



TRICI-Law
RESEARCH PAPER SERIES

THE RULES OF INTERPRETATION OF
CUSTOMARY INTERNATIONAL LAW

Paper No. 008/2020

Final Report on the Interpretative Practice
of the PCIJ/ICJ

by Panos Merkouris & Daniel Peat



university of
 groningen

faculty of law

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



European Research Council
Established by the European Commission



TRICI-Law

Final Report on the Interpretative Practice of the PCIJ/ICJ

by Panos Merkouris & Daniel Peat

published in:

P Merkouris & D Peat, ‘Final Report on the Interpretative Practice of the PCIJ/ICJ’
(2020) (available [here](#))

The TRICI-Law project has received funding from the European Research Council (ERC) under the European Union’s Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

**FINAL REPORT ON
THE INTERPRETATIVE PRACTICE OF THE PCIJ/ICJ**

29 November – 13 December 2020, Kyoto

Panos Merkouris and Daniel Peat ***

General Introduction

The jurisprudence of the International Court of Justice (ICJ) at first sight epitomizes the orthodox approach to treaty interpretation, manifesting, in the words of one author, ‘une symbiose parfaite’¹ with the rules of interpretation that are codified in the Vienna Convention on the Law of Treaties (VCLT).

The link between the practice of the World Court and the development of the rules of interpretation is clear in the work of the International Law Commission, which almost exclusively relied on the jurisprudence of the nascent ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), as the basis upon which to elaborate the rules that later became Articles 31-33 of the VCLT.² Indeed, in his Third Report, Sir Humphrey Waldock explicitly stated that draft articles on interpretation took inspiration from two sources, one of which was Sir Gerald Fitzmaurice’s 1957 article in the *British Yearbook* on the interpretative practice of the International Court.

Yet, despite this close link between the World Court and the rules of the VCLT, understanding the interpretative practice of the Court is not as straightforward as it seems. The Court adopts a pragmatic approach to interpretation, which rejects a mechanistic approach to the rules of interpretation and admits the existence of interpretative principles that are not codified in the VCLT. This approach has provided the Court with a great degree of latitude, both in terms of the materials that it takes into

* Panos Merkouris is Professor at the University of Groningen, and holds a Chair on Interpretation and Dispute Settlement in International Law. His contribution to this report is conducted in the context of the project ‘The Rules of Interpretation of Customary International Law’ (‘TRICI-Law’). This project has received funding from the European Research Council (ERC) under the European Union’s Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728). Daniel Peat is Assistant Professor in Public International Law, Grotius Centre for International Legal Studies, Leiden University.

** The authors would like to thank Dr. Sotirios Ioannis Lekkas for his invaluable assistance in the research, drafting and editing of this Report.

¹ M. Forteau, ‘Les techniques interprétatives de la Cour internationale de justice’ (2011) 115/2 RGDIP 399; H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (OUP 2013), p. 269.

² See for example, *Yearbook of the International Law Commission 1966, Vol. II*, pp. 217-26.

account in the interpretative process and the weight that it gives to different elements of interpretation.

A number of judgments of the Court (mainly on preliminary objections) that have been issued in the past few years – *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, *Alleged Violations (Nicaragua v. Colombia)*, *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Jadhav (India v. Pakistan)*, *Application of the International Convention on the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* – are of particular interest in relation to interpretation. This report will draw on the entire jurisprudence of the Court, but lay a particular emphasis on recent judgments where appropriate.

I. Content-related Issues/Questions

1. *Do the courts and tribunals refer to the VCLT rules of interpretation? Do they discuss the content of these rules?*

The Court engages with the VCLT rules in its pronouncements in a variety of ways, as will be demonstrated in the following Sections. The Court has referred to the VCLT rules of interpretation expressly in its judgments since its judgment in *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*,³ and has stated consistently that those provisions reflect rules of customary international law⁴ However, references to the VCLT provisions on interpretation can be found even before the VCLT's entry into force in 1980 in individual opinions of members of the Court.⁵ In fact, in most cases, the VCLT rules are not applicable *qua* treaty rules, because one or both parties to the dispute are not parties to the VCLT or the treaty in question has been concluded prior to its entry into force.⁶ This has not hindered the Court and the judges from referring to the VCLT rules on interpretation as reflecting customary international law.⁷ In total, citations of the provisions of the VCLT on interpretation – ie Arts 31-33 VCLT – appear in more than 30 decisions and advisory opinions of the Court and more than 65 individual opinions.

³ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports 1991, para. 48. See also *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, I.C.J. Reports 2017, para. 63 and judgments referred to therein; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, I.C.J. Reports 2019, para. 57.

⁴ See for example, *Jadhav (India v. Pakistan)*, I.C.J. Reports 2019, para. 71; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, I.C.J. Reports 2018, para. 91.

⁵ *Barcelona Traction, Light and Power Company Limited (New Application, 1962) (Belgium v. Spain) (Second Phase)*, I.C.J. Reports 1970, Separate Opinion of Judge Ammoun, para. 11; *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, I.C.J. Reports 1972, Separate Opinion of Judge Dillard, para. 90; *Fisheries Jurisdiction (Germany v. Iceland)*, I.C.J. Reports 1974, Separate Opinion of Judge De Castro, para. 10; *Aegean Sea Continental Shelf (Greece v. Turkey)*, I.C.J. Reports 1978, Dissenting Opinion of Judge de Castro, para. 13.

⁶ Arts 4 and 28 VCLT.

⁷ see in detail M. Fitzmaurice and P. Merkouris, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (CUP 2020), pp. 147-58.

This reliance on the text of the VCLT provisions on interpretation, irrespective of whether they are *stricto sensu* applicable in a particular dispute, did not occur instantaneously but rather incrementally, in a *punctiforme* manner and with an increasing degree of confidence over time. In the aforementioned *Arbitral Award of 31 July 1989*, the Court concluded rather cautiously that the approach to interpretation it had employed was based on ‘principles [that] are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, [and] which may *in many respects* be considered as a codification of existing customary international law on the point’.⁸ In judgments following the *Arbitral Award of 31 July 1989* the Court became gradually more assertive in the pronouncement of the customary nature of Article 31 (although not entirely as confident for Article 32 and 33).⁹ Gradually, Article 32 started being mentioned in the same breath as Article 31 as reflecting customary international law, as can be seen in the case concerning *Pulau Sipadan and Litigan*, where the Court held that interpretation could take place ‘in accordance with customary international law, reflected in Articles 31 and 32 of that Convention’.¹⁰ Only to have in 2016, in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the official and open acknowledgment of the triad of the VCLT interpretative provisions as collectively reflecting customary international law. ‘it is well established that Articles 31 to 33 of the Convention reflect rules of customary international law’.¹¹ Of course, that is not to say that individual acknowledgments of elements of Articles 32 and 33 had not occurred earlier,¹² but rather that the acknowledgment of *all three Articles together*, as a *res unum* on interpretation was a long process,¹³ and that the entrenchment of the VCLT rules on interpretation in the jurisprudence of ICJ was neither automatic nor spontaneous. Rather, it came about through an incremental process of carefully formulated *dicta* over a long period of time.

Although interpretation both *qua* VCLT rules and *qua* customary law are central to the judicial function, the content of these rules and their application seems often much less structured and methodical than the process envisaged in the rules themselves. This notwithstanding, the Court in applying the rules of interpretation, inevitably makes incidental findings be they regarding the content both of the rule in general and of its constitutive elements more specifically, their *telos*, or the relationship to each other. In this respect, individual opinions of members of the Court are particularly revealing. As

⁸ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports 1991, para. 48 (emphasis added).

⁹ cf *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening)*, I.C.J. Reports 1992, para. 373; *Territorial Dispute (Libya v. Chad)*, I.C.J. Reports 1994, para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility*, I.C.J. Reports 1995, para. 33; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, I.C.J. Reports 1996, para. 19.

¹⁰ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, I.C.J. Reports 2002, para. 37.

¹¹ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections*, I.C.J. Reports 2016, para. 35; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections*, I.C.J. Reports 2016, para. 33; more recently, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections*, Judgment of 8 November 2019, not yet reported, available at <<https://www.icj-cij.org/files/case-related/166/166-20191108-JUD-01-00-EN.pdf>>, para. 106.

¹² See for instance, *LaGrand*, where the Court pronounced that Article 33(4) VCLT ‘reflects customary international law’ *LaGrand Case (Germany v. United States of America)*, I.C.J. Reports 2001, para. 101.

¹³ Which, of course, can also be attributable to the particularities of the cases that the Court was facing. See also below Sections II.2 and II.3.

will be shown in the following Sections and in the examples provided therein, although judges and the Court itself may avoid referring *expressis verbis* to specific interpretative principles in the content-determination of the rules of interpretation, such a process remains, nonetheless, inherently interpretative in nature and is by necessity grounded in the application of such principles.

2. *Preference/Prevalence of a particular approach to interpretation over others (textual, contextual, teleological, intentions of the parties, historical). Has the approach changed over time?*

Making all-encompassing generalizations as to the interpretative leanings of the PCIJ and the ICJ is questionable at best. One should not forget that both these Courts are of general jurisdiction, meaning that the cases brought before them revolve around diverse instruments, relate to all conceivable areas of international regulation, and pertain to multifarious variations of circumstances and arguments raised by the parties. These are but a few factors that can and have critically influenced the interpretative approach of the Courts and created a veritable smörgåsbord of interpretative methods, elements and solutions adopted. Furthermore, in theoretical terms, the ideas behind the various interpretative schools ‘are not necessarily exclusive to one another, and theories of...interpretation can be constructed (and are indeed normally held) compounded of all [of them]’.¹⁴

By and large, the ICJ has strived to maintain continuity with the PCIJ and consistency in its interpretative approach. Arguably, the catalysing event has been the gradual consolidation of the VCLT rules into the jurisprudence of the Court. To be sure, the VCLT rules on interpretation did not bring about any radical change, as they largely reflected prior practice of the PCIJ and ICJ.¹⁵ Nonetheless, they became ‘the virtually indispensable scaffolding for the reasoning on questions of treaty interpretation’ and the *tertium comparationis* for dealing with interpretative questions arising from other instruments.¹⁶

With respect to the PCIJ, Judge Manley O. Hudson remarked that ‘[it] has formulated no rigid rules; its formulations have been in such guarded form as to leave it open to the Court to refuse to apply them, and it would be difficult to say that all of them have been consistently applied’.¹⁷ Similarly, it is difficult to ascribe to the PCIJ a particular method or approach to interpretation. Hudson observes that ‘numerous’ judgments and opinions of the PCIJ referred to the ‘intentions of the parties’ as a guide for interpretation, but he

¹⁴ G.G. Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points’ (1951) 28 BYBIL 1.

¹⁵ cf, eg the ILC’s commentaries to its draft articles on interpretation (Arts 27-29) that contain almost exclusively references to PCIJ and ICJ judgments: ILC, ‘Draft Articles on the Law of Treaties with Commentaries’ reproduced in *Yearbook of the International Law Commission 1966, Vol. II*, pp. 217-26 (n125-56).

¹⁶ Thirlway (n1), p. 1234.

