German Law Journal (2026), **27**, pp. 240–275
doi:10.1017/glj.2025.10170

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Self-Presentation in International Law: On Reputation and Interpretation

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(Received 30 August 2024; accepted 07 February 2025; first published online 13 November 2025)

Abstract

This Article brings together two important concepts in international law scholarship that have thus far been studied in isolation from each other: reputation and interpretation. Interesting insights lie hidden in their overlap. While interpretation is still commonly perceived as a sterile exercise in "legal logic," the Article suggests that it is often better studied as a social practice, within which the relationships between the interpreters that are arguing with each other frequently matter as much as the arguments themselves. The Article therefore suggests a new way of looking at interpretation in international law: Interpretation as a practice of reputation management, where collective actors like states present themselves to others in the interpretations they adopt, and are evaluated by various audiences on the basis of these interpretations. The main argument can be summarized like this: If international law is relatively indeterminate, interpretation is a situated choice. By making that choice, an interpreter reveals something fundamental about itself to its audiences. Interpreters therefore carefully manage their interpretive expressions out of a desire to be well-regarded by these audiences. This phenomenon of reputation management has important implications for the practice of interpretation in international law.

Keywords: Reputation; interpretation; international law; practice theory; indeterminacy; sociology of international law; recognition; critical; compliance; identity

A. Introduction

People's behavior changes in the presence of others. When they feel the eyes of others resting on them, people usually make an effort to show a flattering side of themselves. Such attempts to acquire favorable opinions among others are ubiquitous in human interactions.[1] Indeed, they are not foreign to the practice of international law either.[2] Also here, actors cannot escape the opinions of others. This goes for individuals, but also for the collective actors like states that this Article focuses on.[3] The Article applies the ostensibly very mundane insight that actors care deeply

[1]This is well supported in social psychology literature. *See* Melissa Bateson, Daniel Nettle & Gilbert Roberts, *Cues of Being Watched Enhance Cooperation in a Real-World Setting*, 2 BIOLOGY LETTERS 412, 412–14 (2006) (explaining a classic experiment where an image of a pair of eyes on a coffee machine creates the feeling of being watched and thereby increases "honesty").

[2]There is plenty of work that suggests that collective actors in international law also care about the opinions of others. *See, e.g.*, ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 71–117 (2008) (arguing that reputation is an important motivation for state behavior in relation to international law).

[3]While this Article focuses mainly on states, other collective actors on the international plane certainly also care about the opinions of others. *See* Kristina Daugirdas, *Reputation as a Disciplinarian of International Organizations*, 113 AM. J. INT'L L. 221, 221–71 (2019) (discussing international organizations and reputation).

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https://doi.org/10.1017/glj.2025.10170 Published online by Cambridge University Press

about the opinions of others to a practice that has curiously escaped detailed scrutiny from this perspective: The practice of interpretation in international law.[4] While interpretation is still commonly perceived as a rational, almost sterile exercise in "legal logic," this Article shows that it is often better studied as a deeply social practice, within which the relationships between the interpreters that are arguing with each other frequently matter just as much as their actual arguments. The opinions and assumptions of audiences, bundled together in reputations, are among the most prominent ways through which these social relations find expression in the practice of interpretation in international law.

This Article thus brings together two heavily researched concepts that have thus far been studied in isolation from each other: reputation[5] and interpretation.[6] Interesting insights lie hidden in their overlap. To capture these insights, the Article suggests a new way of looking at interpretation: Interpretation as a practice of *reputation management*,[7] where collective actors present themselves to others in the interpretations they adopt, and are evaluated by various audiences on the basis of these interpretations. The Article's main argument can briefly be summarized like this: If international law is—relatively—indeterminate, interpretation is a situated choice.[8] By making that choice, an interpreter reveals something fundamental about itself to its audiences. Interpreters therefore carefully manage their interpretive expressions out of a desire to be well-regarded by particular reference groups. This phenomenon of reputation management has important implications for the practice of interpretation in international law.[9]

The idea of interpretation as reputation management finds strong support in international legal practice. When interpreters are confronted with interpretive choices, reputation often figures prominently as a motivation in the decision-making process. Harold Koh faced many interpretive choices during his tenure as the United States State Department's legal advisor. In 2010, he gave his opinion on a longstanding interpretive controversy: The delimitation of the geographic scope of the International Covenant on Civil and Political Rights (ICCPR). Article 2(1) of the ICCPR stipulates that states parties have obligations "to all individuals within its territory and subject to its jurisdiction." This formulation has given rise to a persistent dispute: The word "and" can be read to indicate that "within its territory" and "subject to its jurisdiction" are cumulative requirements for the ICCPR's application, or, instead, that either one of these situations suffices. In the latter case, the ICCPR could also apply extraterritorially. While an increasing number of interpreters, including the UN Human Rights Committee ("Committee" or "Human Rights Committee") and the International Court of Justice,[10] have accepted this perspective, the United

[4]*But see* Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371, 371–419 (1991). *See also* Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 715 (1988) (hinting at influence of reputation on matters of interpretation). Furthermore, some of Fuad Zarbiyev's interesting recent essays touch upon similar issues, albeit from a slightly different angle; *see* Fuad Zarbiyev, *International Law in an Age of Post-Shame*, 9 EUR. SOC'Y INT'L L. 1, 1–7 (2020), https://esil-sedi.eu/wp-content/uploads/2020/07/ESIL-Reflection-Zarbiyev-2.pdf. These works, however, while certainly valuable, do not analyse reputation's role in interpretation in great detail. As will become clear, the concept of reputation that this article introduces is much more developed and differs significantly from the ones employed in these texts.

[5]Scholarly attention for reputation in international law goes all the way back to Hugo Grotius. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS: LIBRI TRES: IN QUIBUS IUS NATURAE ET GENTIUM ITEM IURIS PUBLICI PRAECIPUA EXPLICANTUR para. 27 (Bernardina J. de Kanter-van Hettinga Tromp, B. J. A. de van Kanter-Hettinga Tromp & Robert Feenstra eds., 1939); Hugo Grotius, *Cap. VI: De Fide Et Perfidia*, 36 GROTIANA 106, 171, paras. 76–77 (2015).

[6]That interpretation is a classic theme in legal scholarship requires no elaboration; interpreting is what lawyers do.

[7]ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 208–37 (1959) (The expression "reputation management" is a play on Erving Goffman's "impression management," presented in this book.).

[8]*See infra* Section B (explaining the indeterminacy thesis in more detail).

[9]*See infra* Section D.

[10]U.N. Human Rights Comm., *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 108–12 (July 9).

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States has long opposed the ICCPR's application outside of its own territory. In an attempt to resolve the interpretive question, Koh first looks towards the rules of interpretation in the Vienna Convention on the Law of Treaties (VCLT). These, however, offer little help. After studying the language, context, object and purpose, negotiating history, and even subsequent practice, a singular "correct" legal interpretation of the provision is still nowhere to be found.[11]

Koh therefore decides to look beyond the legal materials themselves for guidance. He argues that "revising our legal position to recognize some application of the ICCPR to U.S. conduct abroad would have a salutary effect on our international *reputation*."[12] What he seems to suggest here is that legal interpretation can be a particularly effective tool for reputation management: By reinterpreting the geographic scope of the ICCPR, the United States could portray itself as a defender of human rights. I will argue that for many reasons, interpretations of international law are indeed particularly potent tools to communicate certain qualities to others. Such reputational considerations are therefore as pervasive—if not even more so[13]—in the practice of interpretation as they are outside of it.

As reputation guides the interpretive choices of the many interpreters engaged in international legal discourse, it shapes that discourse in specific ways. The Article shows that reputation can thereby shed light on one of international law's most persistent puzzles: its stabilization and change. Reputation forces the interpreter to take the opinions of audiences into account and to meaningfully engage with them. This constrains the interpretive freedom left by the indeterminate legal materials themselves and drives stabilization and change in two important ways: (1) It stabilizes the interpretations of individual, collective interpreters like states, because to acquire, maintain, and uphold a desired reputation, interpreters have to consistently project the corresponding image; an image that, as a result of consistent performances will be internalized over time; (2) it stabilizes interpretations within and across communities of interpreters because it often—though not always, context is essential—functions as a motivational mechanism for interpretive convergence, leading to a single or at least a limited number of dominant interpretations. It is only when interpretations stabilize, that legal meanings emerge.[14]

This Article emphasizes a fundamentally different role of reputation in international legal practice than the one traditionally highlighted in scholarship. While reputation has firmly been established as an important explanatory component of state behavior in relation to international law, it is currently foregrounded primarily as a reason for states to *comply* with international law.[15] The dominant rationalist view on compliance argues that states refrain from violating international law because it undermines their reputations, and thereby their ability to cooperate with others.[16] Although this perspective on reputation's work has a lot of merit, I will argue that it also comes with significant downsides that necessitate its reconsideration. This Article will focus primarily on two of the most important ones: its problematic embrace of a one-dimensional concept of reputation itself, and its simplistic notion of law rooted in orthodox legal positivism. The Article shows in detail how sacrificing complexity for an easy-to-use compliance model obscures more nuanced and yet more interesting ideas about reputation and its role in international law. It ultimately warrants the conclusion that these compliance theories[17] have sold

[11]U.S. Dep't of State, Office of the Legal Advisor, Harold H. Koh, Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights (Oct. 19, 2010) at 5–49. *See also* Fuad Zarbiyev, *The 'Cash Value' of the Rules of Treaty Interpretation*, 32 LEIDEN J. INT. L. 33 (2019) (convincingly explaining the use of the rules of treaty interpretation).

[12]KOH, *supra* note 11, at 5.

[13]*See infra* Section C.III.

[14]See *infra* Sections C, D in detail.

[15]*See generally* GUZMAN, *supra* note 2.

[16]*See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1845–1846 (2002).

[17]Compliance theory is the branch of international legal theory that deals with the question why states comply with international law in the absence of an effective centralized enforcement mechanism.

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the role of reputation significantly short: Reputation has already done a considerable amount of work before compliance theory actually makes sense, by stabilizing legal interpretations and thereby demarcating what it means to comply with a rule of international law from what it is to violate it.[18]

To carve out reputation's complex nature and broader role in international law, the Article proceeds by first outlining a more nuanced view of law and legal interpretation than the one employed in rational choice accounts of reputation (Section B). It shares the conviction of the recent turn to practice that international law and legal meanings are fundamentally a product of the practices they are embedded in.[19] But recognizing that international law is constituted in practice is only a first step to approaching questions of *how* international law is actually made and remade within this practice. A crucial question in this regard is how the practice of interpretation in international law stabilizes and changes particularly considering the decentralized nature of international law. Against this background, Section C (re)emphasizes the social nature of interpretation in international law, and argues that precisely because interpretation in international law is a social practice, reputation has a crucial part to play. From there, it suggests a new way of thinking about reputation and its role in the practice of interpretation. Section D then develops this role in processes of stabilization and change in the practice of interpretation in international law. In light of this role, Section E reflects on reputation's normative implications. It warns that even though reputation is often pictured as a force of "good" in international law, its role comes at a price, making any acontextual assertions about its emancipatory potential questionable. Scholars and practitioners would therefore do well to develop a critical sensibility towards reputation management, to be aware of what is obscured by public performances. Section F concludes and provides an outlook on the role of reputation in legal research. It suggests not only that reputation can be a useful analytical tool to better understand interpretive decisions and dynamics, but that it can thereby also serve as a starting point for an emancipatory research agenda. Throughout this Article, I draw on various examples to illustrate how these ostensibly abstract considerations on reputation and interpretation can help to explain concrete situations and broader dynamics in international law.

B. Interpretation as Practice and Struggle

Law is closely bound up with the project of modernity. By providing a rule-based framework for interactions, it purports to increase the predictability of human behavior.[20] Supposedly then, law imposes order upon an otherwise chaotic and complex modern world. The rationalist bend of compliance theory in international law draws on some of these modernist assumptions about law and its rationalizing work. It argues that international law demarcates what is lawful from what is unlawful behavior. By attaching negative consequences to violations and positive ones to compliance, international law influences the behavior of states.[21] Based on an analysis of the costs and benefits attached to a behavioral decision, the behavior of states can be predicted. It facilitates

[18]*See infra* Section D.

[19]*See, e.g.*, Nicolas Lamp, *The 'Practice Turn' in International Law: Insights from the Theory of Structuration, in* Research Handbook on the Sociology of International Law 1, 1–21 (Moshe Hirsch & Andrew Lang eds., 2018); Nikolas Rajkovic, Tanja E. Aalberts & Thomas Gammeltoft-Hansen, The Power of Legality: Practices of International Law and Their Politics (2016) (both works explicitly identifying the "turn to practice" in international law).

[20]Max Weber already recognized the importance of law in the rapidly modernizing society of his time, highlighting its role in an ever-more encompassing system of rationality that makes interactions "calculable" and thereby paves the way for more complex political and economic relations. *See* Max Weber, Economy and Society: An Outline of Interpretive Sociology 337 (1978). *See also* Friedrich A. von Hayek, The Constitution of Liberty 153 (1978) (similarly illustrating the role of law: "The significance for the individual of the knowledge that certain rules will be universally applied is that . . . [h]e knows of man-made cause-and-effect relations which he can make use of for whatever purpose he wishes.").

[21]*See* Guzman, *supra* note 2, at 1845–46. *See also* Robert Owen Keohane, After Hegemony: Cooperation and Discord in the World Political Economy 105–06 (1984).

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rational interactions between them. When the relationship between law and its social impact is understood in this way, policymakers can also instrumentally make use of law to "rationally" pursue certain societal goals.[22]

Compliance theory leans heavily on the determinacy of law. In the picture it paints, it should be relatively straightforward what legal rules mean and how they are applied to practical situations. If the rules do not demarcate the lawful from the unlawful, the term "compliance" would make little sense; for what is there to comply with?[23] Its commitment to legal determinacy seems to tie compliance theory to an orthodox view of legal autonomy: Law comes into existence by virtue of a distinct political process of law creation, and by virtue of that process—the "source" of law—the adopted legal rules leave the political sphere and enter the exclusive domain of law.[24] Within this "legal order," there is supposedly no space for other considerations; law functions as a distinct and autonomous normative system that determinatively spells out what is a lawful course of action in concrete situations.[25] How this happens exactly is not a question compliance theory concerns itself with. What happens inside legal practice remains a black box. Compliance theory is content to submit that legal rules demarcate lawful from unlawful conduct and thereby offer relatively clear instructions for behavior.[26]

The orthodox picture of legal autonomy that compliance theory leans on, however, cannot live up to its promise. In the early 20th century, legal realism—in many ways a curious precursor to today's compliance theory in international law[27]—had already put a few dents into the idea of legal autonomy, arguing that judges hardly follow a strictly "legal logic" when they decide cases.[28] With the inauguration of postmodernism came a further disenchantment with the determinacy and autonomy of law. Taking up insights from postmodernism and linguistic pragmatism, critical legal scholars have forcefully argued that law is indeterminate and does not spell out singular correct solutions to practical disputes about the lawfulness of behavior.[29] With regard to international law, Martti Koskenniemi concluded that "it is possible to defend any course of action—including deviation from a clear rule—by professionally impeccable legal arguments."[30] Next to *semantic* indeterminacy—the indeterminate meaning of words and phrases—a "new

[22]*Cf.* Martti Koskenniemi, *Formalism, Fragmentation, Freedom: Kantian Themes in Today's International Law*, 2007 No Founds.: J. Extreme Legal Positivism 7 (2007) (providing a critical assessment of this instrumentalist outlook).

[23]*See generally* Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 Glob. Pol'y 127 (2010).

[24]*See* Stanley Ingber, *The Interface of Myth and Practice in Law*, 34 Vand. L. Rev. 309, 311–12 (1981) (clarifying how the myth of legal autonomy is sustained). *See generally* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 Hastings L.J. 814 (1987).

