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Treaty Interpretation and its Rules:
Of Motion through Time, 'Time-Will' and
'Time-Bubbles'

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Treaty Interpretation and Its Rules

Of Motion through Time, ‘Time-Will’, and ‘Time-Bubbles’

4.1 Introduction

*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*¹

In the previous chapters, the concept of ‘motion’ of treaties and of treaty law was discussed mainly within the frame of reference of changes to the ‘object-state’ of the rules under examination. However, motion is to be understood not only through space but also through time. Nowhere is this more evident in the law of treaties than in treaty interpretation, and it is exactly this motion through spacetime that will be the focus of this chapter. This chapter analyses the manner in which time and temporal considerations affect the substance of treaty rights and obligations, and which rules (if any) govern this particular motion of treaties. Furthermore, since motion as demonstrated by Einstein is dependent on the observer’s particular frame of reference,² so in this chapter the analysis will move between the two critical frames of references: (i) that of the treaty being interpreted, ie whether from a substantive and interpretative point of view it remains at a state of *stasis* (contemporaneous interpretation) or whether it changes/evolves through time (evolutive interpretation) and (ii) that of the rules of interpretation, ie whether these interpretative rules are constants, immutable and perennial ones, in the system of the law of treaties or are as any other rule potentially subject to motion and change through the temporal dimension.

¹ J Saramago, *Blindness* (Harvest Books 1999) 318.

² See Chapter 1 of this book.

As is evident from these preliminary thoughts, in this chapter the concepts of time and motion through time, *inter alia* in the form of content (non-change), are critical in our analysis. The study of time and the changes effectuated by and through the passage of time have always been central to logic, philosophy, mathematics, and physics. Zeno's arrow paradox,³ Heraclitus's river paradox,⁴ and Theseus's ship paradox⁵ are but a few examples from Antiquity that demonstrate not only the fascination of ancient philosophers with the notion of time and change, but also how tangled and multi-dimensional even the simplest thought experiments could become when tackled from the angle of time and change.

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 inter-temporal 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 tackling the concept of time in international law from a variety of angles.⁶

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 firstly that in legal interpretation there are well-established rules that govern the motion of treaties through time, and to present the key features of these rules.⁷ Secondly, and perhaps more interestingly, what will be shown is

³ N Huggett, 'Zeno's Paradoxes' (*Stanford Encyclopedia of Philosophy*, 15 October 2010) accessed 20 September 2019.

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

⁵ Plutarch, *Theseus* ch 23.1 (available at the Perseus Digital Library as above). An interesting variation on the theme is offered by Hobbes, *Elements of Philosophy* ch XI, s 7.

⁶ S Rosenne, *The Time Factor in the Jurisdiction of the International Court of Justice* (Sythoff 1960) 11–75; AA Cançado Trindade, 'The Time Factor in the Application of the Rule of Exhaustion of Local Remedies in International Law' (1978) 61 *RivDirInternaz* 232–57; P Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public: problèmes de droit intertemporel ou de droit transitoire* (LGDJ 1979); R Higgins, 'Some Observations on the Inter-temporal Rule in International Law' in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International 1996) 173–81. For a great overview of the various theories on interpretation and the effect of time on it, see E Roucouas, *A Landscape of Contemporary Theories of International Law* (Brill/Martinus Nijhoff 2019) 600–13.

⁷ Section 4.2 of this chapter (excluding Section 4.2.2.2) is an updated version of the ideas that appear in ch 2 Merkouris, *Article 31(3)(c) VCLT* ch 2.

also a form of ‘double-think’ that seems to be pervasive when we switch our frame of reference to the VCLT rules themselves.⁸ Whereas when dealing with treaty rules judges and academics 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, nonetheless in the case of interpretation and in particular the rules that govern interpretation, the notion of ‘time’ becomes rather ‘relative’. What we mean by this is that even when interpreting treaties concluded before 1980,⁹ in some cases even treaties of the nineteenth century, most have no hesitation to refer to the VCLT rules on interpretation. However, that would be methodologically appropriate, only if one of the following two propositions were valid; either the rules on interpretation are ubiquitous and immutable, or they are capable of moving backwards through time, ie of ‘time-travelling’. As will be shown in Section 4.3 of this chapter, neither of the aforementioned propositions holds up to scrutiny.

4.2 Contemporaneous Interpretation v Evolutive Interpretation: Content *Stasis* v Content Motion

4.2.1 Interpretative Motion through Time: Intertemporality and Its Connection to Interpretation

Intertemporal law is a concept central to the *kata chronon metavole* of treaties. Despite this, its exact content is somewhat elusive. Judge Huber’s *dictum* in the *Island of Palmas case* is the passage most often cited in connection to intertemporality:

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.*¹⁰

However, as Higgins rightly points out this quote has been read ‘in the most remarkably extensive fashion, as providing obligatory rules

⁸ With a particular emphasis to the ICJ.

⁹ Year of entry into force of the VCLT.

¹⁰ *The Island of Palmas case (or Miangas) (Netherlands v USA)* (1928) 2 UNRIAA 829, 845 (emphasis added).

in circumstances that it never addressed, with consequences that it never intended'.¹¹ This fluidity in the content and substance of intertemporality is also reflected in the multitudinous terms associated with it. Indicatively, 'international intertemporal law',¹² 'doctrine of intertemporal law',¹³ 'rule of intertemporal law',¹⁴ 'rule of intertemporality',¹⁵ 'intertemporal principle',¹⁶ 'principle of intertemporal law'¹⁷ and 'principle of the intertemporality of law'.¹⁸

Both legs of Huber's *dictum* concern the determination of the existence or non-existence of rights, not the determination of its content, so one could wonder if there is a connection with interpretation.¹⁹ However, as Fitzmaurice observed, the principle of contemporaneity can be understood as a '*particular application of the doctrine of inter-temporal law [within treaty interpretation]*',²⁰ a view that seems to be shared by judges and academics alike.²¹

¹¹ R Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) 46 ICLQ 501, 516.

¹² G Schwarzenberger, *A Manual of International Law* (3rd edn, Stevens 1952) 559; Zh Li, 'International Intertemporal Law' (2018) 48/2 CalWInt'ILJ 342.

¹³ TO Elias, 'The Doctrine of Intertemporal Law' (1980) 74 AJIL 285 ff.

¹⁴ *Land and Maritime Boundary between Cameroon and Nigeria*, Separate Opinion of Judge Al-Khasawneh [12]; *Jan de Nul NV and Dredging International NV v Egypt* (Award of 24 October 2008) ICSID Case No ARB/04/13 [132].

¹⁵ *Anglia Auto Accessories Limited v Czech Republic* (Final Award of 10 March 2017) SCC Case No V 2014/181 [146].

¹⁶ *Spence International Investments LLC and Others v Costa Rica* (Interim Award of 30 May 2017) ICSID Case No UNCT/13/2 [222]; *Duke Energy International Peru Investments No 1, Ltd v Peru* (Decision of the *Ad hoc* Committee of 1 March 2011) ICSID Case No ARB/03/28 [175] citing *Mondev International Ltd v USA* [70]; *Pac Rim Cayman LLC v El Salvador* (Decision on the Respondent's Jurisdictional Objections of 1 June 2012) ICSID Case No ARB/09/12 [2.79]; *ATA Construction, Industrial and Trading Company v Jordan* (Award of 12 May 2010) ICSID Case No ARB/08/2 [109].

¹⁷ *Société Générale v Dominican Republic* (Award on Preliminary Objections to Jurisdiction of 19 September 2008) LCIA Case No UN 7927 [78]; *Case of the Serrano Cruz Sisters v El Salvador* (Merits, Reparations, and Costs) IACtHR Series C No 120 (1 March 2005) Dissenting Opinion of Judge AA Cançado Trindade [69].

¹⁸ *MCI Power Group LC and New Turbine Incorporated v Ecuador* (Award of 26 July 2007) ICSID Case No ARB/03/6 [89].

¹⁹ U Linderfalk, 'Doing the Right Thing for the Right Reason – Why Dynamic or Static Approaches Should Be Taken in the Interpretation of Treaties' (2008) 10 ICLR 109, 117–8.

²⁰ Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation' 225 (emphasis added).

²¹ *Arbitration Regarding the Iron Rhine ('Izjeren Rijn') Railway (Belgium v Netherlands)* (2005) 27 UNRIAA 35 [79]; *Caesar v Trinidad and Tobago* (Merits, Reparations, and Costs) IACtHR Series C No 123 (11 March 2005) Separate Opinion of Judge Cançado

The link between intertemporality and the process of interpretation was not for the first time observed by Judge Huber. Both Vattel and Grotius had included in their writings an analysis of the effect of time on treaties and, in fact, came down on the side of the principle of contemporaneity arguing, '[l]anguages vary incessantly, and the signification and force of words change with time. When an ancient act is to be interpreted, we should then know the common use of the terms at the time when it was written'.²²

Despite this, and perhaps surprisingly, the connection between the interpretative process and intertemporality would again be seriously discussed in the international arena by the ILC. Although the Institut de Droit International had delved into several of its sessions in the 1950s on the law of treaties and particularly treaty interpretation, only Lauterpacht seems to have raised the issue and then again only *in passim*.²³ The ILC discussions on intertemporality were the completely opposite to the lackluster interest that the Institut had shown to the topic. Attempts to introduce explicit references to intertemporality happened along two main tracks. First, an article devoted specifically to intertemporality was proposed. Waldock in his 'Third Report' included a draft article entitled 'Inter-temporal Law', which followed closely Huber's *dictum* in *Island of Palmas*.²⁴ Draft Article 56(1) enshrined the principle of contemporaneity, which in Waldock's view was already customary law.²⁵ In his view, the reason for the principle being

Trindade [10]; M Kotzur, 'Intertemporal Law' [2008] MPEPIL 1433[11–122]; Elias, 'The Doctrine of Intertemporal Law' 301; G Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: General Principles and Sources of Law' (1953) 30 BYIL 1, 5–8; C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54/2 ICLQ 279, 316.

²² E de Vattel, *The Law of Nations or Principles on the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (GGJ and J Robinson 1793) Book II, ch XVII [272].

²³ Institut de Droit International, 'De l'interprétation des traités' (1952) 44 AIDI 359, 405 (Lauterpacht). Two decades later the Institut would return again to the issue of intertemporality (not only from an interpretative perspective) and adopt a resolution, that is almost a *verbatim* reproduction of Huber's *dictum*; Institut de Droit International, 'Resolution of 11 August 1975: The Intertemporal Problem in Public International Law' (1975) 56 AIDI 536 [1], [3], [4].

²⁴ '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, [but] 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'. (emphasis added); Waldock, 'Third Report' 8–9.

²⁵ As shown by the following cases to which he referred: *Grisbådarna Case (Norway v Sweden)* (1909) 11 UNRIAA 147, 159–60; *North Atlantic Coast Fisheries Case (Great*

supported by international jurisprudence was that it closest reflected the *will of the parties*.²⁶ Draft Article 56 was at the epicenter of a fiery debate, regarding the limits between interpretation and application,²⁷ the autonomy of the article with respect to the other articles on the law of treaties,²⁸ and the hierarchy between the subparagraphs of Draft Article 56. With respect to the latter, three were the main approaches: (i) the principle of contemporaneity was the rule and evolutive interpretation the exception;²⁹ (ii) evolutive interpretation was the rule and the principle of contemporaneity was the exception;³⁰ and (iii) that the two paragraphs of Draft Article 56 were neither in conflict nor in a hierarchical relationship, but should be applied in a complementary fashion.³¹

Britain v USA (1910) 11 UNRIAA 167, 196; *Case Concerning Rights of Nationals of the United States of America in Morocco*, (*France v USA*) (Judgment) [1952] ICJ Rep 176, 189 (hereinafter *US Nationals in Morocco*).

²⁶ Waldock, 'Third Report' 10.

²⁷ ILC, 'Summary Record of the 728th Meeting' (21 May 1964) UN Doc A/CN.4/SR.728 [12] (Paredes). The debate on where to draw the line (if there is one) between these two concepts continues even today: Gardiner, *Treaty Interpretation* 26; C de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Pedone 1963) 27–28; A Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2/1 JIDS 31–57; C Lo, *Treaty Interpretation under the Vienna Convention on the Law of Treaties: A New Round for Codification* (Springer 2017) 81–97; S Sur, *L'interprétation en droit international public* (LGDJ 1974) 193; MK Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités' (1976) 151 RdC 1, 9–10; M Bos, *A Methodology of International Law* (North-Holland 1984) 112; R Kolb, *Interprétation et création du droit international: esquisses d'une herméneutique juridique moderne pour le droit international public* (Bruylant 2006); H Coing, 'Trois formes historiques du droit: glossateurs, pandectistes, école de l'exégèse' (1970) 48 RHD 531, 540–2; J Klabbers, 'Reluctant "Grundnormen": Articles 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law' in M Craven, M Fitzmaurice, and M Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff 2007) 141, 144; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 12, Separate Opinion of Judge Shahabuddeen 59.

²⁸ ILC, 'Summary Record of the 728th Meeting' [6] (Verdross); ILC, 'Summary Record of the 729th Meeting' (22 May 1964) UN Doc A/CN.4/SR.729 [18–9] (Elias), [30–2] (de Luna), [41–4] (Tunkin), [49] (El-Erian) and [53–5] (Lachs).

²⁹ ILC, 'Summary Record of the 728th Meeting' [12–3] (Paredes); ILC, 'Summary Record of the 729th Meeting' [31–7] (de Luna); Sixth Committee, '20th Session, Summary Record of the 843rd Meeting' (7 October 1965) UN Doc A/C.6/20/SR.843 [25] (UK).

³⁰ ILC, 'Summary Record of the 729th Meeting' [3] (Castrén); Sixth Committee, '20th Session, Summary Record of the 845th Meeting' (11 October 1965) UN Doc A/C.6/SR.845 [41–2] (Greece).

³¹ ILC, 'Summary Record of the 729th Meeting' [14–5] (Rosenne), [38–40] (Briggs) and [54] (Lachs).

In all of these debates, however, what everybody agreed on was that the will of the parties was the decisive criterion for determining the rules that applied to a treaty *medio tempore*,³² an approach that found the States in agreement as well.³³ This was, however, not enough to secure enough momentum for Draft Article 56 to be included in the adopted articles. Nonetheless, during the Vienna Conferences on the Law of Treaties, Waldock reiterated the importance of intertemporal law for the law of treaties, but acknowledged that the omission of an article devoted to intertemporal law was the tactically and politically correct choice to avoid the discussions being prolonged and weighed down by never-ending discussions on the relationship between customary law and treaty law.³⁴

However, the rejected Draft Article 56 was not the only attempt to introduce a point of entry of intertemporal considerations in the VCLT. The second manner in which the doctrine almost found its way in the text of the VCLT was through the articles on treaty interpretation and more specifically Article 31(3)(c) VCLT. Article 31(3)(c) provides that account shall be taken of ‘any relevant rules of international law applicable in the relations between the parties’. The question that the members of the ILC debated was which rules, from a temporal perspective, fell under this provision. Should a treaty be interpreted in the light of the rules *in force at the time of the conclusion of the treaty or in force at the time of the interpretation of a treaty*? Both approaches had their supporters.³⁵ In order to resolve the impasse Waldock proposed the following text: ‘in the light of the rules of international law [in force at the time of its conclusion]’.³⁶ However, this did not have the compromissory effect

³² ILC, ‘Summary Record of the 729th Meeting’ [30] (de Luna); similarly *ibid* [24–6] (Tsuruoka); ILC, ‘Summary Record of the 728th Meeting’ [10–1] (de Aréchaga), [12–4] (Paredes).

