Whose Intentionality is it Anyway? Analogizing the Literary Theory Architecture for International Treaty Interpreation

—Vanya Kumar*

In his story Sarrasine Balzac, describing a castrato disguised as a woman, writes the following sentence: 'This was woman herself, with her sudden fears, her irrational whims, her instinctive worries, her impetuous boldness, her fussings, and her delicious sensibility.' Who is speaking thus? Is it the hero of the story bent on remaining ignorant of the castrato hidden beneath the woman? Is it Balzac the individual, furnished by his personal experience with a philosophy of Woman? Is it Balzac the author professing 'literary' ideas on femininity? Is it universal wisdom? Romantic psychology? We shall never know, for the good reason that writing is the destruction of every voice, of every point of origin.

—Roland Barthes, The Death of the Author, 1968[1]

I. (UN)Intentionality

Ronald Dworkin once proposed that the understanding of law can be improved by "comparing legal interpretation with interpretation in fields of knowledge, particularly literature".[2] This article is ripe for an introductory anecdote to contextualise its thesis and exploration of authorial intentionality as a function of the text in legal and literary interpretation: During the twentieth anniversary commemorations of the adoption of the Rome Statute of

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1 Roland Barthes, 'The Death of the Author' [1968] Image, Music, Text 142 transl Stephen Heath (New York: Hill & Wang, 1977) (Barthes).

2 Ronald Dworkin, 'Law as Interpretation' [1982] 9(1) Critical Inquiry: The Politics of Interpretation 179 (Dworkin).

the International Criminal Court ("Rome Statute" or "Statute" and "ICC" or "Court"),[3] discussions with the visiting drafters often centred on Articles 13 and 14 of the Statute, given their fundamental role as some of the 'trigger mechanisms' in the exercise of jurisdiction by the Court.[4] The common sentiment expressed was that negotiations during the drafting of the treaty had concerned themselves with the political risks surrounding referrals by States Parties of situations in which crimes were allegedly committed by other States Parties within the jurisdiction of the ICC, and the import the same would have on the actual referral and prosecution of cases before the ICC. On being questioned about self-referrals—the by-now well-known practice of States referring situations of international crimes allegedly committed in their territory and over which they likely have jurisdiction—and the complementarity and politicisation concerns such referrals may raise,[5] the wry acknowledgment was that self-referrals had received little to no consideration in the negotiations

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3 The Rome Statute, the founding treaty of the ICC, was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, and entered into force four years later, on 1 July 2002. The Rome Statue celebrated its twentieth anniversary on 17 July 2018.

4 The Rome Statute of the International Criminal Court, (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) arts 13 and 14.

art 13:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

art 14:

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

5 While scholarship has been divided on the complementarity question, self-referrals have been allowed by the ICC. Pre-Trial Chamber I in the *Situation in the Democratic Republic of the Congo*, one of the earliest examples of self-referral by a State Party to the Rome Statute, noted that "[i]n the Chamber's view, when the President of the DRC sent the letter of referral to the Office of the Prosecutor […] the DRC was indeed unable to undertake the investigation and prosecution of the crimes falling within the jurisdiction of the Court committed in the situation in the territory of DRC since 1 July 2002. In the Chamber's view this is why the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime, according to which the Court by no means replaces national criminal jurisdictions, but it is complementary to them." The Chamber additionally noted, however, that "the self-referral or statement by the government of a State that it is unable to investigate or prosecute is not binding for the Court" [*Prosecutor v Lubanga* (Decision on the Prosecutor's Application for a warrant of arrest, Article 58) ICC-01/04-01/06-1-Corr-Red (10 February 2006) 35 and footnote 26].

on jurisdictional schema. The drafters had not seriously considered the possibility that States may want to refer situations concerning crimes committed within their own territories.[6] This general understanding was bolstered by the Prosecutorial mandate embedded in the Rome Statute, whereby investigations, in effect, are required to be carried out with reference to entire 'situations' not individuals, implying that a self-referring Government may equally find their authorities a part of the ICC investigation for determining whether specific persons should be charged with the commission of the international crimes that the self-referring Government alleges to have been committed on its territory or within its jurisdiction.[7] Now consider this: the ICC has received about nine self-referrals[8] and *one* case of a State Party referring another State Party[9]

6 Some prominent Commentators have argued that self-referrals flow "from a creative interpretation of Article 14 of the Rome Statute that was not seriously contemplated by the 1998 Diplomatic Conference and during the prior negotiations. The 1994 draft statute submitted to the General Assembly by the International Law Commission included the concept of 'state-party referral' but described the source of the referral as a 'complainant state'. A State [P]arty could lodge a 'complaint'. The court was authorised to exercise its jurisdiction with respect to genocide if a State party to the statute that was also a contracting party to the 1948 Genocide Convention took the initiative to 'lodge a complaint' that genocide had been committed. In the case of aggression, war crimes and crimes against humanity, the court could proceed if a 'complaint' was lodged by the 'custodial state' (i.e., the state which had 'custody of the suspect with respect to the crime') and by 'the State on the territory of which the act or omission in question occurred'. The language makes it clear enough that what was contemplated was a 'complainant State' 'lodg[ing] a complaint' against another state." William A. Schabas 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2008) Criminal Law Forum 19 (1), 13.