[25]*Cf.* Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 28 (2005) ("But the crux is that we believe, and hold important, that it is at least possible to discover one or several 'legal' solutions at the exclusion of other, legally inadmissible ones. The choice one is faced with is not free, but is constrained by law.").

[26]*See* Guzman, *supra* note 2, at 93–96 (providing a more nuanced perspective on this; his discussion of interpretation is limited, however, and primarily plays a role where a state may want to avoid reputational damage. The effect of reputational concerns *on* the rule and its interpretation is not dealt with).

[27]The shared idea behind them is that social sciences can provide insights into law's operation in practice. Compliance theory, however, has not taken up the ideas of legal indeterminacy and the incompleteness of "legal logic" that early legal realism had focused on, but rather definitively shifted attention to the way law steers behavior—thereby often leaping over the problem of legal interpretation which mediates between law and behavior.

[28]*See* Oliver W. Holmes, *Book Notices*, 14 Am. L. Rev. 233, 234 (1880) (already writing: "The life of the law has not been logic; it has been experience.").

[29]*See* Roberto Mangabeira Unger, Knowledge and Politics 80–81 (1984) (classically developing this argument); *see generally* Roberto M. Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983) (providing an overview of the arguments of the early Critical Legal Studies Movement). For similar arguments in international legal scholarship, *see generally* Koskenniemi, *supra* note 25; David Kennedy, International Legal Structures (1987). *But see* Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 Am. J. Int'l L. 351 (1999) (slightly resisting the "Critical Legal Studies" label). *See generally* Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 Harv. Int'l L.J. 81 (1991) (providing a helpful overview of critical scholarship in international law).

[30]Koskenniemi, *supra* note 25, at 591.

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stream" of scholarship with Koskenniemi and David Kennedy at its forefront revealed international law's *structural* indeterminacy. International law has contradictory premises, which allow conflicting underlying reasons, values, and practices within international law to be mobilized in distinct argumentative patterns—a descending pattern based on deductions from the normative to the particular, or conversely an ascending pattern based on inductions from the practice to the normative.[31] That means that for any position, a valid legal argument is always available; but of course the same goes for the exact opposite position. In this view, no interpretation is logically privileged over another. Instead, legal texts leave their meaning open, and interpretation becomes a situated choice. This critique has fundamentally undermined the traditional picture of interpretation as an autonomous, logical process determined solely by the legal materials.[32] It also poses problems for compliance theory: If interpretation is a situated choice, compliance is in the eye of the beholder.[33]

Recent scholarship in international law has therefore moved away from rigid formalism and embraced a view of legal interpretation as a *practice*.[34] Meanings are not anchored in legal texts, but (re)made within the practice of interpretation.[35] The turn to practice takes interpretation to be performative in the sense that the meaning of legal texts is not simply "there" to be discovered, but created and developed with each and every interpretive act. Ingo Venzke summarizes that "interpretations take part in the creation of what they purport to find,"[36] and therefore, yet more condensed in the title of his book, *Interpretation Makes International Law*. Interpretive acts leave their marks within a community of international lawyers concerned with the interpretation of legal texts and therefore affect the ways in which international law is put into practice. Through these engagements in practice, communities of international lawyers acquire shared "background understandings," allowing them to read and interpret international law in specific and relatively similar ways.[37] These background understandings are passed on from generation to generation: Aspiring lawyers are taught "correct" and "incorrect" ways of using the law during a socializing process in legal practice *en route* to becoming "competent" lawyers. A competent lawyer, then, is able to tell the difference between arguments that are likely to succeed, and those that are not. Though changes happen when this background knowledge is passed on, it gives at least some stability to an otherwise open game of interpretation.[38]

When socialization is successful, these background understandings are so deeply embedded in the mental frameworks of lawyers that, in the words of Beckett, the "inevitable ambiguity [of law] is always already, subconsciously, suppressed."[39] A number of international law scholars have employed Bourdieu's helpful notion of "habitus" to refer to similarly internalized dispositions that

[31] *See* Koskenniemi, *supra* note 25, at 59.

[32] *See* Jan Klabbers, *Towards a Culture of Formalism? Martti Koskenniemi and the Virtues*, 27 Temp. Int'l & Comp. L.J. 417, 417–18 (2014) (capturing the significance of the critical intervention in international law scholarship with a humorous anecdote).

[33] *See infra* Section D.I.

[34] *See generally* Ingo Venzke, How Interpretation Makes International Law: On Semantic Change and Normative Twists (2012).

[35] *See generally* J. L. Austin & James O. Urmson, How to Do Things with Words: The William James Lectures Delivered at Harvard University in 1955 (1975) (arguing the point that words are deeds with world-making effects.)

[36] Venzke, *supra* note 34, at 17.

[37] *See generally* Stanley Eugene Fish, Is There a Text in This Class? The Authority of Interpretive Communities (1982) (popularizing the idea of such an "interpretive community"). For an overview and discussion of the use of this and related concepts in international law, *see* Jean D'Aspremont, Epistemic Forces in International Law: Foundational Doctrines and Techniques of International Legal Argumentation 1–30 (2015).

[38] *See* Andrea Bianchi, *The Game of Interpretation in International Law: The Players, the Cards, and Why the Game Is Worth the Candle, in* Interpretation in International Law 34, 52 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015).

[39] Jason A. Beckett, *Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project*, 7 German. L.J. 1045, 1057 (2006).

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result from processes of socialization, making acting "habitual" or "natural."[40] Bourdieu explains that habitus is indeed unconscious competence, "a modus operandi of which he or she is not the producer and has no conscious mastery."[41] It is not, then, the positive law itself that spells out the solutions to legal problems; it is the fact that interpreters are always socialized in specific contexts and communities within which they usually no longer recognize or deem viable the various possibilities that the law offers in the abstract. Instead, only a number of interpretive possibilities seem "natural," while others seem "bizarre."[42]

This turn to practice is indeed a convincing way forward. But acknowledging that interpretation should be understood as a practice is only a first step to approaching the workings of law, and raises just as many questions as it answers. What does this practice actually look like? What motivations are at play if interpretation is not just a sterile act of rationally distilling a correct answer from the legal materials? Interpretation is constrained by background understandings, but they hardly close down all discretion. How do interpreters make sense of situations where multiple viable interpretations are available, and where law and legal habitus have, so to say, run out?

Building on the insights above, critical legal scholars have emphasized that the practice of interpretation should—also—be understood as a site of *struggle*.[43] Given that interpretations *make* international law,[44] the interpreter wields power: It can shape the law with its interpretations. That means it can bend the law towards its self-interest if its interpretive acts succeed.[45] Because international law distributes important—ideational and material—and often long-term gains and losses among states and other actors, these actors commonly contest legal meanings.[46] Western states, for instance, usually benefit from interpreting rules on intellectual property protection so as to strengthen protection, while states from the Global South tend to lose.[47] Whichever interpreter succeeds in establishing its preferred interpretation as dominant, or even "universal" or "correct," has managed "to lock in gains" and secured "an improved starting position in the next round."[48] The "losers" face an uphill battle against an inconvenient interpretation that is now entrenched in legal practice.[49]

[40]*See* Andrea Bianchi, *Reflexive Butterfly Catching: Insights from a Situated Catcher, in* INFORMAL INTERNATIONAL LAWMAKING, 200, 212–13 (Joost Pauwelyn, Ramses A. Wessel & Jan Wouters eds., 2013); *see* Bianchi, *supra* note 38, at 37. *See generally* Jakob V. H. Holtermann & Mikael R. Madsen, *European New Legal Realism and International Law: How to Make International Law Intelligible*, 28 LEIDEN J. INT'L. L. 211 (2015); STANLEY EUGENE FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1999) (developing the idea that interpretations come "naturally").

[41]PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 79 (1977). *See also* PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE 468 (1984) ("[T]he cognitive structures which social agents implement in the practical knowledge of the social world are internalized, 'embodied', social structures ... which ... function below the level of consciousness and discourse.").

[42]*Cf.* Barry Stroud, *Wittgenstein and Logical Necessity*, 74 PHILO. REV. 504, 513–14 (1965).

[43]*See generally* DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016).

[44]*See generally* VENZKE, *supra* note 34.

[45]*See generally* Ingo Venzke, *Legal Contestation About 'Enemy Combatants': On the Exercise of Power in Legal Interpretation*, 5 J. INT'L L. & INT'L REL. 155 (2009).

[46]*See* Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMB. REV. INT'L. AFFS. 197, 199–200 (2004) (employing the term "hegemonic contestation": "By hegemonic contestation I mean the process by which international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents.")

[47]The interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is therefore heavily disputed. *See generally* JUSTIN MALBON & CHARLES LAWSON, INTERPRETING AND IMPLEMENTING THE TRIPS AGREEMENT: IS IT FAIR? (2008).

[48]KENNEDY, *supra* note 43, at 56.

[49]*See* VENZKE, *supra* note 34, at 58. Compliance, here, emerges only as an afterthought: The real prize, an interpretation that authoritatively sets out what the law is and thus demarcates compliance from violation, has already been given away. The "losers" are evaluated against the standards set by others.

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The continuous contestation is exacerbated by the fact that international law, as opposed to domestic legal systems, frequently lacks centralized mechanisms for the resolution of disputes about the "correct" application and meaning of its norms. In the absence of centralized dispute-settlement mechanisms with the ability to bring disputes to an end, the interpretation of international law remains to a large extent in the hands of the most important norm-addressees themselves: states and international organizations.[50] Interpretation in international law is, therefore, often a practice of *self-interpretation*, where the very actors that interpret the law have an important stake in the game. This has the potential to fundamentally undermine the stability of international law. With legal texts open to conflicting interpretations, law itself cannot offer a stable foundation to legal practice. The result is that interpreters with different backgrounds and divergent interests associated with the law will usually come to conflicting conclusions about what the law means in practice. Legal meanings are only stable in the absence of dispute;[51] and because law distributes important stakes for actors, such disputes are often unlikely to subside out of the blue.

It draws attention to the question of how struggles over competing interpretations of international law are resolved. Certainly, socialization goes some way in explaining this question; but explanations based on a process of socialization that instils a similar habitus in actors rely on a practice that is, to a large extent, *already* stable. For if legal discussions were still open, with different interpreters embracing different positions, these differences would be reproduced through socialization. The same discussions would flare up again in the next generation of interpreters. In international law, where different domestic legal cultures clash, disagreements are yet more persistent.[52] Explanations that refer to interpretive communities and background understandings, then, only go as far as there is agreement; between competing communities and ideas, they are silent.[53] It raises a fundamental question of international legal theory: If the rules found in legal texts themselves do not stabilize practice, what does? What explains the transition from indeterminacy in the abstract to the relative stability and determinacy experienced in practice?

The question of stabilization and change is not merely of theoretical relevance. When legal materials such as treaties enter into force, their content is often fraught with ambiguity. States and other actors often have very widely divergent interests associated with the law, and usually struggle to agree on a text. "A treaty is a disagreement reduced to writing,"[54] Philip Allott therefore famously observed. When the meaning of treaties is left open, the same divergent interests and preferences that led states to the adoption of open-ended norms in the first place will undoubtedly be reproduced in the interpretations of these norms. After the adoption of legal texts, the political

[50]*See* Fuad Zarbiyev, *On the Judge Centredness of the International Legal Self*, 32 EUR. J. INT'L. L. 1139, 1163 (2021) (convincingly questioning the contemporary "judge centredness" of international legal practice and scholarship, arguing instead that "[t]he default setting of international relations is the absence of an authoritative decision-maker with the power to bring disputes to a closure.").

[51]Many international lawyers have recognized this. *See* Andrea Bianchi, *Textual Interpretation and (International) Law Reading: The Myth of (in)Determinacy and the Genealogy of Meaning, in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY 34, 41 (Pieter H. F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010) (approvingly paraphrasing Chaïm Perelman: "[A] text is clear not so much because its meaning is uncontroversial. It is clear because the text is uncontested."). *See also* VENZKE, *supra* note 34, at 46 ("Hart further suggests distinguishing a core of settled meanings from disputed meanings. To this it is worth adding that a norm's settled meaning is not due to a stable connection between the word (expression) used and the thing or concept to which it refers. Stable meaning is rather the result of the absence of dispute."); KOSKENNIEMI, *supra* note 25, at 597.

[52]*See* ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 1–18 (2017).

[53]*See* Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485, 497 (1995) ("The interpretive community account's first failing is that it makes the notion of consensus central to the guidance of the application of words and laws. Hence, it has nothing to say when the community has not reached a consensus."); *see also* Ingo Venzke, *The Practice of Interpretation in International Law: Strategies of Critique, in* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS 305, 317 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2022).

[54]Philip Allott, *The Concept of International Law*, 10 EUR. J. INT'L. L. 31, 43 (1999).

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struggle therefore rages on, albeit by other means, in the practice of interpretation. The question of interpretive stabilization and change thus also emerges as a principal practical concern.[55]

The example of the geographic scope of the ICCPR is again illustrative of the problem. The rules of interpretation in the VCLT do not resolve the interpretive dispute about whether the ICCPR applies extraterritorially; the legal materials justify different readings of Article 2(1). As a result, the underlying interests of states have largely dictated their interpretations. The United States and some of its allies have traditionally considered it beneficial to interpret the geographic scope of the ICCPR narrowly, so as to not be bound by the ICCPR's human rights obligations in their military operations abroad.[56] Conversely, states that have to suffer through such interventions usually have an interest in precisely the opposite, more expansive interpretation of the ICCPR's scope: Their citizens are less likely to see their human rights violated if the United States or other intervening powers are obliged to respect the ICCPR abroad. The clashing interpretations and persistent disputes open the door for further differences and opportunistic changes in interpretations. This can leave the law in flux.[57] It is only when law cannot be taken to mean anything and everything in a concrete situation, that the meaning of legal rules emerges. As Ludwig Wittgenstein so insightfully noted already in the middle of the 20th century, "the meaning of a word is its use";[58] but only relatively stable use in practice generates a meaningful word or concept.

Recent scholarship has approached stabilization and change along two main lines. A first approach has been to retreat from theory and turn to history for context-specific explanations of stabilization and change. Many scholars following this approach have taken the critique of the new stream of international legal scholarship to heart, some having in fact been leading figures within the new stream movement.[59] Their turn to history is inspired by the observation that while international law is theoretically indeterminate, international lawyers experience it as relatively determinate in practice. It means that some interpretations have become "dominant" or even "natural," and their historical analysis seeks to reveal how these interpretations have "won" in specific areas of international legal practice.

But explanation is often not their only goal. Having revealed the origins of the dominant biases within international legal practice, they seek to counteract them by emphasizing the contingencies in law's historical trajectory. Not only is international law indeterminate, privileging no interpretation over another in the abstract, but the fact that we now experience some interpretations as "correct" and others as "incorrect" stems from a historical process that could have turned out different. By highlighting international law's indeterminacy and exploring the contingencies in its historical path, these scholars have sought to open up the—unequal and unjust but at the same time ostensibly "natural" and "necessary"—present in search of a better future.[60] Liberated from these "false necessities,"[61] the international lawyer is centered as the charismatic agent of emancipatory change. "International law is what international lawyers make

[55]*See* Monica Hakimi, *The Work of International Law*, 58 HARV. INT'L L.J. 1, 18–22 (2017) (discussing this issue and some of the ways it is mitigated).

[56]*See* Koh, *supra* note 11.

[57]*Cf.* Koskenniemi, *supra* note 46, at 199–200.

[58]LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 43 (1989), para. 43.

[59]Koskenniemi, for instance, has been a prominent figure in both the new stream scholarship and the turn to history.

[60]This indeed seems to be at stake in the "turn to history" in international law. *See generally* George R. B. Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, 16 EUR. J. INT'L L. 539, 539–59 (2005); Janne E. Nijman, *Seeking Change by Doing History: Inaugural Lecture* (Amsterdam, Nov. 24, 2017).

