

# Treaty Interpretation and the New American Ways of Law Reading

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## **I. Introduction**

The aim of this article is to introduce the reader to developments in treaty interpretation theory and practice in the United States. It is designed, in particular, to guide readers from other countries in understanding that endeavour and in situating it in the context of theories of interpretation being developed and contested in other fields of American law. There has been a veritable explosion of theoretical writing on interpretation in such fields as Constitutional law, the construction of statutes and the interpretation of contracts. That mass can only be tersely summarized here. These theories arose in an environment influenced both by intellectual currents and by political power struggles in the United States; the former aspect suggests that they might be exportable whereas the latter indicates that they may be specific to the United States. This article explores whether those modes might make a useful contribution to the process of construing treaties or whether, on the other hand, they might threaten the degree of international consensus that presently prevails about the meaning of treaties. Such disagreement might complicate both the jobs of the drafters of an agreement between nations with divergent traditions and the tasks of tribunals and other interpreters who are called upon to generate authoritative readings of conventions. Would it, on the other hand, bring forth interpretations that are more just or better?

This article bypasses the more exotic types of interpretation theory – semiotics, Critical Legal Studies, post modernism and the like – that have been ignored or

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rejected by judges, even though they have produced challenging works, including significant contributions to international law.<sup>1</sup> The emphasis here will be on those branches of theory which have had, or promise to have, an impact on the world of affairs, that is, which have been discussed by American judges and other interpreters – legal realism, public choice theory and the like. The focus here is on a practical level, less intent on finding ‘the’ right way of interpreting this class of texts than on identifying techniques that clarify, that help achieve the targets of the drafters and that further a fruitful interaction between the writers and the readers of these documents.

These are important tasks. It is hard enough to achieve agreement in substance on issues that divide the nations of the world in ways that affect their vital interests. What a tragic consequence it would be if nations could not find commonly understood words to memorialize their agreements. The maintenance of an order built on at least an understanding of what divides irreconcilable differences from common ground is an important function for diplomats and lawyers.<sup>2</sup>

We begin with an explanation of the context of treaty law, a topic that specialists in international law may choose to skip. The next section explores the tradition of treaty construction, with a view to the types of decision-makers who are involved in the interpretative process. We then run through brief examinations of each of the major American fields where interpretive methods compete against each other, examining each of them to see how they might shed light on the construction of international agreements. These portions are structured so as to be accessible to European readers for whom such interpretive approaches are novel. The conclusion is that treaty interpretation is surrounded by so many unique conditions that carry over from other styles is not apt to be helpful. An exception may be in the process of developing the interpretation of certain multilateral agreements such as the Treaty of Rome and the European Human Rights Convention that have institutional characteristics in common with the United States Constitution. Finally, it is concluded that the true difficulty with the practice of United States courts in treaty interpretation arises not from new theory, but from an old preference for reading treaties as fitting into the familiar landscape of American law, rather than facing the reality that treaties in fact change national law.

## II. The Corpus of Treaty Law

### A. The Quantity of Treaty Law

In this section I attempt to describe the corpus of international agreements that are the object of the interpreter’s skills. Much of it is familiar to every international lawyer,

1 D. Kennedy, *International Legal Structures* (1987); M. Koskenniemi, *International Legal Structures from Apology to Utopia: The Structure of International Legal Argument* (1989).

2 Of another field of interpretation the philosopher Rorty wrote: ‘[c]ivilization reposes on a lot of people who take the normal practices of the discipline with full “realistic” seriousness.’ Quoted in Moore, ‘A Natural Law Theory of Interpretation’, 58 *Southern California Law Review* (1985) 277, 310 n.71.

but some understanding of this material is a necessary predicate to a comprehension of the problems of those charged with construing these documents. And it is easier to compare the problems of interpreting treaties with those involved in construing other bodies of legal documents when one has a bird's eye view of the domain.

There is a great deal of material here. Precisely how much can never be known; there is no international register where all treaties are filed so as to create a complete inventory such as that in the United States Code or comparable legislative assemblages. The Case Amendment<sup>3</sup> requires the submission of all agreements to Congress and publication ordinarily follows, though a new parsimoniousness has caused slower publication. And some agreements escape the Case Amendment's sweep, being regarded as too informal and unimportant to be fully dealt with.<sup>4</sup> Quite a few agreements that antedate the Amendment are still in force. With those qualifications one can accept as reasonably accurate the count that the United States is a party to over 10,000 agreements of which over 1,000 are 'treaties' in the special American sense of having received Senate advice and consent.<sup>5</sup> As to other countries one can say that the major actors publish two or three volumes of treaties per year. In theory the United Nations Treaty Series in its 1,250 volumes should be a complete listing of agreements. Plainly we are dealing with a large corpus of work, one that affords lots of cases for analysis but is hard to organize and generalize. Many of the treaties within this corpus are in fact quite standardized and routine, even when they are quite important, and questions about their meaning can be settled at low and invisible levels of bureaucracy.

There are no established systems for dividing up the body of treaties.<sup>6</sup> There are some obvious subject matter differences. For example, bilateral investment agreements, extradition treaties, income tax treaties and treaties of friendship, commerce and navigation tend to separate themselves out into special groupings. The same experts tend to represent the governments involved each time such a treaty is negotiated. They tend to compare the phraseology of agreements within the genre and draw inferences from omissions, additions or changes in terminology.<sup>7</sup> They tend to attract the following of a group of professional specialists. More generally, theoreticians tend to distinguish some very broad categories for their own purposes. They would distinguish between pacts which are primarily contracts between two States, each State promising a quid pro quo as part of an exchange, and agreements

3 1 USC § 128a.

4 Implementing regulations, 22 CFR Part 181 (1992), define international agreements and exclude *de minimis* agreements.

5 These figures were provided by the Office of the Legal Adviser, Department of State. For earlier figures see Sutherland, 'Restricting the Treaty Power', 65 *Harv. L. Rev.* (1952) 1305, 1327-28.

6 On the classification of treaties see C. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963) Ch. III.

7 See, e.g., *Sumitomo Shoji America v. Avagliano*, 457 US 176 (1982), and Judge Oda's opinion in *Elettronica Sicula*, ICJ Reports (1989) 15, comparing treaties of friendship, commerce and navigation.

which are designed to lay down rules primarily for the governance of private parties.<sup>8</sup> The first category would embrace such arrangements as the destroyers-for-bases deal of 1940 between the United States and Britain. An example of the second is found in the Hague Convention on the Taking of Evidence Abroad of 1969.<sup>9</sup> Scholars might also separate treaties that establish international organizations as being quasi-constitutional. These therefore call for special treatment in the light of the necessity of adaptation over a longer period of time to the necessities of the age.<sup>10</sup>

### B. The Negotiation of Treaties

Negotiating processes fall into a fairly regular pattern. At the outset one has to notice that there may be two different sets of negotiations precedent to one ultimate agreement. In the first one, a coalition is established within State X (and usually within the government of X) to establish the proposition that there should be negotiated a treaty with State Y along agreed-upon lines. Only when that has been done can delegates of X be nominated who will then carry out on behalf of X the discussions needed to establish the text of an international agreement. Where ratification will be necessary there is then a need for assembling a coalition with the political power to push a ratification through the Senate or comparable legislative body.

It is relatively easy to trace the process of internal coalition-building within the United States government because it is highly formalized. The so-called Circular 175 process prescribes a procedure through which the proposal to negotiate is circulated to the relevant bureaux of the Department of State and, at times, to other agencies for their comments and clearance.<sup>11</sup> Contacts with the congressional committees having jurisdiction over the subject matter are also called for; that is particularly true if the proponents of the negotiation have reason to worry about future disputes as to whether a treaty or a congressionally authorized executive agreement is the appropriate way to proceed.<sup>12</sup> In the modern decentralized Congress, where the heads of important committees no longer carry the weight that former leaders did, the task of lining up the committees can be difficult.<sup>13</sup> One must include the committees which have control over the legislation needed to implement the agreement as well as the foreign relations panels.

8 C. Rousseau, *Principes généraux du droit international public* (1944) 727-62 (traité contrat vs traité loi).

9 54 Stat. 2405 (1940); 23 UST 2555 (1969).

10 See *infra* part IV.A.

11 Circular 175, 11 Foreign Affairs Manual Ch. 700, reprinted in *Digest of US Practice in International Law* (1974) 199.

12 *Ibid.* at § 721.

13 The proposal in H. Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (1990), for a 'core consultative group' in Congress seeks to overcome this loss of focus.

The widely varying political systems of national states mean that widely differing rituals precede international treaty negotiations. Dictators can make up their own minds about pursuing international agreements. A parliamentary democracy can confine its struggles to the cabinet or its delegates in a wide variety of cases. But in critical situations it becomes necessary to sound out the support of parliament and sometimes the electorate. The path to a negotiating consensus is not necessarily easy in authoritarian or parliamentary states.<sup>14</sup> A striking example is the accession of Mexico to the General Agreement on Tariffs and Trade. Mexico made a false start in the early 1980s under President Lopez Portillo and it was not until 1986 that President Miguel de la Madrid was able to muster the support to move forward.<sup>15</sup> All sorts of protectionist and free trade interests and sentiments within the business community had to be dealt with in mobilizing a majority.

In the course of assembling the internal coalition a certain amount of written history is developed – more in the United States than in other countries. In some cases formal congressional hearings are held and the transcript is available. But in more cases the documentation is kept within the government and is not available, at least not immediately, to outside researchers. Governments believe that their negotiating freedom while dealing with their foreign government counterpart will be impaired if a full account of the compromises and side-agreements on the home front is available to the other side.

The negotiation of agreements between States is as a rule a rather formal matter. We are not dealing here with the types of hasty and careless arrangements that courts often have to construe in domestic contract litigation. An international interpreter does not usually have to try to patch together an offer and acceptance out of a series of telexes.<sup>16</sup> For the most part the representatives of the two States have legal advisors who have aided in the development of carefully developed positions, including attempts to forecast the approaches of the other side. They have models of comparable agreements and ready-made formulations. This is not to suggest that negotiations so prepared will not generate problems of interpretation but rather that the problems will be more likely to arise from over-calculation, from excessively diplomatic formulations that fail to confront anticipated problems with ruthless objectivity, from vagueness designed to postpone insoluble problems, or from disparate tacit reservations held by the parties.<sup>17</sup>

14 Mayer, 'Managing Domestic Differences in International Negotiation: The Strategic Use of Internal Side Payments', 46 *International Organizations* (1992) 79. 'When nations negotiate, often the toughest bargaining is not between nations but within them.'

15 S. Weintraub, *Free Trade between the United States and Mexico* (1984) 84-91.

16 Stephens, 'On Ending the Battle of the Forms: Problems with Solutions', 80 *Kentucky Law Journal* (1992) 815; Mehren, 'The "Battle of the Forms": A Comparative View', 38 *AJCL* (1990) 265.

17 E.g., The Law of the Sea Convention Art. 74, referring the delimitation of the exclusive economic zone to the agreement of the parties; The International Covenant on Civil and Political Rights, stating rights with great generality.

