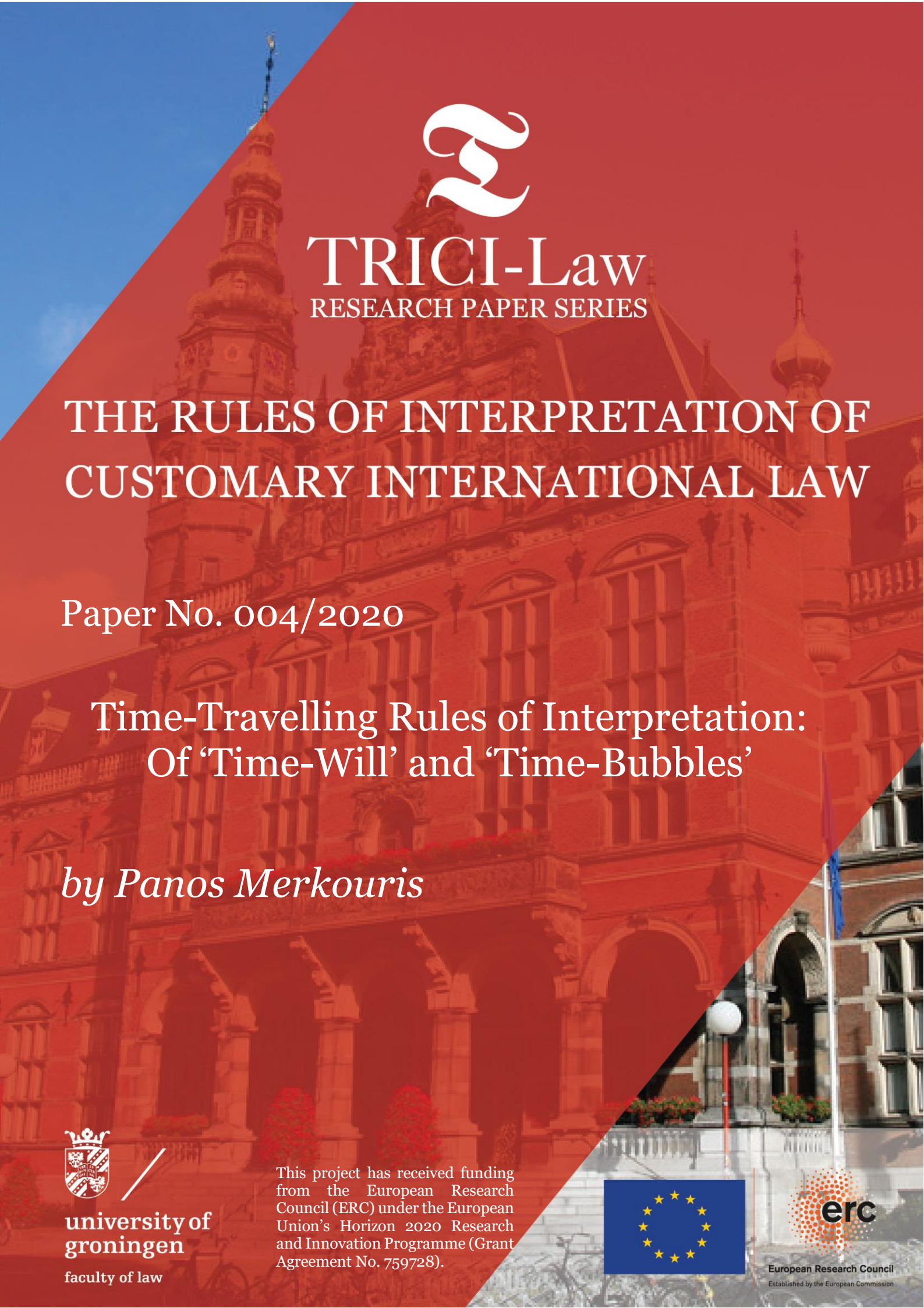

TRICI-Law
RESEARCH PAPER SERIES

THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

Paper No. 004/2020

Time-Travelling Rules of Interpretation: Of 'Time-Will' and 'Time-Bubbles'

by Panos Merkouris

university of groningen
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This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

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forthcoming in:

P Merkouris, 'Time-Travelling Rules of Interpretation: Of "Time-Will" and "Time-Bubbles"' in L Pasquet, K Polackova van der Ploeg, and L Castellanos Jankiewicz (eds), *International Law and Time: Narratives and Techniques* (forthcoming Springer 2021)

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TIME-TRAVELING RULES OF INTERPRETATION: OF 'TIME-WILL' AND 'TIME-BUBBLES'

Panos Merkouris[1]

Abstract: International courts and tribunals are fond of paying lip service to Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT) as reflective of customary international law. In fact, these courts and tribunals sometimes treat the customary rules of treaty interpretation as if they have remained relatively unchanged throughout the ages, which allows judges and arbitrators to draw inspiration from the VCLT even when interpreting a treaty that predates 1980 (the date of the VCLT's entry into force). While this method may be acceptable for relatively recent treaties, the question is whether it can hold water for the interpretation of 20th-century, 19th-century or even earlier treaties. Customary rules of treaty interpretation have not been immutable over time. Practice relating to the very existence as well as to the content of any rules of interpretation has been unsettled, and the claim of the rules' immutability would be logically as well as systemically incoherent with the structure of the international legal system. The changeable nature of the rules of treaty interpretation produces intertemporal concerns and imposes limits as to what interpretative rules judges may apply. Unless the treaty parties agree differently, the presumption must be that the 'time-will' of the treaty parties is determinative of what rules of interpretation apply – whether those of the time of the treaty's conclusion or those that exist today. Rules of interpretation can be 'time-travelers', but only if the treaty parties so will it.

1 INTRODUCTION

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... it's time that rules, time is our gambling partner on the other side of the table and it holds all the cards of the deck in its hand ...

José Saramago, *Blindness*[2]

The study of time and the changes effectuated by and through the passage of time have always been central to logic, philosophy and mathematics. Zeno's arrow paradox,[3] Heraclitus' river paradox,[4] and Theseus' ship paradox[5] are but a few examples from antiquity that demonstrate not only the fascination of ancient philosophers with time and change but also how tangled and multidimensional even the simplest thought experiments could become when tackled from the angle of time.

Legal science and, for our purposes, international law is no stranger to the complexities and the problems that the passage of time can produce. The principle of *tempus regit actum*, the principle of contemporaneity, and intertemporal law are but a few manifestations of the approaches that have emerged through practice in order to respond to the inherent difficulties of deciding in the present on matters of the near or far removed past. Several seminal academic works have been devoted to time in interpretation and application of international law from a variety of angles.[6]

[2] José Saramago, *Blindness* (Harvest Books 1999) 318.

[3] Nick Huggett, 'Zeno's Paradoxes' (*Stanford Encyclopedia of Philosophy*, 15 October 2010) <https://plato.stanford.edu/entries/paradox-zeno/#Arr> accessed 20 September 2019.

[4] Heraclitus as quoted in Plato, *Cratylus* 402a. Ancient Greek text and translation available at the *Perseus Digital Library* < http://www.perseus.tufts.edu/hopper/> accessed 20 September 2019 (Perseus Digital Library).

[5] Plutarch, *Theseus*, ch 23.1 (available in the Perseus Digital Library). An interesting variation on the theme is offered by Hobbes in Thomas Hobbes, *Elements of Philosophy the First Section, Concerning Body* (R & W Leybourn 1656), ch XI, 7.

[6] Shabtai Rosenne, *The Time Factor in the Jurisdiction of the International Court of Justice* (Sythoff 1960) 11-75; Antônio Augusto Cançado Trindade, 'The Time Factor in the Application of the Rule of Exhaustion of Local Remedies in International Law' (1978) 61 Rivista di Diritto Internazionale 232-57; Paul Tavernier *Recherches sur l' application dans le temps des actes et des règles en droit international public: problèmes de droit intertemporal ou de droit transitoire* (LGDJ 1979); Edward McWhinney, 'The Time Dimension in International Law, Historical Relativism and Intertemporal Law' in Jerzy Makarczyk (ed), *Essays in International Law in Honour of Judge Manfred Lachs* (Martinus Nijhoff 1984), 179-200; Rosalyn Higgins,

The purpose of this chapter is to address neither the notion of 'time' in its totality nor all the temporal aspects that come in one way or another within the process of interpretation. What will be demonstrated is a kind of 'double-think' in international judicial reasoning, with a particular emphasis on the decisions of the International Court of Justice (ICJ). Whereas judges are familiar and often pay lip service to the fact that the law to be applied is the law contemporaneous to the relevant juridical fact, in the case of interpretation, and in particular the rules that govern interpretation, the notion of 'time' nonetheless becomes rather 'relative'. When interpreting treaties concluded before the Vienna Convention on the Law of Treaties (VCLT)[7] entered into force in 1980, in some cases even 19th-century treaties, judges have no qualms referring to the VCLT rules on treaty interpretation. But are these rules of interpretation ubiquitous and immutable? If not, we would be faced with the first proof of 'time-traveling' rules. What a scoop this would be for the international legal science to have proven 'time travel' before the hard sciences. Alas, let us not get out the bottles of champagne just yet. This chapter aims to deconstruct this practice of going back in the past to interpret a treaty, and in doing so to look for guidance to the rules of interpretation formulated in the future. What will be shown is that this practice is logically, methodologically and normatively incorrect, and full of contradictory elements.

