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Sisyphus in robes: International law, legal interpretation and the absurd

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Abstract

Legal systems across the world contain the obligation to prevent 'absurd interpretations' of law. In international law, an instruction to avoid 'manifestly absurd' interpretations can be found in Article 32 of the Vienna Convention on the Law of Treaties. This gives rise to at least two questions that I will take up in this article. First, what is meant by the 'absurd' that is to be avoided in legal interpretation. The short answer to this question is: no one knows exactly. The absurd, by its very nature, resists definition in pre-given categories, as I will argue on the basis of four core thinkers on the absurd: Søren Kierkegaard, Jean-Paul Sartre, Albert Camus, and Thomas Nagel. The second question is more technical and easier to answer: how should lawyers try to avoid absurd interpretations? Here, I turn to absurdist writing and the theatre of the absurd for assistance. Absurdist writing and theatre have developed a number of techniques to make the absurd appear, to let the audience experience that something is fundamentally out of tune. Lawyers use similar techniques, but in reverse and with an opposite purpose: they add exposition, narrative, reasonable language, and stable, rational legal personae. In this way, they boost the rationality and reasonableness of the legal order. However, to come full circle, it is exactly the pretension of rationality and reasonableness that makes the law vulnerable to manifestations of the absurd. The rationality of law is the springboard for the very same absurdity it tries to suppress.

Keywords: Article 32 VCLT; legal interpretation; literature of the absurd; philosophy of the absurd; theatre of the absurd

1. Introduction

There is something strange about the absurd. In literature and theatre, the language of law is frequently used to illustrate the absurdity of the human condition, or to show how much a political system is out of tune with ideals of justice and reason. Classical examples are André Malraux' *The Conquerors*,[1] Franz Kafka's *The Trial*,[2] or Albert Camus' *The Stranger*.[3] In ordinary language, the term 'Kafkaesque' has become associated with the absurdity of bureaucratic logic that lost touch with social reality. In *The Garden Party*, Vaclav Havel ridicules bureaucracy through what Bennett

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[1]A. Malraux, *The Conquerors* (translated by S. Becker, 1992).

[2]F. Kafka, *The Trial* (translated by I. Parry, 2015).

[3]A. Camus, *The Stranger* (translated by S. Gilber, 1946).

has called 'mock-legalese dialogues'.[4] Apparently, legal language and legal procedures provide fruitful examples to illustrate the absurd.

However, the picture looks very different from the perspective of law itself. Across the world, legal systems instruct judges to prevent 'absurd interpretations' of legal provisions.[5] In international law, the 'absurdity avoidance principle' is also accepted as a general principle of interpretation. Article 32 of the Vienna Convention on the Law of Treaties (VCLT) instructs interpreters to use 'supplementary means' to prevent results that would be 'manifestly absurd or unreasonable'. From the perspective of law, the absurd appears as an unwelcome stranger, a spoiler at the party of the reasonable. In order to avoid and expel the absurd, those who apply the law may use, if necessary, exceptional methods of interpretation.

Art and law thus seem to move in different directions when it comes to the absurd. Where writers such as Kafka or Camus use the law to make the absurd palpable, lawyers use a variety of techniques to avoid absurd interpretations. The different readings of the relation between law and the absurd form the starting point of this article. In particular, they give rise to two questions, which I will take up in the subsequent sections. The first question is about the *how*: how is the absurd introduced in theatre and literature and how is this different (or not) from the way lawyers seek to expel the absurd in legal interpretation?[6] I will take up this question in Section 3, where I compare the techniques used in absurdist writings (including the theatre of the absurd) to the interpretative techniques employed by lawyers. Absurdist writing and theatre have developed a number of techniques to make the absurd appear, to let the audience experience that something is fundamentally out of tune. These techniques include the lack of exposition and plot, the disintegration of language, and the deconstruction of stable identities of the main personae. As I will argue in Section 3, lawyers use similar techniques, but in reverse and with opposite purpose: they add exposition, narrative, reasonable language, and stable, rational legal personae. The second question is about the *what*: what do lawyers seek to keep at bay when they try to prevent 'absurd' interpretations? In Section 4, I will explain why the absurd, by definition, escapes definition. In order to do so, I will discuss the work of some philosophers of the absurd, such as Camus, Sartre, and Kierkegaard, whose work shows why the absurd cannot be grasped and contained in systems of rational thought. This makes the task of lawyers quite daring, almost Sisyphus-like: it is exactly the legitimate search for of rationality and reasonableness that makes the law vulnerable to manifestations of the absurd. Law is a system that seeks to expel the absurd and, *therefore*, also an obvious example for storytellers who want to express the experience of absurdity.

2. The absurd result principle and Article 32 VCLT

The so called 'absurd result principle' can be found in several jurisdictions across the world.[7] According to this principle, courts are called to avoid interpretations of law, which would produce 'absurd or unreasonable' outcomes.[8] The use of the absurd result principle is generally justified on

[4]M. Y. Bennett, *Theatre and Literature of the Absurd* (2015), 100. Bennett refers to V. Havel, *The Garden Party and Other Plays* (1993), 36

[5]See also Section 4, *infra*.

[6]In this article my focus will be on international law. I do think, however, that many of the findings can also be applied to other fields of law.

[7]See N. MacCormick and R. S. Summers (eds.) *Interpreting Statutes: A Comparative Study* (1991); V. M. Dougherty, 'Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation', (1994) 44 *American University Law Review* 127 (with cross references to other studies that identify the principle in notes 8 and 10); L. R. Dove, 'Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine', (2019) 19(3) *Nevada Law Journal* 742. For the application in India see, *inter alia*, A. Kapoor, 'Legitimate Expectation Doctrine and Protection against Absurdity under the Constitution of India', *SSRN*, 26 September 2019, available at www.papers.ssrn.com/sol3/papers.cfm?abstract_id = 3454266.

[8]The principle is not free from controversy, as it allows judges to deviate from the plain meaning of a text. For a critique see J. F. Manning, 'The Absurdity Doctrine', (2003) 116(8) *Harvard Law Review* 2387. For a critical response to Manning see G. Staszewski, 'Avoiding Absurdity', (2006) 81 *Indiana Law Journal* 1002. Although both writers disagree on the desirability of the principle, they do agree that it matters in legal practice.

two overlapping grounds. The first is a normative presumption about the reasonable intent of the lawmaker: the interpreter is required to assume that the will of the lawmaker is to prevent absurd outcomes in the application of rules. Writing in the context of US statutory interpretation, Dougherty summarizes this position as follows: 'Cases dealing with the principle often speak of the intent in the form of a presumption that the legislature always acts reasonably or rationally, at least to the extent of not intending absurdity ... this presumption acts prescriptively.'[9] The second is the existence of a general principle of law, which restricts the power of lawmakers to create laws that yield absurd or unreasonable outcomes. The absurd result principle is then grounded in a set of generally unspecified values that set 'conditions for the proper exercise of legislative power'.[10]

The absurd result principle also found its way into international law. The Permanent Court of International Justice invoked it in the Advisory Opinion on the Polish Postal Service in Danzig (1925), stating 'it is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd'.[11] This passage was quoted *ad verbatim* by the International Court of Justice in the 1950 Advisory Opinion on the admission of a state to the United Nations.[12] The principle reemerged in the VCLT, albeit in less straightforward form. Article 32 VCLT reads as follows:

> 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.