### Treaty Interpretation and the New American Ways of Law Reading

A more formal mode goes with the hammering out of multilateral arrangements. For example, agreements sponsored by the United Nations go through several stages. The International Law Commission (ILC) may begin the process.<sup>18</sup> A reporter is engaged to produce a draft. The draft is considered by the Commission as a body and amendments are approved or rejected. When a revised draft has been provided by the reporter and approved by the Commission, the UN General Assembly will in all likelihood issue a call for a diplomatic conference to negotiate an agreement on the basis of the draft. At this conference diplomats rather than lawyers take the front row and, if all goes well, the ILC draft is amended and fine-tuned so as to make it suitable for widespread acceptance. Agreements of this type include the treaty on the law of treaties, the conventions on diplomatic and consular immunities, the less-widely accepted agreements on state succession and so on.<sup>19</sup> The UN Convention on the Law of the Sea was, on the other hand, drafted from the beginning by a diplomatic conference that worked from 1974 to its completion in 1982.<sup>20</sup>

These international multilateral negotiations are sufficiently different from each other so that it is not possible to write the type of generalizing study that students have written about the process of legislation<sup>21</sup> in the United States Congress. There committees stay in place and pass (or bury) different drafts of legislation so that it is possible to do comparative and statistical analysis of a fairly large population of laws and to discover trends and contrasts. Books have been written about the process of the Law of the Sea Convention, but they lack some of the theoretical power of public interest oriented works on domestic legislation.<sup>22</sup> They do, however, point to some general characteristics that have implications for the interpretation of the product. First, one sees the critical role played by the drafter or drafters. A strong-willed and adept chair of a drafting committee can manoeuvre a draft through a mass of delegates, many of them unskilled or uninterested. Second, we observe the enormous power of consensus when the process is advanced. The desire not to block a draft that is widely approved, coupled with a sense that the exact wording of the draft may not make too much practical difference, given the soft enforcement of international law, leads many states not to dissent from provisions of which they do not really approve. This is particularly true of States that do not have the superpower status of the United States, which felt capable of torpedoing the Law of the Sea Convention because of its dislike of certain sections.

18 Graefrath, 'The International Law Commission – Tomorrow: Improving its Organization and Methods of Work', 85 *AJIL* (1991) 595; I. Sinclair, *The International Law Commission* (1987).

19 1155 UNTS 331; 21 UST 77, 596 UNTS 261 (1967); 23 UST 3227, 500 UNTS 95 (1964).

20 For a full history see R. Platzoeder, *Third United Nations Conference on the Law of the Sea* (1972) (volumes I to XVIII).

21 For a recent review see C. Wise, *The Dynamics of Legislation* (1991).

22 M. Schmidt, *Common Heritage or Common Burden? The United States Position on the Development of a Regime for Deep Sea-Bed Mining in the Law of the Sea Convention* (1989); J. Sebenius, *Negotiating the Law of the Sea* (1984).

The international negotiating materials of the typical bilateral and multilateral process are very different. After the eruption of the disagreement between the US Senate and the Reagan administration over the interpretation of the Antiballistic Missile Treaty, masses of negotiating materials were discovered.<sup>23</sup> They had to be unearthed from the files of the executive agencies that had participated in the dialogue with the Russians and much of it had to be declassified for use in the debate. The dangers of selective resort to the mass of negotiating documents by the party with the best access to them are obvious.

A multilateral convention that has ground through the International Law Commission process is accompanied by a great deal of published legislative history – *travaux préparatoires* as the internationalists prefer to call it. The trail begins with the reporter's draft and the comments that accompany it; then debates ensue within the ILC that are reported more or less verbatim. There may then be a new draft and reports and another plenary debate. A similar process with regard to the Law of the Sea Convention provided a similarly massive set of *travaux préparatoires*. We will see later that there is acute controversy in the international law community over the resort to such materials in interpreting the finished product.<sup>24</sup>

After a treaty has been signed at the international level it may have to be forwarded to the signatory States for the completion of whatever confirmatory processes may be necessary or customary under their national law to make a treaty binding upon them. The US senatorial advice and consent process is the most notorious of these, although parliamentary approval is called for under a great many constitutions.<sup>25</sup> In the United States the President must first transmit the proposed treaty to the Senate; the transmittal is accompanied by explanations of what was intended.<sup>26</sup> Officers of the executive branch, as well as other interested parties, testify before the Senate Foreign Relations Committee and submit written statements.<sup>27</sup> The Committee provides a report commenting on the treaty (and it may propose reservations or clarifications).<sup>28</sup> The Senate may debate the granting of its advice and consent and may in fact demand modifications before it assents.<sup>29</sup> All of this generates public material that tells us something about the meaning various Americans attributed to the treaty. What this is

23 Koplw, 'Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties', 137 *U. Pa. L. Rev.* (1989) 1353.

24 *Infra* part III.C.

25 For a survey of the Senate's rejections, see C. Wiktor (ed.), *Unperfected Treaties of the United States 1776-1976* (1979). For descriptions of the role of parliaments in treaty-making in various countries see 'Symposium on Parliamentary Participation in the Making and Operation of Treaties', 67 *Chicago Kent Law Review* (1991) 293.

26 For an example of a Presidential transmittal report see S. Exec. Doc. A, 92d Cong. 2d Sess. (1972), cited in *Société Nationale Aérospatiale v. US District Court*, 482 US 522, 529 (1987).

27 Hearings before a Subcommittee of the Committee on Foreign Relations on the Convention with Great Britain and Northern Ireland regarding Income and Estate Taxes. S. Exec. Docs. D and E, 79th Cong. 1st Sess. (1945), cited in *Maximov v. United States*, 373 US 49, 54 n. 2 (1963).

28 For an example of a committee report see S. Exec. Rep. No. 3, 72d Cong., 2d Sess. (1942) cited in *United States v. Stuart*, 489 US 353 (1990).

29 Restatement (Third) Foreign Relations Law of the United States (1987) § 314.

## Treaty Interpretation and the New American Ways of Law Reading

worth to non-Americans is a question for debate below;<sup>30</sup> it is disputed whether it is right and proper for Americans to use such one-sided sources to interpret words meant to create obligations for other States.

Sometimes that is not the end of the interpretive material. The two governments may correspond about the meaning of the agreement they have made.<sup>31</sup> Sometimes this is part of a rather formalized process. After one State has stated its understanding as part of the ratification process other States may respond, affirming or denying that understanding. At other times there will be correspondence about some episode in which the treaty is invoked, an expression that may find itself drawn into later arguments about the meaning of the text. In some cases this behaviour raises questions of the authority of the bureaucrat-interpreters under their national systems because they have stepped beyond the blurry line that separates their authority to interpret an existing agreement from their lack of authority to make an amending agreement.

### C. The Text

One special aspect of the corpus of treaty materials sets it aside from that of other bodies subject to interpretation – that is the fact that there is often a language or translation factor.<sup>32</sup> When the States parties to the agreement do not share a common language various questions may arise. They may be resolved in various ways, each of which prepares the way for a slightly different hermeneutic problem. The treaty can be solely in the language of State X (until about 1900 this was typically French); this means that nationals and agents of State Y will have to translate the text into the idiom of Y and run the risk of mistranslation. Or it can be in several languages which may be denoted as 'equally official' or 'authoritative.'<sup>33</sup> This then puts the risk of error in translation into play in a different way. With the growing number of multilateral agreements, the industry of legal document translating grows, to the distress of lawyers and the delight of translators who see the value of their services rising – particularly in the case of rarer specialties such as legal Farsi. And with that growth the possibility of errors creeping in rises exponentially.

### D. The International Interpretive Community

Treaty-making and treaty-reading constitute, as we have seen, a complex process. Two metaphors in common use in discussing interpretation at home highlight that

30 See *infra* part III.C.2.

31 See, e.g., *Sumitomo Shoji America v. Avagliano*, 457 US 176 (1982).

32 For a comprehensive study of multilingual texts see M. Tabory, *Multilingualism in International Law* (1980).

33 *Ibid.* at 94-167.



complexity. One we owe to Ronald Dworkin, that of a chain novel created by a series of authors each building upon and constricted by the work produced by those who came before. We find the international law process of creating meaningful texts to be an enormously complex chain.<sup>34</sup> The process works back and forth across political frontiers and linguistic/cultural barriers. It implicates many people, some of whom are quite unaware of what other participants in the process have done by way of attaching meaning to the text. And at the end one is left in doubt about which parts of the chain are relevant. Is the interpreter to focus only on the last draft as the final authoritative product? Or should one pay attention to the way in which the novel or treaty grew?

The other metaphor is borrowed from the field of literary criticism, the idea of an 'interpretive community'.<sup>35</sup> While it is difficult to know what this evocative term requires in detail, one definition lays down the following prerequisites:

- (1) generic or background consensus – sharing of a language and concerns and participation in the 'same form of life';
- (2) agreement as to the boundaries of the practice community members share;
- (3) common recognition of propositions as to what the practice requires as 'truth' within that practice; and
- (4) minimal consensus as to the existence of a text and a reading of it that is needed to provide a working distinction between interpretation and invention.

Can one fairly describe the parties involved in drafting and interpreting a treaty as an interpretive community? Not if one reads into the term the evocative aspects suggested by the use of the term community (*Gemeinschaft*) in sociology, as contrasted with the cooler, more conscious network of a society (*Gesellschaft*).<sup>36</sup> Nor if one expects the intimacy and continuity assigned to the term by modern communitarian political theory.<sup>37</sup> But those who practise treaty law seem to share enough of the basic points of consensus, concerns and boundaries cited above to form an interpretive community in a meaningful sense.<sup>38</sup> Their ability to work and dispute together in international fora and to share the ideas about interpretation discussed in the next section seem to point in that direction. This international collegiality of elites from different countries may of course pull each of them away from the consensus prevailing in the interpretive community or communities to which they belong at home. These national

34 R. Dworkin, *Law's Empire* (1986) 228-38.

35 Postema, "'Protestant' Interpretation and Social Practices', 6 *Law and Philosophy* (1987) 283. See also S. Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (1989) 141; Haas, 'Introduction: Epistemic Communities and International Policy Coordination', 46 *International Organizations* (1992) 1.

36 F. Toennies, *Gemeinschaft und Gesellschaft* (1887).

37 For perspectives on communitarianism, as involved in the creation of values, see West, 'The Authoritarian Impulse in Constitutional Law', 42 *University of Miami Law Review* (1988) 531, 540; Gardbaum, 'Law, Politics and the Claims of Community', 90 *Mich. L. Rev.* (1992) 685.

38 Schachter, 'The Invisible College of International Lawyers', 72 *Northwestern University Law Review* (1977) 217; Compare Vagts, 'Are There no International Lawyers Anymore?' 75 *AJIL* (1981) 134.

communities have considerable power to draw those with dual membership into the national orbit, as will be shown in the next section.

