Evolutionary Interpretation and International Law

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Introduction: A Meta-Question

GEORGES ABI-SAAB

A dilemma that frequently faces someone introducing a colloquium or a collective book on a given subject is how to say something relevant without treading on what might be said by subsequent interveners.

One way of circumventing this dilemma is to address a question that transcends the subject, while remaining relevant, a meta-question, such as clarifying the premises of the subject to situate it in its larger context.

The subject of 'evolutionary interpretation' assumes that it is a species of interpretation. But what do we mean by interpretation in the first place? And in what sense and from what angle can it be qualified as 'evolutionary' (or evolutive)? In other words, 'interpretation' needs interpretation.

Indeed, the term interpretation is used in current, and particularly legal, language to designate at least three different objects or referents, two of which refer to the stages of a mental or intellectual operation and the third to the output or outcome of this operation.

1. Interpretation as a 'process of cognition'. This is the wider etymological meaning of interpretation, as the very process of grasping or apprehending the sense of a word, a sentence, or a normative proposition, of identifying and delimiting its substance. It is a purely intellectual activity, studied by different disciplines under different denominations: the theory of knowledge in philosophy, cognitive theories in psychology, the theories of communication in linguistics, as well as by modern theories of literary criticism, etc. Each of these theories endeavours to explain in its own way how the mind grasps external reality, takes hold and deciphers it for itself, particularly when this reality is not material or sensuous, but social or conceptual, even if it is expressed in words like law. In their diverse approaches, these theories provide a variety of tools to seize the meaning of a word, a sentence or a logical or normative proposition.

But is this intellectual process of identifying meaning sufficient by itself to produce a final interpretation of a legal text?[1] I turn for an answer to a great master,

[1] I leave aside for the moment the question of interpretation of non-written law.

Hans Kelsen, who responds in the negative. This is because words, not to speak of words in the context of a sentence or a general normative proposition, are very rarely, if ever, 100 per cent 'univocal', in the sense of 'having only one proper meaning; capable of one single interpretation; unambiguous'.[2] Thus, even when we have a written normative proposition with an absolutely clear hard core, this hard core is always surrounded by a penumbra or a margin of indeterminacy, however narrow it may be.

This means that the purely intellectual process – which Kelsen defines as 'cognitive ascertainment of the meaning of the object that is to be interpreted'[3] – can only be an intermediate stage towards a final interpretation, since it cannot go beyond tracing the outer-limit around possible meanings that can be accommodated within the normative proposition, that which in turn implies the recognition of the existence of several such possibilities within these limits.

2. Interpretation as an 'act of volition'. If every normative proposition comprises a penumbra or margin of indeterminacy, and can thus accommodate more than one meaning, a second step or stage of the interpretative operation becomes necessary: choosing between alternative possible meanings. But choice is an exercise of free will, an act of 'volition', and a conscious 'decision'.

Saying that the final interpretation is the result of the wilful choice of the interpreter does not mean, however, that this choice is totally free. This is contrary to what some schools of thought profess. For instance the New Haven School considers that rules and normative propositions in general are 'open-ended', 'open textures' that can be stood on their head, and made to say the thing and its opposite, according to the subjective views and values of the interpreter. Likewise, some post-modern writers view rules as mere shopping lists from which the interpreter-judge chooses, as well as from the factual matrix of a case, those elements that, when combined, produce his or her preferred outcome.

Yet, the choice of the interpreter is not and cannot be totally free. It is limited primarily by the constraining effect of normativity. For normative propositions cannot by definition be totally open-ended and reversible, *pace* the pundits of New Haven, without losing all their directive power, ie, being emptied of all their normative substance and quality. And saying that they comprise a penumbra of indeterminacy (corresponding to the interpreter's margin of free choice) posits the existence of a clearly determinable (or rather determined) hard core of meaning, surrounded by this penumbra that prolongs and completes it, thus projecting different shades of the total meaning of the text. These shades are variations on (and of), a common theme (the hard core), however radically different they may

[2] *Shorter Oxford English Dictionary on Historical Principles*, 6th edn, vol 2 (Oxford, Oxford University Press, 2007) 3445.

