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Establishing the Argumentative DNA of International Law: A Cubistic View on the Rule of Treaty Interpretation and its Underlying Legal Culture(s)

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> … we may say that a human society is a self-constituting, as one society among many, in and through the thinking of many human minds. The self-consciousness of a given human society is the self-consciousness of a society which has made itself in its own mind, its public mind, a mind formed from, and forming, the private minds of the society's members.[1]

Abstract

There is an increasing tendency to frame international legal discourse in terms of regional designations. We speak, for example, of European or American approaches or of Latin American international law. This development could seriously impact the perception of international law. The present article attempts to deepen the understanding of what happens when we think about international law and international legal theory in national or regional terms. The article looks at different approaches to treaty interpretation which have been framed as European and American, to see how this impacts on international legal discourse. In a first step, the two approaches at the Vienna Conference on the Law of Treaties will be explained. Secondly, two narratives will be developed to describe what happened in Vienna in turn as European/American or as international legal discourse. The third part reflects on the consequences of framing concepts and theories in this way, with particular reference to the rules of treaty interpretation.

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1 Philip Allott, *The Health of Nations* (Cambridge University Press, 2004) 264.

Is there a global community of scholars, or is international legal scholarship divided into different national camps? Both views are prevalent in international legal scholarship. One of many examples in which this debate comes to the fore is the discourse on treaty interpretation. To deepen our knowledge about the issues raised, the aims of the present article are twofold. First, it will inquire into the drafting of the rule of interpretation. It will be shown that this rule is essential for cross-cultural legal dialogue. Secondly, the paper will look into the question of whether we should denote approaches, theories and ideas in international law using national or regional terms. In recent years, an interesting trend can be witnessed in this regard. Not only is there a growing number of regional international law associations,[2] there is also an increasing interest in regionalism in international law.[3] This trend ranges from particular views on international law[4] to an analytical framework that regards international law as inherently different in different regions.[5] In certain national contexts, we can observe reflections about the past and the future of international legal science as a national discipline.[6] The issue of treaty interpretation has been raised in particular with regard to American approaches.[7] On the other hand, there are calls for a post-national global legal scholarship that thinks beyond the structures of the nation state.[8]

All these contributions either assume or argue normatively in favour of the national or post-national condition of international legal scholarship. This indicates that the issue has repercussions for international legal discourse. To stress the centrality, universality and generality of international law could increase its effectiveness. Yet, the same effect could be achieved by its diffusion to and adaption for certain regions. Local ownership

2 For a list, see www.dgfir.de/forschungsnetzwerke/organisationen.

3 See, for example, the Fifth Biennial Conference of the European Society of International law in Valencia, which dealt with the issue of regionalism.

4 See eg the contributions concerning Russia's approach to international law in (2012) 12 *Baltic Yearbook of International Law* 1.

5 Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *British Yearbook of International Law* 79, raising the question of whether there will be 'judicial theories' about international law attached to national jurisdictions such as Canadian international law or British international law. Another good example is the concept of Europeanisation that has the potential also to denote the influence of Europe on international law as defined by Jan Wouters, André Nollkaemper and Erika de Wet, 'Introduction: The "Europeanisation" of International Law' in Jan Wouters, André Nollkaemper and Erika de Wet (eds), *The Europeanisation of International Law* (TMC Asser Press, 2008) 1–16.

6 In 2007, for example, the *German Yearbook of International Law* asked whether there was a German approach to International Law: see (2007) 50 *German Yearbook of International Law* 15. In the same year, the *Heidelberg Journal of International Law* published papers emanating from a lecture series about the future of international legal science in Germany: see (2007) 67 *Heidelberg Journal of International Law* 583.

7 Jean Galbraith, 'Comparing International and US Approaches to Interpretation', http://opiniojuris.org/2012/11/09/the-oxford-guide-to-treaties-symposium-comparing-international-and-us-approaches-to-interpretation.

8 Pierre Larouche, 'A Vision of Global Legal Scholarship' (2012) 34 *Tilburg Law and Economics Center Discussion Paper* 2.

can also mean effectiveness. The present paper goes beyond asserting one form or the other. It will reflect upon what happens if we denote international law as well as international legal science in regional terms. Instead of an abstract normative evaluation, the question of regional designations will be linked to a particular debate, namely the debate about treaty interpretation. The chosen structure will further the reader's understanding of treaty interpretation as well as the structure of international legal discourse.

The following part will provide a detailed description of the deliberations at the Vienna Conference and the stance the different actors had taken previously (I). Examining in what ways the different approaches to interpretation may be linked to theoretical concepts, the paper will take two contradictory perspectives on the issue (II): it will argue that there is indeed a transatlantic gap between theories of treaty interpretation and that a European as well as an American culture can be identified. In turn, it will be argued that no such gap exists. This structure suggests that the answer to the question cannot be determined objectively but lies in the eye of the beholder. Consequently, an inquiry into the consequences of designating and framing theories according to their national or regional origin will be conducted (III). It will outline the predispositions of a theoretical framework that organises legal theories in such a way generally and then in relation to the rule of interpretation.

The point of departure is, however, the discussion at the Vienna Conference of treaty interpretation. Interpretation is a crucial part of legal discourse. The ability to communicate is again a prerequisite of any human group or community. At the Vienna Conference, the delegates tried to fix the rules for such behaviour, and their discourse might be seen as one of the finest hours of international law, combining diplomatic finesse with theoretical argumentation at the highest level.

I. THE BATTLE OF VIENNA

1. The Drafting of the VCLT: Once Upon a Time …

… the Vienna Convention on the Law of Treaties was negotiated and concluded.[9] This instrument can be seen as one of the most successful and important stories of the codification and progressive development of general international law. Referred to as the 'Treaty of Treaties',[10] 113 states have ratified it.[11] This treaty had been with the International Law Commission (ILC) for drafting for about 17 years. Four Special

9 Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 (hereinafter VCLT or Vienna Convention).

10 Richard D Kearney and Robert E Dalton, 'The Treaty on Treaties' (1970) 64 *American Journal of International Law* 495.

11 United Nations Treaty Collection, Ch XXIII Law of Treaties, treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en.

Rapporteurs—James Brierly, Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Waldock—subsequently drafted a set of articles that was discussed and amended within the ILC as well as commented upon by states in the Sixth Committee of the General Assembly of the United Nations before the states assembled at a diplomatic conference in order to negotiate it. After two sessions, they agreed on a text based on the final outcome of the ILC's deliberations.[12]

One part of the Convention that was much contested at the time but which turned out to be influential and successful is the section containing the rule of interpretation of treaties. Voices both within and outside the conference opposed the inclusion of written rules of interpretation.[13] Several proposals attempted to amend the rules, one of which provoked a most controversial and interesting debate. Myres McDougal, then one of the six representatives of the United States at the Vienna Conference,[14] suggested an amendment that would have revolutionised the process of treaty interpretation and turned the text, which the ILC had agreed on, upside down. This proposal and the respective discussions around it were the culmination of a dispute that preceded and followed the discussion in Vienna. The present paper describes the dispute and attempts to find out whether different conceptions of treaty interpretation underlying the dispute are expressions of a theoretical gap between European and American approaches to treaty interpretation or whether it should be understood as genuinely international discourse.

2. An Attempt at Revolution in Vienna: Competing Views

a. Differences between the ILC Draft and the US Proposal

In three consecutive meetings, the Committee of the Whole dealt with the interpretation of treaties.[15] In this committee, all delegations were represented as well as the fourth Special Rapporteur, Humphrey Waldock, who was present as Expert Consultant and entitled in this function to address the committee but not to vote on proposed amendments. As with every other matter, the discussion departed from the text agreed upon by the ILC.[16] This text contained three articles, two of which described the basic approach to interpretation.[17] Article 27 laid down three basic techniques of interpretation, namely to interpret in accordance with the ordinary meaning, in the context of the terms of the

12 See ILC, Draft Articles on the Law of Treaties with Commentaries [1966] *Yearbook of the International Law Commission*, vol II, 187ff. On the whole process see Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2010) 69–72.

13 See eg Charles C Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Little, Brown, 2nd edn 1945) 1468–69; the delegate of Greece Mr Krispis, United Nations Conference on the Law of Treaties (New York First Session 1968–1969) (1969) A/CONF.39/11, 172 para 7.

14 See United Nations Conference on the Law of Treaties (New York First Session 1968–1969), *ibid*, xxii.

15 *Ibid,* 166–85.