What will be demonstrated at the start is that one solution to the problem of using modern rules of treaty interpretation when interpreting earlier treaties would be to argue that these rules are immutable, or at least that they have not changed in the last few centuries. However, that is not the case. The very existence of the rules of interpretation was not only hotly debated until recently, but even their content both in academic writings and international judicial practice has been and continues to be in a state of flux. Apart from this empirical evidence, a claim of the immutability of the rules of interpretation would also be logically and systemically incoherent with the structure of the international legal system.

'Some Observations on the Inter-temporal Rule in International Law' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International 1996), 173-81; Don Greig, *Intertemporality and the Law of Treaties* (BIICL 2001). For a great overview of the various theories on interpretation and the effect of time on interpretation, see Emmanuel Roucounas, *A Landscape of Contemporary Theories of International Law* (Martinus Nijhoff 2019) 600-13.

[7] Vienna Convention on the Law of Treaties [1969].

As the rules of treaty interpretation are thus open to change, the chapter next examines whether the use of future rules of interpretation for past treaty conflicts with any existing rules or principles of international law. If not, then it would simply be at the discretion of each judge to do as they please. However, there are principles at play, which set certain limits to what rules of treaty interpretation judges may apply. The chapter then concludes with guidance on the logically and normatively coherent manner of interpreting pre-VCLT treaties by discussing the possible scenarios in which the modern rules of interpretation are allowed to 'time-travel' and traverse the arrow of time in the opposite direction.

2 The Claim that Rules of Interpretation Are Immutable Despite the Passage of Time

The claim that rules of interpretation enshrined in the VCLT are either immutable or have, at least, not undergone any significant changes throughout the centuries is one that deserves our attention. If that were the case, then the ICJ (and any interpreter, for that matter) employing the VCLT rules in interpreting a pre-VCLT treaty would in principle be applying the rules existing at the time of the treaty's conclusion, since the content of the rules would not have changed at all. However, upon closer scrutiny this claim does not seem to hold any water.

2.1 The Very Existence of Rules of Treaty Interpretation

Even the very existence of rules of interpretation was a topic that was highly debated decades before the International Law Commission (ILC) started discussing the draft articles on the law of treaties. Taylor, for instance, was of the opinion that 'it seems to be universally admitted that it is next to impossible "to prescribe any system of rules of interpretation for cases of ambiguity in written language that will really avail to guide the mind in the decision of doubt"'.[8] Yü, on the other hand, starting from the excessive multiplicity of alleged canons of construction or maxims of interpretation, was led to the conclusion that the abundance of such rules detracted from any meaningfulness that they may have, since 'a mere application of one, or a shrewd combination of two, of them may yield almost whatever conclusion the

[8] Hannis Taylor, *A Treatise on Public International Law* (Callaghan 1901) 394 (internal references omitted).

interpreter desires'.[9] He acknowledged that one 'rule' on interpretation (understood as a principle of conduct and not as a legal rule per se) existed, and that was the discovery of the intention of the parties. In his view:

> [The] challenge [that the people that support the existence of a set of rules of interpretation face] … is this: Can scientific results be obtained through sheer flights of imagination? That the collection of rules sponsored by some publicists are inefficacious in interpreting treaties between nations may be seen from the very fact that interpretation is eminently a practical science, and as such it has to consider extrinsic evidence and circumstances peculiar to each individual case. Moreover, the fundamental difficulty in prescribing a system of rules also lies in the imperfect nature of human language itself, through which no one can define or direct any intellectual process with perfection. How then is it to be expected that any artificial rules which are generally to govern the operations of human relationship can be of scientific value? It would appear, therefore, as futile to attempt to frame positive and fixed rules of construction as to endeavor in the same manner to set forth the mode by which judges should draw conclusions from various species of evidence.[10]

[9] Tsune-Chi Yü, *The Interpretation of Treaties* (Sn 1927) 72. For example, in the *van Bokkelen* case, the tribunal provided an extensive list of alleged 'rules' of interpretation. *Charles van Bokkelen* case *(USA v Haiti)* (1888) 2 Moore International Arbitrations 1807, 1848ff.

[10] Yü (n 9) 28.

Similar views regarding the impossibility or undesirability of a strict set of rules on interpretation were expressed by Westlake,[11] Hyde,[12] Lawrence,[13] Fenwick,[14] Hershey,[15] Oppenheim[16] and Brierly.[17] Even in the commentary to the Harvard Convention on the Law of Treaties, the drafters acknowledged this problem only to state that the rules on interpretation laid out in Article 19 of the Harvard Draft Convention were not iron-clad rules but rather 'guides to direct the interpreter'.[18]

[11] John Westlake, *International Law* (2nd edn, Sn 1910) 293 ('[The rules on interpretation laid down by publicists] are not likely to be of much practical use.' (internal references omitted)).

[12] Charles Hyde, 'Concerning the Interpretation of Treaties' (1909) 3 American Journal of International Law 46, 47. Hyde was of the view that the objective of interpretation was to discover the intention of the parties and that this effort should not be hampered by any preconceived rules, principles and assumptions.

[13] Thomas Lawrence, *Principles of International Law* (7th edn, MacMillan 1923) 302 ('[A] vast amount of misplaced energy has been expended [on trying to devise a set of rules of interpretation].') However, Lawrence later on concedes to textual (ordinary and special meaning) and contextual interpretation.

[14] Charles Fenwick, *International Law* (The American Law Book Co 1924) 331. According to Fenwick, rules of interpretation only have an 'inchoate legal value'.

[15] Amos Hershey, *The Essentials of International Public Law and Organization* (rev edn, MacMillan 1927) 445. Although Hershley puts down nine rules on interpretation in his writings, he makes it crystal clear that these rules have found general acceptance but should not be considered as forming 'part of International Law proper'.

[16] Lassa Oppenheim, *International Law– Vol 1. Peace* (4th edn, Longmans 1928) 759 ('[N]either customary nor conventional rules of International Law exist concerning the interpretation of treaties'.)

[17] James Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Clarendon Press 1928) 168. Brierly was of the view that there 'are no technical rules in international law for the interpretation of treaties; its objective can only be to give effect to the intention of the parties as fully and fairly as possible'.

[18] James Garner (Reporter), 'Codification of International Law: Part III – Law of Treaties – Draft Convention on the Law of Treaties' (1935) 29 American Journal of International Law Supplement 657, 946-47. It is worth reproducing the relevant part in full: 'It seems evident that the prescription in advance of hard and fast rules of interpretation – even though, as in the case of those proposed by Ehrlich, *they amount only to rebuttable presumptions* – contains an element of danger which is to be avoided … If it be kept always in mind that the so-called rules of interpretation have no extraordinary sanctity or universality of application, and that in all probability they developed as neat *ex post facto* descriptions or justifications of decisions arrived at by mental processes more complicated than the mere mechanical application of rules to a text, they may serve some purpose as aids to interpretation. Where a rule is of such a nature as to suggest a line of investigation for discovering the general purpose of the parties, or where a consideration of all pertinent circumstances in a particular case results in a decision easily explained by a well-known maxim, there is probably no harm in relying on it. I*t is always to be recalled, however, that the process of interpretation of treaties is, of necessity, one which is not to be confined within narrow limits by iron-clad rules; that all "rules", including those laid down in this article, are but guides to direct the interpreter toward a decision which conforms, not to preconceived standards, but to the circumstances peculiar to the particular case before him*' (emphases added).

One could brush aside most of these views by simply stating that they were a thing of the past, as they were all expressed prior to 1930, at a time where the rules of interpretation may have been considered still in formation. To that argument, however, two critical remarks must be raised in objection. First of all, the claim would rely on an underlying assumption that if a treaty from that period or before was to be interpreted, then it would be dubious whether any international court or tribunal could refer to the modern rules of interpretation. However, this is exactly what several courts and tribunals have been doing, by interpreting pre-VCLT treaties with reference to the customary content of the rules of interpretation as enshrined in the VCLT. Secondly, this uncertainty about any rules of interpretation continued well into the 1950s and 1960s,[19] and was reflected in the discussions of the Institut de Droit international and during the ILC meetings on the law of treaties.