7 While the ICC tries individuals for the commission of crimes within its jurisdiction, pursuant to Articles 13(a) and 14(1) of the Statute, States Parties can only refer to the Prosecutor *situations* in which one or more of such crimes appear to have been committed. The Pre-Trial Chamber in *Mbarushimana* recalled that "a State Party may only refer to the Prosecutor an entire 'situation in which one or more crimes within the jurisdiction of the Court appear to have been committed'. Accordingly, a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated" [*Prosecutor v Mbarushimana* (Decision on the 'Defence Challenge to the Jurisdiction of the Court') ICC-01/04-01/10-451 (26 October 2011) 27]. Thus, in referrals by a State Party, including self-referrals, the boundaries of the Court's jurisdiction are delimited by the situation itself.

8 These could broadly be said to include the referrals in the situations concerning the Democratic Republic of the Congo (2004); Uganda (2004); Central African Republic (2004 and 2014); Mali (2012); Comoros (2013); Gabon (2016); Palestine (2018); Venezuela II (2020); and Bolivia (2020).

9 Venezuela I (2018). "On 27 September 2018, the Office of the Prosecutor received a referral from a group of States Parties to the Rome Statute namely the Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru regarding the situation in the Bolivarian Republic of Venezuela since 12 February 2014. Pursuant to article 14 of the Statute of the International Criminal Court (ICC), the referring States requested the Prosecutor to initiate an investigation on crimes against humanity allegedly committed in the territory of Venezuela" (ICC, 'Venezuela I' (*International Criminal Court*) <https://www.icc-cpi.int/venezuela> accessed 23 February 2022). It has been noted that "[t]his is the first time that ICC member governments have sought an investigation of potential crimes that took place entirely on the territory of another country" (Human Rights Watch, 'Venezuela:

—with that one case having been referred *after* two decades of the adoption of the Rome Statute.[10]

II. The Birth of the Vienna Convention and The Death of the Author

The above is ample demonstration that texts, including zealously negotiated, extensively debated, and ostensibly carefully drafted treaty texts, inhere possibilities that are not necessarily restricted by the primary understanding of their authors; the term used herein to also exemplify the drafter.[11] Recourse, in such situations, to the drafting history for primary determination of meaning may, in fact, limit the application of the text, which would otherwise fall within a good-faith interpretation of the ordinary meaning of the terms of the treaty and appear to fit its object and purpose—in the ICC's case, its determination to "put an end to impunity" for the perpetrators of "the most serious crimes of concern to the international community as a whole".[12] After all, it was not claimed, even by some of its drafters, that the application of the Rome Statute in this manner, by the virtue of being unforeseen, was necessarily incorrect. While subsequent practice may be arguable in the circumstance, if early judicial interpretation had foreclosed the avenue in the first instance, the question of subsequent practice may not have arisen at all.

The Vienna Convention on the Law of Treaties ("VCLT") appears to have embedded this nuance in its codification, particularly under Articles 31 and 32,[13]

Six States Request ICC Investigation' (*Human Rights Watch*, 26 September 2018) <https://www.hrw.org/news/2018/09/26/venezuela-six-states-request-icc-investigation> accessed 23 February 2022.

10 ibid.

11 The question of what the applicable law identified under Article 21 of the Rome Statute suggests regarding the interpretative process of the treaty in relation to the customary international law for treaty interpretation is saved for a later date…!

12 Rome Statute (n 4) pt *preamble*.

13 Vienna Convention on the Law of Treaties, (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 31 and 32.

art 31 provides that:

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;

of what the International Court of Justice ("ICJ") has referred to as the customary international law on treaty interpretation.[14] The apparent division of the interpretative processes through the 'general rule' of Article 31 and the 'supplementary means' of Article 32, has led to heated scholarship that either seeks to confirm the hierarchical nature of the application of the interpretative methodology identified in the two articles[15] or, contrariwise, to challenge that understanding by emphasising that the so-called 'supplementary means of interpretation' are not intended as a doctrinally rigid exemption to the general law, but only seek perhaps to limit the purpose for which such means can be employed in the process of interpretation.[16] However, what remains textually undeniable, in the face of differential interpretation, is that the VCLT expressly identifies the *travaux préparatoires* and the circumstances of the conclusion of a treaty as 'supplementary' means of interpretation, recourse to which *may* be had for identified purposes, including (a) confirmation of meaning established through the application of the general rule; (b) determination of meaning in cases where interpretation following the general rule leads to ambiguity or obscurity; or (c) determination of meaning in cases

(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.

art 32 provides that: 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.

14 "Articles 31 and 32 of the Vienna Convention on the Law of Treaties [...] may in many respects be considered as a codification of existing customary international law on [treaty interpretation]." [*Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) [1991] ICJ Rep 70] (*Arbitral Award Case*). That the Vienna Convention indeed *was* codification of customary law on international legal treaty interpretation, while controversial in scholarship at the time of its conclusion, appears to be a generally accepted position contemporaneously.

15 *See, e.g.,* Kenneth J. Vandevelde, 'Treaty Interpretation from a Negotiator's Perspective', [1988] 21 VAND. J. TRANSNAT'L L. 281, 296: The "cornerstone of the Vienna Convention" is a "requirement that courts refrain from inquiring into the parties' actual intentions if the provision to be interpreted is clear on its face"; Isabelle Van Damme, 'Treaty Interpretation and Preparatory Work' [2009] OPINIO JURIS: "Any action and inaction of negotiators preceding the conclusion of the treaty is part of the history of text, but history is not applicable law. From the practice of judicial treaty interpretation, it seems that there exists a presumption that materials evidencing such conduct, statements, or lack thereof cannot inform the meaning of the treaty text. It can be rebutted but the burden of proof is considerable. The larger the group of negotiators and signatories of a treaty, the higher that burden." Both citations, in part, also found in Julian Davis Mortenson, 'The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?' (2013) 107 American Journal of International Law 780, 782 (Mortenson).