Article 32 should be read in conjunction with Article 31 VCLT, which sets out how treaty provisions are to be interpreted. According to Article 31, treaty provisions should be read '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' (Article 31(1)). Those interpreting the treaty should also take into account subsequent agreements and practices regarding the interpretation of the treaty as well as any relevant rules of international law applicable in the relations between the parties (Article 31(3)). The 'supplementary means' mentioned in Article 32 are meant to confirm or correct the interpretation that results from the use of the methods mentioned in Article 31.

At first sight, therefore, there seems to be a hierarchical or sequential order between Articles 31 and 32. This is how, for example, Abi-Saab understood both articles, as a 'rigid sequence of autonomous or discrete steps, each of which must be explicitly addressed and "exhausted", before moving to the next'.[13] However, this is not how Article 32 is meant or drafted. It is more than some kind of afterthought to Article 31 – as if an interpreter, to her own surprise, finds a manifestly absurd or unreasonable outcome and then starts to correct it. Instead, Articles 31 and 32 should be

[9]See Dougherty, *supra* note 7, at 131.

[10]See MacCormick and Summers, *supra* note 7, at 535 (quoted by Dougherty, ibid., at 164).

[11]*Polish Postal Service in Danzig (Poland v. The High Commissioner of the League of Nations and the free city of Danzig)*, Advisory opinion, 1925, PCIJ Rep Series B No 11, at 39, para. 113.

[12]*Competence of Assembly regarding admission to the United Nations*, Advisory Opinion of 3 March 1950, [1950] ICJ Rep. 4, at 8.8.

[13]G. Abi-Saab, 'The Appelate Body and Treaty Interpretation', in M. Fitzmaurice, O. Elias and P. Merkouris (eds.), *Treaty Interpretation and Vienna Convention on the Law of Treaties: 30 Years On* (2000), 97, at 104, 105.

taken together in the interpretation of treaty provisions.[14] This is the case for at least two reasons. First, Article 31 contains an obligation to interpret the text of a treaty 'in good faith'. This means it is necessary to account for possible discrepancies between the plain meaning of a provision and the expressed intentions of parties during the lead-up to the convention.[15] Secondly, Article 32 offers the option to use supplementary means to confirm an interpretation reached on the basis of Article 31. In the process of confirmation, new things may come to light:

> The net result [is] that by seeking to 'confirm' the text, the interpreter might well discover herself that a special meaning existed, that latent ambiguity had become apparent, or that the predicted outcome was manifestly absurd with reference to the original understanding. In such cases, she would be obligated to give the *travaux* full effect.[16]

The VCLT thus not only calls upon interpreters to avoid manifestly absurd outcomes, it also suggests a variety of means to detect possible absurdity at an early stage and to do away with it. The means include context, object and purpose, subsequent practice, subsequent agreements as well as other relevant rules in force between the parties (Article 31). Article 32 allows for the use of a rather unspecified category, 'supplementary means'. These means include the negotiating history, but other means may also be employed. As it remains unclear what these other means are exactly, interpreters enjoy broad discretion to avoid manifest absurdity and unreasonableness. As Dörr and Schmalenbach put it:

> In the end, it seems that it basically depends on the assessment of the interpreter whether the material in question can reasonably be thought to assist in establishing the meaning of the treaty under consideration, and if it does, there are scarcely any clear limits to taking it into account under Art 32.[17]

The 'absurd result principle' thus operates in international law, either as a general principle of interpretation as such, or as per Article 32 VCLT, as instruction to prevent 'manifestly absurd and unreasonable' results. This raises two questions, which I shall discuss in more detail below:

1. How can interpreters prevent an absurd or manifestly absurd result? (Section 3);
2. Given the obligation to prevent absurd results, and given all the interpretative techniques at the disposal of lawyers, why has it proven to be impossible to rule out absurdity in encounters with (international) law? (Section 4).

3. Crafting the absurd

In this section, I will discuss three interpretative techniques at the disposal of lawyers when they seek to prevent absurd results in legal interpretation. I will compare these techniques to the techniques used in absurdist writings. I will not make an attempt to define who or what counts as 'absurd writing' or 'absurdist writers'. Instead, I follow the tradition in literary studies to use

[14]For an analysis see J. D. Mortenson, 'The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?', (2013) 107 *American Journal of International Law* 780, at 783, 784 (including references to other practitioners and academics who make the same claim).

[15]See, for this argument, A. Aust, *Modern Treaty Law and Practice* (2013), 245.

[16]See Mortenson, *supra* note 14, at 817 (referring to the ILC position on the matter). Of course, it is also possible to go beyond the travaux and use the other supplementary means mentioned in Art. 32.

[17]O. Dörr and K. Schmalenbach, 'Article 32; Supplementary Means of Interpretation', in O. Dorr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (2018), 571, para. 26.

'absurd' as a label to group together a variety of writers such as Samuel Beckett, Eugene Ionesco, Harold Pinter, Daniil Kharms or Maria Irene Fornes. It is not possible to derive some core meaning of the absurd from all these different works – the absurd simply 'does' different things in different plays or stories.[18] Yet, all these plays and stories make the audience experience something that is out of tune – be it existential, relational, political or utterly unclear; be it funny, deeply tragic or incomprehensible. What is more, the absurd is not primarily argued, like in a philosophical essay, but made palpable through the use of narrative forms and theatrical techniques. To put it differently, absurdist authors do not write *about* the absurd, they *write absurdly*.[19] Absurdist writers use a variety of techniques to express the feeling of being out of tune, out of place, out of time. To this end, they hark back to some age-old traditions of performance and story-telling, including 'abstract scenic effects as they are familiar in the circus or revue … clowning, fooling and mad-scenes; verbal nonsense; the literature of dream and fantasy …'.[20]

As I will argue below, some of the techniques used in absurdist writings echo the techniques used by (international) lawyers when they seek to avoid absurd interpretations. However, just like the sound of an echo, they move in the opposite direction: where absurdist writers want to bring out the absurd, lawyers seek to do away with the absurd. The three techniques I selected relate to: (i) the relation between language and experience; (ii) narrative development and plot; and (iii) the creation of stable identities of personae or characters.