16 The ILC Proposal as well as the drafted amendment can be found in the appendix below.

17 See Draft (n 12).

treaty and in the light of the object and purpose of the treaty. While its second section defines the context of the treaty, the third adds three techniques that can be considered in addition to context. Only in specific circumstances can supplementary means of interpretation such as the *travaux préparatoires* or the circumstances of the conclusion be considered. At the very beginning of the deliberations, McDougal proposed an amendment that would have changed the structure of Articles 27 and 28 significantly and merged the two articles into one.[18] This proposal is still important as it provides evidence of the most influential alternative conception to the Vienna Convention, merging the two articles into a single provision and restructuring the process of treaty interpretation.[19] An in-depth analysis shows that the rule of interpretation proposed by the ILC differs in four respects from the US proposal:

- first, the distinction between primary and supplementary means of interpretation;
- secondly, the role of literal interpretation;
- thirdly, in relation to the notion of context;
- fourthly, as to the order of the means of interpretation.

The proposed amendment did not set out any distinction between means and supplementary means of interpretation. In contrast, Article 28 ILC-Draft allowed access to so-called supplementary means only if interpretation according to the techniques in Article 27 ILC-Draft left 'the meaning ambiguous or obscure' or led to 'a result which is manifestly absurd or unreasonable'. As some delegations observed,[20] these additional requirements inserted a certain hierarchy, in the sense that supplementary means of interpretation could only be resorted to when the criteria were fulfilled. So the interpreter would have had an extra burden of justification. As a consequence, the argumentative weight of the means envisaged in Article 27 ILC-Draft was increased in relation to the supplementary means. Had the US proposal been adopted, it would have had the imme-

18 *Ibid*. Most of the differences are also outlined at the beginning of the statement: see Myres S McDougal, 'Statement of Professor Myres S McDougal, United States Delegation, to the Committee of the Whole, April 19, 1968' (1968) 62 *American Journal of International Law* 1021. The statement is summarised in the Draft (n 12) at 167–8 paras 38–50. I thank Richard Gardiner who pointed me to the fact that a more complete version has been published in the *American Journal of International Law*. This essay uses the text reprinted in the *American Journal of International Law* since there is no difference in content apart from the fact that it is more explicit and more detailed.

19 The focus lies here on the differences between the approaches. An extensive description of both approaches is provided by John G Merrills, 'Two Approaches to Treaty Interpretation' [1968–9] *Australian Yearbook of International Law* 55. See also Richard Gardiner, 'The Vienna Convention Rules on Treaty Interpretation' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2012) 475–506; Gardiner (n 12) 67–68; Sandra Voos, *Die Schule von New Haven* (Duncker & Humblot, 2000) 121–8.

20 See McDougal (n 18) 1021 or the statement of the Delegate of the Republic of Viet-Nam, Mr Phan-Van-Thinh, United Nations Conference on the Law of Treaties (1968–1969 First Session, New York) (n 13) 168 para 51.

diate consequence that the means of interpretation would have been accessible without further requirements. The interpretive hierarchy provided for by the ILC-Draft as well as the Vienna Convention would have been abolished and replaced by a system in which the interpreter could have taken into account an unlimited number of factors of interpretation that could have operated on the same level as the other rules of interpretation.

Secondly, the exemplary list in the amendment did not even include the technique of literal interpretation. While one could argue that the list of factors in the proposed amendment is open-ended in any case, the explanations offered by the delegate before the committee suggest that this happened for conceptual reasons. It was said that the whole process of interpretation was about determining the meaning of a specific clause and that there was in turn no such thing as the ordinary meaning of the terms of a treaty.[21] Consequently, no factor such as the ordinary meaning of the terms had been included in the draft.

While the phrasing of the factors resembles the ILC-Draft,[22] it differs significantly with regard to the notion of context. This is the third major difference. In the ILC-Draft, the context was restricted to the immediate context, such as the preamble and the annexes to the treaty as well as agreements made in connection with the conclusion of the treaty and unilateral instruments made in connection with the conclusion and accepted by the other parties. In contrast, the proposed amendment used the word 'context' without specifying it. Since Myres McDougal explicitly attacked the restrictive notion of context[23] and the US proposal contained no comparable restriction, it can be inferred that it employed a broader conception. It would have been possible to include the social, economic or political context of the provision and, therefore, to insert completely differing rationales and purposes into the process of treaty interpretation.

Fourthly, the list of means contained in the proposed amendment is also different in relation to the order of the means of interpretation. While the ILC Draft arranged for a gradual order, centring on the wording of the treaty, with progressive circles of context from the immediate context, including the preamble and the annexes to the treaty, to the object and purpose and extraneous material such as subsequent agreements and practice of the treaty parties as well as relevant rules applicable between the parties,[24] the proposed amendment does not seem to follow such a structure. As has been established above, even the context has a very wide meaning in the draft amendment, possibly including factual circumstances. Given that it is the first technique mentioned in the list of examples, there seems to be no progressive order but rather a collection at random.

In conclusion, the draft proposal of the United States was roughly in line with what had been proposed by the ILC; however, all four differences show that the proposal

21 See the detailed argument in Gardiner (n 12).

22 *Ibid*.

23 See McDougal (n 18) 1022.

24 See Robert Kolb, *Interprétation et création du droit international: esquisses d'une herméneutique juridique moderne pour le droit international public* (Bruylant, 2006) 459–69.

leant much more towards a rather informal process of treaty interpretation. Under the proposal, any consideration could have been introduced into the process of treaty interpretation. In contrast, Article 31 VCLT allows account to be taken only of considerations that match the criteria prescribed by the techniques mentioned therein. This specific feature of Article 31 VCLT would have been diminished completely and the proposal would have opened up the process. The proposal of the ILC was—in comparison—more formal since it attached more weight to traditional techniques such as ordinary meaning. Those two alternatives were fought over in a heated discussion in which Myres McDougal had the first word and Humphrey Waldock the last. Between these general statements, many delegations' reactions to the different options revealed differing points of view.

b. Arguments for Each Side

Myres McDougal's statement introduced his proposal by attacking the ILC rules on three levels.[25] First, he outlined that several features of the ILC-Draft were overly 'rigid' and 'restrictive'.[26] Secondly, he tried to show that these features were not grounded in international practice and, therefore, not part of international law.[27] In a third step he argued that the conference should refrain from framing the rules in that way.[28] With regard to rigidity and restrictiveness, McDougal criticised the hierarchy introduced by the separation of the techniques of interpretation in draft Articles 27 and 28, 'the predominant emphasis … ascribed to the text of the treaty'.[29] Furthermore, he found fault with the fact that the notions of context and object and purpose were tied to a rather literal reading.[30] McDougal then went on to frame the requirements for the applicability of supplementary means as *petitio principii* since it would require an act of interpretation to determine whether the supplementary rules of interpretation were applicable. All of those arguments were meant to show that the rules envisaged in the ILC-Draft were by their nature rigid and restrictive. After demonstrating that these features were not consistent with positive law, he went on to explain why their inclusion in the Convention would not be desirable. He challenged the assumption 'that a text has a meaning apart from the circumstances of its framing and can be interpreted barely, as it stands, without reference to extraneous factors'.[31] From this he concluded that a mere textual interpretation as he saw it provided for in Article 27 ILC-Draft was not possible. Arguing from the perspective of communication, he saw a restriction of the possible means to inquire into meaning as hampering the ability of the interpreter to inquire into what the parties really intended.

25 See McDougal (n 18).
26 *Ibid,* 1021–2.
27 *Ibid*, 1022–3.
28 *Ibid*, 1024–7.
29 *Ibid,* 1021.
30 *Ibid,* 1021–2.
31 *Ibid,* 1024.

From this McDougal concluded that the ILC-Draft would increase the arbitrariness of the process of interpretation in two ways. While referring to ordinary meaning, the interpreter would in essence choose the meaning him/herself. This arbitrariness would again increase the instability in treaty relations since states could argue that the respective interpreters acted *ultra vires*. The amendment proposed by the United States would, on the contrary, allow the real intention of the parties to be ascertained by exploiting all factors that could possibly indicate the meaning the parties had chosen to establish.

The matter was then discussed controversially within the committee, and although many other delegates brought in amendments, the American proposal remained at the centre of the deliberations: several delegations agreed or disagreed with it and addressed it either directly or implicitly. The most elaborate answer to the proposal was given by the delegate of the United Kingdom, Mr Sinclair.[32] He highlighted that there were two distinct ways to construe the aim of treaty interpretation: textualism and intentionalism. He rejected intentionalism and in line with the final outcome of the deliberations within the Institute of International Law subscribed to textualism. He stated that it had been shown previously that the intention of the parties was a fiction and that there would, moreover, be many aspects that parties would not have thought about so that there would in many cases of dispute be no common intention. The same could happen if the parties had concluded the treaty without agreeing on certain issues which had been left open deliberately. He explicitly referred to the problem that the *travaux préparatoires* would not include states that acceded to the treaties at a later stage and had not been present at the time of the conclusion of the treaty.[33] This argument was aimed at the growing number of decolonised states when it came to voting at the Vienna Conference. As a major difference and rationale of the American proposal, he identified the increased importance of preparatory works in the American proposal, which would have the same significance as all other means of interpretation. He objected to this for several reasons. Preparatory works are 'almost invariably confusing, unequal and partial'.[34] He outlined reasons for confusion which can be grounded in the fact that the positions of delegations can change even during the negotiating process and the fact that the process is sometimes only partly recorded. Not all delegations could speak on every issue.[35] In conclusion, the delegate agreed with the solution chosen by the ILC to include the *travaux* in the process of interpretation without according the same evidentiary value to them.