¹⁷ M.O. Hudson, *The Permanent Court of International Justice, 1920-1942* (Macmillan 1943), p. 643. This study is still cited as the most accurate and authoritative depiction of the PCIJ’s interpretative practice: cf, eg R. Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015), pp. 65-6.

cautioned that this was ‘merely ... a palliating description of a result which has been arrived at by some other method than ascertainment of intention’.¹⁸ For instance, one of the most categorical pronouncements of the PCIJ was that ‘there is no occasion to have regard to preparatory work if the text...is sufficiently clear’, even if this ‘rule’ was not robustly applied in all cases.¹⁹ Conversely, whilst the PCIJ focused on the ‘natural’, ‘literal’, ‘grammatical’, ‘ordinary’, ‘normal’, ‘logical’, or ‘reasonable’ meaning of the terms of the instrument in question, it was apparent from early on that this did not entail the exclusion of other means of interpretation.²⁰ Indeed, the PCIJ enunciated that for the determination of the meaning of the terms of an instrument ‘the context is the final test’.²¹ Similarly, the Permanent Court invoked frequently the ‘nature’, ‘scope’, ‘object’, ‘spirit’, ‘tenor’, ‘function’, ‘role’, ‘aim’, ‘purpose’, ‘intention’, ‘system’, ‘scheme’, ‘general plan’, and the ‘principles’ underlying instruments in support of its interpretative findings.²² In addition, on several occasions, the PCIJ accorded important weight on the legal, political, and social background of the instrument in question.²³ More generally, apart from the PCIJ’s explicit reservations with respect to the use of *travaux préparatoires*, ‘the jurisprudence of the Court d[id] not establish any rigid timetable for the various steps in the process of interpretation’.²⁴

The general direction of the jurisprudence of the ICJ has followed closely that of the PCIJ. With respect to the Court’s pre-VCLT practice, Sir Gerald Fitzmaurice commented that ‘the Court as a whole favours... the textual method, while some of its individual Judges are teleologists’²⁵ and expounded on this a few years later, when he wrote that ‘[w]ith the exception of those who support the extreme teleological school of thought, no one seriously denies that the *aim* of treaty interpretation is to give effect to the intentions of the parties’.²⁶ Thirlway, in turn, noticed a tendency ‘at least in the case of multilateral treaties, where it has been the “intention” or object of the text of the treaty which has been taken as a starting point’.²⁷ These academic qualifications of potential tendencies in the interpretative practice of the ICJ, notwithstanding, in the landmark *Arbitral Award of 31 July 1989* Judge Weeramantry put in very succinct terms, what is generally considered nowadays the principled approach on the matter, ie that ‘a hierarchy

¹⁸ Hudson (n17), pp. 643-4.

¹⁹ *Ibid*, pp. 652-5; see eg *S.S. ‘Lotus’, P.C.I.J. Series A, No. 10*, p. 16 (as a principle of treaty interpretation); *Case concerning the Payment of Various Serbian Loans Issued in France, P.C.I.J. Series A, No. 20*, p. 30; *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France, P.C.I.J. Series A, No. 21*, p. 30 (as a principle of a more general scope).

²⁰ Hudson (n17), pp. 645-6; see *Factory at Chorzów (Indemnity) (Jurisdiction), P.C.I.J. Series A, No. 9*, p. 24; *Article 3, Paragraph 2, of the Treaty of Lausanne (Border between Turkey and Iraq), P.C.I.J. Series B, No. 12*, p. 23; but also *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, P.C.I.J. Series A/B, No. 50*, pp. 373, 378 which seems to accord more weight to the text.

²¹ *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, P.C.I.J. Series B, No. 2*, p. 35.

²² Hudson (n17), pp. 650-2; see eg *German Settlers in Poland, P.C.I.J. Series B, No. 6*, p. 25.

²³ Hudson (n17), pp. 655-7.

²⁴ *Ibid*, p. 651.

²⁵ G.G. Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points’ (1951) 28 BYBIL 1, p. 7.

²⁶ G.G. Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points’ (1957) 33 BYBIL 203, p. 204 (emphasis in the original).

²⁷ Thirlway (n1), p. 1234.

cannot be established among ... [the three principal schools of thought upon treaty interpretation]’.²⁸

As explicated in Section I.1, whereas the interpretative process is one of ‘progressive encirclement’,²⁹ the entrenchment of the VCLT rules was of gradual increase, but one which happened often-times in a non-linear fashion meandering between different strands of interpretation. For instance, Thirlway observed in 2013 that the interpretative practice of the ICJ since 1991 had swung back again ‘towards a more textual approach’.³⁰ To illustrate this point, in the *Arbitral Award of 31 July 1989*, the Court found that

the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. The rule of interpretation according to the natural and ordinary meaning of the words employed is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.³¹

In *Gulf of Fonseca*, the Court expressed itself in a similar vein, when it relied on ‘the basic rule of Article 31 of the Vienna Convention on the Law of Treaties, according to which a treaty shall be interpreted “in accordance with the ordinary meaning to be given to the terms”’.³² Judge Torres Bernárdez, writing separately, was very critical of such an approach:

For treaty interpretation rules there is no ‘ordinary meaning’ in the absolute or in the abstract. That is why Article 31 of the Vienna Convention refers to ‘good faith’ and to the ordinary meaning ‘to be given’ to the terms of the treaty ‘in their context and in the light of its object and purpose’. ... I intend to remain faithful to the rules governing treaty interpretation as codified in the Vienna Convention, whose

²⁸ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports 1991, Dissenting Opinion of Judge Weeramantry, para. 24.

²⁹ An ‘*encirclement progressif*’ as described by Huber in M. Huber, ‘Commentaire de l’*interprétation des traités*’ (1952) 44/1 *Annuaire de l’Institut de Droit International* 198, p. 200; and more than half a century later repeated in *Aguas del Tunari S.A. v. Bolivia*, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ICSID Case No. ARB/02/3, para. 91.

³⁰ Thirlway (n1), p. 1234.

³¹ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports 1991, para. 48 citing *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion*, I.C.J. Reports 1950, p. 8; *South West Africa (Liberia v. South Africa), Preliminary Objections*, I.C.J. Reports 1962, p. 336.

³² *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening)*, I.C.J. Reports 1992, para. 373.

essential characteristic is *that all its interpretative principles and elements form 'an integrated whole'*, including the 'ordinary meaning' element.³³

Since then, the Court has avoided making fragmentary references to the VCLT rules that could be construed as revealing a preference to a particular school of interpretation, but rather reproduces faithfully the formulation of the VCLT.³⁴ Arguably, this subtle change was aimed at dispelling any impression of hierarchy between the elements of the basic rule of interpretation as reflected in Article 31(1) VCLT.

3. *When has the case-law of an international court and tribunal indicated a clear shift in the content of a rule of interpretation? How was this established?*

Given the approach of the Court, as described above in Section I.1, it may be difficult to ascertain when there was a clear shift on the rule contradistinguished from a different solution due to the special characteristics of a case or even from a gradual elaboration of the content of the rule. Sections I.2-6, II, and III below offer some examples that may be considered as examples that could potentially qualify as shift, especially when comparing the pre-VCLT and the post-VCLT era.

4. *When, how and what maxims/canons of interpretation (not explicitly referred to in the VCLT) have been used in international case-law? What is their status?*

Although the Court, has a tendency to refer back to the VCLT rules, on occasion it has referred to maxims/canons of interpretation not explicitly mentioned in the VCLT.³⁵ This practice was for obvious reasons more prevalent during the pre-VCLT era.

Examples of such maxims/canons are the following:

In dubio mitius

The *in dubio mitius* principle was identified by the PCIJ in its Advisory Opinion on *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* when dealing with an argument adduced by Turkey in a telegram sent to the Court. More specifically:

This argument appears to rest on the following principle: if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted. This principle may be admitted to be sound. In

³³ *Ibid*, Separate Opinion of Judge Torres Bernárdez, paras. 190-1 (emphasis added).

³⁴ eg *Territorial Dispute (Libya v. Chad)*, I.C.J. Reports 1994, para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, I.C.J. Reports 1995, para. 33; *Oil Platforms (Iran v. United States of America)*, Preliminary Objections, I.C.J. Reports 1996, para. 23.

³⁵ For a recent exploration of some of these maxims across different courts and tribunals see 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).

the present case, however, the argument is valueless, because, in the Court's opinion, the wording of Article 3 is clear.³⁶

The *S.S. Wimbledon* set out one of the main limits to the application of the *in dubio mitius* principle:

the Court feels obliged to *stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted*.³⁷

This was further explicated in the Advisory Opinion concerning the *Polish Postal Service in Danzig* where

[i]n the opinion of the Court, the rules as to a strict or liberal construction of treaty stipulations can be applied *only in cases where ordinary methods of interpretation have failed*.³⁸

The requirement that doubt must exist, and by implication the supplementary fashion of the *in dubio mitius* principle, was underlined in *Territorial Jurisdiction of the International Commission of the River Oder*:

This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it is not sufficient that the purely grammatical analysis of a text should not lead to definitive results; there are many other methods of interpretation, in particular reference is properly had to the principles underlying the matters to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States.³⁹

In later decisions, relating to the *Free Zones Upper Savoy and the District of Gex*, the PCIJ once again affirmed the supplementary nature of this principle, ie that 'in case of doubt, a limitation of sovereignty must be construed restrictively'.⁴⁰

In *Phosphates in Morocco* there is a subtle reference to the *in dubio mitius* principle, although it strongly connects it with the intention of the parties rather than as a self-standing principle of interpretation, and further the Court once again underlines its supplementary role, as a tool of resolving doubt when the latter still exists despite the application of the classical elements of interpretation (text, intention, object and purpose etc.).⁴¹

³⁶ *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion*, P.C.I.J. Series B, No. 12, p. 25.

³⁷ *The S.S. Wimbledon*, P.C.I.J. Series A, No. 1, pp. 24-5 (emphasis added).

³⁸ *Polish Postal Service in Danzig, Advisory Opinion*, P.C.I.J. Series B, No. 11, p. 39 (emphasis added).

³⁹ *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder*, P.C.I.J. Series A, No. 23, p. 26.

⁴⁰ *Case of the Free Zones of Upper Savoy and the District of Gex (Second Phase)*, P.C.I.J. Series A, No. 24, p. 12; *Case of the Free Zones of Upper Savoy and the District of Gex*, P.C.I.J. Series A/B, No. 46, p. 167.

⁴¹ *Phosphates in Morocco (Italy v. France), Judgment of 14 June 1938*, P.C.I.J. Series A/B, No. 74, pp. 23-4.

In the jurisprudence of the ICJ references to the *in dubio mitius* principle / restrictive interpretation can be found in *Nuclear Tests* and *Frontier Dispute*.⁴² In the more recent judgment on *Dispute regarding Navigational and Related Rights* the Court refused to apply this principle *eo ipso* without any further justification:

[T]he Court is not convinced ... that Costa Rica's right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua.⁴³

From the above it would seem that the *in dubio mitius* principle first of all is used only in a supplementary fashion, when the main elements of treaty interpretation have failed to provide a definitive result; it is strongly connected to both the text and the intention of the parties; and finally especially considering the historical roots of the *in dubio mitius* principle in domestic legal systems⁴⁴ it would seem to have a different degree of import depending on the nature of the treaty (bilateral or multilateral) the nature of the act/instrument being interpreted (unilateral statement, optional clause declaration or treaty) as well as the beneficiaries of the relevant obligations (States or other subjects of international law, especially individuals).

