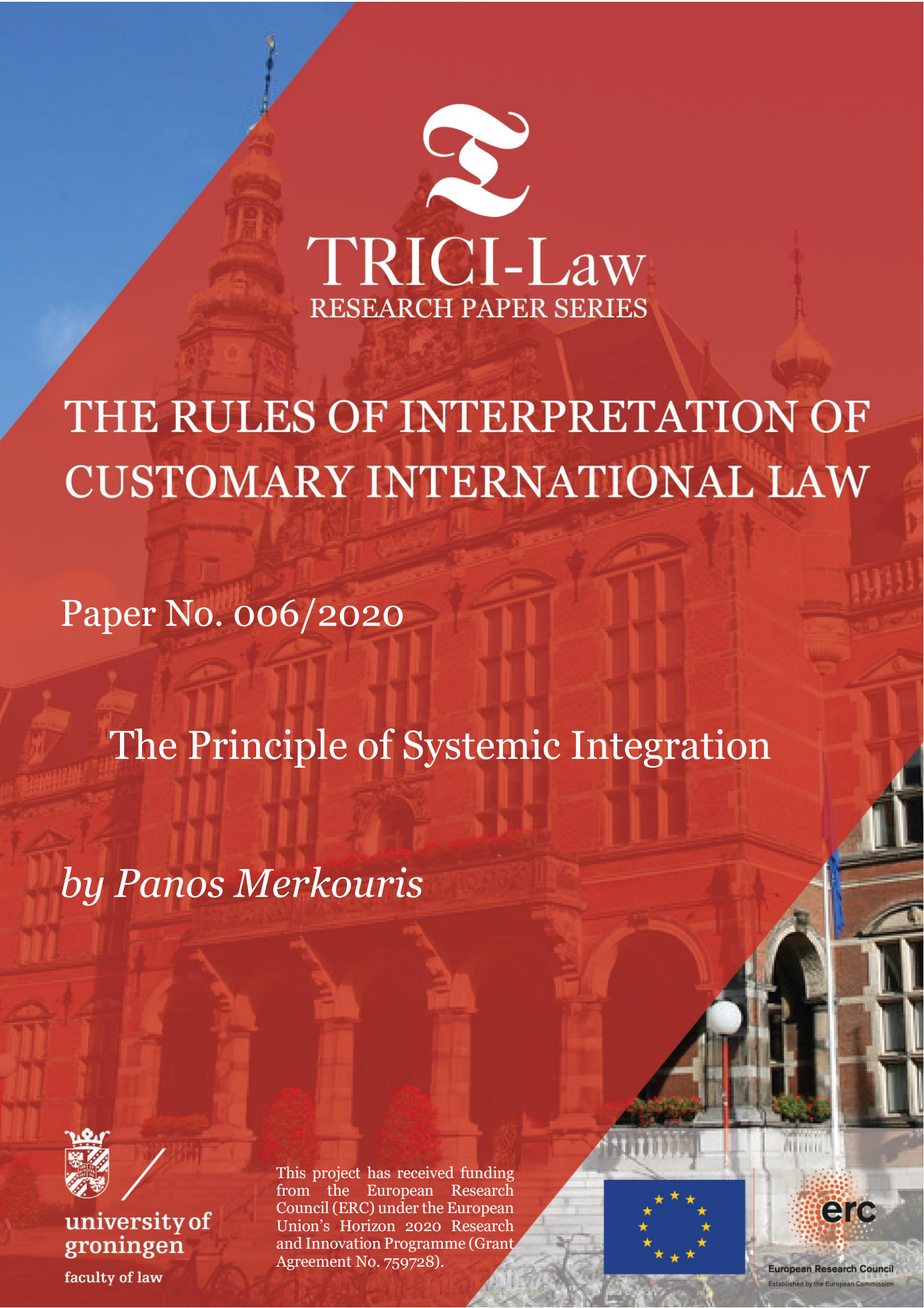

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The Principle of Systemic Integration

by Panos Merkouris

university of groningen
faculty of law

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The Principle of Systemic Integration

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Contents

A. Introduction

B. The Road to the Text of Article 31(3)(c) of the Vienna Convention on the Law of Treaties

1. Institut de Droit International

2. ILC

3. Vienna Conference on the Law of Treaties

C. Systematizing the Principle of Systemic Integration

1. Rules

2. 'Applicable'

3. Parties

4. Relevant: The Proximity Criterion

5. At the time of the Conclusion or of the Application of the Treaty?

D. The Principle of Systemic Integration and its Connection with Other Interpretative Principles/Maxims

1. *In pari materia*

2. Principle of Contemporaneity and Evolutive Interpretation

E. The Potential for Change

F. The Principle of Systemic Integration in the Interpretation of Customary International Law

1. Interpretability of Customary International Law

2. Interpretation of Customary International Law

3. The Manifestation of the Principle of Systemic Integration in the Interpretation of Customary International Law

G. Concluding Remarks

H. Acknowledgments

Cited Bibliography

A. Introduction

1 The proliferation of treaties, international organisations and (quasi)-judicial bodies in the last few decades has ignited an interest in the phenomenon of fragmentation of international law (→ *Fragmentation of International Law* [MPEPIL]) and in addressing any potential pitfalls. In this context, the → *International Law Commission* [MPEPIL] ('ILC') established a Study Group to examine the topic of fragmentation or. as it was renamed, diversification of international law (ILC, Report on Fragmentation of International Law (2006), para 426). In the report, finalised by its Chairman Martti Koskenniemi in April 2006, one of the conclusions was that one of the ways in which fragmentation could be addressed was through interpretation and, in particular, Article 31(3)(c) of the → *Vienna Convention on the Law of Treaties (1969)* [MPEPIL] ('VCLT'). According to this provision, in the process of interpretation '[t]here shall be taken into account, together with the context: …(*c*) any relevant rules of international law applicable in the relations between the parties'.

2 This provision, which reflects → *customary international law* [MPEPIL], is more commonly known as the principle of systemic integration, a term popularised by McLachlan (2005, 279-319). Other terms used to describe it have been:

- '*principe d'intégration*' (Combacau and Sur, 2004, 175);
- 'systemic interpretation' (*Ioan Micula and Others v Romania*, 2013, paras 307 and 310);
- 'systemic harmonisation' (*Al-Dulimi and Montana Management Inc v Switzerland*, Merits and Just Satisfaction, 2016, para 140 and (Concurring Opinion of Judge Sicilianos), para 9);
- 'systematic interpretation' (Bleckmann, 1977, 526; Verzijl, 1973, 324);
- 'principle of systematic integration' (*Hesham TM Al Warraq v Republic of Indonesia*, 2014, para 519; on why the term 'systemic' is preferable to 'systematic' see Distefano and Mavroidis, 2011, 743; Merkouris, 2015, 266); and
- 'harmonious interpretation' (*Vattenfall AB and Others v Germany*, 2018, paras 158 and 167), to name but a few. For the purposes of this entry, the term that will be used is 'principle of systemic integration' to refer both to the rule *qua* VCLT provision and *qua* customary international law, unless explicitly indicated otherwise.

3 Despite the fact that in recent years there has been a 'flowering of case law' referring to the principle of systemic integration (Gardiner, 2015, 290) as a consequence of the broader discussion on the fragmentation or diversification of international law (Tzevelekos, 2010, 621ff), this was not always the case. Thirlway, for instance, doubted 'whether this sub-paragraph will be of any assistance in the task of treaty interpretation' (Thirlway, 1991, 58). This may be partially due to the fact that almost every term in Article 31(3)(c) either remains unclear or was at least at one point hotly contested. Weeramantry, rightly criticizing this vagueness of the text of Article 31(3)(c), noted in → *Gabčikovo-Nagymaros Case (Hungary/Slovakia)* [MPEPIL] that this provision 'scarcely covers this aspect with the degree of clarity requisite to so important a matter' (*Gabčíkovo-Nagymaros Project, Hungary/Slovakia*, Separate Opinion of Vice-President Weeramantry, 1997, 114).

