Richard K. Gardiner. ***Treaty Interpretation.*** New York: Oxford University Press, 2008. Pp. 407. $165.00. ISBN: 9780199277919.

The book under review is a remarkable study on the interpretation of treaties written by Richard Gardiner. The author practised as a barrister, a Legal Advisor at the Foreign and Commonwealth Office, and taught at the Faculty of Law, University College, London. He observes that '[t]his book is not about theory. It is about the practical use of the Vienna rules' (at 8). However, the author also analyses the theoretical and historical backgrounds of certain institutions of the 1969 Vienna Convention on the Law of Treaties (1969 VCLT) and gives the broadest possible presentation of different views, including an ample review of discussions held by the International Law Commission (ILC) during the drafting of the Convention.

The ILC, as Gardiner explains, aimed to provide a set of rules on interpretation which were not to be applied as a step-by-step formula in order to reach 'an irrebuttable interpretation in every case' (at 9). Instead these rules instruct interpreters which elements have to be taken into account (text, preamble, annexes, related agreements, preparatory work, etc.) and to a certain extent how to deal with these materials. These rules are arranged according to an inherent sequential logic. They are not, however, meant to be applied in all cases or always sequentially. This approach is a very important element of the interpretative process and can be said to be a general principle that underlies the VCLT. The ILC named this system of interpretation a 'crucible' approach to treaty interpretation which it describes as follows: '[a]ll various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation' (at 9, note 16, citing the relevant documents of the ILC). According to Gardiner, '[t]his "crucible" approach is designed to result in a single combined operation. It is, therefore, somewhat in opposition to this design to take the rules to bits and examine each component in isolation. In the absence of specific disputes over particular terms of an identified treaty, however, presentation of the Vienna rules is as much a descriptive and analytical exercise as one of treaty interpretation' (at 10).

The book is divided into two main Parts. Part I gives an overview, presents the historical background, and introduces *dramatis personae*. Part II, which is the core of the book, deals with the application of the rules of the Vienna Convention on the Law of Treaties. Gardiner presents a useful analysis of the development of rules of treaty interpretation

starting from the Graeco-Roman era. He makes the compelling observation that certain historical features of treaty interpretation are not unlike contemporary ones and are 'transmitted to modern times through the work of Grotius and others and at the effective foundation of modern international law' (at 54). Furthermore, he gives insight into the canons of interpretation proposed by Grotius, Pufendorf, and Vattel. Grotius, indeed, devoted a whole chapter to treaty interpretation in his work *On the Laws of War and Peace* (1625). For Grotius, the interpreter has to identify the intentions of the parties on the basis of the best available indications (the words they used and legitimate conjectures from those words). His detailed canons of interpretation are based on the Graeco-Roman texts and supplemented by his natural law approach. Gardiner says the following: '[f]urther attempts at elaboration of sets of rules followed those of Grotius and his first glossator Pufendorf, one of the most significant effects of those works being to lead the ILC to reject the idea of an elaborate code of canons' (at 55).

Gardiner also addresses the work of Vattel, which was noted by the ILC, but only for his maxim that 'it is not permissible to interpret what has not need of interpretation'. Gardiner explains that Vattel's dictum had been picked up out of its context and attracted some critical comments. Further, Gardiner comments on the very influential 1935 Harvard Draft Convention on the Law of Treaties. Like the 1969 VCLT, its Draft Article 19 did not attempt to codify or supplement the 'canons of interpretation'. The Harvard rules were based on the premise that the modern trend in interpretation is to reduce, rather than expand, the number of rules. An analysis of the commentary to Article 19(a) of the Harvard Draft Convention leads Gardiner to conclude that its approach is almost identical to that of the ILC.

Gardiner further summarizes the substantial body of case law of the Permanent Court of International Justice, which deals with issues of interpretation in order to show the influence of the PCIJ on the formation of rules of interpretation in the VCLT. Gardiner relies on the monograph by Hudson on the PCIJ's jurisprudence[1] and notes that the judgments and opinions of the PCIJ contain numerous references to the intentions of the parties, as a guide for interpretation. In general, Hudson cautioned against overreliance on the intentions of the parties and suggested the use of other rules of interpretation (including the contextual approach) which were later reflected in the 1969 VCLT. Gardiner adds that Hudson also posited several propositions based on the jurisprudence of the PCIJ which were reflected later in the supplementary rules in the VCLT. While acknowledging the contribution of the PCIJ to the development of rules of treaty interpretation, Gardiner comments that the rules of the VCLT are so general that many issues raised by the PCIJ are not reflected either in those rules or in the somewhat scanty subsequent case law of international courts and tribunals.

Gardiner also addresses the theory of interpretation adopted by the New Haven School, which is dramatically different from the rules of the 1969 VCLT because it promotes a policy-oriented approach.[2] The core idea of this concept is that a treaty is a continuing process of communication. However, as Gardiner observes, such a generalization does not fit all, or even most, international agreements. True, pious statements about the continuing collaboration of the parties in implementation of the treaty are a common feature of *some* treaties, particularly those which are expected to need development or further elaboration in their lifetimes, but there are many treaties not of that kind or which include no such expectation. The author of the book explains how '[a] treaty embodying a one-off transaction or one which is to be applied routinely in a technical field are just two examples of those which may well not involve any further "communication" between the parties once brought into

[1] M.O. Hudson, *The Permanent Court of International Justice, 1920–1942* (1943), at 640–661.

