KFG International Law
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KFG Working Paper Series • No. 24 • December 2018

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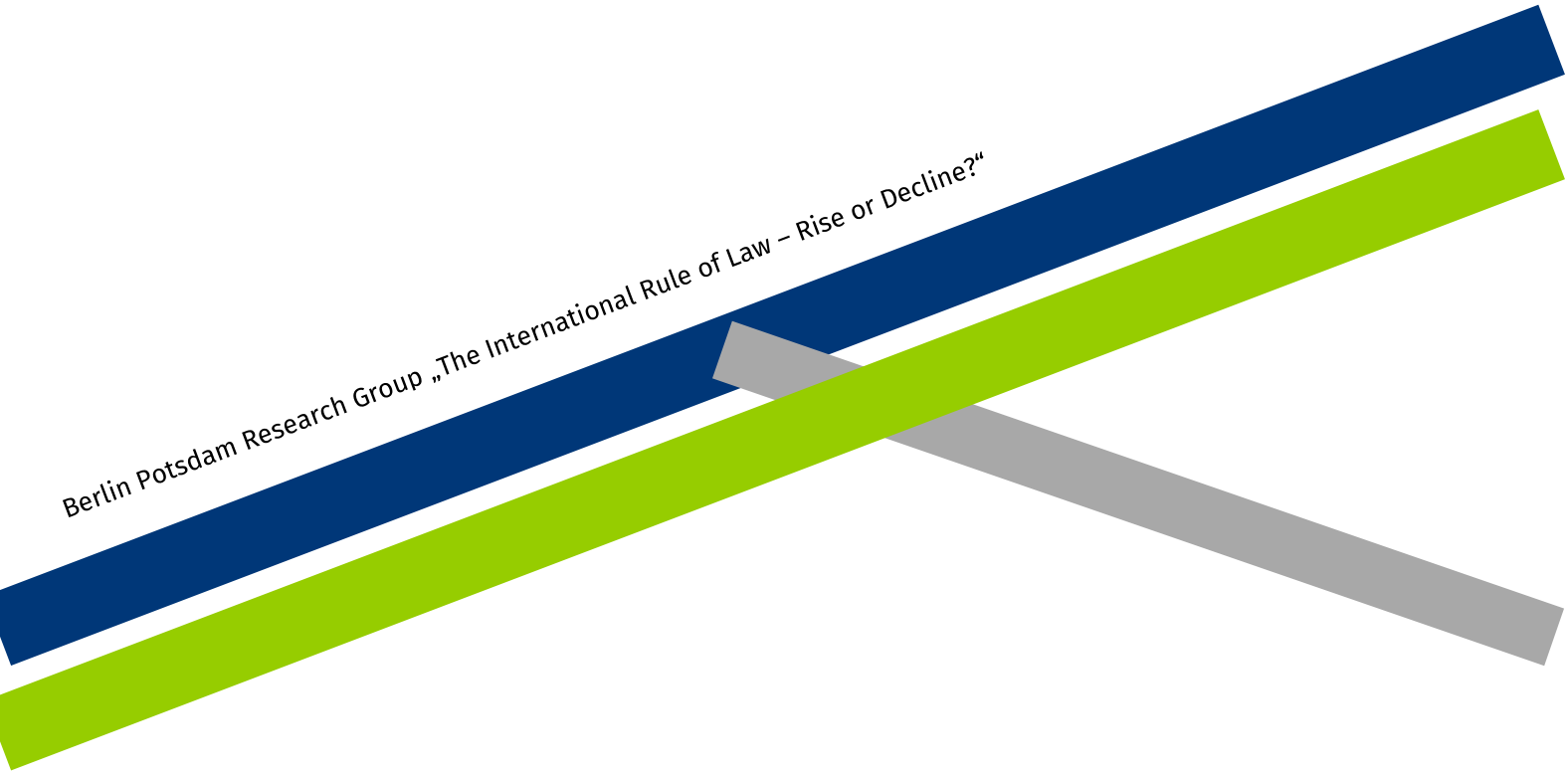

KFG Working Paper Series

Edited by Heike Krieger, Georg Nolte and Andreas Zimmermann

Kleinlein, Thomas, Matters of Interpretation: How to Conceptualize and Evaluate Change of Norms and Values in the International Legal Order, KFG Working Paper Series, No. 24, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?", Berlin, December 2018.

ISSN 2509-3770 (Internet)

ISSN 2509-3762 (Print)

This publication has been funded by the German Research Foundation (DFG)

Product of Humboldt-Universität zu Berlin

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International Law – Rise or Decline?

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Online available at: https://nbn-resolving.org/urn:nbn:de:kobv:517-opus4-422871

Matters of Interpretation: How to Conceptualize and Evaluate Change of Norms and Values in the International Legal Order*

Thomas Kleinlein[1]

For Publication in: Heike Krieger and Andrea Liese (eds.), A Metamorphosis of International Law ? - Tracing value changes in the international legal order from the perspectives of legal and political science, forthcoming.

Abstract:

This article analyses, from a methodological and theoretical perspective, how international legal method deals with change. Section 2 sets the stage, develops a legal perspective on change of norms and values in the international legal order and distinguishes between structural change and norm change. This is followed in sections 3 and 4 by an examination of doctrinal categories that provide techniques to process change in international legal practice. International legal method is equipped with several techniques to process—and to conceptualize and evaluate—change: 'Formal' norm change is a matter of the doctrine of sources. International law can also change 'informally' through the shifting meaning of norm texts. Both formal and informal change is a matter of interpretation. Therefore, section 5 aims at theorizing interpretive change. It examines the relationship between the sources of law and legal interpretation as categories of change and analyses theoretical perceptions of interpretive change.

* I would like to thank Heike Krieger, Andrea Liese and Julian Kulaga for their thoughtful comments on an earlier draft and the participants to the workshop of the Berlin Potsdam Research Group for their stimulating contributions to the discussion.

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1. Introduction

Change is a defining feature of international law. It is not coincidental that the notion figures prominently in the titles of important contributions to international law scholarship. Perhaps most prominently, Wolfgang Friedmann analysed 'The Changing Structure of International Law' in his 1964 monograph.[2] More recently, James Crawford entitled his 2013 General Course at The Hague Academy: 'Chance, Order, Change. The Course of International Law'.[3] Right now, many of us sense that we are experiencing a fundamental change in the international legal order. Liberal values that appeared to be fairly established in international law seem to be on the retreat. A considerable number of multilateral institutions currently face serious challenges, from deep divisions at the UN Security Council and a stalemate at the WTO to severe budget cuts and difficult reform processes in a variety of organizations.[4] Even withdrawals from international organizations are no longer just a mostly theoretical option, as the developments in the International Criminal Court or UNESCO or European Union demonstrate. A far-reaching 'globalization fatigue', a new national egoism, incessant violations of the prohibition of the use of force, a worldwide increase in the flow of migrants and refugees, problems of the global economy and ecological disasters all contribute to the impression that the international legal order is now in a new phase—and in a state of crisis.

