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INTERNATIONAL COURTS, INTERPRETATION AND LEGITIMIZATION: THE DIFFERENCE BETWEEN WHAT WE DO AND WHAT WE SAY WE DO

1. INTRODUCTION

Interpretation has been a hot button topic of late in the international law circles. To use a cliché, gallons of ink and tons of printing paper have been spent debating the issue. Several monographs or edited volumes have been published devoted to either an overview of interpretation in general international law,¹ or of a special regimes within it;² several overarching symposia have been convened reviewing certain issues of interpretation³ and then there is the occasional journal article.⁴ The debate has certainly shed light on the operation of courts and has, to a large extent, managed to show how judges use the methodologies codified in Article 31-33 of the Vienna Convention on the Law of Treaties⁵ (VCLT), as well as the methodologies that have been left uncoded as part of customary international law, in their interpretative processes.⁶ However, it is my opinion that most authors have missed the point, at least the starting point, and very few,⁷ if any, have started with the question of what do we do when we do interpretation and what is, in fact, interpretation.

It is my claim that by answering this question, by having a clearer picture of what we do when we do interpretation, we will shed some light on the use of interpretative methodologies and interpretative methodology talk in articles and judgments. I will also argue in this paper that

¹ For instance see M. FITZMAURICE, et al., *Treaty interpretation and the Vienna Convention on the Law of Treaties: 30 years on* (Martinus Nijhoff Publishers 2010); RICHARD K. GARDINER, *Treaty interpretation* (Oxford University Press. 2008); ALEXANDER ORAKHELASHVILI, *The interpretation of acts and rules in public international law* (Oxford University Press. 2008); for a review of some of these books see MICHAEL WAIBEL, *Demystifying the Art of Interpretation*, 22 *European Journal of International Law* 571(2011).

² GEORGE LETSAS, *A theory of interpretation of the European Convention on Human Rights* (Oxford University Press. 2007); ISABELLE VAN DAMME, *Treaty interpretation by the WTO Appellate Body* (Oxford University Press. 2009).

³ LUIGI CREMA, *Disappearance and New Sightings of Restrictive Interpretation(s)*, 21 *European Journal of International Law* 681(2010); LEENA GROVER, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 *European Journal of International Law* 543(2010); LUCAS LIXINSKI, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 *European Journal of International Law* 585(2010); ISABELLE VAN DAMME, *Treaty Interpretation by the WTO Appellate Body*, 21 *European Journal of International Law* 605(2010); GEORGE LETSAS, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 *European Journal of International Law* 509(2010).

⁴ CHANG-FA LO, *Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding*, 1 *J Int. Disp. Settlement* 431(2010); ISABELLE VAN DAMME, *On 'Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding'--A Reply to Professor Chang-Fa Lo*, 2 *J Int. Disp. Settlement* 231(2011); ANASTASIOS GOURGOURINIS, *The Distinction between Interpretation and Application of Norms in International Adjudication*, 2 *J Int. Disp. Settlement* 31(2011).

⁵ Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331. (1969).

⁶ See e.g. M. FITZMAURICE, et al., *Treaty interpretation and the Vienna Convention on the Law of Treaties: 30 years on* (Martinus Nijhoff Publishers. 2010); RICHARD K. GARDINER, *Treaty interpretation* (Oxford University Press. 2010); GEORGE LETSAS, *A theory of interpretation of the European Convention on Human Rights* (Oxford University Press. 2007); ISABELLE VAN DAMME, *Treaty interpretation by the WTO Appellate Body* (Oxford University Press. 2009).

⁷ GEORGE LETSAS, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 *European Journal of International Law* 509(2010); ISABELLE VAN DAMME, *Treaty interpretation by the WTO Appellate Body* (Oxford University Press. 2009), Chapter II.

methodologies do not have the effect that we think they do – they, to a large extent, do not help interpretation interpretation – when they are deployed as part of a judicial opinion and that they are more useful – and used more – as rhetorical tools, helping the judges justify their normative outcomes.