3.1 Language, experience, and reality

The confrontation between language and experienced reality is a recurring theme in absurdist writing. This can take different forms. A classical confrontation is the one between legal-bureaucratic categories and the experience of people to whom these categories are applied. This is a central theme in for example Vaclav Havel's theatre, with its 'mock-legalese dialogues':[21] the unconditional application of seemingly precise and fixed categories, totally unrelated to social reality. Another example is Albert Camus' *The Stranger*, where the main character, Merseult, is put on trial for murder. During the trial, the prosecutor speaks the language of law, justice, and morality. However, this language remains fundamentally out of tune with the detached inner world of Merseult, producing an uncanny and absurd feeling in the reader. Less uncanny, but certainly absurd, is Monthy Python's 'dead parrot' scene, where a client returns an obviously dead parrot to a pet shop. The shop owner keeps denying that the bird is dead, offering several alternative explanations (such as 'it is only resting'), while the client offers endless variations on the word 'dead' to describe the bird's condition.[22] The words keep flowing, but since the bird's

[18]For an attempt to identify a substantive core see M. Esslin, *The Theatre of the Absurd* (1968) (revised and enlarged edition, orginal published in 1961). Writing in the period 1940–1960, Esslin argues that the theatre of the absurd represents the post Second World War 'attitude', whose 'hallmark … is its sense that certitudes and unshakable basic assumptions of former ages have been swept away'. For Esslin, this attitude was voiced in philosophical terms in Camus' *Myth of Sisyphus* and now found its expression in artistic forms. However, as I will set out below, Esslin also emphasizes the techniques and forms, which typically occur in absurdist theatre. This approach has been adopted more widely. Esslin's book has become a reference point for several studies on absuridist theatre, including C. Nwahunanya, 'Nigerian Drama and the Theatre of the Absurd', (1994) 21 *Neohelicon* 169; J. Zhu, 'Analysis on the Artistic Features and Themes of the Theater of the Absurd', (2013) 3(8) *Theory and Practice in Language Studies* 1462; M. Y. Bennett, *The Cambridge Introduction to: Theatre and Literature of the Absurd* (2015).

[19]This is why Esslin, in his seminal study of the theatre of the absurd, does not list Sartre and Camus as absurdist writers: 'they present their sense of irrationality of the human condition in the form of a highly lucid and logically constructed reasoning … In some senses the *theatre* of Sartre and Camus is less adequate as an expression of the *philosophy* of Sartre and Camus … than the Theatre of the Absurd'. See Esslin, *supra* note 18, at 24. Still, I would argue, Camus and Sartre do use some of the absurdist techniques, especially in their novels, as I will illustrate below.

[20]See Esslin, *supra* note 18, at 318.

[21]See Bennett, *supra* note 18, at 36.

[22]See Monty Python, Dead Parrot sketch, available at www.youtube.com/watch?v=vZw35VUBdzo.

condition is so crystal clear, right from the beginning of the scene, they move further and further away from what the audience experiences.

Perhaps the most radical mismatch between language and experienced reality can be found in the work of Samuel Beckett. Take for example *Watt*, where the main character is unsuccessful in his attempts to capture objects in linguistic terms. No matter how hard he tries, the fixed categories of language fail to reassure Watt about the world he lives in:

> Looking at a pot, for example, at one of Mr. Knott's pots, of one of Mr. Knot's pots, it was in vain that Watt said Pot, pot. Well perhaps not in vain, but very nearly. For it was not a pot, the more he looked, the more he reflected, the more he felt sure of that, that it was not a pot at all. It resembled a pot, it was almost a pot, but it was not a pot of which one could say, Pot, pot and be comforted.[23]

However, Beckett takes the disintegration of language a step further. He not only narrates how characters experience a mismatch between language and reality. The mismatch is also present in the very *form* of narration. At the macro level, the mismatch is present in the flattened narrative curve, a story that does not move (see also Section 3.2). At the micro level, it takes the form of dialogues and monologues that 'seem alternately meaningful and meaningless',[24] moving into a direction 'where logic and language are helpless; there *is* no meaning, and yet there *has* to be meaning'.[25] Take, for example, the following dialogue in *Watt*, between father and son Gall:

> The mice have returned, said Mr. Gall junior. The elder said nothing. Watt wondered if he had heard. Nine dampers remain, said the younger, and an equal number of hammers. Not corresponding, I hope, said the elder. In one case, said the younger. The elder had nothing to say to this. The strings are in flitters, said the younger. The elder had nothing to say to this either. The piano is doomed, in my opinion, said the younger. The piano-tuner also, said the elder. The pianist also, said the younger.[26]

Absurdist writers thus disconnect language and experience to make the feeling of absurdity appear. The absurdity avoidance principle seeks to do the opposite: it instructs lawyers to secure the bond between the language of law and the sense of reasonableness and rationality in the audience.[27] The first step to secure this bond is to relativize what lawyers generally cherish most: the plain or ordinary meaning of a provision. Absurdity in law is typically associated with a fixation on the literal meaning of provisions and the unreflexive application of their terms, as illustrated by, for example, Havel's 'mock-legalese dialogues', mentioned above. This is also the point of the frequently quoted example of absurd interpretation avoidance, invoked by the US supreme Court in *US* v. *Kirkby*:

> The common sense of man approves the judgment mentioned by Puffendorf (sic) which enacted that "that whoever drew blood in the streets should be punished with utmost severity" did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit.[28]

[23] S. Beckett, *Watt* (1959), 88–9.

[24] R. N. Coe, *Beckett* (1968), 43.

[25] Ibid., at 44.

[26] See Beckett, *supra* note 23, at 78, 79 and see Coe, *supra* note 24, at 43.

[27] Whether this is possible at all is a different question, to which I will return in Section 4.3.

[28] *United States v. Kirkby*, 74 U.S. 482, 487 (1868). For further references to this quote in US case law see Dougherty, *supra* note 7; see Manning, *supra* note 8. For a contextual analysis of Pufendorf's example see P. Dane, 'A Blegging Blog about Blood in Bologna', *Law and Religion Forum*, 16 December 2013, available at www.lawandreligionforum.org/2013/12/16/blood-in-bologna/. Dane discusses the different meaning of 'blood' in medieval times in which the (hypothetical?) example of Pufendorf took place. Interestingly, by adding this context, the absurdity of the application of the rules appears in a different light.

Where writers such as Beckett push the precision of language beyond its breaking point, lawyers are called to halt before they reach this stage. Instead of pushing the literal meaning or ordinary meaning of language unreflexively, they should take a step back and add what is lacking in absurdist writing: subtext, narrative plot, and presumptions of reasonableness.