16 *Mortenson* (n 15) 780, 781: "Far from adopting a doctrinally restrictive view of drafting history, the Vienna Conference sought to secure its place as a regular, central, and indeed crucial component of treaty interpretation [...] The modern view that Article 32 relegated travaux to an inferior position is simply wrong. The VCLT drafters were not hostile to travaux. They meant for treaty interpreters to assess drafting history for what it is worth in each case: no more, but certainly no less."

where interpretation following the general rule leads to a manifestly absurd or unreasonable result.

This codification of customary international law on international legal interpretation, and its cautioning against an "[investigation] *ab initio* [into] the intention of the parties"[17] for the purpose of authentic legal interpretation, intersected, serendipitously enough, with comparable developments concerning textual interpretation in the field of literary criticism. The latter was perhaps best exemplified in *The Death of the Author*, an essay by the French literary critic and theorist, Roland Barthes, written in 1967 and first published in 1968—just one year before the adoption of the VCLT in 1969.[18]

Barthes, in a (radical) departure from traditional literary criticism, sought to democratise the interpretation of the literary text from its authorship, arguing that the persistent, hyperindulgent critical focus on the intention or biography of the author to establish textual meaning was detrimental to the process of interpretation and indeed was "to impose [an artificial] limit on that text".[19] Barthes rued, in this context, that "the *explanation* of a work is always sought in the man or woman who produced it, as if it were always in the end, through the more or less transparent allegory of the fiction, the voice of a single person, the *author* 'confiding' in us" (emphasis in original).[20] In discussing his thesis further, Barthes asserted that:

> […] [T]he necessity [now is] to substitute language itself for the person who until then had been supposed to be its owner. […] [I]t is language which speaks, not the author; to write is, through a prerequisite impersonality (not at all to be confused with the castrating objectivity of the realist novelist), to reach that point where only language acts, 'performs', and not 'me'.[21]

The performative ambit of language is arguably recognised by the VCLT, which similarly appears to seek to democratise the treaty text from the perilous realm of true intentionality, which may otherwise require divine insight into the consciousness of an indeterminate number of drafters and (States) powers that be, in order to interpret any single provision of a treaty. It focuses, instead, on the good faith understanding of the "ordinary meaning [of] the terms of the treaty in their context and in the light of its object and purpose",[22] firmly establishing "the text [as] the authentic expression of the intention of the parties; […] [and] in

17 ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1996) 2 Ybk Intl L Comm 220 (ILC Draft Articles).
18 *Barthes* (n 1) 142-148.
19 ibid 147.
20 ibid 143.
21 ibid.
22 VCLT art 31(a).

consequence the starting point of interpretation"[23] for the elucidation of meaning. Moreover, while Article 31(4) provides for 'special meaning' to be given to a term if 'so intended' by the parties, the same has to be *established*. Commentators have noted, in this regard, that the standard of proof required for this may be considered fairly high, and that "in view of the general design of Article 31 [...] it is not enough that one party simply uses the particular term in a particular way, but it must show that such a usage reflects the common intention of the parties".[24] It is the language that performs for the reader, not the drafter.

III. The Unity of Duplicity and Multiplicity

The advocacy for the primacy of the text in the process of interpretation in both literary and legal theory is not a wholesale rejection of the history and process of creation of the text. The VCLT more explicitly per Article 32, but *The Death of the Author* too, particularly in "accepting the principle and the experience of several people writing together"[25] as a means of freedom from the "tyrannical" rule of singularity of intention,[26] implicitly suggest that elements concerning process or intent are not necessarily to be ignored, but, instead, are sought to be derived from the text itself. This proposition may not be unusual, particularly in domestic common law jurisdictions: Consider the doctrine of *mens rea*,[27] for example, for which "criminal law consistently, though not invariably, permits findings of intent to be drawn with respect to side-effects which are the virtually certain outcome of [the defendant's] conduct".[28] The *actus reus* can allow for (rebuttable) inferences related to the *mens rea*; the intention is simultaneously existent with and embedded in the actual criminal act, i.e., the text. Intention, considering from a criminal law perspective, is thus dependent on the text (while adding a certain element of morbidity when the situation concerns a literal death). The finding of 'beyond reasonable doubt' based on circumstantial evidence, e.g., is contingent, not on removing the very shadow of doubt from the case theory, but on connecting the links in the chain to form a complete evidentiary set for a reasonable trier of fact to rely on—the multiplicity of possible circumstances and

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23 ILC Draft Articles (n 17).

24 Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 569 (Dörr). Dörr notes that "the main reason why the ILC decided to include an express provision on the point into its draft was to emphasise that the burden of proof lies on the party invoking the special meaning of the term, and the strictness of the proof required." (*Dörr* 569 citing Final Draft, Commentary to art 27, 222 para 17).

25 *Barthes* (n 1) 144.

26 ibid 143.

27 *Actus non facit reum nisi mens sit rea;* an act does not make a person guilty without a guilty mind.

28 Findlay Stark, 'It's only Words: On Meaning and Mens Rea' [2013] 72(1) CLJ 155, 156, citing AP Simester, JR Spencer, GR Sullivan and GJ Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th edn, Oxford 2010), 315.

opposing case theories is distilled into a reasonably indubitable unity in the interpretation of the criminal act.