My argument will proceed in three broad sections, the first section outlining the concept of what we do when we do interpretation. The argument will take the insight of the so called “old originalists” in US constitutional interpretation debate,⁸ especially when it comes to the question of what do we do when we do interpretation (legal, literary or every day run of the mill interpretation). The second section will review some of the recent literature on interpretation and compare it with the insights of the previous section. It will show that we (international scholars) have mistakenly taken for granted that what judges say they do when they do interpretation is in fact what they do when they do interpretation and that there is a fear that if we acknowledge that judges do more than just interpret – i.e. discover the author’s meaning of texts – then they would be usurping the judicial function and the whole fabric of international adjudication may well unravel. Therefore, we scholars deem even obvious judicial law-making examples as evolutive interpretation – something that is still concerned with the discovery of meaning and not with the creation of meaning. In the third section, I will argue that a more nuanced description for the various methodologies of interpretation that have been espoused by judges would be that they are more in the line of rhetorical tools for justification rather than a specific set of steps and rules one can take to discover the meaning of a text or as constraints on the “free-for-all” “art”⁹ of interpretation. It will also try to kick-start a further debate about the proper role of international courts and the mechanism of their constraint. To make myself clear, I do not urge for a general methodology of interpretation as the phrase “old originalism” might suggest. The broader aim of this paper is to decouple the terms interpretation and judging which have become almost synonymous with each other over the years and to point out that judges do not always do interpretation (do not always discover meaning of texts enacted by somebody else) when they judge but that judging entails something more than “mere” interpretation.

2. WHAT DO WE DO WHEN WE DO INTERPRETATION: THE SEARCH FOR INTENTION

2.1. The Range of Interpretation Talk

Answers to the question “what do we do when we do interpretation” can vary. For instance, Van Damme says that “[t]reaty text is language requiring meaning to apply to it to the concrete facts with which the adjudicator is presented. The process of coming to this meaning is

⁸ WALTER BENN MICHAELS, *A Defense of Old Originalism* 31 *Western New England Law Review* 21(2009); STANLEY EUGENE FISH, *Doing what comes naturally : change, rhetoric, and the practice of theory in literary and legal studies* (Duke University Press. 1989); STANLEY EUGENE FISH, *There is no Textualist Position* 42 *San Diego L. Rev.* 629(2005); STANLEY EUGENE FISH, *Intention is all there is: a Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 *Cardozo L. Rev.* 1109(2008); LARRY ALEXANDER & SALKRISHNA PRAKASH, *Is that English You're Speaking?" Why Intention Free Interpretation is an Impossibility* 41 *San Diego L. Rev.* 967(2005); STANLEY EUGENE FISH, *Wrong Again*, 62 *Texas Law Review* 229(1983); STEVEN KNAPP & WALTER BENN MICHAELS, *Against Theory*, 8 *Critical Inquiry* 723(1982); STEVEN KNAPP & WALTER BENN MICHAELS, *Against Theory 2: Hermeneutics and Deconstruction*, 14 *Critical Inquiry* 49(1987); STEVEN KNAPP & WALTER BENN MICHAELS, *Not a Matter of Interpretation* 42 *San Diego L. Rev.* 651(2005).

⁹ PENOS MERKOURIS, *Introduction: Interpretation is a Science, is an Art, is a Science, in Treaty interpretation and the Vienna Convention on the Law of Treaties: 30 years on* (M. Fitzmaurice, et al. eds., 2010).

interpretation. This is not particular to treaty texts”¹⁰ and that “[i]nterpretation normally presupposes an authoritative text, something authored, whether a statute, a contract, a treaty, whatever ... [which] has a certain status as law.”¹¹ She also says that “every legal system has developed principles to guide and justify the reasoning process of the adjudicator in interpreting and applying the law”¹² and that “[s]imilarly, international law has produced principles of treaty interpretation” both as seen in Articles 31-33 of the VCLT and in customary rules of interpretation. Furthermore, interpretation is a “holistic process”¹³ quoting Abi-Saab who says that interpretation is “one integrated operation which uses several tools simultaneously to shed light from different angles on the interpreted text”.¹⁴ Moreover, international law does not have rules of interpretation in the strict sense, but rather a set of principles that help answer why a rule is to be given one meaning and not another”¹⁵ and that they are “principles of logic and good sense that guide the interpreter in finding and justifying the meaning of the language used in the treaty.”¹⁶ For Van Damme, the treaty language is the controlling part of treaty interpretation, but that some principles of interpretation are there “as a guidance for the interpreter in giving weight to other elements of treaty interpretation, such as the context of the object and purpose. In that sense, they influence how the interpreter weighs and balances means of interpretation.”¹⁷