Effet Utile/Effective Interpretation/ Ut res magis valeat quam pereat

The principle of effectiveness can be understood as follows:

where words or terms of an instrument are capable of two meanings the object with which they were inserted, as revealed by the instrument or any other admissible evidence, may be taken into consideration in order to arrive at the sense in which they were used and where one interpretation is consistent with what appears to have been the intention of the parties and another repugnant to it, the Court will give effect to this apparent intention. The Court will always prefer an interpretation which renders an agreement valid and effective to an interpretation which renders it void and ineffective, provided the former can fairly be said not to be inconsistent with the intention of the parties. This principle is stated in the rule *Ut res magis valeat quam pereat*.⁴⁵

⁴² '[W]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for'; *Nuclear Tests (Australia v. France; New Zealand v. France)*, I.C.J. Reports 1974, para. 47. This is even more so in the case where the statement is 'not directed to any particular recipient'; *Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Rep. 1986, para. 39; see also International Law Commission, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto - 2006' reproduced in *Yearbook of the International Law Commission 2006, Vol. II(2)*, Guiding Principle 7, Commentary – para. 2 (Guiding Principles).

⁴³ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, para. 48.

⁴⁴ A. Berger, 'In dubiis benigniora' (1951) 9 Seminar Jurist 36.

⁴⁵ *South West Africa (Liberia v. South Africa)*, Preliminary Objections, I.C.J. Reports 1962, Dissenting Opinion of Judge van Wyk, p. 583.

The principle of effectiveness by the Court's own admission plays an important law in the interpretation of treaties and in its own jurisprudence.⁴⁶ An in-depth analysis the principle and its use by the PCIJ and ICJ was offered by Sir Gerald Fitzmaurice in his seminal series of articles in the *British Yearbook of International Law*.⁴⁷ So important was this principle considered that he included it in his list of principles of interpretation.

However, Fitzmaurice also warned that the principle 'is all too frequently misunderstood as denoting that agreements should always be given their maximum *possible* effect, whereas its *real object is merely . . . to prevent them failing altogether*'.⁴⁸ Along similar lines Judge Cançado Trindade in *Whaling in the Antarctic* expressed the opinion that the principle *ut res magis valeat quam pereat* is meant to 'to secure to the conventional provisions their *proper effects*'.⁴⁹

As to whether the principle lies outside the VCLT or not, Judge Torres Bernardez in *Land, Island and Maritime Frontier Dispute* opined that the principle of effectiveness 'in so far as it reflects a true general rule of interpretation, is embodied, as explained by the International Law Commission, in Article 31, paragraph 1, of the Vienna Convention'.⁵⁰ Judge Cançado Trindade has also and more recently expressed the view that the principle underlies the general rule of Article 31 VCLT.⁵¹

More recently, in *Georgia v. Russia*, an interesting exchange occurred regarding the proper place of the principle effectiveness within the interpretative scheme envisaged by Articles 31-33 VCLT. The Court applied the principle under the heading of the 'ordinary meaning' of the provision in question.⁵² This would seem to indicate a confirmation by the Court of Judge Torres Bernardez's *dictum* in *Land, Island and Maritime Frontier Dispute*. However, although the Court referred to its own and the PCIJ's jurisprudence (*Corfu Channel, Territorial Dispute* and *Free Zones of Upper Savoy and the District of Gex*) it nonetheless refrained from making any direct reference to the VCLT either as conventional or customary rule. This finding of the Court was censured by several judges in a joint dissenting opinion. However, the dissenting judges as well, although relying explicitly on

⁴⁶ *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 52. See for instance, apart from the other cases mentioned in this Section: *Chorzów Factory*, P.C.I.J. Series A, No. 9, p. 24; *Corfu Channel (United Kingdom v. Albania)*, I.C.J. Reports 1949, p. 24; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, I.C.J. Reports 1949, pp. 179 and 183. As to the scope of the principle Judge Cançado Trindade has expressed the view that it 'applies *not only in relation to substantive norms of human rights treaties* (that is, those which provide for the protected rights), *but also in relation to procedural norms*'; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections*, I.C.J. Reports 2011, Dissenting Opinion of Judge Cançado Trindade, para. 79 (emphasis added).

⁴⁷ Fitzmaurice (n26), p. 203; see also H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Supplement 2006, Part Three' (2006) 77 BYIL 1, pp. 52-5.

⁴⁸ G. Fitzmaurice, 'Vae victis or Woe to the Negotiators: Your Treaty or our 'Interpretation' of it?' (1971) 65 AJIL 373.

⁴⁹ *Whaling in the Antarctic (Australia v. Japan; New Zealand (intervening))*, Judgment, I.C.J. Reports 2014, Separate Opinion of Judge Cançado Trindade, para. 54 (emphasis added).

⁵⁰ *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening)*, I.C.J. Reports 1992, Separate Opinion of Judge Torres Bernardez, para. 205.

⁵¹ *Whaling in the Antarctic (Australia v. Japan; New Zealand (intervening))*, Judgment, I.C.J. Reports 2014, Separate Opinion of Judge Cançado Trindade, para. 54.

⁵² cf *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections*, I.C.J. Reports 2011, paras. 123-41.

Articles 31-32 VCLT, did not a clear position on where the principle of effectiveness fits within the VCLT rules.⁵³ On the one hand, they criticised the fact that ‘the ‘general rule of interpretation’, ie, ‘the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’, is applied in the Judgment in a way that amounts to nothing more than applying the principle of ‘effectiveness’.⁵⁴ In this respect, they remarked that ‘this technique of interpretation is never as all-determinative as the Court would appear to treat it in the present case; it does not suffice by itself.⁵⁵ On the other hand, they did not ‘deny the relevance, or underestimate the importance, of the principle that the interpreter of a treaty must normally seek to give its terms a meaning which leads them to have practical effect, instead of one which deprives them of any effect (the “principle of effectiveness”)⁵⁶

As a final point regarding the principle of effectiveness, and in the context of the present report, we need to underline the fact that in a fashion similar to other canons analysed in this Section, this principle also has certain limits. The principle ‘cannot justify the Court in attributing ... a meaning which ... would be *contrary to [the] letter and spirit [of the provisions]*’.⁵⁷ In essence, the application of the principle of effectiveness should not amount to a revision of the text.⁵⁸

Contra Proferentem

The *contra proferentem* rule, ie that when a text is ambiguous it must be construed against the party who drafted it, was referred to in *Brazilian Loans* but the PCIJ focused particularly in order to make its pronouncement on whether there indeed was doubt as to the ordinary meaning the terms being interpreted.⁵⁹

The rule was, once again, mentioned in *Fisberies Jurisdiction* where the ICJ concluded that whereas the

contra proferentem rule may have a role to play in the interpretation of contractual provisions ... the rule has no role to play in this case in interpreting the reservation contained in the unilateral declaration made by Canada under Article 36, paragraph 2, of the Statute.⁶⁰

Finally, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* Judge Shahabuddeen was of the view that ‘the principle of interpretation *contra proferentem*

⁵³ *Ibid*, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham, Donoghue, and (then) Judge *ad hoc* Gaja, paras. 20-2.

⁵⁴ *Ibid*, para. 21.

⁵⁵ *Ibid*, para. 22.

⁵⁶ *Ibid*.

⁵⁷ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, *Advisory Opinion*, I.C.J. Reports 1950, p 229.

⁵⁸ *South West Africa (Liberia v. South Africa)*, *Preliminary Objections*, I.C.J. Reports 1962, Dissenting Opinion of Judge van Wyk, p. 584.

⁵⁹ *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, P.C.I.J. Series A, No. 21.

⁶⁰ *Fisberies Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 51.

applies to the resolution of any ambiguity’ and that although authors caution that this principle must be applied with circumspection,⁶¹ nonetheless ‘a certain irreducible logic in its substance is not altogether banished’.⁶²

Expressio unius est exclusion alterius/per argumentum a contrario

This approach to interpretation has been condensely described by the ICJ as ‘the fact that a provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded’.⁶³ Recently, however, in *Certain Iranian Assets*, Judge Robinson in his Separate Opinion explicated on his understanding of the scope of an *a contrario* interpretation. In his view, an *a contrario* interpretation is much wider in scope than that. Such an interpretation ‘calls for an inference that a matter is either included in or excluded from a treaty. Whether the inference is that comparable categories are excluded depends on the specific provision in the treaty to which those categories would be contrary. *An a contrario interpretation does not always lead to an inference that other comparable categories are excluded. This means of interpretation can, as in this case, lead to an inference that a comparable category is included*’.⁶⁴

The Court, its predecessor, and the Judges have on occasion been partial to accepting or at least examining the principle of *expressio unius est exclusion alterius* and *a contrario* constructions.⁶⁵ However, recourse to *a contrario* interpretation is not unlimited. An *a contrario* construction is used in a supplementary fashion when recourse to elements of Article 31 VCLT does not lead to a definite answer.⁶⁶ Judge M. Hermann-Otavsky, for instance, had rejected an *a contrario* interpretation on the basis that it could not be supported by the context of the provision being interpreted, its object and purpose and simple logic.⁶⁷

⁶¹ Referring to Ch. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Pedone 1963), pp. 110-2.

⁶² *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility*, I.C.J. Reports 1995, Dissenting Opinion of Judge Shahabuddeen, referring back to *Polish Agrarian Reform and German Minority, Order of 29 July 1933, P.C.I.J. Series A/B, No. 58*, Dissenting Opinion of Judge Anzilotti, final paragraph.

⁶³ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, *Preliminary Objections*, I.C.J. Reports 2016, para. 37. For an exploration on the ICJ’s approach to *a contrario* interpretation, see A.A. Yusuf and D. Peat, ‘*A Contrario* Interpretation in the International Court of Justice’, (2017) 3(1) *Canadian Journal of Comparative and Contemporary Law* 1.

⁶⁴ *Certain Iranian Assets (Iran v. United States of America)*, *Preliminary Objections*, I.C.J. Reports 2019, Separate Opinion of Judge Robinson, para. 9. This would amount to an inversion of the maxim *expressio unius est exclusio alterius*.

⁶⁵ *The S.S. Wimbledon*, P.C.I.J. Series A, No. 1, p. 24; *Railway Traffic between Lithuania and Poland, Advisory Opinion*, P.C.I.J. Series A/B, No. 42, p. 121; *Corfu Channel (United Kingdom v. Albania)*, I.C.J. Reports 1949, Dissenting Opinion by Judge Azevedo, para. 30; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, I.C.J. Reports 1980, para. 40; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1982, Dissenting Opinion of Judge Schwebel, p. 488; *Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Rep. 1986, para. 88.

⁶⁶ *Asylum Case (Colombia v. Peru)*, I.C.J. Reports 1950, Dissenting Opinion of Judge Badawi Pasha.

⁶⁷ *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. the State Of Czechoslovakia)*, P.C.I.J. Series A/B, No. 61, Dissenting Opinion by M. Hermann-Otavsky, p. 257.

Similar limits to or the complementary role of *a contrario* interpretation have been raised in a number of cases with reference to text,⁶⁸ context,⁶⁹ intention,⁷⁰ object and purpose⁷¹ and preparatory work.⁷² In fact, on two occasions the Court has pre-emptively excluded any possible *a contrario* construction of its own judgment.⁷³

The Court has best summarised the above jurisprudence in just a few lines in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* recourse to an *a contrario* interpretation

is only warranted...when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case.⁷⁴

This line of reasoning was once again affirmed in *Certain Iranian Assets*. In that case, Iran argued that measures in violation of immunities of public entities acting *jure imperii* also constituted a violation of the 1955 Treaty of Amity. It based this contention on an *a contrario* reading of a provision of the Treaty that excluded from immunity public owned enterprises engaged in commercial or industrial activities.⁷⁵ The Court rejected Iran's contention by reference to its findings in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*.⁷⁶

Ejusdem generis

The *ejusdem generis* rule refers to a rule of interpretation according to which 'where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those

⁶⁸ *Arrest Warrant of 11 April 2001 (Democratic Republic of Congo v. Belgium)*, I.C.J. Reports 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 38.

