, or entities that are not part of individuals' immediate experience. Without this intersubjective process, we would be unable to form any kind of shared or stable conception of these events, facts, or entities surrounding us.

Phenomenology places the individuals' desire to create meaning from the momentary, abstract, and general experience at the forefront of human motivation.[172] At the momentary level, individuals interpret sensory stimuli

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167. For more on this notion of "shared" or "mutual understanding," see BARBARA ROGOFF, APPRENTICESHIP IN THINKING: COGNITIVE DEVELOPMENT IN SOCIAL CONTEXT (1990); RAGNAR ROMMETVEIT, ON MESSAGE STRUCTURE: A FRAMEWORK FOR THE STUDY OF LANGUAGE AND COMMUNICATION (1974); Michael Tomasello & Malinda Carpenter, *Shared Intentionality*, 10 DEVELOPMENTAL SCI. 121 (2007); Michael Tomasello et al., *Understanding and Sharing Intentions: The Origins of Cultural Recognition*, 28 BEHAV. & BRAIN SCI. 675 (2005); Penelope Hubley & Colwyn Trevarthen, *Sharing a Task in Infancy*, 4 NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV. 57 (1979).

168. For the primary theories of phenomenology, see EDMUND HUSSERL, CARTESIAN MEDITATIONS: AN INTRODUCTION TO PHENOMENOLOGY (Dorion Cairns trans., Kluwer Acad. 1988) (1950); EDMUND HUSSERL, IDEAS: A GENERAL INTRODUCTION TO PURE PHENOMENOLOGY (W.R. Boyce Gibson trans., Collier 1931) (1913); EDMUND HUSSERL, 2 IDEAS PERTAINING TO A PURE PHENOMENOLOGY AND TO A PHENOMENOLOGICAL PHILOSOPHY: STUDIES IN THE PHENOMENOLOGY OF CONSTITUTION (Richard Rojcewicz & André Schuwer trans., Kluwer Acad. 1989) (1952) [hereinafter HUSSERL, PHENOMENOLOGY OF CONSTITUTION]; EDMUND HUSSERL, 1 LOGICAL INVESTIGATIONS (Dermot Moran ed., J. N. Findlay trans., Routledge 2001) (1970) [hereinafter HUSSERL, LOGICAL INVESTIGATIONS]; EDMUND HUSSERL, THE CRISIS OF THE EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY (David Carr trans., Nw. Univ. Press 1970) (1954); MAURICE MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION (Donald. A. Landes trans., Routledge 2012) (1945). For more general theories outside the scope of this argument, see MARTIN HEIDEGGER, BEING AND TIME (John Macquarrie & Edward Robinson trans., 1962); MARTIN HEIDEGGER, THE BASIC PROBLEMS OF PHENOMENOLOGY (Albert Hofstadter trans., rev. ed. 1988).

169. In international legal theory, 'phenomenology' often means something other than it does in the continental philosophical tradition to which I wish to associate my approach. For international legal theory, see KOSKENNIEMI, *supra* note 104, at 376; *cf.* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (2004).

170. *See* HUSSERL, LOGICAL INVESTIGATIONS, *supra* note 168, at 182–86.

171. *See* Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 328 (2002).

172. *See* RUDOLF BERNET ET AL., AN INTRODUCTION TO HUSSERLIAN PHENOMENOLOGY 115–40 (1993); HUSSERL , PHENOMENOLOGY OF CONSTITUTION, *supra*

as intersubjectively discovered entities that help them make sense of the surrounding world. At the abstract level, they turn these momentary interpretations into meaningful generalities. This is what yields a basic common understanding of certain concepts among people despite inherent perception biases and gaps. Intersubjectivity allows us to have at least a basic common conception of what is meant by a table, or science, or ancient Athens when we speak of them or what morality or fairness generally entail.[173] The balance of the reflective equilibrium thus represents a state of moving from initial disagreement in *some* of our considered judgments to agreement and consensus that demonstrates a recognizable kind of objectivity through intersubjective agreement.[174]

The balance between the dimensions of fit and justification will vary according to the strength of each dimension. Inadequacies of fit will count against an interpretation on the dimension of justification and, in turn, "defects of fit may be compensated . . . if the principles of that interpretation are particularly attractive."[175] In CIL, one is then to proceed with reflectively interpreting general state practice and *opinio juris* to reach the most coherent interpretation. Though inadequacies of one element will count against the other, the two elements are not interchangeable.[176] The reflective process revises our interpretation of the dimensions of fit and justification back and forth until we manage to render our interpretation justified and coherent from both ends.[177] This balance is then constantly affected by new practice and *opinio juris* subject to new interpretive processes and even new systemic principles as international law evolves.