Not so long ago, most of us witnessed another change of the international legal order, a change that gave cause for hope. It is a common understanding that, after the end of the Cold War, international law underwent significant transformations that led to a higher degree of institutionalisation and a tighter network of rules. New key multilateral treaties were concluded and many treaty regimes were flourishing. International law increasingly contributed to the legal protection of the individual and international adjudication was in the rise.[5] These developments prompted some scholars to claim that new layers were added to the 'geology'[6] of international law, while its structure has generally evolved from co-existence via cooperation to constitutionalisation.[7]

However, it is far from clear what exactly should be the criteria to justify the claim that the international legal order has entered a new phase.[8] Our answers to this question depend on how we conceptualise and evaluate change of norms and values in the international legal order. While one scholar might get the impression that things are barely moving, others think that things are moving very fast. Stanley Fish, literary theorist and legal scholar, prominently cautions that if

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[2] Wolfgang G Friedmann, *The Changing Structure of International Law* (London: Stevens 1964).

[3] James Crawford, 'Chance, Order, Change: The Course of International Law: General Course on Public International Law' (2013) 365 Recueil des Cours 13–381.

[4] Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25(3) European Journal of International Law 733–763, 737.

[5] For a recent summary of these developments, see Heike Krieger and Georg Nolte, 'The International Rule of Law – Rise or Decline? Points of Departure' [No. 1, 2016] KFG Working Paper Series, 8–10.

[6] Cf. J.H.H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64(3) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 547–562; James Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81(1) The Modern Law Review 1–22, 2, 21: 'sedimentary formation'.

[7] See, inter alia, Anne Peters, 'Global Constitutionalism Revisited' (2005) 11 International Legal Theory 39–67, 39.

[8] See Stefan Kadelbach, 'Jenseits der Anarchie – Entwicklungstendenzen im Völkerrecht' in Heinrich Menkhaus and Midori Narazaki (eds), *Japanischer Vorkämpfer für die Rechtsordnung des 21. Jahrhunderts: Festschrift für Koresuke Yamauchi zum 70. Geburtstag* (Schriften zum internationalen Recht vol 220, Berlin: Duncker & Humblot 2017) 225–241.

change could be understood at all, it was only in the context of a historical reconstruction of its empirical condition and not in the context of any (impossible) general account.[9]

This chapter analyses, from a methodological and theoretical perspective, how international legal method deals with change. Section 2 sets the stage, develops a legal perspective on change of norms and values in the international legal order and distinguishes between structural change and norm change. This is followed in sections 3 and 4 by an examination of doctrinal categories that provide techniques to process change in international legal practice. International legal method is equipped with several techniques to process — and to conceptualize and evaluate — change: 'Formal' norm change is a matter of the doctrine of sources. International law can also change 'informally' through the shifting meaning of norm texts. Both formal and informal change is a matter of interpretation. Therefore, section 5 aims at theorizing interpretive change. It examines the relationship between the sources of law and legal interpretation as categories of change and analyses theoretical perceptions of interpretive change.

2. 'Change' in International Law

a) Structural Changes in the International Legal Order

Change in international law occurs on a structural level and on the level of individual norms. Structural changes of the international legal order bring about transformations of actors, processes, and outputs, as discussed in Friedmann's book 'The Changing Structure of International Law'.[10] Structural changes can reflect changing values or fundamental principles,[11] as exemplified by the 'humanization'[12] and 'ecologization'[13] of international law since the early 1990s. The structural effect of these developments in the subject-matters of international law and their doctrinal expressions in the law of treaties and beyond are well captured in Bruno Simma's phrase 'from bilateralism to community interest'.[14] Beyond the emergence of new normative paradigms, the phenomena of fragmentation,[15] transnationalisation,[16] deformalisation[17] and judicialisation[18] have contributed to structural changes since the 1990s. As diverse as they are, these developments also include changes in international law-making processes,[19] which affect our understanding of

[9] Stanley E Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Oxford: Clarendon Press 1989) 153.

[10] Friedmann (n 1).

[11] Jochen Rauber, *Strukturwandel als Prinzipienwandel: Theoretische, dogmatische und methodische Bausteine eines Prinzipienmodells des Völkerrechts und seiner Dynamik* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht vol 272. Berlin, Heidelberg: Springer 2017).

[12] Theodor Meron, *The Humanization of International Law* (The Hague Academy of International Law monographs vol 3. Leiden: Martinus Nijhoff 2006).

[13] Rauber (n 10), 657ff.

[14] Bruno Simma, 'From Bilateralism to Community Interest' (1994) 250(VI) Recueil des Cours 221–384.

[15] For a recently published analysis, see Eyāl Benveniśtî and George W Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (Cambridge: Cambridge University Press 2017).

[16] Dana Burchardt, 'Intertwinement of Legal Spaces in the Transnational Legal Sphere' (2017) 30(2) Leiden Journal of International Law 305–326.

[17] Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford: Oxford University Press 2012).

[18] Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press 2014).

[19] Rüdiger Wolfrum and Volker Röben (eds), *Developments of International Law in Treaty Making* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 177. Berlin, New York: Springer 2005).

the 'sources' of international law—i.e., changes of the 'rules of change'—and changes in the rules of interpretation.[20] While evolutive interpretation was for a long time a method not frequently used by international courts,[21] more adjudication and more judicial decision-making have now increased the chances for reinterpretations and re-evaluations of previous decisions. Thus, the structural change of judicialisation contributes to a trend towards more evolutive interpretation.[22]

How should legal scholars study structural changes? International lawyers have not only always observed whether and how legal rules form, identified contestations and violations, but also have almost always felt responsible for giving overall assessments about the state of 'the law'.[23] Therefore, it is important that the history of international law does not develop into a separate sub-discipline that is no longer part of the more general legal discourse.[24] In the historiography of international law, structural changes can mark turning points and guide periodisation. Yet, periods are interpretations of facts that allow for many possible approaches and there hardly exist any ambitious theoretical contributions to this aspect of how to conceptualise and evaluate change.[25] This complex issue and its far-reaching implications cannot be expounded in more detail in this chapter. Suffice it to say that future work on periodisation in the historiography of international law is a rewarding task.

Legal historiography and periodisation is certainly not the only approach to structural changes. It even implies a bias towards change. This becomes apparent in a comparison with a 'geological approach' to structural change that Joseph Weiler outlined some years ago. Weiler explains that, while history emphasizes change, geology stratifies and emphasizes accretion. By stratifying, geology folds the whole of the past into any given moment in time – that moment in which one examines a geological section.[26] Weiler continues: '[G]eology allows us to speak not so much about transformations but of layering, of change which is part of continuity, of new strata which do not replace earlier ones, but simply layer themselves alongside. Geology recognizes eruptions, but it also allows a focus on the regular and the quotidian.'[27] In my opinion, this is an effective approach to think about structural changes in the international legal order.