⁶⁹ *Continental Shelf (Libya v. Malta)*, I.C.J. Reports 1984, Separate Opinion of Judge Jimenez de Arechaga, para. 10; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, I.C.J. Reports 1973, Joint Separate Opinion by Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda, para. 4.

⁷⁰ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion*, P.C.I.J. Series A/B, No. 44, pp. 37-8.

⁷¹ *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, Separate opinion of Judge de Castro, p. 137; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, I.C.J. Reports 2002, Dissenting Opinion of Judge Franck, para. 33.

⁷² *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion*, I.C.J. Reports 1962, Dissenting Opinion of Judge Moreno Quintana, pp. 248 and 252; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, I.C.J. Reports 1990, Order of 28 February 1990, Dissenting Opinion of Judge Shahabuddeen, p. 34.

⁷³ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004, para. 151; *LaGrand Case (Germany v. United States of America)*, I.C.J. Reports 2001, Declaration of President Guillaume.

⁷⁴ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, I.C.J. Reports 2016, para. 37.

⁷⁵ *Certain Iranian Assets (Iran v. United States of America)*, Preliminary Objections, I.C.J. Reports 2019, para. 63.

⁷⁶ *Ibid*, paras. 64-5.

specifically mentioned'.⁷⁷ The rule has been referred to by Judge Sir Percy Spender in *Northern Cameroons* in order to interpret the terms 'if it cannot be settled by negotiations or other means'. However, the reliance on an *ejusdem generis* construction is the logical result of reference to circumstances surrounding the Agreement's conclusion, to other similar Trusteeship Agreements and to the object and purpose.⁷⁸ So, once again the rule seems to be rather confirmatory of an interpretation arrived at through an ordinary application of the interpretative process of Article 31 VCLT.

Per analogiam

Per analogiam constructions have been brought before the Court on a number of occasions.⁷⁹ The Court has not elaborated on the relevance of such constructions in the interpretative process⁸⁰ and its acceptance or rejection of these constructions will either be left unexplained or be the logical conclusion of the ordinary application of the VCLT or customary rules on interpretation. Arguably, a *per analogiam* construction may have been implicitly in play in *Certain Iranian Assets* where the Court adopted the same interpretation for Article XX, paragraph 1, subparagraph (c) of the Treaty of Amity that it had adopted in earlier cases when dealing with Article XX, paragraph 1, subparagraph (d). It did so, since 'there [were] no relevant grounds on which to distinguish it [ie Article XX, paragraph 1, subparagraph (c)] from Article XX, paragraph 1, subparagraph (d)'.⁸¹

It should be noted that the Court has occasionally used a methodology that bears some resemblance to *per analogiam* interpretation to interpret declarations made under Article 36(2) of its Statute, referring to the domestic law of the declaring state in order to shed light on limits to the compulsory jurisdiction recognised by that State.⁸²

⁷⁷ *Black's Law Dictionary – Free Online Dictionary 2nd edn.*

⁷⁸ *Northern Cameroons (Cameroon v. United Kingdom)*, I.C.J. Reports 1963, Separate Opinion of Judge Sir Percy Spender, p. 91. The Court has also referred to *ejusdem generis* in its *Review of UNAT Judgement No. 158*, however, in that Opinion it simply mentioned that it was the General Assembly that had considered failure to exercise jurisdiction as *ejusdem generis* with exceeding jurisdiction or competence; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1973, paras. 50-1.

⁷⁹ Analogy with rules on diplomatic protection in *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, I.C.J. Reports 1949, p. 182; analogy with previous case-law in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)*, I.C.J. Reports 1970, para. 70 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, I.C.J. Reports 2004, Separate Opinion of Judge Higgins paras. 4-5; analogous application of the 'reasonable time' requirement for withdrawal or termination of treaties to optional clause declarations in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility*, I.C.J. Reports 1984, para. 63; analogous application of VCLT rules to optional clause declarations in *Fisberies Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 46; analogy with immunities for diplomatic agents and Heads of State in *Arrest Warrant of 11 April 2001 (Democratic Republic of Congo v. Belgium)*, I.C.J. Reports 2002, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, para. 14. See also: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion*, I.C.J. Reports 1971, Separate Opinion of Judge de Castro, para. 3; *Continental Shelf (Tunisia/Libya)*, I.C.J. Reports 1982, Separate Opinion of Judge Jiménez de Aréchaga, para. 115.

⁸⁰ Or even further whether they are closer to gap-filling rather than interpretation.

⁸¹ *Certain Iranian Assets (Iran v. United States of America), Preliminary Objections*, I.C.J. Reports 2019, para. 46.

⁸² See in more detail: D. Peat, *Comparative Reasoning in International Courts and Tribunals* (CUP 2019), Ch. 3.

a minore ad majus/ a majore ad minus

This logical rule, which could be considered a more specialised version of the *per analogiam* constructions, has only once been explicitly referred to briefly in *Corfu Channel* in the Dissenting Opinion of Judge Azevedo.⁸³

More recently, it can be argued that these rules of logic were implicitly relevant in the *Bosnia Genocide* case, where the Court when discussing Article I of the Genocide Convention that requires States to prevent genocide from occurring (*a majore* element) concluded that, although the Article ‘does not *expressis verbis* require States to refrain from themselves committing genocide... the effect of Article I is to prohibit States from themselves committing genocide’ (*ad minus* element).⁸⁴ If that were not the case, it ‘would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide’.⁸⁵

Although the Court referred to a number of *intra-* and *praeter-VCLT* interpretative principles or maxims, such as for instance, object and purpose, logic and necessary implication this seems to be a case where the maxim *a minore ad majous* or even *a majore ad minus* (depending on the angle from which one examines the issue) entered the interpretative fray.⁸⁶

5. How do courts and tribunals define key concepts in the interpretative process (eg ordinary meaning, context, object and purpose [multiplicity, selection between a variety of objects and purposes]), supplementary means etc.?

The Court has generally been reticent to explicitly define particular concepts in the general rule of interpretation and the supplementary means of interpretation available under Articles 31 and 32 of the Vienna Convention. Nevertheless, some judgments provide an insight into the Court’s conception of these elements.

Ordinary Meaning

⁸³ The relevant passage goes as follows: ‘It is of small importance that this is a case of a quasi-delict; for the argument *majus ad minus* would fully justify a conclusion (quite in conformity with the *litis contestatio*, or rather special agreement) in which the purpose of the claim is compensation; this becomes even clearer when we compare it with the counterclaim’; *Corfu Channel (United Kingdom v. Albania)*, I.C.J. Reports 1949, Dissenting Opinion by Judge Azevedo, para. 22.

⁸⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, I.C.J. Reports 2007, para. 166.

⁸⁵ *Ibid.*

⁸⁶ ie if one looks at it from the angle of the crime and then concludes that there is a State obligation not to commit the crime then this would be a case of *a majore ad minus*. If one were to examine it from the angle of the obligation to prevent as necessarily implying an obligation not to commit, then this would be a situation of application of an *a minore ad majus* reasoning.

Perhaps the most elusive element of interpretation in the Court's jurisprudence is the concept of ordinary meaning, which played an important role in the Court's reasoning well before the advent of the Vienna Convention rules.⁸⁷

It is clear, however, that the Court only considers ordinary meaning to be the starting point for interpretation. In the words of Richard Gardiner, 'only if it is confirmed by investigating the context and object and purpose, and if on examining all other relevant matters (such as whether an absurd result follows from applying a literal interpretation) no contra-indication is found, is the ordinary meaning determinative'.⁸⁸ In *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, for example, the Court stated that:

An arbitration agreement (*compromis d'arbitrage*) is an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties. In that respect

'the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.' (*Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8.)

The rule of interpretation according to the natural and ordinary meaning of the words employed 'is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.' (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 336.)

These principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point.⁸⁹

In terms of methodology, the Court has rarely explicated how it determines the ordinary meaning of a particular term. In *Aegean Sea Continental Shelf*, the Court referred exceptionally to a dictionary - the *Robert's Dictionnaire* - to support its conclusion that the

⁸⁷ See eg *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, 8.

⁸⁸ R. Gardiner, *Treaty Interpretation* (OUP 2008), p. 166.

⁸⁹ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports 1991, para. 48.

ordinary meaning of the term ‘*notamment*’ was not the narrow understanding of the term proposed by Greece.⁹⁰

The Court’s flexible approach to the determination of ‘ordinary meaning’ can be seen in its definition of the term ‘main channel’ in *Kasikili/Sedudu Island*. In that case, the Court stated that it would ‘seek to determine the meaning of the words ‘main channel’ by reference to the most commonly used criteria in international law and practice, to which the Parties have referred’.⁹¹ The Court cited various scientific dictionaries’ definitions of the ‘main channel’, as well as the approach of an arbitral tribunal to an analogous interpretative issue, to demonstrate that various criteria had been used to determine the ‘main channel’ of a river:

The Court finds that it cannot rely on one single criterion in order to identify the main channel of the Chobe around Kasikili/Sedudu Island, because the natural features of a river may vary markedly along its course and from one case to another. The scientific works which define the concept of ‘main channel’ frequently refer to various criteria: thus, in the *Dictionnaire français d’hydrologie de surface avec équivalents en anglais, espagnol, allemand* (Masson, 1986), the ‘main channel’ is ‘the widest, deepest channel, in particular the one which carries the greatest flow of water’ (p. 66); according to the Water and Wastewater Control Engineering Glossary (Joint Editorial Board Representing the American Public Health Association, American Society of Civil Engineers, American Water Works Association and Water Pollution Control Federation, 1969), the ‘main channel’ is ‘the middle, deepest or most navigable channel’ (p. 197). Similarly, in the *Rio Palena* Arbitration, the arbitral tribunal appointed by the Queen of England applied several criteria in determining the major channel of a boundary river (Argentina-Chile Frontier Case (1966), United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVI, pp. 177-180; International Law Reports (ILR), Vol. 38, pp. 94-98).⁹²

The Court did not follow one of these definitions, but instead determined the ‘main channel’ on the basis of the criteria that the Parties suggested, all of which it purported to take into account.⁹³ This approach was criticized by Judge Higgins, who was of the view that:

although there are commonly used international law criteria for understanding, for example, the term ‘thalweg’, the same is not true for the term ‘main channel’. And it seems that no ‘ordinary meaning’ of this term exists, either in international law or in hydrology, which allows the Court to suppose that it is engaging in such an exercise. The analysis on which the Court has embarked is in reality far from an interpretation of words by

⁹⁰ *Agean Sea Continental Shelf (Greece v. Turkey)*, I.C.J. Reports 1978, para. 54. The Court also referred to a dictionary definition in *Oil Platforms (Iran v. United States of America)*, Preliminary Objections, I.C.J. Reports 1996, para. 45.

⁹¹ *Kasikili/Sedudu Island (Botswana/Namibia)*, I.C.J. Reports 1999, para. 27.

⁹² *Ibid.*, para. 30.