Towards the end of an intensive discussion, the last word was—as with any other matter—reserved for Humphrey Waldock, who was present not as a delegate but as neutral Expert Consultant. Unlike Myres McDougal, Waldock did not employ a structured argument but addressed eight points, most of which related to the proposal of the United

32 United Nations Conference on the Law of Treaties (New York First Session 1968–1969) (n 13) 177–8 paras 2–11.

33 *Ibid*, 177 para 6.

34 *Ibid*, 178 para 8.

35 *Ibid*.

States and the respective amendment.[36] Stressing that the ILC took a balanced view reflecting state practice and not doctrinal approaches,[37] he addressed several aspects of the problem of preparatory works. He agreed to the use of the *travaux préparatoires* in the process of treaty interpretation but also mentioned the restriction that this technique had only been used in cases of uncertainty.[38] He went on to raise concerns about the integrity of the meaning of the treaty if one were to accept the use of preparatory works.[39] But he then stressed that the possibility of 'confirming' the ordinary meaning would leave the door open for automatic recourse to the *travaux*.[40] Yet, he later upheld the general distinction between primary and supplementary means of interpretation. In conclusion, Waldock argued in favour of his draft, but in a balanced and nuanced way that attempted to mitigate the arguments raised by the supporters of the US proposal. As previously mentioned, a clear majority at the conference rejected the proposal of the United States. This was not, however, the end of the academic discourse. McDougal published a short article in the *American Journal*, fiercely attacking the agreed solution.[41] This attack was countered by Gerald Fitzmaurice in a 17-page book review, in which he meticulously criticised McDougal, Miller and Lasswell's book on interpretation.[42]

As already pointed out, this paper does not aim to argue in favour of one of the approaches to interpretation. It seeks to look at what happens if we designate the two approaches as well as the concepts and theories underlying them as American and European.

The first step towards illuminating the relations between the theories will be to argue in turn in favour of and against the designation of these approaches as European and American. So, I deliberately create two conflicting and opposed narratives. One tells the story of a clash of legal cultures in Vienna between American and European approaches. The other tells the story of the formation of an international legal culture. Both narratives deal with the very same debates in Vienna. They are structured in the same way: they look first at the legal arguments, secondly at the theories underlying these arguments, and thirdly at more basic attitudes which could also be termed legal cultures. While the second narrative argues at each level that no such distinction ought to be

36 *Ibid*, 184 paras 66–74; see especially paras 67–69 on preparatory works, para 70 on the ordinary meaning of words, para 72 on hierarchy, and para 73 on the distinction between the two articles.

37 *Ibid*, para 66.

38 *Ibid*, para 67.

39 *Ibid*, para 68.

40 *Ibid*, para 69.

41 Myers S McDougal, 'The International Law Commission's Draft Articles upon Interpretation: Textuality Redivivus' (1967) 61 *American Journal of International Law* 992; on his critique see generally Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012) 3–4.

42 Gerald Fitzmaurice, 'Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?' (1971) 65 *American Journal of International Law* 358.

assumed, the first narrative sees at each level differences between European and American approaches to treaty interpretation.[43]

II. NARRATIVES: WAYS OF READING THE BATTLE OF VIENNA

1. The Story of the Clash of Legal Cultures: Europe vs America

Many international lawyers maintain that there is a huge gap between European and American attitudes towards international law. While European international legal thinking is perceived to be formalistic, static and doctrinal, American legal thinking is considered realistic, dynamic and contextual.[44] On many levels, it can be seen that the exchange in Vienna is deeply rooted in the different attitudes of Americans and Europeans. It is like a discussion between people from Mars and Venus.[45] Looking at legal arguments, there is a strong tradition of textualism, leading from Emer de Vattel to the scholars at the Vienna Conference. From Waldock's original draft, one can easily conclude that the text of the treaty had an even more important status.[46] Vattel famously restricted the process of interpretation to cases in which the ordinary meaning was not clear.[47] Even in those cases, there was accordingly a strong presumption in favour of the conclusions derived from the wording of the treaty.[48] From the fact that Vattel's formula has often been cited in European treatises, it can be concluded that there has always been a strong formalist current concerning treaty interpretation in Europe.[49] This is reflective of a general formalist and positivist tendency, which was called, in the German context, conceptual jurisprudence (*Begriffsjurisprudenz*) and in the French context the exegetic school (*l'école d'exégèse*).[50] In a rather modest form, it tried to establish a method to answer all interpretive questions by deriving meaning either from legal terms or from

43 As is the case with all narratives, theories will be simplified on several accounts to fit into the narrative structure.

44 See eg Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2008) 482–3, 500; Steven Ratner, 'Legal Realism School' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) 805 para 17.

45 See for this metaphor Robert Kagan, 'The US-Europe Divide' *Washington Post*, 26 May 2002; Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (Vintage, 2004).

46 [1966] *Yearbook of the International Law Commission*, vol II, 199.

47 'La première Maxime générale sur l'interprétation est, qu'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation': Emer de Vattel, *Le Droit des gens* (London, 1758) bk II, ch XVI, § 263.

48 *Ibid*, § 271.

49 See eg Robert Phillimore, *Commentaries upon International Law* (T & JW Johnson, 1855) 73; Henry Bonfils, *Manuel de droit international public* (Arthur Rousseau, 1894) 460.

50 Rudolph von Jhering, *Scherz und Ernst in der Jurisprudenz* (Linde International, 1884) 331.

legal principles inherent in the legal system.[51] No extra-legal means were needed or even allowed.

This met with opposition from American scholars dealing with treaty interpretation. In their writing, less weight was accorded to the literal meaning of the treaty.[52] Extra-textual means, in contrast, were considered an essential part of the inquiry. So, for example, the Draft Convention on the Law of Treaties elaborated at Harvard Law School included in its Article 19 as means of treaty interpretation 'the conditions prevailing at the time the interpretation is being made'.[53] This is a notion that can be interpreted far beyond what is provided for in Article 31(3) VCLT. This openness of American approaches towards all sorts of means of interpretation also transpires from the goals of interpretation: while some took up the traditional notion of the intentions of the parties[54] or the purpose of the treaty,[55] the goal was framed by McDougal, Lasswell and Miller as 'shared expectations of the parties'.[56] It is significant that the scientific nature of the enterprise was explicitly emphasised.[57] In that sense, the process of treaty interpretation had to be open to have all means to show what the parties actually wanted.

In contrast, Europeans contended that the parties to the treaty as well as the interpreters would have to express themselves in a legally preconceived manner which could not be opened up completely. Positive law formed a system and followed a code that the actors had to adhere to. Consequently, these rules also translated into the field of interpretation and they were specifically legal rules that were used by those applying the law. The disagreement briefly sketched here is the ultimate expression of the divide between European positivism and American legal realism that influenced and framed the method of interpretation of treaties in the respective jurisdictions.

The American approaches leading up to the very elaborate treatment by McDougal, Lasswell and Miller were all sceptical of legal rules and tried to establish the parties' intention as a kind of inquiry into something which could be ascertained as true.[58] For them, legal rules and literal arguments were only fig leaves for the process that was occurring in reality. So it was considered that a realist approach would be both more open

51 Jan Schröder, 'Begriffsjurisprudenz' in Albrecht Cordes (ed), *Handwörterbuch zur deutschen Rechtsgeschichte: HRG* (Schmidt, 2nd edn 2008) 501.

52 See eg Hyde (n 13) 1468–1502, Myres S McDougal, 'International Law, Power, and Policy: A Contemporary Conception' (1953) 82 *Recueil des Cours* 133; Myres S McDougal, Harold D Lasswell and James C Miller, *The Interpretation of Agreements and World Public Order* (Yale University Press, 1967) 36.

53 Harvard Law School, 'Harvard Draft Convention on the Law of Treaties' (1935) 29 *American Journal of International Law*, Art 19.

54 See Charles C Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Little, Brown 1922); Harvard Law School (n 53) 946.

55 Harvard Law School (n 53) 937.

56 Myres S McDougal, 'Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry' (1960) 4 *Journal of Conflict Resolution* 337; McDougal, Lasswell and Miller (n 52) 39–45.