In short, Van Damme’s take on interpretation, based on extensive review of case analysis, is to start with treaty language and if that does not take you far, then put that language in context and examine it in the light of the object and purpose of the treaty. If one still has not found the right meaning of the treaty language, then that is fine because there are other principles that will give you guidance, like the principle of effectiveness, the interpretation of silences and so on. It may not be a “free process of interpretation”¹⁸ or “no process at all”¹⁹ but it seems to me that it would also not be a terribly constrained one either.

George Letsas, on the other hand, has a completely different take on what interpretation is all about. For him, the object and purpose of the treaty is what gives us the guide as to what method of interpretation to adopt in the first place,²⁰ for as he puts it “how else could they [treaties] be interpreted” other than looking at the object and the purpose of a treaty.²¹ The concept is simple, any statement of fact about what a treaty means is contingent on a value statement on why that statement of fact is relevant to the interpretation process if we are to avoid infinite regression.²² When it comes to treaty interpretation, that value statement is the “*moral duty to respect and help states pursue their joint projects*, other things being equal (e.g. assuming the projects are unethical, etc.) (emphasis in the original).”²³ Consequently, the process of

¹⁰ ISABELLE VAN DAMME, *Treaty interpretation by the WTO Appellate Body* (Oxford University Press. 2009) at 33.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Georges Abi-Saab as quoted in VAN DAMME, *Treaty Interpretation by the WTO Appellate Body*, *Id.*

¹⁵ *Id.* at 34.

¹⁶ *Id.*

¹⁷ *Id.* at 53.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ GEORGE LETSAS, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 *European Journal of International Law* 509(2010), pp. 532-538.

²¹ *Id.*

²² *Id.* at 534.

²³ *Id.*

interpretation is a thoroughly evaluative process, where the meaning of the treaty is given by evaluating the different normative pursuits and deciding on the different weight that is to be given to each of them.²⁴ Treaty interpretation is an evaluative not an empirical exercise. Furthermore:

[F]or each treaty, the appropriateness of any interpretive technique depends ultimately on what project, as constrained by values of international law, states are taken to have agreed to pursue. There are no general methods of treaty interpretation, if by ‘methods’ we mean some set of fixed rules which takes the relevance of certain facts (e.g. preamble, state intentions, practices, etc.) as given.²⁵

I have presented these two views on interpretation to illustrate the range in which the discourse about interpretation in international law is taking place. On the one hand we have the belief that there is something stable and coherent, a text that can resist interpretation by giving a range in which that interpretation can fall – i.e. some meaning can be clearly wrong and that some meaning can be clearly right – and that that measure of rightness or wrongness is to be found in the text (treaty language as it is put in Van Damme’s book). On the opposite side we have a discourse of putting aside the text altogether for it is the abstract intentions of the parties as constrained by the objective moral values of the international system that interpretation is all about. No methodologies are *a priori* applicable (no treaty is necessary for that matter if by treaty we understand something more than an agreement on the general topic of the compromise) because, at least when we come to human rights treaties, what judges should do is apply the abstract intents of the parties (i.e. the agreement to protect human rights), which ultimately boils down to applying the universal/objective moral principles underpinning human rights and forget any concrete agreement regarding the actual content of those rights. The reader would be safe to conclude that I do not agree with either of these opposite positions, nor do I inhabit some middle ground. This is so because intention free interpretation (treaty language without considering intent) is an impossibility; similarly abstract intention interpretation (a text means what the interpreters take it to mean at the time of the interpretation) is not interpretation at all but something entirely different.

2.2. Meaning and Intention – The Argument of Old Originalism

First, let me start with intention free interpretation. To understand intention free interpretation (and by intention free interpretation I mean interpretation free of authorial intent) is to suppose that a text, a speech-act, acquires a meaning the moment it is uttered or written down, put as marks on paper, and that that meaning is dependent on the rules of the language it is uttered in, that the meaning is the sum of the meaning of its constituent parts put in a certain order defined by the rules of a language (its syntax, grammar etc.) and not on the meaning that its author intended. “[W]ords or signs (vehicles of meaning need not be verbal) are conventionally correlated with meanings, the meanings they conventionally bear will be understood independently of any worry about an intender or an intention.”²⁶ It is the official

²⁴ Id.