In a similar way treaty interpretation is thus liberated from the necessarily inaccessible, 'true' authorial intentionality to the realm of ordinary meaning by the VCLT; however, what is 'ordinary' meaning in light of the multiple meanings that words may inhere? Barthes elaborates on the multiplicity (indeed duplicity) of meaning in noting that "recent research [...] has demonstrated the constitutively ambiguous nature of Greek tragedy, its texts being woven from words with double meanings that each character understands unilaterally (this perpetual misunderstanding is exactly the 'tragic')".[29] The VCLT—in attempting perhaps to avert a modern legal tragedy rather than a classical one—pre-emptively departs from a mechanical, strictly literal reading, by inextricably linking 'ordinary meaning' in treaty interpretation to its context dependency; clearly therefore, *prima facie* cognisant that the linguistic creation of any 'ordinary' meaning has to account for the multiplicity of meanings embedded in the same word. What may be 'ordinary' in a particular context may, after all, be quite extraordinary in another.[30] The ICJ in *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* endorsed this understanding of 'ordinary meaning' in quoting from its Advisory Opinion in *Competence of the General Assembly for the Admission of a State to the United Nations*, that "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning *in the context in which they occur*. If the relevant words in their natural and ordinary meaning make sense *in their context*, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words" (emphases added).[31]

The rule of interpretation according to the natural and ordinary meaning of the words employed is, however, not an absolute one.[32] Per the ICJ in *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* "where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it".[33] The effect of the analytical tools of 'good faith', 'context', and 'object and purpose' is, in principle, greater legal

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29 *Barthes* (n 1) 148.

30 *Dörr* (n 24) 568 "[T]he terms of a treaty may have a technical or 'special meaning' due to the particular field the treaty covers." It would be open to debate, however, whether this may be considered a contextual "ordinary meaning" under Article 31(1) or a "special meaning" establishing the common intention of the parties under Article 31(4).

31 *Arbitral Award Case* (n 14) 69.

32 ibid 70.

33 *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa, Preliminary Objections)* (Judgment) [1962] ICJ Rep 336.

certainty, the absence of which may, in more situations than not, lead to interpretative results that would be ambiguous, uncertain, manifestly absurd, or unreasonable, given the diversity of meaning which may otherwise be derived from the terms themselves. This would correspondingly require more frequent recourse to the *travaux préparatoires* for the determination, rather than confirmation, of meaning, and thereby potentially undermine the 'generality' of the Article 31 procedure. Moreover, in adding the consideration of the complete text (context) as a primary interpretative gambit, these tools further mitigate the risk that 'each character' will 'unilaterally' interpret the terms of the treaty per personal circumstance, whim, or fancy.[34]

IV. Ambiguity Deconstructed

Establishing the primacy of the text in the process of interpretation over the *travaux* or an exhaustive (perhaps inexhaustible) *ab initio* investigation of authorial intention has advantages in addition to preventing the inadvertent delimitation of the scope of the text by precluding all derivative meaning other than the explicitly 'intended'—it accounts for constructive ambiguity.

The Barthesian reference to 'constitutive ambiguity' in Greek tragedy, quoted above,[35] facilitates the recognition that language can be misleading, and sometimes deliberately so, particularly to enable action in narrative. In comedic, tragic (or even tragicomic) narratives, linguistic ambiguity is context reliant—characters understand words in their 'ordinary meaning' but often without the benefit of context of a situation as it stands, which consequently precipitates action, whether comic or tragic.[36] In the international legal context, constructive ambiguity is a similar call for action from diplomatic statis or a breakdown in negotiations over principled objections of position; a strategic manoeuvre that exemplifies the many compromises embedded in finalised texts negotiated by numerous actors, including parties with differential, and often competing, domestic interests. The text is deliberately left open to interpretation that may, upon

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34 *Barthes* (n 1) 148.

35 ibid.

36 The same is often true of the renaissance comedies and tragedies. Alyssa Dinega in analyzing ambiguity in Shakespeare's tragedies notes thus in the context of *Macbeth*: "Macbeth is himself undone by the duplicity of the [weird] sisters' language, for he interprets their prophecies figuratively and is uncomprehending of the words' deceptive literal power. He is told that 'none of woman born / Shall harm Macbeth' [and] 'Macbeth shall never vanquish'd be until / Great Birnam wood to high Dunsinane hill / Shall come against him" […], and he exhibits the last traces of the goodness or "humankindness" […] in his straightforward interpretation of these words"; in the context of *Richard III* "[t]he secret of Richard's power in the beginning of the play is his ability to divide language from its intention, to separate physical and figurative meanings, thus to kill while seeming innocent, as, for example, in his farewell words to Clarence before having him murdered: 'Well, your imprisonment shall not be long; / I will deliver you, or else lie for you'" [Alyssa W. Dinega, 'Ambiguity as Agent in Pushkin's and Shakespeare's Historical Tragedies' [1996] 55(3) Slavic Review 533, 536].

ordinary reading, accommodate a conclusion, as well as its polar. To analogise another literary trope: this is the realm of the unreliable narrator.

Consider, by way of example, Article 7(3) of the Rome Statute, which defines the term 'gender' and states that "[f]or the purposes of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above".[37] Scholars have noted that the wording is odd and circuitous, emerging as it did from "difficult and highly contentious negotiations in which the term 'gender' served as a lightning rod for conservative concerns about sexuality […] [and thus] sharply reflected the use of 'constructive ambiguity' by the negotiators".[38] In effect, the provision appears to limit the meaning of 'gender' in the Rome Statute to a seemingly biologically deterministic 'male and female', whilst simultaneously expanding the scope of interpretation of the term by off-setting it with the phrase 'within the context of society',[39] the latter itself "problematised in both concept and interpretation by the multilateral nature of the treaty".[40] The provision apparently forecloses interpretation while simultaneously (and perhaps counterintuitively) embedding greater interpretative flexibility.