57 See Tsune-Chi Yü, *The Interpretation of Treaties* (Columbia University Press, 1927) 37–38, 138; Harvard Law School (n 53) 956.

58 McDougal, Lasswell and Miller (n 52) xvii.

and more precise in attaining the actual goals of the parties. This realist approach was peculiarly American and can be distinguished from similar but different strands such as Scandinavian realism.[59] While previous American attempts at dealing with the interpretation of international treaties had shown signs of realist thinking, this influence was very explicit and can be clearly established in the work of McDougal, Lasswell and Miller.[60] It has been mentioned that the underlying policy science approach did not stop at translating realist thought into the domain of international thought but also developed it further in some important respects.[61] Nevertheless, both the policy science approach and legal realism have been based on a deep rejection of the assumptions of positivism and formalism. The legal differences identified between the American and European approaches are, consequently, grounded in different theoretical concepts.

These concepts also express a general cultural difference between Europeans and Americans, which is revealed in many different areas of society. While Europeans are said to have a rather traditional attitude, Americans tend to favour the rhetoric of newness and aspiration. European theories referred to and seriously discussed old authorities going back to Emmer de Vattel, always showing the development of the tradition that finally resulted in today's knowledge and today's law. The American approach to interpretation was radically modern in the truest sense of the word since it totally broke with tradition and aimed at inventing a completely new way of interpreting treaties. The policy science approach was extended to the process of treaty interpretation. Even the traditional notion of the 'intention of the parties' was replaced by 'shared expectations of the parties'.[62] So it can very well be said that on legal, theoretical and cultural levels, there has long been a gap between American and European approaches and their underlying theoretical framework in the field of treaty interpretation. Due to these differences, there is a constant need to translate American legal thinking for non-American audiences and vice versa.[63] Both legal cultures clashed in Vienna and the Europeans took first prize.

59 See Michael Martin, *Legal Realism: American and Scandinavian* (P Lang, 1997) fn 123; Ratner (n 44) 805–6 paras 20–23.

60 *Ibid*, 804 para 5.

61 *Ibid*, 804–5 paras 15–16.

62 The new terms as well as the general language of the book were criticised severely by Fitzmaurice (n 42) 359–67.

63 Detlev F Vagts, 'Treaty Interpretation and the New American Ways of Law Reading' (1993) 4 *European Journal of International Law* 472; in relation to the practice of courts see Evan Criddle, 'The Vienna Convention on the Law of Treaties in US Treaty Interpretation' (2003) 44 *Virginia Journal of International Law* 431 and the respective chapters by David Sloss, Michael D Ramsey and William S Dodge in *International law in the US Supreme Court: Continuity and Change* (Cambridge University Press, 2011).

2. The Story of the Formation of an International Legal Culture

Hersch Lauterpacht once convincingly showed in theory and practice that there are no such things as Anglo-American and Continental schools of thought.[64] The same can be said in relation to the present issue: there is no real significant conceptual difference between American and European approaches to international law. This can be shown on a legal, theoretical and cultural level.

On a legal level, at the Vienna Conference it looked as if American lawyers wanted to strengthen the *travaux* and weaken the ordinary meaning, whereas British lawyers rejected the *travaux* and favoured the literal meaning of the words; the preference of each delegation at the conference could be rooted in its respective legal culture. However, it may also be said that the opposite is true: there are indeed examples of American approaches to treaty interpretation demonstrating the importance of literal meaning. One example of this is the Second Restatement, a codification of international law at that time.[65] It states that ordinary meaning must always be considered, whereas there is no established priority between the other means of interpretation.[66] This clearly shows that from the perspective of the Second Restatement, the wording of the treaty is of key importance and distinct from any other technique of interpretation. Of course, it could be argued that the Second Restatement was influenced by Arnold McNair, who is in many respects a classical European lawyer. In any case, the fact that a European was invited to assist the American Law Institute in the drafting of the Second Restatement indicates that there was indeed a strong connection between American and European legal thinking.

Looking at the importance of the *travaux*, it cannot be said that there is a genuine European consensus not to accord to them the same importance as other means of interpretation. On the contrary, there were many approaches emphasising their importance in the process of treaty interpretation.[67] So, for example, John Westlake established that international interpretive method should be different from national interpretative method.[68] This is a very apt demonstration of the fact that even if there is a strong conviction regarding an interpretive method, it is possible to modify it in relation to the realm of international law. What is more, in the seminal case of *Pepper (Inspector of Taxes) v Hart*, in which the then House of Lords reconsidered statutory interpretation in the United Kingdom, Lord Browne-Wilkinson's leading opinion reached a conclusion which was

64 Hersch Lauterpacht, 'The So-Called Anglo-American and Continental Schools of Thought in International Law' (1931) 12 *British Yearbook of International Law* 31.

65 American Law Institute, *Restatement of the Law Second: Foreign Relations Law of the United States* (American Law Institute Publishers, 1965) 452 § 147.

66 *Ibid*, 452 § 147(2).

67 Arnold D McNair, *The Law of Treaties* (Oxford University Press, 1961) 411–12; Hartwig Blück, 'Vertragsauslegung' in Karl Strupp and Hans-Jürgen Schlochauer (eds), *Wörterbuch des Völkerrechts* (de Gruyter, 2nd edn 1962) 550; Ludwik Ehrlich, 'L'Interprétation des traités' (1928) 24 *Recueil des Cours* 118.

68 John Westlake, *International Law* (Cambridge University Press, 1904) 282–3.

very similar to the VCLT's approach.[69] Since the decisive test is whether the legislation is ambiguous or obscure, it is clear that the test resembles the phrase in Article 32(b) VCLT. A very strong emphasis on preparatory works was also advocated by Hersch Lauterpacht, who tried to establish it as a central means of interpretation.[70] Being the rapporteur of the Institut de Droit International, he drafted resolutions in which the *travaux préparatoires* played a central part in the inquiry into the intention of the parties.[71] Lauterpacht later had to relinquish this post to become the ILC's Special Rapporteur on the law of treaties, but the fact that those issues had been discussed amongst Europeans in such a controversial manner makes it hard to contend that preparatory works are generally not included in European approaches to treaty interpretation.

It is also significant that the major arguments made against the formalist conception can be turned against rather informal conceptions. In line with this, it was posited that the ordinary meaning of a word is just a matter of imagination, since no such thing exists.[72] The same argument, however, was being made in relation to the notion of shared expectations, which was criticised particularly in the case of multilateral treaties.[73] There was also another interesting parallel argument in relation to the communicative function of treaty interpretation. While the American delegate stressed that the restricted means of the Vienna Convention would not suffice for the interpreter to arrive at the correct conclusions since s/he did not have enough means at his/her disposal to really understand what function the treaty really had,[74] it was argued, conversely, that the 'completely "open-ended" process of interpretation' would actually ask too much of the interpreter since s/he could never be sure to have exhausted enough resources to arrive at a firm conclusion.[75]

The Vienna Convention actually represents a compromise between the two standpoints. This is especially true in relation to the third section of what is now Article 31(3) VCLT, which concerns extrinsic elements such as subsequent agreements or subsequent practice as well as the relevant rules applicable between the parties.[76] Inter-

69 For the so-called relaxed test see *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3, 28.

70 See especially Hersch Lauterpacht, 'Les Travaux préparatoires et l'interprétation des traités' (1937) 62 *Recueil des Cours* 713.

71 Lauterpacht (1950) 43 *Annuaire de Droit International* 433 and (1952) 44 *Annuaire de Droit International* 222.

72 See eg McDougal (n 18) 1024.

73 Fitzmaurice (n 42) 370.

74 McDougal (n 18) 1025.

75 Fitzmaurice (n 42) 367.

76 The ILC has reconsidered the elements in Art 31(3). Under the heading of treaties over time, the ILC has dealt mainly with subsequent agreements and subsequent practice in a working group. See Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013). After the third report of the chairperson of the working group, a Special Rapporteur was called upon to issue further reports, the first of which is *First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation* by Special Rapporteur Georg Nolte, Reports of the ILC in its 65th session (6 May–7 June and 8 July–9 August 2013). The question of the relevant rules as contained in Art 31(3)(c) VCLT was dealt with in ILC,

estingly, McDougal acknowledged—albeit in a very sarcastic way—that these are indeed extraneous elements, being foreign to the textual approach of the Vienna Convention.[77] So one cannot say that there was or has been a clear divide in relation to American and European legal approaches. There have been Europeans putting forward so-called 'American positions' and vice versa.

