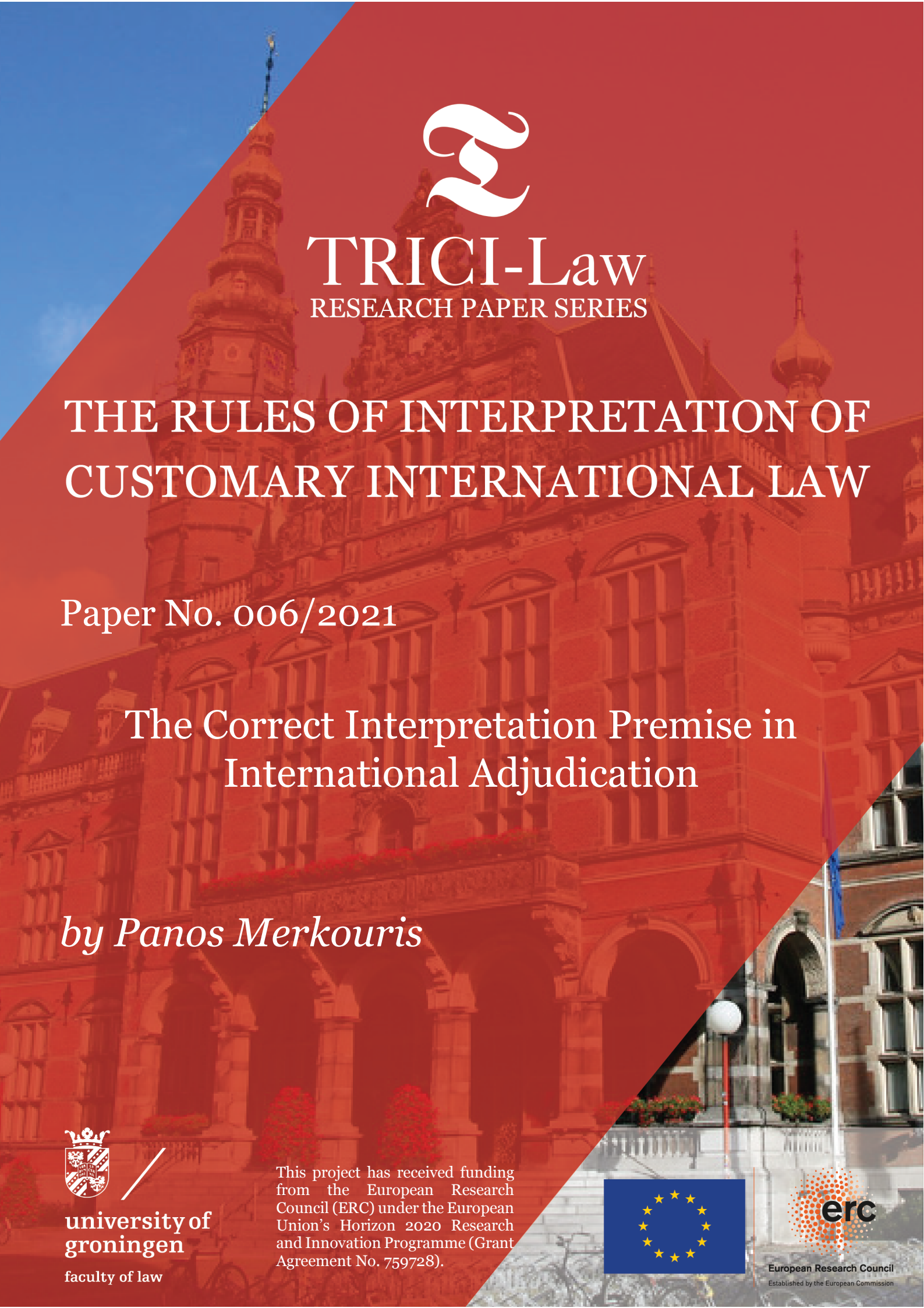

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The Correct Interpretation Premise in International Adjudication

by Panos Merkouris

university of groningen
faculty of law

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The 'Correct Interpretation' Premise in International Adjudication

by Panos Merkouris[*]

1. Introduction

There can be no 'correct interpretation', as interpretation cannot be reduced to a simple mechanical formula like 1+1=2. This is the classical aphorism repeated in scholarly writings. The reference to 1+1=2 is also a nice sound-bite, that aims to demonstrate this simplicity. I always find this delightfully ironic, although I am unsure whether two great philosophers, Russel and Whitehead, would consider it a compliment or an insult. After all, they devoted more than 300 pages, across two volumes of *Principia Mathematica*, to prove this 'simple formula'! This should not to be construed as me suggesting that interpretation is a mechanical or algorithmic formula but rather as highlighting that even the simplest things can have surprisingly great depths and complex underlying premises.

The aim of this contribution is to examine whether international adjudication functions on the premise of the 'correct interpretation'. I use this term, instead of the Dworkinian 'right answer', not only because the latter comes with a lot of semantic baggage that should not to be associated with 'correct interpretation',[1] but also because this is the term used by international courts/tribunals. The aim is not to engage solely with the wider debate on Hart, Dworkin and other philosophers regarding right/wrong, good/bad interpretations.[2] My aim is much more modest. It is to examine the objections to 'correct interpretation' within international adjudication,[3] and whether there are any structural features of the international legal system and of its interpretative rules that bar 'correct interpretation'.[4]

Two questions are intertwined in this inquiry; whether it is possible to arrive at one correct interpretation and whether it is desirable to function under that assumption.[5] In order to answer

[*] This contribution is based on research 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).

