# 1

# The Province of the Rules of Treaty Interpretation

## 1.1 The Bias

Lawyers are enchanted by rules. We work with and through them. Our arguments and our claims are all based on them. We endorse or fiercely oppose their application. It is our professional duty to know them. We give them life by using them daily, and yet they have a life of their own. They come into existence with significant effects on peoples' everyday lives. They can live long and thrive, or be suspended, terminated, or set aside as invalid. We constantly look them up. We also look up to them, as they provide a certainty and stability that would be lacking in their absence. Most of all, however, they give us the power and entitlement that we need in the profession to lay claim to authority vis-à-vis the people and the institutions we address. In many ways, rules are the universe that lawyers inhabit. They have become a second skin, and we no longer realize that we are literally ruled by them. This is not really a major concern to us, as we are at the same time naturally submitted to the authority of the law that we associate with rules and empowered by it. Our professional mindset is calibrated to work on this basis.

It is unsurprising that when we think of treaty interpretation as international lawyers, our reflex (and bias) is to conceive of it as a rule-based activity. The text of a treaty provision becomes the object of investigation to be subjected to the application of the rules of treaty interpretation as codified in Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT).[1] Its meaning will be unveiled, brought to the surface, and revealed by applying a set of rules. The VCLT rules are meant to lead us to the correct legal meaning of the treaty provision to be interpreted. There is hardly any legal argument about treaty interpretation, be it in a judgment, a pleading, a brief, or a scholarly article, that does not take the VCLT as its benchmark. There is no doubt that, in both international law scholarship

[1] The text of Articles 31–33 of the VCLT is reproduced in the Annex.



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and practice, this 'myopic focus on the rules of treaty interpretation, codified in Article 31 of the VCLT', constitutes the 'state of play'.[2] Jan Klabbers expresses the same idea when he writes that 'in all things international', the 'consensus position' is 'always [to] interpret in accordance with the rules of the Vienna Convention'.[3]

The fact that 'international lawyers have come to be obsessed with the rules of the Vienna Convention' is hardly a contestable contention.[4] This is curious, because until recently interpretation was characterized as an art rather than as a science, its basis lying in principles and maxims having a 'non-obligatory character'.[5] As an art, one would expect interpretation not to be unduly constrained by fixed and rigidly applied rules. Yet, as claimed in a monograph on the subject, 'the text of the Vienna Convention, the process of its drafting, and the practice of its application are all unanimous in affirming that the rules on treaty interpretation are fixed rules and do not permit the interpreter a free choice among interpretive methods'.[6]

The rigidity and authoritative character of the rule-based approach is reminiscent of the peremptory character of religious commands. 'Whatever I command you, you shall be careful to do; you shall not add to nor take away from it', says God (through Moses) to the Israelites in the Book of Deuteronomy.[7] Similarly, the World Trade Organization's Dispute Settlement Understanding stipulates that '[r]ecommendations and rulings of the DSB [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements'.[8] Faced with such commands, there is hardly any space left for thinking about the

[2] D. Peat and M. Windsor, 'Playing the Game of Interpretation: On Meaning and Metaphor in International Law', in A. Bianchi, D. Peat and M. Windsor (eds.), *Interpretation in International Law* (Oxford University Press, 2015), 3–4.

[3] J. Klabbers, 'Virtuous Interpretation', in M. Fitzmaurice, O. Elias and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, 2010), 17–24.

[4] *Ibid*., 17.

[5] *Yearbook ILC*, 1966, Vol. II, 218: '[M]any of these principles and maxims … are, for the most part, valuable only as guides to assist, in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document … In other words, recourse to many of these principles is discretionary rather than obligatory and then interpretation of documents is to some extent an art, not an exact science.'

[6] A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008), 309.

[7] 'Laws of the Sanctuary', *Deuteronomy* 12, §32.

[8] Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the World Trade Organization Agreement, Article 3(2).

rationale and assumptions that may have inspired and prompted them. The fundamental belief is in the rules as avatars of an unquestionable and unquestioned authority.

## 1.2 Conventional Wisdom

In international law, when we think about treaty interpretation, we typically adopt a 'how to' interpret mindset that orients us immediately to the rules of treaty interpretation. As lawyers, we have a tool kit from which we pull out the good rules. A competent international lawyer is one who knows which rules to apply in order to discover the meaning of the text, without adding to or taking away anything from it. The route to the correct interpretation of the meaning is disconcertingly simple because the rules on treaty interpretation are conveniently assembled in the VCLT – the alpha and omega of treaty interpretation to international lawyers. There is practically no judgment, no argument by counsel, no scholarly piece, and no student exam dealing with treaty interpretation that does not begin and end with the VCLT. To dispense with the VCLT when talking about treaty interpretation would be akin to mentioning the 1986 World Cup match between England and Argentina without mentioning the 'hand of God' goal scored by Maradona, or speaking of Harry Potter without visualizing his magic wand or impersonating actor Daniel Radcliffe's round, bespectacled face.

Conventional wisdom has it that Article 31 and the other rules of treaty interpretation will get us to the correct meaning of treaty provisions if competently applied. This belief in the unconditional power of the VCLT rules is quite astonishing, particularly if one concedes that the rules in question are 'very banal', as Joe Verhoeven once put it.[9] But this remains an almost isolated instance in international legal scholarship. Would it be conceivable to interpret a treaty provision in bad faith, not in accordance with the ordinary meaning of the terms that appear in it, outside of context, and without even bothering to examine its object and purpose? The interpretive methods proposed in the VCLT are not really strict rules. Instead, they are means to rationally justify certain interpretive outcomes, so as to give the parties the impression that a professionally competent job

[9] J. Verhoeven, 'Le point de vue des praticiens' (2006) *Revue Belge de droit international* 432, 451: 'I find the rules on treaty interpretation very banal. If there is a rule that does not seem to mean much, this is Article 31. I do not see how, in order to interpret a treaty, one should start from the rule, interpret it in bad faith, not follow the meaning of its terms, and not take into account what the treaty provision aimed to accomplish' (our own translation).