It is manifest that first-instance recourse to drafting history and the *travaux* in such circumstances may obscure more than it reveals, since the drafters neither intended nor attempted to embody a common understanding of the meaning of the provision. The VCLT-established approach, however, would suggest that the provision can nevertheless be interpreted in accordance with Article 31, and recourse to the supplementary means under Article 32 could be used *to confirm* the meaning resulting from the application of Article 31, thereby allowing for interpretation that would likely be supported by (some of the) *travaux*. The ideals of the approach may be open to debate;[41] however, it may still be said to

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[37] Rome Statute art 7(3). For a detailed discussion on this subject, *see* Vanya Kumar, 'Society in Context: Re-Gendering the Rome Statute' [2019] 6 GNLU L Rev 241-259 (Kumar).

[38] Valerie Oosterveld, 'The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?', [2005] 18 Harv Hum Rts J 55-56.

[39] *Kumar* (n 37) 249.

[40] ibid. As I questioned previously, "what indeed can be a society as derived from one hundred and twenty two State Party models, each with differential social concerns, cultural tenets, modes of interaction, and societal structures?" The use of the term, therefore, serves the purpose of further highlighting the deliberately ambiguous nature of the construction of the Article.

[41] *See, e.g.,* Martin Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' [1991] 14 BCIntl&CompLRev 111, 131 wherein it is argued that "[r]ecourse to *travaux preparatoires* for the purpose of confirming a textualist conclusion is a precautionary measure. For example, the breakdown of the adversary system due to the non-appearance of a party in *Fisheries Jurisdiction,* or the question of first impression in *Nicaragua* prompted the court to confirm its preliminary conclusions by relying on *travaux preparatoires.* Even though neither case presented a textual problem necessitating recourse to *travaux preparatoires,* the [ICJ] took the precaution of relying on the supplementary materials. Such reliance seems implicitly conditioned on the fact

represent a realistic understanding of the "ever-present tension between State sovereignty and the enforceability of the international norms sought to be codified within treaties"[42] and, indeed, *pacta sunt servanda*[43] in practice—the textual ambiguity is not an inadvertence that needs to be detangled, it is, in fact, central to the consensus achieved. The baton for establishing the true meaning of the text is purposefully, and presumably agreeably, passed on. The parties intentionally thus concur to be bound by the meaning ascribed to the agreed text at a deferred date.

V. Interpreter, Uninterrupted

Who then is the baton passed on to? Naturally the next question to arise is this. Barthes, in discussing the multiplicity of meaning and the unilateral interpretation by the characters, creates this subject as such:

> [T]here is, however, someone who understands each word in its duplicity and who, in addition, hears the very deafness of the characters speaking in front of him – this someone being precisely the reader (or here, the listener). Thus is revealed the total existence of writing: a text is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focused *and that place is the reader*, not, as was hitherto said, the author (emphasis added).[44]

Application of the lens of the reader centralises the apparently obvious, but surprisingly rather side-lined subject of the interpretative articles of the VCLT: the treaty text, the *travaux,* the analytical tools are all evidently geared towards the same entity—the interpreter. Like the Barthesian reader, the interpreter "is the space on which all the quotations that make up a writing are inscribed without any of them being lost".[45] The interpreter "is without history, biography, psychology;"[46] she is simply "that *someone* who holds together in a single field all the traces

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that the *travaux preparatoires* support the preliminary conclusion of the court. What would the court do if the *travaux preparatoires* contradicted its textualist conclusion? Such a contradiction seems inevitable. The apparent lack of such cases in ICJ jurisprudence gives rise to the suspicion that the court admits to resorting to *travaux preparatoires* for support of a textualist conclusion only where the *travaux preparatoires* confirm its initial conclusion."

42 *Kumar* (n 37) 244.

43 The parties to the VCLT noted under preambular paragraph 3 that "the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised". Art 26 of the VCLT titled "*pacta sunt servanda*" provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."

44 *Barthes* (n 1) 148.

45 ibid.

46 ibid.

by which the written text is constituted." A text's unity lies, thus, "*not in its origin but in its destination*".[47]

The interpreter of the treaty is, after all, the persona who navigates, characterises, and ascribes primary meaning to the terms of the treaty. Demonstrably, Articles 31 and 32 of the VCLT do not provide mechanistic tools for thoughtless application; at each turn they require the reader, the interpreter, to make determinations of meaning and to follow the teleological consequences of that determination, whether through confirmation or the need for further determination. In the example of Article 7(3) of the Rome Statute above, Valerie Oosterveld noted that, for the sake of the constructive ambiguity inherent in the provision, "each [negotiating] side gained vague language that can simultaneously mean different things to different people"[48] and both sides lost "some certainty, in that the actual interpretation was left to the Prosecutor and, ultimately, the judges of the ICC".[49] The ICC Office of the Prosecutor has, since then, expressly stated "the Office considers gender-based crimes as those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles"[50], thereby evidently employing the ambiguity in the language towards a progressive construction. Argued further, the interpreter is also the entity who functions as the repository of the *subsequent*, that is, the determiner of subsequent agreements and subsequent practice—thereby advancing meaning that necessarily could not have been foreseen at the time of the act of drafting. The VCLT, thereby, may be said to focus on not merely the determination of meaning of a treaty text, but indeed, on the creation of meaning.