As far as the Institut de Droit International was concerned, its members expressed similar doubts as to the existence of technical rules on interpretation.[20] In the end, however, the Institut adopted, during the Grenada Session in 1956, a resolution on interpretation of treaties.[21] The situation in the ILC was not radically different. Waldock, for instance, in his 'Third Report on the Law of Treaties', starts his commentary on the articles relating to the interpretation of treaties by acknowledging that 'even the existence of rules of international law governing the interpretation of treaties are questions which are not free from controversy.'[22] Apart from the Special Rapporteur, other ILC members also expressed qualms about the existence of rules of interpretation. For instance, Briggs was of the view that '[t]he canons of interpretation were not always rules of international law but, as Judge de Visscher

[19] See eg McNair, who wrote that he was 'amongst those who are skeptical as to the value of those so-called rules and are sympathetic to the process of their gradual devaluation, of which indications exist. The many maxims and phrases which have crystallized out and abound in the textbooks and elsewhere are mere *prima facie* guides to the intention of the parties in a particular case.' Arnold McNair, *The Law of Treaties* (Clarendon Press 1961) 366.

[20] Institut de Droit international, 'De l'interprétation des traités' (1950) 43(1) Annuaire de l'Institut de Droit international 336ff.

[21] Institut de Droit international, 'De l'interprétation des traités' (1956) 46 Annuaire de l'Institut de Droit international 359.

[22] ILC, 'Third Report on the Law of Treaties' (3 March – 7 July 1964) UN Doc A/CN.4/167 and Add 1-3, (1964) Yearbook of the International Law Commission vol II 5, 53, para 1.

had said, they were working hypotheses'.[23] Ruda also felt that 'at the present stage of development of international law, there did not as yet exist for States any obligatory rules on the subject of interpretation'.[24] According to him, if there were any rules, it would simply be the Vattelian axiom *in claris non fit interpretatio*, according to which there could be no question of interpretation where the sense was clear and there was nothing to interpret'.[25] Both the United States and Ghana also had their doubts, with the former suggesting when asked for comments on the draft articles that it might be better to draft the relevant articles as guidelines rather than as rules,[26] whereas the latter during the 1968 Vienna Conference on the Law of Treaties raised similar objections regarding the nature of the proposed 'rules'.[27]

As is manifestly evident from the material presented above, the existence of binding rules of interpretation was questioned even right up to the adoption of the VCLT. Even today, there are authors who still object to the existence of binding rules of interpretation.[28] To argue that for every treaty ever signed and ratified there were immutable customary rules of interpretation which applied is to say the least a very generalized and superficial description of an extremely complex topic.[29]

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[23] ILC, 'Summary Record of the 765th Meeting' (14 July 1964) UN Doc A/CN.4/SR.765, para 9.

[24] ibid para 33. See similar comments by de Luna ibid para 16.

[25] ibid para 33.

[26] ILC, 'Sixth Report on the Law of Treaties' (11 March – 14 June 1966) UN Doc A/CN.4/186 and Add 1-7 reproduced in (1966) Yearbook of the International Law Commission vol II 51, 93.

[27] The objection was raised by Ghana; UN Conference on the Law of Treaties, '31st Meeting of the Committee as a Whole' (19 April 1968) UN Doc A/CONF.39/C.1/SR.31, para 68.

[28] Jean d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law Ascertainment Distinguished' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015), 111-129; Jean d'Aspremont, 'The Idea of "Rules" in the Sources of International Law' (2014) 84 British Yearbook of International Law 103; Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2011).

[29] The author wishes to clarify at this point, that in his view, both after and prior to the VCLT, there are and were customary rules on interpretation, although their content has changed or been clarified over time. Prior to the VCLT and the further back we go in time, these rules become less customary and more principles stemming from domestic legal systems or 'constructive rules', in the Anzilottian sense, ie rules that must by necessity exist otherwise the judges would be unable to properly execute their function (consider the logical absurdity of a case, in which a judge would not have any rules of interpretation to fall back on); as one author has characterized them, these 'constructive rules' are essentially 'not the rules of the game but the necessary premises for the game to be played'. Jacopo Crivellaro, 'How did Anzilotti's Jurisprudential Conception Influence the Jurisprudence of the Permanent Court of International Justice?' (*Jura Gentium*, 2011)

2.2 Various Forms

But let us leave aside the highly debatable proposition that customary 'rules' of interpretation have existed since the inception of the international legal system. Even if one concedes the fact that customary rules (or more likely principles of interpretation) existed at the dawn of international treaties, that still does not solve the problem of using the VCLT rules as a reflection of customary international law. There is still an insurmountable hurdle that must be overcome: the problem of the content of those customary rules/principles, at various points in history. As the argument goes, at least according to the practice of the ICJ, these customary rules have not been the subject of radical change. But is this really the case? In the previous section, some of the authors who doubted the existence of rules of interpretation also made some educated guesses about possible useful rules, as several other authors have done.[30]

These propositions are too numerous and too diverse to enumerate here. However, in order to demonstrate that this diversity is a common and recurring theme, this section focuses on the

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<http://www.juragentium.org/topics/thil/en/crivella.htm> accessed 20 September 2019. Generally, on 'constructive rules,' see Dionisio Anzilotti, *Cours de droit international, tome I* (Sirey 1929) 68ff; Giorgio Gaja, 'Positivism and Dualism in Dionisio Anzilotti' (1992) 3 European Journal of International Law 123, 128ff.

[30] See eg Fitzmaurice, who identified six principles of interpretation on the basis of the jurisprudence of the ICJ: (i) principle of actuality (or textuality); (ii) principle of the natural and ordinary meaning; (iii) principle of integration. Subject to those principles were: (iv) principle of effectiveness (*ut res magis valeat quam pereat*); (v); principle of subsequent practice; and (vi) principle of contemporaneity. Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 British Yearbook of International Law 203, 211-12. For presentations of the various principles of interpretation used in both international and domestic jurisprudence, see Charles Hyde, 'Interpretation of Treaties by the Permanent Court of International Justice' (1930) 24 American Journal of International Law 1; William Eric Beckett, 'Decisions of the Permanent Court of International Justice on Points of Law and Procedure of General Application' (1930) 11 British Yearbook of International Law 1; William Eric Beckett, 'Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice internationale' (1932) 39 Recueil des cours 135, 261ff; William Eric Beckett, 'Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice international (juillet 1932 – juillet 1934)' (1934) 50 Recueil des cours 193; Manley Hudson, *The Permanent Court of International Justice: A Treatise* (The MacMillan Co 1934) 551-73; John Moore, *A Digest of International Law*(Government Printing Office 1906) 249ff; Arnold McNair, 'L' application et l' interprétation des traités d' aprés la jurisprudence britannique' (1933) 43 Recueil des cours 247.

various codes and treaties that included rules of interpretation. What is shown is that each of these documents not only proposed different rules from one another, but also and most importantly differed from the VCLT rules. In the following analysis, various rules proposed have been distilled to their essence and described in a manner similar to the wording used by the VCLT in order for the differences to become more apparent.

In the first attempts towards codification of the international law of treaties, rules of interpretation are conspicuous by their absence. Not in the Havana Convention on Treaties[31] or in David Dudley Field's[32] or Bluntschli's Draft Code[33] or the 1927 Draft of the International Commission of American Jurists[34] do we find any rules of interpretation included. In Fiore's Draft Code, however, an extensive list of rules referring to interpretation can be seen.[35] First of all, Fiore adheres to the *in claris non fit interpretatio* maxim.[36] According to Fiore, when interpretation is necessary, it can have one of two forms, either grammatical or logical. The former may be used to determine the meaning of vague expressions, whereas the latter is aimed at 'fix[ing] precisely the concept and extent of the reciprocal obligations assumed by the […] parties'.[37]

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[31] James Garner (Reporter), 'Codification of International Law: Part III – Law of Treaties – Appendix 1: Convention on Treaties' (1935) 29 American Journal of International Law Supplement 1205.

[32] James Garner (Reporter), 'Codification of International Law: Part III – Law of Treaties – Appendix 2: David Dudley Field's Draft Code' (1935) 29 American Journal of International Law Supplement 1207.

[33] James Garner (Reporter), 'Codification of International Law: Part III – Law of Treaties – Appendix 3: Bluntschli's Draft Code' (1935) 29 American Journal of International Law Supplement 1208.