⁹³ *Ibid.*

reference to their ‘ordinary meaning’. The Court is really doing something rather different.⁹⁴

Despite citing dictionary definitions in *Aegean Sea Continental Shelf* and *Kasikili/Sedudu*, the Court has generally shown reticence to rely on dictionary definitions, recognizing that they often provide multiple meanings of a word that are context-dependent. This is stated particularly clearly in *Avena*, in which the Court stated that ‘[t]he Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term “without delay” (and also of “immediately”). It is therefore necessary to look elsewhere for an understanding of this term’.⁹⁵

In the *Whaling* case, the Court followed a similar approach to that in *Kasikili/Sedudu Island*, regarding the *gravitas* of scientific definitions in the determination of ‘ordinary meaning’. The main point of contention in the *Whaling* case, was the meaning of the terms ‘scientific research’ as used in the International Whaling Convention. Both parties adduced conflicting expert testimony about whether and under what conditions scientific research could involve the killing of whales.⁹⁶ In the end, the Court accorded little weight to the definitions procured by the experts and found that ‘[t]heir conclusions as scientists ... must be distinguished from the interpretation of the Convention, which is the task of this Court’.⁹⁷

Finally, the ordinary meaning of a term seemingly bears some relationship to what the Court has labelled the ‘generic’ nature of a term. The concept of a ‘generic term’ first appeared in the *Aegean Sea Continental Shelf* case, in which the interpretation of a Greek reservation to the 1928 General Act for Pacific Settlement of International Disputes – which excepted disputes that related to ‘the territorial status of Greece’ – was at issue. The Court considered that:

the nature of the word ‘status’ itself indicates, it was a generic term which in the practice of the time was understood as embracing the integrity and frontiers, as well as the legal régime, of the territory in question...Once it is established that the expression ‘the territorial status of Greece’ was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.⁹⁸

The concept of a ‘generic term’ was recently used in the *Dispute regarding Navigational and Related Rights* (case between Costa Rica and Nicaragua, in which the Court was called upon to interpret the term *commercio*). The Court reasoned that: ‘there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have

⁹⁴ *Ibid*, Declaration of Judge Higgins, para. 1.

⁹⁵ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004, para. 48.

⁹⁶ *Whaling in the Antarctic (Australia v. Japan; New Zealand (intervening))*, Judgment, I.C.J. Reports 2014, para. 82.

⁹⁷ *Ibid*.

⁹⁸ *Aegean Sea Continental Shelf (Greece v. Turkey)*, I.C.J. Reports 1978, paras. 75, 77.

been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law'.⁹⁹ Indeed, it is notable that the Court based its reasoning on the 'generic character' of the term, rather than finding such confirmation in the manifest intentions of the Parties:

where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.¹⁰⁰

Context

The Court's recent judgment on preliminary objections in *Somalia v. Kenya* is notable for the clarity with which it sets out the Court's understanding of the interaction between the three elements of the general rule of interpretation (ordinary meaning, context, and object and purpose), as well as its conception of context. In that judgment, the Court stated that the three elements of the general rule 'are to be considered as a whole',¹⁰¹ reflecting the ILC's 'crucible' approach to interpretation.¹⁰² However, perhaps more interestingly, it continued to state that it could not determine the meaning of the provision at issue without first analysing its context and the object and purpose of the Memorandum of Understanding (MOU).¹⁰³ In this context, it stated that the 'text of the MOU as a whole...provides the context in which any particular paragraph should be interpreted and gives insight into the object and purpose' of the treaty.¹⁰⁴

Indeed, context has played a pivotal role in the Court's interpretation in some cases. One illustrative example is the *IMCO* Advisory Opinion, in which the Court gave weight to the context in which a particular word was used within the provision itself. In that case, the Court was called upon to interpret a provision which provided that 'the Maritime Safety Committee shall consist of fourteen members elected by the Assembly from the Members...of which not less shall be the largest ship-owning nations'. Some States contended that the word 'elected' implied free-choice amongst any member States. The Court disagreed, stating that:

The meaning of the word 'elected' in the Article cannot be determined in isolation by recourse to its usual or common meaning and attaching that

⁹⁹ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, para. 64.

¹⁰⁰ *Ibid.*, para. 66.

¹⁰¹ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, I.C.J. Reports 2017, para. 64.

¹⁰² ILC, 'Sixth Report on the Law of Treaties by Sir Humphrey Waldock *Special Rapporteur*' reproduced in *Yearbook of the International Law Commission 1966, Vol. II*, p. 95, para. 4.

¹⁰³ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, I.C.J. Reports 2017, para. 65.

¹⁰⁴ *Ibid.*, para. 65. The Court arguably took a broader approach to context in the *South West Africa* cases; see Thirlway (n1), p. 283.

meaning to the word where used in the Article. The word obtains its meaning from the context in which it is used. If the context requires a meaning which connotes a wide choice, it must be construed accordingly, just as it must be given a restrictive meaning if the context in which it is used so requires.¹⁰⁵

The Court thus concluded that ‘elected’ was to be understood as qualified by reference to the phrase ‘largest ship-owning nations’.

Another example where the reliance on context becomes critical during the interpretative process, especially when the Court is confronted with the silence of the treaty, is the *Bosnia Genocide* case. In this case, the question that arose was whether the Genocide Convention prohibited States from engaging in acts constituting genocide and ancillary acts of genocide as described in Article III of the Convention. The Court concluded that although ‘such an obligation [was] not expressly imposed by the actual terms of the Convention’,¹⁰⁶ nonetheless it did arise by necessary implication from Article I of the Convention.¹⁰⁷ The Court corroborated this finding by reference to the compromissory clause of the Convention which granted jurisdiction to the Court, *inter alia*, for ‘those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III’.¹⁰⁸

Object and Purpose

As noted above, the Court has recently stated that the object and purpose of a treaty may be discerned from the surrounding text of the agreement,¹⁰⁹ including, but not limited to, the title of the treaty and the preamble.¹¹⁰ This approach reflects the Court’s reasoning in its prior judgments. The *Oil Platforms* case provides an illustrative example. In that case, the Court determined that the object and purpose of the 1955 Treaty of Amity, Economic Relations and Consular Relations between the U.S. and Iran was ‘not to regulate peaceful and friendly relations between the two States in a general sense [as Iran contended]’ but rather by providing specific obligations for the effective implementation of such relations.¹¹¹ This object and purpose was induced from both the Preamble and the substantive articles of the Treaty.¹¹²

¹⁰⁵ *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion*, I.C.J. Reports 1960, p. 158.

¹⁰⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits*, I.C.J. Reports 2007, para. 166.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, para. 169.

¹⁰⁹ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections*, I.C.J. Reports 2017, para. 65.

¹¹⁰ *Ibid.*, para. 70. See also *Certain Iranian Assets (Iran v. United States of America), Preliminary Objections*, I.C.J. Reports 2019, para. 57; *Jadhav (India v. Pakistan)*, I.C.J. Reports 2019, para. 74.

¹¹¹ *Oil Platforms (Iran v. United States of America), Preliminary Objections*, I.C.J. Reports 1996, para. 27.

¹¹² See also *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, I.C.J. Reports 2002, para. 51 (stating that the object and purpose can be determined by reference to the preamble and the ‘very structure’ of the treaty).

Again, the Court's recent judgment in *Somalia v. Kenya* also provides an interesting case study. In that case, the Court had to determine whether the purpose of the MOU was to provide a binding settlement of dispute resolution for the two States' maritime boundary dispute. In order to support its conclusion that the MOU did not include such a mechanism, the Court drew on a wide range of interpretative materials including the subsequent practice of the Parties, the similarity between the text of the MOU and Article 83 of UNCLOS, and the *travaux préparatoires* in order to conclude that the MOU could not have been intended to establish a binding method of dispute settlement. This illustrates the fluidity with which the different elements of interpretation are treated by the Court.

As a final point regarding object and purpose it has to be noted that the Court when interpreting a provision has a tendency to refer to the object and purpose of the treaty, although it has, on occasion referred to the object and purpose of the Article under interpretative consideration.¹¹³ Interestingly, in *LaGrand* the Court referred to in the same paragraph both to the object and purpose of the Statute and of the specific Article being interpreted (Article 41):

The object and purpose of *the Statute* is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from *the object and purpose of the Statute*, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding *would be contrary to the object and purpose of that Article*.¹¹⁴

Subsequent agreement/practice

The Court has frequently had recourse to the subsequent agreement and subsequent practice of the Parties under Article 31(3)(a) and (b) of the Vienna Convention, although it has not explicitly defined those terms.¹¹⁵ In *Kasikili/Sedudu Island*, the Court seemed to

¹¹³ See for instance, *LaGrand Case (Germany v. United States of America)*, I.C.J. Reports 2001, para. 102; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, I.C.J. Reports 2004, para. 102.

¹¹⁴ *LaGrand Case (Germany v. United States of America)*, I.C.J. Reports 2001, para. 102 (emphasis added).

¹¹⁵ See further *Kasikili/Sedudu Island (Botswana/Namibia)*, I.C.J. Reports 1999, para. 50, and the cases cited therein.

adhere to the definitions of subsequent agreement and practice outlined by the ILC in its commentary on the draft Convention on the Law of Treaties:

In relation to ‘subsequent agreement’ as referred to in subparagraph (a) of this provision, the International Law Commission, in its commentary on what was then Article 27 of the draft Convention, stated the following: ‘an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation’ (Yearbook of the International Law Commission, 1966, Vol. II, p. 221, para. 14). As regards the ‘subsequent practice’ referred to in subparagraph (b) of the above provision, the Commission, in that same commentary, indicated its particular importance in the following terms: ‘The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals.’ (Op. cit., p. 241, para. 15.)¹¹⁶

The Court’s analysis of the facts in that case reiterated this interpretation of subsequent practice, highlighting that it would only be considered relevant insofar as it manifested an agreement on the part of the Parties.¹¹⁷ Interestingly, however, the Court also held that three surveys carried out by the Parties, which identified the ‘main channel’ of the river, confirmed its own conclusion regarding the main channel:

The Court finds that these facts, while not constituting subsequent practice by the parties in the interpretation of the 1890 Treaty, nevertheless support the conclusions which it has reached by interpreting Article III, paragraph 2, of the 1890 Treaty in accordance with the ordinary meaning to be given to its terms.¹¹⁸

Another example of recourse to subsequent practice is the *Application of the Interim Accord* case (*FYROM v. Greece*),¹¹⁹ in which the Court referred to the failure of the Respondent to object to Applicant’s use of ‘Republic of Macedonia’ as subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention in the application of the Interim Accord between the two parties.¹²⁰ This was used as a means of confirming a prior

¹¹⁶ *Ibid*, para. 49.

¹¹⁷ See in particular *ibid*, para. 63 (‘Those events cannot therefore constitute “subsequent practice in the application of the treaty [of 1890] which establishes the agreement of the parties regarding its interpretation” (1969 Vienna Convention on the Law of Treaties, Art. 31, para. 3 (b)). *A fortiori*, they cannot have given rise to an “agreement between the parties regarding the interpretation of the treaty or the application of its provisions” (*ibid.*, Art. 31, para. 3 (a))’).

¹¹⁸ *Ibid*, para. 80.

¹¹⁹ *Application of the Interim Accord of 13 September 1995 (former Yugoslav Republic of Macedonia v. Greece)*, Judgment, *I.C.J. Reports 2011*, p. 644.

¹²⁰ *Ibid*, paras. 99-101.

interpretative conclusion of the Court that was made on the basis of the elements enumerated in Article 31(1) of the Vienna Convention.¹²¹

A slightly different use of subsequent practice arose in *Somalia v. Kenya*, where the Court held that that Kenya's own conduct of engaging in negotiations prior to the issuance of recommendations by the Commission on the Limits of the Continental Shelf demonstrated that 'Kenya did not consider itself bound to wait for those recommendations before engaging in negotiations on maritime delimitation', as Kenya had argued it was obliged to do under the terms of the MOU.¹²² The Court neither cited Article 31(3)(b) of the VCLT, nor did it enquire whether an agreement of the Parties underpinned this subsequent practice. Rather, Kenya's actions were used to estop it from advancing a particular claim.