Do *The Death of the Author* and the VCLT thereby subordinate the message of the "Author-God"[51] for the understanding of the "Reader-God"? Surely that is not the case. The VCLT, for one, requires rigor of its interpreter and guides her interpretative actions, nor does Barthesian criticism suggest an over-expansive acceptance of literary interpretation of the any-and-all variety. Both focus, however, on the primacy of the text rather than the author as the authentic expression of intention and appear to create the ideal reader-interpreter as the transhistorical, dispassionate medium, in whom the diversity of the text converges, not necessarily to yield transcendent singularity of meaning of the text itself, but perhaps, the applicable singularity of meaning *in* a *particular circumstance* at a *particular moment in time*. Nevertheless, this too, echoing, for example, the legal conceit of

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[47] ibid.

[48] Valerie Oosterveld, 'Gender Justice Legacies at the ICC. Book Discussion', (2016) Blog, EJIL <https://www.ejiltalk.org/gender-justice-legacies-at-the-icc-book-discussion/> accessed 25 February 2022.

[49] ibid.

[50] ICC OTP, 'Policy Paper on Sexual and Gender-Based Crimes' (2014) <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf> accessed 28 February 2022.

[51] *Barthes* (n 1) 146.

the 'reasonable person' in negligence torts, may be a legal (or literary) fiction. The multiplicity of textual meanings may converge in the interpreter, but that, in no way, guarantees singularity of output. The interpreter 'may' take recourse to the Article 32 means of interpretation, but indeed, she equally 'may' not, even in the situations outlined under Article 32—neither of which would appear to be *per se* incorrect under the good faith ordinary meaning of the VCLT text read in its context, particularly considering that the modification of the prescriptive from the "shalls" of Article 31 therein is evident.

This may seem paradoxical, creating as it does a boundless possibility for different interpretations. Certainty of law is a well-founded legal goal—the codification of customary international law itself suggests benefits to the process of codification. However, the flexibility of approach within the scope of the Article 31 interpretative process is a recognition perhaps of the 'object and purpose' of the process of interpretation itself—the actual application, in good faith, of the treaty in question. Interpretation that utterly frustrates implementation would appear to create Beckettian levels of existential absurdity. The true endgame of treaty interpretation is likely not the academic decipheration of its authentic (and obscure) meaning, but rather the good-faith implementation of its terms. Moreover, overreliance on the *travaux* even with the noble intention of (more) authentic interpretation can also lead to a certain circuitous logic—considering that the negotiations of the treaty text are often contained within documents, surely it would be odd to accept at face value the text of the negotiations (which are often also individual statements of position rather than established consensus of textual understanding) in order to determine the meaning of yet another text. But to further apply interpretative tools to negotiation texts would be a veritable journey down the rabbit hole, and whether Wonderland lies at the end is debatable.

To the wary textualist, this emphasis on flexibility may suggest an approach to interpretation more akin to the teleological; however, the primacy of the text is not in dispute, nor is it suggested that overarching policy objectives are the central tenets of treaty interpretation.[52] Flexibility nevertheless may be considered

[52] As per Francis G. Jacobs, "[t]he teleological approach seeks to interpret the treaty in the light of its objects and purposes. The first question on this approach is not about the meaning of the particular clause which is the subject of interpretation, but a broader inquiry into the objects and purposes of the treaty taken as a whole, and individual provisions of the treaty are construed so as to give effect to these objects and purposes. To a certain extent, this approach is simply a combination of elements of the [subjective and textual] approaches. In so far as it relies on the objects and purposes of the treaty as they are expressed in the text, and especially in the preamble, or can be gathered from a reading of the treaty as a whole, the teleological approach is essentially a variant of the textual approach. In so far as it goes beyond the text and seeks to ascertain the original aims of the parties in concluding the treaty by reference to the entire course of negotiations and the circumstances of its conclusion, it is the subjective approach in another guise" [Francis G. Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' [1969] 18(2) ICLQ 318, 319].

a recognition that progression of law in the transnational sphere resists a fossilisation of meaning—should international law be unable to account for progress, treaties, instead of establishing an international standard of rights and obligations, may instead create a roadblock for progress with archaic global frameworks, unable to accommodate any desired (and desirable) evolution. Moreover, as suggested at the beginning, too severe a foreclosure of meaning by authoritative interpreters attempting to determine the 'true' intention of the drafters and fix the application of the text, may in fact *prevent* subsequent practice which may establish the agreement of the parties regarding its interpretation—otherwise a primary interpretative source.

VI. Purposing the Unforeseen

In addition to the above, international treaties must also be able to account for application in unforeseen circumstances. In this context, Barthes' "unity" of "destination"[53] as embodied in the reader-interpreter includes the advantage of temporality and particularity; facilitating the interpretation in light of the 'object and purpose' of the treaty in its application, as mentioned previously, in a particular situation at a particular time, which the drafter necessarily—unless in this hypothetical they are also later the interpreter—does not have access to.

An illustration may be helpful. Following the accession of Libya to the Chemical Weapons Convention ("CWC" or "Convention")[54] in 2004, the treaty-mandated destruction of the Libyan chemical weapons stockpiles, under international verification, was undertaken by the Organisation for the Prohibition of Chemical Weapons ("OPCW"), the implementing body of the CWC. In 2016, Libya indicated to the OPCW that "it was not realistic to expect that the destruction of the remaining Category 2 chemical weapons would be completed by December 16 without effective international assistance".[55] The security situation surrounding the weapons, including the threat of access by hostile non-State actors, and the lack of technological means to carry forward further treatment of the stockpile was also of concern.[56]

The OPCW Executive Council, following the adoption of United Nations Security Council resolution 2298(2016),[57] decided that the remaining Libyan chemical weapons would be removed from Libya for purposes of destruction outside its territory within the shortest timeframe possible. Pursuant to subparagraph

[53] *Barthes* (n 1) 148.