Looking at the underlying legal theory, legal realism is a prominent and important current in American legal scholarship, just as formalism is prominent amongst European academics. Yet Brian Tamanaha has shown that the radical and extreme representation of American legal realism hardly matches what American realists have actually contended.[78] But in both discourses, those are not the only theoretical approaches to legal interpretation. It is interesting to see how approaches developed in European jurisprudence in the nineteenth as well as the twentieth century. Positivist and formalist assumptions were challenged on several occasions. Proponents of the 'free law movement' (*Freirechtsbewegung*) considered the law to be determined to a great extent by the adjudicator, who had to take into account the real interests of the parties.[79] It is sometimes even contended that the free law movement had a significant impact on the development of legal realism in the United States.[80]

In France, influential jurists like Raymond Saleilles and François Gény attacked positivist propositions about the process of interpretation.[81] Gény, for example, stressed the scientific character of interpretation, which could provide for an objective standard to ascertain the content of the law as opposed to a merely technical inquiry as supported by the *école d'exégèse*, a rather formalist tradition in the interpretation of the *Code Civil*. He developed a three-step approach to legal interpretation.[82] Judges would first interpret statutes according to their literal meaning and in light of systematic consideration of the law.[83] As a second step, they could resort to customary law.[84] If there was no custom-

Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Reports of the International Law Commission on the Work of its 42nd session (1 May–9 June and 3 July–11 August 2006), UN Doc A/CN.4/L.682.

77 McDougal (n 41) 992–4.

78 Brian Z Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, 2009).

79 Hermann F Kantorowicz, *Der Kampf um die Rechtswissenschaft* (Heidelberg, 1906); Ernst Stampe, 'Gesetz und Richtermacht' [1905] *Deutsche Juristen-Zeitung* 1140; Ernst Stampe, 'Rechtsfindung durch Interessenserwägung' [1905] *Deutsche Juristen-Zeitung* 713; Ernst Stampe, 'Rechtsfindung durch Konstruktion' [1905] *Deutsche Juristen-Zeitung* 417.

80 This is argument is developed elegantly by James E Herget and Stephen Wallace, 'The German Free Law Movement as the Source of American Legal Realism' (1987) 73 *Virginia Law Review* 399.

81 See only François Gény, *Méthode d'interprétation et sources en droit privé positif: essai critique*, vol I (Librairie Générale de Droit & de Jurisprudence, 2nd edn 1919) and the volume's foreword by Raymond Saleilles.

82 See generally Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen* (Mohr Siebeck, 2001) 331.

83 Gény (n 81) 300.

84 *Ibid*.

ary law, judges could conduct what Gény called free scientific research.[85] Acting like a legislator, s/he would balance certain values to achieve a just solution. On the other hand, European scholars dealing with international law also developed rather sociological approaches that departed from a purely formalistic view of the law. Amongst the most prominent were certainly George Scelle and Max Huber.[86] All these currents can be distinguished from realism, just as one can distinguish between American and Scandinavian realism.[87] By the same token, it can be emphasised that American realism is not a single theory. Quite the contrary: the approaches summarised under this concept might have some things in common, but they also differ in many respects.[88] If those approaches can be compared to one another, this should also be possible for other theories that fulfil the same function in other contexts. Then again, formalist approaches have continuously been advocated by American judges and scholars. The best example of this might be the great attempt of Antonin Scalia and Bryan Garner to provide for a system of interpretation that would translate formalist assumptions into an operable system of interpretation.[89] Although their book received much critical comment almost from the moment it was published,[90] this work as well as others shows that there is a strong formalist tradition in American law.[91] It is true that approaches challenging formalist conceptions gained particular momentum in the United States. Nevertheless, this does not change the fact that such approaches also existed and were prominent in Europe. Theories like the free law movement, French scientific approaches and legal realism in the United States do not correspond in every detail; they nevertheless share assumptions and a common stance towards formalism. In that regard the theories achieved a similar result that challenged and influenced the respective canons of interpretation. In international law, this function was fulfilled by the proponents of the policy science approach, who together with others considerably influenced the VCLT rule of interpretation.

85 *Ibid*, vol II, 90–92.

86 See further Oliver Diggelmann, *Anfänge der Völkerrechtssoziologie* (Schulthess, 2000).

87 See Martin (n 59).

88 Interestingly, Brian Leiter in a paper soon to be published argues that those strands are totally different and cannot be compared. For a rather cultural approach outlining a shared legal tradition see Heikki Pihlajamäki, 'Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared' (2004) 52 *American Journal of Comparative Law* 469. Both the cultural similarities and the jurisprudential differences are dealt with in Gregory S Alexander, 'Comparing the Two Legal Realisms—American and Scandinavian' (2002) 50 *American Journal of Comparative Law* 131.

89 Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012).

90 Andrei Marmor, 'Textualism in Context' (2012) 12–13 University of Southern California Legal Studies Research Paper Series; Stanley Eugene Fish, 'Intention and the Canons of Legal Interpretation', http://opinionator.blogs.nytimes.com/2012/07/16/intention-and-the-canons-of-legal-interpretation/?_php=true&_type=blogs&_r=0; James R Maxeiner, 'Scalia & Garner's Reading Law: A Civil Law for the Age of Statutes?' (2013) 6 *Journal of Civil Law* 1, who interestingly argues that continental jurisprudence today would also include extra-textual factors.

91 See the critical discussion by William N Eskridge, Jr, 'The New Textualism' (1989) 37 *University of California Los Angeles Law Review* 621.

So in essence, American lawyers simply adopted an approach that is necessarily voiced in every situation in which a legal system has to settle the design and the degree of formality of the rule of interpretation. The fact that the approaches were voiced by certain participants more than by others does not mean that one should necessarily ascribe those to the respective legal cultures. As shown above, there were scholars dealing with national as well as international law who followed exactly opposite ideas on the national and on the international plane. In contrast, one could say that it was not the legal culture but national interests that led to the opposition of European and American approaches in this debate. Considering that the approach promulgated by Myres McDougal at the Vienna Conference was not the only one that could be found in American legal scholarship at the time,[92] it might actually have been a conscious decision of the American delegation to allow McDougal to represent America's interest. So it was not a genuine revelation of American legal culture in Vienna but a deliberate decision on the part of American diplomats. This would mean that the diplomats chose the approach they thought to be apt to enshrine in the treaty which would be, to the greatest extent possible, in the interests of the United States. While the responsible government officials could have picked any American law professor or diplomat, they chose Myres McDougal, just as the other delegations picked their delegates.

It is also significant that voices from the United Kingdom to a certain extent dominated the process of formation of the law of treaties. All the rapporteurs in the Institut de Droit International and more importantly all the Special Rapporteurs for the topic of the law of treaties were British. This continuity of Rapporteurs of a single nationality is striking. As already mentioned, the British delegate at the Vienna Conference fiercely defended the draft of the ILC against the American proposal. In conclusion, it can be said that the delegates at the conference did what they were supposed to do, which was to reach a conclusion that would further what they perceived to be the interests of their country. From this perspective, one should attach importance not to a certain legal culture but to the deliberate political choice that influences common perceptions and leads us to think of theories in regional and national categories. But one must not forget that the object of the debate was the establishment of a cornerstone of the international legal system. Consider that the choice was determined not just by cultural reasons but also by a set of deliberate choices. To attach that choice to national legal cultures is not the only valid explanation. It would also be possible to explain it as a decision between different views within a community. Taking this position and thinking contrafactually, one could say that the delegates would have taken exactly the opposite approach had it been in their interest to do so.

It is true that there are cultural differences like the one explained above between European traditionalism and American modern thinking. However, the two cultures

92 The richness of the American discourse is evidenced by a panel discussion summarised here: 'Panel: Some Contemporary Problems in Treaty Law Suggested by the Draft Articles on the Law of Treaties of the International Law Commission: Comments' (1967) 61 *American Society of International Law Proceedings* 204.

have many things in common, such as the English language, which is the *lingua franca* in most parts of Europe, and many important components underlying the legal systems such as the importance of constitutions and human rights. Within the discourse, many differences came to light and those differences can be rooted in theories that had been developed in the European as well as in the American context. However, the divide between positivism and realism is not peculiar to international law. The comparative analysis has shown that the questioning of positivism is a feature not just of American jurisprudence but also of European legal scholarship. In a way, the focus should not be on regional origin but on the function the approaches served, namely to negotiate agreed rules of interpretation that would be the bedrock principles of an international legal culture. This means that the delegates preferred a certain approach to interpretation not because it fitted their legal culture but because it might have been in their interest. If the United States had been in the position of the United Kingdom, it might not have sent Myres McDougal to the conference but another delegate who would have strengthened the formalist view.

III. AND THE MORAL OF THE STORIES …

The two foregoing narratives have shown that there are different ways to answer the question of whether or not there is an underlying theoretical regional divide in relation to treaty interpretation. Both claims can be backed up by good arguments.

