3

Interpreting the Plural Sources of CIL

HARLAN GRANT COHEN

1 Introduction

When faced with the inevitable task of interpreting customary international law (CIL), what should a court do, and what should it consider? Should the court engage in an 'inductive' process of sifting through available evidence of state practice and *opinio juris*, or a deductive process designed to reason logically from principles embedded in the rule? Should the court invoke something like the rules of treaty interpretation with their focus on good faith, ordinary meaning, context, and object and purpose? How should it weigh available evidence of state practice, *opinio juris*, and prior interpretations – both its own and that of others? How concerned should the court be about fitting its interpretation into the broader corpus of international law?

This is where international law doctrine – particularly concerning sources – falls short. Figuring out how to interpret and apply custom requires a theory of custom. What is customary international law? Why is it worthy of being followed? How does custom acquire normative and legal authority? These are difficult and contentious questions we (and certainly courts) usually try to avoid.[1] The doctrine of sources does not

The author is indebted to Marina Fortuna and the organizers of the December 2021 TRICI-Law conference, where an earlier version of this chapter was first presented. Thanks also go to Dan Bodansky, Evan Criddle, Andreas Follesdal, Kostia Gorobets, Fleur Johns, David Lefkowitz, Nahuel Maisley, Steve Ratner, Nicole Roughan, and Oisin Suttle for helping to work through the ideas expressed in this chapter and to Sarah Burns for helping to round it into shape.

[1] See M Fortuna, 'Different Strings of the Same Harp: Interpretation of Customary International Rules, Their Identification and Treaty Interpretation' in P Merkouris, J Kammerhofer, and N Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (Cambridge University Press 2021) (observing that 'hardly

answer them. Article 38 of the Statute of the International Court of Justice (arguably) lists the formal sources of international law – treaties, customary international law, and general principles. Its formulation 'international custom, as evidence of a general practice accepted as law'[2] has been interpreted as implying a two-element test, requiring evidence of both state practice and *opinio juris*.[3] But it provides no account of why those elements would, together, create law or be deserving of normative authority. The International Law Commission (ILC) also studiously avoided these questions in its Draft Conclusions on Identification of Customary International Law.[4]

This is perhaps not surprising. These theoretical questions are difficult and contentious. International actors disagree over the answers, sometimes deeply. And Article 38 and the two-element test might best be seen as an attempt to bridge such theoretical disputes. It encodes formal sources that we agree count as international law, without encoding why. Focused on method rather than theory, the doctrine provides a discursive convention – an agreed-upon framework for structuring claims about rules that is capacious enough to accommodate a range of views on where they come from. It acts as a normative compromise that allows us to operate on the basis of overlapping consensus while leaving room for a certain amount of normative pluralism. If Article 38 and the two-element test count as a rulebook,[5] it is a rulebook on how to argue.

Questions about interpretation, however, reveal the instability of this compromise. We simply cannot answer questions about how rules should be interpreted without some theory as to why certain interpretations would or would not be legitimate. And for an interpretation to be legitimate it must be able to trace its legitimacy to that of the international law source being interpreted and/or the legitimacy of the particular interpreter. Figuring out both requires looking behind the list of sources

any theoretical account of customary international law can coherently explain what it is, how it emerges and how it develops').

[2] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art 38(1)(b).

[3] See ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 121, 124.

[4] ibid 124 ('[T]he draft conclusions do not address, directly, the processes by which customary international law develops over time . . . They do not . . . deal systematically with how such rules emerge, change, or terminate.').

[5] See generally M Hakimi, 'Making Sense of Customary International Law' (2020) 118 Mich L Rev 1487 (rejecting the rulebook approach to CIL).

in Article 38 and asking why we treat each one as a source of normative authority. It requires us to focus on the normative stories we tell.

Such an inquiry, though, reveals that there is not just one story explaining why custom should be a source of law, but multiple stories, each legitimated in very different ways. In fact, if we started not with Article 38 but with our accounts of international law's legitimacy, we would find, as I argue below, that what we call 'custom' may represent or draw from at least three different sources of law,[6] which I will refer to as 'Negotiated Law', 'Legislated Law', and 'Adjudicated Law'.[7] Although we refer to nontreaty rules derived from each as 'custom',[8] they draw on different sources of legitimacy, operate according to different logics, dictate different methods of interpretation, and favour different methods for resolving disputes. Answering questions about any of those aspects of the rule thus requires us first to figure out the sort of custom we are talking about. The types of justification we start with dictate the answer to a range of other questions we might have about the rules emanating from them. And those debating how custom should be interpreted, I argue, are often arguing about different sources of law. Their disagreement is not over how custom should be interpreted, but over the ultimate authority of particular international law rules.

Some readers may bristle at the suggestion that these are distinct 'sources' of law. Do we really need to upend our categories of treaty, custom, and general principles? To the extent, though, that the rules seem to be emanating from entirely distinct sources of legitimacy and operating according to contradictory logics, it is hard to describe them as the

[6] I am not the first to suggest that what we call 'customary international law' may, in fact, reflect more than one source or type of international law rules. See generally D Bodansky, 'Prologue to a Theory of Non-Treaty Norms' in MH Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill 2010); D Bodansky, 'Does Custom Have a Source?' (2014) 108 AJIL Unbound 179. In fact, the three sources of custom identified here bear some resemblance to Bodansky's categories of common law, declarative law, and the behaviour of states (Bodansky, 'Does Custom Have a Source' 180). The list is also not exclusive. A more exhaustive account would need to include a variety of potential natural law sources as well.

[7] While built on somewhat different explanations, these sources also very roughly coincide with notions of traditional custom, modern custom, and international common law proffered by others. See generally AE Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757. One advantage of this account of international law's sources is that it may help explain the divergence between those categories.

[8] As will be explained in Section 2, these sources of justification cut across our formal sources. For our purposes here, though, we will focus primarily on custom.

same in any way other than form. As already noted, formal lip service to the features in Article 38 may play a role in anchoring discussions, but it is unlikely to capture deeper agreement about where these rules come from or what they represent.[9] These three models are meant to capture the true sources of these rules' authority.[10] That said, even if one is unwilling to embrace the idea of plural sources of custom, recognizing that there may be different types of custom may help clarify the stakes involved in debates over interpretation and in interpretive choices.