²⁵ Id. at 538.

²⁶ Stanley Fish describing the notions of Originalist textualism see STANLEY EUGENE FISH, *Intention is all there is: a Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 Cardozo L. Rev. 1109(2008) at 1110.

public language and its rules that give a text its meaning and not the intentions of its author. Signs that have conventionally assigned meanings, like words in a dictionary, when read in a sentence can be understood to give that sentence its meaning. For lawyers, this is an appealing notion, for the very simple reason that judges are supposed to enforce the agreements of the parties and the agreement of the parties is most visible in the text (the language of) the treaty. “Men may intend what they will, but it is only the laws they enact which bind us”²⁷ as it was so elegantly put by Justice Scalia. Another elegant example of this is given by Justice Scalia in his review²⁸ of Steven Smith’s book *Law’s Quandary*²⁹

If the ringing of an alarm bell has been established, in a particular building, as the conventional signal that the building must be evacuated, it will convey that meaning even if it is activated by a monkey. And to a society in which the conventional means of communication is sixteenth-century English, *The Merchant of Venice* will be *The Merchant of Venice* even if it has been typed accidentally by a thousand monkeys randomly striking keys.³⁰

To a subscriber of intention free interpretation this would be the ultimate argument, for to understand a meaning of a text, one should try to figure out the public meaning of the words (which we all know don’t we?) that are used, or maybe put them into context by consulting sources of the period (e.g. dictionaries of the period) of when the text (law, treaty, whatever) was drafted or consult sources that are specific to the subject of the text (e.g. trade dictionaries, legal dictionaries) and through a concoction of all this find the text’s meaning.

However, there are at least two problems with this account of discovering meaning. First let me get back to Scalia’s alarm-bell-by-monkey example. The simple answer to this challenge is that “the bell would not convey a meaning if those who hear it know that a monkey has activated it, any more than it would convey a meaning if they know that it has been activated by a picture falling off a wall.”³¹ No intention behind the turning on of the alarm (since we do not consider monkeys to be intention wielding entities), no meaning to convey, it is simply mere noise, nothing to be ‘alarmed’ about. However, if the people hearing the alarm bell know that that monkey that has pushed the button has also been trained to do so in the case of smoke then they would understand the meaning of the alarm bell as signal to leave the building. But in this case they would understand the meaning of the bell as a signal to leave the building because both the bell and the monkey are vehicles for trainer’s intention (just like marks on a page are), which is to raise the alarm in case of smoke.³²

Without revisiting all the arguments that have gone back and forth in the past decades regarding interpretation,³³ it is impossible to separate author’s intention and meaning, for what a

²⁷ Justice Scalia as quoted by Stanley Fish in id.

²⁸ ANTONIN SCALIA, *Law & Language* (review of Steven Smith’s *Law’s Quandary*), November 2005 First Things 26(2005).

²⁹ STEVEN D. SMITH, *Law’s quandary* (Harvard University Press. 2004).

³⁰ ANTONIN SCALIA, *Law & Language* (review of Steven Smith’s *Law’s Quandary*), November 2005 First Things 26(2005), at 37.

³¹ STANLEY EUGENE FISH, *Intention is all there is: a Critical Analysis of Aharon Barak’s Purposive Interpretation in Law*, 29 Cardozo L. Rev. 1109(2008).

³² This example is taken from id. at 1111

³³ The arguments can be seen in STANLEY EUGENE FISH, *Wrong Again*, 62 Texas Law Rev. 229(1983); STANLEY EUGENE FISH, *Doing what comes naturally : change, rhetoric, and the practice of theory in literary and legal studies*

text means is what its author intends it to mean. To go back to the claim of conventional meaning of texts, we cannot even attribute meaning to texts (marks on a page) without having an author in mind, of somebody who is “intending to communicate a meaning through the marks or sounds”³⁴ because without an author that intends there is no communication, period.