### III. International Interpretation

#### A. Institutions of International Interpretation

When an international text is established, the function of attributing meaning to it may fall to many different people in different roles. A lawyer tends to look to the courts as the authoritative givers of meaning. But courts do not play the central role in attributing meaning to international documents that they perform in domestic matters. The International Court of Justice decides only a handful of cases a year and only a limited number of them can be said to hinge upon the interpretation of a treaty.<sup>39</sup> Thus it cannot serve the function that domestic courts have of casting a shadow within which private parties can dispose of cases that do not go to court. For one thing it does not have the flow of 'easy cases' that bolster the authority of national tribunals.<sup>40</sup> Those easy cases are then reflected in dozens of disputes that are settled extra-judicially in the light of their guidance and which confirm judicial authority. Nor do other arbitral tribunals do much to fill the gap. This comment does not, however, fully apply to the work of a few regional tribunals that regularly interpret the constitutive documents of the international organization to which they belong, namely: the European Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights.

One might plausibly look to national courts as the substitute for international tribunals in the interpretation process. But that has disappointing aspects. In the absence of a strong international reviewing authority – such as the European Court of Justice or European Court of Human Rights – national courts have only their home-grown integrity and good intentions to keep them on the path of internationally acceptable constructions. Few judges have any substantial experience with foreign relations,<sup>41</sup> few of them have had any significant portion of their legal education abroad and the libraries they use may lack international materials. They are largely untouched by criticism or other professional pressures from outside the country in

39 The recent upsurge of cases before the Court – nine new cases in two years – is described in Hight, 'The Peace Palace Heats Up: The World Court in Business Again?', 85 *AJIL* (1991) 646.

40 Compare Schauer, 'Easy Cases', 58 *Southern California Law Review* (1985) 399. The interpretive work of the Court is reviewed in E. Lambruscio, *Treaty Interpretation: Theory and Reality* (1987); Hogg, 'The International Court: Rules of Treaty Interpretation', 43 *Minnesota Law Review* (1959) 369.

41 The international experience of members of the US Supreme Court in recent years has been modest. In earlier times, one (Taft) had been President and four (Jay, Marshall, Day and Hughes) had been Secretary of State. Several served as international arbitrators or as counsel on arbitrations (Fuller, Brewer, Harlan, Day and Hughes). The bureaucratic promotion processes of civil law judicial systems makes it unusual for judges to have served in their foreign policy establishments.

which they practice. And the pressures of the judicial peer group within that country are daily and intense. The subject matter also pushes courts into separate directions. There is a complex matrix of domestic law surrounding most issues of international treaty law. In some States the courts follow a rule that puts treaties first in priority and mandates adjusting domestic rules to them.<sup>42</sup> In others, especially the United States, courts are required to give the Constitution and later statutes priority over treaties if they cannot be reconciled. In either case, the temptation to take the local practice for the important reality is powerful – witness the way in which American courts have put the Hague Convention on Obtaining Evidence together with the Federal Rules of Civil Procedure in such a way as to minimize disturbance of the American way of litigating.<sup>43</sup> And many treaties cannot get to the courts – for reasons such as the complainant's lack of standing, and the concept of the non-self-executing treaty.<sup>44</sup> On the whole, it is a matter of some surprise that national courts have done so well in reading international agreements in a reasonably uniform way that has caused relatively little friction.

Thus the dialogue of State parties over interpretation goes on largely unaided by adjudication. Who acts for parties? In the first instance, they are national governments, typically but not always the Ministry of Foreign Affairs. These agencies conduct the formal diplomatic exchanges which find their way into the digests as authoritative national views about the meaning of the obligations contained in agreements.<sup>45</sup> The same authorities also furnish advice to their nationals who come to them for guidance as to the rights and obligations contained in the agreements. In many countries the executive is *the* interpreter of treaties, and the courts overtly defer to them whenever a treaty question comes within their range.<sup>46</sup> And even in countries like the United States where the courts continue to assert the ultimate authority over treaty interpretation the courts tend to give 'great' or 'decisive' weight to executive branch

42 The United States rule is that the later in time as between treaty and statute prevails although a strong effort will be made to reconcile the two. Restatement (Third) Foreign Relations Law of the United States (1987) § 115; Henkin, 'The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny', 100 *Harv. L. Rev.* (1987) 853. Other countries' constitutions give priority to treaties, see H. Steiner & D. Vagts, *Transnational Legal Problems* (3d ed. 1986) 639-44.

43 *Société Internationale Aérospatiale v. US District Court*, 482 US 522 (1987). It seems highly unlikely, too, that an international tribunal would have interpreted the Mexico-United States extradition treaty as did the Supreme Court in *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992); probably it would have found that reading in the light of 'good faith' barred resort to kidnapping in Mexico.

44 Restatement (Third) Foreign Relations Law of the United States (1987) § 111.

45 See for example the State Department correspondence referred to in *Sumitomo Shoji America v. Avagliano*, 457 US 176 (1982).

46 Thus the French courts ordinarily accept the interpretive views of the Ministry of Foreign Affairs as definitive, at least as far as concerns 'public international policy' (*ordre public internationale*). See D. Carreau, *Droit International* (1986) 477-80, 483-85; N. Dinh, P. Dallier, A. Peller, *Droit International Public* (3rd ed. 1987) 239. For British practice see A. McNair, *The Law of Treaties* (1961) 355-58.

determinations.<sup>47</sup> The executive's interpretive power here is therefore much less controverted than in a statutory context.<sup>48</sup> Many of the government interpreters of treaties are not themselves members of the international community of lawyers. They include army officers instructing their forces on the appropriate standards for handling prisoners of war, treasury officials assessing taxes or releasing blocked funds, customs agents levying duties or enforcing marking requirements, immigration officers dealing with claims of status as refugees or treaty investors and so forth.

In general the legislative branch must play a limited role in the interpretive process. It can, however, make its views felt in various ways. If legislative approval is required before a treaty can become effective, it can insist on clarifying reservations and understandings that will constrict the freedom of the executive to interpret the treaty in ways *ex ante* foreseen and condemned by the legislature. There is not much that it can do directly about problems that arise *ex post*. It can amend the implementing legislation to make the treaty's local effect correspond to its view of the meaning of the treaty. And it can threaten the use of its powers, such as the appropriation power and the appointment power to penalize an executive that has in its view gone beyond the bounds of the permissible readings of the agreement. But it cannot simply hand down directives that will represent a binding reading of the treaty.<sup>49</sup>

Non-government parties too have functions in the process. Private attorneys confronted with executive agents or private adversaries in litigation tell their clients their version of what the treaties mean and argue their position before courts. Law professors find their place in this complex network;<sup>50</sup> through teaching or writing they inform the other actors in this system about their authoritative views on meaning. And in the absence of other powerful assigners of meaning, their role here looms larger than that traditionally assigned to professors in domestic legal processes.

For the most part these interpretive functions are exercised in good faith, that is, the parties and their advisors believe in the validity or defensibility of their views on the

47 Restatement (Third) Foreign Relations Law of the United States (1987) § 326. See, e.g., *Kolovrat v. Oregon*, 366 US 187 (1961); *Factor v. Laubenheimer*, 290 US 276, 294 (1933). A question of treaty interpretation is not a 'political question' *Japan Whaling Association v. American Cetacean Society*, 478 US 221, 229 (1986).

48 On executive construction of the Constitution see Schauer, 'The Occasions of Constitutional Interpretation', 72 *Boston University Law Review* (1992) 729.

49 As to the Senate's power to restrain subsequent interpretation through reservations or understandings see Restatement (Third) Foreign Relations Law of the United States (1987) § 314. As to the ineffectiveness of later Senate interpretations see Restatement (Third) Foreign Relations Law of the United States (1987) § 326, Comment a. The status of attempts to control interpretation through legislation is surveyed in articles written after the Biden Condition; Koh, 'The President versus the Senate in Treaty Interpretation: What's All the Fuss About?', 15 *Yale J. Int'l L.* (1990) 331; Reisman, 'Necessary and Proper: Executive Competence to Interpret Treaties', 15 *Yale J. Int'l L.* (1990) 316; Gallant, 'American Treaties, International Law; Treaty Interpretation after the Biden Condition', 21 *Arizona State Law Journal* (1989) 1067.

50 Statute of the ICJ Art. 38-I(d).

meaning of treaties. But it is not cynical to note that the absence of a reliable check in the nature of disinterested third party adjudication of issues makes it easier to listen to one's own interests and preferences when taking a position on international agreements. All of this rather loose treatment of treaty construction is echoed in the attitudes of those who set about the tasks of drafting them. They may try to be unsparing in their precision so as to make disputation impossible. Or they may reserve the right to terminate their country's commitment to the treaty upon little or no notice so that they can respond to adverse interpretation by opting out entirely.

### B. The International Interpretive Tradition

The international law interpretive tradition has a long history, going back to Grotius and the sixteenth century. It differs from American approaches in its greater emphasis on the text and its aversion to teleology.<sup>51</sup> These differences were highlighted during the process of codifying the international law of treaties during the 1960s which culminated in the Vienna Convention.

The Vienna Conference produced a Convention of 85 articles, three of which deal with interpretation.<sup>52</sup> These articles have been accused of being entirely eclectic, embracing all interpretive approaches.<sup>53</sup> But most observers see them as establishing a hierarchy with 'ordinary meaning' at the top. Original intent gets a secondary role when it appears that a special meaning was intended by the parties. In such a case the use of *travaux préparatoires* is justified in order to find that intent. Teleology gets little room: a mild form of teleology is embodied in the notion of interpretation 'in good faith' and in the reference to the 'object and purpose' of the treaty.

These provisions were anything but non-controversial. Under the leadership of Professor Myres McDougal, the United States delegation went on the attack. Everybody recognized that this formulation gave a strong tilt towards textual analysis and that it downplayed the use of secondary sources and arguments that may have influenced the negotiations, but which were not included in the final language. But the McDougal amendment which would have put in a single list all the interpretive instruments contained in the draft Convention, received 'scant support',<sup>54</sup> and the Vienna approach continues to animate the case-law of the International Court of Justice. The Court regards it as expressing the customary law of treaties, even in cases

51 V.D. Degan, *L'Interpretation des accords en droit international* (1963) 25-48.

52 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Arguments* (1989) 292 n. 52: 'It refers to virtually all thinkable interpretive methods.'

53 McDougal, 'The International Law Commission's Draft Articles upon Interpretation of Treaties', 61 *AJIL* (1967) 992. For the most expansive account of his views on treaty interpretation see M. McDougal, H. Lasswell & J. Miller, *The Interpretation of Agreements and World Public Order* (1967).