[61]ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (2004) (propounding the idea of false necessity: "The illusions of false necessity arise because we surrender to the social world, and then begin to mistake present society for possible humanity, giving in to the ideas and attitudes that make the established order seem natural, necessary, or authoritative" (at XX), while in fact, he argues, that "[w]hat seems to be given and presupposed is merely what we have temporarily refrained from challenging and remaking." (at XXVIII)). False necessity thus points to the openness and contingency of the social constructions that, falsely, seem necessary to us.).

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of it,"[62] Koskenniemi declares. Flanking the false necessity trope is often an exposition of the world-making effects of international law; legal choice is not only deeply political—rather than autonomously dictated by law itself—but the impact of this choice also has potentially immense political consequences.[63] These scholars thus instill in international lawyers an overwhelming sense of responsibility.

It is a responsibility the individual lawyer can never live up to. The abstract possibilities for change that indeterminacy provides are limited in practice by an underlying social structure that an excessive emphasis on freedom and agency tends to obscure. Susan Marks forcefully points out that "current arrangements are not simply arbitrary or accidental, but belong with the logics of a system which must also be brought within the analytical frame."[64] An exposition of the forces that stabilize interpretive practice is crucial, as by "leaving those processes, tendencies and dynamics unacknowledged and unexplored, we also occlude awareness of what it will take to effect change."[65]

Second, then, is an approach that explores these broader structural dynamics by focusing on what for legal scholars is a natural starting point: The authority of courts and other institutions. Gleider Hernández asserts that "international law's indeterminacy [opens up space] for specific actors (and in particular judicial institutions) to claim authority for the interpretation and application of international law."[66] While many areas of international law lack a *formally* authoritative interpreter[67] and there is a general absence of compulsory jurisdiction, a growing body of work seeks to make sense of international courts and institutions' *de facto* authority in a normative pluriverse.[68] With regard to the interpretation of the ICCPR, for instance, the Human Rights Committee's General Comments carry significant practical weight.[69] Undoubtedly, such de facto authorities can have an important stabilizing role even when lacking de jure authority.[70] However, much, if not most, international legal discourse is self-interested legal discourse, where it is not a third party making interpretive claims, but the very actor that is addressed by the norm,

[62]Koskenniemi, *supra* note 25, at 615.

[63]*See* Ingo Venzke, *Situating Contingency in the Path of International Law, in* Contingency in International Law: On the Possibility of Different Legal Histories 3, 3 (Ingo Venzke & Kevin Jon Heller eds., 2021) (noting that that the weight of individual choices was already acknowledged since the Enlightenment:

> The mark of enlightened modernity was then to no longer see the world, and the law in it, as so predetermined that contingency was just puzzling . . . The individual became the focal point of legitimate order and the master of a now disenchanted, freer world. Ridden with contradictions, enlightened modernity evoked anxieties about how to bear the weight of one's choices, if not of the whole world.).

[64]Susan Marks, *False Contingency*, 62 Current Legal Probs. 1, 10 (2009).

[65]*Id.* at 20.

[66]Gleider I. Hernández, *Law's Determinability: Indeterminacy, Interpretative Authority, and the International Legal System*, 69 Neth. Int'l L. Rev. 191, 198 (2022).

[67]*See* Ingo Venzke, *Authoritative Interpretation, in* Max Planck Encyclopedia of Public International Law para. 1, para. 3 (Rüdiger Wolfrum & Anne Peters eds., 2021), https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3528.013.3528/law-mpeipro-e3528?prd=MPIL (last updated Apr. 2018) (distinguishing between formal or de jure authority, "the legally conferred competence to establish a specific meaning of the law as binding," and practical or de facto authority).

[68]*See* Ingo Venzke, *The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation*, 34 Loy. L.A. Int'l & Compar. L. Rev. 99, 99–131 (2011). *See also* Fuad Zarbiyev, *Saying Credibly What the Law Is: On Marks of Authority in International Law*, 9 J. Int'l Disp. Settlement 291, 291–314 (2018); Gleider I. Hernández, *Interpretative Authority and the International Judiciary, in* Interpretation in International Law 166, 166–86 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015).

[69]*See* Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, 2010 I.C.J. 639, 664, para. 66 (Nov. 30) (where the International Court of Justice noted that "it believes that it should ascribe great weight to the interpretation" of the Human Rights Committee).

[70]*See* Hernández, *supra* note 66, at 214 ("[W]hen indeterminacy arises in our non-hierarchical, institutionally decentralized international legal system, norm-applying institutions are particularly well situated to assert discretion in choosing between plausible legal alternatives, claiming as they do an important role in the mitigation and resolution of normative conflicts.").

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and where a court or other "neutral" arbiter has little chance to interject.[71] And even when an authoritative institution has the possibility to voice its opinion on the matter, its lack of de jure authority means that states are not bound to defer to it. Indeed, though the Committee has spoken out in favor of a more extensive interpretation of the ICCPR's geographic scope, the United States does not consider itself bound to follow this "suggestion," and the dispute continues to exist.

Often, then, either the practical authority of third parties is not enough to compel other actors to follow their pronouncements, or they have no say in the dispute at all—for instance due to a lack of jurisdiction. Self-interpretation by states or international organizations becomes primary mode of meaning-making.[72] In such situations of self-interpretation, authority has limited explanatory value: A state may look towards the interpretations of other states, but these interpretations are no more authoritative than its own. International law should not just be understood as a practice centered around authority; it is also centered around the social relationships between actors that have limited or no authority over one another. States certainly take the interpretations of other states into account, but mechanisms and modes of interacting other than those based on authority take over. In trying to convince the U.S. government to change its interpretation of the ICCPR's geographic scope, Koh therefore does not rely on the interpretations of certain authoritative bodies like the International Court of Justice and the Human Rights Committee as the principal argument for interpretive change—although they certainly have their role. Instead, his overriding argument is that changing the interpretation "would have a salutary effect on our international *reputation*."[73]

Individual actors cannot be overburdened with the weight of stabilization and change, and explanations based on authority by themselves cannot fully close this gap. Understanding how states and other "self-interpreters" relate to and engage with each other's interpretive claims requires a different way of looking at the social nature of the practice of interpretation. It is an understanding in which reputation has a crucial role. The remainder of the Article therefore carves out this role. It shows that reputation is one of the most interesting and important ways through which social relations between actors find expression in the practice of interpretation in international law.

C. Reputation in the Practice of Interpretation

I. Conceptualizing Reputation

Social relations are at the heart of the practice of interpretation in international law. In a decentralized interpretive practice, stabilization and change are fundamentally social processes, with actors converging around and shifting between various substantive legal positions. Based on these observations, this Article suggests that despite its connotations of sterile rationality, the practice of interpretation is not fundamentally different from any other social practice. In fact, it features many of the same, very mundane, motivations for stabilization and change.

There are good reasons to push the point that interpretation in a decentralized practice like international law is deeply social. Interpretations invariably relate to others; what one state interprets international law to mean says something about how it will evaluate the behavior of other states, to whom the law applies in equal manner.[74] Formal equality before the law

[71]*See* Hernández, *supra* note 68, at 184 (explaining that even third-party adjudication can be self-interested and warning that "one must be chary of placing undue weight on judicial interpretation as authoritative."). *See generally* Shai Dothan, Reputation and Judicial Tactics: A Theory of National and International Courts (2015) (identifying self-interested motivations of judges, and pointing to reputation as an important one).

[72]*Cf.* Zarbiyev, *supra* note 50, at 1163.

[73]Koh, *supra* note 11, at 5 (emphasis added).

[74]There is a long history to the idea that, at least formally, international law applies equally to all states. *See, e.g.* Edwin D. Dickinson, The Equality of States in International Law (1920). Practice and scholarship are dubious regarding this idea, with a lively debate on universalism *versus* particularism. Dickinson himself, in a different time, also questionably

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fundamentally ties states to each other's interpretive claims. It forces the interpreter to take note of the perspectives of others who have a stake in the game, and brings the social relationships between states into focus. As sociologist Erving Goffman eloquently pointed out, it is often because of these relationships between actor and audience that actors stabilize their behavior:

> The expressive coherence that is required in performances points out a crucial discrepancy between our all-too-human selves and our socialized selves. As human beings we are presumably creatures of variable impulse with moods and energies that change from one moment to the next. As characters put on for an audience, however, we must not be subject to ups and downs.[75]

His insights on how people manage their expressions in social settings have profoundly influenced the field of sociology. In international law, however, these potentially transformative ideas have remained dormant.

Before transposing these ideas to the practice of interpretation and to collective actors rather than individuals, they require a bit more explanation. Why is it that we, as humans, stabilize our behavior before an audience? The short answer is that this is so because we care deeply about what others think of us. We are attached to an image of ourselves that we consciously and unconsciously cultivate, and we want to see this image reflected in the eyes of others. This *self*, that we as humans attribute so much meaning to, is the product and object of our reflexive consciousness.[76]

Over the last decades, the idea of the self as a deeply meaningful project has found its way into many social science disciplines under different headings such as "self-identity"[77] or "narrative identity."[78] Such concepts have also been picked up in international relations theory.[79] But while identity has become a central concept in constructivist thought at the international level—with many classic international relations texts recognizing identity as absolutely central—reputation has been markedly absent from it. The reason should probably be sought in the fact that reputation in international theory carries a strong rational choice connotation.[80] Neglecting reputation, however, comes at a steep price for those taking up identity as an explanatory factor for state behavior. They miss the fundamental point that identity and reputation are mutually constitutive.

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concluded that: "Equality before the law is not inconsistent with the grouping of states into classes and the attributing to the members of each class of a status which is the measure of capacity for rights." *Id.* at 335. *See also* Nico Krisch, *Pluralism, in* CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT 691, 691 (Jean D'Aspremont & Sahib Singh eds., 2020) (pointing out that while international law has universalizing tendencies, "[u]nlike most domestic orders, the international legal system responds to diversity by granting its sub-units extensive control over the content of their obligations—through consent requirements, veto rights, autonomy in the implementation of international law, etc."). As true as that is, states nevertheless seek to universalize their preferences by way of interpretation to "get the law on their side." *See* Martti Koskenniemi, *Legal Universalism: Between Morality and Power in a World of States, in* LAW, JUSTICE, AND POWER: BETWEEN REASON AND WILL 46, 61 (Sinkwan Cheng ed., 2004) ("As international law has the aspiration of universality, it compels those that make claims under it to make those claims in a universal way.").

[75]GOFFMAN, *supra* note 7, at 56.

[76]*See* GEORGE SANTAYANA, SOLILOQUIES IN ENGLAND AND LATER SOLILOQUIES 133–34 (1922) (capturing the idea of a self to which we attach meaning and pride eloquently).

[77]*See generally* ANTHONY GIDDENS, MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE (1991).

[78]*See generally* Margaret R. Somers, *The Narrative Constitution of Identity: A Relational and Network Approach*, 23 THEORY & SOC'Y 605, 605–49 (1994); PAUL RICŒUR, ONESELF AS ANOTHER (1994).

[79]*See generally* James D. Fearon, What Is Identity (as We Now Use the Word)? (Nov. 3, 1999) (unpublished manuscript) (providing a particularly useful introduction of identity in internation relations). In international law, however, such concepts have remained somewhat obscure. The work of Janne Nijman is a notable exception. *See, e.g.* Janne E. Nijman, *Paul Ricœur and International Law: Beyond 'The End of the Subject'. Towards a Reconceptualization of International Legal Personality*, 20 LEIDEN J. INT'L. L. 25, 25–64 (2007).

[80]*See, e.g.* FRIEDRICH V. KRATOCHWIL, PRAXIS: ON ACTING AND KNOWING 168–70 (2018).

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In the context of international law, Janne Nijman has pointed out that the individual is not the sole author of the self.[81] Instead, the self is shaped in the interactions with others, through whose eyes we learn to see and know ourselves as the persons we believe we are. For a positive conception of self, then, we rely fundamentally on the recognition of others.[82] Social psychologist Nicolas Emler insightfully observes that "defining yourself in terms of a social identity is largely a matter of persuading others to so define you."[83] Indeed, people seek to find recognition for their identity narratives in others' opinions of them. Recognition, then, captures the psychological desire that connects identity to reputation. It motivates us to express—idealized versions of—ourselves to others, who evaluate these expressions, form opinions, and collectively construct our reputations. If we want to be human rights defenders, we have to communicate that identity to relevant audiences. Often such an identity truly feels apt only when others recognize us as such.

This is where stabilization kicks in: If we want to impress on audiences a positive image of ourselves, we must consistently project the identity that corresponds to this image.[84] Also states cannot just claim to be human rights defenders and expect to then acquire a matching reputation. It usually requires prolonged, stabilized efforts, for instance through consistently expressing progressive interpretations of human rights instruments. Should these efforts succeed, the state will have acquired a desired *reputation*. When a desired reputation is acquired, audiences will expect the actor to perform the role that matches this reputation. Their expectations converge around it, and they orient their behavior towards the reputation they ascribe to the actor. This reinforces the pressure for behavioral stabilization: Should the actor violate the expectations of audiences by deviating from its role, the audiences will usually be unpleasantly surprised. Reputation therefore usually presents actors with a twofold motivation to stabilize their behavior: First, acquiring a desired reputation requires the actor to consistently enact the corresponding identity; second, stabilized behavior is necessary to live up to the expectations generated by the acquired reputation. In the process of acquiring reputations through stabilized effort, actors will usually also redefine themselves in line with the reputations acquired,[85] and deeply internalize the accompanying behavioral patterns.[86] This is how reputation and identity mutually constitute each other.

It is good to keep in mind that the stabilization of a single collective interpreter's interpretations is just one aspect of the stabilization of the interpretive practice. For legal meanings to clearly emerge, there also needs to be some convergence in norm-use between different—communities of—interpreters, so that they do not talk past each other. Section D carves out the important role of reputation in the processes of convergence and divergence in detail.

[81]Nijman, *supra* note 79, at 28.

[82]Nijman, *supra* note 79, at 49; *see also* Margaret R. Somers & Gloria D. Gibson, *Reclaiming the Epistemological Other: Narrative and the Social Constitution of Identity* 44 (CSST, Working Paper No. 94, 1993) ("If persons are socially constituted over time, and space, and through relationality then *others* are constitutive, rather than external, to identity.").

[83]Nicholas Emler, *A Social Psychology of Reputation*, 1 Eur. Rev. Soc. Psych. 171, 175 (1990).

[84]*See id.* at 184 (stressing that reputation is an important explanation for behavioral stabilization: "reputations suffer from neglect," and they thus require consistent reaffirmation).

[85]*See* Somers, *supra* note 78, at 44 (observing that identities are socially constituted). It resonates with a famous observation Charles H. Cooley made already more than a century ago: "I am not who you think I am; I am not who I think I am; I am who I think you think I am." Building on this insight, theorists have developed understandings of how reputation and acts to acquire a reputation are integrated into self-identity. *See generally* Giddens, *supra* note 77; Nijman, *supra* note 79; Ricœur, *supra* note 78. *See also* Ryan Goodman & Derek Jinks, Socializing States: Promoting Human Rights Through International Law 27 (2013) (attributing this integration in part to the psychological desire to minimize cognitive dissonance, which they define as "the discomfort caused by holding two or more inconsistent cognitions." The idea drawn from this is that if one's reputation or public statements do not conform to one's sense of self, this may give rise to discomfort and undermine self-esteem. A coping mechanism is to then redefine the self.). *See generally* Leon Festinger, A Theory of Cognitive Dissonance (1957) (coining the term cognitive dissonance).

[86]*See* Harlan G. Cohen, *Can International Law Work? A Constructivist Expansion*, 27 Berkeley J. Int'l L. 636, 659–61 (2009) (arguing reputation can spur internalization).

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Reputations are social products. While based on the performances of the actor, they are intersubjectively produced in the interactions within the relational setting in which the actor operates. These interactions may be wholly distant from the actual performances in both time and space, and may very well take place behind the actor's back. Whereas an actor can largely control a performance and the resulting direct impression, its reputation, therefore, it often cannot. This is not to suggest that actors have no tools available to wield considerable influence over the reputations they acquire; it merely points to the complexities of reputation management, and the non-linear relationship it can have with the accumulation of a reputation.