Consider, for instance, the rule on the prohibition of the use of force. Engaging in humanitarian intervention, or the Responsibility to Protect (the "R2P"), would normally be understood as a breach of the existing CIL rule on non-intervention unless there is a strong and consistent practice and *opinio juris* to suggest otherwise.[178] While such *prima facie* breaches of CIL may indeed be interpreted *qua* breaches, they may also, under a different interpretation, create new CIL rules. For instance, the invocation by the United Nations Security Council (the "UNSC") of the doctrine of R2P in the case of Libya[179] may indicate: (1) the emergence of a new right for individual or collective intervention in third states in cases of systematic human

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note 168, at 101–10; HUSSERL, LOGICAL INVESTIGATIONS, *supra* note 168, at 155–89. This sociological level of meaning is explored in ALFRED SCHUTZ, THE PHENOMENOLOGY OF THE SOCIAL WORLD 45–96 (George Walsh & Frederick Lehnert trans., 1967).

173. *See* SCHUTZ, *supra* note 172, at 45–96.

174. Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256, 274–76 (1979).

175. DWORKIN, *supra* note 21, at 246–47.

176. *See* Kirgis, *supra* note 51, at 149.

177. *Id.*

178. *See id*.

179. S.C. Res. 2095 (Mar. 14, 2013).

rights abuses; (2) the emergence of a new duty for individual or collective intervention into third states in cases of systematic human rights abuses; or (3) a singular breach of the principles of non-intervention and prohibition of use of force. Multiple interpretations allow us to assess which one best justifies the conflicting practice without needing to employ either a cumulative or a trade-off methodology between the two CIL elements.[180]

4. Certain Objections to the Application of Interpretivism in International Law

A common objection against the theory of interpretivism in international law is premised on the idea that interpretivism requires the existence of a political community, and the decentralized international system is not such a community.[181] To understand this critique, we must first unpack it. For interpretivism to apply as a social practice in law, it requires coherence in how the law that is created and applied treats society's members.[182] This is the idea of "law as integrity." The application of the principle of integrity into domestic law is based on the idea that law operates within a political community personified and manifested by the state.[183] This political community is a distinct moral agent not only with principles that are separate from those of the officials who act in the community's name,[184] but also an agent with reciprocal rights and obligations among itself and its members.[185] When dissected, this objection effectively becomes a twofold argument. First, international law regulates multiple political communities and not one international community.[186] Second, even if there is indeed one international community, there are no common values and goals that underlie this international community.[187]

(a) There is no Single International Community

For Dworkin, the community in which constructive interpretation has its place is a "true community."[188] The four conditions of this true community are those of reciprocity, responsibility, general concern, and equal concern.[189] Reciprocity reflects the notion that, if some do not accept their responsibility toward one, then that one may also abandon its responsibility

180. *See* Roberts, *supra* note 55, at 776.
181. *See* Çali, *supra* note 105, at 817.
182. *See* DWORKIN, *supra* note 21, at 167.
183. *Id.* at 167–72.
184. *Id.* at 172.
185. *See* George C. Christie, *Dworkin's "Empire*," 36 DUKE L.J. 157 (1987).
186. *See* Çali, *supra* note 105, at 818.
187. *See* DWORKIN, *supra* note 21, at 185.
188. *Id.* at 201–02.
189. *Id.*

toward the rest. Community members ought to manifest an attitude of reciprocal responsibility; in other words, they have to see and believe that they are responsible to each other. Members of this community have a general concern for one another, which constitutes the source of reciprocal responsibilities. Finally, a true community is conceptually egalitarian in the sense that its members have equal standing among the group and treat each other as carrying the same endemic value.[190] Even though different or hierarchical roles may exist within the community, these roles are justified by the benefit they produce for each member equally and for the community as a whole. The outcome of this "true community" is a set of rights and obligations arising out of collective community decisions that bind the members.

The international community increasingly resembles this idea of a "true community." While states remain powerful and relevant actors in international law, they no longer have the unitary authority of traditional international law. More specifically to CIL, a periphery of non-state actors, including international organizations ("IO"), intergovernmental organizations ("IGO"), and non-governmental organizations ("NGO"), increasingly influence state action, resulting in a distinct, measurable impact on international relations and law.[191] Though sovereignty represented a hard shell in the early days of international law development, it significantly transformed over time.[192] Chayes and Chayes argue that sovereignty no longer represents the freedom of states to act entirely independently and out of self-interest. It is rather contingent upon membership and status within international relations regimes and the international system as a whole.[193] In these various regimes, a much wider spectrum of actors is involved in reciprocal relations, making the international system increasingly more egalitarian.

In international legislative action, individual or collective state action was generally presumed as the only relevant metric.[194] But the more complex and connected the international community becomes, the more non-state actors affect the development and determination of international law.[195]

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190. RONALD DWORKIN, SOVEREIGN VIRTUE 6 (2000); *see also* DWORKIN, *supra* note 21, at 179.

191. *See* Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L. L. 211, 221–22 (1991); Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/72/10 (2017).