54 Kearney & Dalton, *The Treaty on Treaties*, 64 *AJIL* (1970) 495, 520.

where one or both litigants is not a party to it.<sup>55</sup> Even American courts regularly cite the Convention, although the United States is not a party.<sup>56</sup>

### C. Special International Interpretive Issues

#### 1. *The Travaux Préparatoires Question*

Consistent with its emphasis on the text, the Vienna Convention was grudging in its acquiescence in the idea that, if all else failed, a treaty interpreter might examine the *travaux préparatoires* for guidance.<sup>57</sup> Although the treatment of *travaux* is part of the general plain meaning approach which is characteristic of international law, it has additional aspects of its own. Many of the major players on the international scene ignore legislative history in interpreting national statutes.<sup>58</sup> Some States keep no such records. In domestic quarrels, recourse to legislative history poses problems of equality as between litigants and lawyers, favouring lawyers for the national government, private practitioners with offices in the capital and wealthy litigators. On the international plane there are even risks of governments being disadvantaged.<sup>59</sup> This is particularly true in the case of multilateral conventions. These tend to generate masses of legislative documents. A State may not have a full set of these even if it participated in the convention. The chance of this occurring is even higher if it did not participate in the negotiations, but later acceded to the treaty, out of a general sense that it would be sound policy to adhere to an agreement which appears satisfactory on its face and is widely supported. Perhaps the most dramatic episode involving *travaux* arose from an attempt to use, in the interpretation of a post World War II treaty with Germany, passages from negotiations among the other parties to the treaty from which the German delegation had been deliberately excluded, being admitted only to sign the agreement presented by the victors. The arbitral tribunal found this inappropriate,<sup>60</sup> although it might have seen the situation differently if it had regarded the agreement as dictated rather than negotiated.

55 *Advisory Opinion on the Continued Presence of South Africa in Namibia*, ICJ Reports (1971) 3, 47.

56 See cases collected in Restatement (Third) Foreign Relations Law of the United States (1987), Introduction to Ch. III.

57 See Vienna Convention Art. 32.

58 See, e.g., *Fothergill v. Monarch Airlines*, [1981] A.C. 251 (H.L.). A. McNair, *The Law of Treaties* (1961) 418: 'An English lawyer approaches [the] question with a bias against resort to preparatory work as that is, in general, contrary to his legal tradition and instinct.'

59 McNair, *ibid.* at 421-22, argues against the use of *travaux* against States not participating in the negotiation of a treaty; the US Supreme Court has used the preparatory work of the Warsaw Convention although the United States did not take part, *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 149 (1991); *Air France v. Saks*, 470 US 392, 400 (1985).

60 *Young Loan Arbitration*, 59 ILR (1983) 495, 543-45; see R. Bernhardt, *Die Auslegung völkerrechtliche Verträge* (1963) 120.

Despite such episodes, courts regularly rummage through *travaux* in search of guidance. National courts have done so both in countries like the United States where the resort to domestic legislative history is common and in countries such as Great Britain where it is not.<sup>61</sup> The International Court of Justice has expressed scepticism about *travaux* though it has used them at times, usually to reinforce a reading arrived at on other grounds.<sup>62</sup> In particular, Judge Alvarez advocated an exclusionary practice, arguing that pursuing the intent of the founders would frustrate a search for the best adaptation of the arrangement to situations as they had developed over time.<sup>63</sup>

Looking at particular cases, one sees that the *travaux* do not always clarify the parties' intentions. Consider, for example, the role of *travaux* in the *Boll* case.<sup>64</sup> The question on which several judges focused was whether there should be an interpretation of the agreement which implied an *ordre public* clause when none was stated in the document. The history of the Hague Convention that generated the agreement showed that there had been extensive discussion about the advisability of inserting an *ordre public* provision.<sup>65</sup> Some judges thought that the fact that no such language emerged in the operative text was good reason for taking the Convention at face value. Others thought that there was such a tradition in favour of its inclusion that even its omission after due deliberation did not exclude it. According to this view apparently it would have been necessary to have an explicit vote against inclusion or an express exclusionary clause in the final agreement.<sup>66</sup>

Yet at times the *travaux* do seem to be helpful. Sometimes they clarify the assumptions the drafters were using when they employed certain language – for example, the Continental legal terms that found their way into the Warsaw Convention.<sup>67</sup> Sometimes they are useful to domestic authorities in other ways. One example might be a situation in which the treaty does not contain details about the way in which the internal law of one of the member States is to be changed by the treaty – its inclusion would have simply overloaded the text. But statements by the delegation of the country in question may have clarified the matter – and may have been communicated to its legislature and used in drafting the implementing legislation.

A special set of questions revolves around the use of domestic legislative history to shape the meaning of an international agreement. There are those who argue that,

61 As to the United States see the review by Breyer, 'On the Uses of Legislative History in Interpreting Statutes', 65 *Southern California Law Review* (1992) 845.

62 Ris, 'Treaty Interpretation and ICJ Recourse to *travaux préparatoires*', 14 *ICLQ* (1991) 111.

63 *Competence of the General Assembly for the Admission of a State to the United Nations*, ICJ Reports (1950) 4, 15-19; *Conditions of Admission of a State to Membership in the United Nations*, ICJ Reports (1947-48) 57, 67-76.

64 *Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (The Boll case)*, ICJ Reports (1958) 55, 129-31.

65 *Ibid.* at 129.

66 *Ibid.* at 96-97.

67 *Air France v. Saks*, 470 US 392 (1985).

## Treaty Interpretation and the New American Ways of Law Reading

while international negotiating history may at times be helpful in the construction of an agreement because it casts light on the intention of the parties, it is unfair to use it if is peculiar to one party's processes.<sup>68</sup> Ironically, that argument was made most vehemently by partisans of the Reagan administration's interpretation of the Antiballistic Missile Treaty to permit it to develop Star Wars.<sup>69</sup> The irony arises in that the Russians did not adopt the US Senate's reading of the ABM Treaty to forbid Star Wars.<sup>70</sup> In particular cases, the division of domestic and international legislative history can be blurred. Many of the citations by US courts to Senate materials actually refer to places where negotiators explain to the Senate what happened at the negotiating table and what the United States had obligated itself to do.<sup>71</sup> It is far from clear that sophisticated negotiators for foreign countries are ignorant of what goes on within the United States councils as an agreement makes its way through the government before or after negotiations with the other country.<sup>72</sup> While it is impossible to find a case in which such domestic legislative history was dispositive of the final result, it seems unwise to maintain an absolute barrier to its use.<sup>73</sup>

Curiously, there are also cases in which the European Court of Justice has examined communications from national governments to their parliaments when asking them to ratify agreements relating to the European Communities.<sup>74</sup> This is partly due to the fact that, intentionally, there are no *travaux préparatoires* developed by the negotiating process itself. In most cases examination of the domestic materials will confirm and clarify what was said in the international negotiations. Only rarely will negotiators misstate to their colleagues at home comments made and heard in the conference room. Thus a sceptical but comprehensive scrutiny of the treaty process may turn up illuminating leads as to meaning.

### 2. The Translation Problem

A persistent source of difficulties with reading treaties is the fact that nations speaking different languages must achieve a common meaning. Some theorists of interpretation

68 *United States v. Stuart*, 489 US 353, 374 (1989) (concurring opinion of Scalia, J.).

69 *Ibid.* at 376-77 for indications that the ABM treaty controversy is the real subject of the argument.

70 Semenow, 'The Treaty's Basic Provisions: View of the Soviet Negotiator', and Vereschbetin, 'Issues Related to Current US and Soviet Views of the Treaty – A Soviet Jurist's Perspective', in R. Cowen, W. Stuetzle and B. Jasani (eds), *The ABM Treaty: To Defend or not to Defend* (1987) 62 and 105 respectively.

71 See, e.g., *Volkswagenwerk Aktiengesellschaft v. Shlunk*, 486 US 694, 710 (1988) quoting US delegate's remarks at the Hague Conference.

72 The majority opinion in *United States v. Stuart*, 489 US 367 n. 7, makes this point. Two German cases resorting to US legislative history are cited in *McNair supra* note 58, at 421.

73 Halberstam, 'The Use of Legislative History in Treaty Interpretation: The Dual Treaty Approach', 12 *Cardozo Law Review* (1991) 1645, 1680.

74 For use by Advocates General of the European Court of Justice of national parliamentary ratification debates, see *Case 6/54, Netherlands v. High Authority*, [1954-56] ECR 103; *Humblot v. Belgium*, [1960] ECR 559, 575-76.



would say that every reading is a translation, between the author and the reader, and that translation in the international sense differs only in degree.<sup>75</sup> But the difference of degree is an important one. The Italians have a phrase – *traduttore-traditore*, meaning that to translate is to betray. Thus treaty-reading shares in a sense a set of problems familiar to the study of literature.<sup>76</sup> But the emphasis is different; one need not worry about rhyme, metre or allusiveness. There are, on the other hand, special difficulties with legal texts: important differences in the degree of binding quality to be attributed to a verb, special meanings in legal usage that are unfamiliar to translators who are not lawyers and the encrustation of legal usage surrounding words of art. Some languages, in particular those brought into the international system by new countries which are sensitive about their national identity, do not have a vocabulary adequate to express all of the concepts needed for treaties. The sources of these problems also include mistakes by translators<sup>77</sup> and even deception.<sup>78</sup> Small wonder that the Court of Justice of the European Communities has warned that, given the number of equally official texts of the Treaty of Rome it will not be common to find a single clear meaning in all of them.<sup>79</sup>

If the texts do not exactly correspond, how does one go about finding a common position? The Vienna Convention calls for the reading that will best reconcile the various texts.<sup>80</sup> The *travaux préparatoires* of the Convention do not provide many examples of such an analysis and one can imagine many cases in which the interpreter is faced with an either/or proposition.<sup>81</sup> One could draw an analogy with domestic contract rules by saying that the minds simply did not meet and that therefore there was no binding contract.<sup>82</sup> The most useful international theory holds that one should adopt the most restrictive reading emerging from the texts – another version of the principle that treaties are to be construed so as to minimize the intrusion upon States' sovereignty.<sup>83</sup> Sometimes there are good reasons to prefer one text over another, for example, if it is simply the only one that makes sense in relation to the question up for

75 For an attempt to apply linguistics to variations between languages and within languages see D. Klinck, *The Word of the Law* (1992) Ch. 2.

76 For general studies on translation, see R. Brower (ed.), *On Translation* (1959); T. Savory, *The Art of Translation* (1957); K. Chukovsky, *The Art of Translation* (L. Leighton trans. 1984).

77 Thus the phrase 'the ulterior right of establishing reciprocity' in Article 7 of the 1853 Consular Convention with France must involve a mistranslation of the French 'ultérieurement', meaning 'later'. 10 Stat. 992, T.S. No. 92. For other examples of translators' errors see Moses, 'International Legal Practice', 4 *Fordham Law Review* (1935) 244, 248-53.

78 For an assertion that Arabic and English texts of the Universal Declaration of Human Rights were consciously written with different emphases, see A. Meyer, *Islam and Human Rights: Tradition and Politics* (1991) 86-87, 104-105.

79 Case, 283/89, *Sri CILFIT v. Ministry of Health*, [1982] ECR 3415, 3430.

80 Vienna Convention Art. 37.

81 2 ILC Yearbook (1964) 208; 2 ILC Yearbook (1966) 225.

82 2 Hurlstone & Coltman 906 (Exch. 1864).