[1] As for instance, personal convictions and value judgments.

[2] Raz, for instance, believes that although certain aspects of the function and nature of interpretation can be accounted for, it is not possible to construct an all-encompassing theory on interpretation that would provide us a ready-made recipe on how to arrive at or on how to evaluate whether interpretations are good or bad; Raz (2009) 322, 356-7. For an excellent overview of this debate, Dickson (2010).

[3] Ie the focus will be on legal-judicial interpretation, and not interpretation by States, other international actors, or non-judicial authoritative interpretations.

[4] Throughout this contribution, I will be using the terms 'a correct interpretation' and 'the correct interpretation' interchangeably for reasons of avoiding weirdly constructed sentences. 'A correct interpretation' should not be conflated as denoting one of the 'permissible interpretations'.

[5] On the desirability see especially Section 6.

these questions an internal point of view is adopted. This means that the question is addressed, relying on authoritative sources and the views of the actors of international law as expressed in international documents and judgments, as in the present author's view any discussion on 'correct interpretation' must reflect and reflect on the existing practice and systemic choices and particularities of the international legal system and its actors.

The objections to 'correct interpretation' revolve around three main axes: i) incompleteness of the law, ie that 'law runs out'; ii) that there are and cannot be any rules of interpretation; and iii) that in order to differentiate between multiple interpretations judges would have to resort to non-legal considerations/tools. Responding to these borrows from a number of arguments and different issues. Thus, in order to avoid duplication, the structure of this contribution shall be the following. Section 2 will examine whether there are any systemic issues that are either prohibitive of or facilitative to 'correct interpretation'. Two features will be examined, namely the (in)completeness of international law and the notion of dispute. This will be followed by an examination of the integration/incorporation of *prima facie* non-legal elements or tools in the interpretative process especially in the context of evolutive interpretation and the existence of limits of interpretation (Section 3). Section 4 will then present the International Law Commission's ('ILC') approach to 'correct interpretation' during the debate on the rules on interpretation of the Vienna Convention on the Law of Treaties ('VCLT'). Section 5, will then tackle the issue of 'permissible interpretations' in international adjudication as an alternative to 'correct interpretation'. Finally, Section 6 building on the previous analysis will address the three groups of objections and highlight misconceptions regarding the nature and function of interpretation that may account for these objections.

2. Systemic Considerations

2.1. (In)Completeness of International Law

The (in)completeness of international law is an issue debated among scholars,[6] and is connected to the issue of *non liquet,* ie whether a court can refuse to deliver a judgment due to absence or obscurity of the law.[7] In international law, the Advisory Committee of Jurists, which prepared the Statute of the Permanent Court of International Justice ('PCIJ'), explicitly sought

[6] In favour of completeness of international law: Kelsen (1952); Lauterpacht (1958); *contra* Stone (1959); Fitzmaurice (1974).
[7] For early domestic codes' approach to *non liquet*, Fastenrath and Knur (2016).

to avoid the potentiality of *non liquet* decisions, and thus included 'general principles' in Article 38. The *Lotus* case, is famous for seeming to adhere to classical positivist consensualism, by adopting a residual negative principle, ie that everything that is not prohibited is permitted.[8] This approach has more recently been followed by the ICJ in the *Nuclear Weapons*[9] and *Kosovo*[10] advisory opinions, not without criticism of course.

Although Lauterpacht is one of the most famous proponents of the existence of a rule prohibiting *non liquet* stemming from a residual negative principle and of the completeness of international law, there are also those who argue that from a positivistic perspective completeness is not a necessity, and that there can be conduct not regulated by international law.[11]

Irrespective of where one lands on this debate, it is not problematic from the perspective of the existence of a 'correct interpretation'. If international law is incomplete, then if the 'correct interpretation' is that the act in question falls outside the scope of regulation of any law, a *non liquet* would be declared. If the system is complete and, thus, a residual negative principle exists, this would equally be unproblematic, as such principles would, eg through Article 31(3)(c) VCLT, be relevant during interpretation and inform any judgment on 'correct interpretation'. The only situation, albeit somewhat of an outlier, would be if the system was accepted as incomplete yet States agreed to submit a dispute to a judicial body, whose rules of procedure disallowed *non liquet*. In that case, again the intention of the parties as expressed through the selection of that dispute settlement body ('DSB') would resolve any issues.[12] Consequently, the (in)completeness of international law does not have a bearing on the existence or not of 'correct interpretation'.