[34] James Garner (Reporter), 'Codification of International Law: Part III – Law of Treaties – Appendix 5: Draft of the International Commission of American Jurists' (1935) 29 American Journal of International Law Supplement 1222.

[35] James Garner (Reporter), 'Codification of International Law: Part III – Law of Treaties – Appendix 4: Fiore's Draft Code' (1935) 29 American Journal of International Law Supplement 1212.

[36] ibid para 797.

[37] ibid para 798. Fiore provides an extensive list of 'rules' of grammatical and logical interpretation. Grammatical interpretation, on the one hand, includes: *in claris non fit interpretatio*; ordinary meaning; contextual interpretation; technical ordinary meaning supersedes everyday ordinary meaning; in case of conflict between the ordinary meaning of a term and its meaning as clearly determined by the intention of the parties, it is the latter that shall prevail; in case of terms with different meanings in different languages the dominant meaning is that of the State which undertakes the relevant obligation; and interpretation by reference to prior and/or subsequent agreements, practice and other relevant rules (ibid paras 799-806). Logical interpretation, on the other hand, consists of the following rules: the intention of the parties is the dominant criterion (*semper autem in fide quid senseris, non quid dixeris, cogitandum*) (ibid para 807); *contra proferentem*; *in dubio mitius*; *ut res*

Fiore also offers some rules regarding resort to broad or restrictive interpretation. According to him, in principle when the text is clear, a broad interpretation or an interpretation by analogy should be avoided.[38] If, however, the text is ambiguous, this ambiguity may be resolved through in *pari materia* interpretation.[39] Finally, provisions creating obligations or restricting rights should be interpreted restrictively.[40]

Unlike Fiore's Draft Code, a resolution on interpretation of treaties adopted by the Seventh International Conference of American States (Conference of American States Resolution)[41] clearly demonstrated that the participating States were of the view that interpretation was governed not by 'rules' but by 'principles.' In fact, Article 1 of the resolution states that 'the rules governing the interpretation of domestic law are applicable to the interpretation of international conventions'.[42]

The commentary to the Harvard Convention, although explaining that the relevant Article 19 should be seen as including guidelines rather than strict rules, all of which are subservient to the general purpose of the treaty.[43]

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magis valeat quam pereat; interpretation by reference to other 'relevant rules'; contextual interpretation; *travaux préparatoires* cannot be used to deviate from the meaning of the text (ibid paras 807-14).

[38] ibid paras 815-16.

[39] ibid para 816; this interpretation is very similar to VCLT art 31(3)(c).

[40] ibid para 817.

[41] James Garner (Reporter), 'Codification of International Law: Part III – Law of Treaties – Appendix 7: The Interpretation of Treaties' (1935) 29 American Journal of International Law Supplement 1225.

[42] The Resolution further states that the intention of the parties (referred to as 'will or purpose of the parties') shall be sought in the preamble and the preparatory work; the treaty must be interpreted in good faith, according to the ordinary meaning of its terms (or special meaning when that can be demonstrated), in context, by reference to subsequent agreements and practice, and in conformity with established rules of international law (a faint echo of art 31(3)(c) VCLT) but only when the intention of the parties cannot be established clearly (arts 3-8); restrictive or expansive interpretation may be resorted to only when the ordinary methods of interpretation have failed; *in dubio mitius* is to be resorted to when the issue is about an obligation of a State (art 10); and if there is an issue of interpretation arising from the existence of equally authentic texts, the intention of the parties will be the deciding factor and if the intention cannot be established then the restrictive interpretation will be the solution to be given (arts 9 and 11).

[43] These guidelines included: the object and purpose of the treaty; preparatory work; circumstances of conclusion; subsequent practice and agreements; the conditions prevailing at the time interpretation is being made. Harvard Draft Convention (n 18) art 19.

Finally, the Institut de Droit international in its 1956 Resolution on 'Interpretation of Treaties' provided two articles that stipulated various 'principles' from which the various courts and tribunals could draw inspiration.[44] The first article includes references to interpretation based on good faith, the text, the ordinary meaning of the words (unless a special meaning was intended by the parties) in their context and in the light of principles of international law.[45] In a supplementary and discretionary fashion, recourse could also be had to other means, which include the recourse to preparatory work, subsequent practice, and the purposes of the treaty.[46]

Leaving aside the various ILC drafts of the articles on treaty interpretation, which vary significantly from one another,[47] and focusing on the preceding attempts to codify the rules of interpretation, one thing becomes eminently clear. Although there are some similarities with Articles 31-33 of the VCLT, they are a far cry from being identical. Granted, there is reference to the text, ordinary meaning, special meaning, good faith, and subsequent practice,[48] but the differences are much more pronounced. For instance, Fiore's Draft Code and the Conference of American States Resolution, refer to restrictive and expansive interpretations, which are activated when the main methods of interpretation have failed. Fiore's Draft Code starts with a reaffirmation of the *in claris non fit interpretatio* maxim, which, however, was rejected in the Vienna Conference on the Law of Treaties as being an 'obscurantist tautology.'[49]

Furthermore, the proposed rules in all the codes are peppered with references to other principles and maxims, which were not included explicitly in the VCLT, such as the *in dubio mititus* and *contra proferentem* maxims. Interestingly, Fiore's Draft Code and the Conference

[44] Institut de Droit international, 'De l'interprétation des traités' (1956) 46 Annuaire de l'Institut de Droit international 359.

[45] ibid art 1.

[46] ibid art 2. Note the use of plural in 'purposes'. For an extensive analysis of the inconsistencies, variations in the use and evolution of the terms 'object and purpose,' see Isabelle Buffard and Karl Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3(1) Austrian Review of International and European Law 311. For a recent foray into the purpose of 'object and purpose', see Dino Kritsiotis, 'The Object and Purpose of a Treaty's Object and Purpose' in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 237–302.

[47] See the various ILC reports in Yearbook of the International Law Commission between 1963-66.

[48] Although not in all of the attempts at codification. For instance, in the Harvard Draft Convention, there is no explicit reference to ordinary meaning.

[49] UN Conference on the Law of Treaties, '31st Meeting' (n 27) para 38.

of American States Resolution place intention at the apex of the interpretative process and any other rule ends up yielding to intention in case of conflict, an approach that was not necessarily reflected in the text of the VCLT, where textual interpretation was given not substantive but at least a temporal prominence. This deviation from the text of the VCLT is also reflected in the solutions in case of conflict between multiple authentic texts. Here we are presented with an embarrassment of solutions. Fiore's Draft Code gives precedence to the language of the State that undertakes the obligation; the Conference of American States Resolution opts for intention as the deciding factor and if that fails, for a restrictive interpretation; only the Harvard Draft Convention goes for a version of the VCLT approach by opting for object and purpose as the means of resolving ambiguity. As a final example, in the Resolution of the Institut de Droit international, where not only preparatory work but also subsequent practice, and even the object and purpose of the treaty, are categorized as supplementary means of interpretation, whose employment is entirely dependent on the discretion of the interpreter. The list of comparisons could continue at some length, but the above should suffice to prove the point that before the ILCdrafts of articles on interpretation, any attempts towards codification of the rules of interpretation of treaties were widely different from one another not only with respect to the actual rules codified but also their interplay and hierarchy. This, once again, demonstrates what a significant change in the interpretative process the VCLT was, where choices were made after long debates that were radically different from choices in earlier codes. Consequently, on this front as well the claim that the rules of interpretation have not undergone any significant changes fails.

2.3 Interpretation of Rules of Interpretation

Having established that not only the nature of the 'rules' of interpretation (as being either rules, principles, canons or maxims) was debated, but even their content was in a constant state of flux at least until the adoption of the VCLT, one more thing remains to be proven: that the rules of interpretation of treaties are themselves also amenable to interpretation and change. If this can be demonstrated, then another critical blow will have been struck against the claim of immutability of the rules of interpretation of treaties in the pre-VCLT era, but this will also prove the possibility of change of the existing rules in the future.

Examining the interpretation of the rules of interpretation might sound somewhat self-referential and a recipe for legal and logical paradoxes; however, the importance of this

exercise cannot be overstated. Even the ILA Study Group on the Content and Evolution of the Rules of Interpretation in its 'Preliminary Report' of 2016 considered this topic one of fundamental importance and will be devoting its resources on establishing the process by which this interpretation has happened and continues to happen, as well as identifying divergent practices in interpretation depending on the tribunal in question.[50]

An exhaustive enumeration of the instances where such an interpretation has occurred falls outside the scope of this chapter. However, the most notable examples that could be mentioned in order to prove the interpretability of the rules of interpretation are the clarificatory or divergent solutions that various courts and tribunals have given, when faced with questions relating to the exact scope of a rule of interpretation.