The position to take and the narrative to be told depend significantly upon the perspective of the observer. External perspectives are more likely to see the common ground, whereas internal perspectives put more stress on the differences. If somebody is from Europe or the United States and sees him/herself as belonging to one of their schools of thought, s/he will find differences between their chosen approach and the other approach much more easily. Coming from a third state or region, it is easier to see similarities between the European and American approaches. To give an illustrative example of this effect, I myself have witnessed a discussion between two scholars, one from the University of Oxford and one from the University of Cambridge, about the numerous differences between the two prestigious institutions. One difference involved the tradition of punting: while the punters in Oxford stand at the front of the boat, Cambridge punters stand at the back. The two scholars could have come up with numerous examples of that kind that would lead one to think that the two universities do exactly opposing things, like punting from the back and punting from the front. However, coming from Berlin, it was much more significant to me that the two universities shared the tradition of punting.

Coming back to the question of whether we should think of the rule of interpretation and the discourse surrounding it in terms of European versus American, we might find a solution if we approach the topic in a more general manner and look at what actu-

ally happens when we denote a theory as stemming from a certain country or region. Therefore, in this third part of the paper I shall attempt to understand that process. To see what can be learned from the foregoing sections, I will first look at what happens when we accord regional designations to legal theories in general, followed by the consequences this has on the process of interpretation. In the end, I will try to develop a cubistic view, looking at what happens from more than one angle at the same time.

1. Legal Theories, Legal Cultures and Imagined Communities

It is very common to assign a name of up to three words to a theory or approach. Theories and ideas that have been developed mainly by one thinker are named after them. For example, we speak of Immanuel Kant and John Locke, even if that is sometimes difficult (as it is in the case of the younger and the older Ludwig Wittgenstein).[93] Names can stand for a whole system of thought or one particular problem. So we can speak about Kelsenian thinking or about Schrödinger's cat. But theories can also have rather abstract names that give an indication as to their content or programme, such as critical theory or Critical Theory. It is also possible that the name carries a local designation, which can be attributed to different regional levels. There is, for example, a New Haven School, the Austrian School of Economics, Scandinavian Legal Realism and Third World Approaches to International Law. The local designation of a theory does not, however, need to be included in its name. It is also possible to think of a theory that has no regional attachment in its name but is nevertheless regarded as being attached to a certain region, be it a town, a country or a continent. When such an assertion is made about a theory, it can simply be descriptive if the people pursuing it can be located in specific places. In such cases, it could merely be coincidental that certain facts, circumstances or relations have been discovered and elaborated in a certain place, and the regional designation functions as a mere expression of this fact. On the other hand, the regional designation may also guide and influence the theory and possibly even the law itself. It is also possible to link a theory with a nation and propose that there is an American or British theory of treaty interpretation. If a social fact such as a theory is attributed to a nation state, the consequences can go far beyond local attribution and impact upon specific characteristics that the people living in that territory are believed to share. What it means to describe something in national terms was reflected upon by historians and sociologists throughout the 1980s and 1990s.[94] They showed that the nation state as a 'cultural artefact'[95] influences and determines social lives and functions as a guiding principle of society.

93 His disciples and followers diligently omit to mention the word 'theory' for his thinking as he was very skeptical about the use of this word.

94 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, rev edn 2006 [1983]); Ernest Gellner, *Nationalism* (New York University Press, 1997); John Breuilly, *Nationalism and the State* (Manchester University Press, 2nd edn 1993 [1985]); Eric J Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Cambridge University Press, 2nd edn 2012 [1990]).

95 Anderson (n 94) 4.

Benedict Anderson famously coined the phrase 'imagined community' for this phenomenon. He contended that although nation states and the national are social facts that can be observed in the real world and have real consequences, they are based on imagination and a certain understanding that helps to build strong intersubjective ties between individuals.[96] This in turn establishes the community, which is limited and encompasses the people living on a defined territory. Membership of the community is based not on social rank but on certain other characteristics, such as ethnicity and mother tongue.[97] The organisation of society in such communities carries with it assumptions that might be termed a nationalist argument. They have been summarised by John Breuilly as follows:

> A nationalist argument is a political doctrine built upon three basic assertions:
>
> a. There exists a nation with an explicit and peculiar character.
>
> b. The interests and values of this nation take priority over all other interests and values.
>
> c. The nation must be as independent as possible. This usually requires at least the attainment of political sovereignty.[98]

Whereas a mere local description is at one extreme, the assumptions carried by a nationalist argument are certainly at the other. However, nationalist thinking has to a greater or lesser extent influenced legal theory. A very apt example is the thinking of Otto von Gierke, who developed a community related law that was derived from collective German thinking as opposed to individualistic Roman thinking.[99] His approach on the one hand tried to incorporate social and welfare considerations into private law, and on the other hand strongly influenced the concept of legal entities in private and in public law.[100] This example of Gierke's thinking establishes how a very strong reference to the nation can affect law and legal theory. It is, of course, contested whether and to what extent scientific activity responds to extra-scientific interests. While some scholars have tried to establish that the scientific process has its own rationale and is relatively unresponsive and autonomous,[101] social scientists have inquired into this interrelation and found

96 *Ibid*, 9–12; Hobsbawm (n 94) 9–12.

97 See eg Adrian Hastings, *The Construction of Nationhood: Ethnicity, Religion and Nationalism* (Cambridge University Press, 2007) 2–3.

98 Breuilly (n 94) 2.

99 Otto von Gierke, *Das deutsche Genossenschaftsrecht* (Weidmannsche Buchhandlung, 1868, 1873, 1881, 1913) 4–5.

100 Jan Thiessen, 'Otto von Gierke (1841–1921) Rechtsgeschichte, Privatrecht und Genossenschaft in Briefen und Postkarten' in Stefan Grundmann, Michael Kloepfer and Christoph G Paulus (eds), *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin: Geschichte, Gegenwart und Zukunft* (de Gruyter, 2010).

101 See very generally Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (Suhrkamp, 2009); Dick Pels, *Unhastening Science: Autonomy and Reflexivity in the Social Theory of Knowledge* (Liverpool University Press, 2003).

that in many contexts one can see interdependence.[102] It is a common observation that theories outside the realm of natural sciences have, on the one hand, a descriptive and explanatory character, which can be more or less adequate in explaining what the world actually looks like. On the other, such theories can constitute social facts and frame the intersubjective relations between human beings.[103] If any theory is dominant and people are used to thinking in that manner, this indeed impacts on the real world.[104] In many instances, the question is then not whether the theory is true or false. If it succeeds in convincing as many people as possible to frame the world in a certain way, people will act based upon the theory, and it will therefore be able to describe the self-created truth better. If the propositions of the theory are rejected, the theory will not adequately describe social reality. What is important is that a comparison with reality can neither verify nor falsify the respective theory.[105] To a certain extent, it actually shapes reality independently of its truth-value. The decisive factor is whether the theory is convincing and appealing to the respective audience. Therefore, the guiding factors in deciding whether to employ a theory are only its suitability to describe present circumstances but also its possible consequences upon society in the future. This applies particularly to regional designation of theories. It is an act of imagination to attach certain attributes to legal theories of a certain community which is defined in territorial terms. So the way we think of the law actually influences the law and has real-world consequences and effects.

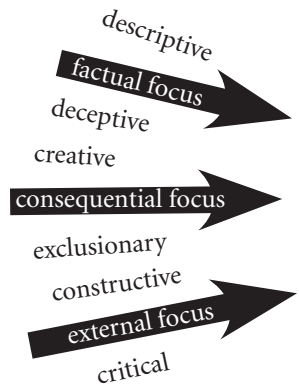
This means that the question whether the rule of interpretation as contained in the VCLT is European or American is not simply a question of right or wrong; the way in which we denote legal methods also impacts upon what it represents. I will inquire into the many different possible effects in a structured manner by taking three different focuses or outlooks: factual, consequential, and external. The different outlooks can be arranged and structured in the following manner:

102 Michael Haas, *Polity and Society: Philosophical Underpinnings of Social Science Paradigms* (Praeger, 1992).

103 For a general account of the problem see eg Alfred Schütz, 'Concept and Theory Formation in the Social Sciences' (1954) 51 *Journal of Philosophy* 257. See also Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor Books, 1966) 53–61.This is for example the basic assumption of Searle which leads him to reconsider the concept of theory in natural science: see John R Searle, *The Construction of Social Reality* (Free Press, 1995) 4–9. For a similar theoretical approach that nevertheless tries to sustain the distinction between natural sciences and *Geisteswissenschaften*, see Johan A Schülein, 'Soziale Realität und das Schicksal soziologischer Theorie' in Georg Kneer and Markus Schroer (eds), *Handbuch Soziologische Theorien* (VS Verlag für Sozialwissenschaften, 2009).