4 That is not to say, of course, that the existence of the principle of systemic integration was a direct response to the modern-day fears of fragmentation. On the contrary, the principle in one form or another had found its way both in academic writings and debates (Section B) and in judgments long before the VCLT. One of the most well-known examples is the *George Pinson* case of 1928, where the Tribunal in no uncertain terms held that '[e]very international convention must be deemed tacitly to refer to general principles of international law for all the questions which it does not itself resolve in express terms and in a different way' (*Georges Pinson v Mexico*, 1928, 422 para 50(4)). There is a plethora of similar pre-VCLT cases, where tribunals found that when interpreting a treaty account should be taken of its wider 'normative environment' (*Différend concernant l'accord Tardieu-Jaspar, Belgium v France,* 1937, 1713; *Affaires des forêts du Rhodope central (fond), Greece v Bulgaria*, 1933, 1426; analytically see Section B.1 and ILC, Report on Fragmentation of International Law (2006), paras 415ff).

5 In order to better grasp the debates surrounding the content of the principle of systemic integration and its role not only in the interpretative exercise but, more generally, in the international legal order, the analysis in the following Sections will resemble concentric circles; starting from the history and content of the rule, and moving outward to its connection with other rules and other → *sources of international law* [MPEPIL]. More specifically the following Sections focus on: i) the drafting history *lato sensu* of Article 31(3)(c); ii) the main controversies regarding the content of the principle of systemic integration; iii) the links between this principle and other interpretative rules/maxims (→ *Interpretative Maxims*); iv) the potentiality of a content change of the principle; and finally, v) its relevance for the

interpretation of customary international law (→ *Interpretation in International Law* [MPEPIL]).

B. The Road to the Text of Article 31(3)(c) of the Vienna Convention on the Law of Treaties

6 The seeds of what would become Article 31(3)(c) VCLT were sown as early as in the writings of Grotius and Vattel. Grotius, in *De jure belli ac pacis*, suggested recourse to the law of nations as a rule of interpretation (Grotius, as edited by Tuck and J Barbeyrac, 833). Vattel, in turn, in *The Law of Nations*, seemed to espouse a more expansive version akin to that of *in pari materia* interpretation when he suggested interpretation by reference to terms used 'either in the same treaty, or in some other of the like kind' (Vattel, as edited by Kapossy Whatmore, 420).

7 Although references to these ideas can also be found, albeit rather underdeveloped, in early codification attempts of the law of treaties, such as in the 1918 Fiore's Draft Code, the 1933 Interpretation of Treaties and the 1935 Harvard Research Draft Convention on the Law of Treaties (Garner, 1935,1219, 1226 and 661, Art 19), the main push forward in the doctrinal development of the principle of systemic integration, and of interpretation in general, occurred in three *fora:* the → *Institut de Droit International* [MPEPIL] ('IDI'), the → *International Law Commission* [MPEPIL] and the Vienna Conference on the Law of Treaties, which led to the adoption of the VCLT.

1. Institut de Droit International

8 Between 1950 and 1956, the *Institut de Droit International* devoted four sessions to interpretation. Verdross, was the first to observe that a fundamental rule of interpretation should be included, ie that any treaty provision should be interpreted 'under the light of general international law' (IDI, 1950, 455). This is not surprising as Verdross had expressed similar views in the course he had taught in the Hague Academy of International Law almost one and a half decades earlier (1935, at 191-251). According to him, this principle was supported by the jurisprudence of the → *Permanent Court of International Justice* ('PCIJ') [MPEPIL], specifically in *Certain German Interests in Polish Upper Silesia* (*Germany v Poland*, 1925, 22) and *Factory at Chorzów* (*Germany v Poland*, 1927, 27). Verdross also suggested including two additional principles complementary to the first one: i) that interpretation must be based on the 'general principles of law', as enshrined in Article 38(1)(c) of the → *International Court of Justice* ('ICJ') [MPEPIL] Statute and ii) 'the principles underlying the matter to which the

text refers' (IDI, 1950, 456; *Territorial Jurisdiction of the International Commission of the River Oder*, *UK, Czechoslovakia, Denmark, Germany and Sweden v Poland*, 1929, at 26).

9 Along similar lines, Huber was of the view that the search for the 'true intention of the parties' was the fulcrum of the interpretative process, and this search resembled 'concentric circles', the centre being the intention of the parties, the next concentric circle being the text, then context, general principles of international law and finally general principles of law (IDI, 1952/1, 215).

10 Although, originally, the utility of such a rule was questioned as being redundant and a potential obstacle to the progressive development of international law, the Drafting Committee was open to the idea of including a rule that would provide that interpretation must occur 'with a background dominated by the principles of customary international law', a position that was in the end accepted even by some of the members that had previously been against it (IDI, 1952/2, 365, 378, 384-7, and 404-5).

11 The importance of this precursor of Article 31(3)(c) became more pronounced in the Grenada Session, where not only was the idea of 'general principles' as an interpretative background accepted but the proposal was also made that it should feature first, even before any reference to the text (IDI, 1956, 330-2). This proposed re-ordering raised objections that led the *Special Rapporteur* to initially remove any reference to 'general principles' from the proposed rule on interpretation. This move, however, also raised objections, which eventually led to the reinstatement of 'general principles of international law' in the rule, albeit placed as the final element of the first paragraph (IDI, 1956, 330-8 and 341-4). To sum up, in the end the members of the *Institut de Droit International* were in agreement that 'general principles of international law', understood both as general principles and as customary international law, were an essential part of the interpretative process (→ *General Principles of Law* [MPEPIL]; → *General Principles of International Procedural Law*).

2. ILC

12 In the 1960s when the ILC tackled the issue of the law of treaties, it built on the consensus that had been achieved among the members of the IDI and proceeded from that point forward. Since an agreement had been achieved on the issue of 'general principles', the ILC discussions shifted to whether this should be broadened, ie whether the interpretative background should not just be 'principles' but a broader set of 'rules'. Along these lines *Special Rapporteur* Waldock proposed that a treaty should be interpreted 'in the light of the rules of international

law [in force at the time of its conclusion]' (ILC, 769th Meeting (1964), para 3). This version of Article 31(3)(c) is critical for two reasons. Firstly, for the introduction of the term 'rules' *in lieu* of 'principles'. Second, for the inclusion, albeit in 'drafting brackets', of the terms 'in force at the time of its conclusion' (→ *Treaties, Conclusion and Entry into Force* [MPEPIL]), which is a reflection of intertemporal considerations within this rule.

13 The substitution of 'principles' with 'rules' was met with voices both in favour and against. De Luna, in particular argued that regional customary law should also be taken into account (→ *Regional International Law* [MPEPIL]). In trying to achieve a compromise Waldock opted for stripping the proposed interpretative rule to its bare minimum and proposed the following wording: 'A treaty shall be interpreted … in the light of … (b) the rules of international law'. Although, this shift to vagueness did not go unopposed, the consensus was that the provision, in one form or another, should be retained as one of its main advantages was that it streamlined the interpretative process giving the terms being interpreted a 'univocal' rather than a 'multivocal' meaning (ILC, 769th Meeting (1964), paras 8-13, 29, 32-3, and 38-9; ILC, 770th Meeting (1964), para 12-15, 18, and 23; ILC, 869th Meeting (1966), para 59; ILC, 870th Meeting (1966), paras 33, 42-3, and 70; ILC, 871st Meeting (1966), paras 12, 22-3, and 51).

14 As far as the term 'rules' was concerned the *Special Rapporteur* was of the view that 'rules' should be understood irrespective of their source, ie not only general principles, but also customary law (both general and special/regional) and treaty-based rules, a position that was approved by the Drafting Committee and culminated in what we now know as Article 31(3)(c)(ILC, 871st Meeting, paras 51-2; ILC, 872nd Meeting (1966), para 10; ILC, 873rd Meeting (1966), para 90).