³³ Sixth Committee, ‘20th Session, Summary Record of the 850th Meeting’ (13 October 1965) UN Doc A/C.6/SR.850 [40] (Kenya); Sixth Committee, ‘Summary Record of the 845th Meeting’ [9] (Syria).

³⁴ United Nations Conference on the Law of Treaties, ‘1st Session – 33rd Meeting of the Committee of the Whole (COW)’ (22 April 1968) UN Doc A/CONF.39/C.1/SR.33 177 [74].

³⁵ In favour of the more static view, ie rules in force at the time of the conclusion of the treaty, see ILC, ‘Summary Record of the 765th Meeting’ (14 July 1964) UN Doc A/CN.4/SR.765 [56–9] (Yasseen), [75–6] (Pal), [80] (Chairman). In favour of the more evolutive approach, ie rules in force at the time of the interpretation of the treaty, see *ibid* [48–9] (Tunkin), [62] (Verdross), [63–6] (Bartoš).

³⁶ ILC, ‘Summary Record of the 769th Meeting’ (17 July 1964) UN Doc A/CN.4/SR.769 [3] (Waldock).

that Waldock hoped for.³⁷ For this reason, Waldock in his ‘Sixth Report’ removed the bracketed part of the sentence.³⁸ In this way, the provision would be vague enough to ensure maximum flexibility,³⁹ while at the same time making it easier to achieve as close possible to a consensus among the ILC members.⁴⁰ This flexible approach was the one tabled for the Vienna Conference on the Law of Treaties and found most States in absolute agreement. As the Netherlands had acutely observed even before the Vienna Conference, the application of the principle of good faith was the key to resolving the complex relationship between interpretation and intertemporality. Consequently, it was best ‘to leave unanswered the question whether any term should be interpreted in any specific case according to the law in force at the time or to that in force now. It would seem more correct and quite enough in itself to allow oneself to be guided solely by good faith when answering the question’.⁴¹

4.2.2 Principle of Contemporaneity and Evolutive Interpretation: *Stasis or Kinesis?*

4.2.2.1 Contemporaneous v Evolutive Interpretation

Although intertemporal considerations were not explicitly reflected in the text of the VCLT, that is not to say that they were still not part of the interpretative exercise as delineated by Articles 31–33 VCLT. Fitzmaurice in his seminal series of articles in the *British Yearbook of International Law* had attempted to streamline the interpretative process by identifying key principles. One of these was the *principle of contemporaneity*.⁴²

³⁷ Rosenne, Briggs, Tunkin, Waldock, the Chairman, Yasseen, Amado and Verdross; *ibid* [16] (Rosenne), [21] (Briggs), [24] (Tunkin), [25] (Waldock), [27] (Chairman), [28] (Yasseen), [30] (Amado), [32] (Verdross).

³⁸ ILC, ‘Summary Record of the 869th Meeting’ (14 June 1966) UN Doc A/CN.4/SR.869 [59] (Waldock).

³⁹ ILC, ‘Summary Record of the 770th Meeting’ (20 July 1964) UN Doc A/CN.4/SR.770 [33] (Waldock), [34] (de Luna).

⁴⁰ (i) in favour of deletion: ILC, ‘Summary Record of the 870th Meeting’ (15 June 1966) UN Doc A/CN.4/SR.870 [13] (Verdross), [21] (Rosenne); ILC, ‘Summary Record of the 871st Meeting’ (16 June 1966) UN Doc A/CN.4/SR.871 [38] (Tsuruoka); (ii) in favour of the intention of the parties being the decisive criterion: ILC, ‘Summary Record of the 870th Meeting’ [10–1] (de Luna), [72–3] (de Aréchaga); ILC, ‘Summary Record of the 871st Meeting’ [31] El-Erian; ILC, ‘Summary Record of the 872nd Meeting’ [9–10] (Waldock); (iii) in favour of retention of some reference to intertemporal law, see ILC, ‘Summary Record of the 870th Meeting’ [58] (Ago), [89–92] (Bartoš); ILC, ‘Summary Record of the 871st Meeting’ [52–3] (Chairman).

⁴¹ ILC, ‘Report of the International Law Commission on the Work of Its Eighteenth Session’ 323 [29] (Netherlands).

⁴² Also known as ‘*contemporanea expositio*’; Kotzur, ‘Intertemporal Law’ [11].

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'.⁴³ Taking the torch over this series, Thirlway built on and improved on Fitzmaurice's legacy by adding that this principle was not an irrebuttable presumption in favour of historical interpretation, but when it could '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*'.⁴⁴

International courts and tribunals have for decades now applied both the principle of contemporaneity,⁴⁵ and 'evolutive/dynamic' interpretation.^{46,47} depending on the facts of the case. Although evolutive

⁴³ Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation' 212; generally on the principle of contemporaneity: Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: General Principles' 5–8; H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989: Supplement 2006: Part Three' (2006) 77 BYIL 1, 65 ff.

⁴⁴ Thirlway, 'The Law and Procedure of the ICJ: Supplement 2006: Part Three' 57 (emphasis added). In this context, Thirlway in his earlier writings used the term '*intertemporal renvoi*' to describe 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'; H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989: Part One' (1989) 60 BYIL 1, 135.

⁴⁵ *Minquiers and Ecrehos (France v UK)* (Judgment) [1953] ICJ Rep 47, 56; *US Nationals in Morocco* 189; *Aegean Sea Continental Shelf*, Dissenting Opinion of Judge de Castro 63 [4]; *Case Concerning Right of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 6, 37; *Case Concerning a Boundary Dispute between Argentina and Chile Concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy (Argentina v Chile)* (1994) 22 UNRIAA 3 [130] (hereinafter *Laguna del Desierto*); *Kasikili/Sedudu Island* [25]; *Grisbådarna Case* 159; *North Atlantic Coast Fisheries* 196; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 [126]; *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, Dissenting Opinion of Judge Spender 128; *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, Separate Opinion of Judge Skotnikov [5].

⁴⁶ *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 [53] (hereinafter *Namibia Advisory Opinion*); *Aegean Sea Continental Shelf* [77]; *Gabčíkovo–Nagymaros Project* [112]; *Case Concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal (Guinea Bissau v Senegal)* (1989) 20 UNRIAA 119 [80–5]; *Iron Rhine Arbitration* [79–81]; *Dispute Regarding Navigational and Related Rights*, Declaration of Guillaume [9–16]; *Tyrer v UK* [31]; *Matthews v UK* [GC] ECtHR, App No 24833/94 (18 February 1999) [39].

⁴⁷ On evolutive/dynamic interpretation, see G Abi-Saab et al (eds), *Evolutionary Interpretation and International Law* (Bloomsbury 2019); M Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties – Part I' (2008) 21 HYIL 101–53; M Fitzmaurice, 'The Tale of Two Judges: Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice – Human Rights and the

interpretation is usually connected to human rights treaties,^{48,49} almost all courts and tribunals have at one point resorted to this kind of interpretation, or at least have had the option to do so.^{50,51}

Interpretation of Treaties' (2008) 61 RHDI 125; M Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties – Part II' (2009) 22 HYIL 3; R Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights' (1999) 42 GYIL 11; G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 58–79; C Brölmann, 'Limits of the Treaty Paradigm' in M Fitzmaurice and M Craven (eds), *Interrogating the Treaty: Essays in the Contemporary Law of Treaties* (Wolf Legal Publishers 2005) 29, 34–6; Bjorge, *The Evolutionary Interpretation of Treaties*.

⁴⁸ A point that we shall return to in the following sections.

⁴⁹ Indicatively: *Christine Goodwin v UK* [GC] ECtHR, App No 28957/95 (11 July 2002) [74–5]; *Schalk and Kopf v Austria*, ECtHR, App No 30141/04 (24 June 2010) [93–4], [105–6]; *Vo v France* [82]; *Tyrer v UK* [31]; *Loizidou v Turkey (Preliminary Objections)* [71].

⁵⁰ Indicatively: *Merrill & Ring Forestry LP v Canada* (Award of 31 March 2010) ICSID Case No UNCT/07/1 [190]; *Mondev International Ltd v USA* [116–25]; *ADF Inc v USA* [181–4], [190]; *Waste Management Inc v Mexico* (Award of 30 April 2004) ICSID Case No ARB(AF)/00/3 [93]; *GAMI Investment, Inc v Mexico* (Award of 15 November 2004) UNCITRAL <www.italaw.com/sites/default/files/case-documents/ita0353_0.pdf> [95]; *Namibia Advisory Opinion* [53]; *Aegean Sea Continental Shelf* [77]; *Gabčíkovo-Nagymaros Project* [112]; *Iron Rhine Arbitration* [79–81]; *Dispute Regarding Navigational and Related Rights*, Declaration of Guillaume [9–16]; WTO, *USA – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (6 November 1998) WT/DS58/AB/R [130] and fn 110–3 (hereinafter *US–Shrimp (AB)*).

⁵¹ Evolutive interpretation is often automatically associated with human rights instruments. In Section 4.2.2.3, we shall demonstrate why this legal shortcut is theoretically and logically erroneous, despite the fact that there is indeed an observed tendency to refer to the nature of human rights instruments. Here, as well, there is a wide array of terms that have been employed: (i) 'living/growing tree': *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion) [2015] ITLOS Rep 4, Separate Opinion of Judge Lucky [9–10]; (ii) 'living instruments/documents': *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)* (Preliminary Objections) [2011] ICJ Rep 70, Dissenting Opinion of Judge Cançado Trindade [5]; *Prosecutor v William Samoei Ruto and Joshua Arap Sang* (Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation of 17 April 2014) ICC–01/09–01/11–1274 [142]; *Judge v Canada*, HRCtee (5 August 2002) UN Doc CCPR/C/78/D/829/1998 [10.3]; *RR v Poland* [186]; *EB v France* [92]; *Hatton and Others v UK* [GC] ECtHR, App No 36022/97 (8 July 2003) Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič, and Steiner [2]; *Puttaswamy and Khanna v Union of India and Others* (24 August 2017) Supreme Court of India [2017] 10 SCC 1, ILDC 2810 [151]; (iii) 'live instruments': *Yakye Axa Indigenous Community v Paraguay* [125]; *Case of the Mapiripán Massacre v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No 134 (15 September 2005)[106]; (iv) instruments of the 'always speaking type': *M, Re, King v Bristow Helicopters Ltd* (28 February 2002) House of Lords (UK) [2002] UKHL 7.

Their practice is so wide and diverse that even the name given to describe this process is equally wide and diverse: ‘evolutionary interpretation’,⁵² ‘evolutive interpretation’⁵³ or ‘dynamic interpretation’⁵⁴ have all been used either alone or in any and all imaginable combinations: ‘dynamic or evolutive’,⁵⁵ ‘evolutive and dynamic’,⁵⁶ or both these options in different parts of the judgment.⁵⁷ This would seem to indicate that there is no measurable qualitative difference amongst these terms. They are merely different adjectives used to describe essentially the same process. Helgesen, however, offers a different approach. According to him, ‘evolutive’ covers situations where the court or tribunal gives answers to a new issue that has not been brought before the court ever before. ‘Dynamic’, on the other hand, describes a situation where the court gives ‘new answers to old facts’.⁵⁸ Such considerations aside, from the above it is evident that evolutive interpretation⁵⁹ is inextricably linked to both temporal motion and ‘motion’ as change. It is no coincidence

⁵² *Whaling in the Antarctic* [31–2]; *ibid*, Separate Opinion of Judge Greenwood [7]; WTO, *India – Certain Measures Relating to Solar Cells and Solar Modules* (24 February 2016) WT/DS456/R [7.231], [7.233]; *The M/V ‘Virginia G’ Case (Panama/Guinea Bissau) (Merits)* [2014] ITLOS Rep 4 [187]; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [148]; *Gabčíkovo–Nagymaros Project*, Separate Opinion of Judge Bedjaoui [5]; *RosInvest Company UK Ltd v Russia* (Award on Jurisdiction of 1 October 2007) SCC Case No V079/2005 [39–40].

⁵³ *Jadhav Case (India v Pakistan)* (Provisional Measures) [2017] ICJ Rep 231, Separate Opinion of Judge Cañado Trindade [27]; *Daimler Financial Services AG v Argentina* (Award of 22 August 2012) ICSID Case No ARB/05/1 [267]; *Mondev International Ltd v USA* [123]; *Bámaca Velásquez v Guatemala* (Merits) IACtHR Series C No 70 (25 November 2000) Separate Opinion of Judge Cañado Trindade [37].

⁵⁴ Fitzmaurice ‘Dynamic (Evolutive) Interpretation of Treaties – Part I’ 101–53; Fitzmaurice ‘Dynamic (Evolutive) Interpretation of Treaties – Part II’ 3–31.

⁵⁵ *Caesar v Trinidad and Tobago*, Separate Opinion of Judge Cañado Trindade [10]; *The Right to Information on Consular Assistance*, Concurring Opinion of Judge Cañado Trindade [3].

⁵⁶ *Şahin and Şahin v Turkey* [GC] ECtHR, App No 13279/05 (20 October 2011) [58]; *Bayatyan v Armenia* [GC] ECtHR, App No 23459/03 (7 July 2011) [98]; *YY v Turkey*, ECtHR, App No 14793/08 (10 March 2015) [103]; *Meftah and Others v France* [GC] ECtHR, App No 32911/96 (26 July 2002) Concurring Opinion of Judge Lorenzen, Joined by Judge Hedigan.

⁵⁷ *Hirst v UK (No 2)* [GC] ECtHR, App No 74025/01 (6 October 2005) Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler, and Jebens.

⁵⁸ JE Helgesen, ‘What Are the Limits to the Evolutive Interpretation of the European Convention on Human Rights?’ (2011) 31 HRLJ 275, 276.

⁵⁹ From this point onward, we will be using the term ‘evolutive interpretation’ for reasons of consistency, but also because this term is closer to the concept of motion as change, which is the central theme of our book.

that it has been characterised as the ‘intertemporal dimension’⁶⁰ and the ‘temporal issue’⁶¹ in treaty interpretation.

This ‘motion’ is also evident in the manner in which evolutive interpretation can occur. Two are the main tracks along which evolutive interpretation can happen: ‘evolution of fact’ (*ouverture du texte*) and ‘evolution of law’ (*renvoi mobile*).⁶² In evolution of fact, the rule being interpreted takes into account the changes that have occurred within the society in which the rule being interpreted produces its effects. Medical and scientific advancements,⁶³ societal and cultural changes,⁶⁴ moral developments,⁶⁵ and the socio-economic situation of a State (including current living conditions)⁶⁶ have all been considered as evolution of fact. In evolution of law, on the other hand, the content of the rule being interpreted changes on the basis of the current status of the surrounding legal framework, eg if any new rules have emerged that could potentially affect the scope of its content. Customary international law,⁶⁷ international treaties,⁶⁸ and even domestic law⁶⁹ all fall within the scope of

⁶⁰ *Caesar v Trinidad and Tobago*, Separate Opinion of Judge Cançado Trindade [10].