This chapter starts in Section 2 with a reconstruction of international law's sources built not on the forms described in Article 38 but instead on the legitimating stories we tell. Section 2 lays out three such stories and the types of law they describe. These three types of law – Negotiated Law, Legislated Law, and Adjudicated Law – each draw on distinct notions of legitimacy, follow distinct logics, and instantiate distinct values. Section 2 describes the very different notions of 'custom' emanating from each of these sources. Section 3 looks at each of these three new sources from the standpoint of interpretation. How are each of these sources interpreted? Section 3 explains how the justificatory story told about each of these sources flows through interpretation, requiring different approaches attentive to different concerns. Again, interpreting 'custom' will require very different approaches and operations depending on its ultimate source and justificatory logic. Finally, Section 4 shifts the vantage point to courts. How should courts approach the task of interpreting each of these sources? Each type of custom, this section argues, dictates not only its own interpretive rules but the specific role of the court in applying them and the weight to be given to the court's judgments in the future. The hope is that this reconstruction of international law's sources, including the identification of different types of custom, can put old arguments about custom and its interpretation in a new light, explain the intractability of certain fights, anchor phenomena that others have observed, and clarify the real stakes behind differing methods of interpretation.

[9] See Bodansky, 'Does Custom Have a Source?' (n 6) 180–81 ('Should we follow the example of Ptolemaic astronomers, who added epicycle upon epicycle to their descriptions of planetary motion, in their efforts to save the geocentric system? Or should we seek a paradigm shift, a new way of understanding the sources of international law?'). No one will be surprised if, like Bodansky, I favour the latter.

[10] To be clear, what I am exploring here is why people *think* certain rules have normative authority – the justifications they articulate. I leave to the side both whether these reasons are good and worthy of authority and whether they actually explain the operative authority of these rules.

2 Three Models of Custom

Article 38 largely describes international law's forms – written agreements, customary practices, accepted principles. What if we defined international law's sources instead according to their sources of legitimacy? What if we started by asking why we give international law rules normative force at all, listening more carefully to the explicit and implicit legitimating stories we tell? This section lays out three prominent stories we tell that cut across form, but for the purposes of this volume explains why nontreaty rules[11] might carry the force of law. Each of the stories produces a different model of law – Negotiated Law, Legislated Law, and Adjudicated Law – drawing legitimacy from different sources, instantiating different values, and following its own logic.

2.1 This Argument Never Ends . . .

Negotiated Law, as a model, is imagined as the product of settlements hashed out over time. These are hard-fought rules, subject to back-and-forth wrangling between states that might range in form and forum from negotiations around a table to jawboning in the media to conflict on the battlefield.[12] The rules that emerge represent a form of compromise, a pragmatic accommodation of different interests. Particularly successful rules reflect a common acceptable balance between states' freedom to take action now and the stability and predictability necessary to pursuing their interests generally.[13] But all of these rules are open-ended and tentative; they leave space for further negotiation and wrangling as circumstances and interests shift.[14] Negotiated Law, to use the words of Myres McDougal, is the product of 'a process of continuous interaction,

[11] See Bodansky, 'Prologue to a Theory of Non-Treaty Norms' (n 6).

[12] See Hakimi (n 5) 1493; see also MH Mendelson, 'The Formation of Customary International Law' (1998) 272 RdC 155, 189–91 ('Out of this constant process of claim and response rules emerge, are strengthened, or are superseded.'). For more on this model and other places where we might find it, see HG Cohen, 'International Law's *Erie* Moment' (2013) 34 MJIL 249, 257–70.

[13] GJ Postema, 'Custom, Normative Practice, and the Law' (2012) 62 DLJ 707, 726 ('Customs are relatively stable points or nodes in the network of expectations.').

[14] See Hakimi (n 5) 1495 ('[B]ecause the CIL process is continuous, a position's status or content within CIL can be transitory and elusive.'); Postema (n 13) 710 ('As such it is flexible, open to *reformulation* and *reformation*, and inviting rather than silencing *scrutiny*.').

of continuous demand and response'.[15] Upheld by a level of consensus among states, these rules shift as that consensus shifts.

Negotiated Law might be seen as a solution to international law's inherent fragmentation. How do we know what is expected of us and how do we guarantee that others know what we expect of them when the law's meaning is not revealed in a document but trapped inside our respective heads?[16] We know what we think it requires, but does anyone else agree? The only way to forge common expectations and to guarantee commitment to them is to talk – a lot.[17] Actors need to constantly explain where their acts fit within the community's rules, why their acts should be seen as conforming, why someone else's acts fail to meet their understanding of the rule. Constant communication, through words and acts, is the structure on which the law remains elevated, the container in which it is held. Without that jostling, the law would collapse or float away into the ether.

This model of the law finds its clearest form in descriptions of 'traditional' custom and the ways that the iterative practice of states can slowly over time produce settlement over rules. It is a model of customary law that Gerald Postema describes as emerging from discursive normative practice.[18] It is the anti-formalist, anti-rulebook model of custom described by Monica Hakimi.[19] But this model also describes traditional bilateral treaty agreements, whose legitimacy emanates from the particulars of the negotiated deal and whose rules are interpreted in light of subsequent practice and agreement between parties.[20]

[15] MS McDougal, 'The Hydrogen Bomb Tests and the International Law of Sea' (1955) 49 AJIL 356, 357. Negotiation here may thus be more implicit than explicit. Rules emerge from a constant give-and-take ('negotiation'), but the results need not take the form of an explicit agreement.

[16] For a rich account that seeks to move beyond this 'separation thesis', see C Turner, 'Interconstituted Legal Agents' (2022) University of Georgia School of Law Research Paper 2022-07, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049942> accessed 27 May 2022.

[17] See generally J Brunnée and SJ Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010).

[18] Postema (n 13) 709 and passim.

[19] See Hakimi (n 5) 1493–96.

[20] See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3)(a) and (b). See also K Gorobets, 'Peaks and Valleys: Contemplating the Authority of International Law' in K Gorobets, A Hadjigeorgiou, and P Westerman (eds), *Conceptual (Re)Constructions of International Law* (Edward Elgar 2022) 171 (noting the commonality between CIL and bilateral treaties). General principles, the third sources mentioned in Article 38, generally are not described this way. Their

Whether taking the form of traditional custom or 'conventional' treaties, Negotiated Law derives its purported authority from notions of consent, autonomy, pragmatism, and the lessons of experience.[21] It elevates values of flexibility and supports efforts at renegotiation. States have fought and have accepted these results. They will continue to fight and test their resiliency. Rules that emerge from this process have proven to 'work'; rules that do not will be challenged. And the (perhaps only) theoretical ability to participate in this ongoing process of contestation and acceptance serves to legitimate the normative authority of settlements that emerge.[22] Rules are legitimated as much by the promise of future process as by the process that produced them.