192. This is evident from the very titles of recent books in the field. *See, e.g.*, SOVEREIGNTY IN TRANSITION (Neil Walker ed., 2003); RE-ENVISIONING SOVEREIGNTY: THE END OF WESTPHALIA? (Trudy Jacobsen et al. eds., 2008); SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT (Hent Kalmo & Quentin Skinner eds., 2010).

193. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 27 (1995).

194. *See* John King Gamble & Charlotte Ku, *International Law–New Actors and New Technologies: Center Stage for NGOs?*, 31 L. & POL'Y INT'L BUS. 221, 243–44 (2000).

195. *See* Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579,

States today are only one relevant actor and factor in the lawmaking process, with IOs, IGOs, NGOs, and other non-state actors also participating.[196] Although there is little doubt about the persisting relevance of states, there is increasing doubt about how dominant they will be going forward. Reference to states as the constituents of this international community does not preclude other actors from either being part of this community or engaging in its normative development.[197]

The non-state actors that emerge within states either have an effective relationship with central domestic governing actors or are in opposition to them, but in either case, they wield significant power.[198] These dynamics foster an environment of reciprocal responsibility and equal concern toward actors and the international community. Non-state actors influence state behavior domestically by working together with or applying pressure on governmental and transgovernmental decisionmaking.[199] They also work collectively with governments by participating in international forums and negotiations, as well as treaty- and resolution-drafting.[200] Some scholars go as far as to argue that non-state actors deserve a more official seat at the international lawmaking table.[201] This type of an international community resembles a wider network of relationships between states and non-state actors coming together collectively, or in smaller sub-networks, to produce political as well as normative and legislative practices and discourse in such a way as to increase reciprocal responsibility.[202]

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595 (1999); Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 959–60 (1996).

196. *See* PROPERTY RIGHTS AND ECONOMIC DEVELOPMENT: LAND AND NATURAL RESOURCES IN SOUTHEAST ASIA AND OCEANIA 18 (Toon van Meijl & Franz von Benda-Beckmann eds., 1999).

197. *See* Nicholas Tsagourias, *The Will of the International Community as a Normative Source of International Law*, *in* GOVERNANCE AND INTERNATIONAL LEGAL THEORY 97, 102 (Ige F. Dekker & Wouter G. Werner eds., 2004).

198. *See* JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT (1994).

199. *See, e.g.*, Christine Walsh, *The Constitutionality of State and Local Governments' Response to Apartheid: Divestment Legislation*, 13 FORDHAM URB. L.J. 763, 795 (1985).

200. For example, the International Committee of the Red Cross played a pivotal role in the initiation and negotiation of the Ottawa convention banning land mines. *See* Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91 (2000).

201. *See* Gunning, *supra* note 191, at 227–34. This has been met with pushback. *See, e.g.*, Spiro, *supra* note 195, at 962–67.

202. *See* BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS 15 (Thomas Risse-Kappen ed., 1995); *see* ROBERT O. KEOHANE & JOSEPH S. NYE, JR., POWER AND INTERDEPENDENCE 8, 39, 42 (1977); Abraham L. Newman & David Zaring, *Regulatory Networks: Power, Legitimacy, and Compliance*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 244, 248 (Jeffrey L. Dunoff & Mark A.

The world through this prism incorporates the characteristics of a true community consisting of a web of state and non-state actors. Despite the traditional hierarchical and largely unequal conception of the international system, when we switch our lens to seeing the world as a web, we notice that these networks of actors, within their internal and external structures and dynamics, operate primarily in egalitarian terms.[203] In their smaller formations, they usually come together more actively regarding a specific issue of interest and establish relationships in order to advocate and achieve their cause through international legislative means.[204] This creates not only reciprocal obligations but also a sense of equal concern for other actors and the community as a whole. The larger international community network proliferates into small sub-networks for the purpose of promoting a specific norm, but also develops standing structures that have larger purposes and agendas beyond the simple promotion, diffusion, and adoption of one norm.[205] These networks are not only a depiction of actors in international relations, but form the international legal community in which we can apply the interpretive framework of analysis.[206]

(b) There Are No Common Values Within the International Community

Another critique of applying interpretivism to international law questions is whether the international community is capable of forming its own distinct governing principles and values due to its innate decentralized nature. Interpretivism in international law is based on the idea that the ultimate justification of the states' coercive power "arises not just *within* each of the sovereign states who are members of the Westphalian system but also *about* the system itself: that is, about each state's decision to respect the principles

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Pollack eds., 2013); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 538, 544 (Walter Carlsnaes et al. eds., 2002); Kal Raustiala, *The Rise of Transnational Networks Conference November 7, 2008: Transnational Networks: Past and Present*, 43 INT'L LAW. 205, 206 (2009); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004).

203. *See* ANNE-MARIE SLAUGHTER, THE CHESSBOARD AND THE WEB: STRATEGIES OF CONNECTION IN A NETWORKED WORLD 24, 66 (2017); Jeffrey L. Dunoff, *Public Participation in the Trade Regime: Of Litigation, Frustration, Agitation and Legitimation*, 56 RUTGERS L. REV. 961, 964–65 (2004).