83 *Mavrommatis Palestine Concession*, PCIJ Series A, No. 2, (1934) 15-21; Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 37 *BYbIL* (1961) 72, 113-15.

interpretation. Or it may be that the treaty so clearly emerged from one language and one legal system that the reader needs to emphasize that text.

For example, the official words in the Warsaw Convention describing situations in which the damage limitation on suits against air carriers does not apply are 'dol ou ... faute lourde'.<sup>84</sup> These words were written into the Convention in 1929 by European lawyers. They brought with them ideas about the boundaries of that concept that they had derived from domestic systems. The US Supreme Court has gone a considerable distance in ransacking that learning in the search for a useful delimitation of the concept, even though the American participants in the ratification process knew little about those texts.<sup>85</sup>

#### D. A Case Study

The people who become involved in the drafting and interpretive process with respect to treaties are numerous, disparate and unpredictable. Let us take one example, perhaps a bit extreme but not wholly uncharacteristic. Article 18 of the Geneva Convention on the Treatment of Prisoners of War of 1929 provided that prisoners were to salute officers of the captor country.<sup>86</sup> That provision was, like the rest of the Convention, produced by a diplomatic conference called to take care of weaknesses in the Hague Convention of 1907 that had been made apparent by the grim experiences of World War I.<sup>87</sup> The conference was attended by some 138 representatives of 47 countries, military personnel, doctors and professional diplomats.<sup>88</sup> When completed, the text, drafted and signed in French, was taken home to the participating States. There it was translated and presented to various national legislatures for approval prior to ratification. Many of those legislators had never undertaken any military service or represented their countries abroad.

In 1944 a dispute arose about the meaning of that clause.<sup>89</sup> From 1939 to 1944 allied prisoners of war in Germany had saluted their German captors in the traditional way, touching their right hands to the visors of their caps. The Germans had returned the salute in the same fashion. Note that the Convention does not specify that the salute be returned; evidently it was a universal assumption embedded in military tradition

84 49 Stat. 3000, T.S. No. 876, 139 L.N.T.S. 11.

85 *Air France v. Saks*, 470 US 392 (1985). See also *Trans World Airlines v. Franklin Mint Co.*, 466 US 243 (1984). *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489 (1991) (interpretation of 'lésion corporelle').

86 47 Stat. 2021, TIAS No. 846.

87 Articles 4-20 of Regulations respecting the Laws and Customs of War on Land, Annex to Laws and Customs of War on Land, 36 Stat. 2277, TS No. 539.

88 Actes de la Conférence diplomatique convoquée par le Conseil fédéral suisse pour la révision de la convention du 6 juillet 1906 pour l'amélioration du sort des blessés et des malades dans les armées en campagne et pour l'élaboration d'une convention relative au traitement des prisonniers de guerre réunie à Genève du 1er au 27 juillet 1929 (1930) 41-46. At 477, these *travaux préparatoires* indicate that there was no debate about this article.

89 A. Durand, *Stalag Luft III: The Secret Story* (1988) 200.

that a salute unreturned is like the sound of one hand clapping. But after the failure of the attempt to assassinate Hitler on 20 July 1944, the *Führer* ordered that regular German army troops salute in the Nazi style, raising their right hands with their palms facing out. Personnel at German prisoner camps began to return British and American salutes Nazi-fashion and the British protested.<sup>90</sup> German captives in Allied camps insisted on the right to initiate the exchange with a Nazi salute. After negotiation between the camp administrative personnel and representatives of the captives, resort was made to the services of the representatives of the International Committee of the Red Cross which served as protecting power pursuant to the provisions of the Geneva Convention. The conclusion, reflected in the 1949 Geneva Convention, is that a prisoner may use the salute that is prevalent in the army to which he or she is serving.<sup>91</sup> Thus we find interpretations of the Convention being presented and considered by persons far away from the original negotiating process. Most of them were not lawyers and they had no access to the *travaux préparatoires* (which, as so often happens, would not have been helpful). There was no decision-maker to force a solution upon the parties. Yet it is apparent that the parties in dispute, although coming from different and at the time violently hostile states, did share assumptions about what a 'salute' was, and when and how one should be rendered. Indeed, it seems likely that professional and traditional German officers had more in common on this point with their British counterparts than with their Nazi colleagues.

Is it possible to characterize the ensemble of people involved in writing, enacting and then interpreting the Geneva Convention of 1929 as an interpretive community?<sup>92</sup> They are so diverse in background and interests that the mind rebels. But perhaps it is possible to salvage the idea that it is a community, first by reminding oneself that the term 'language' is not necessarily the same in the definition of interpretive community as it is in ordinary parlance. So long as decent translations are available the disparity of language in that sense may not add overwhelmingly to the problem of reading the text. And an interpretive community can cut across national frontiers – as do many scientific and intellectual communities. If one thinks of the practice in question as 'saluting' it is apparent that members of the armed forces of the world shared common ideas as to how one did it and what it meant. Persons outside the armed forces had either gleaned some idea about saluting from literature or conversation, or informed themselves about it, more or less, during the ratifying or advice and consent process. In this limited sense one can consider those involved with the Geneva Convention as constituting an ad hoc community with overlapping sub-categories of military officers, diplomats, congressional personnel, Red Cross emissaries and so on.

90 I H. Levie, *The Code of International Armed Conflict* (1986) 337.

91 6 UST 3316, 75 UNTS 135 Art. 39 says 'prisoners ... must salute and show to all officers of the Detaining Power the external marks of respect provided for by the regulations applying in their own forces.'

92 *Supra* part II.D.

## Treaty Interpretation and the New American Ways of Law Reading

This problem confronts us with a Vienna Convention question: to whom must the language be ordinary? Before 1940 almost everybody would have thought they knew what a salute was. The dictionaries, French, English and so on, would not have been particularly helpful because the term 'salute' tends to stretch from the firing of twenty-one cannons to a kiss on the cheek. Teleology or purposiveness would suggest that the Convention meant to support the self-esteem of captured personnel and to force the captors to recognize that they continued to be human beings and military personnel. This purpose also appears in articles allowing prisoners to retain insignia of rank and decorations, limiting the sorts of work they can be compelled to do and so forth.<sup>93</sup> All of these are meant to prevent the degradations that commonly confront a civilian convicted of a crime. However, that purpose may be ambiguous – should the captive be allowed to render the form of salute he or she is used to? Or should he or she be made to adhere to a universally recognized norm?

### IV. US Styles of Interpretation

When one turns to the American legal scene one finds an avalanche of theories and ideas about interpretation, in sharp contrast to the relative quiescence of international law. Looking more closely one finds that the theories cluster about different types of documents. We examine first constitutional interpretation, then statutory construction and finally contract work. There is limited cross referencing between these bodies of learning, although there is beginning to be some between constitutional and statutory interpretation.<sup>94</sup> Some theories of interpretation are strictly academic and have been quite crisply rejected or ignored by the judges; they therefore have little to say about the actual interpretation of US documents and are even less likely to influence treaty construction. This diminishes the danger that the United States will follow its own idiosyncratic path in the treaty process.<sup>95</sup>

#### A. Constitutional Interpretation

##### 1. Schools of Constitutional Interpretation

Perhaps no other document poses a more difficult challenge for the judicial interpreter than the United States Constitution. Even in comparison with its counterparts in other

93 Geneva Convention, Articles 19, 21, 23.

94 It was not always so; Holmes, 'The Theory of Legal Interpretation', 12 *Harv. L. Rev.* (1899) 417, 419 judged that construing statutes and contracts involved the same principles. For a finding of convergence between statutory and constitutional interpretation see Schauer, *supra* note 48, at 401, 745.

95 'Given the gulfs of language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters.' *Trans World Airlines v. Franklin Mint Co.*, 466 US 243, 262 (1984) (Stevens, J., dissenting).

countries, we find that it is (1) considerably older than other constitutions, most of which were written after 1945, (2) considerably shorter and less detailed and (3) harder to amend if its interpretation fails to satisfy the public. All of this has created special problems for the Supreme Court, which are further enhanced by the political sensitivity of the issues to be decided. This sensitivity has at times caused the court to assert that it was bound by the Constitution in a very precise way, that it had no choice but to proffer the ruling made.<sup>96</sup> A theory that will accommodate such demands is hard to find and defend.

For a long time the function was filled by a textualism which was not so very different from that celebrated by treatise writers and judges of international law. Textualism, however, became the central target of first the realist movement and then of critical legal studies.<sup>97</sup> The first wave clearly had the sympathy of many judges. In particular Holmes and Learned Hand made comments about construction – for example the famous phrases ‘a word is the skin of a living thought’<sup>98</sup> and ‘[you cannot] make a fortress out of the dictionary’<sup>99</sup> – that were entirely in keeping with the realist critique of formalism. When the second wave came along the judges were not ready to fraternize with it. For one thing, it was too closely associated with vaguely left-wing politics, and for another, its implications, at least in the more sweeping formulations, struck at the root of the whole process of judging. In that vein, Justice Scalia said:

Not that I agree with or even take very seriously, the intricately elaborated scholarly criticisms to the effect that (believe it or not) words have no meaning. They have meaning enough...<sup>100</sup>

One rival for the position of leading constitutional construction theory has been originalism.<sup>101</sup> In some versions, it mandates a thorough review of documentation and testimony contemporaneous with the establishment of the text itself. Clues about what the authors meant can be found in anything they wrote or said. It is a difficult search which can never be completed. The records of the Philadelphia convention were in fact not complete and in some cases inaccurate. New letters from important delegates were

96 The fact that the Supreme Court is not a representative institution lies at the base of the need to create a belief that it is ‘constrained’ by the text. Perry, ‘The Authority of Text, Tradition and Reason’, 58 *Southern California Law Review* (1985) 551, 580.

97 Critics of the Supreme Court did not rely heavily on weaknesses in the conservatives’ interpretive theory, although they were clearly aware that the claim that the constitution’s text compelled their outcomes was vulnerable. See, e.g., Powell, ‘Some Aspects of Constitutional Law’, 53 *Harv. L. Rev.* (1940) 529, 546–47.

98 *Towne v. Eisner*, 245 US 418, 425 (1918).

99 *Cabell v. Markham*, 148 F. 2d 737, 739 (2d Cir. 1945).

100 Scalia, ‘Originalism: The Lesser Evil’, 57 *Cincinnati Law Review* (1989) 849, 856. See also Zeppos, ‘Justice Scalia’s Textualism: The New New Legal Process’, 12 *Cardozo Law Review* (1991) 1597.