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[20] ILA Study Group on the Content and Evolution of the Rules of Interpretation, 'Preliminary Report Johannesburg' (2016) <http://www.ila-hq.org/index.php/study-groups> accessed 1 May 2018; Michael Waibel, 'Demystifying the Art of Interpretation' (2011) 22(2) European Journal of International Law 571–588, 572.

[21] Paolo Palchetti, 'Interpreting "Generic Terms": Between Respect for the Parties' Original Intention and the Identification of the Ordinary Meaning' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (The Hague: Asser Press 2013) 91–105, 91.

[22] For this trend, see Georg Nolte, 'Between contemporaneous and evolutive interpretation: The use of "subsequent practice" in the judgment of the International Court of Justice concerning the case of Costa Rica v. Nicaragua (2009)' in Holger P Hestermeyer and Rüdiger Wolfrum (eds), *Coexistence, cooperation and solidarity: Liber amicorum Rüdiger Wolfrum* (Boston: Martinus Nijhoff 2012) 1675–1684, 1679; Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge: Cambridge University Press 2016) 5ff.

[23] Krieger and Nolte (n 4), 15.

[24] Thomas Kleinlein, 'International Legal Thought: Creation of a Tradition and the Potential of Disciplinary Self-Reflection' (2016) 16 The Global Community: Yearbook of International Law and Jurisprudence 811–827, 826.

[25] Oliver Diggelmann, 'The Periodization of the History of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press 2012) 997–1011, 999.

[26] Weiler (n 5), 549. For a critique, see Liliana Obregón, 'The Geological Strata of International Law: Response to Professor Weiler's 'Geology of International Law'' (2006) 100 Proceedings of the American Society of International Law 103–107.

[27] Weiler (n 5), 551.

b) Change of Norms

Change occurs also on the level of individual norms. This again is a manifold phenomenon. Change can bring into existence a new legal norm that did not exist before. Sometimes, it is not entirely clear or contested whether norm-generative processes have actually resulted in a new legal norm. Examples of this uncertainty are the much-discussed Responsibility to Protect (R2P)—considered by some as an 'emerging norm' and as customary international law by others[28] — or, less prominently, the odious debts doctrine, where the existence of relevant customary international law is doubtful.[29] Beyond the question of the mere existence or not of a certain norm, norm change can also affect norm diffusion — i.e., the legal subjects bound by a norm — or the broadness or narrowness of the norm's substantive scope of application. Change can also mean that existing norms become stronger (more robust) or weaker (or erode). Norm robustness and norm erosion are difficult to evaluate for international lawyers, who mostly require a threshold for a rule to be established as a legal norm. Yet, international lawyers are well aware that rules can change in their substantive content, their formality and specificity, and authoritativeness.[30] Perhaps most subtly, norm change arises if an existing legal norm shifts its meaning. Instances of this kind of change include the semantic shift of 'peace' in Article 39 UN Charter[31] or the transformation of the NATO Treaty after the end of the Cold War in the wake of the 'New Strategic Concept'.[32] The contested shift in meaning of the distinction between combatants and civilians in the law of armed conflict since the George W. Bush administration introduced the notion of 'enemy combatant' provides a further example.[33] The contributions to this volume also exemplify the different categories of change. The diffusion of the nuclear taboo in arms control is contested; and in international human rights law, the prohibition of torture might be eroding, not to mention the classical candidate for a changing norm, the prohibition of the use of force. The examples also demonstrate that the categories of change are sometimes not clear-cut, especially due to the interaction of individual norms with other norms in the international legal system. This interaction sometimes makes it difficult to distinguish the emergence of new norms and semantic shifts of existing norms.

As the subsequent sections 3 and 4 of this chapter will demonstrate, international legal practice encompasses several doctrinal categories that offer techniques to deal with change. The doctrine of sources is the most obvious candidate to provide rules of change in international law. Beyond these modes of formal change, international treaty norms can change informally, through interpretation. My account of change from the *internal* perspective of legal practice or 'method' differs from other approaches to the change of (legal and non-legal) norms in the international

[28] Sven Simon, '15 Jahre Responsibility to Protect: Worin liegt die Schutzverantwortung?' (2016) 54(1) Archiv des Völkerrechts 1–40, 16ff., with further references.

[29] Sabine Michalowski and Juan P Bohoslavsky, 'Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debts' (2009) 48(1) Columbia Journal of Transnational Law 59–113, 63f.

[30] For these phenomena, see Wayne Sandholtz and Kendall W Stiles, *International norms and cycles of change* (Oxford: Oxford University Press 2009) 6f.

[31] Nico Krisch, 'Article 39' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (Oxford Commentaries on International Law, 3rd edn, Oxford: Oxford University Press 2012) 1272–1296, paras 22–29.

[32] See [2001] 2 BvE 6/99 199–214, BVerfGE 104, 151; Stefan Kadelbach, 'Domestic Constitutional Concerns with Respect to the Use of Subsequent Agreements and Practice at the International Level' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford: Oxford University Press 2013) 145–153, 147f., with further references.

[33] Ingo Venzke, 'Legal Contestation about 'Enemy Combatants': On the Exercise of Power in Legal Interpretation' (2009) 5 Journal of International Law & International Relations 155–184.

legal order. In International Relations, norm change or, more precisely, the inherent dynamism of norms and norm systems is a research area of its own,[34] and in linguistics, a whole sub-discipline analyses the change of language.[35] Legal practice or method is certainly not the only jurisprudential approach to norm change in the international legal order. In particular, legal theory contributes significantly to its understanding and takes up the insights of other disciplines.

3. The Doctrine of Sources and Formal Norm Change

In the doctrine of sources, change has its place in international treaty law (Article 38(1)(a) of the Statute of the International Court of Justice[36]) (a) and customary international law (Article 38(1)(b) ICJ Statute (b). Peremptory norms of international law (*jus cogens*) represent a special case, also in terms of their evolutive nature (c).

a) Change of Treaty Obligations

One obvious method to bring about a change of norms in the international legal order is the conclusion of new international conventions. Today, the practical significance of this instrument of change is limited. The number of international treaties has been stagnating, in terms of both quantity and quality, since the beginning of the new century.[37] The change of existing treaty rules is governed by the fundamental principle of *pacta sunt servanda*, as contained in Article 26 of the Vienna Convention on the Law of Treaties (VCLT).[38] Perhaps the least sophisticated way to bring about change in international treaty law is to replace the entire treaty by a new one on the same subject matter and comprising the same parties. Article 59 VCLT recognizes this option.[39] According to Article 59 para. 1 VCLT, a treaty can, under certain circumstances, be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter. Alternatively, the parties to a treaty can supplement a treaty with an Additional Protocol.[40] A change can also occur if treaty obligations that are limited in time simply expire. This happened to disarmament obligations that expired and were not replaced immediately.[41]

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[34] For a recent overview, see Wayne Sandholtz, 'International Norm Change' in Robert B Thompson (ed), *Oxford Research Encyclopedia of Politics* (Oxford: Oxford University Press 2017).