⁶¹ Higgins, *Problems and Process* 797.

⁶² Georgopoulos, ‘Le droit intertemporel’ 132–4; Higgins, *Problems and Process* 797.

⁶³ *Gabčíkovo–Nagyymaros Project* [104], [107]; *Vo v France*, Dissenting Opinion of Judge Ress [5]; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Separate Opinion of Judge Lucky [9–10]; *Puttaswamy and Khanna v Union of India and Others* [151].

⁶⁴ *The Right to Information on Consular Assistance*, Concurring Opinion of Judge Cançado Trindade [4]; *Öztürk v Germany*, Dissenting Opinion of Judge Bernhardt.

⁶⁵ *Cossey v UK*, Joint Dissenting Opinion of Judges Palm, Foighel, and Pekkanen [5].

⁶⁶ *India – Certain Measures Relating to Solar Cells and Solar Modules* [7.231–7.232]; WTO, *Argentina – Measures Relating to Trade in Goods and Services* (30 September 2015) WT/DS453/R [7.873–7.875]; *Yakye Axa Indigenous Community v Paraguay* [125]; *Gómez Paquiyauri and Others v Peru* [165]; *ibid*, Partly Concurring and Partly Dissenting Opinion of Judge Fogel [33]; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [146]; *Case of the ‘Street Children’ v Guatemala* [193]; *The Right to Information on Consular Assistance* [114]; *Tyrer v UK* [31].

⁶⁷ *Merrill & Ring Forestry LP v Canada* [190]; *Mondev International Ltd v USA* [116–25]; *ADF Inc v USA* [181–4], [190]; *Waste Management Inc v Mexico* [93]; *GAMI Investment, Inc v Mexico* [95].

⁶⁸ *Whaling in the Antarctic* [38]; *ibid*, Dissenting Opinion of Judge Yusuf [26]; *Jadhav Case* (Provisional Measures) Separate Opinion of Judge Cançado Trindade [27]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, Dissenting Opinion of Judge Cançado Trindade [172]; *Sawhoyamaya Indigenous Community v Paraguay* [117]; *Yakye Axa Indigenous Community v Paraguay* [124–31]; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [148–9]; *Gómez Paquiyauri and others v Peru* [165–6]; *The Right to Information on Consular Assistance* [114]; *Case of the ‘Street Children’ v Guatemala* [193–4]; *Juridical Status and Human Rights of the Child* [24].

⁶⁹ *Öcalan v Turkey* [162–4]; *The Right to Information on Consular Assistance*, Concurring Opinion of Judge Cançado Trindade [7]; *Marckx v Belgium* [41]; *Dudgeon v UK* [60].

evolution of law and have, on occasion, been resorted to by courts and tribunals to breathe renewed life into treaty provisions.

4.2.2.2 Evolutive Interpretation and Subsequent Agreements and Practice

Recently, the ILC in its work on ‘Subsequent Agreements and Subsequent Practice in the Interpretation of Treaties’⁷⁰ and the ICJ in the *Whaling in the Antarctic*⁷¹ had to deal with the concept of intertemporality within the process of interpretation, ie whether a treaty should be interpreted in the light of the circumstances and the law at the time of its conclusion (‘contemporaneous’ or ‘static’ interpretation), or in the light of the circumstances and the law at the time of its application (‘evolutive’, ‘evolutionary’, or ‘dynamic’ interpretation) and in particular as to what it concerned subsequent agreement and practice, under both Article 31 and 32 VCLT.

With respect to subsequent practice and agreements, Nolte has cautioned that ‘the possibility of influencing the fate of a treaty through the practice of its application should not, however, be overestimated’.⁷² In his view, and in conformity with the holistic nature of the interpretative process, reference to subsequent agreements and practice is but one of the elements in the process of progressive encirclement that is interpretation.⁷³

⁷⁰ 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, reproduced in [2018/II – Part Two] YBILC 11, Commentary to Draft Conclusion 8, 64 [2].

⁷¹ The ICJ in *Whaling in the Antarctic* made some interesting observations as to the role of subsequent agreements and practice in the interpretative process, its connection and position with respect to other elements of Art 31 VCLT (in particular its relationship with and effect on ‘object and purpose’), and its relation to and influence on evolutive interpretation. For a detailed analysis of this case, see M Fitzmaurice, ‘The Whaling Convention and Thorny Issues of Interpretation’ in M Fitzmaurice and D Tamada (eds), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Brill/Martinus Nijhoff 2016) 55–138; M Fitzmaurice, ‘The Practical Working of the Law of Treaties’ in MD Evans (ed), *International Law* (5th edn, CUP 2019) 138, 155–8.

⁷² G Nolte, ‘Treaties and Their Practice – Symptoms of Their Rise or Decline’ (2018) 392 RdC 205, 334; cf Y Hamamoto, ‘Possible Limitations to the Role of Subsequent Agreements and Subsequent Practice – Viewed from Some State Practices’ (2020) 22/1 ICLR 61–83; D Tamada, ‘The Japan–South Korea Claims Agreement: Identification of Subsequent Agreements and Practice’ (2020) 22/1 ICLR 107–36.

⁷³ Nolte, ‘Treaties and Their Practice’ 336. See, however, Tladi, who expressed ‘concern about an apparent, almost surreptitious, attempt by the Commission to elevate subsequent agreements and subsequent practice as tools of interpretation to the same level as the more objective tools outlined in Article 31(1) of the [VCLT]’; D Tladi, ‘Is the

As far as evolutive interpretation is concerned, and despite some sweeping claims to the contrary, such as the one made by the arbitral tribunal in the *Iron Rhine Arbitration* that ‘note[d] a general support among the leading writers today for evolutive interpretation of treaties’,⁷⁴ most authors take the view that while subsequent practice and evolutive interpretation are similar in objectives, in the sense that they allow for the development of treaties over time,⁷⁵ this is not to say that evolutive interpretation is the default setting when dealing with subsequent agreements and practice. As shown in the analysis in Section 4.2.1,⁷⁶ it is the intention of the parties which is the answer to the question. This intention is the ‘cornerstone of evolutionary interpretation, ie obligations can evolve only if the parties intended that a particular term, or the treaty as a whole, have an evolutionary character’.⁷⁷ Similarly, Nolte, while referring to the *Dispute Regarding Navigational and Related Rights*, was of the view that this case was ‘illustrative of the question of the relationship between the roles of practice in the narrow and in the broad sense for the interpretation of treaties, [but it did] not point to a general approach, or to a theory’.⁷⁸

In the end, the ILC adopted Draft Conclusion 8 ‘Interpretation of treaty terms as capable of evolving over time: Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time’.⁷⁹

In the view of the authors, this Draft Conclusion highlights the correct approach to deciding between static and evolutive interpretation. Instead

International Law Commission Elevating Subsequent Agreements and Subsequent Practice? (*EJIL: Talk!*, 30 August 2018) <www.ejiltalk.org/is-the-international-law-commission-elevating-subsequent-agreements-and-subsequent-practice> accessed 20 September 2019.

⁷⁴ *Iron Rhine Arbitration* [81].

⁷⁵ I Buga, ‘Subsequent Practice and Treaty Modification’ in Bowman and Kritsiotis (eds), *Conceptual and Contextual Perspectives* 363, 370.

⁷⁶ And further strengthened in Section 4.2.2.

⁷⁷ J Arato, ‘Subsequent Practice and Evolutive Interpretation’ (2010) 9/3 *Law and Practice of International Courts and Tribunals* 443, 466; see also Merkouris, *Article 31(3)(c) VCLT* ch 2, and cases and authors cited therein. How one goes about establishing this intention is, of course, an even more complex question.

⁷⁸ Nolte, ‘Treaties and Their Practice’ 359.

⁷⁹ ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice, with Commentaries’, Draft Conclusion 8.

of adopting any legal and mental shortcuts,⁸⁰ it correctly determines that any solution to that question will have to be decided on the basis of the facts of each case, and always by referring to the intention of the parties. According to the Commentary,

Draft Conclusion 8 does not take a position regarding the question of the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general . . . The conclusion should, however, be understood as indicating the need for some caution with regard to arriving at a conclusion in a specific case whether to adopt an evolutive approach. For this purpose, Draft Conclusion 8 points to subsequent agreements and subsequent practice as means of interpretation that may provide useful indications to the interpreter for assessing, as part of the ordinary process of treaty interpretation, whether the meaning of a term is capable of evolving over time.⁸¹

4.2.2.3 Choosing between Static (Contemporaneous) and Evolutive Interpretation

As shown in Section 4.2.1, the VCLT drafters were well aware of the way that intertemporal considerations could encroach on the interpretative process. Instead of offering explicit and detailed solutions, which could in the long run have led to issues of rigidity and *stasis*, they decided to exercise caution by opting for a ‘flexible approach’, in which the interpreter would sometimes ‘draw upon the language and rules that were in existence when the interpreted treaty was concluded, and sometimes upon the language and rules existing at the time of interpretation’.⁸² What is unclear, however, is on what basis the interpreter would know which of these two solutions was the appropriate one for the text being interpreted. Various methods have been proposed, but all can be categorised into three main groups that, unsurprisingly, are also reflective of the three main schools of interpretation: (i) intention of the parties; (ii) text, and in particular the so-called ‘generic terms’; and (iii) the object and purpose of the treaty. All of these have been, on occasion, relied on by courts and tribunals to offer guidance as to whether the interpreted provision has experienced a *kata chronon metavole* that has led to its

⁸⁰ On a deconstruction of these, see Section 4.2.2.3.

⁸¹ ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice, with Commentaries’, Commentary to Draft Conclusion 8, 67 [10].

⁸² Linderfalk, ‘Doing the Right Thing for the Right Reason’ 113; Linderfalk, identifies three approaches to addressing intertemporal issues: (i) the categorically static approach, (ii) the categorically dynamic approach, and (iii) the flexible approach (*ibid.*).

auxesis/meiosis, or whether its content has remained frozen in time, in a state of *stasis*.

4.2.2.3.1 Intention of the Parties This approach is generally uncontested. If the intention of the parties can be revealed to have shown a preference of a particular approach to the interpretation of the treaty to which they are parties, then as a logical corollary of the consent-based nature of international law this should be the determinative factor.⁸³ This is also evidenced by Fitzmaurice and Thirlway's definition of the principle of contemporaneity, which is built around the intention of the parties. Consequently, it is the will of the parties that provides the answer when deciding between a contemporaneous or evolutive interpretation, ie how change in time, law, and fact affects the interpretation of a legal rule. Bearing in mind the main philosophical approaches to time, change, and identity, ie endurantism, perdurantism and exdurantism,⁸⁴ where the existence of an object is described in terms such as 'time-slices' and 'space-time worms', it is only appropriate to refer to this intention of the parties that determines the temporal destiny of a particular term as the '*time-will*' of the parties.

4.2.2.3.2 Generic Terms' The text itself and, in particular, the linguistic characteristics of the terms being interpreted may also affect the intertemporal dimension in the interpretation of treaties. It has been argued that evolutive interpretation is linguistic in nature, that it is 'based on the linguistic usage of the term at the time of interpretation'.⁸⁵ The key concept in this school of thought is that of a term being 'generic'. If a term is of a generic nature, this may tip the scales in favour of an evolutive interpretation.⁸⁶ Courts and tribunals, while characterising a

⁸³ de Aréchaga, 'International Law in the Past Third of a Century' 49; Sinclair, *The Vienna Convention on the Law of Treaties* 140.

⁸⁴ See Chapter 1, Section 1.5.

⁸⁵ G Ress, 'The Interpretation of the Charter' in B Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) 13, 23. However, as Helmersen rightly points out, this is only fitting for terms that actually have the capacity to evolve linguistically, not for the rest; ST Helmersen, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) 6 EurJLegStud 127, 129; see also in more detail later in this section, where Helmersen's theory is analysed in more detail.

⁸⁶ *Iron Rhine Arbitration* [79–80]; *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) PCIJ Rep Series B No 4, 24; *Aegean Sea Continental Shelf* [74–7]; *Gabčíkovo-Nagymaros Project* [112]; *US–Shrimp (AB)* [130]; *Dispute Regarding Navigational and Related Rights* [65–7].

term as ‘generic’ when interpreting it, have on some occasions attempted to offer some glimpse of what makes a particular term a ‘generic’ one. The ICJ has opined that such terms have a content, which ‘the parties expected would change through time’,⁸⁷ and that its ‘meaning was intended to follow the evolution of the law’.⁸⁸ Along similar lines, the arbitral tribunal in *Mondev* simply stated that such terms have an ‘evolutionary potential’.⁸⁹ Unsurprisingly, all of these are not truly definitions but are rather, at best, broad descriptions of certain qualities that a generic term will have, and which most likely be evident after the fact.

Linderfalk and Helmersen have attempted, using linguistics as their base, to provide some guidance about how such a determination could potentially be accomplished *ex ante*. Linderfalk, identifies three groups of ‘referring expressions’:⁹⁰ (i) ‘definite referring expressions’, which refer to one or more specific phenomena; (ii) ‘indefinite referring expressions’, which refer to one or more non-specific phenomena; and (iii) ‘generic referring expressions’, which refer to one or more phenomena as they change in time.⁹¹ Out of these three, the ‘generic referring expressions’ are the prime candidates for qualifying as generic terms that can be open to evolutive interpretation that takes into account not only the evolution of law but also the evolution of fact. The reason is that these ‘generic referring expressions’ are not time-bound, since ‘no relationship is established between the time of the utterance and the time when the referent was assumed to exist’.⁹² Helgersen using two axes, that of values and that of evolution, identifies four different groups of generic terms: (i) ‘value-driven non-evolving’, (ii) ‘value driven evolving’, (iii) ‘non-value driven non-evolving’, and (iv) ‘non-value driven evolving’. If a term on the axis of evolution is non-evolving, ie groups (i) and (iii), then evolutive interpretation is possible within the context of the term being given a

⁸⁷ *Kasikili/Sedudu Island*, Declaration of Judge Higgins [2].

⁸⁸ *Aegean Sea Continental Shelf* [77].

⁸⁹ *Mondev International Ltd v USA* [119].

⁹⁰ ‘Referring expression’ is an expression used by an ‘utterer’ for the purpose of ‘reference’. In turn, ‘reference’ refers to the relationship between an expression and what the expression stands for in the world at the time that it is uttered; Linderfalk, ‘Doing the Right Thing for the Right Reason’ 129. For other linguistic attempts, see J Wyatt, *Intertemporal Linguistics in International Law: Beyond Contemporaneous and Evolutionary Treaty Interpretation* (Hart Publishing 2019).

⁹¹ Linderfalk, ‘Doing the Right Thing for the Right Reason’ 130–1.