While actors engage in reputation management, observers are involved in an equally difficult game of reputation construction. The observers and audiences that the actor encounters try to faithfully reconstruct the identity of the actor from the signals they receive. The better this reconstruction—the actor's reputation—the better the actor's behavior can be anticipated. But such reconstructions are not always straightforward, for a number of reasons. First, an actor's identity is often already extremely complex, fragmented, and unstable.[87] This is all the more true for collective actors like states, where various individuals acting on behalf of a state often give off competing signals about the state's identity.[88] Second, public expressions are rarely authentic expressions of that already complex identity. As Giddens observes with a nod to Goffman: "All human beings, in all cultures, preserve a division between their self-identities and the 'performances' they put on in specific social contexts."[89] Actors indeed consciously and subconsciously manage the way they present themselves to others. It is precisely this phenomenon of reputation management that makes it difficult for observers to reach through the public performances to the authentic identity of the actor. Private beliefs may be hidden in public—a phenomenon known as preference falsification[90]—and for observers it is difficult to distinguish sincere from insincere expressions.[91] We are not very good mind readers, and when we consider states and other collective actors, whose mind are we reading in the first place?

Reputations therefore never perfectly reflect identities. Neither are they objective records of past behavior; they are filtered through the perceptions of observers, and mediated in their discussions. There are gaps in the information about the actor that are filled with (inter)subjective speculation. This is part of the reason why reputation is a meaningful concept; with perfect information on the actor, there would be no use for reputation as an epistemological device.[92] Reputation is precisely also a tool to predict behavior on the basis of imperfect information. Actual behavior may not even be decisive in a reputation's formation: Reputations may be acquired by mere stereotype or association.[93] They are therefore not statements of fact, but *opinions* held by a group of observers simultaneously. Reputation, then, can be defined as *an intersubjectively evaluated reconstruction of identity by others*.

The mutual constitution of identity and reputation goes almost completely unrecognized in international relations and international law scholarship, with grave consequences for both constructivist as well as rationalist explanations of behavior. For constructivists, their inability or unwillingness to engage with reputation leads them to draw problematic inferences about identity

[87]*See generally* Cornelius Castoriadis & David Ames Curtis, World in Fragments: Writings on Politics, Society, Psychoanalysis, and the Imagination (1997).

[88]*See* Andrew D. Brown, *A Narrative Approach to Collective Identities*, 43 J. Mgmt. Stud. 731, 734 (2006).

[89]Giddens, *supra* note 77, at 58. The same is true for states and other collective actors, as the next section argues.

[90]Timur Kuran, Private Truths, Public Lies: The Social Consequences of Preference Falsification 3 (1997) ("Preference falsification . . . [is] the act of misrepresenting one's genuine wants under perceived social pressure."). *See infra* Section E (dealing with some of the normative consequences of preference falsification for the purposes of reputation management in the practice of interpretation in more detail).

[91]*Cf.* Diego Gambetta, *Signaling, in* The Oxford Handbook of Analytical Sociology 168 (Peter Bearman, Peter Hedström & Diego Gambetta eds., 2011).

[92]*See* Gloria Origgi, *A Social Epistemology of Reputation*, 26 Soc. Epistemology 399, 399–418 (2012).

[93]*See* J.C. Sharman, *Rationalist and Constructivist Perspectives on Reputation*, 55 Pol. Stud. 20, 27–29 (2007).

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and its relation to the actor's interpretive behavior. Because interpretations relate to others, the perspectives of these others are usually taken into account. Rarely are interpretations authentic and unfiltered expressions of the self, and some degree of preference falsification is common.[94] There is usually a gap—to some extent filled by reputation management—between stipulating an identity and the actual interpretations that the interpreter adopts. "Predicting" interpretations based on identity is therefore difficult. This also means that "reverse engineering" an identity from a given set of interpretations is equally problematic. One cannot simply infer an identity "human rights defender" from a state's interpretations of a human rights treaty because the fact that the state will usually think about how it presents itself to an audience will have distorted the interpretation. The point here is not to suggest that reputation is "better" or "worse" for explaining interpretive decisions than identity. Rather, it is to show that the two concepts often cannot be understood in isolation from one another. By going beyond a one-sided rationalist perspective on reputation, this article therefore looks to fill some of the gaps left in constructivist and rationalist thought alike.

The recognition-based conception of reputation illustrated above seeks to bridge the gap, and highlights a fundamentally different side of reputation from the one traditionally employed in international legal theory. This traditional view of reputation has focused heavily on reputation's "informational" dimension. In such conceptualizations, reputation is a bundle of information based on past behavior used to predict behavior in the future. A good reputation here means that an actor can make credible commitments, and therefore is likely to benefit from cooperation with others. Reputation is then primarily foregrounded as a reason for states to *comply* with international law; violating international law would undermine a state's ability to make credible commitments.[95] But, as suggested above, a reputation is more than just a tool to signal we are trustworthy partners for cooperation. It is also something we take pride in, an end in itself.[96] Actors thus strive for specific reputations to fulfil their desire for recognition. This diversifies reputations, as it is not just about a binary "good" or "bad" reputation, but also about being, for instance, "independent" or "political," a "human rights defender" or a "tough guy."[97] This Article suggests that a conception of reputation that takes on board both dimensions, reputation as information and reputation as recognition, is the most convincing.[98] While it sacrifices the easy to apply rational choice conception of reputation, this conception is better attuned to the complexities of real-world social interactions within international legal practice—which the rational choice conception never really seems to be able to capture.

II. Reputation and the Collective Actor

Much of what I have written above deals with individuals. While reputation is an important motivation for human behavior, can we simply attribute it also to the collective actors like states that this Article focusses on? International relations theory and international legal theory seem to suggest we can: Reputation has, in these fields, firmly been established as an important

[94]*See generally* KURAN, *supra* note 90.

[95]*See* GUZMAN, supra note 2, at 34-41, 71–118; Guzman, *supra* note 16, at 1844–63.

[96]*See* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/reputation?src=search-dict-box (last visited June 22, 2025) (defining reputation as both the (1) "overall quality or character as seen or judged by people in general" or the "recognition by other people of some characteristic or ability," as well as (2) "a place in public esteem or regard: good name"; the second definition connects well to the recognition-based dimension of reputation). *See also* Alex Geisinger & Michael A. Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 75, 77–131 (2007) (acknowledging this recognition-based dimension in international law).

[97]*See* Daugirdas, *supra* note 3, at 228–29 (touching explicitly on the multiplicities of reputation).

[98]*See generally* Dan Sperber & Nicolas Baumard, *Moral Reputation: An Evolutionary and Cognitive Perspective*, 27 MIND & LANGUAGE 495, 495–518 (2012) (suggesting that a good reputation may have become a psychological and biological desire precisely because of its informational benefits).

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explanatory component of state behavior in relation to international law. Yet, the underlying understanding of reputation in this picture is almost exclusively based on its informational dimension.[99] It is easy to see how reputation can have this informational role, also for collective actors. In fact, much—if not most—scholarship on reputation deals with collective actors like corporations, not individuals.[100] The underlying rationale is simple: Collective actors, whether corporations or states, acquire reputations, which other actors rely on when they interact with them. The fact that these collective actors in turn have good reasons to "manage" their reputations so as to acquire the informational benefits from having a good reputation is fairly undisputed. The people acting on behalf of collective actors therefore take the informational benefits of reputation into account.

But what about reputation as a desire for recognition? How does this psychological motivation travel from the human beings that experience it to the collective actors like states that this Article focusses on? A first path via which reputation as a desire for recognition enters a collective actor's decision-making process is through the personal reputations of decision-makers themselves. These personal reputations are to a large extent connected to and shaped by the decisions they make on behalf of the collective actor they represent.[101] When the former U.S. ambassador to the UN, Mr. Wadsworth, was informed by the Secretary of State that he would have to defend an interpretation of self-determination in the 1960 General Assembly that he strongly disagreed with, he was "shocked and disheartened."[102] "Our failure to support this resolution," he argued, could "seriously weaken [the] record of US positive stand on colonialism."[103] Both his personal reputation and that of the United States were bound to suffer. As Ambassador Chelli of Tunisia noted, after the U.S. position was outlined in the Assembly, the "US claims to be [a] champion of liberty but [the] truth is in [the] vote. 'Who will believe Mr. Wadsworth after this.'"[104] Decision-makers therefore usually think twice before voicing an interpretation that they believe may well undermine personal and collective reputations. Conversely, of course, decision-makers are usually proud to be associated with acts that increase the reputation of a state: One of Obama's first acts when he took office was to rescind the Torture Memos,[105] which undoubtedly was warmly welcomed by many audiences across the world. This mechanism via which reputation as recognition features as a motivation in a state's decision-making I take to be fairly obvious.

The second avenue is less straightforward, but at least as powerful. Certainly, states are abstract entities that do not experience human emotions. Nevertheless, precisely as abstract entities, they

[99] *See* Robert Owen Keohane, After Hegemony: Cooperation and Discord in the World Political Economy 105 (acknowledging explicitly his sole focus on the informational dimension when he writes: "Our analysis of uncertainty earlier in this chapter suggests how important reputation can be even to governments not concerned with personal honor and self-respect.").

[100] Google Scholar, https://scholar.google.com/scholar?hl=en&as_sdt=0%2C47&q=reputation&btnG= (last visited June 22, 2025) (The first hits for a Google Scholar search on "reputation" indeed all deal with *collective* actors.).

[101] *See* Richard Ned Lebow, A Cultural Theory of International Relations 470–71 (2008) (making a compelling case for this with various examples; in relation to former President George W. Bush, for instance, Lebow notes that Bush "made it clear to his closest confidants that he wanted to use the presidency to accomplish something great, something for which he would be remembered," and convincingly suggests that this would have influenced his decisions in the War on Terror).

[102] Telegram from the Mission at the United Nations to the Department of State (Dec. 14, 1960), *in* 2 Foreign Relations of the United States, 1958–1960, United Nations and General International Matters (John P. Glennon, Suzzanne E. Coffman & Charles S. Sampson eds., 1991).

[103] *Id.*

[104] *Id.*

[105] The "Torture Memos" are a set of legal memoranda drafted by the Office of Legal Counsel of the U.S. Department of Justice advising government branches on the use of "enhanced interrogation techniques" in the aftermath of 9/11, among which was a technique known as "waterboarding." One of the memos was leaked to the press in 2004, the others were made public after the Obama administration took office. For a scholarly account that discusses the reputational consequences of the episode, see Micheal P. Scharf, *International Law and the Torture Memos,* 42 Case Western Reserve Journal Of International Law 321 (2009).

https://doi.org/10.1017/glj.2025.10170 Published online by Cambridge University Press

rely heavily on credible and convincing stories to bind people to their cause. These stories need to be communicated by decision-makers on their behalf. An effective decision-maker therefore factors in the fact that people attach meaning and self-worth to the collective enterprises they engage in; whether that is their state of nationality, the university they were educated, the cooperation they work for, or the football team they support. Through these collective actors, people vicariously seek to fulfil their own desires for recognition and self-esteem.[106] If the collective actor's reputation is undermined by inconsistencies or repeated failures, their own sense of pride often suffers.[107] It might lead these individuals to renounce their association with the collective actor—or the ones responsible for its decisions—undermining the collective endeavor. The meaning people attribute to a collective actor is therefore difficult to ignore for the people making decisions on its behalf.[108]

Interpretations of international law are, for various reasons discussed in Section C.III. below, eminently powerful and effective ways to communicate meaningful stories about the state to important audiences. It allows decision-makers to take firm control over the narratives surrounding the state. By making use of legal instruments, they can make a long-term impact on an otherwise fragmented and often fluctuating political organization like a state. This gives off a particularly strong signal to important audiences. People making interpretive decisions on behalf of collective actors therefore often ask themselves questions such as: What does this picture us to be, and is that who we want to be? When answering such questions, both the informational and the psychological dimension of reputation usually play a role.

Harold Koh certainly considered this when he called for "revising [the United States'] legal position to recognize some application of the ICCPR to U.S. conduct abroad," arguing it would "significantly advance our international standing and reputation for respect for the international rule of law, which are primary commitments of this Administration."[109] He uses very similar wording to also argue that the United States should change its interpretation of the geographic scope of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), identifying reputation as the primary underlying rationale: "Most importantly, it would allow the United States to reassert our global standing and leadership in our commitment to humane treatment."[110] Reputation's recognition aspect, which is referred to with a closing of the gap between "commitments of this Administration"—identity—and its "international standing and reputation" —being recognized for that identity by acquiring the matching reputation—is perceived to be important.[111] But also reputation's informational dimension is present in Koh's reasoning. Regarding the ICCPR, he argues that "allies may themselves be unable to engage in cooperative activities with the United States if they *perceive* that our legal obligations and policies diverge significantly from their own fundamental human rights obligations in extraterritorial contexts";[112] in the CAT memorandum, he argues that "[o]ur

[106]LEBOW, *supra* note 101, at 17, 62.

[107]*See id.*; *see also* Fearon, *supra* note 79, at 24 ("Ethnic conflicts are prone to violence because membership in ethnic categories is often an important basis for peoples' sense of self-worth or dignity, and threats to this sense are in general likely to produce powerful emotional reactions.").

[108]*See* GOODMAN & JINKS, *supra* note 85, at 41:

> (Persons acting on behalf of the 'state,' the 'nation,' or the 'government' are, in effect, caretakers of the state's interests, preferences, and reputation. Attempts at material inducement, persuasion, and acculturation are routinely and meaningfully directed toward states as such even though these acts of influence are experienced by individuals in virtue of their connection to the state or nation.).

[109]Koh, *supra* note 11, at 4–5.

[110]Harold H. Koh, Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict 90 (Jan. 21, 2013).

[111]As noted before, identities rely on recognition. A gap between reputation and identity is therefore usually problematic, as it undermines the actor's self-perception. To fulfill the desire for recognition, it is important not just to commit to something, but also to be seen and recognized by others as upholding these commitments.

[112]Koh, *supra* note 11, at 48 (emphasis added).

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isolation has hobbled our cooperation with those allies in important respects."[113] International legal practice is replete with such arguments. It shows that collective actors—much like individuals—"care" about their reputations through the people making decisions on their behalf. Interpretations are particularly effective ways for these actors to express (idealized) identities in the hope of finding recognition in the eyes of others, as the next section shows. Acquiring such reputations usually offers both psychological—for the people associated with the collective actor—and informational rewards.

III. Reputation and Interpretation

Given the sheer amount of research into both interpretation and reputation in international law, it is rather surprising that their overlap has not yet received more systematic attention in scholarship.[114] This is all the more so given that international law's primary attraction in international relations lies in its purported function as a universal, supposedly objective reference point for the evaluation of behavior.[115] International legal discourse indeed mostly revolves around actors justifying and criticizing each other's behavior with reference to international law,[116] precisely because by abstracting from concrete reality, law appears to take out the subjectivity of judgment and thereby to offer a neutral yardstick. Because law is indeterminate in the abstract, however, *choice* and *judgment* are always there, and no such objective reference points exists.[117] It is often through self-serving interpretations of the law, then, that actors express themselves and evaluate each other. By invoking the supposedly universal standard of law, they can effectively substantiate their opinions of one another. Through such repeated encounters and the talk surrounding them, these opinions turn into reputations. To briefly sum up these connections between international law, interpretation, and reputation: as a universal reference point for evaluation, international law is the central yardstick based on which actors intersubjectively construct reputations of each other on the international plane; interpretation connects specific types of behavior to verbal evaluations,[118] and is thus one of the primary means by which the game of reputation management and construction is played.