The typical example for this would be two people walking by on a beach spotting marks that look like the letters “C”, “A” and “T”. Our two walkers then discuss what those marks mean (is it meant to mean cat – the animal – or was it written by a supporter of the Committee Against Torture and therefore the marks are its acronym, etc.) when along comes a third walker and tells them that the marks are a normal feature of the coast line that the waves of the tide leave every day. The debate regarding the meaning of the marks at this point should stop for without an author that has an intention the marks have no meaning; they have not been produced by anyone able to have meaning (that is to have intentions).³⁵ We can certainly ascribe meaning to those marks, but at this point we would be imagining an author (a deity perhaps) that is a fan of cats or a fan of the Committee Against Torture that intended to convey her love of these things through the writing (for now with an author in mind it becomes writing) in the sand. Moreover we would be imagining an author that speaks English for the words “cat” and the acronym “CAT” are in English. We would not even be able to assign the correct language to the marks without a reference to an author who intended to convey a message written in a specific language (in this case English). Again, no author, no authorial intent, no meaning.

To quote:

And what if no intention were in place? In that case not only would there not be a meaning; there would be no reason to seek one. That is, if I were persuaded that what I was looking at or hearing was not animated by any intention, I would regard it not as language, but as random marks--akin to the "garbage" one types in when testing to see if the font is one you like--or mere noise, throat clearings. The instant I try to construe [...] words, the instant that I hear [...] sounds as words, the instant I treat them as language, I will have put in place some purpose [...] in the light of which those sounds become words and acquire sense. Words alone, without an animating intention, do not have power, do not have semantic shape, and are not yet language; and when someone tells you (as a textualist always will) that he or she is able to construe words apart from intention and then proceeds (triumphantly) to do it, what he or she will really have done is assumed an intention without being aware of having done so. A sequence of letters and spaces [...] has no inherent or literal or plain meaning; it only has the meanings (and they are innumerable) that emerge within the assumption of different intentions. Scalia approvingly quotes Justice Jackson as declaring: "We do not inquire what the legislature meant; we ask only what the statute means." My point is that if you do not want to know about intention, you do not want to know about meaning. It is not simply

(Duke University Press. 1989); STANLEY EUGENE FISH, *There is no Textualist Position* 42 San Diego L. Rev. 629(2005); STANLEY EUGENE FISH, *Intention is all there is: a Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 Cardozo L. Rev. 1109(2008); LARRY ALEXANDER & SALKRISHNA PRAKASH, *"Is that English You're Speaking?" Why Intention Free Interpretation is an Impossibility* 41 San Diego L. Rev. 967(2005); STEVEN KNAPP & WALTER BENN MICHAELS, *Not a Matter of Interpretation* 42 San Diego L. Rev. 651(2005); WALTER BENN MICHAELS, *A Defense of Old Originalism* 31 Western New England Law Review 21(2009).

³⁴ LARRY ALEXANDER & SALKRISHNA PRAKASH, *"Is that English You're Speaking?" Why Intention Free Interpretation is an Impossibility* 41 San Diego L. Rev. 967(2005), at 974.

³⁵ Id. at pp. 977-978

that (like love and marriage in a bygone age) they go together; they are inseparable from one another. (footnote omitted)³⁶

Certainly, some would say, and author cannot just say anything, mumble a sound and still be taken as having a meaning. An author cannot just say “gobbledegook” and mean “would you be so kind as to pass me the salt please.” Can “gobbledegook” ever mean “would you be so kind as to pass me the salt please?” And the simple answer is yes, so long as that is what the author intended it to mean. The more relevant question here is not whether “gobbledegook” means “would you be so kind as to pass me the salt please” but whether we would be able to understand “gobbledegook” as to mean “would you be so kind as to pass me the salt please” for this is a separate question, for the first question is a conceptual one: what does an utterance (text, speech etc.) mean (it means what its author intends it to mean) and the second is an empirical one (whether we would be able to discover an author’s intention and therefore the utterance’s meaning)³⁷ and its answer depends on whether we have or do not have enough evidence of the authors intentions. The second question is an empirical one because of a simple fact, intentions are no more easily graspable, no more immediately identifiable then the text itself, for they too need to be discovered, need to be searched for, and when trying to convince others of your interpretation of some text, need to be argued for (or argued against). Intentions do not reveal themselves to us any more readily then the ordinary and plain meaning of a text.