204. *See* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 13 (2002); Newman & Zaring, *supra* note 202, at 253.

205. *See* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L. ORG. 887, 899 (1998).

206. *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 150 (1995); Math Noortmann, *Transnational Law: Philip Jessup's Legacy and Beyond*, *in* NON-STATE ACTORS IN INTERNATIONAL LAW 57, 63 (Math Noortmann et al. eds., 2015).

of that system."[207] This system, represented by the international community, is already ruled by a set of common principles that form the ground for mutual rights and obligations. These principles do not require the explicit consent of all members but instead arise from the historical fact that the international community adopted them.[208] Members of the international communicommunity accept that their rights and obligations are not exhausted by the specific decisions made by the governing actors but instead depend on the more general principles these decisions presuppose and uphold.[209] Indeed, the international system we have today, not unlike domestic systems, is premised on such a set of goals and principles. These include the foundational goals of maintenance of international peace and security[210] and the development of friendly relations and cooperation between nations.[211] They also include common, generally-accepted principles such as the principles of legality,[212] sovereign equality,[213] integrity, and mitigation.[214] These so-called general principles of international law are the common values within the international system that make the method of constructive interpretation conducive to international law.

So, what would the method of constructive interpretation look like in action for the judicial identification of CIL norms within the international community? In the remainder of this Article, I argue that the ICJ already utilized, though inadvertently, constructive interpretation in reaching parts of its dispositive findings in the *Nicaragua* case.[215]

PART III: THE INTERPRETIVE THEORY IN ACTION: THE *NICARAGUA* CASE REVISITED

The case *Nicaragua v. United States* is one of the most noteworthy cases decided by the ICJ. It continues to shed light upon several central international law issues, including the sources of international law and the law on the use of force. However, the methodology adopted by the Court in addressing the question of non-intervention is subject to ample criticism.

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207. Dworkin, *supra* note 90, at 16–17.

208. *See id.* at 15.

209. *See* DWORKIN, *supra* note 21, at 211.

210. *See, e.g.*, U.N. Charter art. 1, ¶ 1.

211. *See, e.g., id.* art. 1, ¶ 2.

212. *See, e.g.*, Statute of the International Criminal Court, arts. 22, ¶ 1, 24, ¶¶ 1–2, July 17, 1998, 2187 U.N.T.S. 3.

213. *See, e.g.*, U.N. Charter art. 2, ¶ 1; EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 46 (2014).

214. *See*, *e.g.*, Dworkin, *supra* note 90, at 17 ("People around the world believe that they have—and they do have—a moral responsibility to help to protect people in other nations from war crimes, genocide and other violation of human rights.").

215. For a similar analysis of the judgment of the *Nicaragua* case with a different aim, see Tasioulas, *supra* note 105.

Most saw the *Nicaragua* decision as an arbitrary departure from the traditional framework the Court used to establish CIL rules.[216] Hilary Charlesworth notes:

> [T]he Nicaragua understanding of customary international law can be criticized for its obscurity. While retaining the traditional language of the elements of customary international law, the Court does not offer any clear definition of these elements and in fact seems to move away from much of the accepted jurisprudence in the area.[217]

Sir Robert Jennings notably observed in the context of the *Nicaragua* case that "we cannot reasonably expect to get very far if we try to rationalize the law of today solely in the language of Article 38 of the Statute of the International Court of Justice."[218] Prosper Weil argued that *Nicaragua*'s "relative normativity" threatened to "destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose."[219] It would shatter the *raison d'être* of the international law construct and its "essential features": voluntarism, ideological neutrality, and, most importantly, positivism.[220]

In this part of the Article, I argue against the popular premise that the ICJ in the *Nicaragua* case departed from its traditional method in identifying CIL in accordance with its Statute.[221] Instead, if we analyze the Court's approach in *Nicaragua* through the interpretive lens, we will find that the Court retained its position that state practice and opinion juris are constitutive of CIL, but reshuffled the relationship between these elements. Because the Court did not depart from the requirements of general state practice and *opinio juris* reflected in its Statute, its findings should not be rejected as arbitrary or indeterminate. Instead, we can establish determinacy and absence

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216. *See* H.C.M. Charlesworth, *Customary International Law and the* Nicaragua *Case*, 11 AUSTL. Y.B. INT'L L. 1, 27 (1991); Jonathan I. Charney, *Customary International Law in the* Nicaragua *Case Judgment on the Merits*, 1 HAGUE Y.B. INT'L L. 16, 17 (1988); *see also* Jennings, *supra* note 49, at 3, 9; Tomuschat, *supra* note 20, at 303 (1993) (arguing a more idealistic approach); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 419–23 (1983).

217. Charlesworth, *supra* note 216, at 27.

218. Jennings, *supra* note 49, at 9.

219. Weil, *supra* note 216, at 423.

220. *Id.* at 418, 420–21.