2.2 But We Agreed . . .

But there are other stories we tell about both custom and treaties that sound far less like negotiated settlements than like forms of international legislation. In these stories, rules are propounded, proposed, and then accepted by some proportion of the community, whether by affirmative acts or by common, silent acquiescence. Rather than the iterative, open-ended, continuous process of acceptance reflected by Negotiated Law, this model assumes a moment in which a rule with particular elements is proffered, and a moment, or series of moments, in which affirmation is collected. Obviously, as with Negotiated Law, these justificatory stories are more metaphor than description.

What rules are described this way? The paradigmatic examples of international law rules described as Legislated Law are products of the ILC – both multilateral treaties, like the Vienna Convention on the Law of Treaties (VCLT), and reports on custom, like the draft articles on state responsibility. As many have noticed, the particular codifications of rules in these ILC products are often treated as fixed points. After they are issued, the relevant question is how they are received. If states' responses can generally be described positively (or at least not negatively), the rule as described by the ILC is taken as the rule of international law.[23] Only if

legitimacy is instead usually described either as a concomitant of rule of law principles or as derivative of their acceptance at the national law level.

[21] Hakimi (n 5) 1525 ('CIL derives what legitimacy it has not from any secondary rules but from the process through which it is developed and used.').

[22] ibid 1524–26.

[23] As Stefan Talmon observes: 'In none of the cases where the Court has found a (draft) article of the ILC to reflect customary international law did it enquire whether the

the ILC's efforts have failed to receive requisite acceptance (whatever that means)[24] are investigations begun into traditional custom's elements of state practice and *opinio juris*.

But these stories of quasi-legislation are far more ubiquitous. Efforts at universalizing treaties have commonly been described this way, whether the Genocide Convention, the UN Charter's rules on the use of force, or the Rome Statute's codification of international criminal law. But key nonbinding declarations of international law rules have been described this way as well. This is, for example, how the International Court of Justice (ICJ) treats the UN General Assembly Declaration on Friendly Relations[25] in the *Nicaragua* decision.[26] The Stockholm Declaration[27] often receives similar treatment with regard to the prevention of transboundary environmental harm.[28] And sometimes customary international law, more broadly, is described and justified this way. Certainly, the way post-decolonization states were required to accept the full customary international *acquis* has this feel.[29] What was proffered in return for recognition was not participation in an ongoing process of

Commission was actually codifying international law or whether it was not perhaps progressively developing international law. In all cases, the ILC has served as a kind of pseudo-witness for a rule having acquired the status of customary international law.' S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417, 437.

[24] One might compare here the more critical reception of the Draft Articles on the Responsibility of International Organizations to that of the much more successful Articles on the Responsibility of States for Internationally Wrongful Acts. See K Daugirdas, 'Reputation and the Responsibility of International Organizations' (2014) 25 EJIL 991, 992; ILC, 'Draft Articles on the Responsibility of International Organizations' (2011) UN Doc A/66/10; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10.

[25] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

[26] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, eg [264].

[27] Stockholm Declaration on the Human Environment in 'Report of the United Nations Conference on the Human Environment' (Stockholm 5–16 June 1972) (16 June 1972) UN Doc. A/CONF. 48/14, at 2 and Corr. 1.

[28] See J Vessey, 'The Principle of Prevention in International Law' (1998) 3 ARIEL 181, 182 (observing that 'the Stockholm Declaration contains the most widely cited version of the principle'); *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996], ICJ Rep 226 [27], [29].

[29] See R Mohamad, 'Some Reflections on the International Law Commission Topic "Identification of Customary International Law"' (2016) 15 Chinese JIL 41; ILA, Committee on the Formation of Customary (General) International Law, 'Statement of

jawboning and negotiation, but instead a supposedly set canon of established international law rules. But more generally, this model of Legislated Law seems implicit in how many people talk about customary international law in a modern world of 200 states. The old rough-and-tumble model, perhaps a fit for a small clique of states, seems neither practicable nor fair in this broader community. [30] Instead, proposed rules are tested by surveying reactions: where a sufficient number of states seem to have accepted the rule, it reflects custom; where a sufficient number object, the rule is rejected.

Deriving rules more from multilateral documents than from traditional state practice, Legislated Law seems to describe some of the phenomena others have described as 'modern' custom.[31] But Legislated Law focuses less on the normative content of the rule than on the justificatory story told. Human rights and humanitarian concerns are often described in ways that sound more like Legislated Law than Negotiated Law,[32] but they are often the rules most likely to be the subjects of universalizing treaty negotiations or attempts to declare custom. This is what these rules have in common with subjects like treaty interpretation or state responsibility, which are arguably less value-driven but seem to be derived in similar ways.

Crucially, this type of Legislated Law is a very different source from traditional notions of custom best described as Negotiated Law. Whereas Negotiated Law derives its authority from its flexible, open-ended, rough-and-tumble process and the battle-tested nature of current settlements, Legislated Law derives its authority from particular imagined moments of proposal and ratification. Whereas Negotiated Law elevates a type of specific consent associated with settlements, Legislated Law relies on a more democratic type of consent associated with voting. The

Principles Applicable to the Formation of General Customary International Law' (2000) 24–25.

[30] As has been oft noted, the traditional model of Negotiated Law favours action over inaction and the powerful, better-resourced states more able to monitor activity and defend their interests. The vast majority of states are rendered (or kept) voiceless – rule-takers rather than rule-makers. Legislated Law, with its emphasis on formal processes of articulation and a more democratic notion of ratification, shifts that power more towards the majority.

[31] See Roberts (n 7). See also Talmon (n 23) 429.

[32] Choi and Gulati note, for example, that international courts seem more likely to look to treaties and international organization declarations when assessing customs related to human rights and international humanitarian law. See SJ Choi and M Gulati, 'Customary International Law: How Do Courts Do It?' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 117, 145.

open-ended, never-ending give-and-take of Negotiated Law (supposedly) promises any state the ability to participate in shaping or reshaping the rule over time; the fixed point of Legislated Law guarantees a type of majority rule, freed from the whim of powerful states. And whereas Negotiated Law celebrates flexibility and renegotiation; Legislated Law promotes the stability and predictability of recognized rules.