While for the interpreter both the psychological—recognition-based—and informational dimension of reputation are important, observers use reputations primarily for informational purposes. For them, reputation is a heuristic device to predict the behavior of an actor, judge its trustworthiness, and so forth.[119] Observers try, as accurately as possible, to reconstruct the identity of the actor through the signals they receive. The more accurate and meaningful these pieces of information are, the more effective the observers can anticipate the interpreter's behavior. Legal interpretations are particularly important signals because they indicate strong commitments to the views expressed. As indicated above, international law durably distributes all sorts of ideational and material stakes for states and other actors.[120] In situations of self-interpretation, where the

[113]Koh, *supra* note 110, at 3.

[114]For some works that have drawn attention to the connection between reputation and interpretation—though not in as much detail, see *supra* note 4.

[115]*See generally* Martti Koskenniemi, *The Mystery of Legal Obligation*, 3 Int'l Theory 319, 319–25 (2011).

[116]*See generally* Ian Johnstone & Steven Richard Ratner, Talking International Law: Legal Argumentation Outside the Courtroom (2021).

[117]*See* Venzke, *supra* note 34, at 31 (observing that Kelsen already held that every act of law-application is an act of lawmaking, because the legal materials never logically guarantee the outcome).

[118]*See* Bourdieu, *supra* note 24, at 849:

> (By ordaining the patterns that govern behavior in practice, prior to any legal discourse, through the objectivity of a written rule or of an explicitly expressed regulation, formalization establishes the operation of what might be termed a homologation effect. The objectification of the practical code in the form of an explicit code permits different speakers to associate the same meaning with the same perceived sound and the same sound with the same conceived meaning.).

[119]*See* Origgi, *supra* note 92, at 400.

[120]*See* Bourdieu, *supra* note 24, at 837 (clarifying that the Greek word for law, *nomos*, derives from the verb *nemo*, meaning to separate, divide, distribute).

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state interprets a norm of international law that applies to itself, interpretations are therefore full of relevant information about the state's interests, preferences, values, and beliefs. They speak to the ways in which the state would like to see the world organized, and often carry more expressive potential than mere actions or specific policies. Whereas actions are single events and a policy may be changed at will, interpretations reflect a durable commitment to put the expressed views into practice. Kratochwil captures it poignantly when he writes that "[w]hile we speak of a violation of legal rules, policies are not violated but 'changed,' exactly because the discretion allowed makes implementation usually solely a matter of the unilateral utilitarian calculus of the actor."[121] Interpretation, then, is a radically expressive act. It conveys important and durable information about the interpreter.

The claim that interpretation is radically expressive is not trivial. It seems to stand at odds with an idea that lingers for instance in the works of many critical legal theorists, which suggests that interpretation is almost its exact opposite. These scholars argue that interpretation obfuscates moments of choice, blending out the expressiveness of politics: Interpretations are presented as universally "correct" positions on the meaning of law, and the particular bias underneath is thereby denied.[122] In this sense, interpretation is a hegemonic act that seeks to universalize a particular political position by veiling the moment of choice.[123] At the same time, the interpreter absolves itself from criticism: The interpretive conclusion is pictured not as a choice, but as the necessary result of a decision made elsewhere.[124]

As true as this is descriptively—reading through many interpretations, this is exactly what they seem to do—this perspective may also be deceptive if it is to deny any expressive force to interpretations, or to imply that there are no consequences attached them. Because whether or not the interpreter's audiences fall for these legal techniques, they nevertheless *do* take interpretations as particularly strong expressions of commitment to certain values, beliefs, interests, and so forth. Certainly, legal interpretation may be an effective technique for an interpreter to redirect the blame from itself to the legal rules that actors within the international community collectively entered into. But if the interpreter implies it has no choice in the matter, it may actually make its substantive commitment expressed in that interpretation that much stronger: Apparently the interpreter believes it is not up to itself to change it. From an observer's point of view, this is valuable information for the construction of a reputation: There are then very good reasons to expect that the interpreter upholds these commitments and carries them into practice.

Because audiences pay close attention to legal interpretations that are loaded with information about the interpreter, the interpreter itself wields considerable influence over its reputation by carefully managing its interpretive expressions. It may anticipate the opinions of important audiences, and adjust its interpretations accordingly. In his memorandum on the geographic

[121]Friedrich V. Kratochwil, *Is International Law "Proper" Law? The Concept of Law in the Light of an Assessment of the "Legal" Nature of Prescriptions in the International Arena*, 69 ARCHIVES PHIL. L. & SOC. PHIL. 13, 38 (1983).

[122]*See* Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT'L L. 7, 7–19, 11–12 (2009) (writing that through expert languages like law, actors "want to ensure that the decisions seem to emanate from some external logic or method that is neutral among the participants, that what is at work is not really 'one's' method but the universal (or 'scientific') method—or, even better, that at work is not a 'method' at all but *reality* itself … This hides or obscures the contingent nature of the choices made.").

[123]*See* KOSKENNIEMI, *supra* note 25, at 597 ("All law is about lifting idiosyncratic ('subjective') interests and preferences from the realm of the special to that of the general ('objective') in which they lose their particular, political colouring and come to seem natural, necessary or even pragmatic."); *cf.* Koskenniemi, *supra* note 46, at 197–218.

[124]Indeed, this seems to be one of the uses of legal language in practice. *See generally* Dimitri van den Meersche, *International Law as Insulation – the Case of the World Bank in the Decolonization Era*, 21 J. HIST. INT'L L. 459 (2019). *See* Jürgen Habermas, *Law and Morality*, THE TANNER LECTURES ON HUMAN VALUES 254 (1986) (capturing Luhmann's functionalist position similarly, stating that "[a]rguments exist so that lawyers can indulge in the illusion of not making decisions according to whim."). *See also* Ingber, *supra* note 24, at 314 (explaining that not only does the idea of legal objectivity absolve the interpreter from criticism, it also serves to comfort the lawyer that the responsibility for the potential consequences of his or her actions lies with the law).

https://doi.org/10.1017/glj.2025.10170 Published online by Cambridge University Press

scope of the ICCPR, Harold Koh puts a particularly strong emphasis on the expressive potential of *legal* signals for the construction of a reputation. To claim that the United States adheres to human rights standards outside of its territory as a matter of policy is simply not as convincing to important audiences as doing so out of a sense of legal obligation:

> Formally acknowledging that we will henceforth treat certain of our announced standards of conduct abroad - such as the prohibition on torture and inhumane treatment - as *legal treaty obligations*, not merely as official policy or even as customary international law, will significantly enhance the United States' credibility and standing as an international leader in respecting and promoting the international rule of law.[125]

Koh concludes that while "[a]dopting the sounder legal interpretation need not require a dramatic change in our actual practices abroad," the United States "should receive significant credit in the international community for finally acknowledging that certain of our activities outside [the] United States are subject to international legal obligations, and not just policy constraints."[126]

In the memorandum on the scope of CAT, Koh is yet more explicit about the reason why legal signals are more convincing than mere policy preferences: "[C]ontinuing to deny that the United States recognizes these commitments as legal obligations under the Convention leaves us vulnerable to the charge that we are not bound by them, and that we could change these policies adversely at any moment."[127] If the United States wants to be recognized as the "human rights defender" it claims to be,[128] Koh argues, it must convincingly reassert this identity to its audiences, otherwise the "*perception* that the United States is continuing to preserve its 'freedom' to commit or condone mistreatment would severely undermine our reputation."[129] This, Koh argues, can only effectively be done through legal interpretation. It is precisely because legal interpretations express durable and relatively stable commitments that they are such effective tools for self-presentation and reputation management. He argues that even though "[p]ublicly acknowledging that the basic principles of humane conduct that we are already committed to pursuing reflects our legal, and not merely policy, commitments would require no change in current U.S. conduct," it would therefore still "attract international approval for adopting responsible legal positions, facilitate the ability of our closest allies to cooperate with us . . . , and allow the United States to *demonstrate* global leadership on one of the most basic human rights: freedom from torture and cruel, inhuman or degrading treatment or punishment."[130]

Two points deserve to be reiterated briefly here. First, it is worth observing that a concern with identity by itself fails to convince. The proclaimed identity of the United States as a human rights defender only really seems fitting if it is recognized by others. *Being*—or wanting to be—a human rights defender is usually not enough as a motivation for action; *being seen* as a human rights defender is often at least as important. Therefore, it is the connection between identity and reputation that is crucial. It speaks to the reasons why the rationalist conception of reputation and the constructivist notion of identity are insufficient. Second, both reputational dimensions seem to

[125]Koh, *supra* note 110, at 55.

[126]*Id.* at 54.

[127]Koh, *supra* note 110, at 6. Indeed, this is precisely what happened on several occasions during the War on Terror, with disastrous reputational consequences. The conduct in Guantanamo Bay and Abu Ghraib is an infamous example, see David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 Va. L. Rev. 1425, 1458-1460 (2005) (describing how limiting the territorial scope of human rights obligations facilitated extreme interrogation techniques).

[128]*Id.* at 7, 72, 90 (speaking of "demonstrat[ing] global leadership on one of the most basic human rights"; "reclaim[ing] our leadership" in human rights; and allowing the United States to "reassert our global standing and leadership in our commitment to humane treatment.").

[129]Koh, *supra* note 110, at 6 (emphasis added)

[130]*Id.* at 6–7.

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go hand in hand for Koh. It is not only the approval and recognition that is important, but also the informational dimension to "facilitate the ability of our closest allies to cooperate with us."[131]

It should be clear by now that reputation and interpretation are closely connected. The interpretation of international law in practice involves much more than a cold doctrinal analysis. In situations of self-interpretation, interpreters are not impartial third parties who give their "expert" opinion about what they think the most "rational" interpretation is—as judges supposedly do—but the actual participants in the struggle over international law, which holds important stakes for them. Here, specific interpretive positions are often of major importance to the interpreters, and therefore hold much information about the positional interests, identities, and worldviews of the interpreters that espouse these legal claims. Audiences heavily rely on the interpreter's interpretations to construct reputations. Interpreters know this, and use interpretations to effectively present themselves to others. For abstract entities like states, interpretations are particularly powerful tools to craft and communicate their stories. They may draw on a whole range of interpretive techniques to acquire their desired reputations. Interpretation under the spell of reputation can be captured in the fundamental dynamic of expression and evaluation, where interpreters—consciously and subconsciously—present themselves to others in the interpretations they adopt, and are in turn evaluated on the basis of these interpretations by their audiences. It is in this dynamic, the next section argues, that interpreters come closer together, and interpretations often change, converge, and stabilize as a result.

D. A Reputational Theory of Interpretive Stabilization and Change

I. The Fluidity of Practice: Reputation and Diversity

International law has been many things to many people. For compliance theorists, it is the impact of law on state behavior that has been the central focus. Here, reputation was proposed as a particularly important pull towards compliance: If an actor violates international law, its reputational capital diminishes, and thereby its ability to make credible commitments in the future.[132] But by focusing on the compliance decision and disregarding substantive engagements with law's content, compliance theory tends to obscure a fundamental reality of legal practice: Law requires interpretation. Law is not determinately black or white, and the demarcation between compliance and violation is therefore often not immediately clear.[133] Before the 1960s, for instance, the legal meaning of self-determination in the UN Charter was terribly unclear.[134] It was therefore difficult to tell what it actually required of states: Was it lawful for the European colonial powers to withhold independence from colonial peoples? Surely, that would have depended on who had been asked.

This seems to pose a fundamental problem for compliance theory: If there is no clear boundary demarcating the legal from the illegal, an act of compliance cannot be distinguished from a violation of international law, and straightforwardly distributing reputational consequences for "trustworthiness" becomes an impossible task. But by narrowing the role of reputation to compliance with legal rules, these theories have sold its role significantly short.[135] For even though

[131]Koh, *supra* note 110, at 7.

[132]*See supra* Section A; *see also* Guzman, *supra* note 16, at 1845–46.

[133]*See supra* Section B (explaining this point extensively).

[134]U.N. Charter art. 1(2) (providing, merely, that one of the primary purposes of the UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"); *id.* art. 55 (reaffirming that commitment).

[135]*See* Howse & Teitel, *supra* note 23, at 127:

A fundamental flaw of compliance studies is that they abstract from the problem of interpretation: interpretation is pervasively determinative of what happens to legal rules when they are out in the world, yet "compliance" studies begin with the notion that there is a stable and agreed meaning to a rule, and we need merely to observe whether it is obeyed.

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international law may be indeterminate or vague, actors nevertheless have strong opinions as to the *meaning* of its rules, and the ways they connect to concrete behavior.[136] To make sense of these opinions, we need to go beyond the legal/illegal binary and the corresponding reputational binary of trustworthy/untrustworthy that compliance theory has traditionally centered on. Instead, both law and reputation should be conceptualized as fluid and dynamic. A specific interpretation of self-determination in the 1950s would not necessarily have been judged as being "correct" or "incorrect," because self-determination's legal meaning was still vague and unsettled,[137] but as "colonialist" or "anticolonialist," or as progressive, traditional, or conservative. The underlying idea here is that even though the meaning of a rule is clearly open to various interpretations, choosing one of those interpretations still gives audiences meaningful information about the interpreter.[138]

Reputation, then, becomes a much more fluid concept in the practice of interpretation.[139] What reputations states seek to acquire is contextual and rarely limited to "good" and "trustworthy." In fact, different states often prefer different reputations. One state may want to be perceived as a defender of human rights, while another prefers being seen as fiercely defending the interests of its own citizens at the cost of the human rights of others. The open language of international law offers these interpreters a chance to express multifaceted *ways of being* in search of recognition.[140] It is only by taking the recognition-based dimension of reputation on board that one can truly understand the pull of this perspective. Actors want to have their identity narratives recognized by others in the form of desired reputations,[141] and law offers them a particularly effective tool to convincingly convey their character to important audiences through interpretations.

Their discretion is significant. Widely shared interpretations are rarely very concrete, because when all discretion is closed down, some preferences are left out, and critique is more likely.[142] Interpreters therefore have considerable space to tinker with the finer points within a broader consensus, and room to express their own narrative identities in search of recognition. But as identities rely on recognition, authentic self-expression through interpretation is usually limited to those areas where such expressions at least fit within a set of recognized (sub)cultural narratives so that they are shared by at least some relevant others.[143]

By evaluating interpretations, forming opinions, and constructing reputations based on them, audiences hold interpreters to account. They evaluate the interpretations of others against their own interpretations of the law. From this perspective, the struggle for recognition in the practice of interpretation emerges as a constant dynamic between expression and evaluation; with interpreters consistently trying to convince others—through their interpretive expressions—to see them as they desire to be seen, observers evaluating these expressions and constructing reputations based on them, interpreters reacting to these evaluations by (re-)expressing adjusted interpretations in search of a "better" reputation, and so on.

[136] *See* GUZMAN, *supra* note 2, at 93–96 (also acknowledging this).

[137] *See* Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, HUM. RTS. L. REV. 609, 610 (2011) ("It is strikingly clear that the right to self-determination was introduced into international law in vague terms.").

[138] *See supra* Section C.III.

[139] *See* Daugirdas, *supra* note 3, at 228–29 (noting the multiplicity of reputation, though not in connection with interpretation).

[140] *See generally* AXEL HONNETH, THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS (1995) (describing the struggle for recognition between people with different ways of being).

[141] *See generally* Emler, *supra* note 83.

[142] *See* KENNEDY, *supra* note 29, at 294 (observing that therefore the open-endedness "of international law seems the subtle secret of its success"); *see also* KOSKENNIEMI, *supra* note 25, at 591–92.

[143] *See* Hanna Meretoja, *Narrative and Human Existence: Ontology, Epistemology, and Ethics*, 45 NEW LITERARY HIST. 89, 98–101 (2014); HONNETH, *supra* note 140, at 131–32; ELLIOT ARONSON, TIMOTHY WILSON & ROBIN AKERT, SOCIAL PSYCHOLOGY 238–40 (2016) (describing Solomon Asch's 1955 "ally experiment" which provides psychological evidence that deviance becomes easier when you have an "ally" that you can be recognized by).