**Figure 1.1** The Wise Owl.
Wikimedia commons, work released into the public domain by the author (Pearson Scott Foresman).

has been done.[10] Yet it would be difficult for international lawyers not to think of interpretive activity related to a treaty without immediate resort to the VCLT rules.

It is hypothetically conceivable that one could think of the interpretive enterprise without making VCLT associations, but it almost never happens. Because they are rarely called into question, certain links or associations become natural reflexes and end up being regarded as unassailable truths. Due to constant reiteration, they become integrated into our professional habits and personal worldviews. Most significantly, however, they become part and parcel of our individual and collective imaginaries. The sense of familiarity that certain images or mental associations evoke bears a resemblance to the special relationship that international lawyers entertain with the VCLT rules on treaty interpretation.

## 1.3 The Eiffel Tower

To further illustrate the point, a look at Roland Barthes' essay 'The Eiffel Tower' is in order.[11] In this short and insightful piece, Barthes explores the

[10] *Ibid.*: 'There is just … a series of methods that are foregrounded to provide a rational justification, so as to leave the party more or less persuaded that one has accomplished an intelligent job. But this is not a rule' (our own translation).

[11] R. Barthes, *A Barthes Reader* (Hill and Wang, 1975), 236–250.

**Figure 1.2** The Eiffel Tower.
Nerthuz/Alamy Stock Photo.

multifaceted functions that the Eiffel Tower performs in the culture, collective imaginary, and everyday life of Parisians. No matter where one is in Paris, one always either sees where the Eiffel Tower is or knows where it stands. It could be a passing glimpse from a tiny apartment window, a full-fledged view of the monument from a balcony, or even the thought that if one walks out of a building and turns the corner – the Eiffel Tower will just be there. It is a landmark like no other, both visual and symbolic. You can live north or south of it, close or far. Such general indications will provide your interlocutor with both a landscape and a sense of position, a reliable guidance and a shared identity.

For Barthes, the Eiffel Tower is fully 'incorporated into daily life'.[12] Seen or seeable by every Parisian, its sight or perception connects people wherever they may be in Paris. Its friendly character makes it present not only in the culture and imaginary of Parisians. Even worldwide, the Tower is a friendly presence. It is a symbol of Paris, and it connotes France and its culture. In collective imaginary, it represents 'the inevitable sign … confronting the great itineraries of our dreams'.[13] It could evoke

[12] *Ibid.*
[13] *Ibid.*, 237.

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plenty of different images (rocket, stem, derrick, lightning rod, insect), and represent many concepts (modernity, communication, science, the nineteenth century). Everyone can see in the Tower an image or symbol of something. Distinct meanings can be appropriated by anyone without infringing on its universality.

Other monuments in other cities have already come to play a similar role. They may be popular, cherished, and treasured. Few, however, enjoy the symbolic value and the cultural purchase of the Eiffel Tower. This may be so – as Barthes says – because '[t]his pure – virtually empty – sign is ineluctable, *because it means everything*'.[14] Here lies the secret of the Eiffel Tower and the reason for its 'prodigious propensity to meaning': it is 'a pure signifier … a form in which men unceasingly put *meaning*'.[15] This meaning can be 'extracted' from people's knowledge, dreams, or history and does not need to ever be 'finite and fixed'.[16] But one can be sure that the Tower will always have the power to produce meaning, as object or symbol, in its materiality and beyond.[17]

The analogy to the VCLT and its place in our professional imaginary as international lawyers is self-evident. When it comes to treaty interpretation, every international lawyer takes the VCLT as a lodestar. Its rules are meant to provide certainty and stability in the otherwise unruly world of unilateral interpretations of international law by states. The VCLT is incorporated into our daily life and it is part of our intellectual and practical landscape. No matter where we stand, as counsel, academic, or judge, we always have a perspective on it, and we know that everyone else, regardless of their professional role and responsibilities, will know exactly how to locate and relate to the VCLT's interpretive rules.

This is also the reason why the VCLT connects international law professionals just like the Eiffel Tower connects Parisians. It makes them feel part of the same space and geography. It constitutes a reassuring presence, something to turn one's gaze to in order to orient and locate oneself in the 'city'. It is a shared symbol of unity of purpose. It provides the community with the comforting thought that no matter where one is there will be always a way to relate to it in a way that is accepted by all its members. Everything can be seen or found in the interpretive rules of the VCLT.

[14] *Ibid.* (emphasis in the original).
[15] *Ibid.*, 238 (emphasis in the original).
[16] *Ibid.*
[17] *Ibid.*: 'Glance, object, symbol, such is the infinite circuit of functions which permits it always to be something other and something much more than the Eiffel Tower.'

It is a placeholder for the apparently opposite values of universality and distinctiveness. It is universal for being recognized and accepted by all as the instrument to apply to treaty interpretation. At the same time, it can provide for discrete solutions that can match everyone's interpretive needs and, in so doing, reinforce its universal appeal.

In that respect, the VCLT regime could also be seen as 'a pure signifier' that can attract an almost infinite variety of meanings. Any interpretive solution is at the disposal of the user, depending on their needs and inclinations. 'Ordinary meaning' can be invoked by staunch supporters of textualism, or by those who believe that the text can only reflect the intention of the parties at the time the treaty was concluded. 'Object and purpose' can either support or disrupt 'ordinary meaning', and a 'special meaning' as expressed by the parties can always be called in aid to support an alternative construction. Lest we forget, 'subsequent practice' or 'any relevant rules of international law applicable in the relationship between the parties' can be deployed to help part company with undesired results obtained by the application of other interpretive rules.