104 In relation to natural sciences, this was one of the major arguments made by Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 3rd edn 1996).

105 This does not of course apply if the theory is obviously based on false presumptions or is not coherently composed. This, however, is not often the problem.



The factual focus seeks to describe the truth-value of the regional designation of a theory. Insofar as this ascription is correct, it has descriptive value. It is true that the New Haven school consisted of scholars living and teaching in New Haven, for example. Especially in cases where a designation entails the claim that a certain theory originated in a certain place, this might in many cases be subject to controversy, as the underlying ideas might have been established elsewhere. The history of science is full of stories of people and places being forgotten despite the credit they deserve for their discoveries. This is why such designations can also be deceptive.

Below, I aim to describe the immediate effects a designation has. Examples show that they can be creative but that at the same time they can also be exclusionary.

The thinking of Otto von Gierke was creative, in that he read history in a very particular way and derived conclusions for the legal system of his day. He made the characteristics he derived from history operable and transferred them to the contemporary legal system. His particular reading of the past enabled him to formulate claims for the legal system of his time. In this sense, thinking in national terms was creative. Of course, his argument had also an exclusionary effect. He implied that other features of the civil code did not belong to his community and should not, therefore, be employed. It must also have been at least a little more difficult for people not belonging to the German community to employ and develop his theory of German law. Therefore, there might have been an exclusionary effect due to those factors. It has been claimed that Emile Durkheim and Max Weber deliberately ignored each other, and this contributed to the mutual failure of French and German sociology to consider each other.[106]

106 See Peter V Zima, *Was ist Theorie? Theoriebegriff und Dialogische Theorie in den Kultur- und Sozialwissenschaften* (UTB, 2004) 42–43; Edward A Tiryakian, 'Ein Problem für die Wissenssoziologie: Die gegenseitige Nichtbeachtung von Emile Durkheim und Max Weber' in Wolf Lepenies (ed), *Geschichte der Soziologie: Studien zur kognitiven, sozialen und historischen Identität einer Disziplin* (Suhrkamp, 1981) 17–28.

An external focus will take an overall standpoint on the effects. This may be either critical or constructive. A constructive view will try to situate the designation amongst others and relate them to each other, therefore engaging in a kind of systematic exercise. So, one could oppose Catholic approaches with Protestant approaches in early international law and try to map out their commonalities and differences. Yet, one can at the same time take a critical stance towards the regional designation. The most obvious example of this would be one in which the respective theory claims to pursue and represent a universal claim and the external observer contends that this theory is actually culturally biased or favours a certain social entity such as states. Claims that human rights are universalist have been presented and sometimes criticised on the basis that they have cultural biases.[107] In this case, the regional designation functions as a way to stress the particularity and non-universality of the position or argument.

To summarise this section, it reviewed the practice of attaching regional designations to legal constructs or theories, and then considered the discourse on the construction of national identity to find that such a construction becomes part of social reality, even though it is to a certain extent imagined. This point was extended to any social construction and theory and noted that those constructs have actual effects, bearing in mind the way in which we structure those effects (factual/consequential/external). This will help us to tackle the ultimate problem addressed by this essay.

3. Configuring the Argumentative DNA of International Law: How to Reflect on the Method of Treaty Interpretation

Should we now think of treaty interpretation as being understandable through American/European approaches or conceptualise it as basically international? Is the neck of the wood or the forest important? This question will be answered in two stages. I will argue first that the rules of treaty interpretation are the argumentative DNA of international law and as such are apt to facilitate communication between interpreters from different legal traditions and to constitute international legal method. As a second step, I will tackle the question of whether we should think of the rule of treaty interpretation in regional terms, such as European/American, or on a genuinely international level.

If we describe the rule of interpretation as contained in the VCLT as argumentative DNA, it is called argumentative since it envisages the process of interpretation as basically being argumentative. Article 31 VCLT does not purport to be the guide to a certain meaning, but rather leaves discretion to the interpreter.[108] It matches the general setting in which several meanings are put forward in relation to a part of the text of an international treaty, and the competent interpreter has to choose amongst them. In the process

107 Raimon Panikkar, 'Is the Notion of Human Rights a Western Concept?' (1982) 30 *Diogenes* 75.

108 Georg Nolte, 'Introduction' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013) 1–12.

of choosing, the interpreter has to give reasons for her/his decision. Those instances of argumentation are considered instances of interpretation to which the rule of interpretation applies. The fact that interpretation is basically argumentative was used to argue that the law itself is an argumentative practice,[109] an idea that has gained ground in general jurisprudence as well as in international law.[110] I will confine myself to viewing the process of interpretation as argumentative but will also look at the ways in which it is argumentative. The rule of interpretation classifies arguments and puts them into a certain order in which they are to be taken account of by the interpreter: first, through the techniques mentioned in Article 31 VCLT; and secondly, via the supplementary means as envisaged in Article 32 VCLT. Kratochwil has compared the workings of the VCLT to Aristotle's rhetoric, since it would also encourage the use of *topoi*, ie standardised forms of argument.[111] This view is certainly appealing, but we should not forget that the *topoi* in Aristotle's rhetoric are at the same time more abstract and more specific:[112] they apply not just to the law or legal argumentation, but rather to all areas in which there can be an argument. However, they are in their nature more specific since they prescribe a certain structure of argument. So, arguments by analogy are mentioned, as well as arguments from contradictions or consequences.[113] Aristotle also looks at arguments from opposites, from different meanings of the same word and from definition or the meaning of names.[114] This generality was later criticised in a book that is commonly known as the 'Logic of Port Royal'. The authors of this book argued that *topoi* were effectively out of use and would also hamper and limit creativity if they were used.[115] So the authors sought another way to enhance argumentation and to preserve the function that *topoi* could no longer fulfil. The 'Logic of Port Royal' provided for three classes of arguments: arguments from grammar, arguments from logic, and arguments from metaphysics.[116]

This is the first point at which we should compare the workings of the VCLT with the workings of DNA in cells. DNA does not have an immediate impact; rather, it is more of

109 See eg Theodor Viehweg, *Topik und Jurisprudenz* (CH Beck, 4th edn 1969) 88.

110 Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (Notre Dame Press, 1969); Julius Stone, *Legal System and Lawyers' Reasonings*' (Stevens, 1964). For international law see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005) esp 566. For a general account of the process of interpretation see Venzke (n 41).

111 Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1991) 234–6.

112 For an introduction to the notion of Aristotle's topics, see Christof Rapp, 'Aristotle's Rhetoric', *Stanford Encyclopedia of Philosophy* (Spring 2010 edn), Edward N Zalta (ed), http://plato.stanford.edu/archives/spr2010/entries/aristotle-rhetoric (accessed 26 August 2013). An accessible table summarising the topics is provided by Douglas N Walton, Fabrizio Macagno and Chris Reed, *Argumentation Schemes* (Cambridge University Press, 2008) 281–2.

113 Aristotle, *Rhetoric*, Book II.22.

114 *Ibid*.

115 Antoine Arnauld and Pierre Nicole, *Antoine Arnauld and Pierre Nicole: Logic; or, The Art of Thinking*, JV Buroker (trans) (Cambridge University Press, 1996).

116 *Ibid*, ch XVIII.

a 'construction plan' that is used in a complex process to put together proteins in several steps. It is those proteins that then work in the cell. Like DNA, the VCLT is a 'construction plan'. Arguments are put together to favour a certain meaning in an interpretive question. This helps in a second step to state whether a treaty applies to a problem or not. The VCLT does not directly impact treaties; it affects them only indirectly as a construction plan for legal arguments, in the same way that DNA is a construction plan for proteins.

DNA has a limited determinative effect. While all possible information is saved in DNA, which part of the information is accessed depends on the context. Different information is accessed at different times, depending on the function the cell fulfils. The whole living being is of course influenced by DNA to a certain extent, but it also reacts to external effects. The fact that the VCLT distinguishes between arguments in Articles 31 and 32 determines outcomes to a certain extent, since it attaches less weight to supplementary means like the circumstances at the conclusion of the treaty. Yet, the VCLT is generally open to all kind of arguments, and it couples the information contained in the treaty with external influences. In this way, it determines the law to a certain extent but is still open to development, which could be seen as being similar to DNA.