[35] See, inter alia, Lyle Campbell, *Historical Linguistics: An Introduction* (3rd ed. Edinburgh: Edinburgh University Press 2013).

[36] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355.

[37] Pauwelyn, Wessel and Wouters (n 3), 734.

[38] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331.

[39] Jan Klabbers, 'Treaties, Amendment and Revision' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press 2008), para. 13.

[40] Georg Nolte, 'Introduction' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford: Oxford University Press 2013) 1–10, 3.

[41] START I treaty expired in December 2009 while the new START between the US and Russia entered into force in February 2011 only. See Claire Mills, 'Nuclear Weapons: Disarmament and Non-Proliferation Regimes' (29 June 2016). House of Commons Library Briefing Paper no. 7634, 15–20 <www.parliament.uk/commons-library> accessed 1 May 2018.

The Vienna Convention also comprises a number of methods of revision.[42] Part IV of the Convention (Articles 39 *et seq.*) contains rules on amendment and modification. An amendment denotes a formal agreement between the state parties to alter the provisions of a treaty with respect to all of them (Articles 39, 40 VCLT). Modification refers to an inter-se agreement concluded between certain state parties and intended to vary provisions of a multilateral treaty in their mutual relations (Articles 39, 41 VCLT). The provisions of the Vienna Convention are subject to modification by special rules on amendment and modification in the relevant treaty itself. In practice, amendment clauses in multilateral treaties show a great variety and state practice is very diverse.[43] Given this diversity of practice, treaty revision is a curiously under-analysed phenomenon. The reason for the lack of scholarly attention may be that revision is often seen as a matter for politics and diplomacy. Moreover, the widely diverging revision clauses reveal few generalities that may come to serve as normative guidance.[44] To generalize, however, it can be said that the revision regimes lead to a considerable rigidity of treaties, once adopted. Amendments often require unanimity or a qualified majority of the state parties, and the need for a new, formal round of parliamentary approvals makes treaty revision a cumbersome process that is rarely applied in practice.

In order to accommodate the need for flexibility and to facilitate revision, some modern treaties distinguish between the basic principles of a regime and more technical and detailed rules. While the basic principles are subject to strict amendment procedures, the technical elaborations, laid down in annexes, in later protocols or in the treaty itself, can be changed in less onerous procedures.[45] Furthermore, many multilateral treaties have created their own governance regimes, in the context of which (non-binding) rulemaking takes place through Conferences of the Parties (CoPs), Meetings of the Parties (MoPs), and other committees or working groups.[46] Under certain conditions, states may also denounce a treaty (Article 56 VCLT). In extreme cases, a party to a treaty may invoke a supervening impossibility of performance or a fundamental change of circumstances in order to terminate or suspend the operation of a treaty (Articles 61, 62 VCLT).[47]

b) Changes in Customary International Law

Since the process of change in treaty law is rather cumbersome, customary international law could be the more important source in terms of change and provide for more flexibility than treaty law. The development of customary international law may also affect treaty obligations. Individual treaty provisions may be superseded and entire treaties may become obsolete if new rules of customary international law emerge. Still, this is not a significant mechanism of change and happens rather rarely, for instance with regard to the third Hague Convention relative to the Opening of Hostilities of 1907.[48]

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[42] Gerhard Hafner, 'Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Admendment' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford: Oxford University Press 2013) 105–122, 105.

[43] Kerstin Odendahl, 'Article 39' in Oliver Dörr (ed), *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg: Springer 2012) 699–707, paras 4, 18.

[44] Klabbers (n 38), para. 19.

[45] ibid, para. 17.

[46] Pauwelyn, Wessel and Wouters (n 3), 740.

[47] Nolte (n 39), 3.

[48] Convention (III) relative to the Opening of Hostilities (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 264; see Klabbers (n 38), para. 16.

More generally, customary international law continues to be relevant, despite the flourishing of treaty law in the recent past. Some of the most crucial rules of international law — the prohibition of genocide and torture, the prohibition of slavery and piracy, the rules on state responsibility and the no-harm rule — started as or continue to exist as customary international law. The intensified international interaction of our day and age may lead to a more rapid formation of customary rules in specific instances. On the other hand, today's preference of states for informal arrangements obviously also impacts upon customary law, as the essence of the *opinio juris* component relates precisely to the legally binding character of an obligation. With fewer multilateral conventions being generated, it becomes harder to find strong evidence of *opinio juris* confirmed by practice.[49]

While change in customary international law sometimes takes several decades, the 'passage of only a short period of time is', in the words of the International Court of Justice (ICJ), 'not necessarily, or of itself, a bar to the formation of a new rule of customary international law' if state practice is 'both extensive and virtually uniform'.[50] In some circumstances, fundamental changes or paradigm-shifting developments can expedite the formation of customary international law, and new rules and doctrines may emerge with unusual rapidity and acceptance. In this sense, it can be argued that the Nuremberg precedent and the universal and unqualified endorsement of the Nuremberg Principles by the U.N. General Assembly in 1946 resulted in an accelerated formation of customary international law, including the mode of international criminal responsibility now known as Joint Criminal Enterprise liability.[51]

The continued existence of a rule of customary international law depends on a continual state practice and a stable *opinio juris*. If many states defect, a rule can lose its status of customary international law. Compliance and change are thus entwined: A state that violates a rule of customary international law creates a precedent that may lead the rule to change or disappear.[52] Different from treaties, customary international law does not include flexibility provisions that allow a state to suspend or breach its obligations. A relatively small number of defections can slowly build up until they reach a critical mass and a tipping point, beyond which defections accelerate and the rule of customary international law unravels.[53] An example of a major change in a rule of customary international law is provided by the transformation of sovereign immunity. The traditional rule of absolute immunity holds that states cannot be sued in the domestic courts of other states. Many states have switched to restrictive immunity, in which foreign states can be sued for their private or commercial activities, thus bringing about a change of the relevant customary international law.[54] By contrast, the 'humanization' of international law mentioned above is not

[49] Pauwelyn, Wessel and Wouters (n 3), 736.

[50] *North Sea Continental Shelf* [1969] 63, ICJ Rep 3 with regard to the formation of a new rule of customary international law on the basis on what was originally a purely conventional rule.