International courts and tribunals often refer to a wide gamut of maxims (such as in *effet utile*, *in dubio mitius*, *expressio unius est exclusio alterius*, *ex abundante cautela*, *ejusdem generis*, *contra proferentem*, *exceptio est strictissimae applicationis*, *lex posterior* and *lex specialis*)[51] or apply comparative reasoning[52] and logical tools (such as the rule of necessary implication or *per argumentum a fortiori*)[53] in order to reach an interpretative conclusion. However, this use raises a slew of questions, which have been answered differently depending on the tribunal or author and the particular time period. Are these maxims and approaches to be considered customary international law? If so, are they customary law on interpretation

[50] International Law Association, 'Preliminary Report of the Study Group on the Content and Evolution of the Rules of Interpretation' (*International Law Association*, 7-11 August 2016), s III.3 <www.ila-hq.org/download.cfm/docid/4AD3C3F1-D91D-4142-8D192EBFBA4E35B9> accessed 20 September 2019.

[51] For discussion of these maxims, see the respective chapters in Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention?: Canons and Other Principles of Interpretation in Public International LawCanons of Construction and Other Interpretive Principles in Public International Law* (Wolters Kluwer 2018) On these maxims as conflict resolution techniques, see Emmanuel Roucounas, 'Engagements parallèles et contradictoires' (1987) 206 Recueil des cours 9, 56ff.

[52] Daniel Peat, *Comparative Reasoning in International Courts and Tribunals* (Cambridge University Press 2019). See along similar lines on the use of domestic law for interpretative purposes, Rumiana Yotova, 'Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?' in Klingler and ors (n 51) 307-31.

[53] For discussion of these logical tools, see the respective chapters in Klinger and ors (n 51).

praeter-VCLT, or do they fall under Article 31(3)(c) of the VCLT (*intra legem*)?[54] If not, when they are used by courts and tribunals, is this interpretation under Article 32 of the VCLT or *contra legem*? Any answer to these questions is by nature an interpretation of the VCLT rules on interpretation and one that crystallizes, and in some cases, evolves the content of those rules.[55]

The nature, form and content of subsequent agreements/practice for the purpose of interpretation is another area where jurisprudential interpretation of the rules of interpretation has occurred. Nolte's reports on this topic provide an extensive presentation of the relevant international jurisprudence revealing the multitude of complexities connected to identifying a particular act as 'subsequent agreement/practice' and the conflicting or gradually more refined approaches in international jurisprudence on the matter.[56] Connected to this is also the debate on where the exact line between interpretation and modification should be drawn, an issue acknowledged by the ILC and Nolte.[57]

The exact meaning of the term 'rules' (does it apply also to treaties that have been signed but not ratified), 'parties' ('parties to the treaty' or 'parties to the dispute') and 'relevant' (how is

[54] Even for widely used ones, such as effective interpretation and evolutive interpretation, there has been debate as to whether they are *intra legem* or *praeter legem*. For effective interpretation, see Braumann and Reinisch in Klingler and ors (n 51) 47-72; for evolutive interpretation, see Fitzmaurice and Merkouris (n 1) ch 4, s 4.2.2; Peter Tzeng, 'The Principles of Contemporaneous and Evolutionary Interpretation' in Klingler and ors (n 51) 387-422; Daniel Moeckli and Nigel White, 'Treaties as "Living Instruments"' in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 136-70; Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge University Press 2016); Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014).

[55] For more detail, see the entire volume by Klingler and ors (n 51).

[56] See Nolte's five reports on Subsequent Agreements and Subsequent Practice: ILC, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation' (19 March 2013) UN Doc A/CN.4/660; ILC, 'Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (26 March 2014) UN Doc A/CN.4/671; ILC 'Third Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (7 April 2015) UN Doc A/CN.4/683; ILC 'Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (7 April 2015) UN Doc A/CN.4/694; ILC, 'Fifth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (28 February 2018) UN Doc A/CN.4/715.

[57] In more detail, Fitzmaurice and Merkouris (n 1) ss 5.3.5.3.1-5.3.5.3.2.

relevance determined) of Article 31(3)(c), as well as the connection of that provision with *in pari materia* interpretation, have given rise to heated debates and extensive case law aiming to interpret the scope of this provision.[58] The same can be said of whether a hierarchy exists between the various schools of interpretation, or between Articles 31 and 32 of the VCLT, or even between the rules of interpretation enshrined in the VCLT and other extraneous rules or maxims of interpretation.[59]

Under which conditions can subsequent agreements and practice be considered as supplementary means under Article 32 of the VCLT? Draft Conclusion 2(4) of the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties has included subsequent practice as supplementary means of interpretation.[60] According to the ILC Commentary, the 'subsequent practice' of Draft Conclusion 2(4) that does not meet the criteria set out for subsequent practice under Article 31(b) of the VCLT, nonetheless may fall under the scope of Article 32, which includes a non-exhaustive list of supplementary means of interpretation.[61] The language used in Draft

[58] Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Martinus Nijhoff 2015), chs 1, 2, and the case law analyzed therein. See also, Paula Henin, '*In Pari Materia* Interpretation in Treaty Law' in Klingler and ors (n 51) 211-40.

[59] See various codification attempts analyzed in section 'Various Forms' above and Klingler and ors (n 51). See also *Polish Postal Service in Danzig* (Advisory Opinion) PCIJ Rep Series B no 11, 39; *Territorial Jurisdiction of the International Commission of the River Oder (the United Kingdom, Czechoslovakia, Denmark, Germany and Sweden v Poland)*, Judgment [1929] PCIJ Rep Series A no 23, 26.

[60] ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, Draft Conclusion 2 ('General rule and means of treaty interpretation. (1) Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. These rules also apply as customary international law. (2) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as provided in Article 31, paragraph 1.3. (3) Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. (4) Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under Article 32. (5) The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in Articles 31 and 32'.).

[61] ibid 20, para 8, Commentary to Draft Conclusion 2(4).

Conclusion 2(4), i.e., 'recourse may be had', mirrors that of Article 32 of the VCLT.[62] The inclusion of subsequent practice in Article 32 has resulted in many comments from scholars who have queried certain aspects of such an approach, for instance the consequence that the distinction between 'agreed subsequent practice' 'and subsequent practice in broad sense' would have in relation to the practice of international organizations. For instance, although the prevailing view is that such practice would presumably fall under Article 32, authors have questioned whether this is entirely correct, as there may be doubts whether such a practice is representative of the intention of the States at the time of the conclusion of a treaty.[63] The approach to subsequent practice as a supplementary means on interpretation, although treated with a certain degree of trepidation by publicists, has been in fact acknowledged by international courts and tribunals.[64]

Article 32 of the VCLT allows for recourse to preparatory work only for purposes of a confirmation or a determination of meaning in case of ambiguity or if the result of the interpretation under Article 31 of the VCLT is manifestly absurd. This then raises the interesting question of whether preparatory work could also have a corrective function, i.e., correct the ordinary meaning of the text, a topic that, surprisingly, has been examined in multiple cases, both before the ICJ and other arbitral tribunals.[65] Are the ILC discussions preparatory work or merely other supplementary means? In the ILC, this point was raised, with members expressing diverging views as to whether ILC discussions were 'other

[62] ibid.

[63] Béatrice Bonafé and Paolo Palchetti, 'Subsequent Practice in Treaty Interpretation between Article 31 and Article 32 of the Vienna Convention' (2018) 46 Questions of International Law 1, 3.

[64] *Kasikili/Sedudu Island (Botswana/Namibia)* Judgment [1999] ICJ Rep 1045, paras 49ff; WTO, *US – Section 110(5) of the US Copyright Act* – Panel Report (15 June 2000) WT/DS/160/R, para 6.55; Rahim Moloo, 'When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation' (2013) 31/1 Berkley Journal of International Law 39, 76; Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis (2008) 19 European Journal of International Law 301, 344.