However, (and what is important for this paper) the consequences of this is the fact that there can be no methodologies of interpretation, no rules or principles that would tell you how to do interpretation, just a direction, an answer to the question “what is the meaning of a text?”³⁸ (it means what it author intends it to mean). The reason why there cannot be any methodologies is because the concept of interpretation (a search for intentions) does not provide you with one, it only provides you with a direction (go search for intentions) and does not give you any guidance as to what counts as good evidence of intent.³⁹ Furthermore, all methodologies, by *a priori* giving guidelines as to what counts as evidence of authorial intentions, or by excluding a search for intentions entirely, unavoidably lead to the exclusion of some probative evidence of an author’s intention. Therefore, theories of interpretation, and the methodologies and principles that go with them (because they lead to the exclusion of some evidence of intention), can actually hinder rather than help the interpretative process. To give a simple example, Articles 31-32 of the VCLT proscribe how interpretation in international law should proceed, and also which evidence should be taken into account when discovering the meaning of a treaty. Under Articles 31-32 one would not have recourse to, for examples, recollections of the actual drafters of the treaty or other individuals who were involved in or closely observed the drafting of the treaty⁴⁰

³⁶ STANLEY EUGENE FISH, *There is no Textualist Position* 42 id. pp. 632-633

³⁷ See STANLEY EUGENE FISH, *Doing what comes naturally : change, rhetoric, and the practice of theory in literary and legal studies* (Duke University Press. 1989); STANLEY EUGENE FISH, *There is no Textualist Position* 42 San Diego L. Rev. 629(2005); STANLEY EUGENE FISH, *Intention is all there is: a Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 Cardozo L. Rev. 1109(2008).

³⁸ STANLEY EUGENE FISH, *There is no Textualist Position* 42 San Diego L. Rev. 629(2005) at 642.

³⁹ Id.; but also see STANLEY EUGENE FISH, *Intention is all there is: a Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 Cardozo L. Rev. 1109(2008); STEVEN KNAPP & WALTER BENN MICHAELS, *Against Theory*, 8 Critical Inquiry 723(1982); STEVEN KNAPP & WALTER BENN MICHAELS, *Against Theory 2: Hermeneutics and Deconstruction*, 14 Critical Inquiry 49(1987).

⁴⁰ For instance the International Criminal Court would not suppose to have recourse to the following articles PHILIPPE KIRSCH & JOHN T. HOLMES, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 The American Journal of International Law (1999); DARRYL ROBINSON, *Defining "Crimes Against*

because simply put, they would not be considered as part of the context of the treaty except for in extraordinary circumstances or only to confirm or reject an already arrived at interpretation. Interpretative methodologies, by depriving interpreters of probative evidence of the intention of the authors can actually hinder interpretation. Fish puts it bluntly when he says

Intentionalism does not, however, tell you how to do it [interpretation]. One of the unfortunate consequences of thinking of intentionalism as a method and a theory is to saddle it with expectations it could not meet and should not be asked to meet; the expectation, for example, that the intentionalist thesis – a text means what its author or authors intend – will direct you to the text's meaning, or rule in or out evidence of its meaning, or provide a set of directions for realizing its imperative. It has no imperative; it doesn't go anywhere; it just specifies where you already are when you try to figure out where to go next. You already are operating within the assumption of something designed (intended), for if you were not – if you regarded what was before you as an object rather than as a message – there would be no reason to assign it a meaning, or (and this is the same thing) no reason to reject any meaning someone wanted to assign it. It would function as a Rorschach test.⁴¹

It is the Rorschach test theme that I would like to linger on a bit when discussing the other range of the issue of interpretation, i.e. that a text means what the current interpreters deem it to mean, for this is what Letsas' arguments ultimately boils down to. In his own words:

My main thesis is that treaty interpretation is fundamentally neither about the meaning of words nor about the intentions of states parties. It is an inherently evaluative exercise in seeking to determine how fact-independent moral values normatively constrain the pursuit of states' joint projects.⁴²

