Chapter 13
Interpretation

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1. Sketching the Problématique

Interpretation is a specific epistemological tool within the overall epistemological enterprise that is scholarship. A form of legal hermeneutics, to study the theory and practice of interpretation is to raise basic jurisprudential questions as to the nature of a legal order, the rules that it contains, and the actors vested with authority for the creation – and the interpretation – of such rules. For international legal scholarship in particular, these questions are key in identifying with any clarity the processes through which international law develops and evolves. Responding to such questions is challenging, and it is no surprise that scholars of international law approach questions of interpretation with some 'trepidation',[1] a doubt shared also in domestic legal scholarship.[2]

The process of interpretation, and the study thereof, is certainly a wider endeavour than can be systematised thoroughly in the present chapter alone. Hence, a few points merit mention from the outset, so as to situate and confine the contribution that I hope will be made here. First, the positivist concept of law in a post-modern world, as befits the title of this collection, can and does admit of the reality that the interpretative act has a constitutive – or, at the very least, a *normative* – effect on the development of international law: given that legal systems are essentially rooted in the power of linguistic constructions, the possibility of semantic indeterminacy remains a reality. In such contexts, the partially constitutive character of interpretative acts and practices ought to be uncontroversial, and has been readily conceded by both Hans Kelsen and Herbert Hart.[3] It is in partial reaction to this reality that concepts are put forward such as inter-temporal interpretation, the principle of 'effectiveness',[4] and the principle of 'systemic integration';[5] although these can only be touched upon in this chapter, they seek partially to restore the idea of determinacy within international law, a particularly indeterminate system by its very form.[6] Yet this indeterminacy occurs within the *frame* of international law, a point that will be briefly surveyed in the following section.

From this vantage point, the next section will proceed within the analytical framework of the interpretation of treaties, to challenge some of the presumptions of determinacy contained in this framework. This is so for two reasons. First, international treaties, as acts through which states consciously accept international legal obligations, allow us to consider the binding character of such obligations and rules whilst avoiding, to a degree, questions relating to

[1] Arnold McNair, *The Law of Treaties* (2nd edn Clarendon Press 1961) 361.
[2] Lon Fuller, *The Morality of Law* (Yale University Press 1969) at 224: '[d]espite the basic significance of interpretation for every aspect of the legal enterprise, it has never been a subject with which analytical positivism has felt comfortable.'
[3] Both Hans Kelsen, *Pure Theory of Law*, 2nd edn (M Knight trans.) (University of California Press 1967), ch. VIII, and Herbert Hart, *The Concept of Law*, 2nd edn (OUP, 1994) 144–150, admit of the use of discretion by law-applying actors in resolving such indeterminacy.
[4] As explored carefully in Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' 26 *BYBIL* (1949) 48–85.
[5] See Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' 54 *ICLQ* (2005) 279–319.
[6] David Kennedy situates international law's structural indeterminacy in that it simultaneously purports to bind the subjects who are the source of the law itself: see generally David Kennedy, 'Theses about International Law Discourse' (1980) 23 *GYBIL* 353.

the different forms of various international legal texts, such as the acts of international organisations or the judgments of international courts or tribunals. Second, the relatively well-specified rules on treaty interpretation contained in Articles 31–33 of the Vienna Convention on the Law of Treaties 1969 (VCLT) are frequently argued to be capable of wider abstraction to all international legal texts and acts, an assertion that will be challenged in the next section. Throughout, the analysis will be conducted with an eye on the *purpose* of interpretation according to positivism, that is, 'to specify the ambit and normative content of the relevant instrument'.[7] However, my analysis will be cautious as to the purpose of interpretation, bearing in mind Sir Humphrey Waldock's exhortation to the International Law Commission to this effect:

> [T]he process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of search for and discovering some pre-existing specific intention of the parties with respect to every situation arising under a treaty … In most cases interpretation involves *giving* a meaning to a text.[8]

The discerning of meaning is claimed to be the central purpose of the interpretative process; yet I submit that in fact, the interpretive process also involves a process of *constructing* meaning. The very character of interpretation cannot simply be assumed to have an objective character, given the difficulties raised by the so-called 'hermeneutic circle', or the claim that the meaning of a text as a whole can only be established by reference to its individual parts, and that one's understanding of each individual part is constructed only by reference the whole.[9] This view holds that there is no neutral, external standpoint from which to measure objectively the meaning of a system of signs or actions; there is thus a need to remove what is arbitrary or extrinsic from the circle, and focus exclusively on the object of cognition.[10] The narrative of classical positivist theorising on interpretation (to the extent that there is such theorising) presumes the objectivity of the interpretative process, a process that aims purely to clarify, developing a method to fill any ambiguities in the fabric of the legal system with the one correct response, based on reason.[11] So confined, the interpretative process can appear to be self-confirming, an unhappy conclusion if one considers that social constructions ought to have rational justification and empirical support. Accordingly, the last section of this chapter will consider some subjectivist theories of interpretation that have been presented, respectively, by leading figures in the New Haven School and the Critical Legal Studies movements.

2. Semantic Indeterminacy and the 'Frame' of a Legal System

2.1 A Legal System as a 'Frame' for Interpretation

Kelsen's 'theory of legal science', as a project of cognising the law through the methods of striving for truth,[12] did contain certain categorical assertions relating to the nature of the inter-

[7] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 285. He continues: interpretation 'is also denoted as the exercise that clarifies the sense of the treaty … and its effect; or ascertains the intention of the parties from the text, their common intention'.

[8] Sir Humphrey Waldock, Special Rapporteur, 'Document A/CN.4/167 and Add.1–3: Third Report on the Law of Treaties' *Yearbook of the International Law Commission*, Vol. II (1964) 53 (para. 1), citing 'Codification of International Law: Part III – Law of Treaties' 29 *AJIL Supplement* (1935) 653–1228 at 939 (emphasis in original).

[9] See generally Martin Heidegger, *On Being and Time* (1927).

[10] Hans-Georg Gadamer, *Truth and Method* (Continuum Publishing Group 1975, 1989 reissue), especially at 266-67.

[11] Kelsen, note 3 at 351.

[12] For further discussion, see Jörg Kammerhofer, 'Hans Kelsen in Post-Modern International Legal Scholarship', in this volume at 3.

pretative process. Chief amongst classical positivist claims is that participants in legal cognition, be they scholars, judges or practitioners, ought to be limited purely to cognising positive acts of law and measuring them according to their positive validity.[13] Yet to do so in international law is to conflate positivism with voluntarism;[14] and Kelsen and other 'Modern' critics of classical legal positivism were sufficiently responsive to difficulties with indeterminacy in legal texts. Kelsen readily conceded the 'intentional indefiniteness' of certain law-applying acts and even the unintended indefiniteness inherent in the linguistic formulation of legal norms.[15] His vision of the legal system was that it formed a 'frame' that admitted of possible applications of norms in concrete cases[16] the act of individual application helped further to determine and constitute a general legal rule.[17] Kelsen's critique of classical legal positivism questioned the idea that the act of application was nothing but an act of understanding and clarification: he situated it as an act of will or cognition: a *choice.*[18] This characterisation renders untenable any categorical distinction, within a given frame, between law-creation and law-application by law-applying actors: to him, these were also law-making acts.[19] His solution was to admit of the constitutive nature of *discretion*, in the application of such rules, by law-applying authorities in a legal system. Similarly, Hart conceded a certain place for discretion in a legal system whose rules were sufficiently determinate to supply standards of correct judicial decision,[20] although he also foresaw that hard cases helped to prove a fundamental 'incompleteness' in law, where the law could provide *no* answer.[21] This is in part because Hart's theory was essentially reductionist[22] in so far as it tried to confine itself to describing how law and a legal system could arrive at the validity of rules, and not on the determinacy of the legal order itself.

It is well-known that Ronald Dworkin rejected the idea that the law could be incomplete and contain gaps, choosing instead a view that law is not incomplete and indeterminate, being supplemented by *principles*, principles that can themselves be derived from moral justifications if necessary.[23] This would have been inadmissible to Kelsen:

> It is, from a scientific and hence objective point of view, inadmissible to proclaim as solely correct an interpretation that from a subjectively political viewpoint is more desirable than another, logically equally possible, interpretation. For in that case, a purely political value judgment is falsely presented as scientific truth.[24]

In any event, what is interesting about Dworkin is that the discretion exercised in the interpretative act requires the construction and balancing of the principles underlying legal rules, a 'weak' form of discretion exercised within the 'open texture'[25] of a legal system. Legal inter-

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[13] Kammerhofer, note 12 at 3.

[14] Kammerhofer note 12 at 7; Jean d'Aspremont, 'Herbert Hart in Post-Modern International Legal Scholarship' in this volume, at 22, suggests that reductionism is indifferent as to the material source of the law, concerning itself only with its *formal validity*.

[15] Kelsen, note 3 at 350.

[16] Kelsen, note 3 at 351.

[17] Kelsen, note 3 at 349.

[18] Kelsen, note 3 at 82-3.

[19] Kelsen, note 3 at 85. See also I Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012) at 31.