⁹² *ibid* 132.

special meaning under Article 31(4) VCLT. ‘Value driven evolving’ terms are the ones with the highest ‘evolutionary potential’, whereas for ‘non-value driven evolving’ terms there is no presumption, and their evolutive potential would have to be decided always on an *ad hoc* basis and by reference to the actual ‘time-will’ of the parties.⁹³ When applying this tool to the jurisprudence of the ICJ, Helgersen came to the conclusion that the Court is more likely to adopt an evolutive interpretation, when the term is generic and the treaty is of unlimited duration.⁹⁴

Despite the undeniable theoretical value of Linderfalk’s and Helgersen’s approach, one major issue is that courts and tribunals rarely elaborate on why a particular term is characterised as ‘generic’ or not.⁹⁵ In most cases, they will assert it and so far, to the knowledge of the authors, no court has undertaken explicitly a linguistic exercise such as the ones described above. Furthermore, as both Linderfalk and Helgersen concede, in several cases the evolutive or non-evolutive potential of a term will rest on identifying the will of the parties, and even in the cases where there is a presumption in favour of evolutive interpretation that would always be rebuttable and exists in the first place by virtue of the fact that the parties intentionally selected that type of term as it served their intention. They chose a generic term to be included in the text of a treaty because its ability to evolve through time reflected their intention/will, or more appropriately their ‘time-will’.⁹⁶

In the *Namibia Advisory Opinion*, which is sometimes used as one example where the Court resorted to evolutive interpretation based on the ‘generic’ nature of the terms,⁹⁷ the text of the Opinion itself gives an indication that it is the ‘time-will’ of the parties that is the critical factor. ‘The Parties to the Covenant [by selecting these generic terms] *must*

⁹³ *ibid* 139.

⁹⁴ *ibid* 135–8 using these cases as reinforcing his argument: *Dispute Regarding Navigational and Related Rights* [65–7]; *Aegean Sea Continental Shelf* [77].

⁹⁵ *Ambiente Ufficio SpA and Others v Argentina* (Decision of 8 February 2013) ICSID Case No ARB/08/9 [492]; *Siemens AG v Argentina* (Decision of 3 August 2014) ICSID Case No ARB/02/8 [114] (Respondent’s Claim).

⁹⁶ *Namibia Advisory Opinion* [53]; *Aegean Sea Continental Shelf* [77]; *Dispute Regarding Navigational and Related Rights* [66] and Separate Opinion of Judge Skotnikov [6]; *Siemens AG v Argentina* [114] (Respondent’s Claim). In all of these cases, the relevant judicial body although making use of ‘generic terms’ always comes back to the fact that the selection of such terms reflects the intention of the parties to allow these terms to evolve (ie is a reflection of the ‘time-will of the parties’).

⁹⁷ The exact wording of the ICJ was ‘by definition evolutionary’; *Namibia Advisory Opinion* [53].

consequently be deemed to have accepted them as such [ie non-static and evolutive].⁹⁸ It is noteworthy that both Fitzmaurice in his Dissenting Opinion⁹⁹ and Thirlway in his writings¹⁰⁰ criticised the Court because they could find no evidence of this evolutive ‘time-will’ of the parties and stated that the Court had failed to provide any evidence of such intent.

Judge Higgins, in *Kasikili/Sedudu Island* drives this point home:

[The aim] is *not to discover a mythical ‘ordinary meaning’* ... we must never lose sight of the fact that *we are seeking to give flesh to the intention of the parties*, expressed in generalised terms in 1890. We must trace a thread back to this point of departure. *We should not*, as the Court appears at times to be doing, decide what *in abstracto* the term ‘the main channel’ might today mean, *by a mechanistic appreciation of relevant indicia*. Rather, our task is to decide what general idea the parties had in mind, and then make reality of that general idea through the use of contemporary knowledge.¹⁰¹

Consequently, the text is not and cannot be the sole basis for evolutive interpretation. It is merely a reflection of the true basis, ie the intention of the parties, and specifically, their ‘time-will’.

4.2.2.3.3 Object and Purpose of the Treaty There is a growing trend in international jurisprudence to justify recourse to evolutive interpretation based on the nature of the text being interpreted, ie its object and purpose. This trend is most pronounced with respect to human rights treaties, environmental treaties (to a lesser degree of intensity than human rights treaties), and constituent instruments of international organisations. The underlying hypothesis is that the content of human rights treaties, because of their particular character and of the nature of the rights they enshrine, must be bolstered and continuously be updated in order to remain relevant in the face of challenges posed by a constantly changing legal and societal environment.¹⁰² Despite the existence of an

⁹⁸ *Namibia Advisory Opinion* [53] (emphasis added).

⁹⁹ *ibid*, Dissenting Opinion of Judge Fitzmaurice [85].

¹⁰⁰ Thirlway, ‘The Law and Procedure of the ICJ: Part One’ 137; Fitzmaurice, ‘The Tale of Two Judges’ 125–70.

¹⁰¹ *Kasikili/Sedudu Island*, Declaration of Judge Higgins [3–4].

¹⁰² *Caesar v Trinidad and Tobago*, Separate Opinion of Judge Cançado Trindade [11], citing *Loizidou v Turkey (Preliminary Objections)* [75]; ‘Other Treaties’ Subject to the Advisory Jurisdiction of the Court (Art 64 American Convention on Human Rights) (Advisory Opinion) IACtHR Series A No 1 (24 September 1982); *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75)* (Advisory Opinion) IACtHR Series A No 2 (24 September 1982); *Restrictions to the*

extensive jurisprudence on the matter,¹⁰³ however, that is not to say that human rights treaties are an *automatic exception to the principle of contemporaneity*. Similar to what we saw in evolutive interpretation based on the ‘generic’ nature of a term, so this approach is actually also based on the ‘time-will’ of the parties. Higgins, once again, opens the blinds on any misconception as to the object and purpose being an automatic exception. “[G]eneric clauses” and *human rights provisions* are not really random exceptions to a general rule . . . [but] an application of a wider principle – *intention of the parties, reflected by reference to the object and purpose* – that guides the law of treaties.¹⁰⁴ Similarly, the tribunal in *RosInvest v Russia* draws attention to the fact that intention is always the underlying principle. ‘[Since human rights treaties] represent the very archetype of treaty instruments in which the Contracting Parties *must have intended* that the principles and concepts which they employed should be understood and applied in the light of developing social attitudes’.¹⁰⁵ Consequently, the object and purpose argument in favour of evolutive interpretation is simply a variation to the overall theme of the ‘time-will’ (ie the intention) of the parties.

The same is applicable to the argument that ‘a treaty of constitutional character should be subject to different rules of interpretation to allow for the “intrinsically evolutionary nature of a constitution”’.¹⁰⁶ However, as with human rights treaties, sooner or later it always comes back to the acknowledgement that for the purposes of evolutive interpretation the nature of the treaty is a reflection of the intention of the parties.¹⁰⁷ Of

Death Penalty (Arts 4(2) and 4(4) American Convention on Human Rights) (Advisory Opinion) IACtHR Series No 3 (8 September 1983).

¹⁰³ Generally, see Bjorge, *The Evolutionary Interpretation of Treaties*; Letsas, *A Theory of Interpretation of the ECHR*.

¹⁰⁴ Higgins, ‘Some Observations on the Inter-temporal Rule in International Law’ 181 (emphasis added).

¹⁰⁵ *RosInvest v Russia* [39] (emphasis added).

¹⁰⁶ P Sands and P Klein, *Bowett’s Law of International Institutions* (6th edn, Sweet & Maxwell 2009) 454, citing RY Jennings and AD Watts (eds), *Oppenheim’s International Law* (9th edn, OUP 2008) 1268; *US Nationals in Morocco* 211.

¹⁰⁷ HG Schermers and NM Blokker, *International Institutional Law: Unity with Diversity* (5th rev edn, Martinus Nijhoff 2011) [1155–6], [1347]; Sands and Klein, *Bowett’s Law of International Institutions* 454; NM Blokker, ‘Constituent Instruments: Creating a Genie that May Escape from the Bottle?’ in JK Cogan, I Hurd and I Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2013) 943–61; T Sato, *Evolving Constitutions of International Organizations: A Critical Analysis of the Interpretative Framework of the Constituent Instruments of International Organizations* (Kluwer Law International 1996) 150–60.

note is Brölmann's excellent analysis on the topic, who draws attention to the fact that teleological interpretation and evolutive interpretation should not be conflated with one another, and that it is actually teleological rather than evolutive interpretation that features more prominently in the interpretation of these treaties.¹⁰⁸ Consequently, object and purpose as well is not a completely independent basis for establishing an evolutive interpretation, but is rather a manifestation of the expressed or presumed intention of the parties. No *automatic* exception to the principle of contemporaneity can be deduced from international jurisprudence, and any exception will, once again, be determined on an *ad hoc* basis, on the facts of the case and, most importantly, on the intention of the parties.

The above analysis coupled with an examination of the *travaux préparatoires* of Article 31 VCLT in the previous sections has demonstrated that irrespective of which school of interpretation one takes as a starting point, and irrespective of which presumptions may apply, in all situations the deciding factor either directly or indirectly was and still is the 'time-will' of the parties. This 'time-will' may be identified by reference to the text of the treaty, the drafting history, the object and purpose of the treaty, and State practice, as well as other relevant treaties,^{109,110} but it is that 'time-will' and nothing else that in each instance determines the balance to be struck between the principle of contemporaneity and evolutive interpretation.

4.2.2.4 Limits of Evolutive Interpretation

Evolutive interpretation is an extremely useful tool that allows a treaty moving along the axis of the fourth (temporal) dimension (*kata chronon metavole*) to also move within the meaning of two more of Aristotle's types of 'motion', ie increase (*auxesis*) and diminution (*meiosis*). A common characterisation of a treaty connected to the process of evolutive interpretation is that of a treaty being a 'living tree'. Similar

¹⁰⁸ C Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' in DB Hollis (ed) *The Oxford Guide to Treaties* (OUP 2012) 507, 512–4.

¹⁰⁹ These could be either 'relevant rules' under Article 31(3)(c), or *in pari materia* treaties; *Daimler Financial Services AG v Argentina* [220 ff].

¹¹⁰ Higgins, 'Some Observations on the Inter-temporal Rule in International Law' 180–1; Fitzmaurice, 'The Tale of Two Judges' 125–70; Yasseen, 'L' interprétation des traités' 66–7; FA Engelen, *Interpretation of Tax Treaties under International Law: A Study of Articles 31, 32, and 33 of Vienna Convention on the Law of Treaties and Their Application to Tax Treaties* (International Bureau of Fiscal Documentation 2004) 291.

to a 'living tree', a treaty also expands and grows (or in some rare cases may also wither away) in order to adapt to situations and problems that the original drafters may not have envisaged at all.

However, this need to adapt should not give us the false impression that this 'motion' is an unlimited one. On the contrary, not only are there limits (or precautions),¹¹¹ but these limits can be grouped into two main categories.

The first group of limits/precautions is the *internal* limits. These limits refer to the treaty itself and are connected to its building blocks, most of which are also evident in the interpretative process as enshrined in Articles 31–33 VCLT. As early as 1929, Lord Sankey, in *Edwards v Attorney-General for Canada*, expressed this, while harking back to the simile of treaties as 'living instruments'. He opined that although certain legal documents were 'living tree[s] capable of growth and expansion', this growth should always be 'within [the instrument's/"living tree's"] natural limits'.¹¹² But what exactly are these 'natural limits'?

The 'umbrella' limit of this first category is the one that states that evolutive interpretation should always observe the general interpretative rule laid down in Article 31 VCLT.¹¹³ This has been further elaborated by a number of international courts and tribunals to refer, among others, to the text of the provision under interpretation,¹¹⁴ its context,¹¹⁵ and, of course, the intention of the parties.¹¹⁶ Especially, with respect to this last one, although evolutive interpretation may be used to address modern challenges and, thus, better serve the object and purpose of a treaty, this at no point should lead to fictional considerations of object and purpose leading to a substitution of the actual intention of the parties. As Fitzmaurice, acting as an ECtHR judge, pointed out, '[t]he objects and purposes of a treaty are not something that exist *in abstracto*: they follow from and are closely bound up with the intentions of the parties, as

¹¹¹ This is a term used by Judge Bedjaoui in: *Gabčíkovo–Nagymaros Project*, Separate Opinion of Judge Bedjaoui [5].

¹¹² *Edwards v Attorney-General for Canada* (Judgment of 18 October 1929) Judicial Committee of the Imperial Privy Council [1930] AC 124, 136 per Lord Sankey.

¹¹³ *Gabčíkovo–Nagymaros Project*, Separate Opinion of Judge Bedjaoui [5].

¹¹⁴ *Al-Saadoon and Mufdhi v UK*, ECtHR, App No 61498/08 (2 March 2010) [119]; *Feldbrugge v Netherlands*, ECtHR, App No 8562/79 (29 May 1986) Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Evans, Bernhard, and Gersing [24]; *Albert and Le Compte v Belgium*, ECtHR, App No 7299/75 (10 February 1983) Partly Dissenting Opinion of Judge Matscher [3].

¹¹⁵ *Soering v UK*, ECtHR, App No 14038/88 (7 July 1989) [103].

¹¹⁶ *Gabčíkovo–Nagymaros Project*, Separate Opinion of Judge Bedjaoui [7].

expressed in the text of the treaty, or as properly to be inferred from it, these intentions being the sole sources of those objects and purposes . . . *a fortiori* [these intentions] *may certainly not be subsequently imported under the guise of objects and purposes not thought of at the time*.¹¹⁷

Another limit, within the first group of ‘internal’ ones, and which is the underlying common denominator of all the limits of that group, is that evolutive interpretation should never amount to a *de facto* revision of a treaty.¹¹⁸ Any such outcome would be tantamount to the judges exercising a *pouvoir de légiférer*, which has been consistently held to fly in the face of the judicial function and the notion of the separation of powers.¹¹⁹

The ILC also raised this issue in ‘Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties’. Draft Conclusion 7(3) states:

It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, *intend to interpret the treaty, not to amend or to modify it*. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognised. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.¹²⁰

In this Draft Conclusion, the ILC recognises revision of a treaty as a limit to the interpretative process, and that when States aim to amend or modify the treaty they should do so either by following the treaty-specific rules on amendment and modification, or the VCLT residual ones, or customary international law, whichever set of rules is applicable to the treaty and the parties in question. However, even the ILC was aware of the fact that although the differentiation of subsequent agreements and practice relevant for interpretative purposes under Article 31(3)(a)

¹¹⁷ *Case of National Union of Belgian Police v Belgium*, ECtHR, App No 4464/70 (27 October 1975) Separate Opinion of Judge Sir Gerald Fitzmaurice [9] (emphasis added).

¹¹⁸ *Gabčíkovo–Nagymaros Project*, Separate Opinion of Judge Bedjaoui [5]; *Kasikili/Sedudu Island*, Declaration of Judge Higgins [2]; *Laguna del Desierto* [157]; *Claude Reyes and Others v Chile* (Merits, Reparations, and Costs) IACtHR Series C No 151 (19 September 2006) Separate Opinion of Judge Ramírez [1], [3].