2.2. Definition of Dispute

Let us now turn to the notion of 'dispute'. Unsurprisingly, early permanent international courts, grappled with providing a definition.[13] In 1924, the PCIJ, in a constantly cited *obiter dictum*, provided that a dispute is 'a disagreement on a point of law or fact, a conflict of legal views or

[8] *SS Lotus* 18–9.
[9] *Legality of the Threat or Use of Nuclear Weapons* [21, 105].
[10] *Kosovo Advisory Opinion* [84, 118-22].
[11] Boisson de Charzournes and Sands (1999); Dekker and Werner (1999); Kammerhofer (2010).
[12] See Weil (1998). The parties' intention as expressed through their DSB choice will inform the judges' interpretation of rules as if existing within a closed system. Here, it is the intention of the parties (and not the (in)completeness of international law) that provides the *in lege* guidance as to the solution to be adopted.
[13] Garrido-Muñoz (2018) [2]; Palchetti (2018).

of interests between two persons'.[14] Various flaws in this definition notwithstanding, it has become a staple point of reference across regimes. This definition has been further refined. In *Certain German Interests in Polish Upper Silesia,* for instance, the PCIJ clarified that 'a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views'.[15] In the *South West Africa* cases, the International Court of Justice ('ICJ') honed in on this point of 'conflict'. In its view, mere assertion of the existence of a dispute was not sufficient to prove the existence of a dispute, as conversely the mere denial of the existence of a dispute was equally inconclusive at to its non-existence. Furthermore, it 'must be shown that the claim of one party is *positively opposed by the other* (emphasis added)'.[16] The definition of dispute, and the positive opposition of views, ie two views/interpretations that cannot be held at the same time, as one of its necessary elements is a crucial point to which we shall return in Sections 5- 6.

3. Evolutive Interpretation & Interpretative Limits

An argument often invoked against the 'correct interpretation' premise is that a judge would always end up with numerous interpretations and no rule/or legal criterion to guide her/him in selecting one over the other, apart from using elements that fall outside legal norms (I will be using the term 'exo-legal' elements to describe this). Leaving aside that this is not necessarily so (depending on the specificity of the rules of interpretation, the interpretative question at hand etc), what we will focus on here is whether indeed the judge will have to look at exo-legal elements. The most revealing example is that of evolutive interpretation.

In international law '[t]he terms of a treaty must be interpreted according to the meaning which they possessed … at the time when the treaty was originally concluded'.[17]This is known as the principle of contemporaneity, but it has a caveat. '[W]here it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, *the treaty must be interpreted so as to give effect to that intention* (emphasis added)'.[18]

This caveat, for which this author has coined the term 'time-will of the parties',[19] allows what is known as evolutive interpretation and is consistent with the VCLT rule of interpretation.[20]

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[14] *Mavrommatis Palestine Concessions* 11.
[15] *Certain German Interests in Polish Upper Silesia* 14.
[16] *South West Africa* 328.
[17] Fitzmaurice (1957) 212.
[18] Thirlway (2006) 57.
[19] Merkouris (2014).
[20] *Rights and Guarantees of Children* [55].

There is extensive jurisprudence on evolutive interpretation, which has clarified both when such intention can be inferred, and also along what tracks such evolution can manifest itself. With respect to the former, three are the main bases invoked, the intention of the parties,[21] the object and purpose of the treaty,[22] and the text of the treaty being interpreted. As to this last one, the reasoning is that the use of 'generic terms' is a clear indication of the 'time-will' of the parties for an evolutive interpretation.[23] With respect to the latter, evolutive interpretation can occur along two tracks: i) evolution of fact, where courts have referred to medical and scientific advancements,[24] societal and cultural changes,[25] moral developments,[26] and the socio-economic situation of a State (including current living conditions).;[27] and ii) evolution of law, where customary international law and general principles,[28] international treaties,[29] and even domestic law[30] have all been considered.

Evolution of law is not problematic in the context of the discussion of 'correct interpretation'. These are legal rules. They may be extrinsic to the treaty being interpreted, but are not non-legal elements and they, in any event, form part of its normative environment, in which the treaty is to be interpreted.[31] Evolution of fact is equally unproblematic. The reason is that although on its face these elements would seem to be exo-legal (they would usually not be referred to in the law being interpreted) nonetheless they are not always so. When intereting a rule we have an interpretative complex that consists of both the rule being interpreted and the rules of interpretation being applied. Given the fact that evolutive interpretation is part and parcel of the rules of interpretation (both the VCLT and the customary ones), and the way that it has been developed and refined such elements (eg the aforementioned medical and scientific advancements, societal and cultural changes, moral developments etc), although not legal rules in and of themselves (*eo ipso*) are integrated into the rules of interpretation through evolutive interpretation, and thus, become part and parcel of the interpretative process and also

[21] See above, definition of principle of contemporaneity.
[22] *Gabčíkovo-Nagymaros Project* [111-2, 140]; see also ECtHR's and IACtHR's extensive jurisprudence on the matter.
[23] *Aegean Sea Continental Shelf* [74-7]; *Dispute regarding Navigational and Related Rights* [65-7].
[24] *Gabčíkovo-Nagymaros Project* [104, 107]; *Vo v France* (Dissenting Opinion of Judge Ress) [5].
[25] *Right to Information on Consular Assistance* (Concurring Opinion of Judge Cançado Trindade) [4]; *Öztürk v Germany* (Dissenting Opinion of Judge Bernhardt).
[26] *Cossey v UK* (Joint Dissenting Opinions of Judges Palm, Foighel and Pekkanen) [5].
[27] *Yakye Axa Indigenous Community v Paraguay* [125]; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [146]; *Tyrer v UK* [31].
[28] *Merrill & Ring Forestry LP v Canada* [190]; *Mondev v USA* [116-25]; *ADF Inc v USA* [181-4, 190]; *Waste Management Inc v Mexico* [93]; *GAMI Investment, Inc v Mexico* [95].
[29] *Yakye Axa Indigenous Community v Paraguay* [124-31]; *Right to Information on Consular Assistance* [114].
[30] *Öcalan v Turkey* [162-4]; *Dudgeon v UK* [60].
[31] As also prescribed by Articles 31(3)(c) and 32 VCLT.