[20] Hart, note 3 at 145. Hart's reliance on specifically *judicial* discretion was premised on his view that judges are law-applying officials within a given legal system; and thus specifically entrusted with safeguarding that system.

[21] Hart, note 3 at 252 (in his 'Postscript' to *The Concept of Law*).

[22] D'Aspremont's term: note 14 at 2, *passim*.

[23] Cf Hart, note 3 at 204-5, denying the legality of recourse to moral justification.

[24] Kelsen, note 3 at 356.

[25] Dworkin, *Taking Rights Seriously* (Harvard University Press 1978), at 31-2. He distinguished his form of 'weak' discretion from the 'strong' discretion that he purported Kelsen and Hart attributed to judges, which allowed them to reach for principles *outside* a legal system. Dworkin's point is fair. If one examines Kelsen, note 3 at 352, his refusal to privilege any acceptable meaning within the frame is evident: '[f]rom the point of view of

pretation would then become an act of cognising the possibilities available *within* the frame of the system;[26] in this respect at least, it is reconcilable with Kelsen and Hart, in that it also situates the interpretative process *within* the frame of a legal system. With respect to international law, such limits are part of its inner logic, and its inherent structural biases that are deeply embedded within the international legal system itself.[27]

2.2 Limits to indeterminacy

Although the indeterminacy of legal language is in many respects presumed, it does not allow for unlimited choices in how interpretation shapes and constructs the meaning of a text. Within that indeterminacy comes a measure of determinacy; the 'canonical terms' within a legal text provide a limit to the political choices available to the interpreter. He or she cannot arrive at interpretations that clearly offend the actual words used, or that are justified by policies and principles wholly absent from the canonical terms.[28] Certainly the text is the 'first authoritative reference point'[29] through which the interpretation of a norm is constructed; but the text is not reducible to a fixed, immutable expression of the rule. What is more, the engagement of actors with a legal text is historically contingent: it is structured by the frame in which it is situated, and measured against rules contained within that frame, not to mention past practices of other actors or disputants.[30]

Therefore, the outer limits that mark the field of possible interpretations may be recognised in an act of scientific legal cognition by capable legal scholars;[31] but true to the Kantian inspiration of Kelsen's legal theory, the concrete meaning of a norm in the individually disputed case cannot be *discovered* but only *created*. This is broadly consonant with Hart's social thesis, where the claim to authority of an interpretative act is to adhere to the standards of legal argument and interpretation that are *accepted* by officials within that system.[32] Understood thus, interpretation is a relatively open exercise taking place within a confined setting, a setting defined by the four corners of the text itself.[33] Even in classical legal positivism there is a certain openness based in the *language* used in constructing a text: '[b]y virtue of linguistic openness, legal positivism in its purest form is never immune to such changes in meaning and to the consequent informal development of law'.[34] As such, the theoretical possibilities of reasonable meaning – and thus, the contestability of meaning – are limited by these practical limits, which would confirm the binding force of international law.[35]

3. The 'Sources of Sources' and the Rules of Interpretation

3.1 Articles 31–33 VCLT as Abstract Rules of Interpretation?

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positive law, one method is exactly as good as the other'. Similarly Hart, note 3 at 204–205, admits that the interpretation of legal texts and precedents by judges leaves open a 'vast field' for judicial law-creation, yet gives few indicia as to what standards should guide judges should the legal rules in question be ambiguous.

[26] Kelsen, note 3 at 351.

[27] Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Finnish Lawyers' Publishing Company 1989, reissued CUP 2005), at 568.

[28] Venzke, note 19 at 5.

[29] Ibid.

[30] Venzke, note 19 at 49.

[31] Hans Kelsen, *General Theory of Norms* (Clarendon Press, 1991), 44.

[32] Dworkin, *Law's Empire* (Hart 1986) at 67.

[33] Dworkin, *Taking Rights Seriously*, note 25 at 108-109.

[34] Ulrich Fastenrath, 'Relative Normativity in International Law' 4 *EJIL* (2003) 315, at 316.

[35] Venzke, note 19 at 49.

The natural tendency of the international lawyer is to seek comfort in certainty,[36] and to seek authoritative rules that lend order to what otherwise could be excessively subjective: an express 'basic assumption that [a] legal regime can only be described in terms of a more or less coherent system of rules'.[37] However valid the criticism that the rules of interpretation are 'not the determining cause of judicial decisions, but the *form* in which the judge cloaks a result arrived at by other means',[38] Articles 31–33 VCLT carry with them that allure, with one view suggesting their transcendent nature as abstract rules of interpretation, extending beyond the remit of treaties.[39] That these articles settle the scope of the interpretative process is often taken as a matter of faith in establishing the 'objective' character of interpretation as a means to attaining legal certainty:

> [T]he rules of interpretation laid down in international law contain a description of the way an applier shall be proceeding to determine the *correct* meaning of a treaty provision considered *from the point of view of international law*.[40]

The appeal of recourse to Articles 31–33 VCLT goes further than mere coherence, especially given their now-accepted customary status in international law.[41] Classical legal positivism argues that treaty interpretation represents the interpretation of an act essentially *posited* by states, and thus a source of obligation as much as a source of law.

A modern example of this position is Alexander Orakhelashvili, who suggests categorically that '[t]he Vienna Convention methods of interpretation, as the practice consistently demonstrates, are not only treaty-based methods but also constitute the generally accepted legal framework of constitutional significance'.[42] To him, therefore, interpretation as a cognitive process has been supplanted by the treaty-based Vienna Convention methods that have been posited. He continues:

> [T]he view that the rules of the Vienna Convention are merely working assumptions is misguided, being a mere assertion unsupported by any evidence. The text of the Vienna Convention, the process of its drafting and the practice of its application are all unanimous in affirming that the rules of treaty

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[36] As was recalled by Special Rapporteur Ago during the first reading of the Draft Articles on the Law of Treaties, *Yearbook of the International Law Commission*, Vol. I (1964) 23, para 34.

[37] Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 19.

[38] H Lauterpacht, 'Restrictive Interpretation', note 4 at 53.

[39] Orakhelashvili, note 7 at 294, again suggesting that the Vienna Convention has *posited* rules that *supersede* thethe objective and subjective approaches to interpretation delineated in Koskenniemi, note 27 at ■. See also Alexander Orakhelashvili, 'Unilateral Interpretation of Security Council Resolutions: UK Practice' 2 *Göttingen Journal of International Law* (2010) 823–842 at 824, arguing for the applicability of the rules of treaty interpretation to resolutions passed by the Security Council.

[40] Linderfalk, note 37 at 29.

[41] Permanent Court of Arbitration, *Arbitration regarding the Iron Rhine ('IJzeren Rijn') Railway (Belgium/Netherlands)*, Award of 24 May 2005 at 23 (para. 45): 'it is now well established that the provisions on interpretation of treaties contained in Arts 31 and 32 of the Convention reflect pre-existing customary international law.

The Court even applies the VCLT between states not parties to it: see e.g. France in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, ICJ Reports (2008) 177; Indonesia in *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment of 17 December 2002, ICJ Reports (2002) 625 at 645–646 (para. 37); and Botswana and Namibia in *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999, ICJ Reports (1999) 1045 at 1059 (para. 18). Orakhelashvili, note 7 at 313–315, cites substantial arbitral practice and a number of WTO Appellate Body decisions which take the same position.

[42] Orakhelashvili, note 7 at 317. But cf. criticism of this point by Jörg Kammerhofer, 'Book Review: Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*' 20 *EJIL* (2009) 1282–1286 at 1283–1284; and M Waibel, 'Demystifying the Art of Interpretation (Review Essay) (2011) 22 *EJIL* 571 at 583-584.

interpretation are fixed rules and do not permit the interpreter a free choice among interpretative methods.[43]

Similarly, Linderfalk claims that, with the entry into force of Articles 31–33 VCLT, many of the major controversies relating to interpretation writ large 'must be considered as finally resolved'.[44] His justification is practical, not doctrinal:

> Not only will such investigations contribute to reducing disagreement among appliers with regard to the contents of international law. They will also provide the foundation for a constructive and more rational discussion concerning how the freedom of action left to the appliers under international law should be used.[45]

For all this, it seems to the present author that the rules on treaty interpretation of the VCLT do not lend themselves automatically, nor easily, to abstraction. First, the idea that posited rules of interpretation supersede the nature of the interpretative process as a cognitive faculty goes a step too far, reducing the nature of the international legal system to an unreflexive dogmatism. To adopt the VCLT's approach uncritically (which even the International Court of Justice itself was rather hesitant to do for some time, even when it was relying on the articles *sub silentio*), would even do violence to the Commission's own modesty when drafting what became Articles 31–33:

> [T]he question raised by jurists is rather as to the non-obligatory character of many of these principles and maxims. They are, for the most part, principles of logic and good sense valuable as guides to assist in appreciating the meaning which the parties may have intended … recourse to many of these principles is discretionary rather than obligatory …[46]

Even within a purely voluntarist concept of international law, the VCLT itself is nothing more than a multilateral treaty, and was not conceived as being hierarchically superior to other forms of treaties. Even if its substantive provisions on the rules of interpretation and other matters (*pacta sunt servanda, rebus sic stantibus*) are regarded as codifications of customary international law, they were never intended to be the 'source-law' for all treaties to which they apply.[47] As such, although they are a useful heuristic device through which to filter the debates within international legal scholarship, they cannot substitute for the reality of interpretation as both a cognitive and law-creative process.