¹¹⁹ *Bayatyan v Armenia*, Dissenting Opinion of Judge Gyulumyan [2]; *Meftah and Others v France*, Concurring Opinion of Judge Lorenzen, Joined by Judge Hedigan; Helmersen, ‘Evolutive Treaty Interpretation’ 137; Thirlway, ‘The Law and Procedure of the ICJ: Part One’ 142; D French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’ (2006) 55 ICLQ 281, 296–7.

¹²⁰ ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice, with Commentaries’ Draft Conclusion 7(3) (emphasis added).

and (b) and subsequent agreements and practice leading to modification is a theoretically sound proposal, in practice the differentiation between the two groups may not always be so straightforward. According to the ILC, '[i]t may sometimes be difficult to draw a distinction between agreements of the parties under a specific treaty provision that attributes binding force to subsequent agreements, simple subsequent agreements under article 31, paragraph 3 (a), which are not binding as such, and, finally, agreements on the amendment or modification of a treaty under articles 39 to 41'.¹²¹

With the exception of the formal criteria set forth in Article 39 VCLT, and any other criteria that may have been included by the parties themselves in the treaty being interpreted, the ILC concluded:

There do not seem to be any [other] formal criteria. It is clear, however, that States and international courts are generally prepared to accord parties a rather wide scope for the interpretation of a treaty by way of a subsequent agreement. This scope may even go beyond the ordinary meaning of the terms of the treaty. The recognition of this scope for the interpretation of a treaty goes hand in hand with the reluctance by States and courts to recognize that an agreement relating to the application of a treaty actually has the effect of amending or modifying the treaty. An agreement to modify a treaty is thus not excluded, but also not to be presumed.¹²²

The difficulty of distinguishing between interpretation and modification by recourse to subsequent agreement and practice is further complicated by the fact that sometimes courts and tribunals simply avoid taking a position on the matter. In *Territorial Dispute (Libya/Chad)*, for instance, 'in the view of the Court, for the purposes of the present Judgment, there is no reason to *categorise it either as confirmation or as a modification of the Declaration*'.¹²³ In other cases, it is also unclear whether the judgment of the court was based on use of subsequent practice as an interpretative element or as a basis of treaty modification.¹²⁴ Another complicating

¹²¹ *ibid* 58–9, Commentary to Draft Conclusion 7(3) [24].

¹²² *ibid* 59, Commentary to Draft Conclusion 7(3) [24].

¹²³ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6 [60] (emphasis added).

¹²⁴ In *Dispute Regarding Navigational and Related Rights*, for instance, the Court seems to indicate that subsequent practice of parties may lead to 'a departure from the original intent on the basis of a tacit agreement', but it is unclear whether it means that in the sense of modification or whether in the sense of departing from the original understanding of the terms by the drafters, which would fall under evolutive interpretation.

factor is that a subsequent agreement under Article 31(3)(a) can also have the effect of modifying a treaty,¹²⁵ although the ILC was, eventually, of the view that ‘while there exists some support in international case law that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties theoretically may lead to modifications of a treaty, the actual occurrence of that effect is not to be presumed, and the possibility of amending or modifying a treaty by subsequent practice has not been generally recognised’.¹²⁶

Irrespective of the difficulties surrounding distinguishing interpretation and revision/modification of a treaty, it is without question that the latter is a limit that interpretation should never cross. The interpretative process and the amendment/modification procedures abide and are governed by different sets of rules. One should not be conflated with another. If an alteration (*alloiosis*) is to transpire for a treaty, then that should be the outcome of the clear intention of the parties to the treaty and not the interpretative outcome of the legal reasoning of a judge. Or as Dupuy forcefully summarised the whole debate: ‘Memory must remain loyal and not serve to rewrite history; a treaty belongs to its authors and not to the judge’.¹²⁷

The aforementioned limit, ie that evolutive interpretation should never lead to a revision of a treaty, is not only the connecting tissue between all the ‘internal’ limits but its proximity to concepts such as ‘separation of powers’ links it also to the second group of limits, which are the *systemic* limits. These limits refer to the entire system of international law and consist of limits that emerge as a result of ensuring logical and normative consistency throughout the entire system of international law. Two are

The matter is further complicated since the Court goes on to base its entire judgement on evolutive interpretation; *Dispute Regarding Navigational and Related Rights* [64]; see also *Temple of Preah Vihear* (Merits) 34; and criticism by R Moloo, ‘When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation’ (2013) 31/1 *BerkJIntL* 39, 78.

¹²⁵ Aust, *Modern Treaty Law and Practice* 212–4 and cases cited therein.

¹²⁶ ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice, with Commentaries’ 63 [38].

¹²⁷ P-M Dupuy, ‘Evolutionary Interpretation of Treaties: Between Memory and Prophecy’ in Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* 123, 129, although, citing Chief Justice Holmes, he acknowledges that when international judges seek the presumed intention of the parties ‘evolutionary interpretation is not simply an exercise of memory; it tends towards prophecy’. In such a scenario, drawing the exact line where a judge crosses from the permitted boundaries of evolutive interpretation into the impermissible realm of exercising a *pouvoir de légiférer* would be a challenging task; *ibid* 126–7, citing OW Holmes ‘The Path of the Law’ 10 *HLR* 457, 458.

the main limits that belong in this category:¹²⁸ non-retroactivity and *jus cogens* norms.

As shown in the previous sections, the principle of non-retroactivity does not *eo ipso* conflict with intertemporal law. However, courts and tribunals have found it pertinent to underline that an evolutive interpretation should always be carried out in such a manner so as not to perfidiously lead to a violation of the principle of non-retroactivity.¹²⁹ Even more straightforward is the systemic limit relating to *jus cogens* norms.¹³⁰ Since *jus cogens* norms are norms from which no derogation is possible,¹³¹ an interpretation that would end up with a result that would be in clear contradistinction to such a norm would be impermissible.¹³² The Institut de Droit International considered this so fundamental to the interpretative process that it explicitly referred to it in its ‘Resolution on Intertemporal Law’: ‘States and other subjects of international law shall, however, have the power to determine by common consent the temporal sphere of application of norms, . . . subject to any imperative norm of international law which might restrict that power’.¹³³

All the aforementioned limits are universal, ie apply to evolutive interpretation of any type of treaty by any international agent. Of course, this does not preclude that additional limits may emerge in the future¹³⁴

¹²⁸ Or three, if one decides to categorise non-revision as a systemic limit as well.

¹²⁹ *ATA Construction, Industrial and Trading Company v Jordan* [109]; *Mondev International Ltd v USA* [70].

¹³⁰ On the attempts of the ILC to shed some light on the theory, emergence, and content of *jus cogens* norms, see D Tladi, ‘First Report on *Jus Cogens*’ (8 March 2016) UN Doc A/CN.4/693; D Tladi, ‘Second Report on *Jus Cogens*’ (16 March 2017) UN Doc A/CN.4/706; D Tladi, ‘Third Report on Peremptory Norms of General International Law (*Jus Cogens*)’ (12 February 2018) UN Doc A/CN.4/714; D Tladi, ‘Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*)’ (31 January 2019) UN Doc A/CN.4/727.

¹³¹ Art 53 VCLT; see also all four of Tladi’s reports on *jus cogens*.

¹³² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, Joint Declaration of Shi and Koroma [2]; *South West Africa Cases (Second Phase) (Ethiopia v South Africa; Liberia v South Africa)* (Judgment) [1966] ICJ Rep 6, Dissenting Opinion of Judge Tanaka 293–5; E McWhinney, ‘The Time Dimension in International Law, Historical Relativism and Intertemporal Law’ in J Makarczyk (ed), *Essays in International Law in Honour of Judge Manfred Lachs* (Martinus Nijhoff 1984) 179, 183.

¹³³ Institut de Droit International, ‘Resolution of 11 August 1975: The Intertemporal Problem’ [3].

¹³⁴ See Sections 4.3 and 4.4 on the fallacy of the immutability of the rules of interpretation.

or that an individual treaty may be subject to additional limits. For instance, the ECtHR has introduced some limits which are, however, specific only to the sphere of the interpretation and application of the ECHR.¹³⁵ Regime-specific limits aside, all the aforementioned internal and systemic limits demonstrate that evolutive interpretation is not a *carte blanche* for judges to exercise a *pouvoir de légiférer* but rather is an important tool in their interpretative toolkit, which must, however, be used within certain boundaries, no matter how wide, and always with deference to the intention of the parties.

4.3 Motion through Time of the Rules on Interpretation

In the previous sections we examined, when dealing with the motion of treaties through the spacetime of the international legal system, the rules that govern the determination of the choice between a contemporaneous (static) and an evolutive interpretation. The conclusion was that, despite the variety of approaches and solutions adopted by academics and judicial bodies, the underlying constant was the intention of the parties, their ‘time-will’.

However, our frame of reference for these sections were the treaties being interpreted. In order to present a ‘holistic’ picture of motion in the interpretative process, we need to switch our frame of reference to the VCLT itself, and specifically Articles 31–33 VCLT. What we show is that the manner in which rules of interpretation are being applied in the temporal dimension may be fraught with logical, methodological, and normative inconsistencies as well as with contradictory assertions that are detrimental to the rule of law of the international legal system. Often

¹³⁵ Such as the ‘margin of appreciation’, ‘the common European standard’ or ‘European consensus’ and, to a lesser degree, its established jurisprudence, departure from which is justified only for good reason. For ‘margin of appreciation’, see eg *Vo v France* [82]; *Rasmussen v Denmark*, ECtHR, App No 8777/79 (28 November 1984) [40]; *Sheffield and Horsham v UK* [GC] ECtHR, App Nos 22885/93, 23390/94 (30 July 1998) [1–4]; for ‘the common European standard’ or ‘European consensus’, see eg *Vo v France* [82] and Separate Opinion of Judge Costa, Joined by Judge Traja, *Scoppola v Italy (No 2)* [GC] ECtHR, App No 10249/03 (17 September 2009) [104]; for established jurisprudence as a relative limit, see eg *Chapman v UK* [GC] ECtHR, App No 27238/95 (18 January 2001) [70]; *Stafford v UK* [GC] ECtHR, App No 46295/99 (28 May 2002) [68]; *Inze v Austria*, ECtHR, App No 8695/79 (28 October 1987) [41]; *Vilho Eskelinen and others v Finland* [GC] ECtHR, App No 63235/00 (19 April 2007) [56]; *Micallef v Malta* [GC] ECtHR, App No 17056/06 (15 October 2009) [81]; *Airey v Ireland* [GC] ECtHR, App No 6289/73 (9 October 1979) [24]; *Goodwin v UK* [GC] ECtHR, App No 17488/90 (27 March 1996) [74].

when courts are required to interpret a treaty concluded several decades before the VCLT, they automatically presuppose that the customary rules of interpretation were and have remained the same throughout the ages. It is this practice of going back in the past to interpret a treaty, but in doing so 'looking back' to the future rules of interpretation for guidance, a kind of interpretative 'temporal solipsism', that this section aims to deconstruct.

Looking at the jurisprudence of the ICJ alone, this practice is quite widespread. In no less than 29 cases,¹³⁶ the Court has found it useful to refer to the VCLT for purposes of interpretation,¹³⁷ even though the VCLT was not applicable, because one or both of the parties were not parties to the VCLT or became parties to the VCLT after the date on which the treaty under interpretation was concluded, or the treaty was concluded before 27 January 1980 (date of entry into force of the VCLT). The relevant cases, along with relevant ratification and treaty information are reproduced in Table 4.1.

Of note is that in 19 of these 29 cases, the Court does not merely pay lip-service to the fact that the customary rules on interpretation are enshrined in the VCLT, and use the classical VCLT terms such as 'object and purpose', but actually actively refers to the text of the VCLT for interpretative purposes. In an additional two (*Maritime Delimitation in the Black Sea*, and *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*), the Court goes a step further, where it does not even refer to the fact that they have to apply CIL, and simply goes directly to the VCLT. This may not *per se* be problematic, as long as the rules have remained the same.

Bearing the above in mind, what we demonstrate is that one solution to the problem of using modern rules of 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. Not only was the very existence of rules of interpretation hotly debated until recently, but even their content both in academic

¹³⁶ Eight of these are the *Legality of Use of Force* cases.

¹³⁷ In an additional one, the VCLT was referred to only by one of the parties to the dispute but not by the Court itself; *Elettronica Sicula SpA (ELSI) (USA v Italy)* (Judgment) [1989] ICJ Rep 15 [118]. The USA was not a party to the VCLT, and both the treaties being interpreted had been concluded before 1980; Treaty of Friendship, Commerce and Navigation (Italy–USA) (adopted 2 February 1948, entered into force 26 July 1949) 79 UNTS 171; Agreement Supplementing the Treaty of Friendship, Commerce and Navigation of 2 February 1948 (Italy–USA) (adopted 26 September 1951, entered into force 2 March 1961) 404 UNTS 326.