assist the judges in guiding them to the correct choice between multiple interpretative choices.[32] In sum, the rule of interpretation, is the point of entry and integration of these elements into the legal rule. Consequently, by virtue of the rule of interpretation these elements cannot be considered exo-legal, but rather elements reference to which, if relevant, is necessary in order for the rule of interpretation to be properly applied.[33]

A final point to be made is that the existence of sets of correct and incorrect interpretations in international law has been ingrained in international law from the very start, and can be seen even in the early writings of Grotius, Vattel and Puffendorf where they provided examples of perfidious interpretations, ie interpretation done in bad faith and thus incorrect. However, where this can be seen in the clearest light is in the case of evolutive interpretation, where although legal instruments are 'living tree[s] capable of growth and expansion' such growth must remain 'within [the instrument's] natural limits'.[34]

Limits to interpretation, and consequently a *prima facie* distinction between correct and incorrect interpretations, can be grouped into system-oriented and instrument-oriented ones. The former include the principle of non-retroactivity[35] and *jus cogens*,[36] this last one being recognized by the *Institut de Droit International* ('IDI') as a fundamental limit.[37] In the instrument-oriented limits one can find the limit that evolutive interpretation should always observe the general rule laid down in Articles 31-3 VCLT (and its various elements).[38] As Higgins observed in *Kasikili/Sedudu Island* 'we must never lose sight of the fact that we are seeking to give flesh to the intention of the parties…We must trace a thread back to this point of departure…our task is to decide what general idea the parties had in mind, and then make reality of that general idea through the use of contemporary knowledge'.[39]

What this actually means becomes even clearer if one considers it in the light of the limit that interpretation may never amount to revision.[40] Treaty revision falls within the exclusive

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[32] In this process, the judges are also guided by the fact that the goal of interpretation is to clarify what the parties intended.
[33] The open-ended nature of Article 32 VCLT as well, works along similar lines. That is not to say that Article 32VCLT is not in and of itself in need of further clarification and refinement, but this is a process that has been incrementally transpiring, and itsopen-ended nature allows the judges the flexibility needed in order to consult any and all relevant material that will shed light on the intention of the parties.
[34] *Edwards v Attorney-General for Canada* 136 per Lord Sankey.
[35] *Mondev International Ltd v USA* [70].
[36] *South-West Africa* (Dissenting Opinion of Judge Tanaka) 293-5; *Gabčíkovo-Nagymaros Project* (Separate Opinion of Judge Bedjaoui) [6].
[37] IDI (1975) [3].
[38] *Gabčíkovo-Nagymaros Project* (Separate Opinion of Judge Bedjaoui) [5, 7].
[39] *Kasikili/Sedudu Island* (Declaration of Judge Higgins) [4].
[40] Ibid [2]; *Gabčíkovo-Nagymaros Project* (Separate Opinion of Judge Bedjaoui) [5].

competence of the parties to the treaty, not of the judges. An interpretation amounting to revision would be equivalent to judges exercising a *pouvoir de légiférer*, a power that they have not been imbued with.[41] As Dupuy very eloquently put it, '[m]emory must remain loyal and not serve to rewrite history; a treaty belongs to its authors and not to the judge'.[42] This final limit was recently re-confirmed by the ILC.[43]

4. The ILC's Position on Interpretation

In this Section we will examine the internal point of view on 'correct interpretation', and specifically the view of the bodies from where the rules that eventually became Articles 31-3 VCLT emerged. It is worth noting that all international courts/tribunals and States have at one point accepted that the VCLT rules reflect customary international law, and thus manifest themselves both as conventional and as customary rules. The rules emerged after lengthy discussions mainly in the IDI and the ILC.

In 1956, when discussing interpretation, several IDI members (sided with the view of the existence of the 'correct interpretation', when opining that 'the main purpose of interpretation was to find the *true* scope/meaning of the text to be interpreted'. [44]

In criticisms on the existence of rules of interpretation, the argument is often brought up that even in the ILC there was heated debate as to whether such rules existed and/or should be included in the VCLT.[45] Despite this, the ILC not only adopted such rules, but also explicated on this presumed inconsistency in its approach. '[The task was not easy, but] there were cogent reasons why it should be attempted…[T]the establishment of some measure of agreement in regard to the basic rules of interpretation is important not only for the application but also for the drafting of treaties'.[46] In the end, the ILC opted for what is known as the 'crucible approach'. It is this unity of the process of interpretation that Article 31's title ('general *rule*' and not '*rules*') also reflects.[47] But what of 'correct interpretation'? This was actually mentioned both by the USA and *Special Rapporteur* Waldock.[48] Waldock was even more explicit when discussing subsequent practice, where he in no uncertain terms stated that

[41] *Meftah v France* (Concurring Opinion of Judge Lorenzen joined by Judge Hedigan); Thirlway (1989) 142.
[42] Dupuy (2011) 129.
[43] ILC (2018) 58.
[44] IDI (1956) 321 and 328-30.
[45] The ILC was very upfront about this; ILC (1966) 218 [1-4].
[46] Ibid 218-9 [5].
[47] Ibid 220 [8].
[48] Ibid 93, 99-100 [19-20].