[3] H Kelsen, *The Pure Theory of Law*, 2nd edn (trans Max Knight) (Berkeley, CA, University of California Press, 1970) 351.

be from each other, and have to echo it, albeit with a distinctive touch, to remain within its orbit, and thus within the circle of possible interpretations. In other words, it is the hard core that sets the outer-limit of logically possible interpretations of the rule or normative proposition.

How large or narrow the penumbra or margin of indeterminacy is, depends on the linguistic and normative consistency of the text. The more tightly woven and thickly textured it is, the more the 'decision-map' is covered, or to use a more familiar analogy, the more the picture is detailed and finely grained (ie, the more pixels it has), the less 'degrees of freedom' the interpreter will have in terms of probability theory.

Are there other constraints on the interpreter's freedom of choice within the penumbra of indeterminacy? One may think in this respect of the principles or 'rules of interpretation' of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), on the legal nature and import of which – whether they are real legal norms or mere logical axioms – the doctrinal debate continues.

As far as their formal legal status, these rules are clearly legal norms. They feature in a general open convention to which an overwhelming majority of the international community of States are parties, and which are recognised, even by the few States that remain outside the Convention, as well as by major international judicial and adjudicative bodies (eg, the International Court of Justice (ICJ) and the World Trade Organization Apellate Body) as a codification of general customary rules.

By contrast, it is more difficult to gauge their exact legal import. They play a useful role by introducing a modicum of order in the intellectual operation of interpretation, earmarking the main elements to be taken into consideration during this operation, and proposing a logical way of proceeding (*une démarche*) going from the text to be interpreted, to its internal context (within the same instrument), to the external context (relevant elements outside the instrument).

But these 'rules', as codified in VCLT Articles 31 and 32, present a serious danger of being taken for what they are not, namely an iron framework and railroad that rigidly encase and direct the intellectual operation of interpretation, automatically and inexorably, to the proper final interpretation. This image is a grossly distorting caricature, as neither the list of elements is necessarily exhaustive, nor the proposed sequence a rigid series of watertight exclusivist stages, in the sense that if one provides an answer, the interpreter is precluded from going further into any of the following, hierarchically ordered ones.

Interpretation is a holistic operation; it is a purposive conscious activity that cannot be reduced to a clock-like mechanical movement or a mathematical equation that automatically provides the right answer. There will always be an essential spring or parameter missing, indispensable for such a mechanism or equation to function, namely human judgement, which is a constitutive part of any decision or other purposive action.

The rules of interpretation, as codified in VCLT Articles 31 and 32, play a positive, persuasively directive, moderate role, by providing a logical, though standard,

road map, with signposts flagging out major stations. But they are far from being determinative of the final interpretation: that which led some authors to question their legal nature.

If the principles of interpretation are moderately directive and non-determinative of the final outcome, ie, that the interpreter's freedom of choice within the penumbra of indeterminacy is quite large as long as he or she does not overstep its outer limit, the question arises: what other factors or considerations may bear on the interpreter's choice, and more particularly those that may favour and/or motivate his choice of an 'evolutionary interpretation'? A question better tackled in the conclusions, after we have examined in some detail the meaning and significance of 'evolutionary interpretation' in diverse contexts.

3. Interpretation as an 'authoritative rendition'. The interpretative operation yields a final product, also referred to as 'interpretation', consisting of a rendering of the meaning of the interpreted text. In evaluating the 'authority' of this final product, ie, the weight it carries in the eyes of the community, particularly the legal community, one has to keep in mind the interpreter's status and position: interpretation by whom and for what purpose? Is it the interpretation by an author of a scientific book? Of a legal adviser to a foreign ministry during the negotiations of a bilateral treaty or of a general codification convention? Of a legal counsel of a State party to an actual or probable dispute? Of a judge in deciding a case before him or her? Of a collective organ, to clarify the meaning of a norm of its own creation, or of its constitution, or with a view to its application to a particular situation?