221. *See* Charlesworth, *supra* note 216, at 30 (arguing the court in the *Nicaragua* case can be seen as allowing the existence of different sets of customs). Tasioulas was the first one to take up this task. *See generally* Tasioulas, *supra* note 105 (arguing in favor of relative normativity under an interpretive approach by using Kirgis' sliding scale theory). However, in my opinion, Tasioulas fell short from offering a comprehensive CIL theory under the interpretive premise, which would more concretely put the *Nicaragua Judgment* in its best light against its critics and in line with international law developments. I wish to take up this task in the present work.

of arbitrariness by viewing the Court's decision as engaging in the interpretive process of identifying CIL norms.

A. *The* Nicaragua *Case*

The dispute before the ICJ was based on Nicaragua's claim that the United States was responsible for the activities of the *contras* forces fighting to overthrow the Sandinista government, including attacks on Nicaraguan territory, waters, ports, and oil installations.[222] Before the Court could establish jurisdiction to hear the dispute, it had to assess the United States' reservation to the compulsory jurisdiction of the ICJ under Article 36(2) of the ICJ Statute for multilateral treaties.[223]

The "Vandenberg" reservation, as it became known, was intended to exclude any disputes from the jurisdiction of the Court that arose under a multilateral treaty unless the United States specially agreed to the jurisdiction of the Court or all the parties to the treaty affected by the decision were also parties to the case before the Court.[224] The United States filed preliminary objections to the dispute, invoking this reservation in order to resist the jurisdiction of the Court on the grounds that Nicaragua's application for relief relied, in part, on four multilateral treaties to which both Nicaragua and the United States were party: (1) the United Nations Charter, (2) the Charter of the Organization of American States, (3) the Montevideo Convention on the Rights and Duties of States of 1933, and (4) the Havana Convention on Rights and Duties of States in the Event of Civil Strife of 1928.[225] The Court found in favor of the United States on this argument because three other states—Costa Rica, El Salvador, and Honduras—would be affected by the Court's decision even though they were not parties to the dispute before the Court.[226] Thus, the conventional rules regulating the use of force under the above conventions were inapplicable *qua* conventional rules.

Nicaragua also based its application for relief on parallel claims under CIL, and the Court was prepared to grant jurisdiction and adjudicate on this basis.[227] In response, the United States argued that the United Nations Charter provisions on the use of force "subsume and supervene related principles of customary and general international law,"[228] and the reservation had the

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222. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 15 (June 27).

223. *See id.* ¶ 37.

224. *See id.* ¶ 42.

225. *See id.* ¶ 15.

226. *See id.* ¶ 292; El Salvador's application to intervene in the jurisdiction phase of the case was rejected on the grounds that the Court was not then dealing with the merits of the case. El Salvador did not make a further application to intervene at the merits phase of the proceedings. *See* Nicar. v. U.S., 1986 I.C.J. 14, ¶ 291.

227. *See* Nicar. v. U.S., 1986 I.C.J. 14, ¶ 292.

228. *Id.* ¶ 173.

effect to exclude "any rule of customary international law the content of which is also the subject of a provision in those multilateral treaties."[229] The Court rejected this argument, stipulating that not all of the relevant CIL rules were identical to those in treaty[230] and, regardless, that a treaty rule and a CIL rule may exist in parallel without the applicability of one barring the applicability of the other.[231] Based on this reasoning, the Court held, *inter alia,* that the United States breached its CIL obligations to Nicaragua to not use force against another state and to not interfere in the domestic affairs of another state.[232]

The "flexible" approach the Court took toward the requirements for the CIL declaration of these norms became a point of contestation. This "flexibility" differed in three main ways from classical conceptions of how CIL rules are identified. First, the Court held that (absolute) uniformity of general practice is not a requirement for a CIL rule to emerge. On the contrary, practice that deviates from a generally uniform practice ought to be interpreted as a breach of a rule rather than a bar to its crystallization as CIL.[233] This was viewed as a reduction in the amount of general practice that the Court required for the identification of a CIL norm. Second, the Court widened the realm of sources from which *opinio juris* can be inferred. It derived *opinio juris* not only from states' declarative belief that they are complying with a rule, but also from their voting patterns within multilateral forums such as the United Nations General Assembly (the "UNGA").[234] Finally, the Court recognized that CIL rules retain their independent and autonomous nature after they are embodied in multilateral treaties.[235] In the following pages, I will examine primarily the first two "innovations" of the Court under the interpretive CIL claim.

B. *Customary International Law Issues in the* Nicaragua *Case*

The ICJ in *Nicaragua* addressed CIL in various instances. First, the Court confirmed the method by which to establish a CIL rule by referring to its decision in the *Continental Shelf (Libya/Malta)* case:

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229. *Id.*

230. *See id.* ¶ 174.