15 As for the intertemporal ramifications of Waldock's earlier proposal, this was the result of the ILC deciding to discard an article specifically devoted to intertemporal law (→ *Intertemporal Law* [MPEPIL]) (on Draft Art 56 see Merkouris, 2014, 121ff). The question was whether the rules contemporaneous to the conclusion of the treaty or those contemporaneous to the interpretation of the treaty should be taken into account (ILC, 765th Meeting (1964), paras 49, 56, 62-4, 75, and 79-80). Eventually Waldock and de Luna suggested that the rule should not be a rigid one. The solution should on each occasion depend on the intention of the parties as manifested through the text, subsequent practice and other relevant documents (ILC, 770th Meeting, paras 29-34). This led to the stripped-down version of Article 31(3)(c), with no explicit mention of intertemporality. Although there were some proposals to either retain the

wording ‘in force at the time of its conclusion’ or introduce a somewhat different wording that would establish the intention of the parties as the decisive criterion for resolving intertemporal conundra (ILC, 870th Meeting, paras 58 and 92; ILC, 871st Meeting, paras 31 and 53), the majority of the ILC members were happy to leave out any explicit reference to intertemporality (ILC, 870th Meeting, paras 10-2, 21,and 50; ILC, 871st Meeting, paras 23, 33, and 38; ILC, 872nd Meeting, para 9).

3. Vienna Conference on the Law of Treaties

16 During the Vienna Conference on the Law of Treaties, the ILC Draft Articles were used as a template, and naturally this informed the scope and nature of the discussions. As far as the principle of systemic integration is concerned, three main points were raised. First, Czechoslovakia raised an objection that certain governments had already lodged in their comments to the Sixth Committee of the United Nations General Assembly (‘UNGA’), ie that the relegation of systemic integration to paragraph 3 of Article 31 did not properly reflect the importance of that interpretative rule (UNGA Sixth Committee, 978th Meeting (1967), paras 18-9; UNGA Sixth Committee, 908th Meeting (1966), para 14).

17 Second, in response to an attempt to revive the intertemporality debate, Waldock replied that this issue was so complex that simply avoiding any explicit reference in Article 31(3)(c) was the best strategy, a position that had also been taken and commented on by the governments in the Sixth Committee (UN Conference on the Law of Treaties, Committee of the Whole, 33rd Meeting, paras 53-4, and 74)M.

18 Third, the Federal Republic of Germany submitted an amendment that focused on clarifying the term ‘parties’. This amendment consisted of adding to Article 31(3) VCLT a sub-paragraph (d) that would state that account should also be taken of ‘any relevant international obligation of one or more of the parties’. This was meant to safeguard the unity of the legal order and avoid any ‘unwarranted harm to at least one of the parties’ (UN Conference on the Law of Treaties, Committee of the Whole, 32nd Meeting, para 10). Although the United Kingdom and Russia were of the view that the proposed amendment raised important issues that deserved attention, the amendment was not put to vote on procedural grounds as Germany considered this to be a drafting issue rather than a substantive one. Interestingly, however, Kenya had commented that the amendment was unnecessary, the implication potentially being that it was already part and parcel of Article 31(3)(c) as it stood (UN Conference on the Law of Treaties,

Committee of the Whole, 33rd Meeting, paras 11, 31 and 80-1; for an alternate reading see Linderfalk, 2008, 361).

19 Although, Article 31(3)(c) eventually remained unchanged, the aforementioned points demonstrate that even at the very last minute, crucial terms of the principle of systemic integration remained couched in ambiguity. This was most likely, as also seen in the IDI and ILC discussions, a perceptive way of arriving at an agreed text at the cost of legal certainty.

C. Systematizing the Principle of Systemic Integration

20 Although the drafting history of Article 31(3)(c) sheds light on the role and content of the principle of systemic integration, it also shows that a number of issues were intentionally left vague in order to allow for flexibility but also for the more practical consideration of achieving consensus. It is no surprise, therefore, that on several occasions the relevant jurisprudence has had to deal with the interpretation of almost every term or set of terms included in the text of Article 31(3)(c) VCLT. In order to make sense of this jurisprudence, those terms will now be discussed.

1. 'Rules'

21 As seen in Section B, originally only general principles were considered to fall within the scope of the principle of systemic integration, this expanded to include customary law and then treaties. Although in doctrine, views have been expressed regarding the exclusion of international agreements (by virtue of them allegedly already falling under Art 31(3)(a); Schwarzenberger, 1968-9, 14), or even general principles (Sinclair, 1984, 139) from the ambit of the principle of systemic integration the all-inclusive approach is an overwhelming favourite (ILC, Report on Fragmentation of International Law (2006), para 426; McLachlan, 2005, 290; Villiger, 1985, 268).

22 This is supported by international jurisprudence. The following cases are just a very small selection of a much larger pool of cases, and are mentioned here to demonstrate that rules stemming from all three sources have been acknowledged as falling within Article 31(3)(c) VCLT by international courts and tribunals active in different areas of international law and with different structures. Recourse to:

- 'general principles' has occurred in *Golder v UK*, 1975, para 35; *Georges Pinson v Mexico*, 1928, 422 para 50(4); *Prosecutor v Furundžija*, Judgment (Declaration of

Judge Patrick Robinson), 2000, para 283; and *Banković and Others v Belgium and Others*, 2001, para 57;

- 'customary international law' has occurred in *Oil Platforms*, *Iran v USA*, Preliminary Objections, 1996, para 41; *Council v Front Polisario*, Judgment, 2016, paras 86ff; *Al-Adsani v UK*, 2001, paras 55-6; the *Iron Rhine Arbitration,* 2005, para 59; *Ambiente Ufficio SpA and Others v Argentina*, 2013, paras 603-28; and *Saluka Investments BV v Czech Republic*, Partial Award, 2006, para 254; and
- 'treaties' has occurred in *Mutual Assistance in Criminal Matters, Djibouti v France*, 2008, paras 112-3; *Selmouni v France*, 1999, paras 97-8; and *Prosecutor v Slobodan Milošević*, 2004, para A.5 and note 52. The Tribunal in the *Iron Rhine Arbitration* has even considered secondary legislation of regional organisations, such as European Union ('EU') Directives and Regulations, to fall within Article 31(3)(c) (para 58).

23 A final question is whether or not non-binding instruments (→ *Non-Binding Agreements* [MPEPIL], → *Soft Law* [MPEPIL]) can qualify as 'rules'. However, since this is also connected to the term 'applicable' it will be discussed in the next sub-Section.

2. 'Applicable'

24 The term 'applicable' received little attention during the negotiating history of Article 31(3)(c) VCLT and this pattern seems to continue today. Perhaps one reason for this is that the term 'applicable' alludes to whether or not the effect of the relevant instrument is binding, but this is then inextricably connected with the term 'rules', which by definition presupposes a degree of legal normativity. Villiger suggests that the ordinary meaning of the term 'applicable' excludes non-binding rules from the scope of Article 31(3)(c) (Villiger, 2009, 433), a view that found support in the *OSPAR Arbitration*, where the Tribunal did not consider a principle invoked by the parties as it was still in *statu nascendi* (*Ireland v UK*, 2003, paras 99-105). The tendency seems to be to consider only binding rules as 'applicable', thus relegating non-binding instruments to being considered as 'supplementary means'. This notwithstanding, there have been cases where judges considered non-binding instruments as falling under Article 31(3)(c) (*OSPAR Arbitration*, Final Award (Dissenting Opinion of Judge Griffith), 2003, paras 7-19; *Southern Bluefin Tuna cases, New Zealand and Australia v Japan,* (Separate Opinion of Judge Treves), 1999, para 10; Dörr, 2018, 608-9, para 100; Arato and Kulick, 2018).

3. 'Parties'

25 One of the main areas of contention with respect to the principle of systemic integration, is the term ‘parties’. Is it supposed to be understood restrictively as ‘parties to the treaty being interpreted’ or more expansively as ‘parties to the dispute’ or something in between? (McLachlan, 2005, 314-5; van Damme, 2009, 372). The former is restrictive in the sense that it allows for a significantly smaller number of rules to pass the ‘parties’ threshold, especially in the case of multilateral treaties, compared to the latter, when more treaties would be examinable by the interpreter as to their relevance, hence the characterization of the interpretation ‘parties to the dispute’ as an expansive one.