3.2 Narrative, plot, and subtext

Many absurdist writings deviate from the classical form of narration in at least two respects: the lack of subtext, combined with the absence of a plot that holds the story together. The function of subtext (or 'backstory') is to make the main characters and situation in which they operate intelligible to the audience. A good example of subtext can be found in Yazmina Reza's play *Art*, which is about the dissolution of a friendship between three middle-aged men. The play starts with a monologue, in which Marc, one of the main characters, introduces his friend Serge, as well as the setting of the scene that will follow.[29] This example is followed in many other stories and plays: generally, storytellers make an effort to ensure that the audience is not left in the dark about the main characters and the situations they face. Now compare this to the opening of Franz Kafka's *Metamorphosis*: 'When Gregor Samsa woke up one morning from unsettling dreams, he found himself changed in his bed into a monstrous vermin.'[30] Where Reza's play helps the reader out in making sense of the situation, *Metamorphosis* abruptly starts with a strange and unsettling event. Gregor has turned into 'a vermin'. That is it. There is no explanation why or how, and Gregor does not investigate his absurd condition either.[31] Instead, he starts worrying about his job at the office and how his family would cope now that he is unable to provide. A similar technique is used in Samuel Beckett's play *Happy Days*. The play starts with an image of Winnie (no surname), a woman buried up to her waist in scorched earth. How she got there, why she got there, why she does not try to escape – it all remains in the dark. The condition is a given, and the characters live with it.[32]

The lack of subtext as a way to show the absurd only works if it is combined with a second deviation from classical storytelling: the absence of a related plot. In and of itself, there is nothing unusual about strange beginnings. It is a classical way to create suspense in, for example, detective stories ('How did the body end up *there*? What about the strange encounter between the doctor and the boatman?'). However, in detective novels the narrative plot is all about solving the initial mystery, trying to make sense of what initially seemed strange and unsettling. In stories such as *Metamorphosis* there is no such move towards a solution. Gregor Samsa's condition remains strange and unexplained from beginning to end. The story revolves around the way he and his family deal with the transformation, not around making sense of how he turned into an insect overnight.

Post Second World War authors took the absurd form even further. They 'flattened the narrative curve', as Bennett has put it.[33] In classical tragedy, the narrative arc gradually builds up to a climax, after which the hero falls (e.g., Oedipus). In comedy, 'we see the *seeming* unraveling of the protagonist(s), only we come to a climax where everything ultimately resolves into a happy ending'.[34] In absurdist writings in the 1950's and 1960's, nothing of the kind happened. One of the

[29]'My friend Serge has brought a painting. It's a canvas about five foot by four: White. The background is white and if you screw up your eyes, you can make out some fine white diagonal lines. Serge is one of my oldest friends. He's done very well for himself, he's a dermatologist and he's keen on art. On Monday, I went to see the painting; Serge had actually got hold of it on the Saturday, but he'd been lusting after it for several months. This white painting with white lines.' Y. Reza, *Art* (1996) opening scene.

[30]F. Kafka, *Metamorphosis* (translated by J. Neugroschel, 2009).

[31]That is: absurd in the eyes of the reader, who cannot but search for meaning and explanation. For Gregor and his family, the situation is more troublesome than absurd (and this fact only heightens the sense of absurdity for the reader).

[32]S. Beckett, *Happy Days* (2010).

[33]See Bennett, *supra* note 18, at 19, 20.

[34]Ibid., at 20.

best examples is Beckett's *Waiting for Godot*.[35] The audience sees two men, Vladimir and Estragon, on a dirt road, waiting for a man named Godot. It is not clear where they are, why they are waiting (other than 'for Godot'), how they got there, and when it all occurs. The rest of the story (if one may call it that) does nothing to help the audience. The structure of the play is circular and repetitive, as underlined by one of the critics, who described it as a play 'in which nothing happens, twice'.[36] What the audience witnesses is not an event that builds up to some kind of solution. Instead, it is presented with a basic, strange situation that essentially stays the same. As a result, as Esslin has put it, the audience is forced to ask different questions:

> . . . the audience can ask "What is going to happen next?" But then, *anything* may happen next, so that the answer to this question cannot be worked out according to the rules of ordinary probability based on motives and characterizations that will remain constant throughout the play. The relevant question here is not so much what is going to happen next but what *is* happening?[37]

Articles 31 and 32 VCLT instruct interpreters to be like Reza, not like Kafka or Beckett. The audience is not left in the dark, wondering what is happening. Unlike Gregor Samsa or Winnie, treaty provisions are not thrown into a strange world that remains inexplicable. Interpreters must act under the assumption that individual provisions are always more than that – more than just individual provisions. They form part of a purposive order with a past, a point and a future. Their meaning should be ascertained by looking at the 'context' (Article 31) as well as the 'preparatory work' and the 'circumstances of their conclusion' (Article 32). In this way, interpreters are instructed to add exposition and explanation to the treaty and its provisions. The context, preparatory work and circumstances of conclusion provide both a history and a point to treaty provisions. Treaty provisions are not 'there' like Vladimir and Estragon. They have a past in the form of an intelligible story, as narrated in for example the preamble or the *travaux*. They serve a place and purpose in the treaty as a whole. By contrast to the main characters in *Waiting for Godot*, treaty provisions are not caught up in a single recurring 'event'. They are part of a historical process that started before they were born and does not stop after they have been formally validated. Their meaning evolves, as underlined by the possibility to include 'subsequent practice' in the process of interpretation. By adding history, a position in the system, a point and a development, interpreters seek to connect the language of law to the experience of reasonableness. Interpretations should appear as intelligible if we take into account the subtext, context, development, and plot of the treaty provision. This then, also makes it possible to prevent a disconnect between language and experienced reality. If legal provisions seem out of place, absurd, interpreters are called to mobilize classical tools of storytelling to put them back in order.

3.3 Personae

3.3.1 Absurd personae

Several post Second World War absurdist plays and novels lack psychologically developed or even coherent characters. Of course, the use of flat characters is nothing new and has a long tradition in theatre. The *commedia dell'arte* for example, is based on a series of stock characters, who lack psychological depth or development. The personae (masks) in this tradition stand for a particular type, group, or class in society. However, in absurdist theatre it is often not clear who or what is represented in a flattened character. The closest answer is probably: no one in particular, or: everyone. Who, for example, would be Winnie, buried in the earth, recalling happy days? Who are,

[35] S. Beckett, *Waiting for Godot* (2006).
[36] V. Mercier, 'The Uneventful Event', *Irish Times*, 18 February 1956.
[37] See Esslin, *supra* note 18, at 406.

at a symbolic level, Vladimir and Estragon, the main characters in *Waiting for Godot*? They are nobodies and every-bodies at the same time. What makes it even more complicated to identify the nature or meaning of the main characters is that they often lack consistency, a stable core, or motives that the audience could understand. The audience, therefore, cannot see the world through their eyes, but remains outside the life-world of the main characters. This makes it easier for the audience to keep a comical distance, even if the main characters find themselves in situations that are quite desperate.[38]