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The virtues of international life are contested in this dynamic. The interpreter that succeeds in establishing its interpretation as the dominant one imposes its particular "way of being" on others via law's universalizing effects.[144] That is, because international law is the primary reference point for the evaluation of behavior on the international plane, dominant interpretations authoritatively outline what virtuous behavior is.[145] Interpretation under the spell of reputation involves an intricate balance between conformity and deviance, between accommodating the perspectives of others and reshaping the constraints that these perspectives impose. It forces actors to reckon with the structural constraints of living up to the opinions of others, but does not strip them of their agency.[146] The historical struggle of Third World States wanting to liberate themselves from, while at the same time having to conform to, the Western image of a "Civilized State" may be seen as an enduring expression of this interplay.[147] There may be moments of relative stability, where dominant "ways of being" are relatively stable, and others where such hierarchies are disrupted, and where what was once "deviant" becomes "normal."[148]

To better understand this complex and fluid practice of interpretation under the spell of reputation, it helps to have a more concrete look at how interpretations are evaluated. The audiences that evaluate an interpretation, just like the interpreter that expresses it, never enter the legal debates behind a veil of ignorance. Even beyond their background understandings that makes actors read texts in specific ways,[149] they often have preferences and interests attached to certain legal rules that shapes their preferred interpretations. That means that even when a rule is indeterminate in the abstract, actors already have either some interpretations that come naturally to them, or preferred interpretations that align with their interests and/or preferences.

An interpretation that comes naturally to a particular interpreter carries certain expectations about the behavior of each norm addressee.[150] When a state naturally interprets the geographic scope of the ICCPR expansively, it also expects other state parties to apply the ICCPR beyond their territory. When another state violates this expectation, a bad opinion forms.[151] In a situation of significant ambiguity, for example when a new treaty enters into force and the meanings of its provisions have not yet stabilized, interpretations hardly resemble expectations. A state party may well know that others interpret the rules differently. Rather, interpretations—in such situations of

[144]*See* Jacques Ellul, *Le problme de l'emergence du droit*, 1 ANNALES DE BORDEAUX 6, 15 (1976) (pointing out the stakes of law's universality: "The emergence of law occurs at the point at which the imperative formulated by one of the groups composing a whole society takes on the status of a universal value by the fact of its juridical formulation." As quoted in Bourdieu, *supra* note 24, at 844). *See supra* note 74 and accompanying text.

[145]*See* Ingo Venzke, *Is Interpretation in International Law a Game?, in* INTERPRETATION IN INTERNATIONAL LAW 352, 355 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015) (describing international law as "a vocabulary of virtue" that is put to use with interpretation); *see also* Shirley V. Scott & Olivia Ambler, *Does Legality Really Matter? Accounting for the Decline in US Foreign Policy Legitimacy Following the 2003 Invasion of Iraq*, 13 EUR. J. INT'L RELS. 67, 72 (2007) ("When an actor in world politics makes reference to international law he or she is implying that international law offers the highest standard against which action in world politics can be judged.").

[146]*See also infra* Section D.II (discussing structure and agency).

[147]*See generally* SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY (2013).

[148]*See generally* LEBOW, *supra* note 101 (providing an excellent account of such hierarchies and their disruption in international relations).

[149]Where background understandings make interpreters read texts "naturally" in the sense meant by FISH, *supra* note 40.

[150]*See* sources cited *supra* note 74 and accompanying text (explaining that this is because, supposedly, the law applies to all norm addresses equally).

[151]*Cf.* SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION 93 (1982) (explaining how such opinions can "filter out" deviants:

> [The expectation of the community] places a substantive restriction on the behavior of each individual, and is not compatible with just any behavior he may choose . . . A deviant individual whose responses do not accord with those of the community in enough cases will not be judged, by the community, to be following its rules . . . When the community denies of someone that he is following certain rules, it excludes him from various transactions . . . It indicates that it cannot rely on his behavior in such transactions.).

https://doi.org/10.1017/glj.2025.10170 Published online by Cambridge University Press

flux often formed more reflectively rather than naturally[152]—then often express preferred behavioral patterns: Interpretations that seek to get the law on the side of the interpreter.[153] For example, the anticolonial states expressed a progressive interpretation of self-determination as a right to independence that they felt should be adopted, knowing full well that other interpretations were possible and pervasive among other states.[154] Either way, the result of a violation of such interpretations is similar to a violation of those interpretations that come naturally and resemble expectations: A bad opinion is formed. Seen in this light—and whether they be expectations or opinions—*interpretations represent normative reference points to which reputational sanctions and rewards are attached*. As such, interpreters usually do well to take interpretations of others into account, lest their reputation may suffer.

Many norms of international law are subjected to a variety of different interpretations by a variety of states. By consequence, interpreters often have to navigate complex webs of socially consequential interpretive reference points. Koh explicitly does so in his memorandum on the ICCPR. He acknowledges that multiple interpretations of Article 2(1) are defensible. Indeed, various actors have interpreted this provision in a variety of ways. Koh suggests that it is therefore prudent to look beyond the rule, towards the interpretations that important audiences have adopted. He finds that "a 'strict territorial' interpretation" would not be "an accurate predictor of how authoritative interpreters, our allies, and other important interlocutors will likely evaluate the United States' legal obligations."[155] The traditional territorial interpretation of the United States has indeed been problematic from this perspective, Koh notes: "The prior administration was severely criticized in U.N. fora, by important U.S. allies, by members of Congress, by domestic and international human rights groups, and in the domestic and international media."[156] While Koh certainly does not suggest the United States should blindly follow the interpretations espoused by these important audiences, they do guide his proposed interpretation.

Reputational considerations thus force interpreters to meaningfully engage with and incrementally (re-)orient their own interpretive behavior towards the interpretations of important others, in search of recognition. This is, I suggest, one of the key mechanisms that explains the convergence and stabilization of interpretations between different—communities of—interpreters in international law. A hypothesis may be formulated that the more reputational sanctions and rewards are attached to an interpretation, the more interpreters will gravitate towards it, and the more likely it is to eventually be accepted as an authoritative statement of the law.

As interpreters gravitate towards the positions of others in search of desired reputations, another problem emerges: Collective actors like states have many different audiences, and it is near impossible to do well in the eyes of all of them at the same time. A single interpretation of self-determination in the 1950s would have evoked very different reactions among the Western colonial powers, the Soviet states, the former colonies, and the people within colonial territories themselves. How do interpreters manage the diversity of opinions? To some extent, they can foreground different parts of their identity in different settings and tailor their performance to the specific audience. But legal interpretations often only serve the interpreter's purposes when they are expressed publicly in order to convince others. And in the world of international law, publicly expressed interpretations usually spread through various channels from one audience to another,

[152]"Reflectively" here denotes the active, conscious engagement of the interpreter with the meaning of law, rather than the natural, subconscious (re)production of meaning. Reflexivity in the production of meaning is especially prevalent in areas where the meaning of legal concepts is contested. *Cf.* KOSKENNIEMI, *supra* note 25, at 38 ("Words such as 'aggression', 'self-defence', 'war', 'intervention' or 'combatant', to name only few within one central area of law, are notoriously ambiguous and require reflective interpretation before applicable in practice.").

[153]*See* Venzke, *supra* note 45, at 155–84.

[154]*See infra* Section D.II (describing the debates in the UN General Assembly on self-determination during the 1950s and 1960s).

[155]Koh, *supra* note 110, at 5.

[156]*Id.* at 4.

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making it extremely difficult for states to compartmentalize their reputations.[157] They therefore need to express at least a relatively consistent and coherent image of themselves through the interpretations they adopt across different settings. Should they not, they run the risk of acquiring a reputation for being untrustworthy, incoherent, and insincere.[158] It means that interpreters like states have to make choices in the images that they portray through their interpretations: They cannot just be anything anywhere.[159] To reduce complexity, it is often easier for actors to stay close to their identity narratives in the interpretations they express. This avoids an uncomfortable gap between these narratives and the reputations they acquire,[160] and offers a path towards projecting a relatively consistent image.

Nevertheless, reputation management amidst a variety of audiences is a challenging task. If an interpretation resonates with some audiences but not with others, choices between these audiences sometimes must be made. To make sense of these discrepancies, interpreters often look beyond the rule to be interpreted towards the audiences with which specific interpretations resonate—as Harold Koh did when he advised the U.S. government on the ICCPR. This allows them to reflect on the reputational sanctions and rewards—in terms of both recognition and information—of the interpretations they adopt. Reputation as an informational device emphasizes the material value of relationships with other actors. Having a good reputation among important audiences makes future cooperation with those audiences more likely.[161] Conversely, an interpreter that adopts interpretations that do not conform to those of certain audiences may lead those audiences to suspect that the interpreter does not share similar values or interests and is therefore unwilling or unable to effectively cooperate with them.[162] Reputation as recognition foregrounds the psychological aspect of the relationships with audiences. The recognition that interpreters get from having a desired reputation among important audiences feeds into their self-esteem, and they will often experience a feeling of pride when they recognize themselves as "virtuous" actors in the eyes of important others.[163]

While both dimensions of reputation usually point in the same direction,[164] they need not necessarily. For example, many states in the Global South have caved to the reputational pressure

[157]Compartmentalizing here refers to dividing reputations between different audiences. *See* George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S109–S114 (2002) (observing that reputations are often divided by issue area. This I do fundamentally not dispute, although some consistency across areas is usually important for states.).

[158]*See* DAVID GAUNTLETT, MEDIA, GENDER AND IDENTITY: AN INTRODUCTION 108 (2010) ("An individual who tells conspicuously different versions of their biography to friends may be resented and rejected, and acute embarrassment is associated with the revelation that one has provided divergent accounts of past events.").

[159]*See generally* Robert Knox, *Imperialism, Hypocrisy and the Politics of International Law*, 3 TWAIL REVIEW 25, 25–67 (2022) (explaining the role of hypocrisy in this regard).

[160]*See supra* Section C.I; *see also* sources cited *supra* note 85.

[161]*See* Guzman, *supra* note 16, at 1849.

[162]*See* Bourdieu, *supra* note 24, at 849 (illustrating through metaphor that when actors do not share the same interpretation of rules, cooperation becomes difficult:

> "Unlike two players who, for lack of agreement upon the rules of their game, are condemned to accuse each other of cheating every time their comprehension of the game diverges, the actors involved in an undertaking governed by specific rules know that they may count on a coherent and inescapable norm. They therefore may calculate and predict both the consequences of adherence to the rule and the effects of transgressing it."

While Bourdieu speaks of rules, the same goes for the interpretation of the rules.)

[163]*See* HONNETH, *supra* note 140, at 131–32 (describing the importance of seeing one's self-image reflected in the eyes of others:

> Because the normative self-image of each and every individual human being . . . is dependent on the possibility of being continually backed up by others, the experience of being disrespected carries with it the danger of an injury that can bring the identity of the person as a whole to the point of collapse.).

See also LEBOW, *supra* note 101 (transposing a similar insight to the level of collective actors like states).

[164]*See* Geisinger & Stein, *supra* note 96, at 96. (arguing for a "need-reinforcement addition to the basic rational choice model of behavior," which adds to the rationalist explanation that "because rational individuals attain benefits from interacting with

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of having to appear attractive to Western investors, sometimes at the cost of an appearance as a defector among close allies.[165] Whereas they may therefore have benefitted from an influx of capital, the fact that this shift was viewed as a defection by close allies may have undermined the sense of self-identity as a result of a deteriorating reputation in this group.

II. Who Wins? Drivers of Interpretive Stabilization and Success

The indeterminacy of international law in no way warrants the conclusion that each proposed interpretation has equal chances of succeeding in legal practice. No matter how much possibilities for different readings international legal texts offer, some interpretations carry more serious social consequences than others. Power and authority relations between interpreters have a significant role here. Because it is usually more attractive and rewarding to be well-regarded by the powerful than by the weak, the interpretations of the powerful carry greater consequences. Should an interpreter diverge from these interpretations, it runs the risk of acquiring an unfavorable reputation in the eyes of the powerful actors that have embraced these interpretations. In this sense, reputation can be understood as a particular operationalization of variables like power and authority that introduce a hierarchy between the formally equal interpreters: It is partly through reputation as a motivation for action that power and authority find their way into the interpretive process.[166] Because the impact of reputational sanctions and rewards attached to interpretations corresponds to some extent to the combined power and authority of those who embrace these interpretations, the unequal relations between interpreters spill over into legal interpretive debates via reputation.[167]

Authority and power clearly have an impact on the informational dimension of reputation. A good reputation among powerful audiences is an informational advantage in securing the beneficial cooperation with these actors. When a powerful actor espouses an interpretation, it is therefore usually attractive to orient interpretive behavior towards it for reputational reasons.[168] The same is true for the interpretations of authoritative actors. Here, it is not so much that a good reputation among authoritative actors itself offers highly beneficial cooperation; that an international court has a good opinion of a state does not necessarily offer that state any direct opportunities for attractive trade deals and so forth. Rather, it is the fact that other actors—like states—look towards these authoritative actors for guidance. Hence, when an authoritative actor adopts a certain interpretation, it is the belief that what the authority says will be accepted by others that induces actors to adhere to its commands.[169] It multiplies the reputational effects of the

others" they "develop a free standing desire for others' acceptance"; actors thus develop "a separate preference for esteem from others").

[165]For instance, states in the Global South gradually abandoned claims about a changing customary international law standard of compensation because it signaled a particularly strong commitment to their national self-interest over investment protection, to the detriment of their reputations among the Western investors. At some point, they caved to the reputational pressures from these Western audiences. Malaysia's explanation of its vote in favor of the Charter of Economic Rights and Duties of States in 1974 is instructive, as it highlights the fear of a bad reputation among investors. *See* U.N. GAOR, 29th Sess., 2316th plen. mtg., at 1381–82, U.N. Doc. A/PV.2316 (Dec. 12, 1974) ("Malaysia has an active policy of wooing foreign investment .... Although we voted in favour of paragraph 2 (c) in the Second Committee, our action should not be considered as a departure from our policy on foreign investment and our commitments."). Such sentiments grew stronger in the years thereafter.

[166]*See infra* Section E (explaining why their operation via reputation is particularly prominent in legal practice in more detail).

[167]I take this to be one of the "pressures which orient change without actually predetermining it" that Marks, *supra* note 64, at 9, refers to.

[168]*Cf.* Nico Krisch, International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order, 16 EUR. J. INT'L L. 369, 403 (2005).

[169]*See* VENZKE, *supra* note 34, at 63 (observing that authority "feeds on social legitimacy—on the general belief of society, which upholds that one should do what the authority says.").

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pronouncements of authoritative actors: Deviating from such an interpretation may lead an actor to incur reputational damage not just from the authoritative actor, but from all others that follow its commands. This partly explains why authoritative interpretations are so powerful in legal practice.[170]

Power and authority also have an impact on reputation's psychological dimension, as there is usually additional prestige involved in being well-regarded by powerful and/or authoritative actors. This observation is corroborated in social psychological research, which suggests that these and other factors can profoundly influence the impact of reputation (and mechanisms akin to it) as a psychological motivation for action.[171] Based on this research, Goodman and Jinks argue that also collective actors are more likely to conform to group norms when the (1) importance of the group for the actor increases—and here power and authority have a role, (2) the actor's exposure to the group increases, and (3) the size of the group increases.[172] Goodman and Jinks suggest that these dimensions are factored into a collective actor's decision-making via pressures that are akin to the psychological side of reputation.[173] Together, then, reputation's informational and evaluative dimension usually provide a motivation for interpreters to conform to the interpretations of important others.