[2] M. McDougal *et al.*, *The Interpretation of Agreements and World Public Order* (1967).

force, and which involve collaboration only in the sense of each party faithfully applying the treaty in parallel with the other' (at 65–66). Gardiner states that the main difference between the 1969 VCLT and the New Haven School is that the VCLT gives a more concrete (firmer) indication of the boundaries of the interpretative process and differentiates, to some extent, between primary and secondary rules of interpretation. Due to their developments from theory and extrapolation from past practice, the New Haven Rules set out in more detailed form 'principles' and 'procedures', which the VCLT rules 'leave largely to emerge from the structure of the Vienna Convention's provisions' (at 68).

The New Haven School of interpretation provoked very strong comments from other international, 'classical' lawyers, such as Sir G. Fitzmaurice who stated:

> [t]his, of course, however excellent, is not law but sociology; and although the aim is said to be 'in support of search for the genuine shared expectations of the parties,' it would in many cases have – and is perhaps subconsciously designed to have – quite a different effect, namely, in the guise of interpretation, to substitute the will of the adjudicator for that of the parties, since the intentions of the latter are, by definition (in the given circumstances) unascertainable because not sufficiently clearly or fully expressed and therefore presumes intentions, based on what the adjudicator thinks would be good for the community, or in accordance with the overriding 'objectives of human dignity' etc., must be attributed to them.[3]

Regarding the principles of the New Haven School, Gardiner concludes that 'it is difficult to extract practical interpretative guidance' from them (at 68) while simultaneously pointing out that '[t]he result, however, of applying the VCLT rules as they have been interpreted and applied in practice is, it is suggested, no way near so restrictive as Professor McDougal's criticisms expected them to be. At all events, it could reasonably be suggested that what is now clear is that the shared expectations of the parties to a treaty must be that it will be interpreted according to the Vienna rules' (at 68).

Gardiner also assesses Lauterpacht's contribution to the development of the canons of treaty interpretation (at 53). Lauterpacht in his influential article 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties'[4] opposes the so-called restrictive interpretation of treaties which is characterized by 'extreme deference to the sovereignty of states, the presumption being in favour of assuming that a state intends to be bound by the least of any obligation which could be read from a provision of doubtful content or ambiguous expression' (at 53). Lauterpacht, as Gardiner correctly states, saw the restrictive approach as inconsistent with the principle of effectiveness, which stresses the integrity of the treaty and is based on the premise of giving effective content to all its terms. Lauterpacht's study of the law of treaties and their interpretation was the precursor of the Resolution of the Institute of International Law on treaty interpretation even though it did not adopt all of Lauterpacht's views on this issue.[5] The restrictive interpretation has not found its way into the rules of the VCLT. However, it is arguable that it is not entirely abandoned and it would have been useful if the author had followed its possible application a little further.

[3] Fitzmaurice, '*Vae Victis* or Woe to the Negotiator? Your Treaty of Our Interpretation of It' (review essay), 65 *AJIL* (1971) 372.

[4] 26 *BYIL* (1949) 48.

[5] The Resolution adopts textual interpretation as the main rule. However, in case of a disputed interpretation, it also gives a shortlist of other means of interpretation which can be used by an international court or tribunal, including, *inter alia*, preparatory work and subsequent practice. The text of the resolution is available at: www.idi-iil.org/idiF/resolutionsF/1956_grena_02_fr.pdf Lauterpacht was Rapporteur on this subject at the Institute.

Gardiner correctly states that nowadays the International Court of Justice (ICJ)'s application of the 1969 VCLT rules to interpretation is 'virtually axiomatic' (at 15). The Court treats these rules without any doubt as 'general, or customary international law' (at 16). The ICJ is not the only international court which applies the rules of the 1969 VCLT; they are also applied, for example, in the World Trade Organization (WTO) and by the European Court of Human Rights (ECtHR). However, it is to be noted that the application by other courts has been at times somewhat controversial. This is especially true for the ECtHR, which developed a doctrine of dynamic treaty interpretation which does not always conform to the classical rules on interpretation.[6] Gardiner suggests that the application of any interpretative rules, including those of the 1969 VCLT, cannot be a purely mechanical process, but that nevertheless 'their proper application is . . . the best assurance of reaching the correct interpretation' (at 29).

Gardiner deals in depth with many issues which have caused misunderstandings, such as, for example, the distinction between a general 'rule' (being in the singular in the title of Article 31) of interpretation and 'rules' of interpretation (as used in Article 31(3)(c)). Gardiner explains that 'a distinct significance does attach to the use here of the singular "rule," which appears to be slightly archaic, but which is to be read as having the role indicating how Article 31 is to be applied, emphasizing the unity of its several paragraphs and its intended application as a single operation' (at 36). Gardiner further deals with many problematic issues of the interpretation of treaties such as interpretative declarations. In this respect nothing substantial had emerged on this issue since Waldock's report[7] until drafts by Alain Pellet on interpretative declarations within the ILC work on reservations to treaties[8] (at 86), which Gardiner discusses extensively and acknowledges to be an 'invaluable study of relevant law and practice' (at 86). However, it would have been of interest to readers how the author judges the practical usefulness of the ILC draft for the interpretative practice of states as it concerns interpretative declarations.