26 In academic writings, both views supporting the restrictive interpretation (Linderfalk, 2007, 178; Yasseen, 1976, 63) and those arguing in favour of a more expansive one (Gardiner, 2015, 303-4; Marceau, 2002, 782; Dörr, 2018, 610-1, para 104; Palmeter and Mavroidis, 2007, 914-8; French, 2006, 307) have been put forward. The use of the term ‘parties’ in the VCLT is also not of any real assistance as the term seems to be used in a variety of different manners, and sometimes even inconsistently with the definition provided in Article 2 VCLT (Merkouris, 2015, 23-4).

27 No clear pattern seems to emerge in international jurisprudence either, with some tribunals opting for the restrictive interpretation while others opting for varying degrees of an expansive interpretation. For the most part investment tribunals, since they deal mainly with Bilateral Investment Treaties (‘BITs’) (→ *Investments, Bilateral Treaties* [MPEPIL]) have not had to face any such issues, since the ‘parties to the dispute’ will be identical to the ‘parties to the treaty’. However, there are situations when a multilateral treaty may be in play. In a recent string of cases dealing with the interpretation of the Energy Charter Treaty (‘ECT’), some investment tribunals have seemed to lean towards the interpretation of ‘parties to the treaty’ (*Vattenfall AB and Others v Germany*, 2018, paras 151-68), a point that will be re-visited at the end of this Section. It has to be noted though, that although the Tribunal in *Vattenfall AB and Others v Germany* elaborated on the term ‘parties’, it also alluded to a lack of linguistic and subject-matter proximity (para 162), and more importantly, there was an even more fundamental issue as to whether a ‘rule’ was even at play (paras 159-61).

28 The Dispute Settlement Body of the World Trade Organization (‘DSB’ ‘WTO’) (→ *World Trade Organization* [MPEPIL]; → *World Trade Organization, Dispute Settlement* [MPEPIL]) has in different cases adopted stances as to how ‘parties’ should be understood that cover the entire spectrum (compare, for instance, *EC-Biotech*, 2006, paras 7.68-7.72; *US – Shrimp (AB)*,

1998, para 130 and notes 110-3; *US – Shrimp (Article 21.5 – Malaysia*), 2001, para 5.57). In *EC – Biotech*, for instance, the Panel although recognising that the treaties invoked were not binding on the parties to the dispute, hence, they failed the 'rules' requirement, nonetheless seemed to lean towards a a restrictive interpretation of the term 'parties', ie parties to the treaty (*EC – Biotech*, paras 7.68-7.72; for an analysis of why *EC – Biotech* is an example of interpretation of customary law, where the interpretative method rejected is the one actually employed see Merkouris, 2017, 148-50). More recently, however, the WTO Appellate Body in *EC – Large Civil Aircraft* chose not to take a position on the 'correct' interpretation of 'parties' but rather referred to the ILC Study Group's Report on the Fragmentation of International Law focused on whether the rules were indeed 'relevant' (*EC – Large Civil Aircraft*, , 2011, paras 844-6; *Peru — Certain Agricultural Products*, 2015, paras 5.101ff; also Ruiz Fabri and Trachtman, 2018).

29 Human rights courts, on the other hand, arguably due to the nature of the instruments they interpret, seem to have embraced a more integrative approach, interpreting their key instruments 'in the light of' other relevant human rights instruments irrespective of whether all the parties to the treaty being interpreted are parties to the treaty being examined as relevant under Article 31(3)(c). The → *European Court of Human Rights* ('ECtHR') [MPEPIL], for instance, has on multiple occasions interpreted the → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* [MPEPIL] ('ECHR') 'in the light of relevant international treaties that are applicable in the particular sphere' (*Demir and Baykara v Turkey*, 2008, para 67), despite the fact that one or more of the ECHR parties were not parties to those treaties. Below, an indicative list of treaties 'in the light of' which the ECtHR has interpreted the ECHR, despite the fact that some of the ECHR parties had not signed and/or ratified these treaties (for a detailed list see ECtHR Research Division, 2011):

- 1984 International Labour Organization ('ILO') Convention No 87 (*RMT v UK*, Merits and Just Satisfaction, 2014, para 76);
- 1930 ILO Convention No 29 (*Van der Mussele v Belgium*, 1983, para 32; *Graziani-Weiss v Austria*, 2011, para 36);
- 1980 Hague Convention on the Civil Aspects of International Child Abduction (*X v Latvia*, 2013, para 93; *Iglesias Gil and AUI v Spain*, 2003, para 51);
- 1964 European Code of Social Security (*Carson and Others v UK*, 2010, paras 49 and 85);

- 1967 European Convention on the Adoption of Children (*Pini and Others v Romania*, 2004, paras 139-42; *Emonet and Others v Switzerland*, 2007, para 65);
- 1975 European Convention on the Legal Status of Children Born out of Wedlock (*Mazurek v France*, 2000, para 49);
- 1989 European Convention on Transfrontier Television (*Autronic AG v Switzerland*, 1990, para 62);

30 Similarly, the → *Inter-American Court of Human Rights* ('IACtHR') [MPEPIL] has also referred to a wide range of legal instruments, of varying degrees of 'actor proximity' (Section C.4). This is usually referred to as a *corpus juris* of international human rights, in the light of which the → *American Convention on Human Rights (1969)* [MPEPIL] ('ACHR') must be interpreted (*Ituango Massacres v Colombia*, 2006, para 157; *The Right to Information on Consular Assistance*, Advisory Opinion, paras 112-5; Burgorgue-Larsen, 2017).

31 Irrespective of whether different courts and tribunals may lean towards a more integrative approach than others, the *Vattenfall* decision raises a critical point in the context of the whole debate on how 'parties' should be understood. The issue was whether European Union (EU) law (→ *European Community and Union Law and International Law* [MPEPIL]) could be considered a 'relevant rule' when interpreting the ECT. Since not all ECT parties were EU Member States, the *Vattenfall* Tribunal was of the opinion that EU law was not a 'relevant' rule. The reason was that 'the same words in the same treaty provision [cannot] have a different meaning depending on … the parties to a particular dispute' and that coherence and a single unified interpretation of each treaty provision mandated opting for a 'parties to the treaty' reading of Article 31(3)(c) (paras 155-6). In the Tribunal's view the 'parties to the dispute' interpretation 'would bring uncertainty and entail the fragmentation of the meaning and application of treaty provisions' (para 158). The crux of the argument is that a single unified interpretation of each treaty provision can be secured only through a restrictive interpretation, ie 'parties to the treaty'.

32 However, this line of reasoning, as also evinced from the jurisprudence of courts and tribunals that have gone for the expansive interpretation of 'parties to the dispute', makes certain questionable assumptions. Firstly, that an expansive reading of the term 'parties' would lead to different interpretations of the same provision depending on the parties to the dispute. This assumes that the principle of systemic integration does not have any other safety valve, and that once the 'parties' requirement is met, the rule would be immediately taken into

account. That is not the case. This is precisely, what the term 'relevant' is designed for; to allocate the appropriate interpretative *gravitas* to a rule, by considering a number of factors that offer insight as to the intention of the parties. Not every rule would be automatically considered 'relevant'. In fact, 'actor proximity' together with other forms of proximity (Section C.4) would be taken into account to determine relevance.

33 Second, the claim about incoherence is equally applicable, if not more so, in the case of a 'parties to the treaty' reading of Article 31(3)(c). Every time a State accedes to or withdraws from the treaty being interpreted, the set of potential 'relevant rules' would also change. To make matters even worse, this would also be true for any accession to or withdrawal from any other treaty of any of the State parties as this would also affect whether that treaty could be considered 'relevant'. Contrarily, an expansive reading of 'parties', where the focus is more on determining actual 'relevance', may *prima facie* increase the pool of potential 'relevant rules' but ensures greater stability and coherence as the 'actor proximity' is not the only decisive criterion, but needs to be supplemented by other forms of proximity to a degree that would satisfy the interpreter. Thus, somewhat paradoxically the expansive interpretation, ie 'parties to the dispute', ensures the same or perhaps an even higher level of systemic coherence than 'parties to the treaty' (in more detail, Section C.4).