In any event, the Vienna Convention rules are very much specific to the particular *form* of a treaty within international law. Certainly, there may be some principles that can be distilled from the VCLT rules that may be relevant for other legal texts in so far as they are paralleled by treaties, but only in so far as the intention *behind* such legal texts is similar.[48]

A particularly good illustration is to be found in the case law of the ICJ when interpreting resolutions of the Security Council, which are themselves written instruments, concluded by

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[43] Orakhelashvili, note 7 at 309. Relying on the International Law Commission, 'Commentaries to the Draft Articles: Law of Treaties' *Yearbook of the International Law Commission* Vol. II (1966) at 219–220, Orakhelashvili concludes at 310 that 'the Vienna Convention conclusively and definitively replaced the relevance of various "schools" of interpretation by formulating a single regime of interpretation based on rules'. But what this suggests is that the Vienna Convention proposed a *single, coherent, general approach* (Orakhelashvili calls it 'holistic') and that the approach was designed to be totalising, to impose a standard of interpretation of all acts in all circumstance

[44] Linderfalk, note 37 at 3, although he tempers this with the discussion of radical legal scepticism versus the 'one-right-answer' thesis.

[45] Linderfalk, note 37 at 6.

[46] International Law Commission, note 43 at 218–219 (paras 4–5), also cited in Ian Brownlie, *Principles of Public International Law* (6th edn OUP 2003) 602; Richard Gardiner, *Treaty Interpretation* (OUP 2007) 37. Humphrey Waldock, Special Rapporteur, 'Document A/CN.4/186 and Add.1–7: Sixth Report on the Law of Treaties' *Yearbook of the International Law Commission* Vol. II (1966) at 94 (para. 1).

[47] Jörg Kammerhofer, 'Systemic Integration, Legal Theory and the ILC' *Finnish Yearbook of International Law* 13 (2008) 343–366 at 354–355.

[48] Lauterpacht, note 4 at 78.

representatives of states, and capable of generating legal obligations. Faced with the opportunity to rely on the VCLT rules when interpreting Security Council resolution 1244 in the *Kosovo* advisory opinion of 2010, the Court drafted a cryptic paragraph concluding that the rules contained in the VCLT 'could provide guidance' for the interpretation of Security Council resolutions, but that other factors were to be taken into account.[49] Accordingly, it behoves the interpreter to consider the nature and form of a legal text, and recall Waldock's distinction between principles ('guides to assist in appreciating the meaning')[50] and methods (textual, subjective, and teleological)[51] of interpretation: that distinction outlines the descriptive, and not consciously prescriptive, spirit which has always permeated the VCLT's approach.[52]

Even if the VCLT approach to treaty interpretation cannot be taken as gospel, the treaty has been the quintessential legal instrument upon which most scholarly theorising on interpretation has been aimed, and in order to engage with classical positivist theories of international legal interpretation on their own terms, the rules on treaty interpretation constitute a self-contained, complete analytical *frame* that has attempted to systematise and to structure the various possible methods for discerning the meaning of a legal text. As a *frame*, they are worthy of careful examination.

3.2 The 'Crucible' Approach of the VCLT

At its core, the object of treaty interpretation is '[t]o determine the meaning of a treaty provision'.[53] The act of interpretation, in this respect, suggests that meaning is not self-evident, or else the converse, that meaning *needs* to be determined, because several possibilities are left open by the legal order. As Kelsen has suggested, the system of norms in question thus leaves open a degree of *choice*: it 'leaves this decision to an act of norm creation to be performed'.[54] It also entails a condition of ambiguity: '[i]t is not possible to interpret what has no need of interpretation'.[55] Yet perhaps this condition of ambiguity for the interpretative act is overstated: in order to discern whether ambiguity or lack of clarity exists, one must *first* interpret the relevant text, using the means of interpretation laid out in Articles 31–33 VCLT. In keeping with this point, one must turn to the Commission's view that Article 31, as a whole, sets out a single 'general rule of interpretation' consisting of four distinct, non-hierarchical modes of interpretation, all of which are technically primary rules of interpretation.[56] This is known as the ILC's 'crucible' metaphor: 'all the various elements, as they were present in any given

[49] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, no ICJ Report yet, 404 at 442 (para. 94). This has been the Court's position for some time: see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports (1971) 16 at 53 (para. 114).

[50] Waldock, note 8 at at 54 (para. 6).

[51] Waldock, note 8 at 54 (para. 7).

[52] Waldock, note 8 at 54 (para. 8): the Commission's aspiration was to 'seek to isolate and to codify the comparatively few rules which appear to constitute the strictly legal basis of the interpretation of treaties'. See also Gardiner, note 46 at 27: 'the Vienna rules …[combine] a clear indication of *what* should be taken into account with some rather less prescriptive pointers as to *how* to use the indicated material, and in the final analysis leaving a margin of appreciation for the interpreter to produce an outcome.'

[53] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1950, ICJ Reports (1948) 57 at 61.

[54] Kelsen, note 3 at 352.

[55] Emer de Vattel, The Law of Nations (Charles G Fenwick (tr.) Carnegie Institution of Washington 1916, reprint 1964) at 263, cited in Lauterpacht, note 4 at 48.

[56] Gardiner, note 46 at 8.

case, would be thrown into the *crucible*,[57] and their interaction would give the legally relevant interpretation.'[58]

The 'crucible' metaphor is apposite in describing the array of approaches embodied in Article 31(1), which encompass good faith, ordinary meaning of the terms of the treaty, *in their context*, and in the light of the treaty's object and purpose. Already here, one begins to see contradictions and limitations in the terms of Article 31 itself in respect of elucidating the purpose of interpretation. The 'ordinary meaning' term used therein presupposes the possibility of natural logic, or an objectivity of meaning in the text itself;[59] yet equally, and *without hierarchy between the approaches*, one must also interpret the terms of the treaty 'in their context and in the light of [the treaty's] object and purpose'.[60] Accordingly, it is not unreasonable to arrive at the peculiar conclusion that the ordinary meaning of a text can only be determined through its context[61] and with regard to the treaty's object and purpose, a conclusion that, if well-founded, seems to dismiss outright the possibility of textual interpretation being conducted purely through reference to the immediate terms of a treaty, as 'it ultimately cannot help to see but many other words which again need interpretation'.[62]

To add to this complexity, Article 31(3) VCLT is relevant when we consider subsequent agreements, subsequent practice, and 'other relevant rules of international law',[63] all of which are added to the crucible as *simultaneous primary sources for interpretation*.[64] As such, treaty interpretation cannot be seen as a quest merely to distil the original meaning of a statement or text, based on taking its words at their face value at the time they were drafted.[65] This cannot be so given the immediate link which Article 31 makes with context and with the requirement of consideration of the object and purpose of a treaty, *even before* further elements of the general rule, including subsequent practice and other 'relevant rules' of general international law, are taken into account.[66]

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[57] The 'crucible' approach also avoids hierarchy of application and in some respects reflects the reality that no one formal maxim objectively dominates the process of interpretation by a judicial institution: see Charles Fairman, 'The Interpretation of Treaties' 20 *Transactions of the Grotius Society* (1935) 123–139 at 134–135.

[58] United Nations Conference on the Law of Treaties: Official Records: Documents of the Conference, UN Doc. A/CONF.3/11/Add.2 at 39 (para. 8) and International Law Commission, note 43 at 219–220 (para. 8). See also Santiago Torres Bernárdez, 'Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties' in Gerhard Hafner et al. (eds), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern* (Kluwer Law International 1998) at 726 (para. 11): '…one of the most distinctive features of the Vienna Convention system … [is] that interpretation of a treaty, or a provision of a treaty, is a legal operation which should combine the various permitted elements and means of interpretation as they may be present in the case, while keeping *open* the interpretation until the very conclusion of the interpretative process' (emphasis added).

[59] As Venzke, note 19 at 50, puts it, 'the *word* is in the beginning of interpretation.'

[60] Art. 31(1) VCLT.

[61] Art. 31(2) VCLT, in fact defines 'context' broadly. 'Context' in interpretation may be found both internally, within the treaty and its terms, preamble and annexes, and externally, as comprising agreements or instruments 'relating' to the treaty.

[62] See, generally, Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012), 3.

[63] For further discussion on the effects of Article 31(3)(c) VCLT as a principle of 'systemic integration' see generally, McLachlan, note 5 especially at 280–282; and Duncan French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' 55 *ICLQ* (2006) 281–314.

[64] It should be noted that subsequent practice is not conceptualised as a *modification* to a treaty: see McNair, note 1at 424; and as the Permanent Court of International Justice concluded in *Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*, Advisory Opinion of 21 November 1925, PCIJ Series B No. 12 (1925) 24.

[65] As some would claim: see Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2011) 127–128, maintaining that a text is static: 'international treaty law is the text which remains; therefore, its meanings remain. The correct temporal reference point is *ex tunc*; anything else constitutes a change.'

[66] Gardiner, note 46 at 26.