[65] Stephen Schwebel, 'May Preparatory Work be Used to Correct rather than Confirm the "Clear" Meaning of a Treaty Provision?' in Jerzy Makarczyk and Krzysztof Skubiszewski (eds), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International 1996), 541-47; Panos Merkouris, '"Third Party" Considerations and "Corrective Interpretation" in the Interpretative Use of *Travaux Préparatoires* − Is It Fahrenheit 451 for Preparatory Work?' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff 2010), 75-98.

supplementary means' or preparatory work of a 'second order'.[66] Can preparatory work be used against third States?[67] The jurisprudence of the ICJ has evolved on this matter. Whereas, originally, unless a party had participated in the negotiations the preparatory work could not be used against it on the basis of the *res inter alios acta* and *pacta tertiis nec nocent nec prosunt* principles, this has changed in more recent cases, with knowledge or presumption of knowledge of the relevant documents being a sufficient ground for resorting to them.[68]

The above examples illustrate that even the VCLT rules of interpretation are open to interpretation in order to determine their content. There is already extensive jurisprudence on the matter, which continues to grow. Even more so, some interpretations given have consistently been held, others reversed *in toto* or partly modified or refined. The aim here is not to give a definitive answer to all the questions that were identified above, but rather to realize that the interpretability of the VCLT rules on interpretation shatters any illusion that the rules of interpretation have not undergone any changes both pre-VCLT and post-VCLT.

2.4 Logical Fallacies of the Immutability of Rules of Treaty Interpretation

Based on the analysis of the previous sections, it is evident that there is empirical evidence disproving any claim surrounding the immutability of the VCLT and customary rules on treaty interpretation. In order to buttress this conclusion further, let us also examine the logical fallacies of such a proposition.

It is generally accepted that the VCLT rules of treaty interpretation reflect contemporary customary international law. However, customary international law emerges through State practice and *opinio juris*. What is there to prohibit States from introducing and applying new rules of interpretation? This would, in combination with an *opinio juris*, lead to a modification of customary international law (or emergence of a new customary rule) which would deviate from that of the VCLT. This possibility of States agreeing to opt out of the VCLT rules of

[66] In the end, ILC discussions were considered as preparatory work. ILC, 'Summary Record of the 872nd Meeting' (17 June 1966) UN Doc A/CN.4/SR.872, para 35; ILC, 'Summary Record of the 873rd Meeting' (20 June 1966) UN Doc A/CN.4/SR.873, paras 25-28 and 34; see also Merkouris (n 58) 11.

[67] Merkouris (n 65).

[68] ibid.

interpretation was explicitly recognized by ILC members[69] and leads to one of the following scenarios. Either the VCLT and customary rules of interpretation would end up having a different content, or the VCLT would automatically adapt, by applying the customary law version of Article 31(3)(c),[70] and their respective contents would remain the same. However, in both scenarios, a change has occurred, and thus the immutability of the rules on treaty interpretation despite the passage of time has been disproved. Furthermore, by applying the *a majore ad minus* logical tool, since the possibility of the emergence of future jus cogens norms and the modification of existing ones is generally accepted,[71] then clearly the same should apply for the possibility of emerging customary rules on interpretation.

Let us now argue *a contrario*. If the customary rules on interpretation cannot and have not changed, and they have the same content as the VCLT rules, then this would mean that the VCLT rules are also immune to time and change. But as was shown in the previous section, this is clearly not the case, as international courts and tribunals have gradually developed the content of these rules, not to mention that this approach also fails to offer a systemically coherent explanation of the possibility of opting out of the rules of interpretation.

The inescapable conclusion of accepting the immutability of the rules on interpretation would be that they are something entirely different from any other rules that we are accustomed to. If they are not affected by the passage of time and if they cannot change, then they clearly are not conventional rules, or customary rules, or principles. They would have to be a unique set of rules falling outside the classical sources with which we are familiar. However, no States or the ILC or international courts have adopted this kind of approach. An additional problem that this kind of logic may create, especially with respect to the ICJ, would be one of applicable law. According to Article 38 of the ICJ Statute, the court may apply treaties, customary law or

[69] Comments by Verdross and Ago in ILC, '765th Meeting' (n 23) paras 61 and 78, respectively.

[70] Since the customary rules on interpretation would be considered as 'relevant rules' for the interpretation of the VCLT rules on interpretation.

[71] VCLT art 53; Gennady Danilenko, 'International *Jus Cogens*: Issues of Law-Making' (1991) 2 European Journal of International Law 42; Ulf Linderfalk, 'The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 European Journal of International Law 853, 854-56 and 863ff; Ulf Linderfalk, 'The Creation of *Jus Cogens* – Making Sense of Article 53 of the Vienna Convention' (2011) 71 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 359.

general principles. But if rules of interpretation are something different, then the ICJ would not even be able to apply them!

The above thoughts demonstrate the paradoxes and internal inconsistencies to which the acceptance of the immutability of the rules of interpretation leads. To say that the rules of interpretation have not changed, significantly or not, throughout the centuries may be a practically alluring solution, as it ties all loose ends with a nice bow; however, as has been shown above , this position is not supported by practice, nor by the history of the rules of interpretation of international law, and to make matters even worse is logically, normatively and methodologically simply incorrect.

3 The Mutability of Rules of Treaty Interpretation Leads to Intertemporal Concerns

Having established that the rules of interpretation can be and are affected by the passage of time, the follow-up question that must be addressed is, what are the effects of the passage of time in the application of legal norms? In international law, as in any legal system, the need for stability presupposes that most rules are created with a view to apply for extended periods of time, but that they are also allowed to change. This, on the one hand, may ensure a modicum of stability but, on the other hand, can also give rise to a whole gamut of complex issues regarding the appropriate rules to be applied in a specific situation and at a particular juncture in time.

3.1 Intertemporal Law

The most well-known solution to these issues is the doctrine of intertemporal law, which is often mentioned in the same breath as Max Huber's dictum in the *Island of Palmas* case:

> [A] juridical fact must be appreciated in the light of the law contemporary with it … The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the *existence of the right, in*

other words its continued manifestation, shall follow the conditions required by the evolution of law.[72]

Consequently, the law applicable to the emergence of a juridical fact is the law which was in force at that time.[73] This is a transposition in international law of the principle *tempus regit actum*.[74]

The ILC itself attempted to tackle the issue of intertemporal law in its discussions on the law of treaties. Waldock, in his 'Third Report on the Law of Treaties', proposed draft Article 56, which was heavily influenced by Huber's dictum.[75] This article sparked a heated debate among the ILC members[76] as well as among the Governments that offered their comments.[77] However, most agreed that any solution as to which rules applied to a treaty *in medio tempore* would be determined on the basis of the will of the parties and good faith.[78] In the end, the article was set aside, most likely for two reasons. Firstly, Waldock conceded that intertemporal law was fraught with difficulties, and from a tactical standpoint, it made more sense to abandon it in order to ensure consensus within the ILC rather than having the ILC members drown in the vast complexities of temporal considerations and the relationship

[72] *The Island of Palmas (or Miangas) case (Netherlands vUSA)* (1949) 2 Review of International Arbitral Awards 845 (emphasis added).

[73] Huber's dictum was reproduced almost verbatim a few decades later in a Resolution of the Institut de Droit international on intertemporal law. Institut de Droit international, 'Resolution of 11 August 1975: The Intertemporal Problem in Public International Law' (1975) 56 Annuaire de l'Institut de Droit international 536, paras 1 and 3-4.

[74] Paul Tavernier, 'Relevance of the Intertemporal Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010), 397.

[75] ILC, 'Third Report on the Law of Treaties' (n 22) 8-9 ('Article 56 Inter-temporal law 1. A Treaty is to be interpreted in the light of law in force at the time when the treaty was drawn up. 2. Subject to paragraph 1, the *application* of a treaty shall be governed by the rules of international law in force at the time *when the treaty is applied*.' (emphases added)).

[76] ILC, 'Summary Record of the 728th Meeting' UN Doc A/CN.4/SR.728, 21 May 1964, paras 6 and 12; ILC, 'Summary record of the 729th Meeting' UN Doc A/CN.4/SR.729, 22 May 1964, paras 14-44, 49 and 53-55.

[77] Sixth Committee, '20th Session, 843rd Meeting' UN Doc A/C.6/20/SR.843, 7 October 1965, para 25 (UK); Sixth Committee, '20th Session, 845th Meeting' UN Doc A/C.6/SR.845, 11 October 1965, paras 41-42 (Greece).

[78] ILC, 'Third Report on the Law of Treaties' (n 22) 10; ILC, '728th Meeting' (n 76) paras 10-14; ILC, '729th Meeting' (n 76) para 30.

between different sources of law.[79] Secondly, and this made the decision slightly easier, some of the draft article's elements were being addressed under other proposed articles (like those on interpretation and modification), although in an ironic twist of fate, none of those articles survived the negotiations in the Vienna Conference in a shape that included references to intertemporal law.