231. *See id.* ¶¶ 177–78 (establishing the reasons for the separate existence of such norms) ("(i) such rules may differ in regard to their applicability: in a legal dispute affecting two states, one may argue that the applicability of a treaty rule to its own conduct depends on the other State's conduct in respect of the application of other rules, on other subjects, also contained in the treaty; and (ii) though indistinguishable as a matter of content, such rules may be differentiated by their methods of interpretation and application.").

232. *See id.* ¶ 292.

233. *See id.* ¶ 186.

234. *See id.* ¶ 188.

235. *See id.* ¶ 174.

> It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.[236]

The Court supported this methodological approach by citing to Article 38 of the ICJ Statute, requiring it to apply "international custom as evidence of a general practice accepted as law"[237] without disregarding "the essential role played by general practice. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice."[238]

This last quote provides the first figment of the purported change in the relationship between the two elements of CIL the ICJ put forward in the *Nicaragua* case. Though not explicitly prescribed anywhere, the traditional CIL identification often began with state practice later confirmed by *opinio juris*. In other words, the first necessary condition to establish was state practice, later followed by a finding of *opinio juris*, for a norm to become a rule of CIL.[239] The *Nicaragua* case inverted this anecdotal process of CIL identification.[240] In the *Nicaragua* case, *opinio juris* is first established as, for instance, embodied in a UNGA Resolution, and then general state practice is used to confirm the CIL character of said *opinio juris* declaration.[241] For some, this downgraded the importance of general state practice in CIL identification and increased the significance of *opinio juris*.[242]

Second, the ICJ addressed the problem of inconsistency between practice and *opinio juris* by partly redefining the two concepts. Starting with the element of general state practice, it found:

> 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

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236. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 27 (Feb. 20).

237. Nicar. v. U.S., 1986 I.C.J. 14, ¶ 184.

238. *Id.*

239. *See, e.g.*, Christian Dahlman, *The Function of* Opinio Juris *in Customary International Law*, 81 NORDIC J. INT'L L. 327, 329–30 (2012).

240. *See* O. Schachter, *New Custom: Power, Opinio Juris and Contrary Practice*, *in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOR OF KRZYSZTOF SKUBISZEWSKI 531, 532 (Jerzy Makarczyk ed., 1996).

241. *Id.* at 532; D'Amato, *supra* note 51, at 101–02.

242. *See* Schachter, *supra* note 240, at 532.

> 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.[243]

The Court thus not only significantly lowered the threshold of general state practice to reach the requisite level of CIL here, but also recognized that it is sufficient for general state practice to be consistent with statements of rules insofar as contrary practice is treated as "breaches of that rule, not as indications of the recognition of a new rule."[244] Traditionally, evidence of inconsistent action was treated as a hurdle and threat to CIL identification. For instance, in earlier jurisprudence the Court insisted on virtually uniform practice undertaken in a manner that demonstrates general recognition of the legal obligation for the identification of CIL. The Court's turn in the treatment of inconsistent practice largely redefined what amounts to general state practice as an element of CIL.

In sum, what the Court did so far is to maintain its approach that CIL derives from the two elements of general practice and *opinio juris*, but to invert the analytical order and to lower the threshold for general state practice in terms of uniformity and conformity compared to its earlier jurisprudence.[245] The Court's reformulated analysis of the CIL elements sets the backdrop of the interpretive process this Article identifies.

C. *Uncovering the Interpretive Process in the* Nicaragua *Case*

In what is perhaps the most significant part of the *Nicaragua* judgment for the purposes of this Article, the Court discussed the establishment of the rule on non-intervention as CIL.[246] In this assessment, the Court argued that the subjective element of *opinio juris* was "backed by established and substantial practice" without offering concrete examples of this practice. [247] At the same time, the Court addressed the practice of foreign intervention that was contrary to the asserted rule by acknowledging generally "in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State."[248] The Court then switched and went on to suggest that,

> [i]t has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support

243. Nicar. v. U.S., 1986 I.C.J. 14, ¶ 186.

244. *Id.*; Roberts, *supra* note 55, at 765.

245. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20).

246. Nicar. v. U.S., 1986 I.C.J. 14, ¶¶ 205–07.

247. *Id.*

248. *Id.* ¶ 206.

> of an internal opposition in another State . . . For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.[249]

After concluding that "states have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition,"[250] the Court found that "no such general right of intervention, in support of an opposition within another State, exists in contemporary international law."[251]

The Court has been criticized on the ground that it thus established a CIL rule of non-intervention by disproving the existence of a rule allowing for intervention. Charlesworth labels this a 'novel technique' that the Court adopts, where it proves a rule of CIL by disproving the existence of an opposite rule.[252] Charlesworth contends that such a method of formal logic is too simplistic in legal analysis, as with legal propositions it is possible to establish the absence of a rule without needing to prove the existence of the contrary rule. Under strict voluntarism, for instance, in the absence of a rule prohibiting certain conduct, a state may act freely.[253] Absence of a rule does not necessarily imply the opposite.[254]