'[c]learly, on the plane of interpretation, *the treaty has only one correct interpretation* (emphasis added)'.[49]

The ILC recently revisited issues of interpretation, and in Draft Conclusion 7 said that '[s]ubsequent agreements and subsequent practice under Article 31[(3) VCLT], contribute…to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations'. This seems to give mixed signals. On the one hand, it indicated that the aim is to *clarify* the meaning of a treaty, not *give* meaning to it. But the second sentence refers to 'range of possible interpretations'. So, which one is it? One correct interpretation or a range of possible interpretations? The ILC clarifies this in the commentary, where it underlines that this expression does not suggest that there 'may ultimately be different interpretations of a treaty, but rather that the treaty may accord the parties the possibility to choose from a spectrum of different permitted acts'. This is a crucial point that we shall return to in Sections 5-6. Just to ensure that there is no equivocation on this issue, the ILC also cites Lord Steyn that '*there can only be one true interpretation of a treaty* … [the court] must search, untrammelled by notions of its national legal culture, for the true autonomous international meaning of the treaty. And there *can only be one true meaning*'.[50]

5. Permissible Interpretations

As shown above, the 'correct interpretation' premise influenced the ILC's work. In its view the underlying assumption is that the crucible approach would never lead the judge to a *Buridan's ass* situation where s/he would not be able to choose between two equally valid and opposing interpretations,[51] and that in order to make a choice they would have to resort to non-legal considerations. The same reference to correct interpretation is often seen in judgments of international courts/tribunals,[52] although this might be due to the bivalent structure of the definition of dispute.

To demonstrate how ubiquitous this idea of 'correct interpretation' is let us examine the WTO Agreements, which is one of the few examples where 'permissible interpretations' was ever an issue. Article 17(6)(ii) of the Anti-Dumping Agreement provides that in case of dispute if 'the

[49] Ibid 90 [9]. In 1964, the ILC had expressed a similar view, ILC (1964) 55.
[50] ILC (2018) 53-4 [10] note 258.
[51] The reason why these interpretations would have to be opposing, stems not only from the notion of 'dispute', but also because otherwise two non-opposable interpretations would be essentially two elements falling within the wider set of 'correct interpretation' and no need would arise to choose one over the other.
[52] Indicatively: *Appeal Relating to the Jurisdiction of the ICAO Council* [42]; *OI European Group BV v Venezuela* [615]. A search of 'correct interpretation' on *ISLG* produces 171 hits on decisions/awards, while none for 'permissible/possible interpretation(s)'.

panel finds that a relevant provision of the Agreement *admits of more than one permissible interpretation,* the panel shall find the authorities' measure to be in conformity with the Agreement *if it rests upon one of those permissible interpretations* (emphasis added)'.

Criticisms, quite merited, of Article 17(6)(ii) being an example of poor drafting aside, this provision would, *prima facie*, seem to fly in the face of the ILC's statement that in the plane of interpretation *there is always one correct interpretation*. However, WTO case-law proves otherwise. In none of the cases did the DSBs ever come across a situation where even just two permissible interpretations were relevant. In fact, the customary rules on interpretation always led to the correct interpretation, without having to apply the 'permissible interpretations' caveat.[53] Similarly, and perhaps more forcefully, in *US — Zeroing (Japan)* the Appellate Body made very clear that the articles in question 'when interpreted in accordance with customary rules of interpretation … do not admit of another interpretation'.[54]

Finally, Abi-Saab's opinion in *US – Continued Zeroing* is most revealing.

> The Appellate Body exists to *clarify the meaning of the covered agreements....The range of meanings that may constitute a permissible interpretation does not encompass meanings of such wide variability, and even contradiction, so as to accommodate the two rival interpretations. One must prevail*…At a point in every debate, there comes a time when it is more important…to have a definitive outcome, than further to pick over the entrails of battles past (emphasis added).[55]

Not only does Abi-Saab highlight the point that the DSB's role is not to create meaning but rather to 'clarify' a pre-existing meaning of the agreements, he also demonstrates that the 'permissible interpretations' structure, which seems to echo Kelsen's 'frame theorem' (Section 6),[56] cannot work in the context of a dispute. It is at this point that the reader should recall the definition of 'dispute' (Section 2.2), and the requirement of claims being 'positively opposed to each other'. As Abi-Saab very logically points out, 'permissible interpretations' cannot encompass meanings of such wide variability, as to allow for even competing interpretations to exist under the rubric of 'permissible' ones. It is no surprise, thus, that the Appellate Body by applying the customary rules on interpretation always arrived at a single interpretation, and not a range of permissible ones. As a final thought regarding Article 17(6)(ii), a guess may be