Table 4.1 Relevant ICJ cases

| No | Case | VCLT EIF for Parties | Judgment Date | Relevant paras | Treaty being Interpreted |
|----|--|---|---------------|---------------------|---|
| 1 | <i>Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua Intervening)</i> (Judgment) [1992] ICJ 350 | El Salvador (n/a) Honduras (EIF: 1980) | 11/9/1992 | [373], [376], [380] | General Peace Treaty (El Salvador – Honduras) (adopted 30 October 1980, entered into force 10 December 1980) 1310 UNTS 213 |
| 2 | <i>Arbitral Award of 31 July 1989 (Guinea Bissau v Senegal)</i> (Judgment) [1991] ICJ Rep 53 | Guinea-Bissau (n/a) Senegal (EIF 1986) | 12/11/1991 | [48] | Arbitration Agreement (Guinea-Bissau – Senegal) (adopted 12 March 1985) |
| 3 | <i>Territorial Dispute (Libyan Arab Jamahiriya/Chad)</i> (Judgment) [1994] ICJ Rep 6 | Libya (EIF 2009) Chad (n/a) | 3/2/ 1994 | [41], [43] | Treaty of Friendship and Good Neighbourliness (France – Libya) (adopted 10 August 1955) 162 BFSP 470 |
| 4 | <i>Maritime Delimitation between Qatar and Bahrain (Qatar v Bahrain)</i> (Jurisdiction and Admissibility) [1995] ICJ Rep 6 | Qatar (n/a) Bahrain (n/a) | 15/2/1995 | [33] | Doha Minutes (Qatar – Bahrain) (adopted 25 December 1990) |

Table 4.1 (cont.)

| No | Case | VCLT EIF for Parties | Judgment Date | Relevant paras | Treaty being Interpreted |
|----|--|--|---------------|----------------|--|
| 5 | <i>Oil Platforms (Iran v USA)</i> (Preliminary Objections) [1996] ICJ Rep 803 | Iran (n/a) USA (n/a) | 12/12/1996 | [23] | Treaty of Amity, Economic Relations and Consular Rights (USA – Iran) (adopted 15 August 1955, entered into force 16 June 1957) 284 UNTS 93 |
| 6 | <i>Oil Platforms (Iran v USA)</i> (Counter-Claims) [2003] ICJ Rep 16 | Iran (n/a) USA (n/a) | 6/11/2003 | [41] | Treaty of Amity, Economic Relations and Consular Rights (USA – Iran) (adopted 15 August 1955, entered into force 16 June 1957) 284 UNTS 93 |
| 7 | <i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)</i> (Merits) [2007] ICJ Rep 43 | Bosnia and Herzegovina (EIF 1993) Serbia and Montenegro (EIF 2001/2006) | 26/2/2007 | [160], [163] | Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 |

| | | | | | |
|----|--|--|------------|---|--|
| 8 | <i>Kasikili/Sedudu Island</i> (<i>Botswana/Namibia</i>) (Judgment) [1999] ICJ Rep 1045 | Bostwana (n/a) Namibia (n/a) | 13/12/1999 | [18], [20], [25], [48], [52], [55], [63], [73], [75], [78-9] | Anglo-German Treaty [Heligoland – Zanzibar Treaty] (adopted 1 July 1890) 51 Das Staatsarchiv, Sammlung der offiziellen Aktenstücke zur Geschichte der Gegenwart [German State Archive, Collection of Official Documents Relating to Contemporary History] 151 |
| 9 | <i>Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/ Malaysia)</i> (Judgment) [2002] ICJ Rep 625 | Indonesia (n/a) Malaysia (EIF 1994) | 17/12/2002 | [37-8], [44], [48], [59-61] | Convention Between Great Britain and the Netherlands Defining Boundaries in Borneo (adopted 20 June 1891) 83 BFSP 42 |
| 10 | <i>LaGrand (Germany v USA)</i> (Merits) [2001] ICJ Rep 466 | Germany (EIF 1987) USA (n/a) | 27/06/2001 | [99-109] | Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993 |

Table 4.1 (cont.)

| No | Case | VCLT EIF for Parties | Judgment | | Treaty being Interpreted |
|----|---|--|------------|----------------|--|
| | | | Date | Relevant paras | |
| 11 | <i>Legality of Use of Force (Serbia and Montenegro v Belgium)</i> (Preliminary Objections) [2004] ICJ Rep 279 | Serbia and Montenegro (EIF 2001/2006; [Yugoslavia EIF 1980]) Belgium (EIF 1992) | 15/12/2004 | [100–1] | Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993 |
| 12 | <i>Legality of Use of Force (Serbia and Montenegro v Canada)</i> (Preliminary Objections) [2004] ICJ Rep 429 | Serbia and Montenegro (EIF 2001/2006; [Yugoslavia EIF 1980]) Canada (EIF 1980) | 15/12/2004 | [99] | Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993 |
| 13 | <i>Legality of Use of Force (Serbia and Montenegro v France)</i> (Preliminary Objections) [2004] ICJ Rep 575 | Serbia and Montenegro (EIF 2001/2006; [Yugoslavia EIF 1980]) France (n/a) | 15/12/2004 | [99] | Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993 |
| 14 | <i>Legality of Use of Force (Serbia and Montenegro v Germany)</i> (Preliminary Objections) [2004] ICJ Rep 720 | Serbia and Montenegro (EIF 2001/2006; [Yugoslavia EIF 1980]) Germany (EIF 1987) | 15/12/2004 | [98] | Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993 |

| | | | | | |
|----|--|---|------------|-------|---|
| 15 | <i>Legality of Use of Force (Serbia and Montenegro v Italy)</i> (Preliminary Objections) [2004] ICJ Rep 865 | Serbia and Montenegro (EIF 2001/2006; [Yugoslavia EIF 1980]) Italy (EIF 1980) | 15/12/2004 | [99] | Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993 |
| 16 | <i>Legality of Use of Force (Serbia and Montenegro v Netherlands)</i> (Preliminary Objections) [2004] ICJ Rep 1011 | Serbia and Montenegro (EIF 2001/2006; [Yugoslavia EIF 1980]) Netherlands (EIF 1985) | 15/12/2004 | [99] | Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993 |
| 17 | <i>Legality of Use of Force (Serbia and Montenegro v Portugal)</i> (Preliminary Objections) [2004] ICJ Rep 1160 | Serbia and Montenegro (EIF 2001/2006; [Yugoslavia EIF 1980]) Portugal (20 EIF 04) | 15/12/2004 | [102] | Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993 |
| 18 | <i>Legality of Use of Force (Serbia and Montenegro v UK)</i> (Preliminary Objections) [2004] ICJ Rep 1307 | Serbia and Montenegro (EIF 2001/2006; [Yugoslavia EIF 1980]) UK (EIF 1980) | 15/12/2004 | [98] | Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993 |
| 19 | <i>Avena and Other Mexican Nationals (Mexico v USA)</i> (Judgment) [2004] ICJ Rep 12 | Mexico (EIF 1980) USA (n/a) | 31/3/2004 | [83] | Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 |

Table 4.1 (cont.)

| No | Case | VCLT EIF for Parties | Judgment Date | Relevant paras | Treaty being Interpreted |
|----|---|--|---------------|----------------|---|
| 20 | <i>Maritime Delimitation in the Black Sea (Romania v Ukraine)</i> (Judgment) [2009] ICJ Rep 61 | Romania (n/a) Ukraine (EIF 1986) | 3/2/2009 | [42] | United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397 |
| 21 | <i>Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)</i> (Judgment) [2009] ICJ Rep 213 | Costa Rica (EIF 1996) Nicaragua (n/a) | 13/6/2009 | [47] | Treaty of Limits (Costa Rica – Nicaragua – San Salvador) (adopted 15 April 1858, entered into force 26 April 1858) in TM Leonard (ed), <i>Encyclopedia of US-Latin American Relations</i> (SAGE 2012) |
| 22 | <i>Pulp Mills on the River Uruguay (Argentina v Uruguay)</i> (Judgment) [2010] ICJ Rep 14 | Argentina (EIF 1980) Uruguay (EIF 1982) | 20/4/2010 | [55] | Statute on the River Uruguay (adopted 26 February 1975, entered into force 18 September 1976) (Argentina–Uruguay) 1295 UNTS 331 |

- | | | | | | |
|----|---|--|------------------|---|---|
| 23 | <p><i>Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)</i> (Judgment) [2008] ICJ Rep 177</p> | <p>Djibouti (n/a) France (n/a)</p> | <p>4/6/2008</p> | <p>[112–3]</p> | <p>Treaty of Friendship and Cooperation between the French Republic and the Republic of Djibouti (adopted 27 June 1977, entered into force 31 October 1982) 1482 UNTS 195</p> |
| 24 | <p><i>Maritime Dispute (Peru v Chile)</i> (Judgment) [2014] ICJ Rep 3</p> | <p>Peru (EIF 2000) Chile (EIF 1981)</p> | <p>27/1/2014</p> | <p>[33–4] (parties); [57–8], [65] (the Court)</p> | <p>Declaration on the Maritime Zones (Peru – Chile) (adopted and entered into force 18 August 1952) 1006 UNTS 323</p> |
| 25 | <p><i>Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)</i> (Preliminary Objections) [2016] ICJ Rep 100</p> | <p>Nicaragua (n/a) Colombia (EIF 1985)</p> | <p>17/3/2016</p> | <p>[33], [38], [44]</p> | <p>American Treaty on Pacific Settlement (Pact of Bogotá) (adopted 30 April 1948, entered into force 6 May 1949) OAS Treaty Series No 17 and 61</p> |

Table 4.1 (*cont.*)

| No | Case | VCLT EIF for Parties | Judgment | | Treaty being Interpreted |
|----|---|------------------------------------|-----------|----------------|--|
| | | | Date | Relevant paras | |
| 26 | <i>Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)</i> (Preliminary Objections) [2016] ICJ Rep 3 | Nicaragua (n/a) Colombia (1985) | 17/3/2016 | [40], [46] | American Treaty on Pacific Settlement (Pact of Bogotá) (adopted 30 April 1948, entered into force 6 May 1949) OAS Treaty Series No 17 and 61 |
| 27 | <i>Maritime Delimitation in the Indian Ocean (Somalia v Kenya)</i> (Preliminary Objections) [2017] ICJ Rep 3 | Somalia (n/a) Kenya (n/a) | 2/2/2017 | [63–4] | Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to Grant to Each Other No-Objection in Respect of Submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf (adopted and entered into force 7 April 2009) 70 Law of the Sea Bulletin 52 |

| | | | | | |
|----|---|---|-----------|-------------|--|
| 28 | <i>Immunities and Criminal Proceedings (Equatorial Guinea v France)</i> <i>(Preliminary Objections)</i> General List No 163 [2018] ICJ 1 | Equatorial Guinea (n/a) France (n/a) | 6/6/2018 | [91], [131] | United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 |
| 29 | <i>Jadhav Case (India v Pakistan)</i> (Merits) General List No 168 [2019] ICJ 1 | India (n/a) Pakistan (n/a) | 17/7/2019 | [71], [135] | Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 |

writings and international judicial practice has been and continues to be in a continuous state of flux. Apart from this empirical evidence, even logically such a claim would be systemically incoherent with the structure of the international legal system.

Once we demonstrate that the rules of interpretation are open to change, what we shall examine is whether the use of future rules for past treaties conflicts with any existing rules or principles of international law. If not, then it would simply be in the discretion of each judge to do as they pleased. What we show is that there are principles in play which set certain limits to what rules the judges can apply. This chapter concludes by identifying, based on the previous analysis, the scenarios where our ‘time-travelling’ rules of interpretation are allowed to traverse the arrow of time in the opposite direction and provide a set of guidelines as to what is the logically and normatively coherent manner in interpreting pre-VCLT treaties.

4.3.1 *Claim That Rules of Interpretation, Despite the Passage of Time, Are Immutable*

4.3.1.1 Very Existence of Rules of Interpretation

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 is the case, then the ICJ (and any interpreter, for that matter) by considering the VCLT rules would be in principle applying the rules at the time of the conclusion of a treaty, since their content has not changed at all. However, upon closer scrutiny this does not seem to hold any water. First, even the very existence of rules of interpretation was a topic that was highly debated decades before the 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”’.¹³⁸ 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

¹³⁸ H Taylor, *A Treatise on Public International Law* (Callaghan 1901) 394.

conclusion the interpreter desires'.¹³⁹ He acknowledged that one 'rule'¹⁴⁰ on interpretation 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.¹⁴¹

Similar views regarding the impossibility and/or undesirability of a strict set of rules on interpretation were expressed by Westlake,¹⁴² Hyde,¹⁴³ Lawrence,¹⁴⁴ Fenwick,¹⁴⁵ Hershey,¹⁴⁶ Oppenheim¹⁴⁷

¹³⁹ T-C Yü, *The Interpretation of Treaties* (Sn 1927) 72. For example, in the *van Bockkelen* case, the tribunal provided an extensive list of alleged 'rules' of interpretation; *Charles van Bockkelen case (USA v Haiti)* (1888) 2 Moore International Arbitrations 1807, 1848 ff.

¹⁴⁰ Understood in an abstract manner and not as a legal rule *per se*.

¹⁴¹ Yü, *The Interpretation of Treaties* 28.

¹⁴² '[The rules on interpretation laid down by publicists] are not likely to be of much practical use'; J Westlake, *International Law* (2nd edn, Sn 1910) 293.

¹⁴³ 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, or assumptions; CC Hyde, 'Concerning the Interpretation of Treaties' (1909) 3 AJIL 46, 47.

¹⁴⁴ '[A] vast amount of misplaced energy has been expended [on trying to devise a set of rules of interpretation]', although he later on concedes to textual (ordinary and special meaning) and contextual interpretation; TJ Lawrence, *Principles of International Law* (7th edn, MacMillan 1923) 302.

¹⁴⁵ Rules of interpretation only have an 'inchoate legal value'; CG Fenwick, *International Law* (The American Law Book Co 1924) 331.

¹⁴⁶ Although Hershey 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'; AS Hershey, *The Essentials of International Public Law and Organization* (rev edn, MacMillan 1927) 445.

¹⁴⁷ '[N]either customary nor conventional rules of International Law exist concerning the interpretation of treaties'; L Oppenheim, *International Law - Vol 1: Peace* (4th edn, Longmans 1928) 759.

and Brierly.¹⁴⁸ Even in the *Commentary of the Harvard Convention on the Law of Treaties*, the drafters acknowledged this problem, only to state that the rules on interpretation which were laid out in Article 19 were not iron-clad rules but rather ‘guides to direct the interpreter’.¹⁴⁹

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 when 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, that would have 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. But this is exactly what several courts and tribunals have been doing, by interpreting pre-VCLT treaties by reference to the customary content of the rules of interpretation as enshrined in the VCLT. Secondly, this uncertainty continued well on into the 1950s and 1960s¹⁵⁰ and was reflected in the discussions

¹⁴⁸ 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’; JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Clarendon Press 1928) 168.

¹⁴⁹ 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. *It 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*’ (emphasis added); JW Garner (Reporter), ‘Codification of International Law: Part III – Law of Treaties – Draft Convention on the Law of Treaties’ (1935) 29 AJIL Supp 657, 946–7 (hereinafter Harvard Draft Convention).

¹⁵⁰ See, for instance, McNair, who wrote that he was ‘amongst those who are sceptical 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 crystallised out and abound in the textbooks and elsewhere are mere *prima facie* guides to the intention of the parties in a particular case’; McNair, *The Law of Treaties* 366.

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, members expressed similar doubts about the existence of technical rules on interpretation.¹⁵¹ In the end, however, the Institut adopted, during the Grenada Session in 1956, a resolution on interpretation of treaties.¹⁵² Despite this, 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 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’.¹⁵³ Apart from the Special Rapporteur, other 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 had said, they were working hypotheses’.¹⁵⁴ 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’.¹⁵⁵ According to him, if there were any rules that would simply be the Vattelian axiom *in claris non fit interpretatio*. He stressed that he was referring to rules binding upon States. In his view, ‘if any rules existed, they were subject to considerable doubt, except for the rule in *claris non fit interpretatio*, which had been first formulated by Vattel and which meant that there could be no question of interpretation where the sense was clear and there was nothing to interpret’.

Both USA and Ghana also had their doubts, with the former when asked for comments on the draft articles suggesting that it might be better to draft the relevant articles as guidelines rather than as rules,¹⁵⁶ whereas the latter during the 1968 Vienna Conference on the Law of Treaties raised similar objections regarding the nature of the proposed ‘rules’.¹⁵⁷

¹⁵¹ Institut de Droit International, ‘De l’interprétation des traités’ (1950) 43/1 AIDI 336 ff.

¹⁵² Institut de Droit International, ‘De l’interprétation des traités’ (1956) 46 AIDI 359.

¹⁵³ Waldock, ‘Third Report’ 53 [1].

¹⁵⁴ ILC, ‘Summary Record of the 765th Meeting’ [9].

¹⁵⁵ *ibid* [33] and similar comments in *ibid* [16] (de Luna).

¹⁵⁶ Waldock, ‘Sixth Report’ 93.