101 For critiques see Bittker, ‘The Bicentennial of the Jurisprudence of Original Intent’, 77 *California Law Review* (1989) 235; Boyle, ‘A Process of Denial: Bork and Post-Modern Conservatism’, 3 *Yale Journal of Law and Humanities* (1991) 263 (pointing out different versions of originalism in Judge Bork’s writings).

discovered. New theories highlight different ways of seeing the sum of the intentions. Originalism also brings to the forefront that difficult question: whose intentions matter?<sup>102</sup> It is one thing to ask about the intentions of a testator, one person with one mind. But whose ideas matter when one deals with the Constitution? We have the most information about the Philadelphians, but are their views uniquely privileged? Suppose that the votes in the states, when ratifying the Constitution, were motivated by explanations somewhat at variance with the ideas expressed inside the hall? Or worse, suppose that the ratifying legislatures and the Congress were motivated by outright deliberate misrepresentations about the document they had before them – as is alleged to have happened with the XIVth amendment.<sup>103</sup> Adopting the Dworkin chain novel metaphor, we ask ourselves what link in the chain is to be regarded as ‘final’ for purposes of interpretation. Originalism can thus represent two different approaches, one centred on the authors and the other on contemporary readers. In either case there is an enormous danger that the ‘moderns’, for all their sophisticated historical apparatus, will misunderstand their forbears. It is understandable that interpreters should flee back to the text.

The constitutional schools of interpretation beyond the textual and the intentionalist are hard to describe or encompass.<sup>104</sup> In a broad sense, they can all be regarded as teleological, that is, they ask that the Constitution be interpreted with some general principle, which may or may not be represented in the actual constitutional text, as the guiding star. Although each such school would claim that the wording of the Constitution gave them some help in starting their analysis, they would generally concede, or assert, that a characteristic of their method is the way in which it frees the court to interpret the Constitution of 1789 in the light of developments in the 1990s. Their standard set of arguments would include a contention that one could never have foreseen in Philadelphia the change in attitude toward corporal punishment in two centuries, or that new technologies such as safe abortion practices would challenge the universally-held assumptions of that time.

None of these theories in fact represent the practice of the Supreme Court in interpreting the Constitution. A more modest claim would be that cases tend to follow a hierarchy of indicia,<sup>105</sup> starting, as does the Vienna Convention, with the ordinary meaning and moving to evidence of intent and historical meaning, and then to teleology. In addition the Supreme Court places an emphasis on previous case-

102 Radin, ‘Statutory Interpretation’, 43 *Harv. L. Rev.* (1930) 863, 870-71.

103 Graham, ‘The Conspiracy Theory of the Fourteenth Amendment,’ 47 *Yale Law Journal* (1938) 371; W. Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (1970) 65-69.

104 Two major interpretive studies that cannot be classified as originalist or textualist are P. Bobbitt, *Constitutional Interpretation* (1991) and L. Tribe & M. Dorf, *On Reading the Constitution* (1991). For an attempt to categorize and integrate these theories see Fallon, ‘A Constructivist Coherence Theory of Constitutional Interpretation’, 100 *Harv. L. Rev.* (1987) 1189.

105 *Ibid.* at 1252-1268.

law, which is an approach that international courts do not and cannot share, given their light case load.

## 2. *The Implications for Reading Treaties*

Only a few special portions of the treaty corpus sufficiently resemble American Constitutional law to give rise to similar problems. These are the Charter of the United Nations,<sup>106</sup> the Treaty creating the European Economic Community,<sup>107</sup> and the European Convention on Human Rights.<sup>108</sup> None resemble the age of the Philadelphia charter, and the latter two have been amended with greater frequency and considerable attention to detail.<sup>109</sup>

The International Court of Justice only spasmodically interprets the UN Charter. A question may be referred to it by the General Assembly or Security Council asking for an advisory opinion. One can fairly characterize the series of advisory opinions of the Court as cautious in the extreme. Only one judge, Alvarez, expressed a sentiment of which John Marshall would have approved:

[Such agreements] can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard.<sup>110</sup>

\* \* \*

[T]he fact should be stressed that an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life.<sup>111</sup>

At the other extreme, judges from Communist countries were concerned that if teleology were invoked, it would be capitalist in character. Therefore they consistently called for narrow and literal construction. Thus Judge Krylov in the *Reparation* case said:

In my view, the Court cannot sanction by its Opinion the creation of a new rule of international law, particularly in the present case, where the new rule might entail a number of complications.<sup>112</sup>

106 59 Stat. 1031, T.S. No. 993, as amended.

107 298 UNTS 11 (1958), as amended.

108 213 UNTS 221 (1955), Eur.TS No. 5 (1950), as amended.

109 Thus the Treaty of Rome has been amended by the Merger Treaty of 1967, the Single European Act of 1987 and three separate accession agreements and now by Maastricht. There have been nine protocols amending the European Human Rights Convention.

110 *Reservations to the Genocide Convention*, ICJ Reports (1951) 14, 53; compare the shipyard metaphor in Aleinikoff, 'Updating Statutory Interpretation', 87 *Mich. L. Rev.* (1988) 20, 21.

111 *Conditions of Admission of a State to Membership in the United Nations*, ICJ Reports (1947-48) 57, 68.

112 *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 174, 219 (dissent of Judge Krylov).

And Judge Koretsky in *Certain Expenses* remarked:

The Court, taking reality into consideration, should at the same time have in mind the strict observation of the Charter.

I am prepared to stress the necessity of the strict observation and proper interpretation of the provisions of the charter, its rules, without limiting itself by reference to the purposes of the Organization; otherwise one would have to come to the long ago condemned formula: 'The ends justify the means.'

(...)

It has been said that you cannot leave one word out of a song. The Charter represents one of the most important international multilateral treaties, from which it is impossible to leave out any of its provisions either directly or through an interpretation that is more artificial than skillful.<sup>113</sup>

One can say that the interpretation of the Charter by the Court has tended to be cautious, that at least throughout 1962 it was applied in the way desired by the United States and American judges. Commentators tended to be content with it and the Russians unhappy. On the whole it deferred to political decisions made by the other branches of the UN organization.<sup>114</sup>

The Treaty of Rome has virtually become a constitution of a federal state and thus the extensive output of the European Court of Justice has formed a body of law that is almost easier to analyse by comparison to the US Constitution than to other treaties.<sup>115</sup> Supreme Court Justices Marshall and Story would have felt at home with much of this case-law. They would have appreciated the smooth determination with which the judges wrote into the Treaty of Rome a supremacy clause that the drafters had omitted to place there.<sup>116</sup> They would have nodded as they examined the creativity with which the Court found bases upon which the political branches of the Community could build bodies of law governing fields to which the terms of the Treaty did not authorize them to attend.<sup>117</sup> Differences between the approach of the European Court and that of some national courts may have been best captured by a British judgment. Lord Denning braced himself for his new role as an interpreter of the Treaty of Rome in the following terms:

113 *Certain Expenses of the United Nations*, ICJ Reports (1962) 151, 268, 272.

114 Gordon, 'The World Court and the Interpretation of Constitutive Treaties', 59 *AJIL* (1965) 794, 828-32. Compare the Vienna Convention Art. 31.3(b).

115 For an extended comparison see Cappelletti & Golay, 'The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration', 1 M. Cappelletti, M. Seccombe & J. Weiler (eds), *Integration through Law: Europe and the American Federal Experience* (1986) Bk. 2 at 261.

116 *Case 26/62 N.V. Algemene Transport Van Gend & Loos v. Netherlands Fiscal Authority*, [1963] ECR 1, 12; *Case 6/64, Flaminio Costa v. ENEL*, [1964] ECR 585, 586-87.

117 Instances of the European Court of Justice approach to broad and empowering constructions of the Treaty of Rome are given in T. Opperman, *Europarecht* (1991) 215-220. The author notes that these readings are closer to national constitutional law than to the Vienna Convention, although some cases involving international organizations might be an exception. A British author takes that approach to task: 'This logic ... ignores the distinction between what the law ought to be and what it is, a distinction which is fundamental to the Western concept of law.' T.C. Hartley, *The Foundations of European Community Law* (2nd ed. 1988) 78.



Beyond doubt the English courts must follow the same principles as the European Court. Otherwise there would be differences between the countries of the nine. That would never do. All the courts of all nine countries should interpret the treaty in the same way. They should all apply the same principles...

What a task is thus set before us! The treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have foregone brevity. They have become long and involved. In consequence, the judges have followed suit. They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation – which was not foreseen – the judges hold that they have no power to fill the gap... How different is this treaty. It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the treaty there are gaps and lacunae. These have to be filled in by the judges, or by regulations or directives. It is the European way...<sup>118</sup>

In contrasting the approach of the European Court of Justice with that of the British courts, Lord Denning is on safe ground. However, one should not assume that there is so clear a contrast between the British way of dealing with their own statutes and that of Continental courts in dealing with theirs. To speak only of German history, one notes a general tendency to read statutes literally, interrupted by teleological periods brought on by violent social changes such as the inflation of the 1920s or the advent of Nazism in 1933-45, which was terminated by an Allied statute mandating a return to 'plain meaning'.<sup>119</sup> Continental courts have been hesitant in taking a teleological approach to other treaties.<sup>120</sup>

The European Court of Human Rights deals with a document that is, in a sense, a bill of rights standing without the institutional framework provided by the US Constitution.<sup>121</sup> Many of its provisions read as if they were the product of drafters familiar with the great eighteenth century documents, the US Constitution and the Declaration of the Rights of Man. For example, Article 10 of the Convention is approximately four times the length of the First Amendment and deals only with freedom of expression. It is modernized to include media not imagined by Madison.

118 *H.P. Bulmer Ltd. v. J.Bollinger S.A.*, [1974] All ER 1226 (CA). Lord Denning's views about interpretation are not to be viewed as characteristic of English judges, among whom he was a 'maverick' on a variety of counts. P.S. Atiyah & R. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (1987) 290. For an academic comparison of British and Continental interpretational approaches, see N. Marsh, *Interpretation in a National and International Context* (1974).

119 A comprehensive study of the asserted positivism of Nazi interpretation is found in B. Rütters, *Die unbegrenzte Auslegung – Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (2d ed. 1989). The statute cited is Military Government Law No. 1, reprinted in E.J. Cohn & M. Wolff, *Manual of German Law* (1950) 19.

120 H. De Vries, *Civil Law and the Anglo-American Lawyer* (1976) 261.

121 For comparisons between American law and the European system, see M. Janis & R. Kay, *European Human Rights Law* (1990).

It states at considerable length exceptions to freedom of expression, and includes provisions which protect national security, the reputation of others, and the maintenance of the authority and impartiality of the judiciary.<sup>122</sup> Each exception has some counterpart in the case-law generated by the US system over two centuries. The detail in the Convention's drafting has not alleviated the resolution of problems of free speech that are classic in American Constitutional law. In other fields, despite the recency and specificity of the Convention, the Strasbourg court has found in it unstated rights which the US Supreme Court has failed to see.<sup>123</sup>

The Inter-American Court of Human Rights has not as yet developed a body of case-law comparable to that of the European court, but some of its judgments point in the direction of similar developments.<sup>124</sup> For lack of comparable interpretive institutions, the provisions of the International Covenant of Civil and Political Rights, although often very similar in wording to the European version, have generated no judicial gloss of comparable depth and variety.<sup>125</sup>

These treaties have thus attracted a style of interpretation that has drawn away from traditional treaty-reading. The International Court of Justice and other arbitral tribunals do not have the opportunity to develop and refine the interpretation of a document by repeatedly returning to the text. These courts also feel that they have tacit permission from the parties to the agreement to develop a body of jurisprudence that sacrifices fidelity to a text (and thus to the conscious concessions of the contracting parties) in order to develop internal consistency and to keep pace with the perceived necessities of changing times.<sup>126</sup>

122 The case-law developing that provision is described in J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (1987) 250-73; C. Jacq & F. Teitgen, 'The Press' in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (1991) 59-81.