What is clear from the previous discussion is that Letsas has completely abandoned interpretation for a moral reading of the convention,⁴³ a reading that does not concern itself with an authoritative text but with abstract intentions (intentions of the parties that they should pursue certain goals, like protect human rights, liberalise trade etc.) nor with overriding concrete intentions (e.g. that 'closed shop' are excluded from the substance of negative freedom of association under Article 11 of the ECHR)⁴⁴ if those concrete intentions go against objective moral standards.⁴⁵ And how do we discover these moral standards? Well we have moral (or ethical) theory that will guide us (or at least the judges) in making these evaluations (and not interpretations). It should be pretty obvious by now that this approach simply does not concern itself with interpretation, does not concern itself with the discovery of a meaning given to a text

Humanity" at the Rome Conference, 93 The American Journal of International Law (1999). because they would not be part of the treaty context as defined in Article 31.

⁴¹ STANLEY EUGENE FISH, *Intention is all there is: a Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 Cardozo L. Rev. 1109(2008) at 1114.

⁴² GEORGE LETSAS, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 European Journal of International Law 509(2010).

⁴³ Id. at 528.

⁴⁴ Id. pp. 518-519.

⁴⁵ Id. pp. 530-592.

by its authors, but with the imposition of meaning on a text (a treaty, a statute, Vergil's poems⁴⁶), and therefore, cannot be considered interpretation but something else, and what that something else, my claim goes, is an aspect of judging, something that I will go into in the next section of the paper.

There is an argument, however, that can redeem interpretative methodologies, and that comes from the direction of the rule of law. Because, as I said, intentions are no easily graspable then the plain or ordinary meaning of a text, a judge needs to find credible evidence for an author's (or authors' more likely) intention and needs to know when to stop looking for evidence (i.e. stop interpreting – stop searching for meaning) and go on with the task at hand, which is to settle the dispute in front of her. Here I am referring to the argument put forward by Alexander and Prakash. The argument goes like this: consider, for an example, that we encounter a law for which we have credible evidence that it was written in a different language than English one that is very similar to it except for some semantic rules (Schmenglish as they call it). In that case “[w]e could imagine an interpretive norm to the effect that lawmakers will be irrebuttably presumed to use standard English in writing laws. We might tell a rule of law story about the justification of such a norm, such as the need for the general public to know the laws, and so forth.”⁴⁷ However,

[B]ecause the evidence of authorial intentions excluded by such norms is reliable evidence, the interpreter will end up in a situation in which the authoritative meaning of the law is different from what the interpreter knows was the meaning intended by the lawmakers. To many, this will not be a devastating criticism; for in applying *stare decisis* to statutory and constitutional interpretations by courts, the courts countenance a similar gap between authoritative meanings and actual meanings. Moreover, if our interpretive norms exclude certain kinds of evidence of lawmakers' intentions, the lawmakers will legislate in light of those norms, thereby narrowing the gap between the meaning they actually intend and the meaning that they will be deemed to have intended (For instance, if they know their intentions will be interpreted as if they had expressed them in standard English, they will try to use standard English and not Schmenglish in writing the laws.) Still, the gap between what the interpreter knows the lawmakers actually intended and what, per these norms, the interpreter will deem them to have intended remains a constant possibility⁴⁸.

Similar, but less convincing (in descending order), arguments could be given for rules that standardize the assumptions under which a text could be read like to take the so called “average/median man on the street” meaning,⁴⁹ the idealized reader⁵⁰ or finally the idealized

⁴⁶ For an example of how Medieval Christians read Virgil's poems as Christian Allegories see STANLEY EUGENE FISH, *Don't Know Much about the Middle Ages: Posner on Law and Literature*, 97 The Yale Law Journal 777(1988) at 781-783.

⁴⁷ LARRY ALEXANDER & SALKRISHNA PRAKASH, “Is that English You're Speaking?” *Why Intention Free Interpretation is an Impossibility* 41 San Diego L. Rev. 967(2005) at 983.

⁴⁸ Id. at 983-984.

⁴⁹ Id. at 984-985.