The 'authoritativeness' (its degree or lack of it) of each of these interpretations, is a function of the above-mentioned factors: the status of the interpreter and the objective of the interpretative operation that determines its orientation. Thus, for gauging this quality in the above-mentioned types of interpretation, we must start by excluding all those put forward *pro domo*, ie, in the course of the interpreter's defence of his own interests or position, or of those he represents. These interpretations may have indirect legal effects (recognition, admission, estoppel, etc). But they do not, and cannot carry an iota of 'authoritativeness', because they are indelibly tainted by a suspicion of subjective bias that annihilates the possibility of them being seen as an unimpeachable reference.

This means that 'authoritativeness' is different from legal effect (though it can subsume it). Some of the above interpretations have a direct legal effect, attached to the formal position of the interpreter within the legal system, such as interpretation by the legislature, which enjoys the *erga omnes* binding force of law, or interpretations in judicial decisions, which are *res judicata* (in French they are significantly described as having *l'autorité de la chose jugée*), ie, a relative legally binding force, limited to the parties (but an indirect *erga omnes* binding force, in the form of an injunction of non-obstruction vis-a-vis third parties). And this, whether or not one considers that the interpretation in question is correct.

The legal effect is attached to the formal status of the interpreter and the legal nature of the instrument carrying the interpretation. In other words, it is the instrument as such, given its source and nature within the legal system, that imparts to the substantive interpretation it carries (regardless of the soundness or unsoundness of this interpretation) the quality of direct and final pronouncement of the law on its subject matter, thus deploying all the legal effects that law attaches to such a pronouncement. In a way, one can describe such a pronouncement as enjoying or having the 'authority' of law. But 'authority' would then be in the general and formal sense of 'due respect to law', owing to its mandatory and enforceable character, ie, to its binding and ultimately coercive power. This is obviously very different from the intrinsic 'authority' or 'authoritativeness' and persuasive power of the substantive interpretation itself.

What makes for this intrinsic quality that begets recognition, respect and deference, even beyond the logical persuasiveness of the reasoning; so that even if one disagrees with some of it, one feels, with awe, the discomfort of having to challenge a well-nigh impregnable presumption of verity?

My short answer, after long reflection, is borrowed from the Ancient Greek philosophy concept of 'place' (*topos*, *locus* in latin). The answer can be found in two such places: the first is the site of an 'oracle', the second of a 'temple'. Neither of them is seen by the community as the lawgiver, but both are considered the conduits and voices that express the law: in one via a person (be it mythified), because of its foreknowledge and foresight; the other via an institution, because of its collective wisdom and sacralised function.

When I delivered the General Course at The Hague Academy in 1987, just after stepping down from the bench of the ICJ as judge ad hoc, I gave the following example, passing from Greek antiquity to present-day actuality:

> What I say here on the podium of the Academy (which is situated in the park of the Peace Palace, the seat of the ICJ) is the opinion of a professor, a doctrinal opinion. At best, and exceptionally, if the professor is very well known and generally considered as an 'authority' in the field, like Anzilotti in his time, his lectures would correspond to the description of the third phrase of article 38(1)(d), of the Statute of the ICJ, as part of 'the teachings of the most highly qualified publicists of the various nations'. If the same lecturer crosses the alley in the park to get to the Great Hall of Justice, 20 meters afar, and sits on the bench of the ICJ, his pronouncements, whether as part of collective decisions, or even as separate or dissenting opinions, correspond to the description of the first two phrases of article 38(1)(d): 'Subject to the provisions of Article 59, judicial decisions'.[4]

The text of Article 38(1)(d) makes a clear distinction between its two components, pointing out the direct legal effects of judicial decisions, owing to their institutional character, ie, their formal position within the legal system: legal effects having

[4] This is a free translation with slight elaboration of the original French text. See G Abi-Saab, 'Cours général de droit international public' (1987) 207 *Recueil des cours de l'académie de droit international* 9.

precedence over their secondary clarificatory effect at one remove, as general interpretations of the law. By contrast, the writings of publicists are deprived of any direct legal effect, because of their personal character; and their mention in second place suggests, consciously or unconsciously a certain hierarchy, perhaps because people in general tend to give greater credence to institutions than to persons, however wise and learned they may be. But both diffuse this intangible quality of intrinsic authority.