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[53] *EC –Bed Linen* [65].
[54] *US – Zeroing (Japan)* [189].
[55] *US – Continued Zeroing* [312].
[56] Kelsen (1960) 347-54; Kammerhoffer (2011) 113-7.

ventured that what it aimed at was either a set of non-contradictory permissible acts (Section 6) or alluding to a version of a 'margin of appreciation', rather than legal interpretation. In the latter case, however, margin of appreciation falls outside the scope of interpretation, and rather in that of application.[57]

6. Correct Interpretation as a Set

As shown in the previous Sections, the ILC, as a UN organ with the mandate of codifying existing international law and promoting its progressive development was guided by the idea of the 'correct interpretation'. This was equally reflected in the views of its members, and of States, the acceptance of limits to interpretation as well as in the language employed by international courts/tribunals (Sections 3 and 4). This last one, could potentially be mere rhetoric, but given the abundance of evidence in support of 'correct interpretation' such an aphoristic approach would seem to be throwing the baby out with the bathwater. A more likely explanation is that it is the organic outcome of the definition of dispute under international law, which requires the existence of two clearly opposite views.

So, it seems that international bodies seem to be functioning under the premise of the one 'correct interpretation'. As mentioned in the introduction, the objections to the notion of 'correct interpretation' seem to revolve around three main axes: i) incompleteness of the law, ie that 'law runs out'; ii) that there are and cannot be any rules of interpretation; and iii) that in order to differentiate between multiple interpretative options the judge would always have to resort to non-legal considerations.

The first objection was dealt with in our analysis in Section 2.1. There is case-law suggesting that the international legal system functions on the basis of a residual negative principle. As Melling notes '[w]hereas "legally neutral" behaviour [would be] a corollary of [an] open/incomplete condition of the international legal system, it is excluded in a logically/formally closed system. This is because in a logically/formally closed system behaviour is either prohibited or permitted, meaning that in the apparent absence of law the "residual negative principle" is applied that forecloses any gap, meaning there is no absence of law'.[58] Hence, in a closed/complete conception of international law the objection is rendered moot. But even if the opposite scenario were to be proven, that would still not be inconsistent

[57] Ulfstein (2020).
[58] Melling (2018) 480; Kammerhoffer (2010) 337-8; Tammelo (1959) 200.

with the 'correct interpretation' premise as courts/tribunals then would always have the option of rendering a *non liquet* decision.

Let us now turn to the second objection. The argument often raised, in a variety of forms, is that the VCLT rules on interpretation are either not rules as such, or would have to be a special type of rules and specifically 'disciplining rules'.[59] In that sense, so the argument goes, 'such constraints on content-determination meet the fundamental objection of an infinite regress made by Fish, according to which such rules themselves need interpretive constraints which in turn also need another set of interpretive constraints'.[60] According to this line of reasoning the elements to which the rules of interpretation refer are also open to interpretation and by that reason alone cannot serve as constraints on interpretation,[61] and thus constraints on interpretation cannot be rules but as practices of an interpretive community.[62]

Leaving aside the fact that the argument that the rules on interpretation in international law are not rules seems to fall flat on its face by the mere existence of the VCLT, and that it bears similarities to relative normativity claims,[63] let us instead focus on the core of the argument, ie that the rules of interpretation by their nature cannot be rules, due to infinite regress. There are two main issues with this assumption. One is that the infinite regress objection is based on the underlying premise that self-referential statements are always paradoxical or blatantly incorrect. This alludes to the famous Russel's paradox, where Russel in one sentence essentially found a hole in Frege's 1879 *Begriffssschrift*. The paradox goes as follows: 'Does the set that contains all sets that do not contain themselves contain itself?'. Often the example used to make this a bit more palatable is the barber paradox. The barber is the one who shaves all those, and those only, who do not shave themselves. The question is, does the barber shave himself/herself?

However, unlike what the objection to the existence of the rules of interpretation presupposes, not all self-referential statements are problematic. Take, for instance, the sentence 'the set of all sets that contain themselves, does it contain itself?' There is no problem with this sentence at all. Despite its self-referentiality it does make sense, and the answer is yes. This type of meaningful self-referentiality applies to rules of interpretation, even more so, and I'll use the

[59] Fiss (1982).
[60] d' Aspremont (2015) 123; referring also to Venzke (2015); Letsas (2010).
[61] An argument also raised by Hart (2012) 126.
[62] Fish (1984); d' Aspremont (2015) 123-4.
[63] It also disregards the fact that the VCLT rules of interpretation (and their customary counterparts) are *jus dispositivum*. States can always agree their own set of rules of interpretation; see eg Article 29 of the American Convention on Human Rights.

VCLT rules as an example. They contain a multitude of elements, and bearing in mind the 'crucible approach', they all can help each other out in order to further refine the meaning of each of the elements, to arrive at the correct interpretation of even the rules of interpretation. One can look at the extensive international jurisprudence on the matter, where elements of treaty interpretation contained in Articles 31-3 VCLT, have and continue to be refined.[64] It is after all this continuous iterative process of refinement that the Tribunal in *Aguas del Tunari v Bolivia* called one of 'progressive encirclement'.[65] Thus, the interpretation of the rules of interpretation is not a paradoxical and infinite regress process, but rather an iterative asymptotic one, where the rules are continuously refined.