Far from being a relativist description of the myriad interpretive possibilities that the VCLT affords, this account is instead a matter-of-fact acknowledgement of the role and function that the VCLT regime of treaty interpretation plays for international lawyers. In some ways, it is a constant and benign presence that reassures us as to the existence of a structured framework that can guide us through the process of treaty interpretation. The fact that we share that framework with the other members of the profession provides us with a common sense of purpose. In many ways, our familiarity with the VCLT rules is a constitutive element of our identity as international lawyers.

One additional element that can be drawn from the proposed analogy is Barthes' description of the Eiffel Tower's dual character as both a highly sophisticated technical object and a 'familiar "little world"'.[18] The oblique insertion of the metal pillars on the ground which matches the obliquity of the elevators that do not climb vertically but follow the curve of the tower, and the odd assemblage of endless plates, beams, and bolts, eventually blend to form rectilinear forms. Upon closer scrutiny, however, these forms appear as 'composed of countless segments, interlinked, crossed, divergent'.[19] The tower as an object, Barthes writes, 'furnishes its observer,

[18] *Ibid*., 249. On the importance of objects to international law see Jessie Hohmann and Daniel Joyce (eds.), *International Law's Objects* (Oxford University Press, 2018).

[19] Barthes, *A Barthes Reader* (*supra* n 11), 249.

provided he insinuates himself into it, a whole series of paradoxes, the delectable contraction of an appearance and of its contrary reality'.[20]

This is certainly reminiscent of the perceived highly technical nature of treaty interpretation. Skirmishes about legal interpretation take place in courtrooms and law journal articles, in books and legal briefs. Virtuoso performances in the use (and abuse) of the rules of treaty interpretation according to the VCLT mark counsel's careers, enhance or diminish a judge's prestige and credibility, and determine the academic fate of scholars and students alike.[21] The common thread for all contestants in the battleground of treaty interpretation is the belief that the correct application of the rules will lead to the correct meaning and, therefore, to victory. The latter is associated almost invariably with the superior technical skills of those who master the use of the VCLT rules in order to arrive at the meaning of a treaty term.

At the same time, the Eiffel Tower is a 'familiar "little world"' of its own. It is a 'form of life' where plenty of activities take place. Cafés and food stands, souvenir vendors and other shops, intersperse visitors' pathways to the Tower and provide comfort and amusement. To shop for a miniature tower or postcard, or order a cup of tea while looking at the Tower's metal structures, are ordinary activities that perform a 'space-taming function'.[22] It is 'by these simple gestures that men truly dominate the wildest sites, the most sacred constructions'.[23] Likewise, putting forward or countering arguments on ordinary meaning, or exchanging views on what the object and purpose of a treaty is, connotes the 'form of life' in which we international lawyers live and thrive. There is no unwelcome surprise, or dramatic shift of paradigms. We easily find our bearings within a friendly and familiar framework that under no circumstances threatens our interpretive preferences.

The Eiffel Tower is a piece of architecture, which is 'always dream and function, expression of a utopia and instrument of a convenience'.[24] The VCLT rules of interpretation can also be regarded as having an architectural structure with a similar dual function. On the one hand, they allow international lawyers to indulge the myth of unity and coherence of the law by providing a generally applicable set of rules that are supposed to

[20] *Ibid.*
[21] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 86.
[22] Barthes, *A Barthes Reader* (*supra* n 11), 249.
[23] *Ibid.*
[24] *Ibid.*, 239.

guarantee the uniform interpretation of all sorts of treaties regardless of their subject matter. The utopian dimension of the interpretive activity as an objective and perfectly neutral process is thus preserved. On the other hand, the rules are sufficiently varied and general in character to allow for specific interpretive solutions whatever the case at hand. In other words, they are an expedient instrument to achieve the desired interpretive result on a case-by-case basis. The tension between the universal and the particular, the utopian and the concrete, is no flaw in the architecture but the very reason for its enduring success. Ultimately, the Eiffel Tower fulfils 'the essential function of all major human sites: autarchy',[25] namely a place that is self-sufficient and needs nothing else to function. By the same token, the rules of treaty interpretation aspire to autarchy to fulfil their alleged primary function of finding the meaning of treaty provisions.

The reader may think that the analogy between the Eiffel Tower and the VCLT is far-fetched, and that its intellectual and practical cascade effects on treaty interpretation are exaggerated. In fact, it is just a novel way of thinking about what we do. By comparing objects and concepts, analogies are not meant to produce scientific demonstrations of sameness. They rather aim at tracing some correspondence or similarity between them in order to shed light on some of their characteristics or particular traits, their nature or functions. To realize that our collective professional imaginary is a space occupied by objects and systematized through concepts and categories that we have integrated into our mindset via our lawyerly training can help us better understand the mental activities that guide us through the process of interpretation, which – needless to say – is hardly a matter of rules.

## 1.4 The Game of Chess and the Illusion of Rules

The illusion in which we international lawyers partake is that the VCLT rules of treaty interpretation, if correctly applied, will lead us to the legal meaning of treaty terms and provisions. We are convinced that we can competently and – even more to the point – correctly interpret the law, *because* we know the rules of interpretation. In other words, we hold the belief that the rules of treaty interpretation, codified in the VCLT and declaratory of customary international law, are determinative of meaning. Although this is not something we often think about explicitly, our professional reflexes quite naturally lead us to make the association that

[25] *Ibid*., 250.