Even so, if the 'crucible' approach to the process of interpretation is essentially simultaneous, this exhortation cannot be taken too literally, as pragmatism dictates that elements are only taken up one at a time.[67] Accordingly, the various elements are cumulative, and must be evaluated as a whole.[68] As such, the process of interpretation may require elements to be considered more than once, as the different priorities enumerated in Article 31 in turn arise.[69] It is not for naught that critics of the 'crucible' approach have taken to task the immense complexity of this process, suggesting that Articles 31 and 32 VCLT are so contradictory to the point of being meaningless,[70] leaving more questions open than settled.[71] Moreover, whether ironic, or merely symptomatic[72] of the inherent difficulties in the Convention's provisions on interpretation, there exists considerable disagreement on the 'interpretation of the rules of interpretation', all of which seek to establish objectively the intention of the authors of a legal text. It is to these various approaches that the next section turns.

4. The Traditional Theories on 'Objective' Interpretation

4.1 The Notion of 'Plain Meaning' and the Faith in Textualism

Even though neither Article 31 nor Article 32 VCLT actually employ the term 'intention' in elucidating the rules of interpretation,[73] amongst classical positivist international lawyers at least, 'no one seriously denies that the *aim* of treaty interpretation is to give effect to the intentions of the parties'.[74] That faith that the text itself holds the key to identifying party intention is repeated to the present day.[75]

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[67] As the ICJ has done since its early days: see *Competence of the General Assembly for the Admission of a State to the United Nations*, note 53 at 8: 'the first duty of a tribunal which is called upon to interpret and apply provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur.' The ordinary meaning of the text thus takes precedence over the object and purpose of a treaty and other available means of interpretation.

[68] As the International Law Commission noted in its 'Commentaries to the Draft Articles: Law of Treaties', note 43 at 220 See also Waldock's comments in the Commission's debates: Humphrey Waldock, Special Rapporteur, 'Document A/CN.4/183 and Add.1–4: Fifth Report on the Law of Treaties, *Yearbook of the International Law Commission* Vol. II (1966) at 36 and Waldock, note 43 at 206. See also the intervention by Yasseen, suggesting that the Commission's proposal prescribed 'a general method for achieving that purpose … The means enumerated were … arranged, not in any order of precedence, but in a practical order, which was self-evident in view of the circumstances' 871st Meeting of the Commission, 16 June 1966, *Yearbook of the International Law Commission* Vol. I (1966) at 197 (para. 48).

[69] Gardiner, note 46 at 30.

[70] Koskenniemi, note 39 at 334 (fn. 89), wryly noted that Article 31 refers to 'virtually all thinkable interpretative methods', blending textualism with intentionalism, context and object and purpose.

[71] As Philip Allott suggests in *The Health of Nations* (CUP 2002) 305, the VCLT 'merely reduced these disagreements to writing'.

[72] As observed by Antonios Tzanakopoulos, 'Review of Richard Gardiner's "Treaty Interpretation" and Ulf Linderfalk's "On the Interpretation of Treaties"' 53 *German Yearbook of International Law* (2009) 721–724 at 722.

[73] Yet see Orakhelashvili, note 7 at 312 (fn. 47): the term 'intention' is used some fifteen times throughout the VCLT.

[74] This would be the 'juridically natural view': see Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation' 28 *BYBIL* (1951) 1–28 at 3–4; and Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–1954: Treaty Interpretation and Other Treaty Points' 33 *BYBIL* (1957) 203–293 at 204. See also Lauterpacht, note 4 at 52, 55, 75–76. But cf. Kammerhofer, note 65 at 89, who emphasises the cognitive aspects of the process: '[t]he will of the parties is on this view not only a logical moment. The will has content; therefore, that juncture of wills is an intent or intention. … Assuming all that, should not our cognition then aim for the 'true' treaty, i.e. party intent?'

[75] Orakhelashvili, note 7 at 286; Gardiner, note 46 at 87; Jean-Marc Sorel and Valérie Boré-Eveno, 'Article 31' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 804, at 806.

Yet even in the VCLT itself, there are a number of means by which the intention of the parties can be re-constructed. Chief amongst these methods is to uphold the ordinary meaning of the words of a text above all other means of interpretation, what will be termed here a *textualist* approach. It is characterised by two presumptions: first, the Vattelian faith that clear written language renders nugatory the need for interpretation or for an interpreter,[76] or at least minimises his role (into an applier); and second, a distrust of extra-textualism as encouraging the 'arbitrary introduction of unreliable and biased considerations in the guise of interpretation'.[77] According to the textualist position, whatever the psychological or internalised intentions of the parties, once these have intermingled and balanced, to then be abstracted into a written text, 'only its terms are agreed upon and only its terms the parties promise to abide by. The treaty text is specifically designed to express the intentions of the parties'.[78] Adherence to textualism thus creates a rebuttable presumption that the text, which is the *outcome* of the meeting of the minds, is presumed to embody the intentions of the drafters, which the International Law Commission's own Commentary to the Draft Articles on the Law of Treaties would seem to confirm:

> [T]he text must be presumed to be an authentic expression of the intention of the parties; … in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intention of the parties.[79]

But the textualist approach goes further than merely suggesting that the text is a starting point: its principal claim is that if the text is clear, recourse to extra-textual means of interpretation should not be necessary.[80] The claim that 'declared will' takes priority over internal volition[81] is both methodological and conceptual,[82] and is underpinned by a faith in the determinacy of legal language: by reducing, confining, and otherwise minimising the third-party interpreter's grounds for discretion,[83] his function is simply to illuminate the intention of the parties as expressed in the language of an agreement. Following the formula exactly is intended to yield the same, predictable result: it is a process of cognition. The over-abundance of caution inherent in legal drafting also belies a sense of complacency, as parties tend to lift, uncritically, text from other treaties and from judgments. This repetitive incantation of text 'that already works' has doubtless led to the recondite form that many contemporary treaties now take.

4.2 Beyond the Text: Constructing, Objectively, the Intention of the Parties

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[76] Myres S McDougal, Harold D Lasswell, James C Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (Yale University Press 1967) suggest that the position taken by the Commission in the Draft Articles 'comes perilously close to Vattel's assumption that there are plain and natural meanings that do not admit of interpretation' (at 90).

[77] Richard A Falk, 'On Treaty Interpretation and the New Haven Approach: Achievements and Prospects' 8 *Virginia Journal of International Law* (1967–1968) 323–355 at 333.

[78] Kammerhofer, note 65 at 89, reporting the position.

[79] United Nations Conference on the Law of Treaties, note 58 at 40 (para. 11) and International Law Commission, note 43 at 220 (para. 11).

[80] For a concrete example of a textualist argument, see Frank Berman, 'Treaty "Interpretation" in a Judicial Context' 29 *Yale Journal of International Law* (2004) 315–322 at 320–321.

[81] See Charles de Visscher, *Théories et réalités du droit international public* (3rd edn Pedone 1963) 17 and Fitzmaurice (1951), note 74 at 3; Fitzmaurice (1957), note 74 at 205–206.

[82] Falk, note 77 at 324: 'there is disclosed the wavering between the autonomy and objectivity of the interpretative process, on the one side, and its normative, instrumental function on the other. This wavering, and the obscurity of meaning that results from it, makes interpretation at once fascinating and mysterious as an object of inquiry.'

[83] A view similar to that expressed by Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011) 157.

The faith in the determinacy of legal language also leads to extravagant claims; according to Sir Gerald Fitzmaurice, the textualist approach presumes to have found '*where* those intentions are to be found, [and] where they are (primarily) to be looked for'.[84] It is myopic: the supposed simplicity and hermetic nature of 'plain' meaning does not exclude questionable or 'illusory' elements; in fact, the question whether a particular sense of 'plain' obtains is at 'the very heart of the task of interpretation'.[85] It also bears recalling that according to Article 31, 'plain' or ordinary meaning is always read in the context of the treaty and its object and purpose. As such, the 'canon' upholding 'the context' not only complements or confirms the plain meaning, but can also correct the erroneous versions of it. Otherwise, context is irrelevant in the face of 'plain' meaning.[86] There is also confusion as to whether 'ordinary meaning' is a purely linguistic term; or whether it refers to the possibility of ordinary meaning *in international law*, an issue which raises wider questions beyond the scope of this chapter. In this respect, any canon of 'ordinary meaning' arguably withstands closer scrutiny if redefined as 'the ordinary meaning in the context'.[87]

Ultimately, the claim by textualism, that it is the one true method through which the intention of the parties can be divined,[88] 'puts the cart before the horse'.[89] As McDougal, Laswell, and Miller have claimed, '[r]eliance on declared instead of actual intent is non-consensual: its point is not to give effect to real will but to the legitimate expectations of other States. It is a standard of justice'.[90] Pure textualism, in this respect, falls short; and it is for this reason that the VCLT includes such a range of methods, both in its primary means of interpretation and in the supplementary means of interpretation contained in Article 32. Before turning to the other means of interpretation embodied in Article 31, a brief segue into the relationship between Article 31 (primary means of interpretation) and Article 32 (supplementary means of interpretation) is relevant here, as recourse to preparatory work reflects most clearly the purpose of interpretation in attempting to construct the meaning of a treaty text.