A good example of the lack of stable and coherent characters can be found in Beckett's trilogy *Molloy*, *Molone Dies*, and *The Unnamable*. Take, for example, the opening of *Molloy*, where the main character finds himself in his mother's room. He has no clue how he ended up there, no clue what is doing there. He 'writes pages' for a 'man', or a group of men, but claims to be unable to work and to have forgotten 'most of the words'. He believes he has a son, but also believes this to be impossible. The son, Molloy conjectures, must be of the same age as his father.[39] Later in the story, a detective named Moran is tasked to track down Molloy. Throughout his search for Molloy, his identity begins to unravel, and the reader is left wondering whether Molloy and Moran may be the same person, vainly in search for his own identity. In these stories, the absurd not only appears because humans find themselves in a strange or meaningless world. The absurd appears within the human self: a self-alienated from itself, yet intrinsically bound up with it. This is how the 'self', the 'I' appears in the opening and closing of *The Unnamable*:

> Where now? Who now? When now? Unquestioning. I, say I. Unbelieving. Questions, hypotheses, call them that. Keep going, going on, call that going, call that on.[40] ... perhaps they have said me already, perhaps they have carried me to the threshold of my story, before the door that opens on my story, that would surprise me, if it opens, it will be I, it will be the silence, where I am, I don't know, I'll never know, in the silence you don't know, you must go on, I can't go on, I'll go on.[41]

3.3.2 Personae as reasonable authors

The Vienna Convention on the Law of Treaties is silent about the rationale that underpins the instruction to avoid absurdity. The World Court called the avoidance of absurd results a 'cardinal principle of interpretation', but left it at that.[42] More elaborate underpinnings can be found in national constitutional law, as I set out in the introduction to this section. As I argued there, two main candidates have been offered so far: (i) interpreters should assume that the lawmaker wants to act reasonably; and (ii) a set of values or principles limits the freedom of lawmakers to create absurd laws.

Interestingly, both underpinnings go beyond the interpretation of rules *per se*. They also contain instructions how to interpret the nature or personae of the lawmaker: the lawmaker is to be seen as someone who is either unwilling or unable to produce absurd results. In other words: the personae of the lawmaker cannot be like a character in a Beckett novel, with their unstable

[38]As Esslin puts it: 'That is why the Theatre of the Absurd transcends the categories of comedy and tragedy and combines laughter with horror.' See Esslin, *supra* note 18, at 401.

[39]Let me quote the opening in full: 'I am in my mother's room. It's I who live there now. I don't know how I got there. Perhaps in an ambulance, certainly a vehicle of some kind. I was helped. I'd never have got there alone. There's this man who comes every week. Perhaps I got there thanks to him. He says not. He gives me money and takes away the pages. So many pages, so much money. Yes, I work now, a little like I used to, except that I don't know how to work any more. That doesn't matter apparently. What I'd like now is to speak of the things that are left, say my good-byes, finish dying. They don't want that. Yes, there is more than one, apparently. But it's always the same one that comes.' S. Beckett, *Molloy, Malone Dies, The Unnamable* (2015).

[40]Ibid., at 331.

[41]Ibid., at 476.

[42]See Section 4.1, *infra*.

identities, incoherent life stories, inconsistent desires, and acceptance of the absurd condition. Legal rules are not the product of arbitrary acts of will, however inconsistent and unreasonable they might be. Either the lawmaker is assumed to want reasonable results (underpinning (i)) or the whims of the lawmaker are corrected by principles of reasonableness (underpinning (ii)). In either case, the transformation from 'will' (is) into 'rule' (ought) is fundamental. The script of law forces the interpreter to treat lawmakers as personae that do not, should not or cannot seek the absurd.

4. The absurd escapes

4.1 The lack of definition

The absurdity avoidance principle leaves much room for interpreters to avoid absurd outcomes in the application of law. The same applies to Article 32, as I set out above: interpreters can employ the *travaux*, together with a number of unspecified tools, to prevent results that would be 'manifestly absurd or unreasonable'. This raises an obvious question: what is it that triggers the use of these partly unspecified 'supplementary means' in the interpretation of law? What is, legally speaking, 'absurd' or 'manifestly absurd or unreasonable'? So far, this question has not spurred much debate in international law circles. Most commentaries on Article 32 just briefly touch upon the question what 'absurd' means, or bracket the question altogether.[43] If a rare attempt is made to capture the concept, this is done in rather general terms. Linderfalk, for example, argues that the terms 'manifestly absurd' and 'unreasonable' as mentioned in Article 32 basically mean the same: 'not justifiable' or impossible to defend rationally.[44] Others have not so much attempted to define the absurd, but tried to assimilate it to already existing categories of law. During the debates in the ILC, for instance, three examples were mentioned of what a manifestly absurd or unreasonable interpretation could look like. An interpretation would be 'manifestly absurd and unreasonable' if it (i) violates the object and purpose of a treaty; (ii) ignores the intention of a state party; (iii) would contradict other rules agreed to by the parties.[45] Of course, object and purpose, intention and other applicable rules may be used to avoid absurd interpretations of law, as set out in Section 2. However, that is not the same as *defining* the absurd in those terms. To be fair, this is not what the ILC intended either. The examples mentioned were exactly that – examples, not an abstract definition, nor an exhaustive list. However, even as examples they cannot capture the concept of the (manifestly) absurd. For one, the need to avoid clashes with object and purpose, intention and other applicable rules is already covered by Article 31 VCLT. If the term 'manifestly absurd' could be defined in these terms, it would lack independent meaning. Secondly, not all interpretations that violate object and purpose, intention or other rules are 'absurd', let alone 'manifestly absurd'. An absurd legal interpretation, as Dougherty has argued, 'offends us at some gut level; it offends not only our sense of fairness, but of rationality and common sense . . . Our reaction goes beyond "That's not fair". It is more like "That's ridiculous; it makes no sense at all"'.[46]

Dougherty's description of the absurd echoes insights from philosophers of the absurd, such as Kierkegaard, Camus or Sartre.[47] Of course, the context, object, and purpose of these philosophical works are quite different from what lawyers are called to do when they interpret legal provisions.

[43]See, for example, M. M. Mbengue, 'Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)', (2016) 31(2) *ICSID Review* 388.

[44]U. Linderfalk, *On The Interpretation of Treaties The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), 334, 337.

[45]See the discussion by Y. Bouthillier, 'Article 32', in O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of Treaties, A Commentary* (2011), 841. In paras. 19 and 20 Bouthillier refers to the discussion in the ILC: 1966 YILC, Vol. I, 873rd meeting, at 206, para. 39, at 215, para. 22; Vol. II, at 223, para. 19.