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Where does 'evolutionary interpretation' fit in this spectrum of meanings of 'interpretation', and how does the adjective 'evolutionary' qualify or modify these meanings in the different branches and regimes of international law?

That is largely the subject of this book.

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Conclusion

KENNETH KEITH

Certainly, the interpretation of treaties is an art rather than a science; though it is part of the art that it should have an appearance of science.[1]

The interpreter, when exercising that art to discover the meaning of a treaty, may have to resolve the balance between stability and change, static and dynamic readings, heritage and heresy. The authors of the chapters of this valuable book have examined the practising of that art by many courts and tribunals and other bodies in several contrasting areas of international law; they have also considered more general issues including those of a theoretical kind. Their work allows the readers, including this one, to draw some conclusions or at least to cast some reflections. I offer some of my own.

I begin with the proposition that there are treaties and treaties. One size does not fit all. The reference in the first footnote in this book is to a work by AD McNair, a one-time judge and president of both the International Court of Justice and the European Court of Human Rights. I return to one of his earlier articles, published almost 90 years ago. Its title captures its essence – the functions and differing legal character of treaties.[2] He anticipates, and indeed goes beyond, the distinctions made in the Vienna Convention on the Law of Treaties 1969, Articles 5, 53, 56(1)(b), 60(5), 62(2)(a) and 64.

First, McNair distinguishes between treaties of a constitutional character, such as the Covenant of the League of Nations; treaties declaratory of international law or of a law-making kind such as the Hague Conventions of 1899 and 1907; treaties comparable to a conveyance, transferring sovereignty over territory or determining a boundary; treaties creating an objective status, benefiting all the nations of the world; and treaties equivalent to contracts in national law, contracts which themselves may vary greatly, for instance from those which capture a discreet transaction to those which govern a long term, even permanent, relationship.

[1] RY Jennings, 'General Course: Principles of International Law' (1967) 121 *Recueil des cours de l'académie de droit international* 323, 544.

[2] AD McNair, 'The Functions and Differing Legal Character of Treaties' (1930) 11 *The British Year Book of International Law* 100.

Second, he distinguishes, convincingly to me at least, between the legal effects of those different categories of treaties. No doubt, with the passage of time, some of his analysis could be updated, for instance by reference to the International Law Commission's work on the effect of armed conflict on treaties,[3] a matter to which McNair gives some attention, but its essence remains.

To begin with a constitutional treaty, we find the International Court of Justice in the *Namibia* Opinion in 1971 being willing to give an extensively updated meaning to, or application of, the principle of the sacred trust of civilisation stated, over 50 years earlier, in the Covenant of the League of Nations. In that case developments external to the original text, particularly the 1960 Declaration on Decolonization, were critical.[4] Subsequent developments, even over a much shorter period, may also play a part, as in the *Pulp Mills* case where general language in a 1975 treaty was interpreted in the light of more recent practice requiring an environmental impact assessment when the proposed industrial action may have a significant transboundary impact.[5]

Boundaries fixed by treaty receive special treatment under customary international law and the Vienna Convention: the boundaries, subject to the forces of nature, remain fixed, not affected by breach of other provisions of the treaty, by fundamental change of circumstance, by the outbreak of war between the parties, by changes in the parties to the treaty or even by the disappearance of the treaty itself. But the treaty may include provisions that are capable of having a changing meaning or application. In the *Navigational Rights* case, for instance, in addition to its finding, discussed in an earlier chapter, about the meaning and application of the expression '*objetos de comercio*', the ICJ ruled that, over the course of the century and a half since the boundary treaty was concluded, the interests that were to be protected through the exercise by Nicaragua, as the territorial sovereign, of its power of regulation of the river in the public interest may well have changed in ways that the parties could never have anticipated: protecting the environment, it said, is a notable example.[6] I might recall that the Stockholm Declaration on the Human Environment was adopted only in 1972, following close on the heels of Rachel Carson's *Silent Spring* (1963).[7] New scientific findings have been influential as well in human rights cases.