⁵⁰ Id. at 985-988 and especially “[u]nfortunately, most modern textualists assume that their idealized reader knows the standard legal conventions and the entire corpus juris. Hence, the meanings generated by this reader are unlikely to have any of the advance notice and rule of law benefits mentioned above for most average folk are unlikely to know either standard legal conventions or the entire corpus juris. If the average Joe attempts to read statutory text,

author⁵¹ (what ultimately Letsas arguments boils down to). One can make the argument that Articles 31-32 VCLT do just that, give standard assumptions under which the text would be read, at which point it makes the whole treaty drafting and treaty interpretation process more predictable. However, I do wish to point out that all of these options forgo the original meaning of a treaty given to it by its authors for some other assigned meaning, one that might better fit a rule of law ideal.

Before I start reviewing the recent writings on methodologies of interpretation, I would like to elaborate one more point regarding the consequences of understanding the interpretative process as a search for intention, and that is the difference between the authors' (more detailed) intentions and the authors' goals when they write a legal texts. To explain the difference, I will use another example by Alexander and Prakesh.⁵² Let us suppose that my grandmother wants to come for a visit and she tells me over the phone that she would like me to move the "autobahn" next to the sofa. Now I know my grandmother and therefore that I know that she used the word autobahn wrongly and meant for me to put the ottoman next to the sofa so that she could rest her legs. From what has been said so far it should be obvious by now that the reason I know that my grandmother wanted me to bring the ottoman in the sofa and not to move a German style autobahn in my living room is because I have looked for and found her intention, i.e. that I move the ottoman next to my sofa. However, I may also know that she would like me to move the ottoman next to the sofa because she would like to rest her legs on it while watching television. Unfortunately, the ottoman is broken and it cannot be of any use to her in propping up her legs. Would I, therefore, still be doing interpretation if I were the substitute (the now correct) meaning bring in the ottoman in the living room, or would I still be doing interpretation if I were to understand the meaning of the sentence "bring the autobahn in the living room" as "go and buy an ottoman"? Clearly not, for what my grandmother intend to tell me was to bring in the ottoman and not go out and buy one. It might not satisfy her goals of having somewhere to rest her feet, but that does not mean that she meant something else when she told me to "bring the autobahn in the living room." It is a completely different question of whether I would be justified to go and buy an ottoman for her visit, for that question is a question of exercising proper judgment in executing the requests (commands) of somebody else (e.g. the legislature) but it is not a question of interpretation for interpretation stops once we (believe we) have discovered the meaning (by finding the intention) of the utterance.

This example should make it clear that interpretation stops once we have a good idea of the intention of the author(s). Now the consequence of this is that interpretation also does not tell us what to do when we find that the interpretation that we have reached at may not be wrong (the authors have intended to mean exactly what we have interpreted a legal text to mean) but that

he is often likely to identify a meaning that is entirely different from the one generated by the textualist's idealized reader.

⁵¹ Id. at 989 "The problems with this approach should be obvious. In order for it to yield interpretations, we need to specify the attributes of the idealized author. What language does he speak? Does he always use primary definitions of words, or does he sometimes (when?) use secondary definitions, or technical definitions, or terms of art? Is his grammar and punctuation perfect? How rational is he? How just? And so on. How we construct the idealized author will determine what the authoritative interpretation is. And the obvious question then is why not construct this idealized author to be ideal? In other words, why not, as Ronald Dworkin advocates, "interpret" every law to be the best law it can be? And if we don't get the best law from assuming the lawmaker is writing in standard English, why not assume the lawmaker is writing in Schmenglish, a language in which the law would be ideal from the interpreter's vantage point? (footnotes omitted)"

⁵² Generally see Id. at 978 and 994-995.

that interpretation would not fit into the society's current understanding of justice. What happens if we are asked to adjudicate according to the dreaded Nazi Nuremberg Laws? It certainly is a frightful prospect when we encounter legal texts that we find abhorrent, unjust or unacceptable. I certainly would not like to be in the position of a judge in South Africa during the Apartheid. Nevertheless, interpretation understood as I have explained so far does not have a prescription on what to do next. It does not tell us what to do next because interpretation is something that we do in the course of communicating; interpretation is what we do when we try to communicate with one another for it is part of the process of communication; it may be a part of the process but definitely it is not the whole process of adjudication.

3. INTERPRETATIVE METHODOLOGIES AND LEGITIMIZATION

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