4. 'Relevant': The Proximity Criterion

34 This brings us to the key feature of the utility of the principle of systemic integration, ie which rules are to be considered 'relevant'. Despite its importance, it was not thoroughly discussed during the VCLT negotiations. There were no objections to its inclusion, as it is a very reasonable term that allows the interpreter the required flexibility to determine which other rules are of interpretative value. Looking at jurisprudence is quite revealing but not without its hurdles. Firstly, different courts and tribunals focus on different elements that reveal relevance, depending on the particularities of each case. Furthermore, it is not always explicitly stated in the judgment when reference to other rules is based on an application of the principle of systemic integration or of a different interpretative element. This is even more pronounced in the case of the pre-VCLT courts and tribunals. In those cases since linguistic expression of the principle of systemic integration (as it now stands in Article 31(3)(c)) did not exist, it is even more unclear whether or not they were at that time applying the contemporary form of the principle of systemic integration (for the potential of rules of interpretation changing through time see Section E).

35 That is not to say, however, that repeated patterns and lines of judicial reasoning cannot be seen across the jurisprudence of international courts and tribunals. On the contrary, a study of the relevant case-law reveals some 'attractors', points of convergence in this somewhat chaotic system, which all share the common theme of 'proximity', ie how close the rule referred to is to the rule being interpreted (Merkouris, 2015, chs 1 and 2). Because these attractors are manifestations of proximity, they are collectively referred to as the *proximity criterion*. There are four main manifestations of proximity on which courts and tribunals tend to converge:

- *Linguistic proximity*. This refers to how similar the wording used in the rule being interpreted and the rule being considered as 'relevant' is. One of the early clear-cut examples of reference to this 'linguistic proximity' can be found in the *Warsaw Electricity Company* case, where the arbiter was stunned by the 'terminological identity' ('*terminologie identique*') and 'near identity' ('*presque identité*') of certain provisions of the relevant instruments (*Compagnie d'Electricité de la Ville de Varsovie*, *France v Poland*, 1929, 1675). A more recent example comes from the ICJ, where in *Maritime Delimitation in the Indian Ocean* (*Somalia v Kenya*, Preliminary Objections, 2017, para 91), the Court emphasized the 'similarity in wording' between a paragraph of a Memorandum of an Understanding ('MOU') between Somalia and Kenya and Article 83(1) of the United Nations Convention on the Law of the Sea ('UNCLOS').

- *Subject-matter proximity*. This focuses on whether the alleged 'relevant' rule deals with the same issue as the provision being interpreted (*Oil Platforms*, Merits, (Separate Opinion of Judge Higgins), 2003, para 46; *EC – Large Civil Aircraft*, 2011, para 846; *RosInvest Co UK Ltd v Russia*, 2007, para 39; Gardiner, 2015, 299; Uibopuu, 1970, 4). This type of proximity is where systemic integration bears a strong resemblance to *in pari materia* interpretation (see Section D.1). Considerations of object and purpose also fall within what courts take into account when examining the 'subject-matter', as one will affect the determination of the other (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion (Separate Opinion of Judge Mosler), 1980, 126).
- *Actor proximity*. In this form of proximity courts examine how many of the parties to the treaty being interpreted are parties to the treaty/rule under consideration for the purposes of the principle of systemic integration. 'Actor proximity' is not only closely connected to the whole discussion about 'parties' in Article 31(3)(c), but is consistent with the object and purpose of the principle and accounts for the great diversity in

approaches to 'actor proximity' of courts and tribunals (see cases in Section C.3). In sum, an expansive reading of the term 'parties' is not the end of the discussion. How many parties are shared between the two instruments remains a factor that is considered for the purpose of determining 'relevance'. The term 'parties' delineates the set of rules that can be examined for 'relevance'. But in the context of 'relevance' actor-proximity is not a *sine qua non*, but one of many factors to be taken into account. This way 'actor proximity' is given proper weight, but not to the detriment of other forms of proximity, as would happen if 'parties' was read restrictively.

- *Temporal proximity*. Finally, one more factor taken into account is how temporally close the two instruments are (*Compagnie d'Electricité de la Ville de Varsovie*, 1675; *Affaire des boutres de Mascate, France v UK,* 1905, 83ff). The reason for this is that 'temporal proximity' may be an indication that the treaty/rule referred to be may be more relevant as it would be a reasonable assumption that the intention of the parties (and the language used) would not have changed so dramatically in a short time span.

36 An important feature of the *proximity criterion*, is that the various manifestations of proximity are in a constant interactive relationship. Relevance is thus also determined through a combination of one or more of the manifestations of proximity, but also and perhaps more importantly the complete or partial lack of one of the forms of proximity may be compensated for if other forms of proximity are met to a great degree (*Compagnie d'Electricité de la Ville de Varsovie*, 1675; *RMT v UK*, Merits and Just Satisfaction (Concurring Opinion of Judge Wojtyczek), 2014; *Arone Kahane Successor v Francesco Parisi and the Austrian State, Romania v Austria,* 1929, 960). The reverse can also be true, ie one factor of proximity may not be enough to establish 'relevance' if other forms of proximity are completely lacking. In the *Ungarische Erdgas AG contre Etat Roumain* (*Hungary v Romania*, 1928, 454ff), for instance, the 1919 Treaty of Versailles was not considered relevant due to insufficient 'actor proximity' and 'subject-matter proximity' despite the existence of 'linguistic proximity'.

37 The *proximity criterion* and the principle of systemic integration as a whole is a microcosmic reflection of the entire interpretative process. It answers the same questions (how, what, who, when) that help the interpreter in identifying the intention of the parties. Although it is an important interpretative tool, one must always bear in mind that it is not without its limits. In the application of the principle of systemic integration the interpreter must always be mindful that it is meant to reveal the meaning of the provision as intended by the parties, and not to

rewrite or substitute it (*Maritime Delimitation in the Indian Ocean*, Preliminary Objections, (Dissenting Opinion of Judge Bennouna), 2017; *Eskosol SpA v Italy*, 2019, paras 124-5; *South American Silver Limited v Plurinational State of Bolivia*, 2018, para 214; Simma, 2011, 584).

5. At the time of the Conclusion or of the Application of the Treaty?

38 In Section B, we saw the heated debate that ensued after the inclusion of the terms 'at the time of the conclusion of the treaty' at the end the provision. Although this language did not survive in the end, that is not to say that what prompted it, ie intertemporal considerations, is not relevant for the purposes of the principle of systemic integration. On the contrary, they are part not only of this principle, but the interpretative process as a whole. The implicit intertemporal considerations that still imbue Article 31(3)(c) and how these can be addressed through the lens of the principle of contemporaneity and evolutive interpretation will be addressed below, in Section D.2.

39 However, these intertemporal considerations should not be conflated with the temporal proximity of the 'proximity criterion'. Although both relate to the concept of time, they deal with different aspects of the principle of systemic integration. Intertemporality outlines the set of rules (either those that existed at the time of the conclusion of the treaty or those at the time of the application of the treaty), that could potentially be *prima facie* considered under Article 31(3)(c). From that set of rules, the interpreter will then determine which ones (if any) are 'relevant'. This will be done by applying one or more of the manifestations of the proximity criterion, including 'temporal proximity'. Thus, although both 'temporal proximity' and intertemporality serve as means of giving effect to the intention of the parties, they fulfil different roles in the application of the principle of systemic integration.

D. The Principle of Systemic Integration and its Connection with Other Interpretative Principles/Maxims

40 As shown above, the principle of systemic integration can on occasion overlap with other principles/canons/maxims of interpretation. This is to be expected in a 'holistic exercise' like that of interpretation. A detailed analysis of all potential links and overlaps is beyond the scope of this entry, but the connection with, on the one hand, *in pari materia* interpretation, and, on the other hand, the principle of contemporaneity and evolutive interpretation merit attention.