[54] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, (adopted 3 September 1992, entered into force 29 April 1997) 1975 UNTS 45 (Chemical Weapons Convention).

[55] Grant Dawson and Evangelia Linaki, 'The Legal Challenges in the Mission to Remove the Remaining Chemical Weapons Stockpiles from Libya' [2018] JC&SL 1, 5.

[56] ibid.

[57] ibid 7.

1(a) of Article 1 of the CWC, States Parties undertake "never under any circumstances to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone"—the question, therefore, naturally arose whether it was "legally permissible for the chemical weapons to be moved outside Libya for destruction".[58] In analysing the provisions of the CWC in this context, Grant Dawson and Evangelia Linaki note that one of the central objects and purposes of the CWC is "the destruction of all chemical weapons, which States Parties are obliged to honour and achieve in good faith".[59] Accordingly, a strictly literal approach to paragraph 1(a) of Article 1 may frustrate the CWC itself, particularly in circumstances where movement of chemical weapons becomes a prerequisite for their destruction.[60] The Council, in deciding that Libya "maintained ownership of its weapons" and that States Parties providing destruction assistance "would not be considered as possessor States within the meaning of the CWC,"[61] therefore gave effect to the Convention, in interpreting the ordinary meaning of the terms of Article 1 in its context, and in light of the object and purpose of the Convention.[62]

This instance highlights one of the tenets of international legal interpretation: how the terms of a treaty can create a living document, seemingly authored almost at the time of interpretation and able to accommodate meaning aligned with the purpose identified and imperative in particular circumstances, much in line with Barthes' modern scriptor, who is "born simultaneously with the text".[63] Indeed, "there is no other time than that of the enunciation and every text is eternally written *here and now*".[64]

VII. Conclusion

In his own exploration of law and literature, Dworkin recognised that the question of "what did the author of the work intend it to be" is, in fact, "what most people for a long time have called 'interpretation'".[65]

Neither the VCLT nor *The Death of the Author* subscribe to this understanding. Nor, it seems, does Dworkin, stating as he did that "[b]ut the choice of which of several crucially different senses of [the] speaker's or legislator's intention is the appropriate one cannot itself be referred to anyone's intention but must

58 ibid 10.
59 ibid 13.
60 ibid.
61 ibid 8.
62 It should be noted that the authors suggest that the CWC *travaux* may support the interpretation; however, the *travaux* in the article are employed for the confirmation of meaning, not its determination—well in line with the VCLT.
63 *Barthes* (n 1) 145.
64 ibid.
65 *Dworkin* (n 2) 188.

be decided, by whoever must make the decision [...]".[66] That the VCLT and *The Death of the Author* emerged from different sources, of different origins, and in different fields, at the same moment in history, with—if not the same, then at least comparable—approaches to textual interpretation, is significant for their convergence. If Barthes talks about the futility and impossibility of understanding the true intention of one author—analogised to international legal interpretation and the years, sometimes decades, of dense negotiations in drafting committees, involving parties with oft-competing interests, the task becomes positively Herculean. Given the consequences that might perhaps follow incorrect legal interpretation over incorrect literary interpretation, and the capacity for error that inheres an "an investigation *ab initio* into the intentions of the parties,"[67] it is not surprising that the VCLT too recognises the primacy of the text as the expression of the authentic intention of the parties. The importance then of the role of a conscientious interpreter is manifest: as stated by Justice John L. Murray in the context of the role of a judge, persistent tensions regarding the 'true intent' of a legal norm are unsurprising, when it is considered that "at first, there is the law; then there is interpretation. Then interpretation is the law".[68]

To Barthes, "[o]nce the Author is removed, the claim to decipher a text becomes quite futile." To give a text an Author is "to impose a limit on that text, to furnish it with a final signified, to close the writing."[69] The VCLT certainly doesn't go that far; the place of the Drafter (as embodying the parties) is not strictly with the Barthesian Author. The Barthesian Author is the dead myth, whom it is necessary to overthrow to give writing its future, for "the birth of the reader must be at the cost of the death of the Author"[70]—the former being the true inheritor and creator of meaning. The VCLT Drafter,[71] on the other hand, in case dead at all, is certainly active in the afterlife; their instructions bolstering the interpreter reading the text "*here and now*,"[72] and guiding her through the treacherous waters of ambiguity and absurdity.

Moreover, the VCLT Drafter has tools at their disposal that the Barthesian Author may not: amendments. It may be recalled that the text being considered in literary interpretation is generally fixed. It is not argued even by Barthes that authorial intentionality has no effect or consequence on the text at all, nor that

[66] ibid 195.

[67] *ILC Draft Articles* (n 17).

[68] Justice John L. Murray, Report on Methods of Interpretation – Comparative Law Method', (2007) Actes du colloque pour le cinquantième anniversaire des Traités de Rome 39 <https://curia.europa.eu/common/dpi/col_murray.pdf> accessed on 28 February 2022.

[69] *Barthes* (n 1) 147.

[70] ibid 148.

[71] The term is used to personify the parties to a treaty, not the drafters of the VCLT themselves—the Barthesian Author is the author as theorised by Barthes, the VCLT Drafter is the drafter as theorised by the VCLT.