[51] Michael P Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge: Cambridge University Press 2013) 63ff. For the more radical concept of 'instant' customary international law, see Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law' (1965) 5(1) Indian Journal of International Law 23–48.

[52] Pierre-Hugues Verdier and Erik Voeten, 'How Does Customary International Law Change? The Case of State Immunity' (2015) 59(2) International Studies Quarterly 209–222, 209.

[53] Pierre-Hugues Verdier and Erik Voeten, 'Precedent, Compliance, and Change in Customary International Law' (2014) 108(3) American Journal of International Law 389–434, 395, 495.

[54] Verdier and Voeten (n 51), 210.

(yet) reflected in a general customary rule on immunity exceptions in cases of grave human rights violations.[55]

c) The Evolutive Nature of Jus Cogens

Beyond treaty and customary international law, the evolutive nature of *jus cogens* is recognized in Article 64 VCLT and unanimously accepted, though some doctrinal controversy regarding its source persists.[56] The emergence and evolution of peremptory norms is a two-level process.[57] According to the wording of the Vienna Convention, a peremptory norm must first become general international law, i.e., customary law or a general principle of law pursuant to Article 38(1) ICJ Statute. In a second step, it can be elevated to *jus cogens* by the international community. Accordingly, a change of peremptory norms presupposes a new ordinary *opinio juris* referring to the primary norms and an *opinio juris cogentis* that is necessary for establishing the special character of peremptory norms.[58] First, the norm comes into existence in the same way as any 'ordinary' norm of general international law. No qualified procedure applies. Even the higher hierarchical status of *jus cogens* norms does not require a higher threshold for achieving that rank as opposed to the creation of 'ordinary' international rules.[59] Statements at the Vienna Conference highlight that acceptance by a very large majority of states would suffice to establish the peremptory character of a norm.[60] Yet, the wording of Article 53 VCLT and the understanding of state parties at the time reflects an unstable compromise. Therefore, some uncertainty persists with regard to the emergence of *jus cogens*. Remarkably, the supposedly most important norms are based on the most uncertain mechanism of norm change.[61]

The strong ethical underpinning of peremptory norms might be able to compensate for deficiencies in universal acceptance of these norms, either at the level of normative content or at the level of peremptory character.[62] Therefore, the threshold for the change of peremptory norms

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[55] Heike Krieger, 'Between Evolution and Stagnation – Immunities in a Globalized World' (2014) 6(2) Goettingen Journal of International Law 177–216, 181ff.

[56] Anne Lagerwall, 'Article 64 Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (New York: Oxford University Press 2011), para. 4. On the modest role of *jus cogens* and the fragility of the core values underlying it, see also Erika de Wet, 'Linking International Law and Values: the (limited) effect of peremptory norms' in Heike Krieger and Andrea Liese (eds.), *A Metamorphosis of International Law ? - Tracing value changes in the international legal order from the perspectives of legal and political science*, forthcoming.

[57] Thomas Kleinlein, '*Jus Cogens* as the 'Highest Law'? Peremptory Norms and Legal Hierarchies' (2015) 46 Netherlands Yearbook of International Law 173–210, 195f.

[58] Władysław Czapliński, '*Jus Cogens* and the Law of Treaties' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff 2005) 83–97.

[59] Andreas L Paulus, '*Jus Cogens* in a Time of Hegemony and Fragmentation: An Attempt at a Re-appraisal' (2005) 74(3) Nordic Journal of International Law 297–333, 302f.

[60] Iraqi Chairman of the Drafting Committee Yasseen, United Nations Conference on the Law of Treaties, Official Records, First Session, 26 March–24 May 1968, Summary Records, UN Doc A/CONF.39/11, p. 472, para. 12. Also, consider the statement by US delegate Kearney, who referred to the 'absence of dissent by any important element of the international community' (United Nations Conference on the Law of Treaties, Official Records, Second session, 9 April–22 May 1969, Summary Records, UN Doc (A/CONF.39/11/Add.1, p. 102, para. 22). See Giorgio Gaja, 'The Protection of General Interests in the International Community: General Course on Public International Law (2011)' (2012) 364 Recueil des Cours 9–185, 56f.

[61] Paulus (n 58), 325.

[62] Jure Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International System?' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press 2012) 13–41, 26.

does not appear to be simply 'higher' than the threshold for 'ordinary' norms. State practice, by contrast, is seemingly irrelevant for establishing the peremptory status of a certain norm. The second sentence of Article 53 VCLT defines a peremptory norm of general international law as a norm *accepted and recognized* by the international community of states as a whole as 'a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[63] Different from the creation of customary international law in general, the creation of the special status of a norm as *jus cogens* obviously does not depend on a consistent state practice, but only on an *opinio juris cogentis*. The example of *jus cogens* demonstrates that we should not confuse normative strength and stability. Despite their normative strength, peremptory norms are not immune to change.

4. Interpretation and Informal Norm Change

a) Low Visibility of Interpretive Change

Apart from 'formal' changes in the sources of international law, international law can change through the shifting meaning of norm texts.[64] Interpretation can bring about 'informal' change by clarifying a previously unclear term, by reinterpreting a term or provision in a sense contrary to its original meaning, and even by reinterpretations that shade into modification.[65] Change through interpretation is mostly not very visible, for two reasons. First, the visibility of change is low simply because the words in the treaty stay the same while only their meaning is altered. Second, judicial interpreters tend to downplay their active role in order not to risk the legitimacy of their judgments. For example, the International Court of Justice has insisted several times that it cannot 'legislate', but only 'ascertain' the existence of relevant legal principles and rules.[66] As Stanley Fish explains, '[t]he enterprise of the law [...] is by definition committed to the ahistoricity of its basic principles. [...] [T]he very point of the legal enterprise requires that its practitioners see continuity where others, with less of a stake in the enterprise, might feel free to see change.'[67] For international courts, it is all the more important to portray their practice as firmly based on the law as it stands because state consent, as expressed in the rules of treaty and customary international law, is an important source of their legitimacy.[68]

Due to this 'outward show' of international courts as ascertaining and not developing or even changing the law, the view persists that interpretation uncovers the law that is already out there, contained and conserved in given norms.[69] While their presentation of legal argument conceals that interpretation actually and necessarily brings about change, it generally responds to

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[63] Italics my own.

[64] Ingo Venzke, 'Sources and Interpretation Theories: The International Lawmaking Process' in Samantha Besson and Jean d'Aspremont (eds), *Oxford Handbook on the Sources of International Law* (Oxford: Oxford University Press 2017) 401–421.

[65] Julian Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9(3) Law & Practice of International Courts and Tribunals 443–494, 457f.

[66] *Legality of the Threat or Use of Nuclear Weapons* [1996] 14, ICJ Rep 226. Also, see *Fisheries Jurisdiction (U.K. v. Iceland)* [1974] 23–24, ICJ Rep 3.