I want to offer a different approach and argue that what the ICJ did here instead was to undergo an analysis akin to the interpretive process. In sum, the Court first defined the principle of non-intervention as "the right of every sovereign State to conduct its affairs without outside interference."[255] The Court then asked itself one primary question and subsequently juxtaposed two different possible interpretations to assess. The Court offered two interpretations to answer the following question: Is there a CIL norm of non-intervention? Interpretation 1 ("INT1"): There is a CIL norm that establishes non-intervention; Interpretation 2 ("INT2"): There is a CIL norm that allows foreign intervention. This distinction between potential interpretations reflects the second stage of the interpretive process, where the interpreter formulates a general justification for a specific set of data identified at the pre-interpretive stage.[256] To determine the best interpretation, the Court then revised the dimensions of fit (state practice) and justification (*opinio juris*) back and forth until it rendered its interpretation justified and coherent from both ends and reached a reflective equilibrium.[257]

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249. *Id.*

250. *Id.* ¶ 207.

251. *Id.* ¶ 208.

252. Charlesworth, *supra* note 216, at 25.

253. *See* S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7).

254. Charlesworth, *supra* note 216, at 25.

255. Nicar. v. U.S., 1986 I.C.J. 14, ¶ 202.

256. *See* DWORKIN, *supra* note 21, at 62.

257. *Id.* at 285.

This process should be dissected in detail from the beginning. In first assessing the dimension of fit, the Court asked what practice attaches to the exact content of the principle of non-intervention.[258] To find the practice, the Court first accepted that a rule of non-intervention "in view of the generally accepted formulations"[259] forbids "all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States" in a coercive manner.[260] The Court attached non-intervention to the wider set of international law principles related to the sovereign equality of states.[261] A prohibited intervention, then, must be one that breaches what the principle of state sovereignty is set to protect, such as matters that include "the choice of a political, economic, social and cultural system, and the formulation of foreign policy."[262] In further assessing the dimension of fit, the Court found that, outside of the context of decolonization, there was "in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State."[263] Considering the existence of this opposite practice, the Court put forward a different interpretation of non-intervention and asked whether this practice could be better understood as an indication "of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State."[264]

After establishing these two possible practices, the Court assessed the dimension of justification within the two possible interpretations. For INT1, suggesting that there is a CIL norm that establishes non-intervention, the Court finds ample support in justification. This includes the UNGA Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States; the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty; the Montevideo Convention on Rights and Duties of States and the Additional Protocol Relative to Non-Intervention; Resolutions of the Organization of American States General Assembly; as well as the Helsinki Final Act.[265]

To assess INT2, suggesting the existence of a CIL norm that allows foreign intervention, the Court looked for instances where states relied on a "novel right or an unprecedented exception to the principle" of non-intervention.[266] In search of such justifications, the Court focused on the

258. Nicar. v. U.S., 1986 I.C.J. 14, ¶ 205.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* ¶ 206.
265. Nicar. v. U.S., 1986 I.C.J. 14, ¶¶ 202–04.
266. *Id.* ¶ 207.

United States and Nicaragua as the two relevant parties in this dispute. Regarding the United States, the Court found that, on occasion, it stated as reasons for intervention in the affairs of third states "the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy."[267] The United States also largely relied on "classic" justifications for intervention—even in Nicaragua—such as collective self-defense.[268] Similarly, the Court found that Nicaragua also expressed sympathy and solidarity with the opposition in neighboring states such as El Salvador, but always in political terms and not as a legal basis for intervention.[269] The Court therefore concluded that the justifications for INT2 were largely political and not an expression of a legal obligation or an assertion of existing international law rules as per the dimension of justification.[270]

To reiterate and illustrate the spectrum, the Court found that practice was largely ambiguous because some states intervened in third states, while others did not engage in intervention at all.[271] The Court also found that states traditionally expressed their opposition against intervention and supported the principle of non-intervention instead.[272] Finally, states largely avoided justifying past interventions on the basis of a legal right to intervene and instead put forward foreign policy considerations.[273]

This produced at least two eligible interpretations that the Court juxtaposed. INT1: There is a CIL norm of non-intervention. States primarily refrain from intervening in third states out of a sense of legal obligation that most states accept through various political statements that non-intervention is the rule. States thus justify instances of intervention by other means, such as that of the right to self-defense or foreign policy considerations. INT1 also aligns with concurrent general principles of international law, such as the principles of sovereignty and territorial integrity that, at the time of the *Nicaragua* Case, were robust regarding the authority of a state to govern itself without interference.[274] INT2: There is a CIL norm permitting foreign intervention. This norm explains instances of intervention and suggests that non-intervening states do so out of choice and not out of obligation. However, despite certain instances of practice, these were not coupled with a sentiment of a legal duty for intervention but were rather singled out as exceptions and justifications to the rule of non-intervention. Even though instances of intervention were sensational and popularized, they were also

267. *Id.*

268. *Id.* ¶ 208.

269. *Id.*

270. *See id.*

271. *Id.* ¶¶ 207–08.