2.3 Use Your Best Judgment . . .

Finally, we have a model of Adjudicated Law. This is law produced or articulated through judicial or judicial-like decision-making. This justificatory story emphasizes the value of neutral, reasoned articulation of the rules, removed from power politics. This model comes closest to notions of common law and, like common law, looks to third-party decision-makers to fill the inevitable gaps in prior agreements and practice.[33] It imagines delegation to courts as a type of preemptive hand-tying, requiring states to live up to the principles of their agreements, even as their politics might suggest otherwise. In this model, courts are there not just to resolve disputes[34] but to apply the law. The law, not the wishes of the parties, prevails.[35]

Various international courts and court-like bodies – the European Court of Human Rights, the Inter-American Court of Human Rights, the World Trade Organization Appellate Body, the UN Human Rights Committee – have told such stories about themselves to justify interpretations less deferential to state views. Some investment tribunals have as well.[36] These stories may or may not resonate with all of those bodies' stakeholders. But Adjudicated Law also describes a range of rules that

[33] See eg I Ehrlich and RA Posner, 'An Economic Analysis of Legal Rulemaking' (1974) 3 JLS 257, 258, 261.

[34] See EA Posner and JC Yoo, 'Judicial Independence in International Tribunals' (2005) 93 CLR 1.

[35] See N Grossman, 'Solomonic Judgments and the Legitimacy of the International Court of Justice' in N Grossman and others (eds), *Legitimacy and International Courts* (Cambridge University Press 2018) 43; see also LR Helfer and AM Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 CLR 901, 942.

[36] To be clear, courts and court-like bodies are not the only ones who can or might articulate this view of the law. Based on reasoned articulation, many legal 'experts' may claim this authority, whether they are self-designated (scholars?) or given a specific formal role (UN special rapporteurs).

exist only in and for courts. International criminal tribunals could not rely on state practice to develop rules of *mens rea* or forms of liability; a type of common law articulation, attentive to commonly held principles of justice, was all that was available. International courts also need to be attentive to concerns about procedural fairness and fairness to parties, irrelevant outside the courtroom, producing procedural or evidentiary rules distinct to adjudication.

Justifying or legitimating this kind of court-made law requires recourse to different values. Adjudicated Law derives its authority from implied or explicit delegation; the authority of the decision-maker; the power of reasoned exposition; and neutral, even-handed consideration. In contrast to Negotiated Law, which emphasizes values like pragmatism, open-endedness, flexibility, and continued negotiation, Adjudicated Law emphasizes uniformity of treatment,[37] even-handedness, finality, and justice.[38]

2.4 *Talking With, and Yet Past, One Another . . .*

To put it another way, in Negotiated Law authority flows from the collective results of innumerable dyads of negotiating actors, who come to settle on particular rules; in Legislated Law authority flows from common, collective will; and in Adjudicated Law authority flows from judge or court (see Table 1). Putting form aside and focusing on these justifications, it becomes clear these are really different, and in some ways irreconcilable, sources. A particular rule might be traceable to multiple potential sources, but interpreting that rule requires identifying the right one.

This is not to suggest that identifying that source is easy or obvious. We each may slip between them as we talk about a rule. And while certain rules may often be associated with one source or another, disagreements over the ultimate source of these rules are common, reflected in the types of justifications used.[39] Meant to provide common rules across a range of states and cultures, international law is deeply pluralistic, accommodating significant disagreement even over the ultimate source of the law's

[37] For more on the role of uniformity in Adjudicated Law, see n 80 and accompanying text.
[38] See Cohen, 'International Law's *Erie* Moment' (n 12) 259–66.
[39] Some may also take categorical approaches, believing that all customary international law rules, for example, can and should be associated with only one of these sources. Such a categorical approach to the justificatory source should and likely will result in an equally categorical approach to interpretation.

Table 1 *Justification-based sources of international law*

	Negotiated Law	Legislated Law	Adjudicated Law
Underlying logic	Product of settlements hashed out over time	Broad (precisely how much unclear) acquiescence to some stated proposition	Product of reasoned elaboration and application by experts
Justification	Specific consent, autonomy, pragmatic experience, flexibility	Common consent, certainty, predictable planning	Delegation, expertise, neutrality, finality, justice
Examples	Traditional custom, bilateral treaties such as BITs	Articles on State Responsibility, VCLT, Genocide Convention	Regime-specific precedents, general public international law (PIL) precedents

authority. Such disagreements may help explain some of the most difficult and intractable fights over rules. Take, for example, fights over a potential 'unwilling or unable' standard for self-defense against non-state actors. Those supporting such a rule often draw from a Negotiated Law model, arguing that the rules must pragmatically respond to reality and focusing on the rules being hashed out by those taking these actions; under this model those states responding to attacks by non-state actors are a specially affected group, whose actions and interactions help define the resulting rule.[40] For many of those opposed, the argument seems derived from a Legislated Law model; looking to fixed points like the UN Charter, they question whether the 'unwilling or unable' standard is what was agreed on or whether, now proffered, sufficient states have accepted it.[41] Others focus on Adjudicated Law, placing heavy weight on the ICJ's

[40] See eg SA Yeini, 'The Specially-Affecting States Doctrine' (2018) 112 AJIL 244. See also generally AS Deeks, 'Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 VJIL 483.

[41] See KJ Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112 AJIL 191 (developing such an account).

prior reasoned articulation of customary international law of self-defense;[42] for them, ignoring the ICJ's views would violate notions of rule of law, coherence, predictability, and fairness.

Immunity presents another good example. Disagreements over whether states or officials should retain their immunity in the face of alleged international crimes seem fuelled by competing models of where those rules would come from. While a majority of the ICJ looks to state practice,[43] others look to quasi-legislative moments like Nuremberg,[44] or seek to reason from broader principles of international law.[45] These disagreements are often coded as doctrinal or interpretative, but they seem to run much deeper; those arguing over immunity are actually arguing over the ultimate source of those rules.

And while these three models do reflect different sources of international law, they are not hermetically sealed. Rules can over time be translated from one source to another – a rule developed through Negotiated Law may over time be rearticulated as a form of Legislated Law. This process is most explicit with many ILC products[46] but may happen more implicitly as particular rules becomes canonized through repetition in declarations, judgments, and treatises.[47] As some have noted, when rules seem to become 'established' in this way, they take on new characteristics and are interpreted in a different way, as explained

[42] See eg KJ Heller, 'The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang' (2011) 47 TILJ 115, 140; ME O'Connell, 'Remarks: The Resort to Drones under International Law' (2011) 39 Denv J Intl L & Pol'y 585, 594–95.

[43] See *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Merits) [2012] ICJ Rep 99; *Arrest Warrant (Democratic Republic of the Congo v Belgium)* (Jurisdiction and Admissibility) [2002] ICJ Rep 3.

[44] See *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-397-Corr (6 May 2019) [103].

[45] See *Jurisdictional Immunities* (n 43) Dissenting Opinion of Judge Cançado Trindade 331.