123 See *Dudgeon v. United Kingdom*, [45] Eur. Court H.R. Series A, (1981) (consenting adult homosexuality); *Campbell & Sogans v. United Kingdom* [48] Eur. Court H.R. Series A, (1982) (corporal punishment of schoolchildren).

124 Dwyer, 'The Inter-American Court of Human Rights: Toward Establishing an Effective Regional Contentious Jurisdiction', 13 *International and Comparative Law Review* (1990) 127; on interpretation in advisory opinions see Buergenthal, 'The Advisory Practice of the Inter-American Human Rights Court', 79 *AJIL* (1985) 1, 18-21. For comparisons of the practices of the two see Espiell, 'La Convention américaine et la convention européenne des droits de l'homme. Analyse Comparative', 218 *Hague Academy, Recueil des Cours* (1989) 167, 376-81, and Bernhardt, 'Thoughts on the Interpretation of Human Rights Treaties', in F. Matscher & H. Petzold (eds), *Protecting Human Rights: The European Dimension: Studies in Honour of Gérard J. Wiarda* (1988) 65.

125 T. Meron, *Human Rights Lawmaking in the United Nations* (1986) 85-86.

126 See Ost, 'The Original Canon of Interpretation of the European Court of Human Rights', in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (1991) 285, 292, who notes that British commentators find the ECHR's interpretation as troubling as that of the ECJ. Mosler, 'Problems of Interpretation in the Case Law of the European Court of Human Rights', in F. Kalshoven, P. Kuyper & J. Lauenders (eds), *Essays on the Development of the International Legal Order in Memory of Haro T. van Panhuys* (1980) 149 attributes the problems of British lawyers with interpreting the Convention to their emphasis on statutory law as a derogation from the common law.

## B. US Statutory Construction

### 1. US Statutory Readings

In evaluating the statutory construction ideas emanating from the United States the reader accustomed to parliamentary systems must make some adjustments. US laws do not emerge from the executive and pass speedily through a parliament controlled by the same party that occupies the cabinet. American statutes are filed by members of Congress – sometimes at the behest of the executive – and then travel complicated routes through a bicameral body. They are frequently amended in the process. Some of the ideas on statutory interpretation come from judges who were appointed during the long period when Republican presidents controlled the executive power – including judicial appointments – but were confronted with one or both houses of Congress controlled by the Democratic party, thereby creating difficulties for presidential legislative initiatives. One has to evaluate their ideas with this background in mind.

American learning on statutory construction was brought out of a wasteland of ad hoc dicta, resonant but empty maxims and protestations of simple fidelity to texts by the critiques of such semi-realist writers as Frankfurter, Landis and Radin. After World War II<sup>127</sup> an influential book by Professors Hart and Sacks,<sup>128</sup> entitled *The Legal Process* developed a theory of the relative roles of legislatures and courts that made it possible to think coherently about the topic. In their view the courts should think of themselves as being partners of the legislature, and respectfully examine its work for indications of its underlying purposes. Given that the chief policy-making agency of society was the legislative, Hart and Sacks believed that an understanding of its position was essential. The *Legal Process* writers

assumed that norms of judicial decisionmaking would follow from the craftsmanship of the interpreters and their commitment to skilled (and prudential) decisionmaking rather than some elusive commitment to objective legal reasoning.<sup>129</sup>

They stressed the collaborative nature of the interpretive process and the assumption that legislatures were consistently pursuing a social calculus aimed at the greater good of society. While the instructions issued to the judges from this scholarship were addressed to the way in which they should approach the documents rather than to the statutory language itself, adherence to the *Legal Process* model would give a distinct slant to opinions and presumably the outcomes. The so-called 'new legal process' scholars of the 1980s and 1990s moved the ideology of interpretation in a different

127 Classic early works are Landis, 'A Note on Statutory Interpretation', 43 *Harv. L. Rev.* (1930) 881; Frankfurter, 'Some Reflections on the Reading of Statutes', 47 *Colum. L. Rev.* (1947) 327; Frank, 'Words and Music, Some Remarks on Statutory Interpretation', 47 *Colum. L. Rev.* (1947) 1259; Radin, *supra* note 102, at 857. For a general review see Blatt, 'The History of Statutory Interpretation', 6 *Cardozo Law Review* (1985) 799.

128 H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1958).

129 Rodriguez, 'Book Review', 77 *California Law Review* (1990) 919, 942.

direction.<sup>130</sup> The transactionalist, public choice or pluralist model of law-making derives from writers in political science who in turn derive their impetus from economics. It emphasizes the view of legislation as the product of bargains between the representatives of different interest groups. In this world, legislators do not seek the common goal of public welfare maximization but individual representatives pursue separate goals of securing their own tenure in office by attracting votes and the money to appeal for other votes.<sup>131</sup> Interest groups seek to maximize their own well-being regardless of others. Laws are commodities that go to the highest bidder.<sup>132</sup> The moderate representatives of this school of thought would concede that this description fitted some statutes better than others, and that at least on occasion members of Congress rally to make law out of their concept of overall public welfare.

A priori, the consequences of this analysis for statutory construction are ambiguous. One could deduce from this description the rule that a court or other reader should try to understand the nature of the bargain struck between the parties in the legislature and choose the reading of the statute which would best effectuate their common understanding.<sup>133</sup> In other words, one should read statutes as if they were multilateral contracts. The role this version assigns to the courts is, however, an awkward one that is hard to ground in any traditional political theory. Another approach would have the courts disregarding the underlying bargain and holding the statute to a reading that adopted the pretence that there had been a legislative intention to pursue a common good, even though the court knows or guesses that there was none.<sup>134</sup> On the first approach it seems important to read the legislative history to discover just what sort of a bargain there was. On the second, one would slam the door shut on the legislative history and any evidence it might convey as to what the factions actually wanted, because that desire is illegitimate and irrelevant. On the whole, the latter deduction is the one that is being made by the courts, with the result that interest group analysis feeds into the textualism being practised by the courts.<sup>135</sup> It also seems to push in the direction of deferring to views of statutory meaning expressed by the agency charged with its enforcement, although the idea that administrative agencies

130 For a general introduction to this learning see D. Farber & P. Frickey, *Law and Public Choice: A Critical Introduction* (1991).

131 Macey, 'Promoting Public Regarding Legislation through Statutory Interpretation: An Interest Group Model', 86 *Colum. L. Rev.* (1986) 223.

132 On statutes as bargains see Macey, *ibid.*; Easterbrook, 'Foreword: The Court and the Economic System', 98 *Harv. L. Rev.* (1984) 9, 17.

133 Landes & Posner, 'The Independent Judiciary in an Interest Group Perspective', 18 *J.L. & Econ.* (1975) 875.

134 Zeppos, *supra* note 100.

135 *Ibid.* at 1617.

are significantly more liberated from interest group struggles than Congress is does not appeal to one's intuitive views about the political scene.<sup>136</sup>

One advantage of this approach would be that it raises the cost of lobbying – one must 'buy' a completed statute rather than efforts of one or two members of Congress who can succeed in getting some history into the record.<sup>137</sup> A further aspect of the textualist statutory approach is the emphasis it places on reading the particular statute in dispute against the whole corpus of existing legislation. All parts of it have equal dignity as the product of Congress, and should be given the best possible joint reading so as to create a seamless web of directions.<sup>138</sup>

## 2. Implications for Reading Treaties

Can one derive any support for any particular slant on treaty interpretation out of American statutory analysis, in particular from public choice theory? As one considers the implications of their view that statutes are 'deals' made by interest groups in the legislature, one remembers that treaties are, after all, contracts in one sense.<sup>139</sup> The law of treaties grew out of the law of contracts and is still shaped very much like a Restatement of Contracts or a contracts text. There need be no embarrassment about the idea that there was horse trading in the course of creating the document; that is most clear with bilateral agreements but it is true even in the case of multilateral arrangements such as the Law of the Sea Convention that purport to lay down legal rules.<sup>140</sup> One cannot begin to understand its provisions unless one knows of the ways in which the interests of the major naval powers were played off against those of the states wanting control of wider fisheries zones, as well as a share in the supposed riches of the deep sea bed. It is perhaps least true for those conventions that have as their goal the setting up of rules to govern the behaviour of private parties, but even there it is hard to grasp the rules on private activity in those treaties unless one understands how the national interests related to those private activities were traded off. For example,

136 *Chevron USA Inc. v. Natural Resources Defense Council*, 467 US 837 (1984). For analysis of the *Chevron* case see Farina, 'Statutory Interpretation in the Administrative State', 89 *Colum. L. Rev.* (1989) 452.

137 Macey, *supra* note 131, at 236-38.

138 Zeppos, *supra* note 100, at 1620-23.

139 As to the treaty/contract analogy and its limitations the classic is still Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (1927, reprint 1970) 155-81. The US Supreme Court has said that treaties should be construed more liberally than contracts. Treaties are 'not to be read as rigidly as documents between private parties governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations'. *Choctaw Nation v. United States*, 119 US 1 (1886). But see *TWA v. Franklin Mint Corp.*, 466 US 243, 260 (1989): 'our task is to construe a "contract" among nations'. A divergence in methods used to interpret treaties and statutes might lead to the awkward result that a statute designed to carry out a treaty commitment might be construed in such a way as not to carry out a United States international obligation. A construction avoiding such a result is to be preferred. *INS v. Cardoza-Fonseca*, 480 US 421, 436-441 (1987) (interpreting term 'refugee' in treaty and statute).

140 E.g., J. Sebenius, *Negotiating the Law of the Sea* (1984).

the protection against liability that was given to airline companies in the Warsaw Convention takes its shape from the fears of the signatory states that 'their' airlines would be overwhelmed by huge and unpredictable tort claims, and so would be unable to function as national flag carriers.<sup>141</sup>

Therefore, the interpreters of treaties, in particular national courts that are strangers to the treaty field, need to work for an understanding of the processes that brought the agreement into existence. They will need that knowledge even if they hesitate to rely heavily on history and other matters not embodied in the text because it is only with such an awareness that the words of the agreement come into focus.