272. *Id.*

273. *Id.*

274. *See, e.g.*, ERSUN N. KURTULUS, STATE SOVEREIGNTY: CONCEPT, PHENOMENON AND RAMIFICATIONS (2005); *see also* Nicar. v. U.S., 1986 I.C.J. 14, ¶ 202.

significantly scarcer than the instances of observance and were based either on factual claims or existing justifications on the part of offending states. Out of the two possible interpretations, given the findings of the interpretive process, the most coherent interpretation of fit and justification within a wide reflective equilibrium is INT1. In other words that there is a CIL norm of non-intervention, in line with the finding of the Court.

Charlesworth also criticized the ICJ in *Nicaragua* for creating a type of instant law because it was prepared to find both practice and *opinio juris* in a single action through accession to a treaty or a vote on an IO resolution.[275] The Court stretched not only the legislative effects of both IO resolutions, but also the impact that treaty rules have on CIL.[276] This is because the boundaries of whether elements of CIL represent *lex lata* or *lex ferenda*, as well as the distinction between normative description and prescription, remain largely unsettled in international law.

Constructive interpretation again offers a different lens. As discussed earlier, the dimensions of fit and justification take roughly the form of normativity and descriptivity. Interpretation begins with the construction of a theory that best justifies a practice through the dimension of justification, while the dimension of fit determines and describes this practice. Fit and justification are not two distinct moments in the interpretive process, but instead two related concepts that do different kinds of work: one descriptive and one normative.[277] For an interpretive CIL theory, the fact that a single act, such as the adoption of IO resolutions, may constitute both a descriptive narrative of history and practice as well as a normative justification of this practice is not only not problematic, but is, in fact, expected and desirable. This reflects the thicker conception of *opinio juris* of the interpretive theory that cuts across the distinction between description and normativity and is able to infuse fact with value. Constructive interpretation thus offers a systematic, methodological paradigm that undermines the salience of the critiques of the *Nicaragua* decision regarding CIL identification.

CONCLUSION

The definition and scope of CIL has always been a site of contestation. This not only creates gaps between existing international law and legal expectation, but also casts doubt on the very nature of CIL as law. International law largely expanded to reflect the changing realities of the international system by incorporating new phenomena and actors in the process of maintaining a sustainable system. The framework of international law, and particularly that of CIL, has fallen behind. To this day, CIL identification is

275. Charlesworth, *supra* note 216, at 24.

276. *See* D'Amato, *supra* note 51, at 102.

277. *See* Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 555 (2010).

trapped in the methodological divide between induction and deduction. According to the inductive method, one attempts to identify CIL from 'facts' of international life.[278] The deductive method focuses instead on the abstract and deduces CIL norms from general propositions, usually deriving from a non-factual and normative authority.[279] However, this divide persists without a largely accepted position on which method is preferable or more authoritative.

The goal of this Article is to suggest a new methodological approach for CIL identification: the method of constructive interpretation. This method incorporates the dimensions of descriptive accuracy and normative justification and seeks to balance these elements within a reflective equilibrium. I contend that this reflective interpretive approach results in a more sophisticated understanding of fit (state practice) and justification (*opinio juris*) and provides a nuanced method for reconciling their relationship in CIL identification. To support this, I revisited one of the classic cases in international law: *Nicaragua v. United States*. I argue against the idea that the ICJ in *Nicaragua* departed from the traditional method of CIL identification and instead propose that the Court, in fact, engaged in an interpretive process. I suggest that the Court in *Nicaragua* asked one primary question about the existence of a CIL rule—namely, the norm of non-intervention—and consequently juxtaposed two different possible interpretations to answer this question: INT1: There is a CIL norm of non-intervention; and INT2: There is a CIL norm allowing foreign intervention. By then engaging in a reflective process of assessing the dimensions of fit and justification, the Court reached a reflective equilibrium on the existence of a norm of non-intervention.

Through the *Nicaragua* case, the ICJ managed—likely inadvertently—to escape the methodological divide of induction versus deduction. That is why the *Nicaragua* case is best defended as endorsing an interpretive theory of CIL identification. However, the analysis of the *Nicaragua* case through constructive interpretation is only one example of the potential applications of the interpretive method to recent developments in scholarship or future adjudication, such as the questions of humanitarian intervention, the emerging notion of Responsibility to Protect, or contested issues beyond the law on the use of force.

To maintain an international legal system that is not only current but also desirable and encourages compliance, we need to approach international lawmaking as a dynamic process with ongoing changes that require conceptual clarity and legal certainty, but also adaptation. Freeing the identification of CIL from the restrictive dichotomy of induction versus deduction opens up new avenues for the normative and methodological exploration of international law in today's pluralistic international system. We can no longer

278. *See* Kammerhofer, *supra* note 20, at 557.

279. *See id.*

afford to sustain means and methods because a particular process is the way we used to do things at a different time in a different international system. That is just bad reasoning.