[67] Fish (n 8), 157.

[68] Ingo Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation' (2011) 34(1) Loyola of Los Angeles International and Comparative Law Review 99–131, 101.

[69] ibid, 99.

expectations of other participants in legal discourse and has the aptitude to constrain and allow for critique. Argumentative standards in legal discourse can contribute to the normative legitimation of international adjudication.[70] Accordingly, the rule of interpretation in the Vienna Convention (Articles 31 *et seq*.) functions less as a hermeneutical guide for the interpreter to arrive at goals such as the intentions of the parties to the treaty and does not directly impact upon the interpretive result. Rather, it is best understood as a structure for international legal argument and its presentation. However, the Vienna Convention forces the interpreter to make his or her arguments visible and thus requires a justification, which fosters the precedential value for future cases.[71]

Despite legitimacy concerns regarding 'law-making' by international judicial institutions, change is a necessary product of international adjudication. Since process of formal international law-making, described above, is cumbersome, international courts simply correspond to an existing social need for change. A specific legitimation problem of international judicial institutions still exists in an institutional asymmetry of legislation and adjudication. While — as a product of the 'judicialisation' mentioned in the introduction — a highly developed judiciary exists at the international level, legislative power is decentralized and essentially exists at the level of individual states. Unlike domestic courts, international judicial institutions are regularly not embedded within an overall context of democratic politics. Domestic (parliamentary) control is therefore curtailed, and law-making by international courts largely evades the reach of national parliamentary bodies. As pointed out above, procedures for amending treaties or alternative mechanisms for 'overriding' a specific judicial interpretation often requires unanimity or a qualified majority of state parties, which is difficult to attain. The processes of negotiating international treaties are slow and protracted.[72] The democratic premise that judicial law-making can be politically corrected with democratic majorities is hardly respected with international adjudication. Therefore, the lack of a fully-fledged political system at the international level creates a major problem of democratic legitimation.

b) Modes of Interpretive Change

Nonetheless, (judicial) interpretation is a significant mechanism of change in current international law. For this reason, the specific method of norm creation — like in the case of *jus cogens* — does not necessarily make norms more resistant to change. Dynamic or evolutive interpretation (in a broad sense) seeks to establish the meaning of a treaty at the time of its interpretation. Its effect is that while the words in a treaty stay the same their meaning is altered.[73] By contrast, static or contemporaneous interpretation asks for the meaning of treaty provisions and the circumstances prevailing at the time of the conclusion of the treaty.[74] The decision between evolutive or static interpretation is a question of inter-temporal law.[75] Established rules and practice of interpretation

[70] ibid, 107.

[71] Djeffal (n 21), 352.

[72] Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press 2014) 124.

[73] Djeffal (n 21), 19.

[74] Oliver Dörr, 'Article 31' in Oliver Dörr (ed), *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg: Springer 2012) 521–570, para. 23.

[75] Nolte (n 21), 1676.

include two basic modes of change via interpretation.[76] Both evolutive interpretation (in the narrow sense) and taking into account subsequent practice and agreements rest upon the intention of the parties that their treaty develop over time. Evolutive interpretation (in the narrow sense) is based on the *original* intention of the parties. This first mode of change is not a separate method, but rather the result of a proper application of the usual means of interpretation.[77] The second mode is based on the *later* intentions of the parties as expressed in subsequent conduct, namely subsequent agreements (Article 31(3)*(a)* VCLT) and subsequent practice (Article 31(3)*(b)* VCLT). 'Subsequent agreement' is a manifested agreement between the parties after the conclusion of a treaty regarding its interpretation or the application of its provisions. 'Subsequent practice' consists of conduct, including pronouncements, by one or more parties to the treaty after its conclusion regarding its interpretation or application.[78] The International Court of Justice recognized these two types of interpretive change — one based on the original intention of the parties, and the other based on their later intentions — in the *Navigational Rights* Case. According to the Court, the subsequent practice of the parties can result in a departure from the original intent on the basis of a tacit agreement between the parties. Moreover, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give some or all of the terms used a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.[79] In such instances, the Court considered it to be 'indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied'.[80]

The 'bifurcation'[81] of evolutive interpretation (in the narrow sense) and taking into account subsequent conduct as two modes of interpretive change does not imply that they can be kept separately. Rather, evolutionary interpretation and the taking into account of subsequent conduct are in principle mutually complementary, and are often used that way in practice.[82] Notably, subsequent conduct can also limit evolutionary interpretation.[83]

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[76] Moreover, founding treaties of international organizations may undergo change with the help of the doctrine of implied powers, cf. Klabbers (n 38), 15.

[77] Georg Nolte, 'Report 1 – Jurisprudence of the International Court of Justice and Arbitral Tribunals of Ad Hoc Jurisdiction Relating to Subsequent Agreements and Subsequent Practice: Introductory Report for the ILC Study Group on Treaties over Time' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford: Oxford University Press 2013) 169–209, 188.

[78] International Law Commission, 'First report on subsequent agreements and subsequent practice in relation to treaty interpretation: by Georg Nolte, Special Rapporteur' (19 March 2013) UN Doc. A/CN.4/660, 45 accessed 1 May 2018 (draft conclusion 3: definition of subsequent agreement and subsequent practice as means of treaty interpretation).

[79] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009], ICJ Rep 213; cf. Nolte (n 76), 184f; Arato (n 64), 445; Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' (2013) 38(2) Yale Journal of International Law 289–357, 307–348; Richard K Gardiner, *Treaty Interpretation* (2nd ed. Oxford: Oxford University Press 2015) 253, 317.

[80] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 78), 242f; cf. Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford: Oxford University Press 2014) 76–79.

[81] Bjorge (n 79), 77.

[82] Nolte (n 76), 184–188. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] 31, ICJ Rep 16; *Aegean Sea Continental Shelf (Greece v. Turkey)* [1978] 31, ICJ Rep 3.

[83] Bjorge (n 79), 76–79.