4.3 Preparatory Work as a Supplementary Means of Interpretation

A proxy for the debate on intentionalism versus textualism is embodied in the 'supplementary' means of interpretation referred to in Article 32 VCLT. The interpretative elements of each paragraph of Article 31 are to be employed in determining the meaning of any treaty, while recourse to the sources and materials available under Article 32 is never obligatory, and

[84] Fitzmaurice (1951), note 74 at 90.

[85] Julius Stone, 'Fictional Elements in Treaty Interpretation: A Study in the International Judicial Process' 1 *Sydney Law Review* (1954) 344–368 at 355. At 356 he continues: 'the "plain" … or "ordinary" … meaning has no other claim to primacy other than that … words are ordinarily used in the sense in which they are ordinarily used – … the generally used standard of meaning is the standard of meaning generally used' (emphasis removed). This circularity also has a strongly objective element: if the intention of the parties cannot be discerned, the 'plain' meaning given to terms seems to be that general or 'ordinary' meaning that non-parties, or in fact the third-party interpreter, would affix to the text.

[86] Stone, note 85 at 357.

[87] See *Interpretation of Convention of 1919 concerning Employment of Women during the Night*, Advisory Opinion of 15 November 1932, PCIJ Series A/B No. 50 (1932) 365 at 383 (Diss. Op. Judge Anzilotti).

[88] Fitzmaurice (1957), note 74 at 205; Ian M Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn Manchester University Press 1984) 115, 141. As claims McNair, note 74 at 365–366, the entirety of the maxims and canons of interpretation 'which have crystallised out … are merely *prima facie* guides to the intentions of the parties.' Or as Orakhelashvili, note 7 at 286 would simplify it, '[a]ll international acts embody State consent and agreement, expressed in one or another form. Therefore, interpretation methods must be those which deduce the meaning exactly of what has been consented to and agreed'.

[89] Hersch Lauterpacht, 'The Doctrine of Plain Meaning' in Elihu Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, Vol. 4 (CUP 1978) 393–403 at 396.

[90] Koskenniemi, note 39 at 343.

may be used generally only to confirm an interpretation already arrived at.[91] The other justification for using the sources of interpretation enumerated in Article 32 is corrective: if, *and only if*, the interpretative rules under Article 31 leave the meaning ambiguous or obscure, or would lead to a result that is 'manifestly absurd or unreasonable',[92] one may consider the *travaux préparatoires* and factual circumstances obtaining at the time of a treaty's conclusion. These *means* 'can be read as allied to, but contrasted with',[93] the *rules* in Article 31.

Whatever this secondary nature, in practice recourse to preparatory work is more widespread than its 'supplementary nature' would suggest: even if declining somewhat in recent years, 'most international lawyers will almost automatically include a discussion of preparatory works in legal argument, and will consider it vital to do so'.[94]

This surely makes logical sense: in seeking to identify the intention of the drafters of a legal text, it would seem not only impractical, but counter-intuitive, to postpone all consideration of the circumstances behind its conclusion until *after* subsequent practice and customary international law rules have been examined.[95] Preparatory work, in the widest sense, constitutes part of the context behind the final treaty text.[96] Moreover, international courts and tribunals do refer expressly to the drafting history of treaty provisions; even if they formally rely upon a treaty's drafting history only after applying the general rule, the impact it might have played in a court's reasoning and decision-making process should not be underestimated.[97] The real question is therefore the legitimacy of recourse to such methods. Given that the overriding intention of interpretation through the VCLT methods is to determine the intention of the parties, to dismiss outright recourse to preparatory work, even for the textualist, would be justifiable only:

> If one accepts that it is the goal or aim of treaty interpretation to find something beyond the text of the treaty and if one argues that that goal can only be validly reached by reference to the text, rather than extra-textual references.[98]

Quite simply, recourse to preparatory work, as an extra-textual source of interpretation, underscores the basic purpose of interpretation in discerning the intention of the authors to a legal text.[99] It constitutes recognition that the meaning of norms does not simply lie behind words, but is the product of interpretation. Yet looking through a text for the 'force behind it'[100] also brings with it certain problems, not least the difficulty in constructing a uniform

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[91] In *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, note 53 at 63, the Court considered that if a text is 'sufficiently clear', 'consequently it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself'. Cf. Hersch Lauterpacht, De l'interprétation des traités, Rapport et projet de résolutions présentés à l'Institut de Droit International 43 *Annuaire de l'Institut de Droit International* (1950) 366–460 at 433–434, which supported full recourse, as a primary means of interpretation, to 'duly authenticated and published' *travaux préparatoires*, suggesting their utility in establishing the intention of the parties.

[92] Art. 32 VCLT.

[93] Gardiner, note 46 at 37. During the Commission's deliberations on the matter, Tunkin suggested that they are 'secondary sources of interpretation, which had to be taken into account, but did not have the same legal force.' See 871st Meeting of the Commission, note 68 at 190.

[94] Jan Klabbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' 50 *Netherlands International Law Review* (2003) 267–288 at 268.

[95] Gardiner, note 46 at 10.

[96] Klabbers, note 94 at 285.

[97] The immediate example that comes to mind is *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, note 97. But it is not isolated: the history of a given treaty provision is often reviewed by courts and tribunals as part of the relevant law (i.e. the context), and arguably therefore plays an important role in a court's reasoning, even if it is usually only formally relied upon after applying the general rule. See, for further examples, Gardiner, note 46 at 38–45.

[98] Kammerhofer, note 65 at 90.

[99] McNair, note 74 at 411.

[100] Linderfalk, note 37 at 43.

collective intention of its authors,[101] or in situating how practice contributes to the interpretation of a text.[102]

4.4 'Objective', 'Dynamic', and 'Evolutive' Interpretation

It is perhaps true that the VCLT's approach to interpretation strives to outline the means of identifying the intention of the parties in arriving at the legal text they have produced. Yet there are two important notes of cautions to be raised, as one cannot adhere strictly to the belief that interpretation will always yield an objective conclusion as to the parties' intentions. First, parties' intentions cannot be assumed to be so transparent, for a number of reasons. Parties may, in good faith, have attached different meanings as to the language agreed between them.[103] Parties may be unable to reach agreement on certain details, and thus have deployed 'ambiguous or non-committal expressions';[104] this might even be in order 'to leave the divergence of views to be solved in the future by agreement or in some other way'.[105] Parties may not have envisaged that a given subject-matter would be applied at the time of drafting; or drafters may have, whether by carelessness or design, included treaty provisions which contradict each other in application to a given subject-matter.[106] This is also the case when the treaty 'actually registers the absence of any common intention … or contains provisions which are mutually inconsistent and which the creative work of interpretation must reduce to some coherent meaning'.[107] The linguistic basis of law and legal texts thus can and does admit of evolution in meaning.[108] Put differently:

> If the *text* of a treaty is recognised as the object of interpretation [*Auslegung*], then nothing stands in the way of assuming that the text can experience a change of meaning in the course of its development even without any tacit modification of the treaty.'[109]

Secondly, undue faith in intentionalism also underplays the possibility that the drafters intend to bestow expressly upon the interpreter the power to give meaning to the text, either to allow for the divergence to be resolved by agreement or otherwise,[110] to allow the text to evolve 'dynamically'.[111] This can be achieved through the use of generic terms whose meaning is susceptible to evolution over time.[112] That parties may choose to conclude texts of this

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[101] Venzke, note 19 at 3.
[102] Venzke, note 19 at 4.
[103] Lauterpacht, note 4 at 77–78.
[104] Lauterpacht, note 4 at 77.
[105] Lauterpacht, note 4 at 77–78. Stone, note 85 at 347 makes the same point less charitably.
[106] What is particularly interesting is that resolving the contradiction is in fact 'imputing rather than discovering a common intention underlying the treaty as a whole': Lauterpacht, note 4 at 81.
[107] Lauterpacht, note 4 at 52; see also Gardiner, note 46 at 27. Orakhelashvili, note 7 at 339, reduces ambiguity to a problem to be clarified, and concludes essentially that ambiguity is 'only a factor that opens the door for other factors of interpretation that are available within the framework of the relevant treaty'.
[108] Venzke, note 19 at 39-40, cites a number of judicial institutions giving sanction to this principle: the International Court of Justice, in *Aegean Sea Continental Shelf (Greece v Turkey)*, ICJ Reports 1978, 3, para 77, and *Dispute concerning Navigational Rights (Costa Rica v Nicaragua)*, ICJ Reports 2009, 213, para 65; the European Court of Human Rights, in *Bayatyan v Armenia*, App. Application no. 23459/03 (27 October 2009), at para 63, and *Scoppola v Italy (no 2)*, Grand Chamber, App. No 10249/03 (17 September 2009), at para 104; and the WTO Appellate Body, in *United States—Import Prohibition of Certain Shrimp and Shrimp-like Products*, WT/DS58/AB/R, 6 November 1998, paras 127-31, and *China—Publications and Audiovisual Products*, WT/DS363/AB/R, 21 December 2009, para 47.
[109] R Bernhardt, *Die Auslegung völkerrechtlicher Verträg. Insbesondere in der neueren Rechtsprechung internationaler Gerichte* (Heymann 1963) 132, translated by Venzke, note 19 at 4.
[110] Stone, note 85 at 348.
[111] See Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London Institute of World Affairs 1950) xiv–xv.
[112] The ICJ used this approach in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua),* Judgment of 13 July 2009, ICJ Reports (2009) 213 at 242–243 (paras 63–66).