[46] Particularly intriguing here is the ILC's citation in the final Draft Articles on State Responsibility to the ICJ's decision in *Gabčíkovo Nagymaros*, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [1997] ICJ Rep 7, a decision which favourably cited the ILC's first draft report on the subject, a draft which was itself a distillation of state practice. See J d'Aspremont, 'Canonical Cross-Referencing in the Making of the Law of International Responsibility' in S Forlati, M Mbengue, and B McGarry (eds), *The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law* (2020) 22.

[47] Think here, for example, of how, regularly repeated, Daniel Webster's particular formulation of the customary international law of anticipatory self-defense – 'a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation' – is now interpreted almost as text, with each word parsed as if deliberately chosen.

in Section 3. Alternatively, a customary international law rule developed through adjudication can become an input into the process of negotiation, its development and articulation moved out of the realm of judicial reasoning and into Negotiated Law's 'bid and barter' system.[48]

3 Interpretive Paths

Negotiated Law, Legislated Law, and Adjudicated Law each have their own sources of legitimacy and operate according to attendant logics. Each reflects a coherent story as to why a rule developed and operating in a particular way should carry normative authority, why it deserves to be treated as law. For interpretations of those rules to benefit from those rules' legitimacy, they must be able to fit within those same stories. What legitimates the rule should also legitimate interpretation. This means that interpretation will look different, involving different processes and considerations, depending on the asserted source of the rule. These divergent methods of interpretation also help explain why the interpretability of custom remains so controversial: those taking opposing views may simply be focused on different sources, all unfortunately labelled 'custom'.

3.1 Interpreting Arguments

Negotiated Law, or traditional custom, is what scholars likely have in mind when they argue that customary international law cannot be interpreted.[49] As explained in Section 2.2, Negotiated Law imagines the law as a product of a constant, never-ending discursive dance between states. Every interaction involves claims about the nature, scope, and application of the rule that may or may not be accepted by others.[50] In the Negotiated Law model, rules are constantly being made and remade through arguments and actions. Even when relatively stable, the rule is not static; whether it will change or remain the same are both determined

[48] See, for example, Ezgi Yildiz and Umut Yüksel's investigation of the role of ICJ judgments in maritime boundary negotiations. E Yildiz and U Yüksel, 'Limits of Behavioral Approaches: Lessons from the Field of Maritime Boundary Making' (2022) 23 GLJ 413–30.

[49] See eg T Treves, 'Customary International Law' para 2 (2006) MPEPIL <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1393> accessed 27 March 2024; M Bos, *A Methodology of International Law* (Elsevier 1984).

[50] 'Claims are advanced and interpretations and defenses of actions are offered; exchanges of interpretations are made with other parties; counterclaims or challenges are advanced; arguments are offered, reviewed, assessed, and answered.' Postema (n 13) 728.

by the arguments states have made, are making, or will make.[51] As Postema writes: 'No one, not even the entire community, has unchallengeable, final say on what the norms of the practice are.'[52] Authoritative interpretation is an inapposite concept. Interpretations of the rule melt into the process of argumentation, becoming a 'bid' for what the rule is that can be accepted, modified, or rejected as states dance or wrestle (depending on the mood) over the rule.[53]

This, though, does not mean that Negotiated Law is not interpreted. On the contrary, it is and must be constantly interpreted. As Orfeas Chasapis Tassinis observes, deriving rules from practices requires more than just observation.[54] It requires the 'imposition of meaning'[55] on those observations, a process that requires theorizing and categorizing[56] – in other words, interpretation. But in Negotiated Law this theorizing goes in both directions.[57] Practices are themselves arguments, reflecting views on what rules do or should require.[58] Actors committed to being part of a rule-based community must assess how and where their actions will fit within others' expectations of what the rules mean and require.[59] In the

[51] ibid 726 ('custom following is never a matter of rote repetition'). Başak Etkin beautifully evokes the image of the river to describe this reality, in which flux is the constant and defining state of customary international law. B Etkin, 'The Changing Rivers of Customary International Law: The Interpretative Process as Flux' (2022) 11(5) ESIL Reflections <https://esil-sedi.eu/esil-reflection-the-changing-rivers-of-customary-international-law-the-interpretative-process-as-flux/> accessed 16 December 2022.

[52] Postema (n 13) 728. See also Hakimi (n 5) 1494 ('No one entity is entitled to assess the various claims on an issue, weed out the outliers, and finally settle CIL's normative content.'); MJ Durkee, 'Interpretive Entrepreneurs' (2021) 107 VLR 431, 442 (describing interpretation of international law as 'decentralized').

[53] Etkin (n 51) ('While interpretation is done in an active sense by an actor invested with the authority to interpret the rule, be it for instance a court or a state, change (as an umbrella term for modification, evolution and beyond as used in this paper) is the result of that process, and all of these phenomena contribute to the rule's flux.')

[54] OC Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 EJIL 235, 243 ('Observation is then itself theory-laden.').

[55] A Marmor, *Interpretation and Legal Theory* (2nd edn, Hart 2005) 25.

[56] See Chapter 1.

[57] See Etkin (n 51) ('[T]he direction of fit is doubled, as the interpreting authority, while trying to fit world to word, also fits word to world.').

[58] K Gorobets, 'Practical Reasoning and Interpretation of Customary International Law' in P Merkouris, J Kammerhofer, and N Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (Cambridge University Press 2021) 382 ('This is precisely why, even when states do not explicate their position regarding actions of other states, this may still contribute to formation of a new, or sustaining an existing, practice.'), also 375 (observing that 'state practices are not only the *containers* but also the *content* of rules one wants to interpret').

[59] This is precisely why, even when states do not explicate their position regarding actions of other states, this may still contribute to the formation of a new, or sustaining of an

model of Negotiated Law, actors' interactions are structured by their understanding of the rules. Interpretation is embedded in every action and interaction.[60]

This, though, is where interpretation of Negotiated Law diverges from the more textual methods of interpretation. Negotiated Law is intersubjective. Its meaning is a function, not of a particular formulation, written or unwritten, but of the networked expectations of members of the community. The questions one must ask in interpreting the law are not 'what does this rule mean?' but 'what do others think the rule is and how would others apply it to my potential conduct?' As Postema writes 'Caught in the net of interactions, one must know not only what others have done, but also how they understand what they have done, what they expect one to do, and so how they expect one to understand what one has done and what they have done.'[61]

Nor does Negotiated Law imagine any interpretation as an end point. Instead, interpretation and action are embedded in an ongoing dance, a give-and-take over the rules. For Negotiated Law, interpretation is thus both a form of second-person thinking – a prediction of what others think the rule is – and a first-person assertion – a proffer of a desired interpretation going forward.[62]

The ever forward-looking nature of this enterprise also means that interpretation is somewhat open-ended and tentative, an attempt to discern the space open for action, the negative space between prior negotiations. While actors must determine what actions are definitively forbidden, they do not need to determine the four corners of a particular rule. Quite the contrary, interpretation should foster the same values of flexibility, pragmatism, and renegotiation that the rules themselves are thought to promote. Interpreting away the rules' frayed edges may make future negotiations more difficult.

existing, practice. Even an absence of reaction may, under certain circumstances, be deciphered by other participants in a practice meaningfully either as endorsement or at least as acquiescence. Gorobets, 'Practical Reasoning' (n 58) 382.