¹⁵⁷ The objection was raised by Ghana; United Nations Conference on the Law of Treaties, ‘1st Session – 31st Meeting of the Committee of the Whole (COW)’ (19 April 1968) UN Doc A/CONF.39/C.1/SR.31 164 [68].

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 VCLT. Even today there are authors who still object to the existence of binding rules of interpretation.¹⁵⁸ 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 generalised and superficial description of an extremely complex topic.¹⁵⁹

4.3.1.2 Various Forms of Rules of Interpretation

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 interpretation 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

¹⁵⁸ J d’Aspremont, ‘The Multi-dimensional Process of Interpretation: Content-Determination and Law Ascertainment Distinguished’ in A Bianchi, D Peat, and M Windsor (eds), *Interpretation in International Law* (OUP 2015) 111–29; J d’Aspremont, ‘The Idea of “Rules” in the Sources of International Law’ (2013) 84 BYIL 103; J Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2011); R Gardiner, ‘Characteristics of the Vienna Convention Rules on Treaty Interpretation’ in Bowman and Kritsiotis (eds), *Conceptual and Contextual Perspectives* 335–62.

¹⁵⁹ The authors wish to clarify at this point that, in their view, both after and prior to the VCLT there are and were customary rules on interpretation, although their content has changed and/or been clarified through 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 and/or ‘constructive rules’, in the Anzilottian sense, ie rules that must by necessity exist otherwise the judges would be unable to execute properly their function (consider the logical absurdity of a case, where a judge did not have any rules of interpretation to fall back on); as one author has characterised them, these ‘constructive rules’ are essentially ‘not the rules of the game but the necessary premises for the game to be played’; J Crivellaro, ‘How did Anzilotti’s Jurisprudential Conception Influence the Jurisprudence of the Permanent Court of International Justice?’ (*Jura Gentium*, 2011) <www.juragentium.org/topics/thil/en/crivella.htm> accessed 20 September 2019; generally, on ‘constructive rules’, see D Anzilotti, *Cours de Droit International, Tome I* (Sirey 1929) 68 ff; G Gaja, ‘Positivism and Dualism in Dionisio Anzilotti’ (1992) 3 EJIL 123, 128 ff.

authors who doubted the existence of rules of interpretation also made some educated guesses about possible useful ones, as several other authors have done.¹⁶⁰ These are too numerous and diverse to enumerate here. However, and in order to demonstrate that this diversity is a common and repeating theme, in this section the focus is on the 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 Treaties¹⁶¹ or in David Dudley Field's¹⁶² or Bluntschli's Draft Code¹⁶³ or the 1927 Draft of the International Commission of American Jurists¹⁶⁴ do we find any rules of interpretation included. In Fiore's Draft Code, however, an extensive list of rules

¹⁶⁰ See, for instance, 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; G Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation' 211–2; for presentations of the various principles of interpretation used in both international and domestic jurisprudence, see CC Hyde, 'Interpretation of Treaties by the Permanent Court of International Justice' (1930) 24 AJIL 1; WE Beckett, 'Decisions of the Permanent Court of International Justice on Points of Law and Procedure of General Application' (1930) 11 BYIL 1; WE Beckett, 'Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice internationale' (1932) 39 RdC 135, 261 ff; WE Beckett, 'Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice internationale (juillet 1932–juillet 1934)' (1934) 50 RdC 193; MO Hudson, *The Permanent Court of International Justice: A Treatise* (MacMillan 1934) 551–73; JB Moore, *A Digest of International Law* (Government Printing Office 1906) 249 ff; AD McNair, 'L'application et l'interprétation des traités d'après la jurisprudence britannique' (1933) 43 RdC 247.

¹⁶¹ JW Garner (Reporter), 'Codification of International Law: Part III – Law of Treaties – Appendix 1: Convention on Treaties' (1935) 29 AJIL Supp 1205.

¹⁶² JW Garner (Reporter), 'Codification of International Law: Part III – Law of Treaties – Appendix 2: David Dudley Field's Draft Code' (1935) 29 AJIL Supp 1207.

¹⁶³ JW Garner (Reporter), 'Codification of International Law: Part III – Law of Treaties – Appendix 3: Bluntschli's Draft Code' (1935) 29 AJIL Supp 1208.

¹⁶⁴ JW Garner (Reporter), 'Codification of International Law: Part III – Law of Treaties – Appendix 5: Draft of the International Commission of American Jurists' (1935) 29 AJIL Supp 1222.

referring to interpretation can be seen. First of all, Fiore adheres to the *in claris non fit interpretatio* maxim.¹⁶⁵ 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’.¹⁶⁶ He then provides an extensive list of ‘rules’ that fall under each of these categories of interpretation. Grammatical interpretation, on the one hand, includes the following rules:

- *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.¹⁶⁷

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*);¹⁶⁸
- *contra proferentem*;
- *in dubio mitius*;
- *ut res magis valeat quam pereat*;
- interpretation by reference to other ‘relevant rules’;

¹⁶⁵ JW Garner (Reporter), ‘Codification of International Law: Part III – Law of Treaties – Appendix 4: Fiore’s Draft Code’ (1935) 29 AJIL Supp 1212 [797] (hereinafter Fiore’s Draft Code).

¹⁶⁶ *ibid* [798].

¹⁶⁷ *ibid* [799–806].

¹⁶⁸ *ibid* [807]. The Latin phrase is a quote from Cicero’s *De Officiis* and can be translated as: ‘but in a promise, what you mean, not what you say, is always to be taken into account’; Marcus Tullius Cicero, *De Officiis* 1.40 (Latin text and translation available at the Perseus Digital Library, as above).

- contextual interpretation; and
- *travaux préparatoires* cannot be used to deviate from the meaning of the text.¹⁶⁹

In addition to the foregoing, 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.¹⁷⁰ If, however, the text is ambiguous, this can be resolved through *in pari materia* interpretation.¹⁷¹ Finally, provisions creating obligations or restricting rights should be interpreted restrictively.¹⁷²

Unlike Fiore's Draft Code, a resolution on interpretation of treaties adopted by the Seventh International Conference of American States clearly demonstrated that the participating States were of the view that interpretation was governed not by 'rules' but by 'principles'.¹⁷³ 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'. Other interesting morsels taken from that Resolution are that:

- the intention of the parties¹⁷⁴ shall be sought in the preamble and the preparatory work;
- that 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 but only when the intention of the parties cannot be established clearly;^{175,176}
- notably, 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;¹⁷⁷ and finally

¹⁶⁹ Fiore's Draft Code [807–14].

¹⁷⁰ *ibid* [815–6].

¹⁷¹ *ibid* [816]; this interpretation is similar to Art 31(3)(c) VCLT.

¹⁷² *ibid* [817].

¹⁷³ JW Garner (Reporter), 'Codification of International Law: Part III – Law of Treaties – Appendix 7: The Interpretation of Treaties' (1935) 29 AJIL Supp 1225 (hereinafter Conference of American States Resolution).

¹⁷⁴ Referred to as 'will or purpose of the parties'.

¹⁷⁵ A faint echo of Art 31(3)(c) VCLT.

¹⁷⁶ Conference of American States Resolution, Arts 3–8.

¹⁷⁷ *ibid* Art 10.

- if there is an issue of interpretation arising from the existence of equally authentic texts then the intention of the parties will be the deciding factor. If that cannot be established, then the restrictive interpretation will be the solution to be given.¹⁷⁸

The commentary to the Harvard Convention, although explaining that the relevant Article 19 should be seen as including guidelines rather than strict rules, included the following: the object and purpose of the treaty, preparatory work, circumstances of conclusion, subsequent practice and agreements, and the conditions prevailing at the time interpretation is being made. But all of these are subservient to the general purpose of the treaty. Also, in case of multiple authentic texts the interpretation that best serves the object and purpose of the treaty will be opted for.¹⁷⁹

Finally, the Institut de Droit International in its 1956 Resolution on ‘Interpretation of Treaties’ provided two articles that included various ‘principles’ from which the various courts and tribunals could draw inspiration. 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. In a supplementary and discretionary fashion, according to Article 2, recourse could also be had to other means, which include the recourse to preparatory work, subsequent practice and the purposes¹⁸⁰ of the treaty.¹⁸¹

Leaving aside the various ILC drafts on the articles on interpretation, which vary significantly from one another,¹⁸² 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 VCLT, they are a far cry from being identical. Granted, there is reference to text, ordinary meaning, special meaning, good faith, and subsequent

¹⁷⁸ *ibid* Arts 9 and 11.

¹⁷⁹ Harvard Draft Convention, Art 19.

¹⁸⁰ Note the use of plural. For an extensive analysis of the inconsistencies, variations in the use and evolution of the terms ‘object and purpose’ see I Buffard and K Zemanek, ‘The “Object and Purpose” of a Treaty: An Enigma?’ (1998) 3/1 ARIEL 311; and for a recent foray into the purpose of ‘object and purpose’, see D Kritsiotis, ‘The Object and Purpose of a Treaty’s Object and Purpose’ in Bowman and Kritsiotis (eds), *Conceptual and Contextual Perspectives* 237–302.

¹⁸¹ Institut de Droit International, ‘Resolution: L’interprétation des traités’ (*IDI*, 1956) <www.idi-iil.org/app/uploads/2017/06/1956_grena_02_fr.pdf> accessed 20 September 2019.

¹⁸² See the various ILC reports in YBILC between the years 1963 and 1966.

practice,¹⁸³ but the differences are much more pronounced. For instance, in some codes¹⁸⁴ there is reference 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'.¹⁸⁵

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 mitius* and *contra proferentem* maxims. Interestingly, Fiore's Draft Code and the Conference of American States Resolution place intention at the apex of the interpretative process and any other rule ends up yielding to it 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 the ambiguity. A last example is that 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 categorised as supplementary means of interpretation, whose employment is entirely dependent on the discretion of the interpreter. The list of comparisons could continue to some length, but the above should suffice to prove the point that before the ILC, 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.

¹⁸³ Although not in all of the attempts at codification. For instance, in the Harvard Draft Convention there is no explicit reference to ordinary meaning.

¹⁸⁴ In Fiore's Draft Code and the Conference of American States Resolution.

¹⁸⁵ United Nations Conference on the Law of Treaties, '1st Session - 31st Meeting COW' [38].

Consequently, on this front as well the claim that the rules of interpretation have not undergone any significant changes fails.

4.3.1.3 Interpretation of Rules of Interpretation

Having established that not only the nature of the ‘rules’ of interpretation (as being either rule, principles, canons, or maxims) were 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 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 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.¹⁸⁶

An exhaustive enumeration of the instances where such an interpretation has occurred falls outside the scope of this chapter. However, some 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. Most notable amongst these are:

- International courts and tribunals often refer to a wide gamut of maxims such as *effet utile*,¹⁸⁷ *in dubio mitius*,¹⁸⁸ *expressio unius est*

¹⁸⁶ ILA, ‘Preliminary Report of the Study Group on the Content and Evolution of the Rules of Interpretation’ (ILA, 7-11 August 2016) <<https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1401&StorageFileGuid=bcaa951e-ae3e-4ccb-9c80-248c98c741e3>> accessed 20 September 2019, sect III.3.

¹⁸⁷ Also known as *ut res magis valeat quam pereat*; C Braumann and A Reinisch, ‘*Effet Utile*’ in J Klingler, Y Parkhomenko and C Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2018) 47–72.

¹⁸⁸ P Merkouris, ‘*In Dubio Mitius*’ in *ibid* 259–306.

exclusio alterius,¹⁸⁹ *ex abundante cautela*,¹⁹⁰ *ejusdem generis*,¹⁹¹ *contra proferentem*¹⁹², *exceptio est strictissimae applicationis*,¹⁹³ *lex posterior* and *lex specialis*,¹⁹⁴ or apply comparative reasoning,¹⁹⁵ and logical tools (such as the rule of necessary implication¹⁹⁶ or *per argumentum a fortiori*)¹⁹⁷ in order to reach an interpretative conclusion. However, this use raises a slew of questions, which have been answered differently depending on the tribunals or author and particular time period.

Are these maxims and approaches to be considered as customary international law? If so, are they customary law on interpretation *praeter-VCLT*, or do they fall under the Articles 31(3)(c) or 32 VCLT (*intra legem*)?¹⁹⁸ If not, when they are used by courts and tribunals is this interpretation under Article 32 or *contra legem*? Any answer to these questions is by nature an interpretation of the VCLT rules on interpretation and one that crystallises and, in some cases, evolves the content of those rules.¹⁹⁹

¹⁸⁹ J Klingler, 'Expressio Unius Est Exclusio Alterius' in *ibid* 73–114.

¹⁹⁰ A Macdonald, 'Ex Abundante Cautela' in *ibid* 115–32.

¹⁹¹ Fr Baetens, 'Ejusdem Generis and Noscitur a Sociis' in *ibid* 133–60.

¹⁹² P d'Argent, 'Contra Proferentem' in *ibid* 241–58.

¹⁹³ A Solomou, 'Exceptions to a Rule Must Be Narrowly Construed' in *ibid* 359–86.

¹⁹⁴ D Pulkowski, 'Lex Specialis Derogat Legi Generali/Generalia Specialibus Non Derogant' in *ibid* 161–96. On these maxims as conflict resolution techniques see E Roucouas, 'Engagements parallèles et contradictoires' (1987/VI) 206 Rdc 9, 56 ff.

¹⁹⁵ D Peat, *Comparative Reasoning in International Courts and Tribunals* (CUP 2019). See along similar lines on the use of domestic law for interpretative purposes, R Yotova, 'Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?' in Klingler, Parkhomenko, and Salonidis (eds), *Between the Lines of the Vienna Convention?* 307–31.

¹⁹⁶ AD Mitchell and T Voon, 'The Rule of Necessary Implication' in Klingler, Parkhomenko, and Salonidis (eds), *Between the Lines of the Vienna Convention?* 331–58.

¹⁹⁷ A Minon, 'Per Argumentum a Fortiori' in *ibid* 197–210.

¹⁹⁸ 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, 'Effet Utile' 47–72; for evolutive interpretation, see analysis in Chapter 4 of the present book, Section 4.2.2; see also, P Tzeng, 'The Principles of Contemporaneous and Evolutionary Interpretation' in Klingler, Parkhomenko, and Salonidis, *Between the Lines of the Vienna Convention?* 387–422; Moeckli and White, 'Treaties as "Living Instruments"' 136–70; C Djefal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (CUP 2016); Bjorge, *The Evolutionary Interpretation of Treaties*.

¹⁹⁹ For more detail, see entire volume by Klingler, Parkhomenko, and Salonidis (eds), *Between the Lines of the Vienna Convention?*

- The nature, form, and content of subsequent agreements/practice for the purpose of interpretation is also 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.²⁰⁰
- Connected to this is also the debate on where the exact line between interpretation and modification should be drawn, an issue that was acknowledged by the ILC and Nolte in the discussions on subsequent agreements and practice and is addressed in more detail in Chapter 5.
- 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 relevance determined) of Article 31(3)(c), as well as the connection of that provision with *in pari materia* interpretation, has given rise to heated debates and extensive case law aiming to interpret the scope of this provision.²⁰¹
- Whether a hierarchy exists between the various schools of interpretation, or between Article 31 and 32 VCLT, or even between the rules of interpretation enshrined in the VCLT and other extraneous rules/maxims of interpretation.²⁰²
- The conditions under which subsequent agreements and practice can be considered as supplementary means under Article 32 VCLT. Draft Conclusion 2(4) has included subsequent practice as supplementary means of interpretation.²⁰³ According to the ILC Commentary, the

²⁰⁰ See Nolte's five Reports on Subsequent Agreements and Subsequent Practice.