3.2 Principle of Contemporaneity and Evolutive Interpretation

The structure of Huber's dictum should not lead to any misconceptions regarding the scope of its application. The doctrine of intertemporal law is applicable not only in the evaluation of juridical facts but also in the process of interpretation.[80] In this context, the solution to any temporal qualms, i.e., which meaning should be given to the terms of a treaty,[81] is provided by the so-called principle of contemporaneity.[82] According to this principle, '[t]he terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded.'[83] However, this principle has an important caveat:

> Provided that, where it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, *the treaty must be interpreted so as to give effect to that intention*.[84]

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[79] UN Conference on the Law of Treaties, '33rd Meeting of the Committee as a Whole' (22 April 1968) UN Doc A/CONF.39/C.1/SR.33, para 74.

[80] Fitzmaurice (n 30) 225-27; *Arbitration Regarding the Iron Rhine ('Izjeren Rijn') Railway (Belgium v Netherlands)* (2005) 27 Review of International Arbitral Awards 35, para 79.

[81] The meaning which was prevalent at the time of the conclusion of the treaty or at the time of its interpretation.

[82] Fitzmaurice described the principle of contemporaneity as a 'particular application of the doctrine of intertemporal law [within the context of treaty interpretation]'. Fitzmaurice (n 30) 225.

[83] ibid 212.

[84] Hugh Thirlway, 'The Law and Procedure of the International Court of Justice: 1960-1989, Supplement 2006: Part Three' (2006) 77 British Yearbook of International Law 1, 57 (emphasis added). Another term used by Thirlway, 'intertemporal renvoi', which referred to situations in which the intention of the parties is deemed to have been 'to subject the legal relations created to such law as might from time to time thereafter become effective'. Hugh Thirlway, 'The Law and Procedure of the International Court of Justice: 1960-1989, Part One' (1990) 60 British Yearbook of International Law 1, 135.

This caveat has given rise to what is widely known as evolutive interpretation. In sum, a treaty and its terms are to be understood as they stood at the time of the conclusion of the treaty. However, if the parties so intended, the treaty can evolve, and its terms can be understood in the light of modern-day conditions. Both the principle of contemporaneity[85] and evolutive interpretation[86] have been a staple feature in judgments in which the interpretation of treaties is a critical issue.[87]

What is of interest for the present analysis is whether the rules of interpretation (which as was shown in the previous sections can, have and will continue to change and undergo refinement over time) may be included in the process of evolutive interpretation. Essentially, the question boils down to whether legal rules may be considered elements of evolutive interpretation or whether evolutive interpretation is restricted only to elements which qualify as facts. In general, evolutive interpretation can refer to evolution of fact and evolution of law.[88] Examples of what international courts and tribunals have considered as evolution of fact are medical and scientific advancements,[89] societal and cultural changes,[90] the socioeconomic

[85] *Minquiers and Ecrehos (France/UK)* Judgment [1953] ICJ Rep 47, 56; *Case Concerning Rights of Nationals of the United States of America in Morocco (France v USA)* Judgment [1952] ICJ Rep 176, 189; *Kasikili/Sedudu Island* (n 64) para 25; *The Grisbådarna case (Norway v Sweden)* (1909) 11 Review of International Arbitral Awards 147, 159; *North Atlantic Coast Fisheries Case (Great Britain v USA)* (1910) 11 Review of International Arbitral Awards 167, 196.

[86] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* Advisory Opinion [1971] ICJ Rep 16, para 53; *Aegean Sea Continental Shelf* (Greece v Turkey) Judgment [1978] ICJ Rep 3, para 77; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* Judgment [1997] ICJ Rep 7, para 112; *Tyrer v UK* App no 5856/72 (ECHR, 25 April 1978), para 31; *Vo v France* App no 53924/00 (ECHR, 8 July 2004), para 82.

[87] There are of course ongoing debates as to when and how judges should determine the aforementioned intention of the parties, but that falls outside the scope of the present chapter.

[88] Georgopoulos uses the terms ‘renvoi mobile’ and ‘ouverture de texte’, respectively. Théodore Georgopoulos, ‘Le droit intertemporel et les dispositions conventionelles évolutives – quelle thérapie contre la vieillesse des traités?’ (2004) 108/1 Revue générale de droit international public 123, 132-34.

[89] *Gabčíkovo-Nagymaros Project* (n 86) paras 104 and 107.

[90] *Öztürk v Germany* App no 8544/79 (ECHR, 21 February 1984), Dissenting Opinion of Judge Bernhardt.

situation of a State,[91] and changes in morals.[92] On the other hand, evolution of law has been recognized to include changes in customary international law,[93] international treaties,[94] and even domestic law.[95] It is therefore evident that the rules of interpretation can also be the object of the process of evolutive interpretation.

3.3 Scenarios (Dis)Allowing 'Time-Traveling' Rules of Interpretation

This analysis leads us inexorably to the necessity of examining the approach by international courts and tribunals in using the VCLT rules on interpretation to interpret pre-VCLT treaties. International courts and tribunals have shown a tendency when interpreting treaties concluded several decades before the entry into force of the VCLT[96] to simply pay lip service to the fact that the VCLT rules reflect customary international law,[97] and, in some cases, even indicate that there have been no significant changes to the content of those rules under customary

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[91] *Gómez Paquiyauri and others (on behalf of Gómez Paquiyauri and Gómez Paquiyauri) v Peru* Judgment on Merits, Reparations and Costs [2004] Inter-American Court of Human Rights Series C no 110, para 165; *Case of the 'Street Children' (Villagrán Morales et al) v Guatemala* Judgment on Merits [1999] Inter-American Court of Human Rights Series C no 63, para 193.

[92] *Cossey v UK* App no 10843/84 (ECHR, 27 September 1990), Joint Dissenting Opinion of Judges Palm, Foighel and Pekkanen, para 5.

[93] *Mondev International Ltd v United States of America*, ICSID Case no ARB(AF)/99/2, Award, 11 October, paras 116-25; *ADF v United States of America*, ICSID Case no ARB(AF)/00/1, Award, 9 January 2003, paras 181-84.

[94] *Sawhoyamaxa Indigenous Community of the Enxet-Lengua People v Paraguay* (Judgment on Merits, Reparations and Costs) Inter-American Court of Human Rights Series C no 146 (29 March 2006), para 117; *Case of the 'Street Children'* (n 91), paras 193-94.

[95] *Öcalan v Turkey* App no 46221/99 (ECHR, 12 May 2005), paras 162-64; *Dudgeon v UK* App no 7525/76 (ECHR, 22 October 1981), para 60.

[96] eg *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* Judgment [2002] ICJ Rep 625; *Case Concerning Avena and Other Mexican Nationals (Mexico v USA)* Judgment [2004] ICJ Rep 12; *Kasikili/Sedudu Island* (n 64). In detail see Ulf Linderfalk, 'The Application of International Legal Norms Over Time: The Second Branch of Intertemporal Law' (2011) 58(2) Netherlands International Law Review 147, 163-65.

[97] *Kasikili/Sedudu Island* (n 64) para 8; *Case Concerning Oil Platforms (Iran v USA)* Merits [2003] ICJ Rep 161, para 23.

international law.[98] This practice has not gone unnoticed amongst academics,[99] although there is a begrudging admittance that any other solution 'would complicate matters considerably'.[100] However, this is immaterial as to what is the proper application of the law.

The question we are faced with then is what possible options exist with respect to this issue of the interpretation of pre-VCLT treaties and whether by process of elimination one can arrive at a solution. As mentioned above, the principle of contemporaneity provides that a treaty should be understood as it stood at the time of its conclusion unless the parties intended for it to follow the evolution of fact and/or law.[101] A treaty, therefore, can be interpreted either statically (contemporaneously) or evolutively. Similarly, the rules of interpretation applicable to that treaty can be either those of the time of the conclusion of the treaty or those at the time of its interpretation. This then provides us with all the possible variations, and these are expressed below in Table 1:

		Intention of the Parties Regarding Time / 'Time-Will of the Parties'			
		Contemporaneous Interpretation		***Evolutive Interpretation***	
Rules	***Treaty***	yes		yes	
	Rules on Interpretation	yes	no	yes	no

Table 1: Possible variations as to what rules of interpretation should apply to a treaty

[98] *Kasikili/Sedudu Island* (n 64) Separate Opinion of Judge Oda, para 4.

[99] Malcolm Shaw, 'Case Concerning *Kasikili/Sedudu Island (Botswana/Namibia)*' (2000) 49 International and Comparative Law Quarterly 964, 968; Greig (n 6) 113-14; Hazel Fox, 'Article 31(3)(a) and (b) of the Vienna Convention and the *Kasikili/Sedudu Island* Case' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *The Issues of Treaty Interpretation and the Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2010), 59, 64-65; Linderfalk (n 96) 163-65.

[100] Shaw (n 99) 968.