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the rules are conducive to meaning, and that provided one masters the former, there can be no doubt that one will get the latter right.

This posture is entrenched in the profession and is hardly ever called into question. The reasons for this are numerous, including faith in the objectivity and neutrality of rules, and the allure of certainty in an otherwise highly subjective process of interpretation, which creates the illusion that meaning can be apprehended as a form of truth by skilled professionals using the right tools, namely rules. In many ways, the reasons put forward to buttress the fundamental role of rules in treaty interpretation also serve to put distance between the interpretive decision and the decision maker. The latter can hide behind the former, claiming that the interpreter does nothing other than reveal the correct interpretation of legal provisions, the meaning of which can be found by applying neutral and generally applicable rules of treaty interpretation. The rules allow the interpreter to understand meaning, which is brought to light by their proper application. In our collective professional understanding, the activity of treaty interpretation is defined and operationalized by rules. In other words, it is the rules of treaty interpretation that characterize the essence of the practice of treaty interpretation.

In this section, we reconsider this widely held assumption and inquire afresh about the role and function of rules in treaty interpretation. To do so, we shall have recourse to a debate that has occurred in philosophy concerning the role of rules in defining an activity, an institution, or any social practice. In particular, Hubert Schwyzer took issue with the widely held conviction among philosophers that language is determined and defined by a set of rules that allow us to grasp the meaning of the speech acts we perform.[26] According to the philosophical orthodoxy, activities and practices can be seen as '*systems of rules* and the rules *define* them'.[27] So are games, such as the game of chess. According to some, the rules that the bishop can move diagonally, the rook vertically or horizontally, and all the other rules that determine how the pieces can be moved on the chessboard, constitute the game of chess. If the queen were not allowed to move

[26] H. Schwyzer, 'Rules and Practices' (1969) 78 *The Philosophical Review* 451. Schwyzer quotes W. P. Alston, *Philosophy of Language* (Prentice Hall, 1964); W. P. Alston, 'Linguistic Acts' (1964) 1 *American Philosophical Quarterly* 138; J. L. Austin, *How to Do Things with Words* (Harvard University Press, 1962); J. Rawls, 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3; J. R. Searle, 'How to Derive "Ought" from "Is"' (1964) 73 *Philosophical Review* 43; and J. R. Searle, 'What Is a Speech Act?', in Max Black (ed.), *Philosophy in America* (Cornell University Press, 1965), 221–239.

[27] Schwyzer, 'Rules and Practices' (*supra* n 26) 452 (emphasis in the original).

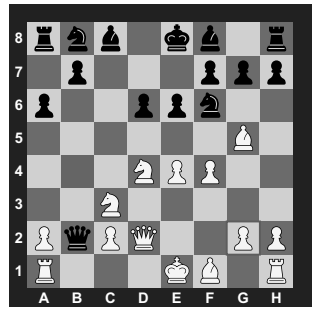


**Figure 1.3** The Chessboard.
Alexander Ryabintsev/iStock/Getty Images Plus.

freely on the chessboard, or if a pawn could advance three squares, we might conclude that we are no longer playing a game of chess. This is why we believe somewhat simplistically that the rules define the game, and that – as John Searle contends – '[t]he activity of playing chess is constituted by action in accordance with these rules'.[28]

Schwyzer subtly distinguishes the idea that a given activity such as the game of chess should be played in accordance with some rules from the assertion that the rules define the activity of chess playing, meaning that the activity is constituted by action in accordance with the rules.[29] In fact, while the rules of chess may help us to understand the difference between chess and football or tennis, they are incapable of telling us 'what kind of thing chess playing is'.[30] What captures the essence of chess is rather 'a matter of what sort of things *it makes sense to say with respect to chess*, of what sort of things are, in a logical sense, relevant or appropriate to say with regard to chess',[31] such as 'let's play chess', 'good move', 'well played'.[32] These expressions are appropriate to be used in the context of chess, as they belong to the 'grammar' of chess.[33]

The point about the role of rules is illustrated by a compelling example. Schwyzer asks one to imagine a visitor to the fictitious country of

[28] Searle, 'How to Derive "Ought" from "Is"' (*supra* n 26) 55.
[29] Schwyzer, 'Rules and Practices' (*supra* n 26) 454.
[30] *Ibid*., 455.
[31] *Ibid*., 454.
[32] *Ibid*., 455.
[33] Schwyzer takes the term 'grammar' from L. Wittgenstein, *Philosophical Investigations* (Oxford University Press, 1967), paras. 371, 373: 'Essence is expressed by grammar … Grammar tells what kind of object anything is.'

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Ruritania, who happens upon a group of people sitting in a circle on the floor and speaking to one another. In the middle of the room, there is a small table with a chessboard and pieces arranged on it as if a chess game were about to start.[34] After some time, two men in elaborate clothes enter the room and stand on the two sides of the table. They start moving the pieces on the chessboard according to the rules of chess. They concentrate closely on the actions they perform, but they do not seem to follow any known strategy for the game. After a while, when the white check mates black, everyone seems relieved and starts congratulating one another.

Rather puzzled at what she saw, the person visiting the Ruritanians was convinced that she had watched a chess match, however unconventional the attitudes of players and bystanders. Later in the day, she takes a chessboard out of her backpack and invites her Ruritanian friend to play the game. Her friend reacts with disdain, accusing her of blasphemy for wanting to play chess and for having presumably forged the chessboard. After a rather heated exchange, the misunderstanding is resolved. In fact, in Ruritania, each community has only one chess set, which is used for divinatory purposes. If white check mates black, crops will flourish and the community will thrive. If black check mates white, the opposite will occur. The whole process is a sacred rite and no game at all. No one wins or loses, chess is not a competitive contest, the expression 'let's play chess' carries no meaning at all, and the Ruritanian priests moving pieces on the chessboard by the rules of what we know as the game of chess do not intend to play a game. They only want to find out the will of the gods. To say and do the things we usually do when we play chess have no meaning in this particular context. The attitude of the Ruritanian people, their utterances, and their comments provide the grammar by which it is possible to understand the meaning of what they do and speak about.