[46]See Dougherty, *supra* note 7, at 151.

[47]S. Kierkegaard's *Writings*, Vol. 6, *Fear and Trembling/Repetition* (translated by E. and H. Hong, 1983). See also G. Clive, 'The Suspension of the Ethical in Nineteenth Century Literature', (1954) 34(2) *Journal of Religion* 75, at 79. A. Camus, *The Myth of Sisyphus* (translated by J. O'Brien, 2000). J. P. Sartre, *Nausea* (translated by L. Alexander, 1969). See also the article by

Still, philosophical reflections on the absurd: (i) do shed light on the reasons why attempts to define its meaning are bound to fail; (ii) help to understand the paradoxical relation between law's search for rationality and its vulnerability to the absurd.

4.2 The absurd as confrontation

In their attempts to articulate the meaning of the absurd, philosophers such as Kierkegaard, Camus or Sartre have shied away from giving abstract definitions. Instead, they focus on analysing what the absurd *does*, and use stories, novels, and anecdotes to illustrate this. Their starting point is the concrete *experience* of absurdity. Take, for example, the way Camus describes the beginning of a sense of absurdity:

> that odd state of soul in which the void becomes eloquent, in which the chain of daily gestures is broken, in which the heart vainly seeks the link that will connect it again ... is as it were the first sign of absurdity.[48]

As Camus makes clear, none of this is a proper definition of the absurd, 'but rather an *enumeration* of feelings that may admit of the absurd'.[49] The experience of the absurd grows out of a mismatch or confrontation. It requires a human being who tries or pretends to follow rules and conventions, or who seeks order and meaning in the world. This person is confronted with something that is out of tune with the rules, with the rationality of a practice, or with the longing for meaning. The confrontation or mismatch can take different forms, varying from the mundane to the existential, from the comical to the tragic – and all the combinations thereof. Take, for example, the illustrations of the absurd as used by Thomas Nagel:

> someone gives a complicated speech in support of a motion that has already been passed; a notorious criminal is made president of a major philanthropic foundation; you declare your love over the telephone to a recorded announcement; as you are being knighted, your pants fall down.[50]

The absurdity arises out of the attempt to act according to the rules and rituals of a practice (legislation, doing philanthropic work, declaring love, being knighted) and a reality that is fundamentally out of tune. However, Nagel also points at another confrontation through which the absurd can emerge. The absurd can also be experienced when humans bump up against the outer limits of rationality and justification. This is bound to happen, at least now and then, because humans have the capacity of doubt. They can, 'without developing the illusion that they are able to escape from their highly specific and idiosyncratic position ... view it *sub specie aeternitatis* – and the view is at once sobering and comical'.[51] Indeed, the absurd can be hilarious and make for a

Thomas Nagel, who illustrates the absurd through (made-up) anecdotes from everyday life: T. Nagel, 'The Absurd', (1971) 68(20) *Journal of Philosophy* 716.

[48]See Camus, ibid., at 19.

[49]Ibid., at 20. See also Sartre, *supra* note 47, where the main character, Roquentin, experiences 'a sort of sweet disgust' (at 22), which triggers him to search for an expression: 'Oh, how can I put that in words? Absurd: irreducible, nothing – not even a profound, secret aberration of Nature – could explain that' (at 26). For Kierkegaard too, what counts is the experience of the absurd, underlined by the title of his philosophical (theological) novel, *Fear and Trembling* (or, to be precise, the novel narrated by the fictitious character and author Johannes Silentio). Nagel's essay on the absurd opens in a straightforward way with the statement: 'Most people *feel* on occasion that life is absurd, and some feel it vividly and continually' (see Nagel, *supra* note 47, at 716 (emphasis added)).

[50]See Nagel, *supra* note 47, at 718.

[51]Ibid., at 720.

good laugh.[52] However, the same external perspective can also give rise to existential questions such as Camus' 'one truly philosophical problem and that is suicide'.[53] Whatever form the experience of absurdity takes, it is rooted in a confrontation. To build on Nagel's example, absurdity does not arise from the lack of rational foundations – not as such. It emerges out of a confrontation between the necessity to take our lives and practices seriously and the impossibility to provide a rational foundation:

> We see ourselves from outside, and all the contingency and specificity of our aims and pursuits become clear. Yet when we take this view and recognize what we do as arbitrary, it does not disengage us from life, and there lies our absurdity: not in the fact that such an external view can be taken of us, but in the fact that we ourselves can take it, without ceasing to be the persons whose ultimate concerns are so coolly regarded.[54]

4.3 The impossibility to contain the absurd

From the foregoing it follows that the absurd cannot be fully contained through rational thinking. The absurd occurs when something is out of tune with rules or reason. By definition, a rational system cannot include this mismatch – not as such. Of course, it can try to dissolve or silence the feeling of absurdity by applying its own categories. These rationalizations, however, cannot be fully immunized against their own confrontations with something that is out of tune.[55]

While it cannot be contained by reason, the absurd cannot exist without reason and rationality either. After all, it is only possible to be out of tune when there is a tune to begin with. The absurd only occurs if humans take the rationality of a practice seriously, if they genuinely seek to give meaning to their lives. This is what makes absurd situations laughable and tragic. If the people involved would not have serious pretentions, if they did not genuinely search for meaning, if they did not try hard to perform according to rules, the absurd situation would simply not arise. This is what makes Sisyphus the absurd hero: the endless confrontation between a genuine effort to roll the stone up the mountain and the pointlessness of doing so. If Sisyphus were to give up, or if he managed to keep the stone on top, no absurdity would arise. If he could not care less, no absurdity would arise either (or maybe the absurdity of putting so much effort in something you do not care

[52]See also M. Gordon, 'Camus, Nietzsche and the Absurd: Rebellion and Scorn versus Humor and Laughter', (2016) 39 *Philosophy and Literature* 364.

[53]See Camus, *supra* note 47, at 11.

[54]See Nagel, *supra* note 47, at 720. The idea of a confrontation is also central to Camus' *Myth of Sisyphus* and Sartre's *Nausea*. For Camus, the experience of the absurd occurs when human's longing for a meaningful world is met with silence and indifference: 'The absurd is born of this confrontation between the human need and the unreasonable silence of the world . . . The absurd is essentially a divorce. It lies in neither of the elements compared; it is born of their confrontation.' (See Camus, *supra* note 47, at 30–1, 33). In *Nausea*, Roquentin undergoes the absurd when he tries to link the abstract, general categories of language to his concrete experience of the world. The ordering function of language scatters when it is confronted with the 'obscene nakedness' of existence: 'It had lost its harmless appearance as an abstract category: it was the very stuff of things, that root stepped in existence.' (See Sartre, *supra* note 47, at 26). Kierkegaard's position towards the absurd as rooted in confrontation is more ambivalent. *Fear and Trembling* sets out how Abraham opens up to the absurd when he is confronted with the outer limits of ethics and reason. At the same time, *Fear and Trembling* treats the absurd as a redemptive force, the source of renewal and creativity. See also S. Lee, 'The Antithesis Between the Religious View of Ethics and the Rationalistic View of Ethics', in R. L. Perkins (ed.), *International Kierkegaard Commentary: Fear and Trembling and Repetition* (1993), 127.