But even if one were to accept the infinite regress argument, this still disregards the particularities of the international legal system and the solutions adopted therein. Firstly, the VCLT rules of interpretation are not interpreted by reference to themselves, by virtue of the non-retroactivity rule of Article 4 VCLT. Consequently, if called to interpret Articles 31-3 VCLT, the interpreter would have to apply customary law. Here the infinite regress argument immediately fails. Customary international law emerges as the result of practice and *opinio juris*, which is what will determine, refine and can also modify the content of the customary rules on interpretation.[66] So the question turns from one of infinite regress to one of *pedigree*.[67] The moment, however, we turn to practice and *opinio juris*, at this very moment we have arrived at the practices of the interpretive community that the proponents of this theory espouse, but without the need to engage in all sorts of unnecessary and somewhat awkward theoretical calisthenics.

In an attempt to salvage the infinite regress argument, sometimes the argument is made that there can be no procedural rules of customary international law. However, not only is this not so (see rules on State responsibility), but it also disregards the practice of international courts/tribunals, and of States that consistently and virtually uniformly refer to the VCLT rules on interpretation as reflective of customary law. This way, the argument disregards and rejects the very same practices of the interpretive community it claims to be champion of.

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[64] On this see eg the ILC's work on 'Subsequent practice and agreements'; reports of the ILA Study Group on Content and Evolution of the Rules of Interpretation.
[65] *Aguas del Tunari v Bolivia* [91].
[66] The customary rules of interpretation, may also themselves be open to interpretation, but that chain of regress will eventually be broken as well by eventual recourse to the constituent elements of practice and *opinio juris*. So, the question becomes one not of infinite regress but one of *pedigree*.
[67] The issue of *pedigree* may also be criticised as leading to infinite regress, but then this is a criticism for all legal rules and not just for interpretation.

The third objection, ie that in order to differentiate between multiple interpretative options the judge would always have a choice that would be informed by non-legal considerations, has two legs. The first one was addressed in Section 3, where it was shown that the rules of interpretation allow for recourse to elements that demonstrate an evolution of fact. Such elements although *per se* not legal, by virtue of finding an entry point through the rules of interpretation, have been integrated in the interpretative process, and, thus, in that context cannot be viewed as exo-legal ones. The second leg takes us back to the issue of 'permissible interpretations', which echoes Kelsen's 'frame theorem'. The 'frame theorem' can be understood in two ways. According to Kelsen, the result of interpretation 'can only be the discovery of the frame that the norm to be interpreted represents and, within this frame, the cognition of several possibilities for implementation'.[68] The way in which this is described, and the example provided earlier in his analysis of an officer arresting an individual according to law, but having choice in when and how this is to be implemented (this example is in and of itself problematic as it refers to application rather than interpretation of the rule), seems to echo the ILC's and the WTO Appellate Body's views on the matter of 'permissible/possible interpretations', ie that the instrument offers the 'possibility to choose from a spectrum of different *permitted* acts'. However, viewed this way, what we are facing is a *set* (the correct interpretation), where the permitted acts (that should not be in conflict with each other) are elements within that set. Consequently, the correct interpretation remains the one, and the different permitted acts are just elements falling within that set. If we were to take this 'set' analogy and run with it, then this would also account for Hart's famous quote that every rule has a 'core of settled meaning' and a 'penumbra of uncertainty'.[69] This could be visually described through the fractal known as Mandelbrot set (Figure 1), or if we are to take Dworkin's criticism of Hart's analysis in *Riggs v Palmer*, ie that there is not even a core of settled meaning, then one of the numerous Julia sets could equally work.

[68] Kelsen (1990) 129.
[69] Hart (2012) 124-36.

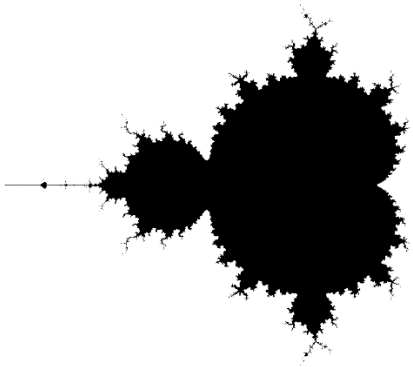

Figure 1: Mandelbrot Set

But unlike Hart, where in the penumbra of uncertainty '*hic est* discretion' to paraphrase an old cartographic expression, in our case an ideal judge, using the crucible approach and the 'progressive encirclement' nature of interpretation would hone in (zoom into) the fractal landscapes of the Mandelbrot set to the correct interpretation.