What distinguishes the Ruritanian rite of chess from our game of chess does not lie so much in what goes on the board and whether the pieces get moved in the same way, but rather in the role that the activity in question plays in the lives of those who perform it and for whom it is a practice. It is exactly this 'that makes the one a sacred rite and the other a competitive game'.[35] This is the reason why, according to Schwyzer, it is not appropriate to characterize the game of chess as a system of rules. What playing chess means is not explained by the rules: 'Playing chess does not *consist* in acting in accordance with the rules … The rules of a practice do not

[34] *Ibid*., 456 ff.
[35] Schwyzer, 'Rules and Practices' (*supra* n 26), 464.

tell us *what* the practice is of which they are the rules.'[36] Schwyzer thus convincingly argues that 'rules do not and cannot define the nature of an activity' and that 'the rules of chess, for example, do not explicate what it is to play chess'.[37]

By the same token, one could say that the rules of treaty interpretation do not define the nature of the activity of treaty interpretation, and that these rules do not explain what it is to interpret a treaty. If to interpret a treaty provision or any other legal text implies attributing a meaning to it, this meaning can only be inferred or derived by a social practice, and no social practice is captured solely by rules.[38]

## 1.5 Meaning and Rule Following

Ludwig Wittgenstein famously expressed scepticism about the role of rules in determining meaning and in ensuring stability and consistency. By showing that knowledge of rules does not imply knowing how to use and to follow them, Wittgenstein paved the way for reassessing the role of rules in language and social intercourse. In particular, Wittgenstein maintained that the correct use of language is determined not by formal rules but by its use, and the fact that rules are followed and obeyed is nothing but a social practice.[39]

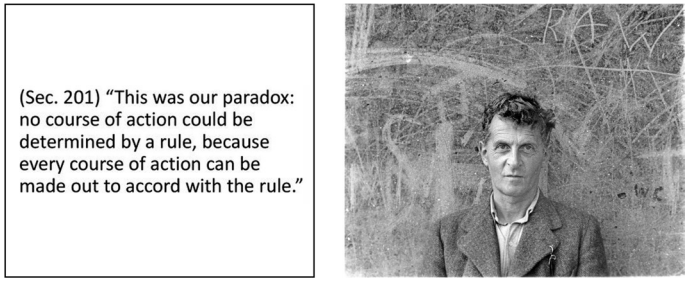


**Figure 1.4** Ludwig Wittgenstein, *Philosophical Investigations* (translated by G. E. M. Anscombe; Pearson, 1973).
© Wittgenstein Archive Cambridge.

[36] *Ibid*. (emphasis in the original).
[37] *Ibid*., 453.
[38] I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012), 1: 'Meaning is a product of practice'; 4: 'The meaning of norms is the product of legal practice.'
[39] L. Wittgenstein, *Philosophical Investigations* (translated by G. E. M. Anscombe; Pearson, 1973), para. 202.

**Figure 1.5** Hand-pointing direction.
MoreVector/Shutterstock.

Rules do not show you what to do at any given point, as some interpretation can always be made out to accord with the rule. Wittgenstein offered an example drawn from mathematics, where a pupil is instructed to complete a sequence by following the rule of adding 2 (n + 2) to a number series (2 … 4 … 6 … 8 etc.). Suppose that the pupil follows the instruction until 1,000, but then rather than writing 1,002, he writes 1,004 followed by 1,008 and 1,012. As much as one can insist on repeating the original instruction and restating that this is what one meant, it is impossible to demonstrate that the pupil did not follow the rule. As Wittgenstein argues, the pupil may have understood the instruction as follows: 'Add 2 up to 1000, 4 up to 2000 and 6 up to 3000 and so on.'[40] It is a possible interpretation of the rule, and we can always find an interpretation that accords or conflicts with the rule (the so-called rule-following paradox, Figure 1.4). However, 'any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.'[41]

By the same token, it would be impossible to demonstrate that the rule of gesturing the direction by pointing one's finger compels us to look in the direction of the line from wrist to finger-tip rather than from finger-tip to wrist (Figure 1.5). Yet it is a natural reflex for us to do so, because that is what we were taught to do and that is what we always do.[42]

Understanding what something means, therefore, is not reducible to the application of rules. Instead, one must understand the language and its 'grammar' and be able to master its techniques.[43] Language and its grammar are not external tools by which meaning is bestowed on objects and activities. Rather, they are a social practice where shared expectations, common uses, and societal agreements rather than formal rules determine meaning. This is why 'obeying a rule' is a practice, something embedded in society and its 'customs (uses, institutions)'.[44]

[40] *Ibid*., para. 185.
[41] *Ibid*., para. 198.
[42] *Ibid*., para. 190.
[43] *Ibid*., para. 199.
[44] *Ibid*., para. 199.