5. Theorizing Interpretive Change

a) Relationship Between Different Modes of Change

Although of relatively low visibility, informal change via interpretation clearly has its place in legal practice. This raises the question of how formal and informal change relate to each other and how interpretive change interacts with changing values and structural change. According to the outward show of international legal argument and its standard perception, change is taking place in terms of sources, and interpretation is uncovering what is already out there.[84] At this point, I should like to emphasise that both applying the doctrine of sources in order to ascertain the existence of rules, on the one hand, as well as interpreting these rules in order to determine their content, on the other hand, are matters of interpretation. When ascertaining the law, the judge, counsel, academic, activist, adviser or observer necessarily interprets some pre-existing standards of identification of law. What qualifies as law itself involves an act of interpretation.[85]

Legal method comprises different approaches as to how changes of overarching values can be reflected on the level of the interpretation of individual norms. Interpretative practice, particularly in some fields like human rights protection and international criminal law, increasingly invokes notions of fundamental values or community interests, which is possibly indicative of a deeper structural transformation of international society which influences understandings of interpretation.[86] In a meticulous study, Jochen Rauber has demonstrated the impact of legal values like human rights or the global environment, understood as legal principles, on the interpretation and judicial development of international law.[87] While Rauber offers a 'principle-based reconstruction', I have argued elsewhere that structural changes like the 'humanization' of international law and changing legal values actually find expression in certain 'burdens of justification'. International judicial institutions have placed new 'burdens of justification' on international actors like the UN Security Council and have developed legal presumptions of non-deviation that express fundamental values or 'constitutional concerns' such as human rights sensitivity or responsiveness to domestic preferences and subsidiarity.[88] Arguably, the international lawyers' very awareness of an increasing intertwining of overarching values and individual norms makes them worry that international law is particularly vulnerable if liberal values are now on the retreat.

b) Theoretical Perceptions of Interpretive Change

In legal practice, interpretation is obviously an important mechanism of change. However, mainstream positivism has some difficulties to conceptualise interpretive change. It struggles to reconcile the idea that legal provisions are 'posited' and come with fixed meanings attached to

[84] Venzke (n 67), 107.

[85] Jean d'Aspremont, 'Wording in International Law' (2012) 25(3) Leiden Journal of International Law 575–602, 580, highlighting (and criticizing) that practice even tends to blur the distinction between content-determination processes (or interpretation *stricto sensu*).

[86] Venzke (n 67), 114.

[87] Rauber (n 10), 491ff. (chapters 4 and 5).

[88] Thomas Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law' (2012) 81(2) Nordic Journal of International Law 79–132, 112ff.

them, only waiting to be uncovered, with the notion of interpretive change.[89] This understanding and even the notion that the norm is a 'frame' of possible meanings,[90] is difficult to uphold if one takes seriously central propositions of the linguistic turn in philosophy. In Ludwig Wittgenstein's formulation that would trigger the linguistic turn, words do not have a meaning other than that given to them by their use.[91] Semantic pragmatism teaches us that it is not possible to find meaning anywhere beyond the specific 'use of words'.[92] Consequently, law also only exists in its interpretative practice and is not something ready to be discovered. The content of legal expressions is shaped in the creative acts of interpretation. Interpretive practice shifts meanings and offers new reference points for legal discourse thereby contributing to the change of norms.[93]

One attempt to reconcile this conception of interpretive practice with legal positivism is to distinguish between interpretation and mere application of the law, as suggested by Marko Milanovic.[94] According to him, 'interpretation' denotes the activity of establishing the linguistic or semantic meaning of a legal text. 'Application', by contrast, refers to the activity of translating that text into workable legal rules to be applied in a given case. This distinction enables Milanovic to claim that the meaning of the word has not changed with the passing of time. What has changed is only the application of that meaning.

Milanovic's approach cannot explain that the meaning of the norm is generally not affected by the changing application. If norms do exist only in practice, if they do not have a fixed meaning, this cannot be the case. In language theory, the very question of whether there is a language 'behind' speaking provides a criterion for structuring the debate of the 20th century. The distinction between a universal scheme and the particular use serves as a criterion for sorting out those authors who plead for this methodological difference and those who reject it. On the one hand, we can identify proponents of a 'two-worlds model' of language, including Saussure and Chomsky, as well as Searle and Habermas. On the other hand, there are those philosophers, like Wittgenstein, Austin, Davidson and Derrida, who reject the separation between scheme and use as a methodological strategy.[95] If we share an understanding of law as language, a theory of evolutive interpretation in law cannot simply ignore this 'logical geography'[96] of 20th-century language theory and the fact that a 'two-worlds model' that distinguishes between 'abstract meaning' and 'application' does not make sense for a significant number of language philosophers, and tacitly side with the contested 'two-worlds model'.

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[89] Cf. Emmanuel Voyiakis, 'International Law, Interpretative Fidelity and the Hermeneutics of Hans-Georg Gadamer' (2011) 54 German Yearbook of International Law 385–420, 400.

[90] Hans Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (Leipzig: Deuticke 1934) 64f.

[91] Ludwig Wittgenstein, *Philosophical Investigations* (3rd ed. New York: MacMillan 1958) 43; cf. Richard Rorty, 'Wittgenstein, Heidegger, and the Reification of Language', *Essays on Heidegger and others: Philosophical papers* (vol 2, Cambridge: Cambridge University Press 1991) 50–65.

[92] Venzke (n 67), 115.

[93] Venzke (n 63), 1.

[94] Marko Milanovic, 'The ICJ and Evolutionary Treaty Interpretation' (14 July 2009) <https://www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation/> accessed 1 May 2018.

[95] Sybille Krämer, 'Is there a Language 'Behind' Speaking? How to Look at 20th Century Language Theory in an Alternative Way' in Volker Munz, Klaus Puhl and Joseph Wang (eds), *Language and World, Part Two: Signs, Minds and Actions* (Publications of the Austrian Ludwig Wittgenstein Society, New Series vol 15, Frankfurt, Paris, Lancaster, New Brunswick: Ontos 2010) 39–52, 39f.

[96] ibid, 39.

For our purposes, the suggestion is also unsatisfying because change actually reaches beyond mere application in some prominent international law cases and is also presented in that way. In the case law of the ICJ, some of the Court's evolutive interpretations clearly go beyond mere changes in application. For example, the *Aegean Continental Shelf* Case raised the issue of ICJ's jurisdiction under the General Act for the Pacific Settlement of International Disputes of 1928. One of the intertemporal questions concerned the phrase 'domestic jurisdiction' in a reservation of Greece to the General Act, and whether it would apply to continental shelves. The ICJ opted for an evolutive interpretation that changed the very concept of territory and not only its application.[97]

Eirik Bjorge offers a further solution to the problem of how to reconcile positivism and interpretive change. He argues that evolutive interpretation is entirely explainable by reference to the concept of the common intention of the parties. Their common intention at the time the treaty was concluded, correctly understood, can be that later interpreters take into account the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.[98] Bjorge defines the intention of the parties as the product of general rules of interpretation correctly applied. He himself admits that this approach, which relies on interpretation in order to decide on the question of how to interpret intertemporal law, amounts to a circular definition and 'comes close to being a *petitio principii*'.[99]

While the idea that the task of good interpretation is to retrieve authorial or legislative intention is difficult to reconcile with taking the object of interpretation to be a living instrument,[100] a different understanding of interpretation reconciles insights of the linguistic turn and positivism. For positivists, interpretation need not necessarily refer to 'the intention of the parties'. In Emmanuel Voyiakis' terminology, there is, beyond positivism as 'intentionalism', a second strand of positivist understandings of interpretation: 'conventionalism'. 'Conventionalists' like Stanley Fish,[101] Detlef Vagts[102] and Ian Johnstone[103] have taken on board many of the insights of 20th-century philosophy into the intersubjective nature of language and the public character of the standards of its use. For them, legal meaning turns on the state of contemporary conventions. The interpreter's question then is what the interpretive convention is that members of this community currently share. Accordingly, evolutive interpretation is rather the rule and not the exception. It is the consensus in the profession — the invisible college of international lawyers[104] — that determines, at any moment, whether a particular argument is or is not persuasive, whether or not interpretive change is

[97] *Aegean Sea Continental Shelf (Greece v. Turkey)* (n 81), 33f.; cf. Djeffal (n 21), 222f. For further examples, see Djeffal (n 21), 219ff.