[72] *Barthes* (n 1) 145.

an author is somehow precluded from changing or editing a work-in-progress to further clarify her 'intended' meaning should it be unclear. However, once complete, the text is the authentic premise, for which the existence of an author becomes meaningless, as it is the reader who shall ultimately 'create' the text as the final arbiter of its meaning. Once the genie is out of the bottle, it cannot be pushed back in agreeably; the 'intention' of the author is subsumed by the many thousand interpretative theories, and authorial clarification at this stage becomes *another interpretation* rather than the final word in authentic meaning. The Barthesian Author may, of course, write sequels to try and shut down disagreeable interpretation, but she will almost certainly be accused of retconning, and subsequent interpretation shall discard this attempted external imposition of meaning, even by its own author, as incompatible with the primary text—such is the power of the Barthesian Reader.[73]

The VCLT Drafter, however, has the power to comprehensively foreclose what they may consider overreach by the interpreter, including through amending the text of the treaty to bring it closer to their understanding of the authentic 'intention' of the parties whose agreement is the genesis of the text. Like the parts of the Ship of Theseus, the actual individual drafter or negotiator is endlessly replaceable (as representatives of the (States) parties to the treaty or the primary drafters may keep changing), but the text which results through further negotiations or amendments remains the authentic expression of the (States) 'parties'. Moreover, the VCLT Drafter, in the context of the negotiation of individual treaties, has the prerogative of expressly defining the applicable law or creating

[73] René Glas describes retcon as "a term coming from 'retroactive continuity', which originated in the culture of serialised comics. In comics, retcons describe the liberties that comic writers and artist sometimes take to reinvent superheroes with a longstanding narrative tradition like Batman or Superman, just to keep them fresh or introduce them to new audiences" [René Glas, 'Performing on the Edge of Rules and Fiction' in René Glas (ed) *Battlefields of Negotiation: Control, Agency, and Ownership in World of Warcraft* (1st edn, Amsterdam University Press 2014) 146]. Sam Leith explains this "trick" as "more or less subtle versions of saying 'he wasn't killed in the explosion, he was just, um, buried under a pile of rubble and lost his memory for 40 years, but now he's back'" [Sam Leith, 'One of these Comic Heroes Really is Dead' (*The Telegraph*, 12 March 2007) <https://www.telegraph.co.uk/comment/personal-view/3638405/One-of-these-comic-heroes-really-is-dead.html?fb> accessed 27 February 2022]. Wikipedia, in a fairly comprehensible definition, defines it as "a literary device in which established diegetic facts in the plot of a fictional work (those established through the narrative itself) are adjusted, ignored, or contradicted by a subsequently published work which breaks continuity with the former" <https://en.wikipedia.org/wiki/Retroactive_continuity> accessed 27 February 2022. The same is usually analogised for interpretation, wherein interpretation by the primary author of the text is given no greater status than that of any other reading basing themselves on the text. A piece on the sitcom *Community* argues that while the seemingly disjunctive views expressed by the creator may reflect the "views and ideas of what [the creator] intended to show in a scene" it is nevertheless "up to the viewers to interpret it for themselves based on the dialog and performance of the actors." In invoking *The Death of the Author*, it notes that "a work of fiction should stand on its own [and] once released it belong to the readers/viewers and not the creator" [Matt, 'Community Finale was the Jeff and Annie Endgame' (*Medium*, 23 September 2020) <https://mattaf30.medium.com/community-finale-was-the-jeff-and-annie-endgame-8cb1a8b51af5> accessed 27 February 2022].

specific modes for interpretation of particular treaty texts, that may then be *lex specialis* in relation to the interpretative articles of the VCLT—many international criminal law statutes, for instance, may follow the interpretative principle of *in dubio pro reo*, as a corollary to the presumption of innocence, including by embedding it within the statutory text.[74] There would appear to be no *per se* preclusion to individual treaties expressly prioritising the intention of the VCLT Drafter/parties as a primary source of interpretation.

The VCLT and *The Death of the Author* may thus be considered equally significant for their divergence. Barthes himself may have been surprised (if not outright appalled) at this comparison, considering as he did, that his thesis "liberate[d] what may be called an anti-theological activity, an activity that is truly revolutionary since to refuse to fix meaning is, in the end, to refuse God and his hypostases—reason, science, law".[75] However, perhaps even more surprising to him would have been discovery that his revolution could almost be considered the normative: the VCLT was, of course, codification of *customary* international law, law that preceded and was acknowledged; while in an international criminal tribunal, it could well-be argued—at least in front of a Pre-Trial Chamber determining 'reasonable grounds to believe' as the burden of proof for the confirmation of charges—that Barthes himself killed the Author. Barthesian theory was a break, the VCLT a continuity.

Dworkin contemplates that "a theory of interpretation must contain a subtheory about identity of a work of art in order to be able to tell the difference between interpreting and changing a work".[76] In this, the existence of (accepted) theories of interpretation are themselves triumphs: their mere existence ensures that authors are aware, at the outset, of the analytical tools that will generally be used to determine the meaning of their text and can reverse-engineer their intended meaning into the writing of the text, bringing the interpreter closer to authentic intention as expressed in the text, and thereby working towards reconciling the ever-present, ever-theorised question of whose intentionality it really is anyway.

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[74] *See*, *e.g.,* art 22(2) of the Rome Statute which provides "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

[75] *Barthes* (n 1) 147.

[76] *Dworkin* (n 2) 183.