Wittgenstein's intuitions and findings are particularly relevant to our understanding of treaty interpretation. They point to the fact that rules as such are not conducive to meaning, as their application can always be made to accord or conflict with a given interpretation of the rule (the rule-following paradox). Rules alone cannot ensure the stability and predictability of meaning. They are embedded in practices, where obedience depends on there being a practice followed by a social group in a given 'form of life'.[45] In other words, they provide the 'grammar' that, according to Wittgenstein, represents the normative structure for giving meaning to language, for telling what an object is, and for determining what language move makes sense in any given form of life. Grammar, rather than being the formal collection of syntactical rules that logically determine the correctness of our utterances, becomes the set of community norms by which our linguistic expressions are given meaning. Knowing the grammar and speaking a language by which we describe, justify, or criticize what we say and what we do is to partake in a form of life.

Likewise, in the field of treaty interpretation, the rules in the VCLT could be regarded as the 'grammar' or 'common discipline' that can be used not so much to get directly to the meaning but to establish what means can be used for determining that meaning within international law.[46] A practice such as treaty interpretation can never be 'defined or exhausted by the formalized rules designed to regulate it; it is also defined by a series of informal conventions governing the relevant actors' attitudes towards it and determining what they consider to be permissible as appropriate things to do when they engage in such a practice'.[47] This is the reason why the practice of treaty interpretation, while not defined by rules, can never allow for 'anything goes'. Such conventions limit the choices that interpreters make and render treaty interpretation 'a constrained activity'.[48]

## 1.6 Mindsets and Assumptions

Even Sir Gerald Fitzmaurice, who in many ways epitomizes the 'black letter' approach to international law, acknowledged that interpretation

[45] On the notion of 'form of life' in Wittgenstein's philosophy see J. F. M. Hunter, '"Forms of Life" in Wittgenstein's Philosophical Investigations' (1968) 5 *American Philosophical Quarterly* 233. See also the monograph by David Kishik, *Wittgenstein's Form of Life* (Continuum, 2008).

[46] F. Zarbiyev, 'The "Cash Value" of the Rules of Treaty Interpretation' (2019) 32 *Leiden Journal of International Law* 33. See also *infra*, Chapter 12.6.

[47] *Ibid*., 45.

[48] *Ibid*. See *infra*, Chapter 2.

and disagreement about the meaning of treaty provisions may be more a matter of 'attitude or frame of mind' than of rules.[49] In *Golder v. United Kingdom*, the European Court of Human Rights (ECtHR) had to decide whether Article 6 of the European Convention on Human Rights, concerning the right to a fair trial, implicitly included a right to appear before a court.[50] The claimant, a prison inmate, had argued that the Home Secretary had violated Article 6 by denying him leave to meet a solicitor with a view to starting an action for libel against a prison officer.[51] The Court, by a majority of nine to three, held that Article 6 embodies the 'right to a court', of which the right to institute proceedings before the courts in civil matters is one aspect, basing its interpretation on Article 31 of the VCLT.[52] The majority of the Court maintained that '[i]t would be inconceivable' for Article 6(1) to spell out the procedural guarantees applicable in legal proceedings without first protecting the very premise for the exercise of these guarantees, namely the right of access to a court.[53] The Court held that access to a court is an element 'inherent' in the right enshrined in Article 6.[54]

In his separate opinion, Judge Fitzmaurice emphasized that the disagreement between the European Commission and the United Kingdom about the interpretation of Article 6(1) was an almost insoluble one, as the differences in mindset and attitude between the parties were so huge as to amount to 'parallel tracks that never meet'.[55] For him, the acceptability (if not the correct character) of the interpretive solution depended on a preliminary determination of the 'frame of reference'. However – he further argued – 'since matters of acceptability depend on approach, feeling, attitude, or even policy, rather than the correct legal or logical argument, there is scarcely a solution along those lines either'.[56]

[49] ECtHR, *Golder v. United Kingdom*, Application no. 4451/70, Separate Opinion of Judge Sir Gerald Fitzmaurice, para. 23.

[50] ECtHR, *Golder v. United Kingdom*, Application no. 4451/70, Judgment of 21 February 1975.

[51] The *Golder* case is discussed *infra* in more detail in another context, as an example of inferential reasoning (Chapter 9.2).

[52] *Ibid*., para. 36: 'it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention.'

[53] *Ibid*., para. 35.

[54] *Ibid*., para. 36.

[55] Separate Opinion of Judge Sir Gerald Fitzmaurice, *supra* n 49, para. 23.

[56] *Ibid*.

What Fitzmaurice was referring to, when mentioning the 'frame of reference', is the set of assumptions that guide the interpreter through the process of attributing meaning. In the *Golder* case, there were those, including the majority of the Court, who were convinced that there cannot be any procedural protection of the individual before a court of law unless that individual is accorded access to it. The implied existence of a right of access to a court would be a truism to those who put the protection of the individual and his or her human rights first in interpreting a human rights treaty. On the other hand, it might be difficult to uphold the existence of an implied right, not expressly recognized in the text of Article 6, for those who regarded the Convention as a conventional treaty instrument predicated on state consent. From that vantage point, it is more difficult to justify the extension of protection to an aspect of the right not expressly mentioned in the Convention.

Eventually, Fitzmaurice opted for the latter state-friendly interpretation, arguing that it is unlikely that, by ratifying the Convention, governments had accepted to provide access to their courts without stating that right expressly in the text. To hold the opposite as regards a legal instrument that depends on the agreement of states and on their continuing support for its enforcement would have been quite inconceivable. What is noteworthy, however, is that Fitzmaurice acknowledged without flinching that the interpretation of Article 6 and the legal consequences attached thereto depend on the mindset and attitudes of the interpreter rather than the formal rules of treaty interpretation. It is on this basis that he got to the conclusion that his interpretation was 'sound' and 'in the best interests of international treaty law'.[57]

Interestingly enough, in the very same case, even the Commission candidly admitted that a purely linguistic analysis of Article 6 could not lead to it reading into the Convention an implied right of access to a court. However, the Commission argued that whenever one is confronted with a legal text, lawyers and laypeople alike always end up applying some form of pragmatism or 'common sense', to provide the terms to be interpreted with a sense of purpose and to furnish them with the factual and legal background to which they belong.[58] Even though its argument was inevitably couched in terms of ordinary meaning, context, and object and purpose, in keeping with the VCLT, the Commission lucidly underscored that:

[57] *Ibid*., para. 48.