[60] ibid ('From this perspective, customary rules do not and cannot exist separately or detached from practices that sustain them.'). See also J d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished' in A Bianchi, D Peat, and M Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 111, 114 ('all practices and discourses about international law having an interpretive dimension').

[61] Postema (n 13) 728.

[62] See Chapter 1 (where Westerman describes a 'practice of claims' in which *opinio juris* is understood best 'not as a conviction or belief' but 'as an articulated and publicly accessible claim'). See also d'Aspremont (n 60) 113.

All of this, as I will explain in Section 4 (and have explained elsewhere[63]), is a difficult, perhaps impossible, task for courts, whose mandate and institutional role may conflict with the logic and legitimacy of Negotiated Law. But courts are not the paradigmatic interpreters in this model.[64] Instead, they are sometime interlopers, used more for ad hoc dispute settlement than for rule development: 'authoritative determinations analogous to umpires' rulings are the exception'.[65] In Negotiated Law, interpretation is part of the daily life of living in an international community, practiced in every interaction, by all members of the community.[66]

3.2 *Interpreting Agreement*

The interpretation of Legislated Law, by contrast, comes much closer to the textual methods familiar to treaty law. Partly, this is because Legislated Law is often tied to texts – broad multilateral treaties, codification efforts, international organization declarations, judicial opinions, even treatises. Even if these are not directly binding, they nonetheless establish commonly accepted baselines that can be interpreted. But the analogy to treaties runs deeper. Legislated Law is meant to create common baselines and consensus around rules. It is meant to supersede the uncertainty and power politics of Negotiated Law/traditional custom. And it is meant to foster predictability and encourage planning. Predictability is both the point and the justification. Legislated Law is also legitimated by notions of ratification, in which states are imagined to have agreed, at least implicitly, to a specific rule. This notion of ratification, in turn, requires greater attention to what specifically was ratified.

Scholars endorsing the interpretability of custom often seem to have the model of Legislated Law in mind. It should perhaps not be surprising

[63] Cohen, 'International Law's *Erie* Moment' (n 12); HG Cohen, 'Methodology and Misdirection: Custom and the ICJ' (*EJIL:Talk!*, 1 December 2015) <www.ejiltalk.org/methodology-and-misdirection-a-response-to-stefan-talmon-on-custom-and-the-icj/> accessed 27 May 2022.

[64] FV Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press 1989) 102.

[65] ibid.

[66] 'In the international system, which does not have the benefit of much judicial assistance, the norms are interpreted, elaborated, shaped, reformulated, and applied in large part in the course of debate about the justification for contested action.' A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995) 122.

that many of their examples involve customary rules said to be reflected in multilateral treaties, ILC codification efforts, or declarations of international organizations. (Such efforts themselves have often been described as more legislative than contractual.[67]) Panos Merkouris, for example, focuses in on the customary rules of interpretation and the ways they are interpreted in parallel with the VCLT.[68] But Legislated Law's justificatory stories seem also to run just below the surface of these arguments, which often attempt to distinguish between the period when rules are forming and the period after they 'come into existence'[69] or are 'established'. It imagines identification of a rule and interpretation as separate temporal stages (even if just for the purposes of theorizing).[70] This sort of description does not fit well with notions of Negotiated Law, in which the process never ends, rules are always debatable, and complete agreement over the rule is ephemeral at best.

Whereas interpreting Negotiated Law involves prediction and thus looks to the future (how will others respond?), interpreting Legislated Law is backward-looking, requiring excavation of what actually has been agreed, with help from ordinary meaning, context, and object and purpose. Along with other applicable rules from the VCLT, interpreting Legislated Law is also a good fit for the principle of systemic integration.[71] Imagined as the product of a concerted attempt at codification, it makes sense to imagine these rules as part of a more cohesive international law fabric. It makes sense to interpret them against the backdrop of other international rules, particularly other rules imagined to be similarly established within the international community.

3.3 *Interpreting Decision*

Interpretation of Adjudicated Law can look somewhat similar – in part, because judges often prefer to rely on state-created, rather than judge-made, law and may try to squeeze the latter into the rhetoric of the former whenever possible.[72] But following the alternative logic and justifications

[67] See eg B Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) 85 AJIL 281, 361.
[68] See P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 ICLR 126.
[69] ibid 128, 136.
[70] See Tassinis (n 54) 244–46.
[71] Vienna Convention on the Law of Treaties (n 20) art 31(3)(c).
[72] Cohen, 'International Law's *Erie* Moment' (n 12).

of Adjudicated Law, interpretation will look somewhat different. For one, designed to resolve disputes with some finality, Adjudicated Law is specifically meant to fill gaps, rather than leave them open. This contrasts interpretation of Adjudicated Law most starkly with Negotiated Law. Negotiated Law's open-ended interpretations are pushed aside in favour of binary ones, in which one side wins and one side loses, or one side's view of the law is right and the other's is wrong. But Adjudicated Law goes beyond mere dispute settlement. Adjudicated Law imagines courts playing a systemic role: Adjudicated Law should not just resolve present disputes but avoid future ones as well. This requires developing rules for prospective application: rules that states can rely on, and interpretations they can predict. But how are those gaps to be filled where the rules before them seem to run out? Adjudicated Law might be seen as a mandate, perhaps even an obligation, to find and apply broader principles of law that can fill the gaps. '[A]s Judge Higgins pointed out, it is "an important and well-established principle that the concept of *non-liquet* . . . is no part of the Court's jurisprudence".'[73]