sort makes it difficult to arrive at an objective interpretation based on their intentions at the time of the conclusion of a treaty, and requires one to give the treaty terms meaning at the time that an interpretation of its terms is required.[113]

Take the example of standard-setting instruments such as human rights conventions. Although formally structured like all other multilateral conventions,[114] these are framed so that the rights and obligations embodied in them are *integral*,[115] as obligations to all other contracting parties, or in other words, as obligations *erga omnes partes*.[116] The very structure of such agreements, therefore, requires that legal provisions be interpreted with a view to the overall object and purpose of the convention, and where appropriate, a teleological, systematic interpretation which recalls the convention's place in the legal system as a whole.[117] Another example of such a treaty would be the UN Charter, the quintessential instrument on which it seems to be agreed that the teleological method of interpretation has 'pride of place'.[118] As Kammerhofer explains, besides the entire structure and framework of the Charter itself, to discern properly its *telos* it is both advisable and common to look extra-textually, both into its *travaux préparatoires*[119] but also into the subsequent practice of its principal organs and its member states.[120] It is difficult to understand how preparatory works can hold a diminished place in teleological interpretation, as whilst their use to buttress the intentions of the parties might be 'tautologically limited'; they seem eminently suited as a means to discover the object and purpose of the treaty. In short, in such circumstances, parties must be regarded as having consented to a dynamic, 'evolutive' approach to the interpretation of their respective obligations.[121]

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[113] Catherine Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 *Nordic Journal of International Law* 383; Gardiner, note 46 at 27.

[114] Bruno Simma, 'From Bilateralism to Community Interest' 250 *Recueil des Cours* (1994) 217–384 at 335. A more cautious, 'dynamic' interpretation of the UN Charter was previously advanced by Alfred Verdross, Bruno Simma, *Universelles Völkerrecht. Theorie und Praxis* (3rd edn Duncker & Humboldt 1984) 496–497.

[115] The concept of 'law-making treaties' ('*traités–lois*') was made prominent by Gerald Fitzmaurice in the ILC in his Second Report on the Law of Treaties, *Yearbook of the International Law Commission* Vol. II (1957) at 31: such treaties were said to establish 'inherent', 'non-reciprocal' obligations that required 'an absolute and integral obligation and performance under all conditions'.

[116] Bruno Simma, Gleider Hernández, 'Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where do we Stand?' in Enzo Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention: Essays in Honour of Professor Giorgio Gaja* (OUP 2011) 60–85 at 67.

[117] The mode of interpretation is thus partly contingent on the intention of the drafters themselves: see e.g. the 'living instrument' principle guiding the interpretation of the European Convention of Human Rights 'in the light of present day conditions': ECtHR, *Tyrer v. United Kingdom*, Application No. 5856/72, Judgment of 25 April 1978, ECHR (1978) Series A, No. 26 at 15–16 (para. 31); ECtHR, *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, Judgment of 23 March 1995, 20 *EHRR* (1995) 99 at para. 71. It is also endorsed by the UN Human Rights Committee, which tried to shoehorn its teleological interpretation within Article 31 VCLT: see UNHRC, *Roger Judge v. Canada*, Communication No. 829/1995, UN Doc. CCPR/C/78/D/829/1998 (2003), 5 August 2002, paras 10.3–10.4.

[118] Kammerhofer, note 65 at 99.

[119] Ibid. See also Stephen Schwebel, 'May Preparatory Work be Used to Correct Rather than to Confirm the "Clear" Meaning of a Treaty Provision?' in Jerzy Makarcyzk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International 1996) 541–547 at 543: 'there is simply too much State practice and judicial precedent that accords preparatory work a greater place'. But cf. *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports (1962) 151 at 185 (Sep. Op. Judge Spender): '[t]he stated purposes of the Charter should be the prime consideration in interpreting its text.'

[120] The trite, but most effective, example of this practice is the manner in which abstaining votes by the permanent members of the Security Council have come to fall within the expression 'concurring votes of the permanent members' contained in Article 27(3) of the Charter. Through practice, it has come to be 'deemed as a constitutionally valid interpretation of the notion of "concurrence"', and acknowledged as such by the ICJ in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, note 49 at 22 (para. 22).

[121] A point taken up by Kammerhofer, note 65 at 98.

The concerns expressed above aim to demonstrate that the intention of the parties simply cannot always be the prime consideration, even if it is highly relevant. Parties must be regarded as having assented to a treaty being situated within an intellectual framework that underpins the international legal order, with its terms being susceptible to interpretation according to the canons and processes of that frame. Their very consent, and not merely the legal text concluded between them, can be 'objectivised' rather than merely be seen as objective: the *process of interpretation* is removed from the parties. Had they intended otherwise, they would have subjected their treaty to another legal structure altogether. Moreover, although parties can reasonably expect disagreement over the meaning of terms, they do not expect every disagreement to signify a desire on the part of one or the other to terminate the relationship embodied in the treaty.[122] In short, parties to a treaty consent to obligations with the implicit understanding that there may be disagreements as to the tenor and scope of those obligations, and they consent to a system of rules to resolve those disagreements. In this respect, even if the sources and methods of interpretation are different, and the materials and references to be examined may vary somewhat, the teleological mode of interpretation can be distilled into seeking to discern what precisely the parties have agreed to be bound by, an essentially *objective* exercise.

As a matter of practice, parties are of course free to formulate rules strictly or expansively; and whatever their unilateral wish, as a general rule, it can be said the common intention of parties should be distilled so that the rights and obligations created in a treaty obligation can be equitably interpreted, in a spirit of good faith, common sense, and reasonableness.[123] Even setting aside these platitudes, which provide little guidance to an impartial third party that seeks to reconcile the competing interpretations of parties and to identify the commonalities between their views, the various means of interpretation deployed in the VCLT demonstrate the difficulties of objective interpretation and the continued allure of more subjectivist approaches, to which this chapter now turns.

5. Subjectivity and Interpretation

5.1 Beyond Objectivism

The various theories described above all strive to delineate and describe a process of *objective* interpretation, one whose object is to distil *true* meaning *from* legal texts: even if one moves away from textualist assumptions about interpretation, one cannot supplement the text with anything that it does not already contain.[124] For all the rigour that the VCLT rules purport to establish in matters of interpretation, there is a serious theoretical problem with uncritical acceptance of these rules, which, after all, are based on the positivist aspiration to *identify* legal norms, and on the belief that such identification can be objective to the neutral, expert interpreter. Yet by its very nature, the process of interpreting a text requires cognition of that text, and a judgment as to how its meaning should be understood. As explained above, the interpretative act is a choice between the alternatives made simultaneously available and limited by that text. Such a claim defies the claim that meaning lays hidden behind a text, ready to be discerned objectively; it is the product of the cognitive process of interpretation. Moreover,

[122] Ian Johnstone, 'Treaty Interpretation: the Authority of Interpretive Communities' 12 *Michigan Journal of International Law* (1990–1991) 371–419 at 382.

[123] Georg Schwarzenberger, 'Myths and Realities of Treaties of Treaty Interpretation: Articles 27–29 of the Vienna Draft Convention on the Law of Treaties' 9 *Virginia Journal of International Law* (1968) 1–19 at 9. But cf. Kammerhofer, note 65 at 91, who calls into question whether the intention one seeks to discern is the joint intention of parties, or even the unilateral intention of one party.

[124] Robert Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* (Bruylant 2006), at 412-413.

because interpretation remains an epistemological tool and cannot be reduced to a set of posited rules, the process of interpretation must necessarily exist prior to the substantive or procedural rules or norms to be interpreted. In a sense, therefore, the rules of interpretation exist *outside* the realm of rules of law, as they are partially connected to the subjectivity of the interpreter and not to the purported objectivity of a text.