[98] Bjorge (n 79), 77.

[99] ibid, 63, relying on 'Report of the International Law Commission on the work of its sixty-fifth session, 6 May to 7 June and 8 July to 9 August 2013, Chapter IV', UN Doc. A/68/10, 27 accessed 1 May 2018.

[100] Voyiakis (n 88), 400.

[101] Stanley E Fish, *Is There a Text in this Class? The Authority of Interpretive Communities* (6th ed. Cambridge, Mass.: Harvard University Press 1980); Fish (n 8).

[102] Detlev Vagts, 'Treaty Interpretation and the New American Ways of Law Reading' (1993) 4(4) European Journal of International Law 472–505.

[103] Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12(2) Michigan Journal of International Law 371–419; Ian Johnstone, *The power of deliberation: International law, politics, and organizations* (New York: Oxford University Press 2011).

[104] For this prominent notion, see Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72(2) Northwestern University Law Review 217–226.

achieved.[105] Interpretation is the object of the semantic struggles[106] that take place in the community. Identifying interpretive communities is not straightforward. Boundaries are fluid and intersecting and community members increasingly interact and overlap. International law has many different interpreters and associated perspectives: judges and arbitrators on international courts and tribunals, national courts, government legal advisers, the staff of international organizations, and a wide range of non-state actors.[107] Obviously, these challenges and uncertainties make it difficult to evaluate change. If nothing else, the concept of interpretive communities draws our attention to struggles about who is a relevant member of the community and thus, contestations about the modes of interpretative change,[108] as a further indication of instability.

Unlike the approaches discussed before, 'conventionalism' does not provide a complete structure for international legal argument and its presentation. Interpreters would not present their interpretation of the law by simply referring to the consensus of the profession. According to Article 31(1) VCLT, this consensus can indeed be relevant with regard to the 'ordinary meaning to be given to the terms of the treaty'. However, this is qualified by the context and object and purpose of the treaty (Article 31(2) and (3) VCLT). Consequently, 'conventionalism' rather aims at explaining 'interpretation' from a different perspective. Keeping these perspectives separately as 'internal' perspective of the interpreter and 'external' perspective of the theorist, however, is not that simple for the very ambition of the rules of interpretation themselves to determine the relevant interpretive communities.

The concept of interpretive communities explains why neither interpretation can produce one single stable meaning, nor can the theory of sources provide full stability in the process of law ascertainment. Meaning is constructed and not extracted through interpretation.[109] International law is not only a set of rules, but also an argumentative practice aimed at persuading target audiences.[110] Other members of the interpretive community may accept interpretive change because they are convinced by it, genuinely agree with it, or because they succumb to it as they either falsely agree or as they submit due to material forces at play. At the abstract level of theory,

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[105] Martti Koskenniemi, 'Methodology of International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press 2008), para. 1; Jean d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International law* (Oxford: Oxford University Press 2015) 111–129, 114.

[106] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press 2012); Ralph Christensen and Michael Sokolowski, 'Recht als Einsatz im Semantischen Kampf' in Ekkehard Felder (ed), *Semantische Kämpfe: Macht und Sprache in den Wissenschaften* (Linguistik – Impulse & Tendenzen vol 19, Berlin, New York: De Gruyter 2006) 353–371. Bourdieu has offered a view of law as a product of the struggle between different actors: Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38(5) Hastings Law Journal 814–853; cp. Yves Dezalay and Mikael R Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' (2012) 8 Annual Review of Law and Social Science 433–452.

[107] Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International law* (Oxford: Oxford University Press 2015) 147–165, 152, 155.

[108] See, for example, the debate about the role of international organizations in the formation and determination of rules of customary international law Niels Blokker, 'International Organizations and Customary International Law' (2017) 14(1) International Organizations Law Review 1–12.

[109] d'Aspremont (n 104), 114.

[110] Andrea Bianchi, 'The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International law* (Oxford: Oxford University Press 2015) 34–57.

as well as in the study of specific instances of interpretative practice, it is necessary to account for the possibility of both reason and the role of power, rhetoric and violence.[111] At this abstract level, the concept of interpretive communities offers a plausible explanation for the fact that change in international law is not easy to achieve even for the most powerful states. The complexity of interpretive communities and the plurality in the convictions of its members make international law resistant to sudden change. Yet, this does not mean that the legal character of a norm generally makes it more resistant to change.

6. Conclusion

International law scholarship is struggling with the problem of how to conceptualize and evaluate change. On the one hand, standard narratives on change like those presented in the introduction are widely shared. On the other hand, methodological uncertainty — and even a certain lack of scholarly attention — persists with regard to the question of how to perceive change. On the one hand, the notion of 'change' figures prominently in scholarly discourses. On the other hand, change is sometimes not directly visible because international lawyers have good reasons to downplay their own role in bringing about interpretive change. An examination of how international law changes demonstrates that the international legal order is less stable than the doctrine of sources and cumbersome processes of treaty revision suggest. Due to the restrictions in the avenues of formal change, the importance of informal change in interpretation as a mechanism of change should not be underrated. In any case, change is a matter of interpretation. In interpretation, changing values can play out at least in new or shifting burdens of justification and presumptions of non-deviation. To complicate further the conceptualization of change, structural and norm changes interact, mostly in legal interpretation, and the example of jus cogens teaches us that we cannot simply equate normative strength and stability. Precisely the informality of change might be a challenge for international lawyers, who are trained as formalists. However, if we take the interpretive community as the locus of interpretive change seriously, international lawyers should be well aware of their own role in the change of international legal norms and values.

[111] Venzke (n 63), 25. For interpretation as rhetoric and violence, respectively, see Ian Scobbie, 'Rhetoric, Persuasion, and Interpretation in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International law* (Oxford: Oxford University Press 2015) 61–77; Robert M Cover, 'Violence and the Word' (1986) 95(8) Yale Law Journal 1601–1629.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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