However, later on in the same article Kelsen seems to indicate that the 'frame' can also hold opposing outcomes. In Kelsen's view, there is 'no criterion on the basis of which one of the possibilities given within the frame of the norm to be applied could be favoured over the other possibilities'. [70] Understood this way, the frame theorem essentially resorts to allowing judges ultimate discretion, and choice, unregulated by any positive rules.[71] However, this version of the 'frame' is problematic. Firstly, in the context of disputes, and given the definition of dispute, it would amount to a non-frame as both opposing views would equally fall within the scope of acceptable interpretations. Secondly, it disregards the fact that in international law rules of interpretation are *jus dispositivum.* Nothing prevents States to negotiate a treaty, in which they include a provision addressing whether the textual, teleological and intentions-based approach to interpretation would prevail in case of conflict, or simply spell out their own rules to any degree of specificity they wish, or even provide for procedures for 'authentic interpretations' binding on all parties (eg Article IX(2) WTO Agreement). Finally, as shown in Section 3 recourse to *eo ipso* non-legal elements is under conditions permitted under the VCLT and its customary law counterparts and integrated in the interpretative process. An ideal judge, *Judge Hercules* as Dworkin referred to him, would, thus, using these tools be able to arrive at the 'correct interpretation'. That is not to say VCLT rules of interpretation as they stand are the be all end all on interpretation. Not only can different rules of interpretation be agreed on, or

[70] Kelsen (1990) 130; Kelsen (1960) 348-9.
[71] Similarly Hart (2012) 145. Generally, Hernández (2015) 319-21.

evolve through State practice and *opinio juris*, but they are themselves open to change, and most importantly continuous refinement. It is this continuous refinement that links not only to the Mandelbrot set, but also the idea of *Judge Hercules,* which the everyday judge could gradually approach the further the rules of interpretation are refined.

Here, however, I would like to stress a number of points. First, that I use the term *Judge Hercules* for reasons of simplicity here as most readers will be familiar with this Dworkinian construct, although the naming somewhat unfortunate given the spotty, to say the least, record of Hercules both with law and the respect for human life. Mythological objections aside, unlike the Dworkinian *Judge Hercules*, who would resort to principles (non-legal ones and even personal held ones as well) to arrive at that interpretation, in our case there is no such need. As already explicated, the VCLT rules on interpretation have a degree of flexibility that allows recourse to such elements (not the personal convictions though) through their application.

Of course, it is reasonable to ask the question, why do we need such recourse to *Judge Hercules*? If such a judge is needed, woe to the everyday judge, and woe to any discussion on 'correct interpretation'. However, that is not entirely true. *Judge Hercules* would be able to find the 'correct interpretation' always. But that is not to say that a regular judge would not be able to find it as well in individual cases, either using the same reasoning or even by stumbling on it. After all we all can still add 1+1=2 even though we have not memorized or even do not understand completely the 300+ page proof, or we can still catch a ball even if we do not understand differential equations. What the *Judge Hercules* construct is for, is an ideal that we should strive for, and in order to reduce the gap between that ideal judge and the everyday judge the discussion and further refinement of the rules of interpretation as has been and is happening at the moment in international law is an invaluable stepping stone.[72]

7. Concluding remarks

In conclusion, UN organs and international courts/tribunals seem to function under the premise of 'correct interpretation'. Nothing in the structure of the system of international law, seems to prevent the existence of such a notion, in fact there are many indications that show that there is a line to be drawn between correct and incorrect interpretations, as for instance in the cases of perfidious interpretations and/or the limits of interpretation analyzed in Section 3. However,

[72] As are of course discussions on personal biases, judicial independence and impartiality and reasoned judgments, to name but a few.

'correct interpretation' should not be understood either as frozen in time, or as a point wholly existing within a single instance of time. This would be taking an endurantist point of view, which as the discussion on contemporaneity and evolutive interpretation has demonstrated is not tenable or corresponding to reality. On the contrary, the 'correct interpretation' is to be understood as a 'set' in two ways. Firstly, as a 'set' including all elements of permitted acts, as discussed earlier in Sections 5-7. Secondly, and perhaps most importantly, as a 'set' in a perdurantist or exdurantist context.[73] Various theories have grappled with change in time. The most prominent ones are endurantism, perdurantism.and exdurantism According to endurantism, things have only spatial elements/parts and are 'wholly present whenever they exist', which creates issues on how to explain change. Conversely, perdurantism holds that things have not only spatial but temporal parts as well. They are 'space-time worms' that are only partially present at any given moment ('time-slice'). Finally, exdurantism, acknowledges that things have temporal parts ('stages') and are wholly present 'at momentary regions that lack temporal extension' and persist 'by standing in temporal counterpart relations to later and earlier object stages'.[74] The easiest way to visualize endurantism is like a movie reel that consists of single frames.

Based on the above, it is easy to see why viewing 'correct interpretation' from a perdurantist or exdurantist point of view makes more sense that in an endurantist one, ie as a set that contains all the correct interpretations throughout time (which can also vary depending on the rules of interpretation themselves, ie whether they have evolved, changed or different ones agreed by the parties).[75] Given this inescapable connection with time, and in order to visually represent this, the Mandelbrot set (or Julia set) mentioned earlier would also become a 3-D version of itself to account for the extra dimension of time.

[73] On endurantism, perdurantism and exdurantism see Hawley (2020); and within treaty interpretation Merkouris (2014).
[74] Hawley (2010).
[75] There could potentially be a third way to see 'correct interpretation', ie as a set that contains all possible interpretations (even conflicting ones), that collapses into a single sub-set upon the hermeneutic moment of being examined in a particular case, without of course this affecting the overall set (a kind of exdurantist point of view on the issue, or if one wants to draw an analogy from physics, a wave function collapse). At this moment all the variables, eg particular circumstances, conditions, rules of interpretation etc. would also collapse in a single reality.

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