Relevant Rules of International Law

Although the Court has not defined what it considers to be the 'relevant rules of international law applicable in the relations between the parties', the *Somalia v. Kenya* judgment again provides an interesting case study.¹²³ In the relevant treaty, the paragraph that was at issue was virtually identical to Article 83 of UNCLOS. The Court reasoned that:

Pursuant to Article 31, paragraph 3 (c) of the Vienna Convention, '[a]ny relevant rules of international law applicable in the relations between the parties' should be taken into account, together with the context. In this case, both Somalia and Kenya are parties to UNCLOS, which is expressly mentioned in the MOU. UNCLOS therefore contains such relevant rules.¹²⁴

This passage suggests that other rules of international law might be particularly relevant if express reference is made to them in the treaty being interpreted. Furthermore, the Court continued to state that: 'In line with Article 31, paragraph 3 (c), of the Vienna Convention, and particularly given the similarity in wording between the sixth paragraph of the MOU and Article 83, paragraph 1, of UNCLOS, the Court considers that it is reasonable to read the former in light of the latter'.¹²⁵ This sentence suggests that a similarity in wording might also constitute a reason why the Court may look to another rule of international law when interpreting a particular provision.¹²⁶

One particularly interesting approach to Article 31(3)(c) is the Court's judgment on the merits in *Oil Platforms*. In that case, the Parties disagreed about the relationship between

¹²¹ *Ibid*, paras. 98 and 101.

¹²² *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, I.C.J. Reports 2017, para. 92.

¹²³ See also *Oil Platforms (Iran v. United States of America)*, Merits, I.C.J. Reports 2003, para. 41.

¹²⁴ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, I.C.J. Reports 2017, para. 89.

¹²⁵ *Ibid*, para. 91.

¹²⁶ In more detail on linguistic similarity or 'proximity' as one of the determinative factors of relevance for the purposes of Article 31(3)(c) see: P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill/Martinus Nijhoff 2015), Ch. 1.

self-defence and Article XX(1)(d) of the Treaty of Amity of 1955, which provided that the Treaty did not 'preclude the application of measures...necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests'. The question before the Court was whether this provision simply enshrined the rules of international law on the use of force, or instead provided that the Parties may use force in different circumstances (as the U.S. contended). The Court stated that it was obliged to take account of any relevant rules of international law under Article 31(3)(c) VCLT and thus that:

The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty...The Court is therefore satisfied that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty...extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law.¹²⁷

This approach was criticised by Judge Higgins, who was of the view that:

The Court has...not interpreted Article XX, paragraph 1 (d) by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law. It has replaced the terms of Article XX, paragraph 1 (d), with those of international law on the use of force and all sight of the text of Article XX, paragraph 1 (d), is lost. Emphasizing that 'originally' and 'in front of the Security Council' (paras. 62, 67, 71 and 72 of the Judgment) the United States had stated that it had acted in self-defence, the Court essentially finds that 'the real case' is about the law of armed attack and self-defence. This is said to be the law by reference to which Article XX, paragraph 1 (d), is to be interpreted, and the actual provisions of Article XX, paragraph 1 (d), are put to one side and not in fact interpreted at all.¹²⁸

The Court's approach in *Oil Platforms* seems to have been moderated in subsequent judgments. In *Immunities and Criminal Proceedings* case, the bone of contention between the parties was the interpretation of Article 4(1) of the UN Convention against Transnational Organized Crime, and whether the rules of State immunity were incorporated in it. Although the Court acknowledged that rules of customary international law on State immunity derived from the principle of sovereign equality, it

¹²⁷ *Oil Platforms (Iran v. United States of America)*, Merits, I.C.J. Reports 2003, para. 41.

¹²⁸ *Ibid*, Separate Opinion of Judge Higgins, para. 49.

stressed that the terms of Article 4(1) referred only to the latter principle.¹²⁹ After referring to the context of the provision, the *travaux préparatoires* and to similar provisions of other treaties, it concluded that the rules on State immunity were not incorporated to Article 4(1).¹³⁰ Several judges, in a Joint Dissenting Opinion, criticised the apparent, in their view, inconsistency in the Court's reasoning, and were of the view that not only should there have been reference to general international law, but also that such reference would have revealed the strong connection between sovereign equality and immunity, and thus would have led the Court to the correct, again in their view, conclusion that a violation of state immunity is also at the same time a violation of sovereign equality.¹³¹

Supplementary Means of Interpretation

The Court has taken a relatively flexible approach in relation to the supplementary means of interpretation that are permissible under Article 32 of the VCLT.¹³² *Somalia v. Kenya* again provides an illustrative example of this flexibility. The MOU in that case was drafted by Ambassador Longva of Norway in the context of assistance provided by Norway to a number of African coastal States related to their submissions to the Commission on the Limits of the Continental Shelf before the deadline established by States Parties to UNCLOS. Only minor changes were made to the agreement by the Parties themselves. The Court was of the view that the fact that the MOU was drafted and concluded just before the deadline for submission of information to the CLCS 'tend[ed] to confirm that the MOU was concerned with the CLCS process'.¹³³ Moreover, the Court placed importance on the fact that neither Ambassador Longva (in a presentation given by at the Pan African Conference on Maritime Boundary Delimitation and the Continental Shelf), nor Norway (in a Note Verbale to the Secretariat of the UN) noted that the MOU specified a particular method of settlement for the Parties' maritime dispute (as Kenya had contended).¹³⁴

Two elements of this reasoning are notable. First, the supplementary means of interpretation drawn on by the Court did not emanate from one of the Parties to the MOU. Instead, the Court reasoned that as Norway had drafted the MOU, it was Norway's understanding of the MOU more broadly that was relevant. This was particularly important given the absence of any *travaux* from the adoption of the MOU by the Parties. Second, the Court relied on the *absence* of support for Kenya's argument in

¹²⁹ *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, I.C.J. Reports 2018*, para. 93.

¹³⁰ *Ibid*, paras. 94-5 and 99-102.

¹³¹ *Ibid*, paras. 27-8.

¹³² For recent examples of recourse to the *travaux préparatoires* by the Court, see *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, I.C.J. Reports 2018*, paras. 96-8; *Jadhav (India v. Pakistan), I.C.J. Reports 2019*, paras. 76-86.

¹³³ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, I.C.J. Reports 2017*, para. 102.

¹³⁴ *Ibid*, paras. 103-4.

the *travaux* to confirm its interpretation.¹³⁵ In this context, the Court stated that ‘were [the sixth] paragraph [of the MOU] to have the potentially far-reaching consequences asserted by Kenya, it would in all likelihood have been the subject of some discussion’.¹³⁶ This demonstrates that the purpose for which the *travaux* are used – and the elements of the *travaux* on which that the Court places importance – depend on the particular circumstances of the case at hand.

In *Equatorial Guinea v. France*, the Court, while interpreting a provision of the 2000 Convention against Transnational Organized Crime, consulted the commentary to the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, from which the relevant provision had been transposed.¹³⁷ Although the Court did not characterise or categorise *expressis verbis* this reference to a commentary of a different treaty it would appear to have been done in a confirmatory fashion alluding to Article 32 VCLT.

For reasons of avoiding duplication, some additional points on preparatory work and supplementary means can also be found in Section II.1.

6. Is there a difference between the interpretative approach to treaties and that to unilateral acts of States and/or acts of international organizations?

Unilateral Acts and Optional Clause Declarations

The Court has occasionally dealt with interpretation of unilateral acts of States. The vast majority of these instances revolves around the interpretation of the declarations made under Article 36(2) of the ICJ Statute.

Although the interpretation of treaties bears striking similarities with that of unilateral acts of States, the Court has in no unclear terms explicated its position on the matter:

*The regime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties ... the provisions of that Convention may only apply analogously to the extent compatible with the sui generis character of the unilateral acceptance of the Court’s jurisdiction.*¹³⁸

¹³⁵ See also *Oil Platforms (Iran v. United States of America)*, *Preliminary Objections*, I.C.J. Reports 1996, paras. 28-9; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility*, I.C.J. Reports 1995, para. 41.

¹³⁶ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, *Preliminary Objections*, I.C.J. Reports 2017, para. 103.

¹³⁷ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Preliminary Objections*, I.C.J. Reports 2018, paras. 99-101.

¹³⁸ *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 46 (emphasis added); see also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Preliminary Objections*, I.C.J. Reports 1998, para. 30; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, I.C.J. Reports 1984, para. 63.

The Court has further elaborated its approach to interpretation of optional clause declarations in a number of decisions. Firstly, regarding the interpretative process as whole it has noted that: '[a]ll elements... are to be interpreted as a unity, applying the same legal principles of interpretation throughout'.¹³⁹

Furthermore, and affirming a textual approach to interpretation, such declarations 'must be interpreted as [they stand], having regard to the words actually used'.¹⁴⁰ Despite this,

the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text.¹⁴¹

In *Right of Passage over Indian Territory* the Court supplemented the requirement to refer to the actual wording with the need to refer also to applicable principles of law.¹⁴²

Furthermore, and since it is unilateral acts that we are dealing with, text is not the only element to be considered. In fact, the Court by its own admission 'has not hesitated to place a certain emphasis on the intention of the depositing State'.¹⁴³ This intention can be deduced from the text of the declaration, its context and any relevant evidence surrounding the 'circumstances of its preparation and the purposes intended to be served'.¹⁴⁴ In the *Fisberies Jurisdiction* case such evidence examined were ministerial statements, parliamentary debates, legislative proposals and press communiqués.

Regarding maxims/canons not explicitly mentioned in the VCLT, these also feature to varying degrees in the interpretation of optional clause declarations. As stated in *Fisberies Jurisdiction*

[the principle of effectiveness] has an important role in the law of treaties and in the jurisprudence of this Court; however, what is required in the first place for a reservation to a declaration made under Article 36, paragraph 2, of the

¹³⁹ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, *Preliminary Objections*, I.C.J. Reports 2017, para. 118, referring to *Fisberies Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 44; This includes good faith; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, I.C.J. Reports 1984, para. 63.

¹⁴⁰ *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *Preliminary Objections*, I.C.J. Reports 1952, p. 105; similarly, *Certain Norwegian Loans (France v. Norway)*, *Judgment*, I.C.J. Reports 1957, p. 27; *Temple of Preah Vihear (Cambodia v. Thailand)*, *Preliminary Objections*, I.C.J. Reports 1961, pp. 32-3; *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction*, I.C.J. Reports 2000, para. 42.

¹⁴¹ *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *Preliminary Objections*, I.C.J. Reports 1952, p. 104.

¹⁴² *Right of Passage over Indian Territory (Portugal v. India)*, *Preliminary Objections*, I.C.J. Reports 1957, p. 142; an echo perhaps of Article 31(3)(c) VCLT; this should be contradistinguished with the suggestion made by Spain in *Fisberies Jurisdiction*, that declarations should be interpreted taking into account 'the legality under international law of the matters exempted from the jurisdiction of the Court'. The Court explicitly denied the affirmation of any such interpretative rule in its jurisprudence. *Fisberies Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 54; also referring to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, I. C. J. Reports 1984, para. 59.