[55]The experience of the absurd may reveal what was hidden for a long time. A good example is Kamel Daoud's novel *Meursault, contre-enquête*. Daoud's book is narrated from the perspective of the brother who was killed in Camus' *The Stranger*. In Camus' story, the murder victim remains unnamed and without an identity, 'an Arab'. Daoud's book retells the story of the murder, this time pointing at the absurdity and injustice of both the murder and the subsequent indifference towards the victim and his family. Once the story is retold and the victim is given a name, Moussa, it becomes clear that Camus' novel is absurd in more ways than was often acknowledged. K. Daoud, *Meursault, contre-enquête* (2014). For an analysis see S. Horton, 'Solidarity and the Absurd in Kamel Daoud's Meursault, contre-enquête', (2016) XXIV(2) *Journal of French and Francophone Philosophy - Revue de la philosophie française et de langue française* 286.

about). It is the genuine effort, combined with the unavoidable failure, which makes us feel that something is out of place on Sisyphus' mountain.

It is exactly this combination which makes the absurd escape attempts to capture it in rational categories. The experience of the absurd requires an initial search for rationality and reason: Sartre's Roquentin who seeks to apply the abstract categories of language, Camus' individuals longing for a meaningful world, Kierkegaard's Abraham who cares about morality and loves his son, Nagel's fellow human beings who can only live their lives if they take them seriously. The absurd only arises if this search bumps up against its outer limits: Roquentin who experiences nausea, the utter silence of the world for Camus, Abraham entering the realm of the impossible, or the human capacity to discover a lack of foundations in practices we still hold dear. I could add less philosophical examples, from absurd comedy or my own personal life. The point remains the same, however: the absurd exists by virtue of a search for rationality and meaning that it simultaneously undermines.

4.4 The absurd cannot be tamed

Let us return to Dougherty's description of absurdity in legal interpretation.[56] Her formulation also captures the core of the absurd: it is not just about inconsistency; it is about an unsettling experience of being out of tune. This explains why legal systems have been unable to come up with a definition of the absurd. How would it ever be possible to define what is out of tune? If the attempt to do so were successful, it would be self-defeating. The absurd would have turned into predictable legal categories; it would have been defined away. In other words: there would be nothing left of what is out of tune, and hence the definition fails. The absurd simply cannot be tamed like this. It is born out of a confrontation between a search for rationality and meaning and that, which belies it.

The more rational and coherent a system becomes, the more likely it is to be confronted with its counterpart. Humans have the capacity to take an external perspective, as Nagel has argued, and question the very foundation of the practices they cherish. Humans experience mismatches between language and reality, as Sartre and Beckett have argued and illustrated. Humans experience despair or laugh when the pretensions of law fail to connect to their sense of reasonableness. This is why the absurd result principle is important for a legal system. Lawyers should uphold the ideal of reasonableness and prevent the experience of mismatch as much as possible. They have an arsenal of interpretative techniques at their disposal to make this happen, such as exposition, narrative structure, plot, and the assumption of reasonable lawmakers. However, none of this can do away with the ever-looming possibility of the experience of the absurd. After all, as Camus has put it 'At any street corner the feeling of absurdity can strike any man in the face.'[57]

As the quote from Camus already indicates, the feeling of absurdity is not an objective category. It is rooted in a personal experience, which will be different for different individuals, at different points in time. What may look like a perfectly normal act for one person (e.g., applying rules consistently) may be experienced as absurd, as out of tune, for someone else. What a person may experience as mundane activities on a given day (e.g., taking the train to work) may come across as absurd and pointless on some other day (e.g., when a loved one just passed away). It is the personal confrontation that creates a sense of absurdity – not a state of affairs that can be described objectively. Therefore, it is impossible for me to give examples of situations that *are*, in and by themselves, absurd. What I can do, however, is provide two illustrations that made me experience the absurd in the field of international law. What I can also do is briefly sketch how different

[56]See Section 4.1, *supra*, last paragraph.

[57]See Camus, *supra* note 47, at 17.

audiences have experienced the application of rules in different ways – some as absurd, others as completely legitimate and reasonable.

My first example is the ruling of the Dutch Supreme Court in the *Srebrenica* case. In this case, the court was called to determine the responsibility of the Dutch state for not preventing the genocide that took place in 1995. The *Srebrenica* case was, to say the least, complicated and controversial. What happened in Bosnia in the 1990s and why? How was the relation between the UN command structure and the independent responsibility of the Dutch state? What would have happened if the soldiers on the ground had behaved differently, if the UN had provided air support – and are we even capable of answering such questions? Numerous books and articles have been written in an attempt to address the genocide, the lead-up to the genocide, the role of the UN, the role of the peacekeepers on the ground and the aftermath of the genocide.[58] Now it was up to the Court. After an analysis of the facts, Dutch tort law, human rights law, the Genocide Convention, and the customary rules on state responsibility, the Court concluded that, had the troops acted differently, there was a 10 percent chance that the 350 men on the compound would not have fallen into the hands of the Serbs. Consequently, the Dutch state was for 10 percent liable for the damages suffered. The experience of absurdity, at least for me, arises out of the mismatch between the enormity of the injustice and suffering (genocide), the impossibility to determine what would have happened in alternative scenarios, the difficulties of grasping what happened to begin with – and the pretension of technical precision in the calculation of alternative histories and the liability of the state (10 percent).[59]

My second example is the *Praljak* case.[60] This case provides a good illustration of the different ways in which the same event is experienced differently by different audiences. What comes across as 'absurd' for one, may be tragic or even reasonable for another. For me, as I will explain below, the *Praljak* case started out as a tragedy, but turned absurd when the court finally sought to capture this tragedy in legal-bureaucratic categories. This is not to say the court should have acted differently – it is exactly the understandable and legitimate attempt to apply rules and procedures that made me feel that something was out of place in The Hague.