With this in mind, the contours of processes of stabilization and change under the influence of reputation emerge. From this perspective, interpretive practice is a constant dynamic of expression and evaluation. The evaluative dimension of interpretation provides a structuring force: Actors hold each other to account through the evaluation of the interpretations of others against their own, and by constructing reputations based on these evaluations. Particularly the evaluations of the powerful, the authoritative, and/or the many count heavily. Wanting to be well-regarded by these groups, interpreters therefore often—incrementally—orient their own interpretations towards the interpretations held by these groups. But the individual interpreter is never rendered meaningless within this structuring context. Harold Koh did not simply recommend the United States to word for word adopt the interpretation of Article 2(1) ICCPR that important others had expressed. Instead, an interpreter has situated freedom to express itself in the interpretations it adopts, creatively placing its interpretation in relation to those of important audiences.[174] Through the individual's expressions, the structure of practice in turn is (re)shaped: These expressions contribute to a context for evaluation within which other interpreters operate.[175] When interpretations stabilize and the space for interpretive agency is eventually—temporarily—closed down, reputation has done its stabilizing work; one interpretation, or a limited number of interpretations, have become operational routines. Interpreter and key audiences have internalized similar understandings of the law, and expression and evaluation overlap. The dynamic is then brought to a halt, and the legal concept has assumed a stable meaning—for the time being.

[170] *See* Zarbiyev, *supra* note 50, at 1139 ("If international law were to be considered as a language game, statements of law issued by international adjudicatory bodies could easily qualify as the best moves in the game.").

[171] *See generally* Bibb Latané, *The Psychology of Social Impact*, 36 AM. PSYCH. 343, 343–56 (1981) (developing "social impact theory," which is concerned with the impact of a social environment on an individual's decision-making process).

[172] RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW 28 (2013).

[173] *See id.* at 27–28.

[174] *See* Iain Scobbie, *Rhetoric, Persuasion, and Interpretation in International Law, in* INTERPRETATION IN INTERNATIONAL LAW 61, 70 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015) (explaining that interpreters usually seek to enlist the interpretations of the powerful and authoritative on their side by picking and choosing elements of these interpretations and repackaging them in support of their own interpretive claims: "The rhetor adapts his discourse to the audience by hooking his argument onto a proposition the audience already accepts in order to show that his conclusion is a development from that initial position.").

[175] *See generally* Ian Hacking, *Between Michel Foucault and Erving Goffman: Between Discourse in the Abstract and Face-to-Face Interaction*, 33 ECON. & SOC'Y 277, 277–302 (2004) (providing an interesting perspective on similar questions).

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Many of the examples that were used throughout the text can illustrate this process. With regard to the geographic scope of the CAT, the United States in 2014 decided to follow Harold Koh's suggestion in his 2013 CAT Memorandum to change its interpretation. In an address to the Committee Against Torture—whose authority certainly played a role here[176]—then acting Legal Adviser to the State Department Mary McLeod presented an interpretation that increased the obligations of the United States outside its territory, and hinted at a reputational basis for this decision, writing: "The United States is proud of its record as a leader in respecting, promoting, and defending human rights and the rule of law, both at home and around the world," and this new interpretation would increase the reputation of the United States in this regard, allowing it to "lead by example."[177]

With regard to the ICCPR, the United States has not yet shifted towards an extraterritorial interpretation of Article 2(1). Many other states, however, have increasingly espoused extraterritorial readings of the Covenant's geographic scope, often for reputational reasons.[178] These reinterpretations reshape the context for evaluation within which the United States operates. In light of the many negative evaluations that its strictly territorial interpretation has already received,[179] it is not difficult to imagine that the United States might in the future also shift towards a more progressive interpretation of the geographic scope of the ICCPR—as it did regarding the CAT.

Reputations are important to collective actors everywhere—not just to the United States—and often drive interpretive stabilization and change. To draw on another example used earlier, reputation also played an important role in the process of change and stabilization during the discussions on the meaning of self-determination in the 1950s and early 1960s. When the UN Charter came into force in 1945, self-determination was left undefined, and different groups had adopted very different interpretations of the concept. Colonial peoples had something they could cling to, while the European empires could brush their claims aside by pointing to the principle's indeterminacy. And yet, in 1960, the widely celebrated General Assembly Resolution 1514 on decolonization declared self-determination to imply the "right to complete independence"[180] for colonial peoples. In the years that followed, opposition to an ever more forceful right to self-determination for colonial peoples dwindled quickly. What had seemed like a hopelessly utopian idea a mere 15 years earlier had now become a legal and political reality.

Archival materials indicate that reputational concerns were the primary driver behind this shift. Western states were highly susceptible to reputational concerns, particularly as they sought to present themselves under the umbrella of the "free world" at the grand stage of the UN General Assembly. The growing number of former colonies in the Assembly effectively mobilized these reputational concerns and thereby gained traction in their struggle for a right to self-determination. They exposed the discrepancy between Western self-perceptions as "enlightened administrators" on the one hand and their conservative interpretations of self-determination and practices of colonialism on the other, and thereby opened up an uncomfortable gap between the reputation and identity of these Western states. This induced these states to adopt more progressive interpretations of self-determination during the late 1950s and early 1960s.

[176]*See* Koh, *supra* note 110, at 20–21 (using the interpretation of the UN Committee Against Torture as an important reference point in his memorandum).

[177]Mary McLeod, Opening Statement Before the Committee Against Torture (Nov. 12-13, 2014), https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/.

[178]*See* Tilmann Altwicker, *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, 29 EUR. J. INT'L L. 581, 606 (2018).

[179]See Koh, *supra* note 110, at 4.

[180]G.A. Res. 1514 (XV), para. 5 (Dec. 14, 1960).

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For instance, the Dutch UN delegate noted in 1958 that he "felt uncomfortable when defending the Dutch position against the ever more pressing demands for an inalienable right to self-determination, particularly from African and Asian states."[181] Reputational concerns turned out to be overwhelmingly important for the Netherlands: Considering that "in the UN, *resistance to the recognition of a right to self-determination is labelled as colonialism*,"[182] the Dutch Foreign Minister concluded that "it is both in the Dutch interest as well as important from the perspective of political considerations in the United Nations, to not adopt a strict 'administering power' position, and to incrementally change the Dutch policy"[183] towards a more progressive interpretations.

Other Western states soon followed suit. As more and more states abandoned their prior, conservative interpretations, pressure on others grew. Each individual interpretive decision (re) shaped the evaluative context, and other interpreters in turn relied on these new contexts to (re) orient their own reputation management strategies. The United States also started to believe that its old interpretations were "*extremely costly to US prestige*."[184] A 1959 UK memorandum warned that if the United Kingdom did not change its positions regarding Africa, "our past record of benevolent government will be forgotten and it will be the French and perhaps the Belgians who will be regarded by world opinion as the leaders, while we may be classed with the Portuguese as the obstacles to further advance."[185] During the 1960s, the United Kingdom therefore also changed its interpretation in the General Assembly. Despite the fact that many Western states still had important economic and strategic interests in prolonging control over the colonies,[186] their archives reveal that reputational considerations made it "impossible [to] take position against [the] concept of independence as an inalienable right for all dependent peoples"[187] during the 1960s. With opposition waning, interpretations converged, and a relatively determinate right to self-determination emerged.

The bigger a group of interpreters converging on one specific interpretation becomes, the more likely it is that other interpreters will also gravitate towards it; more and more reputational consequences are attached to it, and deviance becomes less likely.[188] Eventually, this may lead to a

[181]He admitted this in an informal meeting with a handful of Dutch politicians and scholars. Translation by author. Original text: "een gevoel van onbehagen te hebben bij het verdedigen van het Nederlandse standpunt tegen de toenemende aandrang, van vooral Afrikaans-Aziatische zijde, op erkenning van een algemeen geldend recht van zelfbeschikking." Verslag betreffende informele bespreking over zelfbeschikking, May 19, 1958 NL-HaNA, Buitenlandse Zaken/Code-Archief 55-64, 2.05.118 inv.nr. 25719. [Report on Informal Discussion on Self-Determination, Foreign Affairs/Code Archive 55-64, NL-HaNA. 2.05.118 inv. no. 25719 (May 19, 1958)].

[182]Instructie voor delegatie, Nov. 11, 1958 NL-HaNA, Buitenlandse Zaken/Code-Archief 55-64, 2.05.118 inv. nr. 25719. [Instruction for Delegation, Foreign Affairs/Code Archive 55-64, NL-HaNA, 2.05.118 inv. no. 25719 (Nov. 11, 1958)]. (emphasis added). Original text: "In aanmerking ware nl te nemen, dat in het algemeen in de VN verzet tegen erkenning van het recht van zelfbeschikking als kolonialisme wordt aangemerkt."

[183]Instructie voor delegatie, Nov. 11, 1958 NL-HaNA, Buitenlandse Zaken/Code-Archief 55-64, 2.05.118 inv. nr. 25719. [Instruction for Delegation, Foreign Affairs/Code Archive 55-64, NL-HaNA, 2.05.118 inv. no. 25719 (Nov. 11, 1958)]. Original text: "Zowel in het Nederlandse belang als ter wille van de politieke verhoudingen in de VN is het dan ook wenselijk, niet een al te star beherende mogendheid standpunt in te nemen en het Nederlandse beleid voorzichtig aan te passen."

[184]Telegram from the U.S. Mission at the United Nations to the U.S. Department of State, *United States: A Colonial Power?* (Oct. 26, 1960), *in* 2 Foreign Relations of the United States, 1958–1960, United Nations and General International Matters (emphasis added).

[185]*Africa in the Next Ten Years*, Report of Committee of Officials (1959), *reprinted in* The Conservative Government and the End of Empire 1957–1964, 125 (S.R. Ashton & A.N. Porter eds., 2000).

[186]*See Future Constitutional Development in the Colonies,* UK Govt. Report (1957), *reprinted in* The Conservative Government and the End of Empire 1957–1964, 2–20 (S.R. Ashton & A.N. Porter eds., 2000); *see also Africa in the Next Ten Years*, *supra* note 185, at 124.

[187]Telegram From the Department of State to the Mission at the United Nations (Nov. 30, 1960), *in* 2 Foreign Relations of the United States, 1958–1960, United Nations and General International Matters.

[188]*Cf.* Latané, *supra* note 171. *See also* Aronson, *supra* note 143, at 238–40.

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convergence to one, or at least a limited number of dominant interpretations.[189] The grip of such dominant interpretations increases through teaching and training. New lawyers will be socialized to see the dominant interpretation as the (only) "correct" one, and a new structural bias will have emerged. Many universities across the world now teach aspiring international lawyers that a state has duties to individuals "within its territory" *and* to those "subject to its jurisdiction."[190] At some point, perhaps, the conflict over the meaning of the word "and" may therefore be resolved, when its meaning has stabilized and a new generation of lawyers has been taught one—supposedly "correct"—way of reading the text that they can hardly "unthink." With self-determination, this has already happened: It is now uncontested that it implies a right to independence for colonial peoples.[191]

Two caveats are in order. First, the fact that interpretive struggles over the meaning of legal concepts may stabilize does not mean that all discretion is then closed down. Interpretive debates are rarely "won" with any definite finality. Next to the ever-present possibility of reopening old debates,[192] closing one door often opens another. Now that it seems that an extraterritorial reading of the ICCPR has become dominant in practice, the interpretive debate has shifted to when a state has jurisdiction outside of its territory.[193] If this is interpreted narrowly, the extraterritorial "victory" will merely be a pyrrhic one. The 1960 Decolonization Declaration declared a right to independence for colonial peoples, but the precise contours and mechanics of it remained subject to further contestation.[194] In this sense, wins are always relative, and winning the battle over one term usually means that the battlefield will simply shift to adjacent semantic territories.

Second, the above considerations must not be taken to suggest that *all* interpretation should be understood as an exercise of reputation management, or that the developed perspective should be understood as a comprehensive theory of interpretation in international law. Certainly, there are many instances where reputation has no, or not a very important role in interpretive dynamics. The examples provided above, in that sense, are anecdotal, serving merely to illustrate how reputation "works" in the practice of interpretation. But as the next section argues, it is important to be aware of reputation's role; for with every act of reputation management, the interpreter obscures something from the public eye.[195] This can have severe consequences for international legal practice.

E. Reflections on the Role of Reputation

Reputation is often hailed as a force of good in international law. It motivates states to present the best sides of themselves, incentivizing them to comply with international law[196] and spurring them

[189] *See generally* Karl Mannheim, *Competition as a Cultural Phenomenon, in* FROM KARL MANNHEIM 223, 223–62 (Kurt Wolff ed., 2017); *see also* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 51–62 (2002) (describing policy convergence in the international sphere. Such observations resonate fairly closely with doctrinal notions like *opinion juris* with regard to customary international law and subsequent practice with regard to treaty interpretation—Vienna Convention on the Law of Treaties, art. 31, para. 3(b)—in the sense that if an overwhelming majority of interpreters will converge on a single interpretation, that interpretation will also doctrinally be taken as a statement of the law. The social reality, however, is often much more fluid than legal doctrine can admit.).

[190] International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171.

[191] Of course, there are other dimensions of self-determination that are still widely contested and unclear to this day. Only a part of self-determination's meaning has been relatively stable over the last decades.

[192] Because there is no stable semantic pillar or theoretical foundation to ground consensus. *See* sources cited *supra* note 51 and accompanying text.

[193] *See generally* Koh, *supra* note 11 (recommending the extraterritorial interpretation, then sketching some of the contours of the debate on this topic).

[194] G.A. Res. 1514 (XV), para. 5 (Dec. 14, 1960).

[195] *See* KURAN, *supra* note 90 and accompanying text.

[196] *See, e.g.*, GUZMAN, *supra* note 2.

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to enter into new commitments.[197] Additionally, this Article has shown that reputation contributes to stabilizing, clarifying, and strengthening these commitments. If we believe in the project of international law, perhaps reputation's role should indeed be cherished.[198]

The positive connotation also resonates in many examples that are used to demonstrate the work that reputation does. Finnemore and Sikkink, for example, highlight reputation's role in the emergence of women's suffrage and norms of international humanitarian law.[199] Goodman and Jinks identify mechanisms similar to reputation as an important pathway for the adoption of human rights law.[200] Many of the examples throughout this article also illustrate reputation's progressive potential in the legal practice: Reputation induces states to increasingly accept the extraterritorial application of human rights treaties, and it had an important role in transforming the abstract principle of self-determination into a relatively determinate legal right to independence for colonial peoples.

Reading through much of the literature, it is almost as if reputation is a mechanism by which the trend of universal progress is brought to bear on the practice of international law. Also from the more theoretical perspective that was developed in this Article, this may not seem all too surprising. Reputation seems to carry emancipatory potential: It forces an interpreter to take the perspectives of others, who evaluate its conduct, into account. It offers the weak a tool to hold the strong accountable. International law and reputation thus work together to make political contestation a site of intersubjective argumentation, rather than one dominated by unilateral power politics.

But as argued, the relational nature of reputation also means that unequal relations between interpreters spill over into interpretive debates: It is more attractive to be well-regarded by the powerful than by the weak. That means that power can be exerted through reputational pressures in the practice of interpretation. This still should not necessarily tip the scale towards the negative, however. In political conflict, power inevitably plays a role, as Kennedy makes clear: "When distribution is accomplished without the use of force, the coercion may not be obvious on the surface. But it is there .... Force is somewhere in the mix, often in the implicit background thinking where people take formal and informal, direct and indirect pressures into account."[201] The role of power in legal practice should therefore not come as a surprise: If power imbalances had no place in legal contestation, dominant actors would simply disregard it as a method of waging political struggles, and law would lose its prominence.[202] International law is successful also because it to a large extent aligns with the interests of the powerful.[203] If politics and power are fundamentally intertwined,[204] then perhaps it is better to tame it. Power exercised through reputational pressure is still better than the violent power that Western states predominantly

[197] *Id.*; *see also* GOODMAN & JINKS, *supra* note 172, at 28.

[198] *Cf.* Zarbiyev, *supra* note 4, at 1–7 (warning of an age of "Post-Shame", where being well-regarded does not sway states to adopt credible legal arguments).

[199] Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 898 (1998).