Adjudicated Law thus dovetails well with some of the instances Stefan Talmon identifies, in which the ICJ uses deduction rather than induction to discern the content of customary international law. Talmon notes the ICJ's deduction from 'axiomatic principles such as sovereignty, sovereign equality or territorial sovereignty'[74] in cases like the *Jurisdictional Immunities of the State*, or 'general and well-recognized principles' in cases like *Corfu Channel*.[75] He also observes that the 'ICJ deduces rules from general considerations concerning the function of a person or organization'[76] in cases like *Reparations for Injuries*, *South West Africa*, and *Arrest Warrants*. But the logic of Adjudicated Law is visible in instances of what Talmon calls 'assertion' as well. In those decisions, regardless of evidence, the ICJ often justifies its interpretation on assertions of common knowledge.[77]

Courts also derive some of their authority to apply these rules from their respect for procedural and substantive fairness. They draw legitimacy from their ability to treat parties equally before the law and from their promise to treat like cases alike. These become especially weighty in

[73] *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion, in Talmon (n 23) 423.
[74] Talmon (n 23) 423.
[75] ibid 424.
[76] ibid 425.
[77] ibid 434–40.

international criminal law contexts, in which fairness and due process become matters of human rights. Predictability, for example, merges with the legality principle of *nullum crimen sine lege*. All of this creates incentive and pressure for courts to look to their own prior judgments and to adopt some notion of precedent.[78] Whatever pressure they feel to have their decisions cohere with the broader corpus of international law will face countervailing pressure to guarantee that their current interpretation coheres with their own prior interpretations.

At the same time, as Adjudicated Law relies on explicit or implicit delegation for its legitimacy, judges will also have to be attentive to their specific mandate in interpreting the rules. When they understand their mandate broadly as international courts within an international legal system, treating like cases alike may point to the work of other courts interpreting similar rules. When they understand their mandate more narrowly as extending only to a specific regime, they may feel pressure to hew closely to their own decisions even where courts outside the regime have decided differently.

In sum, though, the interpretative process of adjudicative law will focus much more on reasoned gap-filling and court-specific predictability. Adjudicated Law should make it easier for actors to know what to expect, both to avoid the courtroom and once inside it.

4 The Quandary of Courts

Negotiated Law, Legislated Law, and Adjudicated Law are thus best seen as distinct sources, with their own legitimating logics, favoring different interpretive techniques. These differences highlight the problem for courts of interpreting custom (or really any source of international law). Although ostensibly focused on one formal source in Article 38 – custom – courts are faced with a choice between divergent paths, a fork in the road, that will dictate the factors they should consider and the weight they should give them. These choices can be stark, resulting in contradictory interpretations of what custom requires. As such, courts need a theory, whether explicit or implicit, of what 'custom' is and where it comes from before they can interpret any particular rule before them.

[78] HG Cohen, 'Theorizing Precedent in International Law' in A Bianchi, D Peat, and M Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 268, 282–83.

The challenge for courts can be illustrated well by the problem of coherence. We might want courts to worry about coherence,[79] but coherence with what? The different possible sources described here – Negotiated Law, Legislated Law, and Adjudicated Law – point to different concepts of coherence favoring different outcomes in specific cases. Here, we can go in the opposite order, moving from the source easiest for courts to interpret to the hardest.

Courts will have the easiest time with Adjudicated Law. Adjudicated Law maps what courts do (or at least imagine themselves doing) well: asking judges (or other decision-makers) to resolve arguments about the meaning and requirements of the law by reasoning their way to definitive answers. It leans on their (perceived) instincts, talents, and expertise.

For the court engaged with Adjudicated Law, the demands of coherence will point first and foremost to what might be called 'courtroom coherence'. Courts working within an Adjudicated Law model need to worry that like cases be treated alike and that litigants be able to predict the rules that will apply to them. These are core factors legitimating a court's authority to explicate and develop legal rules, which only become heightened in international criminal cases where they may merge with human rights and due process. Courtroom coherence grows out of the model's emphasis on legitimacy of reasoning and expertise. Both of those would be undercut if rules were interpreted differently in each case: if the court's legal reasoning is so solid, why can it not convince itself? If the court is so expert in the law, why does it have so much trouble finding the right rule? But courtroom coherence also draws from Adjudicated Law's emphasis on justice and binary choices of right and wrong, winner and loser. It becomes much harder to argue that one answer is the just one in any given case if that answer's justice seems so unclear over time.[80]

In sum, Adjudicated Law's emphasis on courtroom coherence and the expectations of litigants before them should lead courts to favour interpretations concordant with their own prior rulings, to follow a form of precedent, even at the expense of developments elsewhere in international

[79] Coherence is arguably a factor in the legitimacy of their judgments. See TM Franck, 'Legitimacy in the International System' (1988) 82 AJIL 705, 712.

[80] One can arguably see the results of the opposite in perceptions of the International Criminal Court, where regular disagreements between its judges have undercut its legitimacy. For some discussion, see D Guilfoyle, 'Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis' (2019) 20 Melb JIL 401.

law or renegotiation or clarification by states. When investment tribunals do just this, rightly or wrongly, Adjudicated Law seems to be the model they have in mind.

Legislated Law, drawing on a story of ratification, common understanding, and the demands of cooperation and planning, also favour the coherence that comes from predictable rules. Focused, though, on the quasi-legislative nature of international agreement, Legislated Law will favour transsubstantive, transforum predictability – the coherence of systemic integration. Legislated Law is meant to avoid the uncertainty of Negotiated Law and the ex-post justice of Adjudicated Law by creating clear frameworks for action that can be interpreted in common ways with as little friction between them as possible. Legislated Law values coordination over conflict, settled rules over settlement. Fragmentation undercuts these goals and may even seem illegitimate. A court placing its own precedent ahead of the will of the international community becomes a judicial despot. Legislated Law will thus favour common rules for all, accepted by all, which can integrate rules across courts and regimes into a single doctrine of international law.

In a vacuum then, courts applying Legislated Law would still be expected to hew to prior rulings. But that expectation would be based on the assumption that the court was correct in its prior interpretation, not on notions of litigant fairness. A single court's interpretation should remain revisable in the face of evidence of other courts having arrived at a different interpretation or in light of developments elsewhere in international law. Legislated Law argues in favour of transjudicial dialogue and drawing from one set of rules to another, whether environmental law into trade or human rights into humanitarian law.

Negotiated Law presents the most difficult problems for courts. As noted in Sections 2.3 and 2.4, the logics of Negotiated Law and of courts are in some opposition.[81] Courts are asked to decide in favour of one party or another, to decide that one actor was right and the other was wrong; Negotiated Law prefers negotiated settlements that leave room for future negotiation and wrangling. Courts are asked to provide justice; Negotiated Law is looked to provide a modicum of peace. Courts lean on delegated responsibility to the law; Negotiated Law leans on the autonomy of parties to order their affairs. To some extent, courts are faced with a problem like Heisenberg's: deciding a case based on Negotiated Law

[81] For more, see Cohen, 'International Law's *Erie* Moment' (n 12); Cohen, 'Methodology and Misdirection' (n 63).

risks transforming it, giving its rules a level of certainty that wrangling within that model would not have produced.