¹⁴³ *Fisberies Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 48; similarly, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *Preliminary Objections*, I.C.J. Reports 1952, p. 107. See further Peat (n83), Ch. 3.

¹⁴⁴ *Fisberies Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 49.

Statute, is *that it should be interpreted in a manner compatible with the effect sought by the reserving State*.¹⁴⁵

This was reaffirmed most recently in *Maritime Delimitation in the Indian Ocean*.¹⁴⁶ It suggests that the principle of effectiveness, or at least the version which is inextricably linked to the intention of the State,¹⁴⁷ forms also part of the interpretative tools that the judge can use when interpreting optional clause declarations.

In *Phosphates in Morocco* there is a subtle reference to the *in dubio mitius* principle, although it strongly connects it with the intention of the parties rather than as a self-standing principle of interpretation, and further the Court relegates it to a supplementary role, as a tool of resolving doubt when the latter still exists despite the application of the classical elements of interpretation (text, intention, object and purpose etc.).¹⁴⁸ Similar references to a restrictive interpretation can be found in *Nuclear Tests* and *Frontier Dispute*.¹⁴⁹

In *Fisheries Jurisdiction*, in relation to the *contra proferentem* rule, the Court distinguished between interpretation of contractual provisions and that of unilateral declarations. Whereas in the former the rule could have a role to play the Court was of the opinion that due to the particular character of unilateral declarations that the ‘rule has no role to play in this case in interpreting the reservation contained in the unilateral declaration made by Canada’.¹⁵⁰

An interesting distinction between the interpretation of unilateral acts and that of optional clause declarations may be hinted at drawing from the language employed by the Court. In *Nuclear Tests*, the Court enunciated that ‘[i]t is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced’.¹⁵¹ In subsequent judgments, the Court reiterated this finding in the following terms: ‘in order to determine the legal effects of a statement of a person representing the state, one must “examine its actual content as well as the circumstances in which it was made”’.¹⁵² Similarly, in the *Frontier Dispute* case, the Court emphasized that ‘[i]n order to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act

¹⁴⁵ *Ibid*, para. 52.

¹⁴⁶ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, *Preliminary Objections*, I.C.J. Reports 2017, para. 118.

¹⁴⁷ See in more detail above Section I.4.

¹⁴⁸ *Phosphates in Morocco (Italy v. France)*, *Judgment of 14 June 1938*, P.C.I.J. Series A/B, No. 74, pp. 23-4.

¹⁴⁹ ‘[W]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for’; *Nuclear Tests (Australia v. France; New Zealand v. France)*, I.C.J. Reports 1974, para. 47. This is even more so in the case where the statement is ‘not directed to any particular recipient’; *Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Rep. 1986, para. 39; see also ILC, ‘Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto - 2006’ reproduced in *Yearbook of the International Law Commission 2006, Vol. II(2)*, Guiding Principle 7, Commentary – para. 2 (Guiding Principles).

¹⁵⁰ *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 51.

¹⁵¹ *Nuclear Tests (Australia v. France; New Zealand v. France)*, I.C.J. Reports 1974, para. 51.

¹⁵² *Obligation to Negotiate Sovereign Access to the Pacific Ocean (Bolivia v. Chile)*, *Merits*, I.C.J. Reports 2018, para. 146 quoting *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility*, I.C.J. Reports 2006, para. 49.

occurred'.¹⁵³ These pronouncements strongly suggest that, unlike the process of treaty interpretation, the circumstances of occurrence of the unilateral act are almost of the same level of import if not completely on par from an interpretative perspective with their actual substance.

This seems to be reinforced by the seemingly intentional tendency of the Court to avoid using the same language or referring to these *dicta* when dealing with the interpretation of optional clause declarations or reservations to treaties,¹⁵⁴ and the opposite equally holds true.¹⁵⁵ This is of import as it seems to suggest a methodological distinction between the identification of the legal effects of a unilateral declaration and the interpretation of a unilateral declaration whose legal effects are undisputed.

Resolutions of International Organizations

Regarding interpretation of acts of international organizations, the prime example is that of interpretation of Security Council Resolutions. The PCIJ in the *Jaworzina Advisory Opinion* held that 'it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it'.¹⁵⁶ However, both the PCIJ and the ICJ have on occasion given a glimpse into what they consider to be the elements to be taken into account during the interpretation of such Resolutions.

In this context the main judicial authority is a short passage taken from the *Namibia Advisory Opinion*.

*The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.*¹⁵⁷

This passage although not making reference to rules of interpretation *eo ipso*, nonetheless draws attention to four elements in particular that are in the Court's view of extreme import for the interpretative process. These elements are also reflected in the VCLT.

¹⁵³ *Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Rep. 1986, para. 40

¹⁵⁴ cf eg *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 49.

¹⁵⁵ cf *Nuclear Tests (Australia v. France; New Zealand v. France)*, I.C.J. Reports 1974, para. 51; *Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Rep. 1986, para. 40; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, I.C.J. Reports 2006, para. 49.

¹⁵⁶ *Jaworzina Advisory Opinion*, P.C.I.J. Series B, No. 8, p. 37.

¹⁵⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion*, I.C.J. Reports 1971, p. 53 (emphasis added); of interest is also the analysis in: R. Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions Are Binding under Article 25 of the Charter?' (1972) 21 ICLQ 270.

The ICJ was somewhat more explicit in the *Kosovo Advisory Opinion* where although it referred to the VCLT rules on treaty interpretation it expounded on the difference in nature of Security Council Resolutions and how this may affect the elements to be taken into account, and the interpretative *gravitas* to be accorded to them.

Before continuing further, the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 54, para. 116), irrespective of whether they played any part in their formulation. *The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.*¹⁵⁸

We can supplement the above passage by reversing the arrow of time and looking back at the jurisprudence of the PCIJ where in 1931 the Court in its Advisory Opinion on *Access to German Minority Schools in Upper Silesia*, in interpreting a Council of the League of Nations Resolution of 12 March 1927, attempted to reveal the Council's intention by referring to a subsequent relevant Resolution.¹⁵⁹ This could be considered as a corollary of the 'subsequent practice' to be found in Article 31 of the VCLT.

Building on these passages, various authors have suggested a number of approaches to the interpretation of decisions of international organizations, the common denominator being a *mutatis mutandis* application of the VCLT rules, albeit with varying degrees of *gravitas* on its main elements.¹⁶⁰

¹⁵⁸ *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, para. 94 (emphasis added).

¹⁵⁹ *Access to German Minority Schools in Upper Silesia, Advisory Opinion*, P.C.I.J. Series A/B, No. 40, p. 18.

¹⁶⁰ For instance, whether intention should be regarded as of higher import than textual interpretation; in more detail on the various constructions put forward, see: E. Papastavridis, 'Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis' (2007) 56/1 ICLQ 83; M. Wood, 'The Interpretation of Security Council Resolutions' (1998) 2 Max Planck Yearbook of United Nations Law 73; M. Bos, 'The Interpretation of Decisions of International Organisations' (1981) 28 NILR 1.

7. How do courts and tribunals respond to multiple authentic and conflicting texts of a treaty (or any other instrument)? How has Art. 33 VCLT been employed in practice? Does the procedure followed by courts and tribunals differ from that of Art. 33 VCLT?

The leading judgment on the application of Article 33 is the judgment of the Court in the merits phase of the *LaGrand* case. In that case, the Court had issued provisional measures, ordering the U.S. to stay the execution of a German national pending the outcome of the final decision on the merits. This national was executed prior to the merits phase of the case in contravention of the Court's Order of provisional measures. Germany claimed that such an order created international legal obligations for the U.S. and as such a breach of the provisional measures entailed the latter's responsibility. The question therefore before the Court was whether provisional measures created binding obligations, a question that in its view 'essentially concern[ed] the interpretation of Article 41' of the Court's Statute.¹⁶¹ The Court analysed the English and French versions of the Court's Statute,¹⁶² finding that the two versions differed in relation to the imperative character of provisional measures. As a result of this divergence, it invoked Article 33(4) VCLT, according to which 'when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'. The Court reasoned that the object and purpose of the Statute was to enable the Court to fulfil 'the basis function of judicial settlement of international disputes' and that the 'object and purpose' of Article 41 was 'to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court'.¹⁶³

II. Process-related Issues/Questions

1. *The variety of materials used during the interpretative process and their probative value (eg dictionaries, commentaries, books, statements etc.)*

Although the use of publications to assist in the interpretative process was and remains a common practice in the Separate and Dissenting Opinions of Judges of the PCIJ and ICJ in order to bolster their findings, the Courts were much more cautious. However, there have been cases where both the PCIJ and the ICJ have found recourse to such material useful. One example of such material is dictionaries, which the Court resorts to in order to establish the 'ordinary meaning' of the terms under interpretation.

The PCIJ in its 1922 Advisory Opinion on *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in*

¹⁶¹ *LaGrand Case (Germany v. United States of America)*, I.C.J. Reports 2001, para. 99.

¹⁶² It should be noted that the Court did not refer to the equally authentic versions of the Court's Statute in the other official languages of the United Nations (in particular, the Chinese, Russian, and Spanish versions were cited by Germany).

¹⁶³ *LaGrand Case (Germany v. United States of America)*, I.C.J. Reports 2001, para. 102.

Agriculture in order to identify the content of the terms ‘industry’ and ‘industrial’ had recourse to the *French dictionary by Littré* and the *Oxford Dictionary*.¹⁶⁴

More recently, in *Oil Platforms*, the Court resorted to the *Oxford English Dictionary* in order to demonstrate that

[t]he word ‘commerce’ is not restricted in ordinary usage to the mere act of purchase and sale; it has connotations that extend beyond mere purchase and sale to include ‘the whole of the transactions, arrangements, etc., therein involved’ (The Oxford English Dictionary, 1989, Vol. 3, p. 552).¹⁶⁵

Furthermore and in order to demonstrate that the legal ‘ordinary meaning’ flowed along the same lines it also made reference to legal dictionaries, namely *Black’s Law Dictionary*, and the *Dictionnaire de la terminologie du droit international*, the latter having been produced under the authority of a former president of the ICJ (Basdevant).¹⁶⁶

However, recourse to dictionaries does not always clarify the situation as was the case in *Avena* where the Court observed ‘that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term “without delay” (and also of “immediately”’). It is therefore necessary to look elsewhere for an understanding of this term’.¹⁶⁷ An example of such a different direction of drawing inferences regarding the ordinary meaning of a term is international reports. In *Oil Platforms*, for instance, the Court referred to the UN Secretary General’s Report entitled ‘*Progressive Development of the Law of International Trade*’.¹⁶⁸

Another set of documents that features in the interpretative process of the Court is the Yearbooks of the International Law Commission (ILC), particularly references to Commentaries of Draft Codes and Articles prepared by the ILC, which sometimes formed the basis of binding treaties. For instance, the Court has referred to the *Draft Articles on Jurisdictional Immunities of States and their Property*¹⁶⁹ ¹⁷⁰ the *Draft Code of Crimes against the Peace and Security of Mankind*,¹⁷¹ ¹⁷² and the *Draft Articles on the Law of Treaties*.¹⁷³ Where exactly within the rubric of Articles 31 and 32 of the VCLT these documents fall is not always clarified by the Court. The ILC itself, in a somewhat ‘meta’ fashion, had addressed this question during the discussions surrounding what would become Article 32 VCLT. After some debate on the issue, the members of the ILC seemed to lean

¹⁶⁴ *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, Advisory Opinion, P.C.I.J. Series B, No. 2*, paras. 41-5.