It is claimed that there is an ironic circularity in the VCLT rules in that Articles 31–33 must, in 'infinite regression', be interpreted.[125] More generally, Hart suggests that rules of interpretation are themselves nothing but rules and subject to the same fate of interpretation.[126] This is an over-simplification, confusing the hermeneutic process of interpretation with such rules of interpretation as might be posited. As Kammerhofer explains, rules are 'acts of will purporting to modify the frame of the possible meanings of norms.'[127] The hermeneutic process of interpretation is anterior to such norms, and external to the frame. Yet, whatever views exist as to whether interpretation exists outside the frame or is part of the frame itself, the quasi-scientific approach to law has its weaknesses: as Koskenniemi notes, the one thing that unites Kelsen and McDougal is:

> [T]heir insistence on the indeterminate, subjective, political character of interpretation. They … criticize disguising the arbitrariness of interpretation under the fictions of textual clarity or juristic method. They propose that interpretation be conducted openly by reference to important values'.[128]

As such, to anchor a positivist approach to interpretation too closely to objectivism constitutes an incomplete understanding of the positivist approach to interpretation. The idea that international law must merely be applied 'correctly' to yield a consistent answer each time to any given question suggests a certain objectivity in the rules of application that does not seem to be borne out in practice. The indeterminacy that is yielded through this undue faith in the VCLT rules of interpretation opens the door to Beckett's criticism that these rules privilege desirability through their sheer contradiction: 'one can add or remove words to realise the *telos* imposed … as in the end, Art. 31 mandates "decontextualised and arbitrary reasoning"'.[129]

5.2 The Policy-Oriented Jurisprudence of the New Haven School

Accordingly, a few tentative steps outside what is generally understood as 'positivist' are necessary, and at this juncture, it is interesting to focus on the essence of the argument favoured by the founders of the New Haven school of policy-oriented jurisprudence. In *The Interpretation of Agreements and World Public Order*, McDougal, Lasswell and Miller sought to elucidate a different *mode* of interpretation, one which set that process within their conceived framework of world public order.[130] Part of a consciously different 'intellectual strategy for restating a subject of basic importance',[131] the New Haven approach flowed from redefining the very concept of 'international agreement':

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[125] See Gardiner, note 46 at 9, and Klabbers, note 94 at 270. That circularity has also been noted in the domestic law context: see Stanley Fish, 'Fish v. Fiss' 36 *Stanford Law Review* (1984) 1325–1347 at 1326.
[126] Hart, *The Concept of Law*, note 3 at 126.
[127] See Kammerhofer, note 65 at 112–113.
[128] Koskenniemi, note 39 at 341.
[129] Jason Beckett, 'Fragmentation, Openness, and Hegemony: Adjudication and the WTO' in Meredith K Lewis, Susy Frankel (eds), *International Economic Law and National Autonomy* (CUP 2010) 44–70 at 57, citing Margaret Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case' 56 *ICLQ* (2007) 907–930 at 922, 924.
[130] McDougal, Lasswell, Miller, note 76 especially at 197–201.
[131] Falk, note 77 at 331. According to him, the 'chief value of the New Haven Approach is to provide a persuasive reorientation of inquiry into the interpretative process, not that the approach is so definitive as to put to rest the need for inquiry.'

> The most comprehensive and realistic conception of an international agreement … is … not that of a mere collocation of words or signs on a parchment, but rather that of a continuing process of communication and collaboration between the parties in the shaping and sharing of demanded values.[132]

The divergence from the VCLT methods of interpretation is conscious and emphatic, as is exemplified by the scathing attack on textualism by McDougal, Lasswell and Miller:

> It is the grossest, least defensible exercise of arbitrary formalism to arrogate to one particular set of signs – the text of a document – the role of serving as the exclusive index of the parties' shared expectations.[133]

Instead, they argue that:

> [T]he primary aim of a process of interpretation by an authorized and controlling decision maker can be formulated in the following proposition: discover the *shared expectations* that the parties to the relevant communication succeeded in creating in each other.[134]

The approach favoured is contextual: to situate international agreements and the obligations they contain as part of a larger context, thus engaging in a 'systematic, comprehensive examination of all the relevant features of that context, with conscious and deliberate appraisal of their significance'.[135]

New Haven was thus the outline of a *method*, one entirely different from the positivism that permeated the VCLT approach, although both ostensibly sharing the primary aim of ascertaining the intention of parties to an agreement.[136] What is particular about the New Haven school is that it redefines the intentions of parties into their 'shared expectations', which are to fit into a distinctive view on the nature of the international legal system:

> This primary, distinctive goal [of interpretation] stipulates that decision-makers undertake a disciplined, responsible effort to ascertain the genuine shared expectations of the particular parties to an agreement. The link with fundamental policy is clear: to defend the dignity of man is to respect *his* choices and not, save for overriding common interest, to impose the choices of others upon him.[137]

The distinguishing feature, aiming to ascertain the 'shared subjectivities of communicators',[138] is wholly to remove the text as the principal object of the interpretative process. The consent-based, intentionalist elements of the VCLT approach remain alive, but the objective character of legal texts is subordinated, instead being replaced by an inquiry into the subjective, common agreement of the parties, which in turn is understood against a common (objective) 'standard of justice'. The formalism of the VCLT approach, which insisted on the importance of the text as a primary element to be considered in the interpretative process, is lost.

5.3 Implications of Interpretation According to the New Haven School

The shortcomings in the purported objectivity of the VCLT approach to interpretation are one matter; but it is the totalising pretentions of the New Haven school, of interpreting all legal texts from a purported common standard of justice, that are genuinely problematic. The principal criticism to be levelled against the New Haven school is rooted in the indeterminacy of

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[132] McDougal, Lasswell, Miller, note 76 at xxiii.
[133] McDougal, Lasswell, Miller, note 76 at xvii.
[134] McDougal, Lasswell, Miller, note 76 at xvi (emphasis added).
[135] McDougal, Lasswell, Miller, note 76 at 337.
[136] This is no creation of a paper tiger: at the same period McDougal, Lasswell and Miller were writing, mainstream scholarship sought to uphold the intentions of the parties as the ideal towards which treaty interpretation should aspire: see e.g. Francis G Jacobs, 'Varieties of Approach to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' 18 *ICLQ* (1969) 318–346.
[137] McDougal, Lasswell, Miller, note 76 at 40–41; see also at 367–368.
[138] McDougal, Lasswell, Miller, note 76 at xix.

the international legal system, at the very least with respect to the values it means to embody. The New Haven school elides the possibility that there remain a multiplicity of values and objectives, all possibly mutually contradictory, embedded in supposedly objective, 'positivist' law. Instead, the New Haven school portrays the international legal frame as fully determinate, complete through its abiding quest to elucidate and advance 'the realization of a world public order of human dignity',[139] which in turn is based on its own conception of what such human dignity would entail. As such, it falls prey to the concern that interpreters will, more or less unquestioningly, conduct the interpretative process with reference to their individualised conception of these values: 'interpretation may … have recourse to values already embodied within the system to determine which interpretation best makes sense systemically'.[140]

Moreover, although it is true that the New Haven school has never purported to settle questions of interpretation by endowing a text with a clarity that it does not possess,[141] its emphasis on specific policy objectives in fact embodies an important characteristic shared with the objectivist schools of interpretation. Both approaches attempt to define the interpretative process by advancing a more or less objective claim as to the *nature* of the international legal system as a determinate, complete system. Whilst classical positivist theory situates the VCLT rules, arrived at consensually, as part of the 'inner coding'[142] of the international legal system, the New Haven school merely situates that focus differently: international agreements are to be measured by some overriding, nebulous, 'common standard of justice',[143] or alternatively, a substantive overarching end of 'protecting human dignity'.[144] Both traditions create an expectation as to what constitutes a right and proper interpretation *within* the international legal system, and offer, therefore, a form of operational closure:[145] a set of rules and techniques not only defined by international lawyers *for* international lawyers, but also a systemic understanding that comes to define the international legal system. Interpretation, the epistemic exercise through which the system constructs its own realities and applies them to concrete cases, in this respect remains '*autopoeisis*' at its best, impacting and affecting the system as rapidly as it creates expectations for how the system is meant to function.[146] In short, interpretation theory remains rooted in a faith that there is 'truth' to be found in the legal system, and that the system, even if imperfect, is perfectible through technique. It is that quest for truth that will be examined in the concluding arguments of this chapter.

5.4 The 'Search for Truth' Immanent in Interpretation Theory

Perhaps it is to be left to the 'post-modernists' to salvage the thoughts of the 'modernists' in search for a fuller understanding of the interpretative process. In an early article,[147] David Kennedy challenged that very search for truth – 'the idea of an unknowable subject that demands understanding'[148] – inherent in interpretation theory. Part of his challenge is based in the difficulty in actually discerning objective truth: '[t]he view that things "really are" or really could be completely open ended is either nihilism or lunacy. But it is a lunacy that interpre-

[139] McDougal, Lasswell, Miller, note 76 at 395.
[140] Iain Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism' 61 *BYBIL* (1990) 339–362 at 349.
[141] Although one cannot take too far Falk's point that the very existence of a dispute presupposes equally valid adversary interpretations of a text: see Falk, note 77 at 346.
[142] Beckett, note 129 at 51.
[143] McDougal, Lasswell, Miller, note 76 at 40; see also at 367–368.
[144] Myres McDougal, 'International Law, Power, and Policy: A Contemporary Conception' (1954) 82 *Recueil des Cours* 137, *passim*.
[145] Beckett, note 129 at 50–51.
[146] Beckett, note 129 at 50.
[147] David Kennedy, 'The Turn to Interpretation' 58 *Southern California Law Review* (1985) 251–275.
[148] Kennedy, note 147 at 255.

tation seems able to cure.'[149] According to Kennedy, 'truth' is not to be found in the text, the authors, nor the context, a claim that would obliterate the VCLT rules. Nor would truth be found in the interpreter. His claim focuses on the 'hermeneutic moment' in which the interpreter resolves the meaning of a legal text:

> This movement from truth to power is constructed so as to deny both the authority of any theory of truth and the exercise of any power. The hermeneutic moment is supplemental to the stable standoff of the interpretive process. As theorists, we achieve it, in part, by focusing upon what the interpreter must have been thinking given his admittedly socially constructed consciousness … we get out of the stalemate of conflicting and irresolvable truth claims.[150]

The unknowable 'hermeneutic moment' shifts the focus of discussion, suggesting that the purpose of hermeneutics within a discipline is not to dictate a method of interpretation for that discipline but, rather, to assess empirically the 'self-understanding' of the interpreter and to scrutinise how the interpretative process works in practice.[151] David Hoy claims that the emphasis on empiricism allows us to suspend the assumption that law is 'miraculously rational' or merely *ad hoc*,[152] and that the emphasis on the hermeneutic moment is the sole outcome once a totalising moment can be reduced to a privileging of textual oppositions: without that hermeneutic moment, 'we cannot really contemplate an infinity of meanings and still claim to be understanding the text'.[153] This turn to empiricism, accordingly, also represents an emphasis on the manner in which actors entrusted with interpretative authority provide legitimation for their practices and methods.[154] Moreover, it allows the identification of larger struggles for semantic authority, in which 'actors craft legal interpretations in an attempt to implement meanings of legal expressions that are aligned with their convictions or interests'.[155]

Yet, such a turn to empiricism is problematic in that it transforms hermeneutics into metatheorising about interpretation practice, a 'theory of theories', privileging interpreters' self-understanding, to the extent that this is even feasible. As Kennedy underlines, a turn to empiricism confines hermeneutics to:

> [C]onsumption by the analytic elite; those whose consciousness positions them above the judicial interpreters themselves, but who can escape responsibility for their own 'understanding and interpretation' by flaunting the infinite regress of their methodology and by calling it 'modesty' about 'practical' effects.[156]

Accordingly, it becomes impossible to engage in a critique of reason as the discussion becomes centred on sources and actors making claims to interpretative authority. To do so, even whilst demonstrating the fragility of privileging one source over another, or the intention of the interpreter over that of the author of a legal text, leads nowhere else than to the 'authority fetishism' rebuked by Kennedy,[157] which merely displaces speculation relating to the intentions and mindset of the authors of a legal text over to the interpreters of that text. Such em-

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[149] Kennedy, note 147 at 252.
[150] Kennedy, note 147 at 255.
[151] Kammerhofer, note 65 at 122, invokes Joachim Hruschka, *Das Verstehen von Rechtstexten: Zur hermeneutischen Transpositivität des positiven Rechts* (1972) 10 (translation by Kammerhofer): 'the question concerning the phenomenon of understanding legal texts … is not concerned with how the "interpreter" *ought to interpret*, but how the interpreter *has always been behaving* in the process of understanding a legal text. Which preconditions have to be fulfilled in order to be able to call it "understanding legal texts"?"
[152] David Couzens Hoy, 'Interpreting the Law: Hermeneutical and Poststructuralist Perspectives' 58 *Southern California Law Review* (1985) 135–176 at 172.
[153] Kennedy, note 147 at 261, in response to Hoy, note 153 at 169.
[154] Kennedy, note 147 at 262.
[155] Venzke, note 19 at 58.
[156] Kennedy, note 147 at 258. At 275, he concludes: '[t]he turn to interpretation in legal theory, by accepting the inevitability of elite management, reconfirms the structured distinction between truth and power which in turn sustains the position of the manager.'
[157] Kennedy, note 147 at 260.

phasis on actors incorrectly situates the focus of analysis, ignoring how successful interpretations become 'expressions of power in the sense that they influence what the law means and thus shape others in the determination of their own circumstances and fate.'[158]

And what if this line of reasoning leads one to the conclusion that there is no such thing as the 'truth'; of a universal morality being impossible? Venzke makes an interesting claim to agnosticism, a minimal commitment through which a 'minimal residual element of subjectivity' is sufficient to admit of genuine agreement.[159] Without this, the analysis becomes exclusively structural, entirely ignoring the practice of relevant actors: it denies the constructive or constitutive power of actors, of the normativity or power of the law. The acceptance of international actors, which is a necessary condition for the development of international law, demands an understanding of interpretation as an *act of authority*, dependent on its ability to induce acceptance by way of argument or persuasion, rather than an *act of power*.[160]

Ultimately, the true value of hermeneutics in interpretation theory lays elsewhere, in leading us to consider and to theorise about the *structure* of interpretation, rather than interpretation itself. This would allow scholars of interpretation theory to continue to consider, or even 'recuperate', the text as part of their own project,[161] but without becoming slavishly dogmatic as to its centrality to interpretation.

6. Concluding Observations

There is something compelling in Martti Koskenniemi's claim in *The Gentle Civilizer of Nations* that the international legal profession's evolution through the early twentieth century consummated its maturity as a discipline by suppressing its link to describing the practice of nations (and thus describing relations of power).[162] International lawyers claimed authority for international law through a turn to what is now classical legal positivism, brought about by a claim about the 'truth' of the law and legal texts. Yet, the interpretative process remains a set of shared vocabularies and techniques which are to be mastered *by* international lawyers *for* international lawyers. The abdication of political responsibility that can result from this blind focus on technical prowess and objectivity risks the classical positivist international lawyer becoming rather far removed from questions of ideology and power.[163] In this respect, an 'oecumenical'[164] rejuvenated legal positivism holds appeal; one can draw from the lessons on semantic indeterminacy of Kelsen and Hart, as well as both the subjectivist, ideological critiques of interpretation that more critical voices have expressed. For all its flaws, even the value-laden approach of the New Haven school may be helpful: it has the virtue of seeking to engage with the law (albeit instrumentally), breaking at least partially with the truth-seeking of classical legal positivism and transparently acknowledging the interpenetration of law and policy.[165]

For better or for worse, one's views on the interpretative process will necessarily remain coloured by one's views as to what is the object of interpretation: is it a search for objective

[158] Venzke, note 19 at 62.
[159] Venzke, note 19 at 62.
[160] Venzke, note 19 at 63. See also LV Prott, 'Argumentation in International Law' (1991) *Argumentation* 299.
[161] Beckett, note 129 at 1046.
[162] This is the *leitmotif* that permeates Martti Koskenniemi, *The Gentle Civilizer of Nations* (CUP 2004).
[163] In the domestic context, Kennedy, note 147 at 252, suggests that this removal from the political scene has been 'achieved through a continued repetition of the difference between truth and power, each time subtly privileging one over the other.'
[164] A term borrowed from Jean d'Aspremont, 'Reductionist Legal Positivism in International Law' *Proceedings of the 106th Annual Meeting of the American Society of International Law* (2012) 368.
[165] China Miéville, in *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press 2005) at 43 has made this point.

truth? A reconciliation of 'shared subjectivities'? An 'infinite regress' of methodology? All of these highlight the basic tension as to the (possibly radical?)[166] (in)determinacy of law for positivists, and whether rules of interpretation can actually aspire to entrench and enhance the effectiveness of international legal rules. In the final analysis, the real question is not whether rules of interpretation yield fruit in a quixotic quest for legal certainty; instead, equally relevant remain the rich milieu of sources and materials surrounding the legal text itself: methods and forms of interpretation (e.g. the limits of grammatical interpretation when faced with the inevitable indeterminacy of language), the actors who are involved in the act of interpretation and the authority they claim to wield, and the sources of law which fall to be interpreted. And as Kennedy reminds us, if the analysis that drives us through this inquiry is complete, this panoply of sources will – and should – yield conflicting signals.[167] Such ambiguity is not meant to be a failure of interpretation, but a reflection of ambiguities within the legal system itself. As such, in a sense, any study of the rules of interpretation, which indeed is but a secondary topic in the light of the role of interpretation as a hermeneutic tool, necessarily extends further than the rules themselves, and must also study the *practice* of relevant law-applying actors as an equally important locus for the construction of meaning. For it is the claim of law-applying actors to 'semantic authority', or the capacity to influence and shape meanings as authoritative reference points in legal discourse',[168] that is equally important. The focus on interpretative authority opens a discussion on legal normativity, going beyond obligation and very much into the practice of international actors. Any such study might even address the conceptual disagreement as to the *form* of international law itself, a much wider project for all international lawyers.

The possibility remains that a fetishisation of the interpretative process gives the international lawyer a false sense of safety, reassuring him or her of the objectivity of the rules of interpretation. By burying interpretation theory in technical or theoretical rationalisations, the curious divorce between what interpretation 'is' and what interpretation 'means' suggests two conclusions: by seeking refuge in the *form* of interpretation, the lawyer can evade responsibility for the outcome of an interpretative process. Yet more than that, by reducing the study of interpretation and interpretation theory to exclude all that one does not wish to consider simply by dismissing it as being 'improperly legal', one loses sight of how interpretation permeates all of legal life.[169]

[166] See Koskenniemi, note 39 at 591; Jason Beckett, 'Rebel Without a Cause: Martti Koskenniemi and the Critical Legal Project' 7 *German Law Journal* (2006) 1045–1088 at 1046 and *passim*.
[167] Kennedy, note 147 at 271.
[168] Venzke, note 19 at 63.
[169] Although Kammerhofer, note 65 at 122–123 accepts the transcendental aspect of the question.