[200] *See generally* GOODMAN & JINKS, *supra* note 172; Daugirdas, *supra* note 3, at 221–71 (explaining that this also goes for international organizations and drawing attention to some of the dangers of reputation management).

[201] DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY 60-61 (2016).

[202] The anti-law rhetoric often becomes pervasive among powerful actors when international law is experienced as shackling their power in pursuit of their interests. *See* JACK L. GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 58–64 (2009) (discussing the "lawfare" debate surrounding the War on Terror, where international law was perceived as an inconvenient limitation on U.S. power, as an insider).

[203] *See generally* Krisch, *supra* note 168. *See also* Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 14 EUR. J. INT'L L. 105, 117 (2003) ("More powerful parties, for their part, tend to be content with and to accept the law because law generally embodies their fundamental interests due to their strong influence in the law-making process.").

[204] *Cf.* CHANTAL MOUFFE, ON THE POLITICAL 18, 106 (2005) (noting that "power is constitutive of the social because the social could not exist without the power relations through which it is given shape," and that "since power relations are constitutive of the social, every order is by necessity a hegemonic order.").

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relied on prior to the emergence of stable international institutions.[205] As Koskenniemi succinctly puts it: Legal struggles "enable political victory without having to fight to the death."[206]

Certainly, mechanisms of influence like overt coercion are not completely foreign to the practice of legal interpretation. But within legal practice, the balance shifts from these mechanisms to "softer" forms of influence through social mechanisms and persuasion. That is primarily because for law to effectively do its work in society, it must be perceived to be distinct from arbitrary exercises of power. International law therefore presents itself as an exclusive, reason-based practice, within which only *legal* reasons count.[207] The participants in this practice collectively work to uphold this well-maintained veil of legal autonomy and objectivity, presenting their interpretations as being compelled by a distinctly "legal logic."[208] From the outside, it often seems as if persuasion based on legal reasons is the only mechanism of influence that is at work in the practice of interpretation. But while persuasion based on a rational exchange of legal arguments certainly happens, there are also other, "extra-legal" influences at work that are obscured by how interpretations are formally presented to the outside world—precisely as reasoned positions on the "correct" meaning of the law.[209]

It is this outward show of legal argument that contributes to reputation's prominence within the practice. For the formal self-presentation of international law as an exclusive, reason-based practice places a restriction on the means of influence that are permitted in the practice: Any attempt at influencing others overtly outside this scheme of reasoning—for example influence by overt coercion—is rejected because it threatens to undermine the practice's autonomy. To maintain its veil of autonomy, legal practice must hide all visible cracks in its apparent rationality and suppress all overtly extra-legal influences.[210] Reputation, however, even though it does not follow what is usually conceptualized as law's "internal logic," does not visibly pierce this veil. Interpreters can influence each other with reputational consequences simply by expressing an interpretation. That is enough to impose on others a reference point to which reputational sanctions and rewards are attached. No explicit threats need to be made, and there may not even be an intention to influence others. And while another interpreter may be motivated to adopt that interpretation for reputational reasons—for wanting to be well-regarded by the first interpreter—it can plausibly present such a decision as the outcome of a "legal" reasoning process.

Indeed, obscuring certain beliefs, values, interests is part of the very nature of reputation management: It implies that an interpreter seeks to present its best self to others, pre-empting their opinions and reactions, and thereby concealing their influence from the public eye. It is no surprise, then, that Koh's *leaked* memorandum on the ICCPR was meant for *internal* purposes only: To the outside world, the United States would not do well to admit that it adopted a specific interpretation for reputational reasons—rather than for the sake of being convinced that this is the "correct" reading of the law. That would have both pierced the veil of autonomy of legal practice,

[205] *See generally* China Miéville, Between Equal Rights: A Marxist Theory of International Law (2005) (describing how violence has always been at the heart of international legal relations). *See also* Robert Knox, *Marxism, International Law, and Political Strategy*, 22 Leiden J. Int'l L. 413, 426 (2009) (sympathizing with the argument, but suggesting that Miéville may overstate the role of coercive violence in modern day international law).

[206] Martti Koskenniemi, Apology to Utopia: The Structure of International Legal Argument 597 (2009).

[207] *Cf. id.* at 28.

[208] *See* Bourdieu, *supra* note 24, at 820 (insightfully observing:

> Far from being a simple ideological mask, such a rhetoric of autonomy, neutrality, and universality, which may be the basis of a real autonomy of thought and practice, is the expression of the whole operation of the juridical field and, in particular, of the work of rationalization to which the system of juridical norms is continually subordinated.).

[209] *See generally* Stanley Fish, *The Law Wishes to Have a Formal Existence, in* There's No Such Thing as Free Speech and It's a Good Thing, Too 141 (Stanley Fish ed., 1994).

[210] *Cf.* Bourdieu, *supra* note 24, at 844.

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and undermined the very strategy of reputation management that Koh and the United States are engaged in.

Because reputation is one of the few mechanisms of influence that operates unseen, its relative effect in the practice of interpretation is amplified. It is precisely the invisibility of reputation's work that may darken the rosy picture of reputation that scholarship usually paints. As simply expressing an interpretation is enough to impose on others a reference point to which reputational sanctions and rewards are attached, persuasion and reputational pressures can become conflated: Interpretations are at once attempts to persuade on rational grounds, as well as socially consequential normative reference points. From the outside, it is therefore difficult to tell why a state adopts a specific interpretation: Is it genuinely convinced, or does it feel compelled to adopt the interpretation for reputational reasons?[211]

The conflation of persuasion and reputational pressures can have chilling effects on interpretive practices. Social mechanisms like reputation skew the chances of success towards the powerful without requiring them to openly put their power to work. Because this "soft" power via reputation operates largely under the radar, the outcomes of interpretive struggles may often be mistaken for genuine consensus—rather than hegemonic victory. Especially if actors publicly suppress private sentiments out of a desire to be well-regarded, this tendency may be pervasive. Timur Kuran therefore explains that although these performances may seem insincere—mere "talk"—there may be severe consequences to such instances of public preference falsification. The fact that many interpreters publicly express a certain interpretation for reputational purposes contributes to the perception that the beliefs underlying this interpretation are widely shared. Interpretations that are expressed publicly therefore influence others, regardless of whether they are privately rejected. Audiences usually do not have access to these private thoughts, and can only rely on the public signals they receive. Thus, even interpretations that are deeply unpopular among many interpreters privately may acquire a strong normative traction if they are widely expressed publicly.[212] Over time, more and more interpreters may conform to such interpretations for reputational reasons, and stabilization sets in. These public interpretations then become embedded in legal practice, are taught in law schools, and internalized by participants in legal discourse. At that point, opposing views may be erased altogether, and rule-following becomes a subconscious routine.[213] In the end, only the interpretation that succeeds in authoritatively defining what the law means matters; the struggles from which it emerged are usually forgotten.[214]

Especially from the outside, processes of interpretive stabilization and change under the spell of reputation may seem agreeable and argument-based, with little signs of struggle at all.[215] It adds

[211] *Cf.* Alastair I. Johnston, *Treating International Institutions as Social Environments*, 45 INT'L. STUD. Q. 487, 494 (2001) (observing that such conflation happens).

[212] *See generally* KURAN, *supra* note 90.

[213] Failing to internalize dominant interpretations can make you ineffective in a practice where all others take them as "correct." *Cf.* KOSKENNIEMI, *supra* note 206, at 550 ("There is this dilemma: to participate in routine, one needs to do this through a role. But the more one immerses oneself in one's role, the less one is actually participating as a conscious agent at all.").

[214] This is exactly why the turn to history has critical potential: it brings back alternative voices.

[215] Interpreters often publicly hide their disagreement. For instance, the representative of the United States to the UN Human Rights Council Keith Harper, when addressing the Committee Against Torture in 2014, stressed that this was "an opportunity to learn from you. We have faith that both sides of the dialogue will be constructive." He thus emphasized reasonable "dialogue" over the underlying tension between their positions (https://geneva.usmission.gov/2014/11/12/ambassador-harper-opposition-to-torture-is-a-fundamental-american-value/ (last visited October 17, 2025)). It is also why the United Kingdom, to acquire a better reputation among the anticolonial states in the General Assembly in 1960, introduced its particular interpretation of self-determination with the questionable assertion that "[i]f we have sometimes had differences of opinion on this question, these have been differences of method and sometimes of timing; they are not differences of intention." *See* U.N. GAOR, 15th Sess., 935th plen. mtg. at 983, UN Doc A/PV.925 (Nov. 28, 1960). This statement obscured the still deeply internalized narrative identity of the United Kingdom as a "civilizer" of its colonies, and it conflicted with many of the United Kingdom's daily practices *Cf., e.g., Future Constitutional Development in the Colonies*, *supra* note 186, at 9.

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legitimacy to outcomes that were in reality arrived at under the influence of power, and places those who struggle against it at a further disadvantage: They may be perceived to be fighting against ostensibly legitimate legal distributions, while the "naturalness" of these distributions in fact resulted from reputational pressures driven by underlying power imbalances. Many states in the Global South were, and still are, for example, under pressure to signal to Western states and investors a commitment to strong foreign investment protection, and therefore ostensibly "agreed" to tone down their—interpretive—demands for a progressive distributive justice in the late 1970s and 1980s.[216] But it is questionable whether this "agreement" on the principles that should guide foreign investment was genuine, as it rather seems to have resulted from almost inescapable reputational pressures. Nevertheless, the result is that many now regard the principles that emerged in this process as natural and legitimate. Those who question them are often set aside as disrupting a "fair" international legal order.

The way power operates through reputation can thus change, stabilize, and constitute the ways we think about international law.[217] This may increase order in an otherwise chaotic world of international politics. But the fact that reputational pressures often stifle critique without any overt trace of coercion at all can make legal outcomes appear as though they were reasonable and fair to all participants, as critiques are often suppressed without being uttered. The fundamental difference with—overtly—coercive forms of influence is that in these cases, it is at least clear that pressure is being applied to suppress opposing views, and it is then less likely that outcomes will be mistaken for genuine agreement. From this perspective, law—with its strict limitations on the modes of overt influence—can be a particularly effective, cost-efficient, and durable means for the powerful to retain and expand their material and ideational gains into the future.[218] Reputation can play an important role in making legal outcomes seem "natural" and therefore in adding to their legitimacy. Without understanding the way in which power operates through reputational pressures—and how it thereby shapes and stabilizes interpretations of international law—our awareness of the processes that bring about such outcomes and the conditions for their change is occluded.[219]

F. Conclusion and Outlook: What Role for Reputation in Legal Research?

Reputation as an analytical concept brings the social relations underlying legal discourse to the surface. It emphasizes that interpretive debates are part of a fundamentally social practice, within which the relations between the participants often matter just as much as the merit of their arguments. Reputation transforms these ostensibly silent social relations into concrete motivations in interpretive decision-making: It forces interpreters to think about how they want to present themselves to relevant audiences through the interpretations they adopt. As such, reputation helps to explain the interpretive choices of interpreters. These individual choices are connected to broader dynamics within the practice of interpretation. As a social concept, reputation forces interpreters to take note of each other's interpretations. Each interpretive decision (re)shapes the context for the evaluation of others. Since interpreters use these evaluative contexts for orientation out of a desire to be well-regarded, interpretation under the spell of reputation often leans towards stabilization. As interpreters over time internalize the consistent interpretive behavior to acquire and live up to their desired reputations, reputation can help to explain transitions from interpretive flux to the many routines we encounter in international legal

[216] *See* sources cited *supra* note 165 and accompanying text.

[217] *Cf.* Michel Foucault, Discipline and Punish: The Birth of the Prison 194 (1995) (conceptualizing disciplining power as productive).

[218] *Cf.* Kennedy, *supra* note 201, at 56.

[219] *Cf.* Marks, *supra* note 64, at 20.

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practice.[220] Reputation's role thus extends far beyond compliance; it contributes to shaping how lawyers think about and experience international law itself.

For scholars with an emancipatory research agenda, reputation can serve as more than an explanatory "factor" in interpretive practice. By drawing attention to what remains hidden beneath the veil of public performances, reputation as an analytical concept can help to guide analyses that look to retrieve suppressed critiques. If reputation management renders critique invisible—by forcing actors to falsify their preferences in public settings—it is easy to rewrite interpretive struggles as teleologies of progress towards order and justice. In this way, reputation contributes to naturalizing and closing the present by falsifying preferences in the past. A critical sensibility towards instances of reputation management may help to counteract such tendencies, and "denaturalize" false consensuses by piercing the veil of public preference falsification.[221] It becomes particularly important to identify moments of acquiescence out of a fear of reputational consequences, and to distinguish genuine consensus from a subtly imposed conformity.

An awareness of reputation's role can thus help researchers not to be fooled by the apparent agreeableness and constructiveness of so many public debates where contestation is or was to be expected.[222] It should inspire a healthy suspicion towards public settings; a sense of wonder about the positions that are adopted under the bright lights of the General Assembly and other grand stages; a feeling that there is more than meets the eye. Interpreters present stylized versions of themselves to relevant audiences—often very aware of the images they portray. But this critical sensibility to the "frontstage" of interpretive practice is only a preface to recovering or excavating what was hidden underneath the public façade.[223] For the real emancipatory potential lies in retrieving the voices from *backstage*, where the masks come off and some of the authentic motivations and reasons—the interests, preferences, values that were suppressed in public—are no longer concealed. It demands that the researcher devises methods and searches for archives that give access to this life behind the scenes, a glimpse into the backstage, to recover the critiques that are silenced by reputation management. It implies, for instance, digging into governmental archives in search of internal memoranda, internal meeting records, anything that can reveal what is really going on—what really motivated interpreters to adopt the public positions they adopt, and which positions were *not* expressed out of a fear of a bad reputation.

Retrieving silenced voices is not just important for their own sake. It is also a way of counteracting the public perception that certain—usually conservative—positions are widely shared, and thereby preventing them from becoming embedded in legal doctrine. Revealing suppressed critiques means reclaiming conflict and agency, by showing interpreters that they are hardly alone in their "deviance." If interpreters know there are others who can positively recognize them for their deviant interpretations, change is more likely to succeed.[224] It can aid attempts to break through what David Kennedy describes as an "eerie stability" that oftentimes seems so "hard to imagine challenging or changing."[225] The present may be more open than we realize.

[220] *See supra* Section D.II. The examples illustrated that what was once disputed may come to be perceived as clear and undisputed. Self-determination, for instance, now implies a right to independence for colonial peoples.

[221] *See generally* KURAN, *supra* note 90.

[222] For historians looking to reclaim possibilities of the past to open up the present, this is crucial. *See supra* Section B.

[223] *See generally* GOFFMAN, *supra* note 7 (applying and popularizing the metaphors of frontstage and backstage in sociological thought).

[224] *See generally* KURAN, *supra* note 90 (showing how piercing preference falsification can indeed have transformative social consequences); Timur Kuran, *Sparks and Prairie Fires: A Theory of Unanticipated Political Revolution*, 61 PUB. CHOICE 41, 41–74 (1989). *See also* ARONSON ET AL., supra note 143, at 238-40 (describing Asch's "ally experiment," which provides psychological evidence that deviance becomes easier when you have an "ally").

[225] KENNEDY, *supra* note 201, at 5.

https://doi.org/10.1017/glj.2025.10170 Published online by Cambridge University Press

Acknowledgments. The author wishes to thank Janne Nijman, Ingo Venzke, Sara Wissmann, Kirsten Schmalenbach, and the participants in the Munich Research Forum for helpful discussions and comments. The article draws on arguments developed in the author's forthcoming book, *Interpretation as Reputation Management: On the Social Life of International Law* (Cambridge University Press, forthcoming).

Funding Statement. This research received no specific grant from any funding agency, commercial or not-for-profit sectors.

Competing Interests. The author declares none.

Cite this article: Zimmermann W (2026). Self-Presentation in International Law: On Reputation and Interpretation. *German Law Journal* **27**, 240–275. https://doi.org/10.1017/glj.2025.10170

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