1. *In pari materia*

41 *In pari materia* interpretation has received fairly little attention in international scholarship. Yet, as shown in Section B, the connection and partial overlap between the principle of systemic integration and *in pari materia* interpretation has been hinted at on multiple occasions (eg by Vattel, in the codification attempts, by ILC members, and through the German amendment).

42 *In pari materia* is a canon of construction stemming from domestic legal systems, according to which 'statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject' (Garner, 2014, 911). In a domestic setting *in pari materia* interpretation makes sense, as itis useful in avoiding conflict, but it is based on the premise of how domestic legal systems function, i.e., that the relevant statutes are binding on all. This is not the case in international law.

43 As Henin, Wittich and Schill note (Henin, 2018, 219-24; Wittich, 2013, 97-8; Schill, 2009, 303-12), in international case-law and literature *in pari materia* interpretation has been utilised both in the classical sense, ie that of two instruments having the 'same subject matter' (*Metal-Tech Ltd v Uzbekistan*, 2013, para 159), and in a more flexible manner of 'similarity of subject matters' (*Genie Lantman Elton (USA) v United Mexican States*, 1929, 533; *Asian Agricultural Products Ltd v Sri Lanka*, 1990, para 40).

44 The tendency, however, is to avoid offering any clear explanation as to how the subject-matter is determined (Paparinskis, 2012, 113). When *in pari materia* interpretation is resorted to this includes earlier and later instruments (*Kronprins Gustaf Adolf, Sweden v USA*, 1932, 1258-61; *Asian Agricultural Products Ltd v Sri Lanka*, para 40), although interestingly Judge van Wyk in his Separate Opinion in the *South West Africa* cases was of the view that in the context of *in pari materia* interpretation it was 'clearly untenable' to consult a later treaty in an attempt to 'throw … light on the intentions of the authors [of an earlier legal instrument]' (*South West Africa Cases, Ethiopia v South Africa; Liberia v South Africa,* Second Phase, (Separate Opinion of Judge van Wyk), 1966, para 49).

45 There is great uncertainty not only as to the normative status of *in pari materia* interpretation, but also regarding its place within Articles 31-33 VCLT. This is exacerbated by the fact that 'courts and tribunals do not generally particularize the peg on which they hang their use in interpreting one treaty of terms in other treaties' (Gardiner, 2015, 324). If *in pari*

materia interpretation is a *praeter*-VCLT interpretative rule then 'all the *in pari materia* treaties would fall indirectly under Article 31(3)(c) by virtue of the customary rule of *in pari materia* interpretation [being a relevant rule]'. However, most authors do not consider it as an autonomous principle of interpretation (Merkouris, 2015, 78-9).

46 If the *pari materia* treaty satisfies the requirements of Article 31(3)(c), then there is an *ad hoc* overlap between *in pari materia* interpretation and the principle of systemic integration. Despite this, it should be emphasized that whereas *in pari materia* focuses entirely on the '*subject-matter proximity*', the principle of systemic integration requires consideration of other forms of proximity as well (linguistic, actor and temporal). Consequently, although there might be overlap in certain situations, that will not always be the case. In all other instances not falling under Article 31(3)(c), it would seem that recourse to *in pari materia* treaties would fall under 'other supplementary means' of Article 32 VCLT (*Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia,* 2014, para 195; *Orascom TMT Investments Sàrl v Algeria*, 2017, para 303; Henin, 2018, 227-35; Berman, 2004, 317-22), or under certain conditions act as a tool for identifying the ordinary meaning under Article 31(1) VCLT (Schill, 2009, 312).

47 Consequently, although there is an undeniable link between *in pari materia* interpretation and the principle of systemic integration, a link that depending on the treaty may lead to the exact same result, they remain distinct methods by virtue of the fact that the principle of systemic integration requires more elements to be satisfied in order for another rule to be considered as 'relevant'.

2. Principle of Contemporaneity and Evolutive Interpretation

48 One of the principles of interpretation identified by Fitzmaurice was that of contemporaneity, according to which '[t]he terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded' (Fitzmaurice, 1957, 212). This was qualified by Thirlway, who added '[p]rovided that, where it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, *the treaty must be interpreted so as to give effect to that intention*' (Thirlway, 1991, 57).

49 Within the context of treaty interpretation the principle of contemporaneity, and by implication evolutive interpretation, is a 'particular application of the doctrine of inter-temporal

law' (Fitzmaurice, 1957, 225). This particular feature informs the connection with the principle of systemic integration, which runs along two main tracks.

50 An evolutive interpretation is prompted either by an evolution of fact or evolution of law (Georgopoulos, 2004, 123ff; Bjorge, 2014) (→ *Evolutionary Interpretation*). It is in the latter case that a connection can be made with the principle of systemic integration. Evolution of law covers not only customary international law (*Mondev International Ltd v USA*, 2002, paras 116-25) but also treaties (*Mayagna (Sumo) Awas Tingni Community v Nicaragua*, 2001, paras 148-9), and domestic law (*Dudgeon v UK*, 1981, para 60). The evolution of law could potentially fall under many elements of Article 31 VCLT and its customary law counterpart, but as long as the requirements of Article 31(3)(c) are met, evolutive interpretation prompted by the evolution of law (treaties and customary law, not domestic law) can also be linked to the principle of systemic integration.

51 The second track along which a connection between evolutive interpretation and the principle of systemic integration runs was already seen in the drafting history of Article 31(3)(c). One of the early drafts included at the end the terms 'at the time of the conclusion of the treaty'. Although this language was removed, intertemporality still plays a crucial role in the functioning of Article 31(3)(c). Bearing in mind the definition of the principle of contemporaneity, and the extensive jurisprudence and literature on the matter (Bjorge, 2014; Merkouris, 2015, ch 2;), it seems, as was suggested by several ILC members, that the decisive criterion should be the intention of the parties. If the parties intended the treaty and its provisions to evolve, then similarly the 'relevant rules' should be those contemporaneous to the application of the treaty. If not, then the principle of contemporaneity also informs the pool of 'relevant rules', which should be those existing at the time of the conclusion of the treaty. This way the intention of the parties, which decides whether a contemporaneous or evolutive interpretation should be opted for, also colours our understanding of the content of the principle of systemic integration.

E. The Potential for Change

52 When discussing the content of the principle of systemic integration, or any legal rule for that matter, one must always bear in mind the effect that the passage of time may have on it. There is sometimes the tendency to view certain legal rules as an immutable variant. Although doctrines such as that of intertemporal law and its interpretative manifestation assist in this

temporal content course-correcting, there are instances where this temporal solipsism still creeps in. Such an example is the rules of interpretation, and this, naturally also includes the principle of systemic integration.

53 International courts and tribunals often repeat that Articles 31-33 VCLT reflect customary international law (*Arbitral Award of 31 July 1989, Guinea-Bissau v Senegal,* 1991, para 48; *Japan — Taxes on Alcoholic Beverages*, 1996, Section D)). They do so even when the treaties interpreted pre-date the VCLT, sometimes by several decades (for an overview see Fitzmaurice and Merkouris, 2020, ch 5). This is representative of the underlying premises that either the rules of interpretation are immutable or have not undergone any significant changes in the last few centuries.

54 However, as shown above the very existence or not of the principle of systemic integration was debated pre-VCLT. This is also true for the rules of interpretation, in general. In pre-VCLT writings, authors such as Taylor (1901, 394), Hyde (1909, 47), Westlake (1910, 293), Yü (1927, 72), Oppenheim (1928, 759) and Brierly (1928, 168) questioned the very existence and utility of any set of interpretative rules. Similar doubts were expressed both during the IDI and the ILC discussions on the law of treaties. Waldock, for instance, in his 'Third Report on the Law of Treaties' was very open about the fact that 'even the existence of rules of international law governing the interpretation of treaties are questions which are not free from controversy' while Briggs considered them as 'working hypotheses' (IDI, 1950, 336ff; Third Report on the Law of Treaties, 1964, para 1; ILC, 765th Meeting, para 9). Even today, more than 60 years after the adoption of the VCLT, the existence of binding 'rules' of interpretation is still debated (d'Aspremont, 2013, 103ff; d'Aspremont, 2015; Kammerhofer, 2011; Gardiner, 2018, 335-62).