Another controversial issue addressed in the book concerns the preparatory material. It includes a myriad of unresolved and controversial problems, such as what is admissible as preparatory work. Gardiner discusses the following questions: how far back may an interpreter go into the history of a treaty? Can preparatory work be differentially admissible (i.e. opposable to parties which took part in the negotiation but not to states the involvement of which is limited to the treaty processes which occur after conclusion) (at 99). Gardiner explains that courts and tribunals regard preparatory work as constituting 'clarificatory information' which 'must attest to a meaning which can be said to have been accepted (at least implicitly) by prospective parties' (at 100), rather than concerning themselves with how far back into the history of the negotiation of the treaty the *travaux* extend. As to differential admissibility, Gardiner concludes that 'it would be inconsistent with the principle . . . of there being one correct interpretation, and also somewhat out of line with the ethos of avoiding secret treaties' (at 105).

The author of the book gives an interesting overview of the views of Professor McDougal on preparatory work and his efforts during the Diplomatic Conference to put preparatory work on the same footing as text and context. His proposal to combine Articles 31 and 32 (in so far as preparatory work is concerned) of the VCLT was rejected (at 303–306). The author's own view on the controversy relating to

[6] See on this subject G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007), and see Fitzmaurice, 'Dynamic Interpretation', *The Hague Yrbk Int'l L* (2008), forthcoming.

[7] *Yrbk of the ILC* (1965), ii.

[8] The Commission, at its forty-fifth session (1993), decided to include the topic 'The law and practice relating to reservations to treaties' in its programme of work, and at its forty-sixth session (1994) appointed Mr Alain Pellet Special Rapporteur for the topic.

preparatory work emerges when he cites with approval the view of Sir Humphrey Waldock in his Third Report on the Law of Treaties in 1964 that, while recourse to preparatory work is frequent, it is not 'an authentic means of interpretation'. Sir Humphrey Waldock continues, '[*travaux préparatoires*]…are simply evidence to be weighed against any other relevant evidence of the intention of the parties, and their cogency depends on the extent to which they furnish proof of *common* understanding of the parties' (at 307).

The book also addresses the 'object and purpose of the treaty' and its controversial role in treaty interpretation. The author makes the following observations: 'the precise nature, role and application of the concept of "object and purpose" in the law of treaties present some uncertainty' (at 190). The part of the book which deals with object and purpose is one of the most interesting. It deals extensively with many practical issues (at 197) and relies on many examples from international courts and tribunals such as the ICJ and other tribunals including the Iran–United States Claims Tribunal. Gardiner has an excellent grasp of difficulties stemming from such a vague formulation as 'object and purpose'. There is a multitude of issues which still remain controversial, including whether there is a difference between the object and the purpose and whether the object and purpose of the treaty can override substantive provisions. With regard to the former the author – having analysed the somewhat academic argument concerning the existence of a difference in French public law between the word *objet* and the word *but* (the equivalents in the French texts for the English words 'object' and 'purpose') and having reviewed the use of the term 'object and purpose' in other Articles of the VCLT besides Article 31 – concludes that courts and tribunals have tended to treat the term 'as a single broad remit, in the sense that it is difficult to find any reasoned distinction being drawn between the object and purpose of a treaty' (at 139). With regard to the latter, Gardiner is of the view that 'the object and purpose of a treaty cannot be used to alter the clear meaning a term of a treaty' (at 198).

In conclusion, it may be said that the book under review is a meticulously researched study on treaty interpretation. The author presents an erudite and complete book on this controversial subject. He analyses the jurisprudence of various courts and tribunals (international and domestic). On an international level, he presents examples from such courts and tribunals as the ICJ, the Iran–United States Claims Tribunal, the European Court of Human Rights, NAFTA, the WTO, and several arbitral tribunals. On a national level he deals with German, UK, and US courts' case law. The principal objective of the study under review is to provide a clear and comprehensive exposition of the complex rules relating to the interpretation of treaties as they stand at present. This exposition is founded on a detailed review of both the historical development of those rules and the many, often conflicting, theories relating to them. Whenever necessary to achieve his principal objective, the author has indicated his own views on conflicts between such theories and other outstanding issues.

Treaty interpretation is analysed in the wider context of the law of treaties, of which Gardiner has unparalleled knowledge. It is very rarely that the whole subject of treaty interpretation is dealt with in such detail in one study, and the achievement of the author is therefore even more significant. We have to agree with Lord McNair that '[t]here] is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation'.[9] However, Gardiner successfully proves in his book that such an endeavour is, in fact, possible. The book will undoubtedly become a classic study on the interpretation of treaties – of great use to both practitioners and academics.

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[9] Lord McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1961), p. 364.