[58] *Golder v. United Kingdom*, Application no 4451/70, Report of the Commission (1 June 1973), p. 36, para. 49.

> [S]ubjective appreciations easily also enter into this process and cannot be considered completely extraneous to the task. What is given as the 'natural' and 'ordinary' meaning of the text is often influenced by a particular way of reading which supports the result one wants to reach for other reasons. What one 'finds' in a text often depends on what one is looking for.[59]

## 1.7 Humpty Dumpty's 'Master'

Lewis Carroll's *Alice in the Wonderland* and its sequel, *Through the Looking Glass*, are among the most quoted children's books in the history of the judiciary. References to them are legion in the case law of English-speaking tribunals. In particular, the dialogue between Alice and Humpty Dumpty on the meaning of words (Figure 1.6) has been extensively used by judges to connote different attitudes towards the interpretation of legal provisions.

On the one hand, Humpty Dumpty's contemptuous assertion that he may unilaterally choose the meaning of words has been widely used

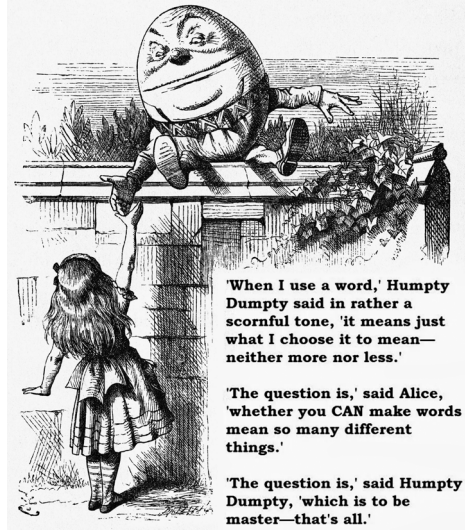


**Figure 1.6** Humpty Dumpty offers Alice his hand. Wood engraving after John Tenniel for the first edition of Lewis Carroll's *Through the Looking Glass*, 1872. GRANGER – Historical Picture Archive/Alamy Stock Photo.

[59] *Ibid.*, 36–37, paras. 50–51.

to resist leaving the interpreter with unfettered interpretive discretion. An apposite example is Justice Rehnquist's majority opinion in *Adamo Wrecking Co v. US*, in which the unilateral designation by an administrative agency of a particular type of regulation was equated to Humpty Dumpty's power to decide about meaning 'by mere designation'.[60] Likewise, Chief Justice Burger, writing for the majority in *TAV v. Hill*, qualified the interpretation of the term 'actions' in § 7 of the Endangered Species Act by Justice Powell in his dissenting opinion, as reminiscent of Humpty Dumpty's arbitrary attribution of meaning to words, for its want of any explanation in support of his interpretation.[61]

On the other hand, a different string of judicial references foregrounds Humpty Dumpty's second statement, maintaining that there might be a danger in supporting the view that those in power, be they legislator or judge, may authoritatively determine the construction and interpretation of the law. In *Liversidge v. Anderson*, the then House of Lords had to interpret a provision in the Defence Regulations that empowered the Secretary of State to issue an order to detain someone 'if he has reasonable cause to believe' that this is necessary to exercise control over him and to prevent harm to the public safety or defence of the United Kingdom. The majority of the Law Lords concluded that 'has reasonable cause to believe' ought to be interpreted as if a merely subjective belief on the part of the minister, and not evidence of an objective fact, would be enough to meet the requirements of the regulations and avoid judicial scrutiny of the order.[62]

In dissent, Lord Atkin vehemently criticized the majority and famously wrote that the only possible authority to support the majority's interpretation was Humpty Dumpty's dialogue with Alice, which he quoted *in extenso*, including: 'The question is … which is to be master – that's all.' Lord Atkin's critique apparently gained him the hostility and ostracism of his fellow Law Lords. Apparently, the Lord Chancellor after reading a draft of the judgment asked him to delete the reference to Humpty Dumpty as 'wounding to colleagues and exposing them to ridicule'.[63] Atkin's 'scornful' statement presumably meant to constrain the executive's power in times of war via judicial review. His remarks addressed

[60] *Adamo Wrecking Co. v. U.S.*, 434 U.S. 275 (1978), 283.
[61] *Tennessee Valley Authority (TAV) v. Hill*, 437 US 153 (1978), 173, footnote 18.
[62] *Liversidge v. Anderson* [1942] AC 206, 3 All ER 338.
[63] T. Bingham, 'The Case of Liversidge vs Anderson: The Rule of Law Amid the Clash of Arms' (2009) 43 *The International Lawyer* 33, 37.

the risks inherent in considering that the government may decide whatever it wants and interpret the law as it sees fit in times of war, because it considers itself to be 'master'.

In fact, both ways of using the dialogue between Humpty Dumpty and Alice in the context of interpretation fail to capture its salience. The issue is neither to say that any meaning can be attributed to any word or expression to be interpreted, nor that whoever has the power or is vested with some authority fully controls the attribution of meaning. What the dialogue conveys is the sense that there is no objective truth or correct interpretation when it comes to the meaning of words, and that the authority of the speaker matters a great deal. The idea of 'master', however, need not be understood in absolute terms. It can be taken as a way of making visible something that is usually hidden in plain sight, namely that acts of interpretation do not depend on rules and cannot be decoupled from interpreters and their place in any given social community to which the interpretation is relevant. After all, Humpty Dumpty may have been subtler than the foregoing judicial references led us to believe.