### C. US Contract Interpretation

#### 1. Theories of Contract Interpretation

Early in the twentieth century American contract law placed strong emphasis on the external meaning of the text. The courts asserted that they would reject the internal intention of a party even if twenty bishops swore to it.<sup>142</sup> The objective theory of contracts has certain implications for their interpretation, for example in excluding evidence of the parties' private intentions and expectations (making the parol evidence rule roughly parallel to a treaty rule against using *travaux préparatoires*). Many judges went further and assumed that the objective meaning could be derived from the text alone, assisted by a few general rules or maxims, in much the same way as they thought statutes could be read. This confidence drew the fire of the legal realists. These writers drew attention to the vagueness and indeterminacy of contracts and to the degree to which other factors influenced the way the judges read them.<sup>143</sup> Karl Llewellyn in particular saw the secret of appropriate interpretation as being located in the degree of the judges' awareness of commercial realities and the understandings that emerged from them.<sup>144</sup> He saw grave dangers in purely lawyerly readings of texts that were written in the context of commercial practices that the practitioners did not feel they needed to make explicit because 'everybody' understood them. Cures for the problem would be found by giving the matter to arbitrators or commercial judges steeped in the merchants' ways of conducting affairs, by providing texts that incorporated merchants' understandings and by sounding out the views of those actively engaged in the business. A major measure of success was achieved by employing these methods;

141 *Eastern Airlines, Inc. v. Floyd*, 111 S.Ct. 1489 (1991) (purpose of Warsaw Convention 'to foster the growth of the fledgling commercial aviation industry'). Some lower courts have given priority to the provision of a 'more adequate remedy' for US tort victims over both that policy and plain meaning. See, e.g., *Lisi v. Alitalia Linee Aeree*, 370 F.2d 508 (2d Cir. 1964); *Alitalia-Linee Aeree Italiane SpA v. John Lisi*, 390 US 455 (1968).

142 *Hotchkiss v. National City Bank*, 200 Fed. 287, 293 (SDNY 1911), affirmed, 201 Fed. 664 (2d Cir. 1912), affirmed, 231 US 60 (1913).

143 A. Corbin, *Contracts* (1960) Chs. 24, 25.

144 Llewellyn, 'Remarks on the Theory of Appellate Decisions and the Rules or Canons about How Statutes are to be Construed', 3 *Vanderbilt Law Review* (1950) 395.

the Uniform Commercial Code, even though without some of Llewellyn's proposed innovations, comes as close as is possible to commercial reality and allows the merchant community various ways of making its views known, ranging from the many provisions that incorporate ideas of commercial reasonableness to the participation of business lawyers in the ongoing process of updating the Code.<sup>145</sup>

Llewellyn's thinking about contract construction is reflected in the Uniform Commercial Code's general provision:<sup>146</sup>

The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

Recently American contract interpretation theory has been influenced by law and economics modes of analysis. This analysis concentrates on the 'efficiency' of interpretive rules, in particular upon default rules that are meant to fill in gaps left by the parties in making their agreements.<sup>147</sup> That efficiency involves a number of calculations. A court would need to take into account the fact that it is efficient for contracting parties not to expend time and money in providing for remote contingencies, particularly if they can rely upon the courts to make sensible decisions about the contingency if it in fact arises. A ruling should be judged in the light of the predictable reaction to it by other contracting parties; thus one should favour a rule that either parties will not wish to contract around or one which they can contract around more easily if they so choose. In a sense, this puts judges in the position of the drafters of legislation or trade association rules that prescribe definitions or clauses that will be assumed to have been adopted by contracting parties.

One notable feature of contract interpretation theories is their tendency to aggregate contracts into classes, and to consider the appropriateness of a construction beyond the interests of the two parties to the single contract under adjudication. In a sense the courts view themselves as participants in an ongoing process. The announcement of outcome A not only settles the matter as between litigating parties One and Two but warns parties Three and Four who are contemplating similar arrangements that outcome A will govern their contracts if a similar problem arises – unless Three and Four expressly provide otherwise. The characteristic of an outcome as being easier to bargain around in later cases by other people, who were on notice of the court's determination, is important to analysts of this persuasion. Such a line of

145 Wiseman, 'The Limits of Vision: Karl Llewellyn and the Merchant Rules', 100 *Harv. L. Rev.* (1987) 465, 492-505.

146 Uniform Commercial Code § 1-205.

147 Charny, 'Hypothetical Bargains: The Normative Structure of Contract Interpretation', 89 *Mich. L. Rev.* (1991) 1815; Barnett, 'The Sound of Silence: Default Rules and Contractual Consent', 78 *Virginia Law Review* (1992) 821.

thinking is not congenial to the way that international lawyers think about treaties. It is hard to imagine any group of treaties that lends itself to being considered in this collective way, and even harder to envisage situations in which the rare tribunal that becomes seized by a treaty construction problem might find it useful to warn States contemplating entering into similar treaties that they should take notice and adapt their drafting accordingly. International courts are constrained to concentrate on what is fair (what was expected and intended) as between the two parties to one discrete transaction. It is significant that the law of treaties essentially has no default rules.<sup>148</sup>

One category of private agreement that sheds light on the problems of the treaty is the private international commercial contract. It has long been notorious among non-American business lawyers that the American forms of contract are much longer and more intricate than the agreements drafted in their own offices.<sup>149</sup> The American style seeks to spell out the rights and obligations of the parties in full detail, and to anticipate all of the contingencies that might perchance occur over the term of the arrangement. A Japanese or European counterpart might sketch a few general principles only. Behind the contrast lies a differing set of experiences. American contracts are often developed to form the basis of relations between people who do not know each other because they operate at a great distance from the other's place of business. New Yorkers and Texans come from distinct sub-cultures. Furthermore, a contract between the two is subject to possible adjudication in a distant and perhaps hostile forum. That would apply particularly to a contract between a bank in an eastern metropolitan area (such as New York) and a borrower in a rural western state (such as Montana). Thus many American contracts are designed to minimize room for the later exercise of discretion and a sense of substantive justice by a court. A party who has signed on to such an arrangement can expect little sympathy from the court when it complains that the meaning that emerges from the text is not equitable.<sup>150</sup> It is perhaps not surprising that the American practice has carried over into relations with businesses from other countries, and that the tendency even seems to be for the detailed American practice to win acceptance from lawyers from other countries as they cope with the difficulties of bridging cultural gaps.

148 Thus the Vienna Convention on the Law of Treaties contains very few default rules, that is, provisions which States could contract out of. But see Articles 40 and 55.

149 Van Hecke, 'A Civilian Looks at the Common Law Lawyer', in *International Contracts, Choice of Law and Language* (1952). To the effect that even the Japanese are edging toward the American style, see Walton, "'Now that I ate the Sushi, Do we Have a Deal?'" The Lawyer as Negotiator in Japanese-US Business Transactions', 12 *Northwestern Journal of International Law and Business* (1991) 335, 356.

150 *Metropolitan Life Ins. Co. v. RJR Nabisco*, 716 F. Supp. 1504 (SDNY 1989).



### VIII. Conclusions

In each of the fields of American law we have examined, as well as international law, the prevailing doctrine asserts that the ordinary meaning of the text governs when it offers an acceptable solution. It is the most favourable solution and is an efficient means of coordinating the many parties involved.<sup>151</sup> Modern linguistic theory makes the contrary contention that the meaning shared by the relevant interpretive community should apply, for no answer arises from the mere words on a page. Accepting that, legal doctrine would argue that the meaning which is attainable by all readers should apply, or perhaps all lawyers or all international lawyers.<sup>152</sup> But even with the careful drafting that prevails in international agreements, there are going to be questions which the ordinary meaning cannot answer – sometimes there is a deliberate vagueness designed to give leeway to interpreters or negotiators in the future, or sometimes a factual circumstance arises which the drafters had not anticipated. In general, however, the expectation of treaty-drafters is that their efforts will be taken seriously and that the words they chose will be read as their community understands them.

The contending theories here discussed also differ on the approach to be employed when the plain meaning of the text proffers no adequate answer for a given problem. Two widely supported schools of thought go to the intentions of the drafters of the text and the meaning that contemporaries would generally apply to the text. The intentions of the drafters seems to be important in international law because of the degree to which international law is based upon the consent of the sovereign States that make up the global society. But that approach encounters great difficulties where, as in a constitution or a multilateral treaty, a wide variety of different human individuals, acting for a variety of constituencies, participate in the negotiating, drafting, signing and ratification of the document. While the *travaux préparatoires* and other evidences may give some clues as to what some participants thought, the answer is likely to be partial at best. As Professor/Judge Pescatore has said:

It is not, in actual fact, on the intentions of the contracting parties that agreement is reached, but only on the written formulas of the treaties and only on that. It is by no means certain that agreement on a text in any way implies agreement as to intentions. On the contrary, divergent, even conflicting, intentions may perfectly well underlie a given text...<sup>153</sup>

151 Schauer, 'Statutory Construction and the Coordinating Function of Plain Meaning', *Supreme Court Review* (1990) 231.

152 *Santovincenzo v. Egan*, 284 US 30, 40 (1931), says words are to be taken 'in their ordinary meaning as understood in the public law of nations'.

153 Lecture of 1963 cited in N. Brown & F. Jacobs, *The Court of Justice of the European Communities* (2nd ed. 1983) 245.

### Treaty Interpretation and the New American Ways of Law Reading

The search for contemporaneous understanding may suggest an answer when the plain meaning approach produces nothing, but only if there has been a significant lapse of time between ratification and the interpretation in which the meaning became lost. That may be of significance in reading a 200 year old constitution but not a treaty formulated in the last few decades.

A court like the Supreme Court of the United States can fall back on its own line of precedents regarding constitutional or statutory questions without paying great heed to the original text. That method is not generally available to the International Court of Justice although it can be, and has been, used by the European courts. There is simply not yet the steady flow of cases to the World Court that would make such usage feasible.

One then turns to teleology, an approach which has in fact, however much it may disconcert conservatives, been the mainspring of US constitutional interpretation. In the field of general international law this is a most uncomfortable technique. Nations have not given the International Court of Justice a general licence to pursue the just world order. At the most they give a little leeway by setting forth 'objects and purposes' in the preamble to a treaty. Their distrust of discretion in that institution has been a constant. What consent to jurisdiction the Court has obtained is at risk of being withdrawn again.<sup>154</sup> Thus there has been a widespread feeling among international lawyers that the advocacy of pursuit of the values of world public order along the lines of McDougal's writings cannot command worldwide agreement. There is a strong suspicion that the values there enshrined are not universally held ones but strongly ethnocentric. The same holds true of cases in which the last interpretive word is going to be said by national courts of national foreign policy authorities. How, the observer asks, can one count on one party to a treaty developing a teleological approach that will be acceptable to the other side, who invariably will see its own interests slighted? In particular, the record of the United States Supreme Court reveals a tendency in fact to favour maintenance of US interests and legal structures even over plain meaning.<sup>155</sup> The experience of the European Court of Justice with its forceful assertion of authority to pursue its ideas of what is required by the new European legal order is greatly at variance with general international law tradition and more in harmony with US constitutional approaches. Perhaps it is a harbinger of what other international tribunals might achieve if they were entrusted with the range and volume of decision-making which has fallen into the hands of that court.

154 For an account of the stresses that an interpretation issue imposed on the Iran-US Claims Tribunal see Stein, 'Jurisprudence and Jurists' Prudence, The Iranian Forum Clause Decisions of the Iran-US Claims Tribunal', 78 *AJIL* (1984) 1.

155 See, e.g., *Sales v. Haitian Centers Council*, 113 S. Ct. 2549 (1993); *United States v. Alvarez-Machain*, 112 S. Ct. 2190 (1992).