[101] Elsewhere I have opted the term 'time-will' to express this intention of the parties that determines whether a treaty is to be understood as frozen in time or as a living instrument. For reasons of simplicity, I will be using this term from this point onwards to describe the form of intention. Panos Merkouris, '(Inter)Temporal Considerations in the Interpretative Process of the VCLT; Do Treaties Endure, Perdure or Exdure?' (2015) 45 Netherlands Yearbook of International Law 121.

Consequently, there are four possible variations:

(i) The treaty is to be interpreted statically and the rules of interpretation are those that existed at the time of the treaty's conclusion.

(ii) The treaty is to be interpreted statically but the rules of interpretation are those that exist at the time of the treaty's interpretation.

(iii) The treaty is to be interpreted evolutively and the rules of interpretation are those that exist at the time of the treaty's interpretation.

(iv) The treaty is to be interpreted evolutively but the rules of interpretation are those that existed at the time of the treaty's conclusion.

Let us take a closer look at these four possibilities. The first and the third possibilities should actually be considered one and the same. The reason is that the underlying premise for both of them is that the rules of interpretation follow the intention of the parties as to the treaty as whole. If the treaty is meant to be interpreted contemporaneously, then so should be (i.e. contemporaneous to the time of conclusion of the treaty) the rules of interpretation. The same is true when the parties opt for evolutive interpretation. That same intention demands that the rules of interpretation are the ones applicable at the time of interpretation. Even if there is no explicit expression that the parties wish for those particular rules to apply, following the overall intention ('time-will') of the parties seems a reasonable choice. A separation of a treaty and the rules to interpret it seems too artificial without the parties having clearly indicated their preference for such a two-level approach. Such an approach would also avoid the burdening of the courts with the obligation to identify the content of the rules of interpretation in bygone eras. However, this would happen only when the treaty was to be interpreted evolutively. For those treaties where the parties wanted the principle of contemporaneity to apply, the aforementioned task would become a necessity.

However, let us examine the other two options to see if any of them can be rejected. The second option would bring about a situation in which the treaty remained in its own 'time-bubble,' while the rules of interpretation would be the modern ones. Indeed, this would be the preferred option by international courts and tribunals, as this would mean that they could rely on the VCLT rules as a reflection of present-day customary international law. However, this approach would seem to conflict with the principle of non-retroactivity, a

well-recognized principle in international law,[102] and the principle of contemporaneity as analyzed earlier. Both these principles can be circumvented only when there is an express intention of the parties to that effect. If no such express stipulation by the parties exists, either the apparent intention is that the parties have opted for a static interpretation of the treaty, or there is no apparent intention either way, in which case the principle of contemporaneity intervenes. Consequently, the latter eventuality conflicts with the principles of nonretroactivity and contemporaneity, and therefore does not withstand scrutiny.

A possible way out of this conclusion would be to argue that even if one were to apply the rules of interpretation contemporary of that time, this would include the customary version of Article 31(3)(c) of the VCLT. Consequently, the modern rules of interpretation could be taken into account as 'relevant rules' to determine the content of the earlier rules of interpretation. That way, although the court applies the earlier rules, it still ends up using their modern version. Apart from the evident *ouroboric* nature of this argument, it is entirely based on an assumption that is not supported by either doctrine or jurisprudence. First, whether in earlier eras Article 31(3)(c) existed as such in customary international
law is a topic equally open to debate as the ones we examined in the previous sections. Second, Article 31(3)(c) is silent on the fact of what is the temporal stamp of the 'relevant rules', i.e. relevant rules applicable at the time of the conclusion of the treaty, or at the time of the interpretation of the treaty.[103] Unsurprisingly, we also end up returning to our starting point. The temporal aspect of Article 31(3)(c) was extensively debated in the ILC, and eventually any such temporal reference was omitted from the final text. However, it seems that even in this case the solution will be determined by the time-will of the parties; and once again we also return to our original conclusion that the time-will is the decisive criterion in each scenario that offers solutions not only with respect to the treaty as such, but also to the peripheral rules that may be used in order to ensure its application and interpretation.

The final option of using old rules of interpretation to interpret a treaty that is considered a 'living instrument' is perhaps the easiest to discard. Not only all the previous considerations

[102] *The Chamizal case (Mexico v USA)* [1911] 11 Review of International Arbitral Awards 309, 343; *Clipperton Island Arbitration (Mexico v France)* [1931] 2 Review of International Arbitral Awards 1105-11; *Ambatielos case (Greece v UK)* Preliminary Objections [1952] ICJ Rep 28, 40.

[103] Although earlier drafts, possibly influenced by the ideas behind the principle of contemporaneity, leaned in favor of the time of the conclusion of the treaty. See Merkouris (n 58) ch 2.

regarding the single solution to the treaty and its rules of interpretation, and the 'time-will as the decisive criterion' apply here as well, but it is not supported by any case law whatsoever. This is not surprising. Consider, as we mentioned before, that a 'living instrument' will be interpreted on the basis not only of evolution of fact but also of law. Consequently, using earlier rules of interpretation would rather be a (d)evolution of law, in clear contradiction to one of the two main venues through which evolutive interpretation is accomplished.

Based on this, the only logical solution is that there is a presumption of a single solution. The 'time-will' choices that the parties make with respect to the treaty apply equally to the rules of interpretation. Of course, this should be considered a rebuttable presumption. Bearing in mind that parties can anytime they please opt out even from the existing rules of interpretation and agree amongst themselves to apply other ones of their own choosing,[104] the presumption can be reversed. But in order for this to happen the parties must explicitly demonstrate their intention for opting for one of the aforementioned discarded options or for an entirely different set of rules of interpretation. Updating Table 1 to reflect the above analysis, we arrive at the solution to our problem which is represented in Table 2.

		Intention of the Parties Regarding Time / 'Time-Will of the Parties'			
		Contemporaneous Interpretation		***Evolutive Interpretation***	
Rules	***Treaty***	yes	no	yes	no
	Rules on Interpretation	yes	no	yes	no
		Unless the parties explicitly express a different intention			

Table 2: What rules of treaty interpretation should apply to a treaty

4 Conclusion

This chapter started from an observed tendency amongst international courts and tribunals to apply the VCLT rules of treaty interpretation, and the modern understanding thereof, to pre-VCLT treaties. This practice has been rationalized on the basis of the claim that the rules

[104] Verdross and Ago (n 69).

of treaty interpretation have not changed significantly in the last few centuries. However, there has been no general agreement even as to the existence of rules of treaty interpretation, let alone as to the content of any such rules pre-VCLT. Additionally, the rules of treaty interpretation are themselves open to interpretation, and the claim of their immutability over time involves logical and methodological fallacies. Rules of treaty interpretation not only can change, but they have done and continue to do so.

The question of when and under what conditions modern rules of interpretation may be applied to earlier treaties opens the door to examining issues connected to intertemporal law and the tug-of-war between the principle of contemporaneity and evolutive interpretation. However, the logical and normative consistency with the existing international legal system demand the 'time-will' of the parties to a treaty to be determinative of whether the rules of interpretation of the time of the treaty's conclusion or of today should be applied. The only exception is if the parties' explicitly determine that other rules of interpretation should apply. In that case, the explicit expression of the intention of the parties supersedes any presumption on the basis of the 'time-will' relating to the treaty as a whole. This solution, of course, means that courts and tribunals may have to start examining thoroughly what the exact content of the rules of interpretation at a particular era was, when they interpret a pre-VCLT treaty. But the difficulty of the situation does not bear upon the systemic coherence of this conclusion.

Returning, thus, to the 'time-traveling' rules of interpretation in the title of this chapter, the answer should be this: As in physics, any notion of 'time-travel' is connected and restricted by the speed of light, which is the cornerstone of the physical laws of our Universe, so in international law any 'time-travel' of the rules on treaty interpretation is dependent on the cornerstone of this system, i.e. the intention of the parties to the treaty being interpreted.

This intention provides all the answers to our questions. When a treaty is to be interpreted statically, then the rules of interpretation at the time of the conclusion of the treaty are to be applied. The treaty and its rules of interpretation travel forward in time in a kind of 'time-bubble' to be adjudicated and applied today. When a treaty is to be interpreted evolutively, then the rules of interpretation to be applied are those that have emerged through the passage of time. The only way to break up this connection between the treaty and its rules of interpretation is, once again, through that fundamental concept, the intention of the parties. In theory, and if the parties so will it, modern rules of interpretation can go against the arrow

of time and apply to a treaty that exists in its own 'time-bubble'. But this has to be expressly agreed to by the parties: rules of interpretation can indeed be 'time-travelers,' but only if the parties to the treaty so will it.

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