²⁰¹ Merkouris, *Article 31(3)(c) VCLT* chs 1 and 2, and the case law analysed therein; see also, PF Henin, 'In Pari Materia Interpretation in Treaty Law' in J Klingler, Y Parkhomenko, and C Salonidis (eds), *Between the Lines of the Vienna Convention?* 211–40.

²⁰² See various codification attempts analysed in Section 4.3.1.2; Klingler, Parkhomenko, and Salonidis (eds), *Between the Lines of the Vienna Convention?; Polish Postal Service in Danzig* (Advisory Opinion) PCIJ Rep Series B No 11, 39; *River Oder* 26.

²⁰³ '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

‘subsequent practice’ of Draft Conclusion 2(4) that does not meet the criteria set out for subsequent practice under Article 31(b), nonetheless may fall under the scope of Article 32, which includes a non-exhaustive list of supplementary means of interpretation.²⁰⁴ The language used in Draft Conclusion 2(4), ie ‘recourse may be had’, mirrors that of Article 32 VCLT.²⁰⁵ 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 organisations. 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.²⁰⁶ 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.²⁰⁷

- Article 32 VCLT allows for recourse to preparatory work only for purposes of confirmation or to determine the meaning in case of ambiguity or if the result of interpretation under Article 31 VCLT is manifestly absurd. This then raises the interesting question of whether preparatory work could also have a corrective function, ie correct the ordinary meaning of the text, a topic that, surprisingly, has been

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;

ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice, with Commentaries’ Draft Conclusion 2.

²⁰⁴ ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice, with Commentaries’ 20 [8], Commentary to Draft Conclusion 2(4).

²⁰⁵ *ibid.*

²⁰⁶ BL Bonafé and P Palchetti, ‘Subsequent Practice in Treaty Interpretation between Article 31 and Article 32 of the Vienna Convention’ (2018) 46 *QuestInt’lL* 1, 3.

²⁰⁷ *Kasikili/Sedudu Island* [49 ff]; WTO, *US – Section 110(5) of the US Copyright Act – Panel Report* (15 June 2000) WT/DS/160/R [6.55]; Moloo, ‘When Actions Speak Louder than Words’ 76; OK Fauchald, ‘The Legal Reasoning of ICSID Tribunals – An Empirical Analysis’ (2008) 19 *EJIL* 301, 344.

examined in multiple cases, both before the ICJ and other arbitral tribunals.²⁰⁸

- 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 they were ‘other supplementary means’ or *travaux préparatoires* of a ‘second order’.²⁰⁹
- Can preparatory work be used against third States?²¹⁰ The jurisprudence of the ICJ has evolved on this matter. Whereas, originally, unless a party had not 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.²¹¹

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, the interpretations given have either been consistently held, reversed in *toto* or partly modified and/or refined. The aim here is not to give a definitive answer to all the questions that were identified above, but rather to realise 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.

4.3.1.4 Logical Fallacies of the Immutability of Rules of 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 interpretation. In order to buttress

²⁰⁸ S Schwebel, ‘May Preparatory Work Be Used to Correct Rather than Confirm the “Clear” Meaning of a Treaty Provision?’ in Makarczyk and Skubiszewski (eds), *Theory of International Law at the Threshold of the 21st Century* 541–7; P Merkouris, ‘“Third Party” Considerations and “Corrective Interpretation” in the Interpretative Use of *Travaux Préparatoires* — Is It Fahrenheit 451 for Preparatory Work?’ in M Fitzmaurice, O Elias, and P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff 2010) 75–98.

²⁰⁹ In the end, they were considered as preparatory work; ILC, ‘Summary Record of the 872nd Meeting’ [35]; ILC, ‘Summary Record of the 873rd Meeting’ [25–8], [34]; see also Merkouris, *Article 31(3)(c) VCLT* 11.

²¹⁰ Merkouris, ‘“Third Party” Considerations and “Corrective Interpretation”’.

²¹¹ *ibid.*

further this conclusion, let us also examine the logical fallacies of accepting such a proposition.

It is generally accepted that the VCLT rules of international law reflect contemporary customary international law. However, customary international law emerges through State practice and *opinio juris*. What is there to prohibit States 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 interpretation was explicitly recognised by ILC members.²¹² This 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)²¹³ and their respective contents would remain the same. However, in both scenarios change has occurred, and thus immutability despite the passage of time has been disproved.

Furthermore, by applying the *a majore ad minus* logical tool, since the possibility of emergence of future *jus cogens* norms and the modification of existing ones is generally accepted,²¹⁴ 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 kind of rules that we are accustomed to. If they are not affected

²¹² ILC, 'Summary Record of the 765th Meeting' [61] (Verdross), [78] (Ago).

²¹³ Since the customary rules on interpretation would be considered as 'relevant rules' for the interpretation of the VCLT rules on interpretation.

²¹⁴ Art 53 VCLT; GM Danilenko, 'International *Jus Cogens*: Issues of Law-Making' (1991) 2 EJIL 42; U Linderfalk, 'The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think about the Consequences?' (2007) 18 EJIL 853, 854–6 and 863 ff; U Linderfalk, 'The Creation of *Jus Cogens*: Making Sense of Article 53 of the Vienna Convention' (2011) 71 ZaöRV 359.

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 and tribunals 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 can apply treaties, customary law or general principles. But if rules of interpretation are something different, then not even the Court would be able to apply them!

The above thoughts demonstrate the paradoxes and internal inconsistencies that the acceptance of the immutability of the rules of interpretation leads to. 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 it 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.

4.3.2 *Mutability of Rules of Interpretation Leads to Intertemporal Concerns*

4.3.2.1 Effect of Time on Rules of Interpretation

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 also they are 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 at a specific situation and at a particular juncture in time. In the previous sections, we examined how the principle of contemporaneity and evolutive interpretation offer the tools to achieve this feat of balance. According to the former, 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. That is the basic tenet of evolutive interpretation.

In the case at hand, what is of interest for our analysis is whether the rules of interpretation, which, as was shown in the previous sections can, have and will continue to change and be refined through time, can be considered for the purpose of evolutive interpretation. Essentially, the question boils down to what elements can be taken into account in the process of evolutive interpretation. Do legal rules fall into the set of elements to be considered under evolutive interpretation or is that set restricted only to elements which qualify as facts?

As shown in Section 4.2.2.1, evolutive interpretation can refer to evolution of fact and/or evolution of law.²¹⁵ Examples of what international courts and tribunals have considered as evolution of fact are medical and scientific advancements, societal and cultural changes, the socio-economic situation of a State, and changes in morals.²¹⁶ On the other hand, evolution of law has been recognised as including customary international law, international treaties, and even domestic law.²¹⁷ Having this in mind, it is evident then that the rules of interpretation can also form part of the process of evolutive interpretation.

4.3.2.2 Scenarios (Dis)Allowing ‘Time-Travelling’ 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 VCLT²¹⁸ to simply pay lip-service to the fact that the VCLT rules reflect customary international law²¹⁹ and, in some cases, even indicate that there have been no significant changes to the content of those rules under customary international law.²²⁰ This practice has not gone

²¹⁵ Georgopoulos, ‘Le droit intertemporel’ 132–4.

²¹⁶ See Section 4.2.2.1 of this chapter and cases cited therein.

²¹⁷ *ibid.*

²¹⁸ Such as: *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*. In detail, see Linderfalk, ‘The Application of International Legal Norms Over Time’ 163–5.

²¹⁹ *Kasikili/Sedudu Island* [8]; *Case Concerning Oil Platforms (Iran v USA)* (Merits) [2003] ICJ Rep 161 [23].

²²⁰ *Kasikili/Sedudu Island*, Separate Opinion of Judge Oda [4].

Table 4.2 *Possible variations as to what rules of interpretation should apply to a treaty*

| | | Intention of the Parties Regarding Time/ ‘Time-Will of the Parties’ | | | |
|-------|--------------------------------|--|---|-------------------------------------|---|
| | | <i>Contemporaneous Interpretation</i> | | <i>Evolutive Interpretation</i> | |
| Rules | <i>Treaty</i> | √ | | √ | |
| | <i>Rules on Interpretation</i> | √ | X | √ | X |

unnoticed amongst academics,²²¹ although there is a begrudging admittance that any other solution ‘would complicate matters considerably’.²²² However, that 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, and whether by process of elimination one can arrive at a solution. As mentioned above, the principle of contemporaneity provides that a treaty is to 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.²²³ 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 in Table 4.2.

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.

²²¹ M Shaw, ‘Case Concerning *Kasikili/Sedudu Island (Botswana/Namibia)*’ (2000) 49 ICLQ 964, 968; D Greig, *Intertemporality and the Law of Treaties* (BIICL 2001) 113–4; H Fox, ‘Article 31(3)(a) and (b) of the Vienna Convention and the *Kasikili/Sedudu Island* Case’ in M Fitzmaurice, O Elias, and P Merkouris (eds), *The Issues of Treaty Interpretation and the Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2010) 59, 64–5; Linderfalk, ‘The Application of International Legal Norms’ 163–5.

²²² Shaw ‘Case Concerning *Kasikili/Sedudu Island*’ 968.

²²³ Elsewhere, Merkouris has opted for 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, we will be using that term from this point onwards to describe that form of intention; Merkouris, ‘(Inter)temporal Considerations’ 140–52.

- (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 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 a whole. If the treaty is meant to be interpreted contemporaneously, then so should be (ie 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 treaty and the rules that 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.

But let us examine the other two options to see if any of them can be rejected. The second option would bring about a situation where whereas the treaty remained in its own 'time-bubble' 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 would seem to conflict with the principle of non-retroactivity, a well-recognised principle in international law,²²⁴ and the principle of contemporaneity, as analysed earlier. Both these principles can be circumvented only when there is an express intention of the

²²⁴ *The Chamizal Case (Mexico v USA)* (1911) 11 RIAA 309, 343; *Clipperton Island Arbitration (Mexico v France)* (1931) 2 RIAA 1105, 1105–11; *Ambatielos case (Greece v UK)* (Preliminary Objections) [1952] ICJ Rep 28, 40.

parties to that effect. In the present case, and unless such an express stipulation by the parties exists, the only intention that is apparent is either one that has opted for a static interpretation of the treaty, or no apparent intention either way, whereby the principle of contemporaneity kicks in. Consequently, this option conflicts with the basic tenets of the principles of non-retroactivity and contemporaneity and does not withstand scrutiny. The decisive criterion is the time-will of the parties.


A possible way out of this conclusion, would be to argue that even if one were to apply the contemporary of that time rules of interpretation, this would include the customary version of Article 31(3)(c). Consequently, the modern rules of interpretation could be taken into account as ‘relevant rules’ in order 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 *our-aboric* 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 on what is the temporal stamp of the ‘relevant rules’, ie relevant rules applicable at the time of the conclusion of the treaty, or at the time of the interpretation of the treaty.²²⁵ Unsurprisingly, we also end up returning to our starting point. This issue was extensively debated in the ILC, and eventually any such 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 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

²²⁵ Although earlier drafts, possibly influence by the ideas behind the principle of contemporaneity leaned in favour of ‘at the time of the conclusion of the treaty’; see Merkouris, *Article 31(3)(c) VCLT* ch 2.

Table 4.3 *What rules of interpretation should apply to a treaty*

| | | Intention of the Parties Regarding Time/ ‘Time-will of the Parties’ | | | |
|-------|--------------------------------|--|---|-------------------------------------|---|
| | | <i>Contemporaneous Interpretation</i> | | <i>Evolutive Interpretation</i> | |
| Rules | <i>Treaty</i> | √ | X | √ | X |
| | <i>Rules on Interpretation</i> | √ | X | √ | X |



**Unless the Parties Explicitly Express
a Different Intention**

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 equally apply 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,²²⁶ 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 4.2 to reflect the above analysis we arrive at the solution to our problem which is represented in Table 4.3.

4.4 Forward and Backward Motion through Time: Rules of Interpretation as ‘Time-Travellers’

In this chapter we have examined the *auxesis* and *meiosis* that can happen to treaty provisions as a result of their *kata chronon metavole* and in the context of the process of interpretation. In Section 4.2 we focused on the two opposite spectra of motion, ie *stasis* and *kinesis*, as exemplified through contemporaneous and evolutive interpretation,

²²⁶ Given the residual nature of the rules of the VCLT.

respectively. Going through the preparatory work of the VCLT and case law across different courts and tribunals, we identified that the intention of the parties is the driving force, which informs each and every instance the choice between static and evolutive interpretation. Such a choice, however, is not without its limits, most notable amongst these being that evolutive interpretation should never reach the point where it modifies/amends the treaty text and the corresponding obligation. This would lead to an *alloiosis* of the obligation, a type of motion that goes beyond the scope of interpretation, and is more characteristic of amendment as is shown in Chapter 5.

In Section 4.3 of this chapter, we started from an observed tendency amongst international courts and tribunals to apply the VCLT rules, and the modern understanding thereof, to pre-VCLT treaties. This practice has been rationalised on the basis of the claim that the rules of interpretation have not changed significantly in the last few centuries.

In order to put this claim to the test, the following were examined: (i) whether pre-VCLT there was general agreement even as to the existence of rules of interpretation, (ii) whether pre-VCLT the content of those rules was fixed and enjoyed general approval, (iii) whether the rules of interpretation were also open to interpretation, and (iv) the logical and methodological fallacies of refusing the mutability of rules of interpretation through time. From that analysis, what emerged was that rules of interpretation not only can change but they have and will continue to do so.

This then led then to the question about when and under what conditions modern rules of interpretation can be applied to earlier treaties. This question opened the door to examining issues connected to intertemporality and the tug of war between the principle of contemporaneity and evolutive interpretation. By examining all the possible solutions and the logical and normative consistency with the existing international legal system, it was concluded that the time-will of the parties with respect to the earlier treaty will be determinative of whether the rules of interpretation of that time or of today should be applied. The only exception was when the parties explicitly made a determination on the specific set of rules of interpretation to be applied. 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 when they interpret a pre-VCLT treaty courts and tribunals may have to start identifying properly the exact content of the rules of interpretation of a particular era. But the

difficulty of the situation does not bear upon the systemic coherence of our conclusions.

Returning, thus, to the concept of motion through time and the ability of the rules of interpretation to ‘time-travel’, 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 any ‘time-travel’ in international law is dependent on the cornerstone of this system, ie the intention of the parties.

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 interpretative rules 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 as they 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 of the intention of the parties. In theory, and if the parties so will it, then 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 on by the parties. In conclusion, rules of interpretation can indeed be ‘time-travelers’ but only if the parties so will it.