The three cases mentioned, along with some of the human rights cases, have in common that broad wording or a general power was in issue, as was also the case with the provisions of the human rights and refugee treaties addressed in

[3] Annexed to GA Resolution 66/99, UN Doc A/RES/66/99 (9 December 2011).

[4] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Court Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, paras 52–54.

[5] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para 204.

[6] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, para 89.

[7] R Carson, *Silent Spring* (Boston, MA, Houghton Mifflin, 1963).

earlier chapters. But other provisions of the treaties in those cases have a different character. They are specific, with a stable meaning – South Africa, as mandatory of South West Africa was obliged to make a report each year to the League of Nations on the actions it was taking to meet its obligations under the Mandate; the parties in the *Pulp Mills* case were subject to precise procedural obligations; and the Costa Rica–Nicaragua boundary is for the most part on the 'right bank' of the river. Such mixes of general and specific wording are to be seen in treaties in others of the areas discussed.

To be added to developments in scientific understanding, as recognised in the *Pulp Mills* case, are major changes in social attitudes, as seen in human rights and refugee cases. Such changes in understanding may be clarified and consolidated through various processes associated with certain treaty regimes, processes that enable those involved as national or international judges or administrators to share information and opinion.

A further factor favouring a broader reading or application of a treaty text, although mentioned only occasionally, may be the difficulty of amending some of the treaties. The Whaling Convention appears to provide an exception since the International Whaling Commission has the power to amend, by majority vote, the schedule to the Convention regulating the numbers of whales to be taken and areas and times of catch. However, the State parties may exempt themselves from such amendments and, as well, they have the power to withdraw on six months' notice.

The sense I have given so far may be far too rosy. Several chapters describe strong forces against an evolutionary reading or application of treaties. The State parties, in exercise of their sovereignty, have agreed, often following very hard-fought negotiations, to a particular text, nothing more and nothing less. The Uruguay Round, which led to the current World Trade Organization (WTO) agreements, lasted for more than six years and involved over 120 national delegations. According to one very strongly held view, it is not for unaccountable judges or arbitrators to add to the obligations that States have so carefully formulated; international courts and tribunals are not legislators. The opposition to what is seen as overreach is demonstrated, for instance, in the difficulties the WTO dispute settlement process faces at the moment, in the withdrawals from the International Convention on the Settlement of Investment Disputes and from bilateral investment treaties and in the use by the NAFTA parties, even in the course of a pending case, of their power through the Free Trade Commission in effect to amend the Agreement. Such opposition may also be seen in State attitudes to what they see as overbroad readings of human rights treaties, notably in respect of measures taken by States to respond to terrorist acts, and refugee protection, as indicated by significant opposition to the Global Compact for Safe, Orderly and Regular Migration adopted by the UN General Assembly in December 2018.[8]

[8] GA Res 73/195, UN Doc A/RES/73/195 (11 January 2019).

A distinct reason for opposing an evolutionary reading relates to treaties imposing criminal responsibility on individuals. The principles of the non-retrospectivity of criminal liability and penalty and of legality are long and well established. The criticism, some unfounded, based on those principles, directed at the Nuremberg Tribunal and its Charter must be kept in mind. Were the principles put in jeopardy when, for instance, an international criminal tribunal established as a basis for criminal liability the concept of joint criminal enterprise, a concept which appears to run beyond the specific crimes established in the tribunal's statute?

A final reflection concerns judicial technique. Are courts and tribunals, or some of them, now more and more willing to address contextual material which runs far beyond that identified in Article 31(2) of the Vienna Convention on the Law of Treaties? I have the sense that some are, if with caution. To go back to the *Namibia* case, the ICJ called for the Covenant of the League of Nations, along with the Mandate, to be interpreted within the framework of the entire legal system prevailing at the time of the decision, that is in 1971.[9] Courts and tribunals may also sometimes suggest that they are not giving the treaty terms a wider meaning but rather a wider application as, for instance, technology develops, scientific knowledge increases or social attitudes change – is this a way perhaps of deflecting criticism against judicial overreach?

[9] Above n 4, para 54.