What might appear as a literary digression is in fact one of the key reflections put forward in this book. The idea that interpretive authority is a major factor in the process of treaty interpretation stands out prominently in the set of insights on offer.[64] The 'master' is whoever wields authority to interpret. The concept of authority propounded in this context refers to the socially accepted deference entitlement that certain individuals, groups of people, or institutions may enjoy in any given setting. The interpretation of public international law issues by the International Court of Justice (ICJ), or of the International Covenant on Civil and Political Rights by the United Nations (UN) Human Rights Committee, are examples of authority-wielding bodies whose social acceptance and deference entitlement are particularly high in international law. Their interpretation is likely to carry much persuasive force when it comes to the field of their respective expertise, as compared to that of other international law actors.

Authority as 'social recognition' to speak credibly about international law is not absolute.[65] It may come in 'different shades and degrees' and vary in time and space, depending on the subject matter and the

[64] See in more depth *infra*, Chapter 12.

[65] Fuad Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law' (2018) 9 *Journal of International Dispute Settlement* 291–314, 297.

receptivity of the audience.[66] It is well known, for example, that international lawyers are particularly sensitive to judicial determinations. The 'judge centredness of the international legal self' attests to the 'privileged status of the judicial representation of international law in the mainstream international legal discourse'.[67] The interpretation of the law provided by international courts and tribunals has come to occupy a special place in international legal argument. It will be referred to as particularly authoritative and operate as a benchmark against which the credibility or persuasive force of legal arguments will be measured.

This is especially so in the particular field of specialization of the relevant court or tribunal. In the highly decentralized structure of investment arbitration, for instance, authority may be linked to the reputation of the arbitrators. The composition of arbitral tribunals is commonly specified in public commentary and the professional prominence of individual members of the panel is often a factor in determining the authoritative character of their decisions.[68]

'[T]o be master', therefore, is not tantamount to having an absolute power to determine, even arbitrarily, the meaning of things. In the context of treaty interpretation, it means to be able to speak authoritatively about legal interpretation, in a manner that is socially recognized and that elicits deference. In many ways, this concept of authority-wielding bodies, institutions, or even individuals is slightly reminiscent at times of the *skeptron* holders in ancient Greek literature.[69] The point is of extreme importance, as it stresses the fact that the authority of language and its interpretation does not come 'from the words alone',[70] but rather from the social authority vested in the speaker who holds the *skeptron*. An inquiry

[66] *Ibid*., 309.

[67] F. Zarbiyev, 'On the Judge Centredness of the International Legal Self' (2021) 20 *European Journal of International Law* 1, 4.

[68] C. MacLachlan, 'Investment Treaties and General International Law' (2008) 57 *International and Comparative Law Quarterly* 361, 391, quoting Ian Brownlie, *Principles of Public International Law* (6th ed.; Oxford University Press, 2003), 19.

[69] A. Bianchi, 'On the Skeptron: Visions of Authority in International Law', paper presented at the conference The Construction of Authority in International Law, Faculty of Law, University of Durham (UK), 25–26 April 2017 (unpublished; on file with the authors). See in more details *infra*, Chapter 12.3.

[70] P. Bourdieu, *Language and Symbolic Power* (Harvard University Press, 1991), 9: 'When an authorized spokesperson speaks with authority, he or she expresses or manifests this authority, but does not create it: like the Homeric orator who takes hold of the *skeptron* in order to speak, the spokesperson avails himself or herself of a form of power or authority, which is part of a social institution, and which does not stem from the words alone.'

into the authority of the interpreters thus becomes relevant to assess 'who is master' in treaty interpretation.[71]

Authority is obviously linked to other processes that have a bearing on the activity of treaty interpretation and its outcomes. Perceptions of authority are shaped by the way in which knowledge is produced in any given field, in particular by the social forces at play and the actors involved in such processes.[72] Power structures, epistemic communities,[73] and discursive policies – influenced as they are by theories and theoretical discourse – determine what is deemed to be an acceptable and competent thing to say about treaty interpretation and, more generally, about international law. The same structures and forces draw the contours of the discursive policies that control the discipline and are reflected in accepted social practices. To determine what issues are deemed relevant to the field of treaty interpretation, what questions can be competently raised by the members of the profession and the discipline, and who has the authority to provide them with an answer are all issues that ought to be included in any serious attempt to understand what treaty interpretation is and how it works.

Far from being an activity merely based on the application of highly technical skills, treaty interpretation is a process embedded in the professional and societal setting in which it takes place. To understand treaty interpretation inevitably requires going beyond the province of the rules, and to incorporate the considerations foregrounded in this chapter into treaty interpretation and concrete application.

[71] This general idea of authority and its underlying social foundations bears a resemblance to the notion of 'semantic authority' outlined by I. Venzke in *How Interpretation Makes International Law* (*supra* n 38), 63: 'By semantic authority I refer to an actor's capacity to influence and shape meanings as well as the ability to establish its communications as authoritative reference points in legal discourse … To have authority is distinct from having power in that it implies a certain degree of deferred judgement on the part of others. It feeds on social legitimacy – on the general belief of society, which upholds that one should do what the authority says.'

[72] For insight on such processes, see A. Bianchi, 'Knowledge Production in International Law: Forces and Processes', in A. Bianchi and M. Hirsch (eds.), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (Oxford University Press, 2021), 155.

[73] A. Bianchi, 'Epistemic Communities', in J. d'Aspremont and S. Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2019), 251.