55 Even if we disregard this history of gradual evolution of the rules of interpretation, the premise of their immutability is still problematic with respect to customary law. As is generally accepted Articles 31-33 VCLT reflect customary international law. However, a customary rule emerges as a result of State practice and *opinio juris*. It would logically follow then, that if States started to conduct the interpretative exercise in a manner different than hereto, and such practice was combined with the requisite *opinio juris* this would eventually lead to the modification of the customary rule on interpretation or the emergence of an entirely new one. After all, the residual nature of the interpretative rules was recognised by the ILC members (ILC, 765th Meeting, paras 61 and 78). Consequently, the customary rules on interpretation are

in principle mutable, and this in turn would also affect the content of the VCLT provisions (the customary rules on interpretation being 'relevant rules').

56 The drafting history of the rules of interpretation and the practice of international courts and tribunals are further evidence of this. In Section B, for example, we saw the many and vastly different versions that the principle of systemic integration went through, on its way to reaching the text that finally became Article 31(3)(c) VCLT. The situation is no different if one considers all the interpretative rules. An overview of the various codification attempts of the interpretative rules, demonstrates a veritable *smörgåsbord* of proposed rules, some of them eventually being featured in the VCLT, but many others not, and the gravitas of each element different depending on the codification attempt (Fitzmaurice and Merkouris, 2020, ch 5). Even post- VCLT, maxims such as, for instance, → *In Dubio Mitius*, → *Expressio Unius (Est) Exclusio Alterius, ejusdem generis, contra proferentem*, and → *Exceptiones Sunt Strictae Interpretationis*, are still invoked before and used by international courts and tribunals (Merkouris, 2018, 259ff; Klinger, 2018, 73ff; Baetens, 2018, 133ff; d'Argent, 2018, 241ff; Solomou, 2018, 359ff). This then, logically raises the question of whether these maxims are an implicit part of the VCLT, or of only customary law. Do they exist *intra*-, *praeter*- or *contra*-VCLT, and how do they complement or conflict with the VCLT rules?

57 But one does not have to look to other maxims. Even the interpretative elements included in the VCLT and their customary counterparts are not immune to change and interpretation. Section C showed the interpretation and gradual clarification of elements of the principle of systemic integration. The same is true for other elements included in Articles 31-33 VCLT. By way of example, the ILC undertook the study of subsequent agreements and practice. Its recent 'Draft Conclusions with Commentaries' perfectly describe the mosaic of the conflicting or, on occasion, increasingly refined approaches in international jurisprudence on the topic (ILC, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries (2018)).

58 Another revealing example is → *Travaux Préparatoires*. The content of *travaux préparatoires*, eg whether subsequent agreements and practice or the ILC discussions can be categorised as preparatory work (ILC, Draft Conclusions on Subsequent Agreements and Subsequent Practice, Commentary to Conclusion 2(4), para 8; ILC, 873rd Meeting, paras 25-8 and 34); whether preparatory work can also have a corrective function and if and under what conditions it can be used against States that had not participated in the treaty negotiations

(Schwebel, 1996, 541-7; Merkouris, 2010, 75-98); all these are but a few instances where interpretation of the rules of interpretation occurred and in some instances even changed the content of these rules.

59 These examples illustrate that the rules of interpretation both as VCLT and as customary rules are open to change and interpretation, as is any legal rule. This phenomenon is currently being examined by the International Law Association ('ILA') Study Group on the Content and Evolution of the Rules of Interpretation (ILA, Preliminary Report of the Study Group on the Content and Evolution of the Rules of Interpretation, 2016), but for the purposes of this entry it suffices to say that the content of the principle of systemic integration is not set in stone, but open to interpretation, and continuously refined and re-evaluated through the practice of States and of all other relevant actors on the international scene.

F. The Principle of Systemic Integration in the Interpretation of Customary International Law

60 In the previous Sections, the focus was on the content of the principle of systemic integration both *qua* VCLT rule and *qua* customary rule for the purpose of interpreting treaty provisions. One final issue is whether the principle of systemic integration has any role to play in the interpretation of rules emerging from other sources of international law, and in particular customary international law.

1. Interpretability of Customary International Law

61 In order to answer this, however, what has to be first determined is whether customary international law is amenable to interpretation. Barile in several of his writings identified lacunae in the process of detection of customary law; lacunae that in his view could be filled through a process that was inherently interpretative in nature (Barile, 1953, 141 ff; Barile 1978, 61-2 and 85-7; Barile, 1989, 21-4). In doctrine, opinions accepting and rejecting the interpretability of customary international law in a form that may bear certain similarities to treaty interpretation have been expressed. (for: Merkouris, 2015, ch 5; Alland, 2014, 82-88; Sur, 2012, 294-5; Kolb, 2006, 219ff; Orahkelashvili, 2008, ch 15; Bleckmann, 1977, 504ff, Bentivoglio, 1965, 35; against: Treves, 2006, para 2; Bos, 1984, 109; Degan, 1963, 162).

62 The purpose of interpretation, is to lift the vagueness surrounding the content of a particular rule. In essence, its role is a content-determinative one. Every legal term has as Hart poignantly

described ‘a core of certainty and a penumbra of doubt’ (Hart, 2012, 123). If customary rules are not open to interpretation, one must hold two conflicting statements at the same time. Customary rules are vaguer than treaty rules (ILA, 2000, 713; Wolfke, 1998, 36), yet that vagueness cannot be alleviated through the process of interpretation. This means that in order for the customary rule to be applied, its content would have to satisfy a degree of certainty that is significantly higher than that required of treaty rules. Consequently, treaty rules would be allowed a degree of vagueness that can be resolved through interpretation, but customary rules must in all instances meet an extremely high threshold of content-determination, which is not even required by a written rule. This is an untenable conclusion that calls into question the argument on non-interpretability of customary law on the basis of its vagueness.

63 A corollary to this type of reasoning is that treaty rules are written, whereas customary rules are not. This irrelevance of linguistic expression is, according to this line of thought, the reason for the non-interpretability of customary international law (Treves, 2006, para 2). However, not only can a rule of customary international law find a linguistic manifestation in various texts (eg treaties, soft law documents etc) and in judgments of courts and tribunals, but also the unwritten nature of customary law cannot *eo ipso* be a ground for denying its interpretability. There is a plethora of examples where the international community has accepted the interpretability of unwritten instruments or acts.

64 Verbal treaties, for instance, are covered by the customary law of treaties. This includes the customary rules of interpretation *mutatis mutandis* in order to account for the lack of written text (Verzijl, 1968, 32; Bos, 1980, 6-10; *contra* see Degan, 1963, 162). Additionally, the ILC has also acknowledged the interpretability of non-written acts. Both the ICJ in the *Nuclear Tests* cases and the ILC have come to the conclusion that ‘oral declarations may be formulated orally or in writing’ and ‘[w]hether a statement is made orally or in writing makes no essential difference … Thus the question of form is not decisive’(*Nuclear Tests, Australia v France*, 1974, para 45; *Nuclear Tests, New Zealand v France*, 1974, para 48; ILC, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations (2006), Guiding Principle 5). The ILC has also adopted Guiding Principle 7 that sets out the rules of interpretation applicable to unilateral declarations of States creating international obligations. Guiding Principle 7 and its commentary do not make any distinction between written and unwritten unilateral acts of States; thus, both would be open to interpretation.