Especially in the case of big and complex organisms, it is significant that DNA as a structure is omnipotent. It can work in cells belonging to organs such as the heart, the brain or the liver, but also in cells comprising nerves or muscles or fat. In all those circumstances, the very same DNA can function and be the plan for the construction of proteins. The workings of DNA are actually based on a rather simple principle with four nucleobases (guanine, adenine, thymine, and cytosine) and their combination creates the structure of the protein. Similarly, the VCLT is made up of only six types of argument (ordinary meaning, context, object and purpose, subsequent agreements, subsequent practice, relevant rules) that can be combined. It applies to any kind of treaty, as well as to all actors. There is a certain scholarly tendency to categorise treaties[117] according to their structure (bilateral/multilateral), nature (constitution/*traité contrat*) or subject matter (human rights/investment/trade), but the rule of interpretation contained in the VCLT works equally for all of those treaties. Yet, the rule is also omnipotent in another respect: it applies to all kinds of interpreters. While the VCLT is formally only binding upon states, international courts and tribunals, the organs of international organisations are also within the scope of the provision. The alleged omnipotence of the rule of interpretation offers an interesting and important aspect for our topic: the rule of interpretation applies equally to all interpreters no matter which legal culture or country they come from. If there is an argument between lawyers from different legal countries, those lawyers will not use their respective national method but rather will resort to Articles 31–33 VCLT, as applicable between all possible actors. This leads us again to the

117 Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 2008) 636–8; Malgosia Fitzmaurice, 'Treaties' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) paras 22–28.

heart of the question of whether the rule of interpretation is actually based on different legal cultures or whether it transcends those cultures and merges them into a particular international legal culture.

In answering this question, I chose to lay open my argument from the beginning. As the preceding section showed, there are two viable narratives, each of which can be supported and challenged. One way of approaching this question could be to employ Jastrow's duck-rabbit, which was used by Koskenniemi, to show that some practices can be viewed as legal and political at the same time depending on the angle from which one looks at the law.[118] In this way, we could perceive the rule of interpretation as stemming from a certain legal culture or as international depending upon the perspective we take. Both perspectives are viable, and the choice between them is contingent and deliberate. As has been amply shown, designations as well as legal cultures are themselves social constructs. They are a product of our imagination and have no inherent truth-value. Let us try to take a wholly different approach to the question, breaking the picture up analytically: in a cubistic exercise, we will see both parts of the picture—the duck as well as the rabbit—at the same time. This is a difference between mere perception of social constructs and a deeper understanding of them. What a cubistic exercise means will hopefully reveal itself in due course.

The factual focus immediately forces us to take a cubistic look at things. Of course the VCLT can be seen as strongly influenced by and echoing national methods. It could be argued that the rules of interpretation were strongly influenced by the English approach, especially through Humphrey Waldock, which manifested itself in the relatively minor weight the *travaux préparatoires* attained. But then, it is clear that Waldock's thinking is embedded not only in the English but also in the European tradition. Furthermore, it could also be argued that there was a strong American influence. Although Waldock relied on the resolution of the Institut de Droit International and the work of the previous Special Rapporteur,[119] it was the Harvard Draft Convention that coined the so-called 'factor approach' which heavily influenced the Vienna Convention. It was the first scheme of interpretation relying on interpretive techniques that worked almost exactly like the Vienna Convention. A slight interpretive hierarchy was added in the attempt to codify by the American Law Institute, which otherwise worked in a very similar way.[120] If one compares this to the European approaches, such as the highly refined

118 The picture can be accessed here: http://mathworld.wolfram.com/Rabbit-DuckIllusion.html. It first appeared in *Fliegende Blätter* (23 October 1892) 147. It was then inquired into by Joseph Jastrow, 'The Mind's Eye' (1899) 54 *Popular Science Monthly*, and was later taken up by Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell, 1958) 165–6. The use by Koskenniemi is reported by http://miriamaziz.wordpress.com/2014/05/01/max-planck-institute-masterclass-in-international-law-may-1-2014.

119 ILC, Draft Articles on the Law of Treaties with Commentaries, [1966] *Yearbook of the International Law Commission*, vol II, 218 para 1.

120 See American Law Institute (n 65).

system of presumptions as provided for by Ludwik Ehrlich[121] or the attempt to codify the thinking of the classical authors of international law by Pascqual Fiore,[122] it becomes clear how much the Vienna Convention is actually based on American legal thinking. We should also remember that the Vienna Conference was not only composed of Europeans and Americans: lawyers such as Eduardo Jiménez de Aréchaga and Taslim Olawale Elias played a significant role and showed us that we must not forget about African, Asian, Australian, Latin-American and Caribbean influences. On the other hand, it was a rule of international law at issue that resulted in certain peculiarities that are not modelled in accordance with national interpretive methods. Examples include subsequent agreements and subsequent practice as envisaged in Article 31(3)(a) and (b) VCLT. They are indeed peculiar to international law. We can with the same authority trace all influences separately or designate the rule of interpretation as international. Both contentions describe the situation to a certain extent and are partly deceptive at the same time.

The consequential focus reveals that both alternatives have their effects: linking the rule of interpretation to certain traditions can enhance creativity.[123] Since all traditions can enrich the interpretive method, this is hardly an aspect that can assist in deciding between those two approaches. The same applies to potential exclusionary effects. If we give credit to certain national traditions for the rules in the VCLT, this of course excludes all approaches not mentioned. If we designate this method as international, this excludes all approaches not in line with that particular method and frames them as not being international.

Similarly, the external focus works in both ways. To think of the rules as being international explains the particularity of the rules and strengthens the idea of an international community with its international argumentative DNA. On the other hand, the national construction could link the rule to the national method and strengthen links between the international and national spheres, having an inclusive effect. The reflection based on national methodology could help to explain why certain preferences were included in the VCLT. This could at the same time be used to look at the whole process in a rather critical manner, as the positions taken could be viewed as attempts to pursue national interests. In this manner, the battle of Vienna could be described in terms of a declining world power trying to formalise and freeze the legal order it had shaped and an already ascended world power trying to enhance flexibility in the system to open it up to informal dynamics. To think of the rules as 'international' could be taken as an attempt to superimpose certain preferences on all parts of the international community even though different solutions might be much more advisable in certain cases.

121 Ehrlich (n 67) 95–139.

122 Pasquale Fiore, *Le Droit international codifié et sa sanction juridique* (A Pedone, 1911) 404 ff.

123 See for examples Marcelo Kohen's interesting discussion of the concept of *desuetudo* and obsolescence in international law, in which he draws much inspiration from the foundations of those doctrines in Roman law: Marcelo G Kohen, 'Desuetude and Obsolescence of Treaties' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 350–9.

The discussion of the three outlooks and focuses reveals that in each instance it can go either way. This reinforces what was found above, namely that the question is not one of right and wrong but one of preferences. If we seek to encounter this question as far as possible without taking sides, we will also try to see all aspects as far as possible. This means that we have to think of the rule of interpretation as being both national (European/American) and international at the same time.

To conclude in American as well as European terms: Everything is imaginable, from exceptionalism, the unbridgeable deep gap, to transcendentalism, the ocean that links everybody and everything. Both of those strands are rooted in the American tradition, a rich tradition which can assert at one and the same time that every individual is linked to the universe, but also that America is something special and exceptional, different from all other countries. This was a belief that was shared by American communists and neoconservatives alike. So even within one tradition, there is ample space to choose between universal similarity and distinctiveness. We can also see that the United States has over time played many different roles in the European collective memory: from Tocqueville's Garden of Eden of democracy and Goethe's lands where the golden oranges glow to the big McDonald's-CocaCola-Hollywood-machine threatening genuine European, and perhaps world, culture. Of course there are undeniable differences between Europe and America. But we must not imagine the ocean to be too great and the gap too vast. For—to end in European terms—if Atlas, who carries the world on his shoulders, tumbles or drowns, Gaias and Uranos will meet.

IV. ANNEX

1. Final Draft of the International Law Commission

Article 27 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   (a) Any subsequent agreement between the parties regarding the interpretation of the treaty;
   (b) Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation;
   (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 28 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

(a) Leaves the meaning ambiguous or obscure; or
(b) Leads to a result which is manifestly absurd or unreasonable.

2. Proposal of the Delegation of the United States of America[124]

Article 27

A treaty shall be interpreted in good faith in order to determine the meaning to be given to its terms in the light of all relevant factors, including in particular:

(a) the context of the treaty;
(b) its objects and purposes;
(c) any agreement between the parties regarding the interpretation of the treaty;
(d) any instrument made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;
(e) any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally;
(f) the preparatory work of the treaty;
(g) the circumstances of its conclusion;
(h) any relevant rules of international law applicable in the relations between the parties;
(i) the special meaning to be given to a term if the parties intended such term to have a special meaning.

124 Amendment A/CONF.39/C.1/L.156, United Nations Conference on the Law of Treaties, 1968–1969 Documents of the Conference, New York 1971, A/CONF.39/1 l/Add.2, 149.

3. Vienna Convention on the Law of Treaties

Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.