¹⁶⁵ *Oil Platforms (Iran v. United States of America), Preliminary Objections, I.C.J. Reports 1996*, para. 45.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Avena and Other Mexican Nationals (Mexico v. United States of America), I.C.J. Reports 2004*, para. 84.

¹⁶⁸ *Oil Platforms (Iran v. United States of America), Preliminary Objections, I.C.J. Reports 1996*, para. 46.

¹⁶⁹ Specifically, what became Article 12 of the Convention; reproduced in *Yearbook of the International Law Commission, 1991, Vol. II(2)*, p. 45, para. 8.

¹⁷⁰ *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening) Judgment, I.C.J. Reports 2012*, para. 64.

¹⁷¹ *Yearbook of the International Law Commission, 1996, Vol. II(2)*, p. 44, para. 5.

¹⁷² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, I.C.J. Reports 2007*, para. 186.

¹⁷³ Which were used as a template for the text of the 1969 Vienna Convention on the Law of Treaties; *Yearbook of the International Law Commission, 1966, Vol. II*, p. 251.

towards considering the ILC discussions and commentaries as preparatory work of a second order.¹⁷⁴

The *Jadhav* case seems to confirm this, as the Court examined the discussions within the ILC on the topic ‘consular intercourse and immunities’ under the rubric of *travaux préparatoires* of Article 36 of the Vienna Convention on Consular Relations,¹⁷⁵ And cited explicitly Article 32 VCLT.¹⁷⁶

The evidentiary value to be accorded to ILC documents can lie anywhere on the spectrum between absolute adherence and total rejection, and will largely depend on the circumstances of each case. For instance, in *Jurisdictional Immunities*, the ICJ relied on the ILC’s commentary to its Draft Articles on Jurisdictional Immunities of States and their Property according to which the provision at issue did not apply to ‘situations of armed conflict’.¹⁷⁷ The Court read this caveat into the UN Convention on Jurisdictional Immunities of States and their Property, notwithstanding the fact that the text of the Convention did not provide for such a qualification *expressis verbis*.¹⁷⁸

On the other end of the spectrum is the *Construction of a Road* case. There, Nicaragua contended that Costa Rica’s works breached the ‘no significant harm’ customary rule.¹⁷⁹ Nicaragua, invoked the ILC’s Commentary to Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, to define ‘significant harm’ as ‘any detrimental ... impact susceptible of being measured’.¹⁸⁰ The Court this definition – as ‘unfounded’.¹⁸¹ Although, of course, this case dealt more with the interpretation of the customary rule of ‘no significant harm’ it nonetheless demonstrates that the interpretative *gravitas* of the ILC’s work is by no means a universal constant.

Finally, depending on the nature of the case, documents from other international organs may also be relied on by the Court. Indicatively, in the *Wall Advisory Opinion*, the Court referred to documents originating from the ICRC to support its interpretation of the provisions of the Fourth Geneva Convention.¹⁸² In *Diallo*, the Court referred to the jurisprudence of the Human Rights Committee and its General Comments, as well as the African Commission on Human and Peoples’ Rights, and the European Court of Human Rights.

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it

¹⁷⁴ Comments by Rosenne in: ILC, ‘Summary Record of the 872nd Meeting’, 17 June 1966 (A/CN.4/SR.872), para. 35; Comments by Yasseen, Tunkin, Rosenne and El-Erian in: ILC, ‘Summary Record of the 873rd Meeting’, 20 June 1966 (A/CN.4/SR.873), paras. 25, 27-8 and 34.

¹⁷⁵ *Jadhav (India v. Pakistan)*, I.C.J. Reports 2019, paras. 77-83.

¹⁷⁶ *Ibid*, para. 76.

¹⁷⁷ *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening) Judgment*, I.C.J. Reports 2012, para. 69.

¹⁷⁸ cf, critically, *ibid*, Dissenting Opinion of Judge *ad hoc* Gaja, para. 5.

¹⁷⁹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, para. 174.

¹⁸⁰ *Ibid*, para. 190.

¹⁸¹ *Ibid*, para. 192.

¹⁸² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2007, para. 97.

believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question. In the present case, the interpretation given above of Article 12, paragraph 4, of the African Charter is consonant with the case law of the African Commission on Human and Peoples' Rights established by Article 30 of the said Charter.¹⁸³

2. Do international courts and tribunals have a tendency to explain the process and stages of their interpretative reasoning? If yes, what is the form that this usually takes?

The Court explains the process and stages of its interpretative reasoning in reference to the elements of interpretation in the VCLT articles, and generally explains how it considers the various elements of interpretation to interact in any particular case.¹⁸⁴

The ICJ does not, however, take a formulaic approach to these elements: in the majority of cases, the Court examines ordinary meaning before moving to assess the context of a provision and to determine the object and purpose of the treaty;¹⁸⁵ however, this is not always the case.¹⁸⁶

If its interpretative approach differs from the elements identified in Articles 31 and 32 of the Vienna Convention (for example, when it takes into account an argument made *a contrario*), the Court explicitly states the principle on which it relies.¹⁸⁷

3. What internal or external factors (eg contract incompleteness, statute of the court, the background of judges, the subject area, political constellations or situations, concerns about the court's legitimacy, or about implementation of the judgment) affect the interpretative choices of international courts and

¹⁸³ *Abmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, I.C.J. Reports 2010, paras. 66-7; for the European Court of Human Rights jurisprudence, see *ibid*, para. 68.

¹⁸⁴ See eg *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, I.C.J. Reports 2017, para. 65; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, I.C.J. Reports 1960, p. 158.

¹⁸⁵ See eg *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, I.C.J. Reports 2018, paras. 92-6; *Jadhav (India v. Pakistan)*, I.C.J. Reports 2019, paras. 73-5.

¹⁸⁶ See eg, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, I.C.J. Reports 2017, paras. 65 *et seq*.

¹⁸⁷ *Alleged Violations (Nicaragua v. Colombia)*, para. 39; *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, para. 37.

*tribunals, or changes in such choices, and in what manner? (In this context the framework suggested by Pauwelyn and Elsig could be useful).*¹⁸⁸

Unlike other judicial or quasi-judicial bodies that focus on the interpretation of a singular instrument, the Court has had to deal with a wide variety of instruments covering all areas of international law. Consequently, contract incompleteness may influence the hermeneutic choices in a particular case, but as an external factor is not *per se* determinative of the Court's wider approach to interpretation. Perhaps the only instrument that could be considered for the purposes of contract incompleteness is the Statute of the Court which was almost a *verbatim* reproduction of the Statute of the PCIJ. However, unlike other Statutes, like the Statute of the International Criminal Court, the ICJ Statute does not offer any specific interpretative guidance and its nature is not such that would allow for potential arguments in favour of preference of a particular interpretative method. That is of course not to say, that the Court has not, on occasion, been called to interpret gaps in the Statute, for instance in the case of the binding effect of provisional measures.¹⁸⁹

A potentially relevant external factor could be the reaction of interested states, especially if one considers the concerted reaction by post-colonial states to the *South Africa* Judgments, which led to clear changes to the interpretation adopted by the ICJ, as can be seen in, for instance, the *Namibia* Advisory Opinion or more recently in the *Genocide (Gambia v. Myanmar)* case.

Taken from a different angle, the interpretations and judgments of the ICJ have, on occasion, led to withdrawal of declarations under the optional clause declaration system (eg France after *Nuclear Tests*, US after *Nicaragua Preliminary Objections*); and withdrawal from general conventions and treaties (Colombia's withdrawal from the Pact of Bogotá in 2012, and US from 1955 Treaty of Amity and Optional Protocol to the VCCT in 2020). This may in turn have also informed the interpretative choices of the ICJ regarding the temporal effect of such withdrawals, compared to the effect of making declarations accepting the jurisdiction of the Court (see eg *Cameroon v. Nigeria* case).

As for internal factors that may influence the interpretative choices, evidently the permanent nature of the Court, and its role as the 'principal judicial organ of the UN' and its general jurisdiction are clearly such factors.

III. Systemic Issues/Questions

1. *What are the defining characteristics that differentiate interpretation from gap-filling and normative conflict? How do courts and tribunals address these processes?*

¹⁸⁸ J. Pauwelyn and M. Elsig, 'The Politics of Treaty Interpretation' in J.L. Dunoff and M.A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013), 445-73.

¹⁸⁹ As occurred, for instance, in *LaGrand* and *Avena*.

Although the ICJ has been reluctant to draw clear lines between interpretation, on the one hand, and gap-filling and resolution of normative conflicts, on the other, it has consistently held that interpretation has its limits, the most fundamental of which is that it should not rewrite the text of the treaty or substitute the intention of the parties. If that happens, then the judge has crossed the boundaries of what constitutes the interpretative process.¹⁹⁰

2. *When have international courts and tribunals interpreted (not identified) the rules of interpretation? How do they distinguish between interpretation and identification?*

Although the Court does not engage *expressis verbis* in the interpretation of rules of interpretation, as has been shown in the analysis provided in the previous Sections, it has on occasion clarified the content of an interpretative rule in a manner that escapes the classical identification scheme of a customary rule (ie reference to State practice and *opinio juris*) without at the same time merely asserting it, but rather engages in a process that is inherently interpretative in nature. The members of the Court as well, although they do not usually cast their own views on the content of rules of interpretation as a product of a clearly defined and coherent interpretative process, do engage on occasion in such interpretation.¹⁹¹ When they do so, given the freedom they enjoy in explicating on certain key points of their judicial thought-process, one can see more clearly the interpretative process being clearly at play.¹⁹²

¹⁹⁰ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, I.C.J. Reports 2017*, Dissenting Opinion of Judge Bennouna; *Kasikili/Sedudu Island (Botswana/Namibia), I.C.J. Reports 1999*, Declaration of Judge Higgins, para. 2; *Gabčíkovo - Nagymaros Project*, Separate Opinion of Judge Bedjaoui, para. 5.

¹⁹¹ Some notable examples are:

- *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, where the then Vice-President Schwebel in his Dissenting Opinion embarked on an interpretation of Article 32 VCLT to demonstrate that it could have a corrective function (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, I.C.J. Reports 1995*, Dissenting Opinion of Vice-President Schwebel);
- *Land, Island and Maritime Frontier Dispute*, where Judge Torres Bernárdez, seems to have engaged in an interpretation relating to the relationship between Articles 31 and 32 VCLT (*Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening), I.C.J. Reports 1992*, Separate Opinion of Judge Torres Bernárdez, paras. 191-2);
- *Kasikili/Sedudu Island*, where Vice-President Weeramantry and Judge Parra-Aranguren, interpreted Article 31(3)(b) VCLT (*Kasikili/Sedudu Island (Botswana/Namibia), I.C.J. Reports 1999*, Dissenting Opinion of Vice-President Weeramantry paras. 23-4; *ibid*, Dissenting Opinion of Judge Parra-Aranguren, paras. 11-8);
- *Oil Platforms*, where Judge Higgins, employed a textual approach to determine the meaning of Art 31(3)(c) VCLT (*Oil Platforms (Islamic Republic of Iran v. United States of America), Merits, I.C.J. Reports 2003*, Separate Opinion of Judge Higgins, paras. 45-6); and
- *Georgia v. Russia*, where Judge Koroma equally employed a textual approach to determine the meaning of Art 31(1) VCLT (Application of the International Convention on the Elimination of All Forms of Racial Discrimination, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, I.C.J. Reports 2011*, Separate Opinion of Judge Koroma, para. 5).

¹⁹² For a more detailed analysis see P. Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19(2) ICLR 126-55.