2. Interpretation of Customary International Law

65 In addition to the aforementioned, examples of interpretation can be found not only in international jurisprudence but also the Statutes of international courts. A few notable examples will be mentioned here for the purpose of demonstration. Both the Rome Statute for the → *International Criminal Court* ('ICC') [MPEPIL] (1998) and the PCIJ/ICJ Statute and its preparatory work lend support to the interpretability of customary international law. Article 21 of the Rome Statute of the ICC ('Rome Statute') in paragraph 2 and 3 refers to the interpretation of principles and rules, which include customary law. Not only that, but paragraph 3, which states that '[t]he application and *interpretation of law* pursuant to this article *must be consistent with internationally recognized human rights*' (emphasis added), seems to suggest an interpretation akin to the principle of systemic integration. The preparatory work of the PCIJ Statute is also quite revealing. Article 36, referring to jurisdiction (reproduced *verbatim* in the ICJ Statute) states '… the jurisdiction of the Court in all or any of the classes of legal disputes concerning: a. the interpretation of a treaty; b. any question of international law'. With respect to sub-paragraph (b), Ricci-Busatti had proposed an amendment with the following form: '*the interpretation or application of a general rule of international law*' (Advisory Committee of Jurists, Procès-Verbaux, 275). Although the members of the Advisory Committee were of the view that this was a better and more precise wording than 'question of international law', the latter was adopted simply in order to ensure linguistic consistency (Advisory Committee of Jurists, Procès-Verbaux, 264-5 and 283-4), as this wording was the one used in other treaties, including Article 13 of the Covenant of the League of Nations (1919).

66 Additionally, the interpretability of customary international law is *nihil novum sub sole*. This is confirmed by international jurisprudence, which is replete with examples of customary rules being interpreted (Merkouris, 2015, ch 4; Merkouris, 2017; Fortuna, 2020). This has happened, for instance in:

- → *North Sea Continental Shelf Cases* [MPEPIL] (*North Sea Continental Shelf, Germany/Denmark and the Netherlands* Judgment (Dissenting Opinion of Judge Tanaka), 1969, 181);
- → *Gulf of Maine Case* [MPEPIL] (*Delimitation of the Maritime Boundary in the Gulf of Maine, Canada/USA*, 1984, paras 83 and 112);
- *Qatar v Bahrain* (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Qatar v Bahrain*, Jurisdiction and Admissibility (Dissenting Opinion of Vice-President Schwebel), 1995, 27-39);

- *Arrest Warrant* (*Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v Belgium*, 2002, paras 53-4);
- *Hadžihasanović* (*Prosecutor v Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Partial Dissenting Opinion of Judge Shahabuddeen), 2003, paras 9-10).

67 It is not only international courts but also domestic courts that have on occasion interpreted international customary law (Ryngaert 2019, Mileva, 2019). Indicatively, in:

- *Institute of Cetacean Research and ors v Sea Shepherd Conservation Society and Watson* (2013, para 6);
- *A v Swiss Federal Public Prosecutor and ors* (2012, para 5.4.3);
- *'Abu Omar' case, General Prosecutor at the Court of Appeals of Milan v Adler and ors* (2012, para 23.7); and
- *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors* (2006, paras 19-26).

3. The Manifestation of the Principle of Systemic Integration in the Interpretation of Customary International Law

68 What then is the role of the principle of systemic integration in this interpretative scheme? Quite a significant one. There are three main 'points of entry' through which the principle of systemic integration is utilised in the interpretative process of customary rules.

69 The first is the function of the principle of systemic integration that has been described throughout this entry. A customary rule is being interpreted by taking account of other relevant rules. Article 21 of the Rome Statute, as mentioned above, provides that '[t]he application and *interpretation of law* pursuant to this article *must be consistent with internationally recognized human rights*' (emphasis added), which depending on the rule may be an application of the principle of systemic integration or *in pari materia* interpretation or both (depending on whether one considers that the principle of systemic integration in the case of interpretation of customary law is akin to or identical to *in pari materia* interpretation). Another example can be found in Judge Tanaka's reference to logical interpretation in the → *North Sea Continental Shelf Cases* [MPEPIL] (*North Sea Continental Shelf, Germany/Denmark and the Netherlands* Judgment (Dissenting Opinion of Judge Tanaka), 1969, 181). This is also a reference to the

principle of systemic integration. One need only recall Fiore's Draft Code (Garner, 1935, 807-14) where the reference to other 'relevant rules' was categorised as a rule of logical interpretation. Similar applications of the principle of systemic integration to interpret customary rules can be found in → *Gulf of Maine Case* [MPEPIL] (*Delimitation of the Maritime Boundary in the Gulf of Maine, Canada/USA*, 1984, paras 83 and 112), *Tunisia/Libya Continental Shelf* (*Continental Shelf, Tunisia v Libya*, 1982, paras 38 and 70), and *Mondev* (*Mondev International Ltd v USA*, 2002, para 127) to name but a few.

70 The lack of a written provision, does not automatically exclude the consideration of any written legal provisions during the interpretative process of customary law. This is the second 'point of entry'. Although a *stricto sensu* → *textual interpretation* is not possible in the case of customary rules, international courts and tribunals often rely on the expression and language of a customary rule as expressed in a codification treaty (*EC – Large Civil Aircraft*, 2011, para 845; *Gulf of Maine*, para 845; Bleckmann, 1977, 526; Orakhelashvili, 2008, 498). In this scenario, textual interpretation is substituted by the principle of systemic integration as these treaties are to all intents and purposes 'relevant rules' for the interpretation of customary international law. Of course, the version of the principle of systemic integration in this case is somewhat more expansive than for treaties, as a general customary rule would be binding on all States (unless they are persistent objectors), whereas the treaty being referred to usually will not. However, this is not an issue as the 'proximity criterion' allows for such an application (an alternative explanation could also be that the principle of systemic integration is of a different/wider content in the case of customary international law). In the case of this 'point of entry' the principle of systemic integration assumes a role similar to that of textual interpretation.

71 The third 'point of entry' is through → *teleological interpretation*. In the case of interpretation of customary international law, courts and tribunals have referred not only to the object and purpose of the rule, but also the object and purpose of an entire area of international law (*Prosecutor v Tadić*, 1999, para 124; *Fisheries, UK v Norway,* 1951, 133). This expanded version of a teleological interpretation overlaps somewhat with the principle of systemic integration as other 'relevant rules' and their respective objects and purposes need to be taken into account.

G. Concluding Remarks

72 The aim of the present entry is to showcase the complexity and multifariousness of the principle of systemic integration, both as to the determination of its content and as to the link it has with other principles and other sources of international law. Moving in gradually wider concentric circles, our analysis started from a historical overview of the complex drafting history of what became Article 31(3)(c). We then examined international jurisprudence with respect to all the debated terms of the principle of systemic integration, with a particular focus on 'parties' and 'relevant', and the 'proximity criterion' connected to the latter. In Section D, the link of the principle systemic integration to other interpretative principles/maxims demonstrated that interpretative elements cannot be compartmentalised, but interact and overlap with one another. After all, this is to be expected since we are dealing with interpretation, which is a 'holistic exercise'. To complicate matters further the content of any rule of interpretation is open to refinement and change, and, thus, we need to constantly re-evaluate our understanding of these rules. Such a re-evaluation was also demonstrated in Section F, where it was firstly shown that interpretation is not only restricted to written rules but covers also customary ones, and secondly that the principle of systemic integration has a very important role to play in this process as well, where once again different interpretative elements and approaches overlap with each other.

73 The increased regulation and judicialization of international law has led, as Cançado Trindade put it, '[t]he systemic outlook [to be] flourishing in recent years' (*Whaling in the Antarctic, Australia v Japan: New Zealand intervening,* Judgment (Separate Opinion of Judge Cançado Trindade), 2014, para 26) and the principle of systemic integration to continue to gain in prominence in international jurisprudence (Gardiner, 2015, 290). This trend does not seem likely to slow down, on the contrary it seems to be accelerating. This is to be expected as the principle of systemic integration is an extremely versatile tool in the interpreter's arsenal that allows promoting a 'univocal' meaning of the treaty provisions being interpreted, without sacrificing their uniqueness, and enhances the unity and stability of the international legal system.

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