If courts are to be attentive to Negotiated Law, if they believe that Negotiated Law is the true source of the rules before them, then they must be very careful not to overstep their role. Courts should be minimalist in their decision-making and treat their decisions as ad hoc and revisable. They should revisit state practice in each new case regarding the rule at issue to see whether their prior interpretation has been vindicated or rejected.[82] Here, the coherence sought is negotiating-table coherence. The goal for courts interpreting Negotiated Law is to maintain states' expectations about the shape of the negotiating space, about what has been negotiated and what has not. A court should not be able, like an interloper, to stick its nose in ongoing negotiations (which in this model are all the time and endemic) and throw things in favour of one side or another.

An analog to these problematic, divergent choices can be seen in the WTO Dispute Settlement Understanding (DSU). While largely a matter of treaty interpretation, the problem is the same. DSU 3.2 provides that:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements.[83]

In other words, WTO panels and the Appellate Body should stick to negotiated agreements, and only those agreements, but provide security and predictability (a justification for precedent), all while taking account of customary rules of interpretation of public international law, which of course might require looking at other, external agreements and general

[82] See Etkin (n 51) ('One cannot adjudicate the same custom twice.'). Recognizing that decisions of international courts are only 'subsidiary means for the determination of such rules', the ILC nods in this direction as well. ILC (n 3) 149 ('It needs to be borne in mind, moreover, that judicial pronouncements on customary international law do not freeze the law: rules of customary international law may have evolved since the date of a particular decision.'). Whether courts pay any attention is a different matter.

[83] Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the 1994 Agreement Establishing the World Trade Organization (1947) 1869 UNTS 401, art 3.2.

international law.[84] The impossibility and incompatibility of doing all of those at the same time is evident in the Appellate Body's attempts to interpret rules regarding antidumping duties and zeroing, where the Appellate Body, seeking courtroom predictability, adopted a doctrine of precedent, policed by a cogent reasons standard.[85] Simple, the Appellate Body thought, we will apply the same zeroing rule regardless of plaintiff and regardless of defendant. But to the United States, this position regarding both the rule and the Appellate Body's authority was simply wrong. In response, the United States declared war on the body, drawing on a Negotiated Law model to argue that zeroing was a gap in the agreements purposely left for future negotiation and explicitly questioning the Appellate Body's authority to fill it.[86]

Fair and equitable treatment in investment law provides another example. Faced with a question about the scope and meaning of the concept,[87] an arbitral panel is left with a series of choices:[88] if it wants to be true to the Negotiated Law model, it will adopt a minimalist view of role and precedent, see its interpretations as mere proffers, and be extraordinarily attentive to state responses to these decisions, including attempts to renegotiate bilateral investment treaties. This, though, would come at the cost of doctrinal coherence or courtroom coherence. If the panel instead worries most about its authority as court-like tribunal and about courtroom coherence, it will strive to treat like cases alike and stick to its own precedent, potentially at the cost of both systemic integration and negotiating space. If, though, the panel is concerned about systemic or doctrinal coherence, it might eschew the consistency of its own opinions in favour of looking to *jurisprudence constante* or *acquis*, or even beyond to foster systemic integration by looking to rules about the environment, human rights, and sovereignty. In this case, the panel could

[84] See Vienna Convention on the Law of Treaties (n 20) art 31(3)(c). See also Merkouris (n 68).

[85] See HG Cohen, 'Culture Clash: The Sociology of WTO Precedent' in A Frese and J Schumann (eds), *Precedent as Rules and Practice: New Approaches and Methodologies in Studies of Legal Precedents* (Nomos 2021) 112; N Ridi, 'United States: Anti-dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada' (2020) 114 AJIL 735.

[86] See Cohen, 'Culture Clash' (n 85) 114–22.

[87] The question is usually complicated by its entanglement of treaty and customary international law, though, as noted in Section 2, from the perspective of interpretation those may not be as different as is usually thought.

[88] See similar discussion in A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179.

Table 2 *Justification-based sources of international law: summary*

	Negotiated Law	Legislated Law	Adjudicated Law
Underlying logic	Product of settlements hashed out over time	Broad (precisely how much unclear) acquiescence to some stated proposition	Product of reasoned elaboration and application by experts
Justification	Specific consent, autonomy, pragmatic experience, flexibility	Common consent, certainty, predictable planning	Delegation, expertise, neutrality, finality, justice
Examples	Traditional custom, bilateral treaties such as BITS	Articles on State Responsibility, VCLT, Genocide Convention	Regime-specific precedents, general PIL precedents
Coherence?	Negotiating table coherence, predictability of negotiating space	Doctrinal coherence, transsubstantive and transforum predictability, common rules for all	Courtroom coherence, treating like cases alike

rely neither on Negotiated Law bases of legitimacy nor on its delegated authority. Instead, it would have to rely on the authority of the international community. Systemic integration might be achieved, but only at the cost of treating like cases alike, respecting specific negotiated deals, and respecting space for future deals (see Table 2).

Coherence, ironically, thus represents a fragmented choice. Different courts will take different views on these issues, but these decisions are always contested and contestable. What is often only recognized by critics, though, is that these choices are foundationally not about coherence or methods of interpretation, but about justifications of authority. Even if only implicit, the legitimating source of a rule must be identified before the proper interpretative tools can be deployed.

5 Conclusion

Debates over the proper interpretation of customary international law reveal the limits of doctrinal consensus. Methods of interpretation draw on the authority of the particular interpreter and the authority of the rules being interpreted. As such, the choice of methods must be sensitive to our accounts of each. But surfacing those accounts by teasing out the stories we tell to justify customary international law rules reveals the deep theoretical disagreements buried beneath our doctrine of sources. Multiple, competing, perhaps even contradictory concepts of customary international law are in common use; what we call 'custom' might emanate from any of those sources of authority. It is no wonder that we disagree on how to interpret it. Interpretive debates reflect the varied sources we have agreed to group under the label of 'custom' and the deep normative pluralism undergirding the agreed formal sources of international law. Competing justificatory accounts of customary international law that formal doctrine seeks to ignore resurface in these debates. Interpretation becomes the battleground on which our justificatory accounts of custom are forced into combat.