As may be recalled, when Praljak heard the judge confirming most of the charges against him (war crimes, grave breaches, and crimes against humanity), he took the floor, declaring: 'Slobodan Praljak is not a war criminal. I reject your verdict.' Thereupon he drank a vial filled with deadly poison, which he managed to smuggle into the courtroom.[61] After the judge was informed what just happened, he suspended the session: 'please, the curtains'. End of scene. For many, including myself, Praljak's suicide was most of all a tragedy, performed before the eyes of the world. For some others the act itself, performed in the context of the courtroom, with all its claims and symbols of reason and fairness, was more than that: it spurred a feeling of absurdity. As one commentator put it: 'Suicide before the eyes of the whole world; it was too absurd to be true.'[62] For Praljak and his supporters, however, the absurdity lay elsewhere. His suicide was seen as a way to *end* an absurd trial, which failed to do justice to what Croatian nationals believed to be the true story of the war. For

[58]For an analysis of several historical accounts of what happened see E. Rijsdijk, *Lost in Srebrenica: Responsibility and Subjectivity in the Reconstruction of the Failed Peacekeeping Mission* (2012), PhD, Vrije Universiteit Amsterdam.

[59]Hoge Raad, *Mothers of Srebrenica*, 19 July 2019, ECLI:NL:HR:2019:1223. Note that the Supreme Court overturned an earlier ruling that claimed that the state was liable for 30% for the death of the 350 men. To me, the correction of an earlier pseudo-precise calculation only adds to the feeling of absurdity.

[60]*Prosecutor v. Prlić et al.,* Appeals Chamber decision, Case No. IT-04-74-A, A.Ch, 29 November 2017.

[61]'Slobodan Praljak Suicide: War Criminal "Took Cyanide" in Hague court', *BBC*, 1 December 2017, available at www.bbc.co.uk/news/world-europe-42204587.

[62]'Life Sentence for Mladić: Mission Sccomplished?', *Interview with Carsten Stahn, Leiden University*, 8 June 2021, available at www.universiteitleiden.nl/en/news/2020/08/yugoslavia-tribunal-closes-its-doors-mission-accomplished. See also M. Lanier, 'Romancing Violence: Intellectuals and War Criminals: The Suicide of Slobodan Praljak', (2018), at 2: 'Mr. Praljak's suicide was an absurdist disruption, something that wasn't supposed to happen in an international juridical institution', available at www.academia.edu/41172212/Intellectuals_and_War_Criminals_the_Suicide_of_Slobodan_Praljak.

them, the absurdity also arose out of a confrontation, between their version of history and the pretensions of procedural fairness and objectivity of the Tribunal. At a commemoration, the son of former president Tudjman denounced the trial as 'a parody, a theatre of the absurd'.[63]

For me the feeling of absurdity only kicked in later. After Praljak took his life, the ICTY requested an independent review, alongside the criminal investigation undertaken by Dutch authorities. This makes perfect sense of course. One would hope and expect the Tribunal to identify possible shortcomings and to learn from possible mistakes that were made. And indeed, the review came up with a number of recommendations to facilitate early detection of materials that could be used to take one's life. They included random cell searches, regular visual inspection of cells, possible enhanced search of visitors and, interestingly, a 30-minute delay for broadcasting of the pronouncement of judgments.[64] The review also examined whether the rules and procedures at the ICTY were in line with international standards. In a way, this can be seen as an attempt to undo the disruptive effect of a suicide in court: apparently, this event too is embedded in existing rules and procedures and can be assessed accordingly. The review does indeed identify relevant rules and applies them to the facts of the case. However, precisely this makes the review vulnerable to yet another experience of absurdity. The author of the review concluded that his research has:

> not exposed any gaps or flaws in the ICTY legal framework ... Further, the Review shows that the legal framework was complied with by UNDU Officers, Security Officers, and other ICTY staff ... As set out in my Conclusions, without specific intelligence (which there was none), and remaining within the limits of the Nelson Mandela Rules, there are no measures that would have guaranteed detection of the poison at any stage.[65]

In other words: the rules were fine, procedures were followed – Praljak just happened to kill himself.

5. Conclusion

The VCLT was negotiated and drafted in the period 1949–1969. This period also witnessed a peak in the theatre of the absurd, with the publication of plays such as *The Bold Soprano* (1950), *Waiting for Godot* (1952), and *The Birthday Party* (1957). These two things have nothing to do with each other.

And yet, connecting the theatre of the absurd to Article 32 VCLT helped me to grasp the role of absurdity in legal interpretation. At first sight, the absurd appears as an outsider to law. Across the world, legal systems instruct interpreters to avoid absurd outcomes. A similar instruction can be found in Article 32 VCLT, which suggests the use of so-called 'supplementary means' in order to avoid interpretations that would be manifestly absurd or unreasonable. In order to prevent such outcomes, interpreters should use techniques that echo the means employed by absurdist writers. It is only the aim that radically differs: absurdist writers seek to create a feeling of mismatch and absurdity, lawyers seek to do away with that. Therefore, they employ the techniques the other way around. They are called to connect the language of the law to a sense of reason through the

[63]L. Veselica, 'Croats Honour War Criminal "Martyr" Who Killed Himself in Court', *Yahoo!News*, 11 December 2017, available at www.sg.news.yahoo.com/croatians-honour-war-criminal-killed-self-court130002598.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAFEO8uiArvSOKhjOt76c7zDLMHWh9SniYIQKT4eiKComM-dkv_8pHiOohML0S9Ltds1wb0xRfl3yagnJmmw3YNcAAUoaSiEGJBXl2ty278pBplC7xcH9-kMh13KmfiGOCxjfTS8vZsIlxS2EoVWrGbPhQwoPxgEKB9dmF7GfqhqB.

[64]H. B. Jallow, 'Report to the ICTY Registrar on the Independent Administrative Review regarding The Death of Slobodan Praljak in the Custody of the ICTY', 29 December 2017, at 19, available at www.irmct.org/sites/default/files/attachments/articles/180309-report-29-december-2017_0.pdf.

[65]Ibid., para. 59.

addition of subtext, narrative plot, narrative development, and reasonable legal personae. End of story.

But what is the story about? Despite their general love for definitions and categorizations, lawyers have hardly made a serious attempt to define the absurd. Legal systems agree that the absurd should be expelled, but *what it is* that should be expelled remains in the dark. This makes perfect sense, as I have argued in the previous sections. The absurd simply cannot be captured in abstract and general definitions. The experience of the absurd arises out of a confrontation, a mismatch between a search for rationality and meaning and that, which belies it. To define what counts as absurd in advance would make it disappear. However, the absurd is bound to stay, as the ever-lasting possibility of mismatch, of our failure to fully grasp the world in (and on) our terms. At the same time, the absurd can only raise its head as long as we try to make sense of the world, as long as we seek to follow rules, be reasonable, long for meaning and justice.

This is why writers on the absurd have used the setting of law and legal procedure so frequently. In a way, law and the absurd are antitheses. Law carries a claim and vocation to the reasonable, the rational and the coherent. Legal systems across the world instruct judges to avoid absurd outcomes in the application of law. Thankfully so. However, precisely this makes law a good example to illustrate an absurd condition: the more a system claims to be reasonable, the harder the absurd will be able to hit.

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